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NO. 51367-6-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,  
Respondent,

v.

BRIAN K. TERWILLEGER,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE STEPHEN E. BROWN, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

1. **The Defendant refused to put forth a mental health defense and demonstrated consciousness of the wrongfulness of his conduct, although his attorney did investigate such a defense.**
2. **There is no evidence that the Defendant's statement to police was involuntary, but any error was harmless.**

## **RESPONDENT'S COUNTER STATEMENT OF THE CASE**

The Defendant's recitation of the facts is sufficient.

## **ARGUMENT**

1. **Defense counsel was not ineffective because it did investigate a mental defense, but the Defendant refused to pursue it.**

The Defendant's trial counsel twice was granted a continuance to facilitate investigating the Defendant's mental health for a defense. Both times the Defendant objected. Throughout the proceedings the Defendant insisted he was not guilty and asked for a trial. At sentencing, the Defendant's trial counsel agreed that the Defendant had refused a mental health defense. Now, he claims counsel was ineffective for not pursuing the mental health defense he refused.

### **Standard of review for Ineffective Assistance of Counsel.**

“Ineffective assistance of counsel is a fact-based determination...”

*State v. Carson*, 184 Wn.2d 207, 210, 357 P.3d 1064, 1066 (2015) (citing

*State v. Rhoads*, 35 Wn.App. 339, 342, 666 P.2d 400 (1983).) Appellate courts “review the entire record in determining whether a defendant received effective representation at trial.” *Id.*

The Washington State Supreme Court has adopted the two prong *Strickland* test for analysis of the effectiveness of a defense counsel performance. See *State v. Jeffries*, 105 Wn.2d 398, 417, 717 P.2d 722, 733 (1986). *Strickland* explains that the defendant must first show that his counsel’s performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel’s errors must have been so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel’s performance is guided by a presumption of effectiveness. *Id.* at 689. “Reviewing courts must be highly deferential to counsel’s performance and ‘should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” *Carson* at 216 (quoting *Strickland* at 690.)

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Strickland* at 687. The defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial,

a trial whose result is reliable.” *Id.* For prejudice to be claimed there must be a showing that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The defendant bears the “heavy burden” of proof as to both prongs. *Carson* at 210. If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Strickland* at 687.

**The Defendant’s trial counsel did investigate a mental health defense.**

Although the Defendant now claims that his trial counsel was ineffective for not investigating a mental health defense, the record indicates the contrary.

Defendant’s trial counsel requested two continuances specifically to investigate the Defendant’s mental health. The first continuance, requested on October 17, 2016, was to obtain medical records and consult with the Defendant’s doctor. RP 10/17/2016 at 5 – 6 and CP at 21-22. This was less than 30 days after arraignment. CP at 19. The Defendant refused to cooperate with his attorney’s plans. *Id.* The Defendant insisted

that he was not guilty of the charge and wanted to go to trial. RP 10/17/2016 at 9.

Because he had not received all the records he had subpoenaed, and because he wanted to have the Defendant's sanity evaluated, the Defendant's attorney again asked to continue the trial on November 21, 2016. RP 11/21/2016 at 13; CP at 23-25. Again, the Defendant refused to cooperate, stating that the medical records were unnecessary and that he wanted to go to trial. RP 11/21/2016 at 15.

Shortly thereafter, the Defendant's attorney requested that the Defendant be examined for competency to stand trial, and the court granted the motion. RP 1/17/2017 at 9-10; CP at 26; 27-33. As the Defendant concedes in his Brief, shortly thereafter the court found the Defendant competent. CP at 116 – 177.

These facts are substantively different from *State v. Fedoruk*, 184 Wn. App. 866, 339 P.3d 233 (2014), the case on which the Defendant so heavily relies. In *Fedoruk* the defense attorney did not request a continuance to explore an insanity defense until the day before jury selection was about to proceed. *Fedoruk* at 876. This in a case where the defendant's mental health was so obviously at issue that the State had

moved *in limine* to exclude evidence concerning such a defense, given that the defense had disclosed no expert on the subject. *Id.* at 875-76.

In *Fedoruk* defense council was found ineffective for failing to investigate an insanity defense until the day before trial when the defendant's mental health was so obviously at issue. Here, defense council was aware of the issue early on, and moved to investigate such a defense early on in the case, even before the Defendant's sanity evaluation.

The only real similarity between the facts of the instant case and *Fedoruk* is that both defendants have been in motorcycle crashes. This inconsequential similarity is not enough to support a claim of ineffective assistance of council. In this case the record shows the Defendant's attorney did investigate the Defendant's mental health early on, even though the Defendant did not wish to cooperate and insisted he was not guilty.

**The Defendant chose not to pursue a mental health defense.**

Not only did the Defendant not agree with his attorney's attempts to investigate his mental health, he actively refused to put forward such a defense. His attorney confirmed this at sentencing, when the following exchange occurred:

MR. WALKER: And your Honor, I apologize. There's something I wanted to let the Court know. I'm not sure if you were aware. Mr. Soriano can correct me if I'm wrong. But I believe that something that the Court might want to know in taking everything into consideration is that Mr. Terwilliger did not want any kind of mental health defense. And again, Mr. Soriano can correct me if I'm wrong on that. But I think that Mr. Soriano was pursuing that early on.

MR. SORIANO: That's correct. That is an accurate statement, your Honor.

RP 9/8/2017 at 4 – 5.

The Sixth Amendment right to control one's own defense includes the decision whether to present a given defense, or whether to forego it. *State v. Coristine*, 177 Wn.2d 370, 376, 300 P.3d 400, 402 (2013) (citing *State v. Jones*, 99 Wn.2d 735, 742, 664 P.2d 1216 (1983).) “Imposing a defense on an unwilling defendant impinges on the independent autonomy the accused must have to defend against charges.” *Id.* at 377.

In *State v. Coristine* the defendant was charged with Rape in the Second Degree. *Coristine* at 373. When discussing the jury instructions, the State argued that an instruction be given explaining the affirmative defense of a reasonable belief that the victim was not mentally incapacitate or physically helpless. *Id.* at 374. The Defendant objected,

arguing that their defense was that the State failed to prove the victim was incapacitated. *Id.* The trial court included the instruction anyway. *Id.* The instruction was given and neither side mentioned the affirmative defense in closing argument. *Id.* at 374-75.

The Supreme Court reversed the conviction, holding that instructing the jury on an affirmative defense over the defendant's objection violates his right to present a defense. *Id.* at 375. The court reasoned that the right to control one's own defense safeguards the truth-seeking function of trials and affirms individual dignity and autonomy of the accused. *Id.* at 375-76. (citing *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) and *McKaskle v. Wiggins*, 465 U.S. 168, 176-77, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984).)

The Defendant now claims trial counsel was ineffective for not pursuing both the insanity defense and a diminished capacity defense. Brief of Appellant at 2. Insanity is an affirmative defense,<sup>1</sup> so *Coristine* makes clear this defense cannot be unwillingly foisted on a defendant. However, diminished capacity is not necessarily affirmative. *State v. Marchi*, 158 Wn. App. 823, 833, 243 P.3d 556, 560 (2010) (citing *State v.*

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<sup>1</sup> *State v. Box*, 109 Wn.2d 320, 322, 745 P.2d 23, 25 (1987).

*Sao*, 156 Wn.App. 67, 76, 230 P.3d 277 (2010) and *State v. James*, 47 Wn.App. 605, 608, 736 P.2d 700 (1987).)

However, there is no reason *Coristine*'s reasoning concerning the Defendant's autonomy and dignity would not apply to any defense. If a competent defendant chooses not to make an issue of his mental health and put his personal history on public display either because he does not believe that it was the cause of his behavior, or any other reason, should an attorney be able to override that choice?

Even putting *Coristine* to one side, trial counsel cannot be said to be ineffective for following his client's wishes. Pursuing a diminished capacity defense would necessarily require the Defendant's cooperation. The Defendant repeatedly asserted in letters to the court that he was not guilty because it was an "accident" and that his insurance would cover the damage. CP at \_\_\_\_\_.

The record is clear that the Defendant did not want to present a "mental health defense." This Court should respect that decision and affirm the conviction.

**The Defendant's inconsistent statements indicate that a mental health defense would not have been successful.**

The Defendant claims that his statement to a detective the day after the incident, wherein he made statements about the "Mexican mafia" and

“crips,” is proof that his mental illness contributed to the offense.

However, he ignores the fact that he first told the responding officer that the collision occurred because his clutch had stuck.<sup>2</sup> RP II at 86. It was only in jail, the next day, when he Detective Ramirez that he believed the “Mexican mafia” was involved. RP II at 111-14.

The statement to the officer at the scene is important because it demonstrates the Defendant’s consciousness of his culpability; that he was able to tell wrong from right, and that he knew what had happened. It also demonstrates that he was able to perceive the nature and quality of the act that he had committed.

For an insanity defense to apply, the Defendant must be “unable to perceive the nature and quality of the act with which he... is charged... or... unable to tell right from wrong with reference to the particular act charged.” RCW 9A.12.010. An insanity defense is “available only to those persons who have lost contact with reality so completely that they are beyond any of the influences of the criminal law.” *State v. White*, 60 Wn.2d 551, 590, 374 P.2d 942, 965 (1962).

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<sup>2</sup> Deputy Holmes later determined that the Defendant’s vehicle had no clutch pedal. RP II at 158. In a letter to the trial court, the Defendant said he must have meant his throttle. CP at \_\_\_\_\_.

Attempts to hide evidence manifest an awareness that an act was legally wrong. *State v. Crenshaw*, 98 Wn.2d 789, 804, 659 P.2d 488, 497 (1983). The Defendant's attempt to blame a mechanical malfunction is the same. It demonstrates that he knew he could potentially face consequences, negating an insanity or diminished capacity defense.

In this case, even if the Defendant had wanted a mental health defense and his attorney had presented one, the Defendant's act of making an excuse about his behavior makes it unlikely that such a defense would have affected the outcome of his case. Therefore, the Defendant cannot establish prejudice, a necessary element of his ineffective assistance claim.

**It is not likely that the court would not have imposed a standard range sentence.**

The Defendant also claims that trial counsel was ineffective for failing to request a mitigated sentence. Pursuant to RCW 9.94A.535(1)(e), a court can impose an exceptional sentence downward if "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired."

The same two issues persist. The Defendant refused the mental health defense, despite his attorney's efforts, and his attempt to excuse his

behavior at the scene would undercut any such claim. Because of these two reasons, the Defendant cannot establish prejudice for his alleged error.

**Conclusion.**

The Defendant chose not to pursue any kind of mental health defense, as is his right. Rather, the Defendant believed himself not guilty and wanted to go to trial on the merits of the case. As a competent Defendant, he was within his rights to do so.

However, if he had presented such a defense, it is highly unlikely it would have been successful. His statements about the “Mexican mafia” were later, after the incident. His efforts to diminish his culpability at the scene to Deputy Holmes demonstrated his awareness of his actions.

Because the record shows the Defendant’s attorney made an effort to investigate the Defendant’s mental health history, but the Defendant refused to put forward such a defense, this court should hold that the Defendant’s attorney’s performance was not deficient. And because the Defendant’s own words at the scene indicate such a defense would not have been successful, this court should hold the Defendant has failed to show prejudice. The conviction should be upheld.

**2. There is no evidence the Defendant’s mental state made him unable to give a voluntary statement.**

The Defendant next claims that his mental state rendered him incapable of waiving his rights and speaking with the officers voluntarily. There is nothing in the record to support this claim.

**Standard of review.**

Appellate courts, “review challenged findings of fact entered after a CrR 3.5 hearing for substantial evidence and review de novo whether the trial court’s conclusions of law are supported by its findings of fact.” *State v. Rosas-Miranda*, 176 Wn. App. 773, 779, 309 P.3d 728, 730–31 (2013) (citing *State v. Solomon*, 114 Wn.App. 781, 789, 60 P.3d 1215 (2002).)

Criminal defendants are presumed sane, even if there is a history of prior institutionalizations for mental health issues. *Crenshaw* at 801 (citing *State v. McDonald*, 89 Wn.2d 256, 571 P.2d 930 (1977)). This is because “legal insanity has a different meaning and a different purpose than the concept of medical insanity.” *Id.* (citing *White, supra.*)

**The Defendant’s mental state at the time he spoke to the police is speculative.**

The evidence adduced at the CrR 3.5 hearing was that Deputy Holmes read the Defendant from his *Miranda* card while the Defendant was detained in another officer’s patrol car. RP II at 34. The Defendant

testified he had no memory of speaking with Deputy Holmes that day. RP II at 58.

Detective Ramirez testified that he interviewed the Defendant in the jail on September 12. RP II at 43. He identified a statement that included an advice of rights that he had completed with the Defendant, which was admitted. RP II at 44-45 *and see* Exhibit 23. The Defendant testified that he had no memory of being interviewed by Detective Ramirez. RP II at 59-60.

In essence, the testimony of Deputy Holmes and Detective Ramirez was unchallenged. The court's point in equating the situation to an alcoholic blackout was that a lack of memory *at the hearing* is not probative as to whether the Defendant understood his rights at the time he made the statement.

Deputy Holmes said that he thought the Defendant was "a little off," and Detective Ramirez said that the Defendant seemed "anxious," but both officers testified that the Defendant appeared to comprehend. RP II at 40 & 48-49. Further, neither officer testified they knew the Defendant, or how he usually behaved.

In short, there is no evidence that the Defendant's mental state at the time he gave a statement to the officers impaired his ability to

understand his rights, or allowed the police to “capitalize on his mental state.” Any claim to the contrary is speculation.

**The Defendant’s statements did not exonerate him so their admission did not affect the outcome of the trial.**

Even assuming, *arguendo*, that there was some error in admitting the Defendant’s statements, it was harmless. Without his statements, the evidence would have been that the Defendant inexplicably rammed Mr. Holloway’s vehicle, injuring him. The jury could still convict, based upon that evidence.

### **CONCLUSION**

The Defendant refused any kind of mental health defense, despite his attorney’s efforts. This negates the Defendant’s claim that his trial counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. The Defendant had a right to refuse such a defense, and imposing it upon him against his will would have be an affront on his dignity and autonomy.

Further, the Defendant’s excuse to Deputy Holmes immediately following the crash showed that the Defendant was conscious of the wrongfulness and nature of his act, which the Defendant would have had

to prove he could not appreciate for any such defense to be effective.

Therefore, he fails to demonstrate prejudice.

The same logic applies to using this evidence as a mitigating factor at sentencing. The trial court heard the facts, and was aware that the Defendant claimed a mechanical malfunction was responsible for the crash. It is unlikely that the trial court would have found that the Defendant's ability to appreciate the wrongfulness of his conduct was impaired when the evidence showed he was aware of it. The Defendant fails to establish prejudice.

Because it was the Defendant's right to refuse to pursue a defense that he did not want to present, there was no error here. Likewise, the Defendant falls short of establishing prejudice. This Court should therefore affirm the conviction.

DATED this 3<sup>rd</sup> day of June, 2019.

Respectfully Submitted,



JASON F. WALKER  
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# GRAYS HARBOR PROSECUTING ATTORNEY

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## Transmittal Information

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