

FILED
Court of Appeals
Division II
State of Washington
5/11/2018 1:55 PM
NO. 50782-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GABRIEL JOSEPH MORALES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 15-1-04976-5

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Mark von Walde
Deputy Prosecuting Attorney
WSB # 18373

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....	1
1.	Did the trial court properly exercise its discretion when it denied defendant's self-representation request?	1
2.	Was defendant's motion for self-representation timely, when made after trial commenced and two witnesses had testified?.....	1
3.	Was defendant's conditional motion for self-representation equivocal?	1
4.	Did defendant receive effective assistance of counsel when his attorney did not call two witnesses who refused to testify and he provides no information as to what two other unknown witnesses would testify and the actions counsel undertook during plea negotiations?.....	1
B.	STATEMENT OF THE CASE.....	1
1.	PROCEDURE.....	1
2.	FACTS	4
C.	ARGUMENT.....	7
1.	THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY NOT ALLOWING DEFENDANT TO PROCEED <i>PRO SE</i> WHEN THE REQUEST WAS EQUIVICAL AND MADE AFTER TWO WITNESSES HAD ALREADY TESTIFIED.....	7
2.	DEFENSE COUNSEL WAS EFFECTIVE BY NOT CALLING TWO WITNESSES WHO REFUSED TO TESTIFY AND DEFENDANT PROVIDES NO SUPPORT FOR HIS REMAINING CLAIMS.....	12
D.	CONCLUSION.....	23

Table of Authorities

State Cases

<i>In re Detention of Turay</i> , 139 Wn.2d 379, 986 P.2d 790 (1999)	8, 9, 11
<i>In re Rice</i> , 118 Wn.2d 876, 886, 828 P.2d 1086 (1992)	17
<i>State v. Benn</i> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993)	14
<i>State v. Byrd</i> , 30 Wn. App. 794, 799, 638 P.2d 601 (1981)	17
<i>State v. Carpenter</i> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988)	14
<i>State v. Ciskie</i> , 110 Wn.2d 263, 751 P.2d 1165 (1988)	14
<i>State v. Coley</i> , 180 Wn.2d 543, 559, 326 P.3d 702 (2014)	9
<i>State v. Edmondson</i> , 43 Wn. App. 443, 446, 717 P.2d 784 (1986)	16
<i>State v. Englund</i> , 186 Wn. App. 444, 455, 345 P.3d 859 (2015)	7
<i>State v. Fritz</i> , 21 Wn. App. 354, 361, 585 P.2d 173 (1978)	7
<i>State v. Garrett</i> , 124 Wn.2d 504, 520, 881 P.2d 185 (1994)	13
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)	13
<i>State v. Jury</i> , 19 Wn. App. 256, 265, 576 P.2d 1302 (1978)	18
<i>State v. Madsen</i> , 168 Wn.2d 496, 504 229 P.3d 714 (2010)	9
<i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)	14, 16, 17, 21
<i>State v. Osborn</i> , 102 Wn.2d 87, 99, 684 P.2d 683 (1984)	21
<i>State v. Roberts</i> , 142 Wn.2d 471, 491, 14 P.3d 713 (2000)	16

<i>State v. Rohrich</i> , 149 Wn. 2d 647, 654, 71 P.3d 638 (2003)	9
<i>State v. Sherwood</i> , 71 Wn. App. 481, 484, 860 P.2d 407 (1993)	17
<i>State v. Stenson</i> , 123 Wn.2d 668, 737, 940 P.2d 1239 (1997).....	7, 8, 11
<i>State v. Thomas</i> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987)	13, 14
<i>State v. Vermillion</i> , 112 Wn. App. 844, 51 P.3d 188 (2002)	7, 8, 9, 11
Federal and Other Jurisdictions	
<i>Commonwealth v. Pander</i> , 100 A.3d 626, 2014 PA Super 201 (2014)...	21
<i>Deloatch v. State</i> , 763 S.E.2d 480, 483, 295 Ga. 681	20
<i>Douglas v. State</i> , _ So.3d _, 43 Fla. L. weekly D298 (2018).....	20
<i>Faretta v. California</i> , 422 U.S. 806, 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).....	7
<i>Gustave v. United States</i> , 627 F.2d 901 (9 th Cir. 1980)	21
<i>Hall v. Sumner</i> , 682 F.2d 786, 788 (9 th Cir 1982)	19
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).....	13
<i>Lafer v. Cooper</i> , 566 U.S. 156, 162, 132 S. Ct. 1376, 182 L. Ed.2d 398 (2012).....	21
<i>Missouri v. Frye</i> , 566 U.S. 134, 146, 132 S. Ct. 1399, 182 L. Ed.2d 379 (2012).....	21, 22
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	13, 14
<i>United States v. Cronic</i> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	13

Constitutional Provisions

Fifth Amendment of the United States' Constitution 16

Sixth Amendment of the United States' Constitution..... 7, 13

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion when it denied defendant's self-representation request?
2. Was defendant's motion for self-representation timely, when made after trial commenced and two witnesses had testified?
3. Was defendant's conditional motion for self-representation equivocal?
4. Did defendant receive effective assistance of counsel when his attorney did not call two witnesses who refused to testify and he provides no information as to what two other unknown witnesses would testify and the actions counsel undertook during plea negotiations?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Gabriel Joseph Morales, hereinafter "defendant," was charged with two counts of unlawful possession of a controlled substance with intent to

deliver, one count of unlawful possession of a firearm in the first degree, and one count of possession of a stolen firearm. CP 3-5. The unlawful possession with intent to sell counts were for possession of heroin and oxycodone. *Id.*

Prior to trial commencing a CrR 3.5 hearing and 3.6 hearing were both held. CP 64-69; RP 3-75, 97-123. The court found there was sufficient cause to search defendant's home and vehicle and all of defendant's statements were admissible. CP 64-69; RP 75, 130.

During trial the State called a total of seven witnesses. CP 250. After two witnesses had been called, the trial court noticed how defendant appeared to be "somewhat agitated." RP 195. Defense counsel noted defendant had two writings which he wanted to bring to the court's attention. *Id.* The first one stated "[Defendant] want[s] to motion to go prose or repersent my self or for new lawyer [sic]" Exh. 9; RP 195 (emphasis in original). What defendant meant by "motion" was that he wanted to "...write out what the problem is and explain out loud or at least be able to set my thoughts to be heard." Exh. 10; RP 195. At no point did defendant indicate why he wanted to go *pro se* or make a formal motion. Rather, he indicated multiple times he had a disagreement with his current counsel and simply wanted new representation. Exh. 9; RP 195, 199-202.

At the same time defendant's writing were presented, counsel also indicated that one of their areas of disagreement was counsel not calling witnesses defendant wanted to testify on his behalf. RP 196. Counsel stated how one witness, Faye Reynolds, was currently incarcerated and after speaking with her attorney, Reynolds would invoke her Fifth Amendment rights if called to testify. RP 197. Defense counsel related that he spoke to a second witness, Kimberly Hector, in person at the courthouse during motion arguments. *Id.* It is undisputed that counsel provided the court with an offer of proof that Hector would testify how the stolen firearm was in her car and was her gun. *Id.* However, after being told she needed to contact an attorney and could be charged with a crime if such was her testimony, she fled the courthouse. *Id.* Neither defense counsel nor his investigator were able to contact or find her despite them making "great efforts." RP 197-198. Defendant claimed there were two other witnesses he wanted his attorney to contact. RP 200. At no point did defendant provide the court with their name, any identifying information, or the substance of their testimony.

Following a jury trial, defendant was convicted as charged for all offenses other than possession of oxycodone with intent to sell, where the

jury convicted him of the lesser included offense of unlawful possession of a controlled substance. CP 56-63; RP 330-331.¹

Before sentencing, defendant again asked the court for new counsel or to proceed *pro se*. 5-5-17RP 2-3. He wanted either one or the other. *Id.* He simply did not want his current attorney to be his attorney for sentencing. 5-5-17RP 3. While the court denied defendant's motion for new counsel at the time, prior to sentencing defendant retained private counsel. CP 251. His new attorney filed multiple motions on defendant's behalf and represented him at the multiple hearings. *See* CP 135-140, 141-156; 5-5-17RP; 8-18-17RP. Defendant was sentenced to a period of confinement of 226 months with community custody to follow. CP 188-202; 8-18-17RP 18-19. He timely filed a notice of appeal. CP 238-239.

2. FACTS

In December 2015, Sara Thompson was supervising defendant in her capacity as his community corrections officer. RP 161. A decision was made to search defendant's residence for illegal substances on December 11, 2015. RP 162-163. At the start of the search defendant was detained for officer safety purposes and Reynolds, who was in defendant's apartment, was asked to remain on the scene. RP 163, 165.

¹ The verbatim reports of proceedings are contained in ten volumes. The trial proceedings are in seven volumes with consecutive pagination and are referenced as "RP #." The remaining volumes have separate pagination and are referenced by date.

After detaining defendant a search was conducted of defendant's person and his residence. On his person there was tin foil consistent with drug paraphernalia, a large amount of cash, and a cell phone. RP 164. Among the significant items found in the residence were a 9 millimeter handgun magazine, some plastic baggies containing what appeared to be contain drugs, and hyperdermic needles. RP 167. The drugs appeared to be heroin and oxycodone. RP 188, 190. A 38-caliber Sig Sauer pistol with a fully loaded magazine was found under the driver's seat in defendant's car. RP 169-170. Thompson subsequently turned the evidence over to Officer Jeff Thiry of the Tacoma Police Department. RP 170-171, 175. Officer Thiry conducted a records check for the gun and discovered it was reported stolen. RP 217. This was confirmed by the true owner of the gun that the gun was indeed stolen. RP 281.

Following the retrieval of the evidence, Thompson and a second officer overheard a conversation between defendant and Reynolds. RP 171-172, 191. During the conversation, they heard defendant trying to convince Reynolds to say that the drugs were hers and to take the drug charges. RP 172. Thompson believed defendant was intimating Reynolds based on the way defendant was looking at her, speaking to her, and the conversation Thompson had with Reynolds. RP 180.

Defendant was arrested following the evidence being found and speaking to Reynolds. RP 216. He was given his constitutional rights and chose to speak with Officer Thiry. *Id.* Defendant began the conversation by stating, "I know I am screwed. I am headed for prison." RP 217. Officer Thiry then asked defendant where he got the gun and was told defendant was given it about a week before. *Id.* He then asked if defendant knew the gun was stolen. *Id.* Defendant replied, "Aren't most guns you get off the street stolen?" and when asked if that meant he did know it was stolen replied, "Usually guns are stolen." *Id.* He also admitted he knew he could not possess a firearm. RP 218.

Officer Thiry and defendant then discussed the large quantity of drugs found in defendant's room. RP 217-218. Defendant stated "when I lost my job, I had to do something to make money" and he had gotten the drugs from Seattle. RP 218. He stated he had the gun because he sold drugs and needed it for protection. *Id.* Defendant then said there would be around 40 grams of heroin in his residence. *Id.* In reality, the heroin weighed just over 48 grams, or more than 40 times what a typical user would use. RP 219.

The Sig Sauer pistol had an operability test conducted on it by the Tacoma Police Department and the drugs were tested by the Washington State Patrol Crime Lab. RP 227, 235. The gun was test fired and found to

be a functioning firearm. RP 231. Tests on the drugs confirmed that they were indeed heroin and oxycodone respectively. RP 239-240.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY NOT ALLOWING DEFENDANT TO PROCEED *PRO SE* WHEN THE REQUEST WAS EQUIVICAL AND MADE AFTER TWO WITNESSES HAD ALREADY TESTIFIED.

The Sixth Amendment of the United States' Constitution guarantees that a defendant in a criminal trial has the right to waive the assistance of counsel and represent themselves. *Faretta v. California*, 422 U.S. 806, 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Improper denial of the right of self-representation requires reversal regardless of whether prejudice results. *State v. Englund*, 186 Wn. App. 444, 455, 345 P.3d 859 (2015).

A defendant's request to proceed *pro se* must be timely made and stated unequivocally. *State v. Stenson*, 123 Wn.2d 668, 737, 940 P.2d 1239 (1997). When a request to proceed *pro se* is made during trial, the right to proceed *pro se* rests largely in the informed discretion of the trial court. *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002) (citing *State v. Fritz*, 21 Wn. App. 354, 361, 585 P.2d 173 (1978)). When a request to proceed *pro se* is an alternative to substitution for new counsel, the request is not necessarily equivocal, but may be an indication

to the trial court in light of the whole record that the request is equivocal. *Stenson*, 123 Wn.2d at 740-741. Even when a request is unequivocal, a defendant still may waive their right to self-representation through subsequent words or actions. *Vermillion*, 112 Wn. App. at 851.

Our Supreme Court has found multiple times that when there is equivocation, a court acts well within its discretion in denying defendant's motion to proceed *pro se*. For instance, in *Stenson*, virtually all of the conversation between the court and defendant was how he wanted a new lawyer and discussed specifically whom should be assigned. *Stenson*, 123 Wn.2d at 742. He noted that he only wanted to proceed *pro se* because he felt as though he was forced to do so by the court and counsel. *Id.* Finally, when the court stated how it did not believe defendant truly wanted to represent himself, defendant did not argue or object. *Id.* Similarly, in *In re Detention of Turay*, 139 Wn.2d 379, 986 P.2d 790 (1999), in the context of a sexually violent predator commitment proceeding, defendant numerous times tried to represent himself. *Turay*, 139 Wn.2d at 395-400. In the first attempt, defendant wanted to either represent himself or have a specific attorney. *Turay*, 139 Wn.2d at 396. When that lawyer was not available, defendant did not answer the court's questions related to what he wanted to do and asked for more time to consider the matter. *Turay*, 139 Wn.2d at 396-397. All of this showed that he wanted only a specific

attorney, not that he truly wanted to proceed *pro se*. *Id.* Another time, defendant listed three alternatives he would be satisfied with, including the final option being *pro se* representation. *Turay*, 139 Wn.2d at 398. The court found that this was again equivocal. On a third and final occasion, defendant stated he wanted to preserve his objection for the record on being denied the right to represent himself. *Turay*, 139 Wn.2d at 399. This was again an equivocal request.

A trial court's decision on a defendant's request for self-representation will only be reversed if the decision is manifestly unreasonable, relies on unsupported facts, or applies an incorrect legal standard. *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702 (2014) (quoting *State v. Madsen*, 168 Wn.2d 496, 504 229 P.3d 714 (2010) (citing *State v. Rohrich*, 149 Wn. 2d 647, 654, 71 P.3d 638 (2003))). Courts should indulge every reasonable presumption against finding that defendant has waived their right to counsel. *Vermillion*, 112 Wn. App. at 851.

Defendant's request here to represent himself was both equivocal and untimely. After two witnesses had testified, defense counsel presented two pieces of writing to the court indicating defendant wanted to either proceed *pro se* or have a new lawyer. Exh. 9; RP 195. Defendant's emphasis however, was on having a new lawyer, even going so far as to

underline such in his writing. *Id.* Further, defendant made it clear he was not bringing an actual motion before the court. Rather, by “motion” he meant, “writ[ing] out what the problem is and explain[ing] out loud or at least be able to set my thoughts to be heard.” Exh. 10; RP 195. His actions here are the definition of equivocal. He did not truly want to represent himself or formally make a motion to do so. Rather, he simply did not want his current attorney due to disagreements on strategy and tactics. *See* RP 195-202.

When looked at in the context of the whole record, defendant’s request was equivocal. At no time did defendant make a formal motion or explicitly move to proceed *pro se*. Throughout the course of the proceedings his argument consistently was that he simply did not want his current counsel to continue to represent him. He made the request time and time again that he wanted a new lawyer. *See* Exh. 9-10; RP 195; 5-5-15RP 2-3. He did this even before trial commenced when he stated how he only wanted a new attorney, not that he wanted to represent himself. 1-9-17RP 2-4. This was done because of disagreements in terms of strategy and what he thought counsel should be doing. RP 196-200. Defendant made it clear he simply did not want his current attorney on his case. This is radically different from defendant making it unequivocally clear that he wanted to represent himself.

Defendant's requests here are similar to both *Stenson* and *Turay*. Just like in *Stenson* defendant here spent the vast majority of his discussions with the court arguing for new counsel. RP 195-202. The court tried to discern what exactly was defendant's issues with counsel. *Id.* The discussion was based upon the reasonable actions counsel undertook and why they were what is expected of an attorney. *Id.* The court attempted to explain to defendant how counsel was undertaking whatever actions they could, but to no avail. *Id.* Defendant kept on complaining on why he did not like his attorney and simply wanted a new attorney. *Id.* Unlike in *Turay*, defendant here never made a formal motion during trial to represent himself. Rather, he gave alternatives and appeared to simply want the court to know his thoughts. *Id.* At no time did defendant make it explicitly clear that he wanted to represent himself. *See* Exh. 9-10.

Additionally, this request was not made in a timely manner. Rather, defendant made the motion only after two witnesses had already testified, two more were waiting to testify and additional witnesses were scheduled for the afternoon and the following day. RP 149, 195, 247. Even if the request was made unequivocally, the trial court was well within its discretion to reject the request. *See Vermillion*, 112 Wn. App. at 855. The trial court here could have determined that allowing defendant to proceed *pro se* at that point would have caused a disruption to the trial and affected

the orderly administration of justice. At that point in the trial, defendant was not entitled to proceed *pro se*.

Defendant also claims he was denied his right to proceed *pro se* prior to sentencing. *See* Brf. of App. at 7-8. However, again defendant asked to proceed *pro se* or to have a new lawyer. 5-5-15RP 2-3. This is again, an equivocal request when viewed in the context of the entire record because he simply did not want his current attorney to remain on the case. This time though, he got his wish. Before sentencing, defendant did in fact receive new counsel. *See* CP 251. This attorney made multiple motions on his behalf and represented defendant during sentencing. CP 135-140, 141-156. There is nothing in the record to indicate that after defendant retained a new attorney he wanted to proceed *pro se*. This is simply further evidence how defendant did not truly want to proceed *pro se*, but rather only wanted not to be represented by his trial attorney. As such, defendant's conviction and sentence should be affirmed.

2. DEFENSE COUNSEL WAS EFFECTIVE BY NOT CALLING TWO WITNESSES WHO REFUSED TO TESTIFY AND DEFENDANT PROVIDES NO SUPPORT FOR HIS REMAINING CLAIMS.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80

L. Ed. 2d 657 (1984). When such an adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) his or her attorney's performance was deficient, and (2) he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters which go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of

hindsight." *Strickland*, 466 U.S. 668 at 689. This Court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

- a. Defendant provides only bald assertions that his counsel was ineffective by not calling or interviewing witnesses which are insufficient for appellate review.

Under the second prong of *Strickland*, defendant has the burden of showing that but for counsel's errors, the results would have been different. *Thomas*, 109 Wn.2d at 226. The burden on establishing ineffective assistance of counsel is on defendant to show deficient performance based on the record developed at trial. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Using the record developed at trial, defendant must show that the result would have been different, but, for counsel's deficient representation. *McFarland*, 127 Wn.2d at 337.

Here, defendant is unable to do so. Defendant merely provides bald assertions that if his counsel had interviewed witnesses, the results of plea negotiations would have been different. *See* Brf. of App. at 13. The record is insufficient for review for what exactly the testimony would have been regarding the two unnamed witnesses and how, if they had testified, defendant would have been acquitted. No information is provided as to their names, any identifying information, or the substance of their testimony. Rather, during trial the only thing defendant ever said about these two witnesses is “I have two other witnesses I asked to be brought.” RP 200. Nothing more is known about them, yet defendant claims he was prejudiced by their exclusion. These witnesses are not mentioned anywhere in the record other than this one occurrence. There is not enough in the record to support defendant’s argument.

He also at no point provides what information would have been gained that would have assisted him during plea negotiations. Rather, all that is provided are bold assertions without any support in the record. Defendant cannot show how his counsel was deficient in not calling them, and why he was prejudiced by the unknown witnesses not testifying

Additionally, defendant claims that his attorney did not conduct timely interviews of witnesses. *See* Brf. of App. at 11. Again however, no information is provided on when counsel conducted witness interviews.

All that is said is that he should have done so prior to trial. *Id.* There is nothing in the record to indicate when counsel first learned of these witnesses or what actions he took to conduct them prior to trial.

Defendant's argument is simply unsupported bald assertions.

The record is insufficient for review on direct appeal. If defendant wishes to raise issues which are outside of the record he can do so through a personal restraint petition. *State v. McFarland*, 127 Wn.2d at 335. As such, defendant has not met his burden of proof and his conviction should be affirmed.

- b. Reynolds was constitutionally unavailable to testify as a witness.

A witness is unavailable to testify if they assert their Fifth Amendment rights when called to testify at trial. *State v. Roberts*, 142 Wn.2d 471, 491, 14 P.3d 713 (2000); *State v. Edmondson*, 43 Wn. App. 443, 446, 717 P.2d 784 (1986). Here, it is undisputed that Reynolds was unavailable to testify as she would have invoked her Fifth Amendment right to remain silent if called to testify. Counsel made it clear that he talked to Reynolds' attorney and, after multiple conversations, was informed that she would invoke her Fifth Amendment rights. RP 197. He provided defendant with an email from Reynolds' attorney indicating the same. *Id.* As such, defense counsel was not deficient and defendant not prejudiced by Reynolds not testify. His conviction should be affirmed.

- c. The unchallenged representations of defense counsel provided the court an adequate basis to show his counsel was not deficient or defendant prejudiced by counsel not calling Hector as a witness.

A decision not to call witnesses is usually one of trial strategy.

State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). For failure to call witnesses to result in ineffective assistance of counsel, the decision must be unreasonable and must result in prejudice or create a reasonable probability that if the lawyer had called the witnesses, the outcome of the trial would have been different. *State v. Sherwood*, 71 Wn. App. 481, 484, 860 P.2d 407 (1993). Counsel is presumed to be effective and counsel must show an absence of legitimate strategies to support his challenges to defendant's conduct. *McFarland*, 127 Wn.2d at 335. "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *Id.* When a petitioner is addressing matters outside of the record, they must do more than merely state what others would say, but must provide affidavits or other corroborative evidence. *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). There is nothing in the record here to support defendant's argument and he provides no affidavits or other corroborative evidence to support his argument. He thus cannot show the counsel's

decision was either unreasonable nor how he was prejudiced by counsel's tactical and strategic decisions.

An appellate court is "not inclined to rule that actual prejudice is shown solely because defense counsel neglected to interview and subpoena witnesses who might have helped the defense." *State v. Jury*, 19 Wn. App. 256, 265, 576 P.2d 1302 (1978). When there is only speculation from the record that the missing witness would have helped defendant's case ineffective assistance of counsel cannot be proven, even when the incompleteness is due to counsel's actions. *Id.* The appellate court must be "credibly informed" as to what the missing witness would have testified to in order for it to rule on ineffective assistance of counsel. *Id.*

The only witnesses whose purported testimony is described even in minute details in the record is Hector. An attempt was made to call Hector as a witness. Prior to trial commencing she appeared in court and wanted to tell counsel about the gun and how it came to be in the car, which she claimed was her car, not defendant's. *Id.* Counsel asked for her to remain outside and he would return from court in a few minutes. *Id.* He did advise her she needed to contact an attorney and could be at risk of being charged with possession of a stolen firearm and/or perjury. *Id.* He made it clear that he wanted to talk to her and put her in touch with his investigator. *Id.* Unfortunately, when he returned from court a few minutes later, Hector

was gone. *Id.* Counsel had his investigator call her several times by phone and go to her house, but Hector never responded or appeared. RP 197-198. The investigator continued to try to contact her, but to no avail. RP 198. Counsel did everything he could to try and get Hector to court and call her as a witness.

The Ninth Circuit has determined that when the record is silent as to allegations of failure to investigate witnesses, a defendant's claim of ineffective assistance of counsel cannot be supported. *Hall v. Sumner*, 682 F.2d 786, 788 (9th Cir 1982). Defendant has still not provided any written or oral statements from Hector herself that indicate she would have given favorable testimony to defendant. There is nothing in the record to suggest she would have done so, other than a few sentences from defense counsel. There is also nothing in the record to indicate that counsel intentionally ignored contacting her until trial had commenced. Rather, counsel stated that it was only a "relatively recent occurrence" between when he first learned of Hector from defendant and the start of trial. RP 202-203. There is no record or reason to believe that counsel could have found her and compelled her to testify if he had learned about her or

started looking for her earlier than he did. This record does not establish that council was deficient here.²

Even if he was deficient, defendant was not prejudiced. If Hector had testified that the car and gun were hers, the jury would likely have not found her to be credible. They had already heard how in relation to Reynolds, defendant was trying to intimidate Reynolds into telling the police the drugs were hers. RP 171-172, 191. The jury would have been confronted with a witness who claimed illegal items were not defendant's, but her items instead. They may have come to the conclusion that because of the conversation defendant had with Reynolds, he had a similar conversation with Hector. This would have resulted in him still being convicted on the firearm charges and enhancements. As such, defendant's convictions should be affirmed.

Defendant has also failed to meet this burden because he has failed to demonstrate that Ms. Hector was available as a witness. *See Douglas v. State*, _ So.3d _, 43 Fla. L. weekly D298 (2018); *Deloatch v. State*, 763 S.E.2d 480, 483, 295 Ga. 681; *Commonwealth v. Pander*, 100 A.3d 626,

² While there are multiple unpublished opinions that state this principle, the State could find no published case which clearly articulates the principle that counsel is not ineffective when there is nothing in the record and/or no affidavits or other corroborating evidence to substantiate to what a missing witness would have testified if compelled to do so.

639, 2014 PA Super 201 (2014); *Gustave v. United States*, 627 F.2d 901 (9th Cir. 1980).³

- d. Defendant cannot show that his attorney was deficient or he was prejudiced during plea negotiations.

In the context of plea bargains, for counsel to be effective, the only thing required is that counsel actually and substantially assisted their client in the decision whether to plead guilty. *State v. Osborn*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). To establish prejudice, defendant must show how the outcome of the plea process would have been different with competent advice. *Lafer v. Cooper*, 566 U.S. 156, 162, 132 S. Ct. 1376, 182 L. Ed.2d 398 (2012). When a plea offer has been rejected because of counsel's deficient performance, defendant must demonstrate there is a reasonable probability that they would have taken the plea offer with effective assistance of counsel. *Missouri v. Frye*, 566 U.S. 134, 146, 132 S. Ct. 1399, 182 L. Ed.2d 379 (2012). A claim of ineffective assistance of counsel on direct appeal will not consider matters outside of the record. *McFarland*, 127 Wn.2d at 335.

Defendant here provides no information on the context of what occurred during plea negotiations or makes any citations to the record to

³ The record suggests that Ms. Hector was not a willing witness because she fled the courthouse when confronted with the possibility of testimony and possible self-incrimination. *See* 197-198.

indicate what occurred during negotiations. Rather, all defendant now states is that the parties were considering making a plea deal, but one was not struck. *See* Brf. of App. at 13. Defendant provides no other information on how his attorney was deficient during negotiations. Defendant claims his attorney was deficient in not interviewing witnesses. *See* Brf. of App. at 12. However, we do know that defense counsel interviewed Hector and communicated with Reynolds' attorney prior to trial. RP 197-198. Before trial commenced defendant and counsel knew Reynolds and Hector would likely not be testifying. *Id.* Counsel could have used such information when advising his client to accept a plea deal. We simply do not know because there is no record of what they discussed.

Even if counsel was deficient, defendant was still not prejudiced. Defendant must show he would have taken the plea offer with effective representation. *Frye*, 566 U.S. at 146. He does not show such here. Rather, all he claims is that there is a "reasonable possibility" he would have

“more rigorously sought to negotiate a plea or accepted an offer.” *See* Brf. of App. at 13. There is nothing to indicate defendant would have indeed accepted a plea if he had known this information. There is nothing to indicate defendant told his counsel he would have accepted a plea. There is nothing defendant has provided to this Court to show that he was indeed prejudiced. There is nothing in the record which supports defendant’s contentions. Rather, all he provides are conclusory statements and speculation. As such, he cannot show that his attorney was either deficient or he was prejudiced. This Court should affirm defendant’s convictions.

D. CONCLUSION.

Defendant made an equivocal untimely statement about whether to proceed *pro se* both in the middle of his trial and prior to sentencing. He also fails to show that his counsel was deficient or he was prejudiced by not calling witnesses who refused to testify. He provides no information to show that his counsel was deficient or he was prejudiced by unknown

witnesses not testifying and during plea negotiations. As such, this Court should affirm defendant's convictions.

DATED: May 11, 2018.

MARK LINDQUIST
Pierce County Prosecuting Attorney

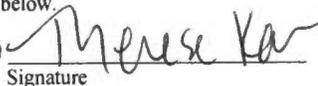


Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

Nathaniel Block
Rule 9 Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by  U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.11.18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

May 11, 2018 - 1:55 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50782-0
Appellate Court Case Title: State of Washington, Respondent v Gabriel Joseph Morales, Appellant
Superior Court Case Number: 15-1-04976-5

The following documents have been uploaded:

- 507820_Briefs_20180511135425D2739897_0886.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Morales Response Brief.pdf
- 507820_Designation_of_Clerks_Papers_20180511135425D2739897_4821.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was DESIGNATION MORALES.pdf

A copy of the uploaded files will be sent to:

- dobsonlaw@comcast.net
- nelsond@nwattorney.net

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

Filing on Behalf of: Mark Von Wahlde - Email: mvonwah@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20180511135425D2739897