

FILED
Court of Appeals
Division II
State of Washington
3/15/2019 4:11 PM
NO. 51460-5-II

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

STATE OF WASHINGTON, Respondent

v.

JASON PHILLIP WHITE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-01109-8

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

KRISTEN L. ARNAUD, WSBA #46828
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (564) 397-2261

TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 I. Determining whether trial counsel’s performance was deficient requires evidence outside the record and cannot be reviewed by this court. Even if the court were to address the merits of the assignment of error, appellant cannot establish actual prejudice. 1

STATEMENT OF THE CASE..... 1

 A. Procedural History..... 1

 B. Factual History 3

ARGUMENT..... 10

 I. Determining whether trial counsel’s performance was deficient requires evidence outside the record and cannot be reviewed by this court. Even if the court were to address the merits of the assignment of error, appellant cannot establish actual prejudice. 10

 a. Deficient Performance..... 11

 1. Investigation of Alibi Witnesses 12

 b. Actual Prejudice 14

CONCLUSION..... 19

TABLE OF AUTHORITIES

Cases

<i>Barker v. Weeks</i> , 182 Wn. 384, 47 P.2d 1 (1935).....	13
<i>In re Hutchinson</i> , 147 Wn.2d 197, 53 P.3d 17 (2002).....	12
<i>State v. Adams</i> , 91 Wn.2d 86, 586 P.2d 1168 (1978)	10
<i>State v. Byrd</i> , 30 Wash.App. 794, 638 P.2d 601 (1981).....	12
<i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994).....	11
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011)	11, 14
<i>State v. Hassan</i> , 151 Wn.App. 209, 211 P.3d 441 (2009)	11
<i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876 (2012)	13
<i>State v. Jury</i> , 19 Wn.App. 256, 576 P.2d 1302, 1308 (1978).....	12, 15
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	11, 15
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251, 1256 (1995).....	12
<i>State v. Ray</i> , 116 Wn.2d 531, 806 P.2d 1220, 1230 (1991).....	12
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	12
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816, 820 (1987)	12
<i>State v. Thomas</i> , 71 Wn.2d 470, 429 P.2d 231 (1967)	10
<i>State v. We</i> , 138 Wn.App. 716, 158 P.3d 1238 (2007).....	13
<i>State v. West</i> , 139 Wn.2d 37, 983 P.2d 617, 622 (1999)	15, 16
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	10, 11, 14, 15

RESPONSE TO ASSIGNMENTS OF ERROR

- I. **Determining whether trial counsel's performance was deficient requires evidence outside the record and cannot be reviewed by this court. Even if the court were to address the merits of the assignment of error, appellant cannot establish actual prejudice.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On June 8, 2016, the State filed an information charging Appellant, Jason Phillip White, with Attempting to Elude a Pursuing Police Vehicle in violation of Revised Code of Washington ("RCW") 46.61.024(1) as Count 1 and Driving while License Suspended or Revoked in the Third Degree in violation of RCW 46.20.342(1)(c)(iv) as count 2. CP 1-2. A Motion in Support of Issuance of a Summons was filed on June 8, 2016. CP 3-4.

On September 18, 2017, Defense counsel filed a Motion and Affidavit Requesting Additional Funds for Investigator at Public Expense. 2nd Supp CP filed on 3/14/2019 (Request for Defense Services, Sub 64). In the Affidavit, Defense stated that an investigator had been assigned to the case and "been in touch with possible alibi witnesses". 2nd Supp CP filed on 3/14/2019 (Request for Defense Services, Sub 64). The Affidavit further stated that there were additional witnesses that needed to be located and

interviewed prior to trial. 2nd Supp CP filed on 3/14/2019 (Request for Defense Services, Sub 64). The motion was granted and 5 additional hours of investigator services were authorized on September 20, 2017. 2nd Supp CP filed on 3/14/2019 (Ex Parte Authorization, Sub 65). On September 28, 2017, Defense filed a Motion and Declaration for Order of Continuance which stated that “Defense would raise an alibi defense at trial as defendant was working in Oregon at the time of the offense.” CP 110-114. The Motion continued that “alibi witnesses need to be interviewed and potentially subpoenaed for trial.” CP 111.

The case went to trial in Clark County Superior Court on December 18, 2017. The jury found Appellant guilty on both Count 1 and 2. CP 37-38.

After trial, Defense filed a Motion, Memorandum of Law and Declaration for a New Trial on December 29, 2017. CP 39-43. Defense also filed a Declaration of Jason Phillip White in Support of the Motion for New Trial. CP 44-49. The Motion alleged that prior to the morning of trial, the attorney for Appellant had not seen a letter provided to his previous attorney. CP 42. The letter was from Mr. White’s employer, Gino Streano. CP 46. The letter stated that Mr. White was scheduled to complete work for Cathy Thompson on March 3, 2016 and the work was completed and paid for in full. CP 46. Neither the Declaration from

Counsel nor the Declaration from Appellant stated that the trial attorney was not aware that Mr. Streano would be a possible alibi witness prior to seeing the letter. CP 42-45. Neither Declaration stated that Mr. Streano had not been interviewed by counsel or the Defense investigator. CP 42-45.

In the hearing on the motion, counsel for Appellant did not indicate whether he was aware of Mr. Streano prior to seeing the letter, nor did counsel indicate whether he or an investigator had contacted or attempted to contact Mr. Streano prior to trial. RP 214-215.

B. FACTUAL HISTORY

On March 3, 2016 at about noon, Sergeant Todd Brightbill of the Multnomah County Sheriff's Office (hereinafter "MCSO") was driving home from his shift in Troutdale, OR. RP 24-25. He was in his uniform and was driving his marked service vehicle. RP 26. The vehicle was equipped with emergency sirens as well as red and blue flashing lights in an overhead light bar, on the front of the side mirrors, and in the headlights. RP 26, 35.

When Sgt. Brightbill was headed north on I-205 around the Airport Way exit, he noticed a blue Volkswagen Passat with license plate OR YMM224. RP 25-27. Sgt. Brightbill testified that his attention was drawn

to the Passat because it made an abrupt lane change without signaling. RP 25-26.

Sgt. Brightbill again noticed the same blue Passat on I-205 northbound near the end of the interstate bridge in Washington State. RP 27, 28. At that time, Sgt. Brightbill and the blue Passat were either just before or just after the location of a speed change on I-205 where the speed limit is raised to 60 miles per hour. RP 27. His attention was drawn to the vehicle the second time because the Passat passed his vehicle on the right side while Sgt. Brightbill was in the fast lane. RP 27-29. Sgt. Brightbill estimated that the blue Passat was driving around 75 to 80 miles per hour as it overtook his vehicle. RP 27. Sgt. Brightbill testified that he had training and experience in estimating vehicle speeds based on how fast his vehicle is driving. RP 29-30.

Sgt. Brightbill was able to view the driver's face of the blue Passat as the vehicle passed him. RP 29. He testified he did not have any problems seeing the driver of the blue Passat at that time. RP 30. Sgt. Brightbill ran the vehicle registration information for OR YMM224 through Oregon Department of Motor Vehicle ("DMV") records and learned that the registered owner, Jason White, had a suspended driver's license in Oregon. RP 31.

Sgt. Brightbill then pulled up the driver's license photo for Jason White, which appeared to match the driver of the blue Passat. RP 31, 33. A certified copy of the same photo that Sgt. Brightbill observed on March 3, 2016 was admitted to the jury as State's Exhibit 4. RP 31-32. He noticed the haircut was slightly different in the photo than the driver of the vehicle, but other than the hair it was "the same guy". RP 33.

Sgt. Brightbill then approached the vehicle from the right side to confirm the driver matched the registered owner. RP 33. He had the photo of Jason White still open at the time he approached. RP 33. He confirmed that the person driving the blue Passat matched the DMV photo of the registered owner of the vehicle. RP 33. In court, Sgt. Brightbill identified Jason White as the driver of the Blue Passat. RP 29-30.

After confirming the driver of the blue Passat had a suspended license, Sgt. Brightbill attempted to stop the vehicle using the overhead emergency lights on his vehicle. RP 35. The blue Passat initially changed lanes over to the right lane, but did not pull over. RP 36. Sgt. Brightbill moved behind the blue Passat, and activated the emergency sirens on his vehicle. RP 36. The blue Passat slowed down to around 20 miles per hour and pulled onto the shoulder, but did not stop. RP 36. The blue Passat then accelerated at a high rate of speed and swerved back into the lanes of traffic. RP 7-38. Sgt. Brightbill estimated the blue Passat was going at

about 100 miles per hour. RP 38. He observed as the blue Passat swerved in between other cars coming close to colliding with several cars due to the difference in speed between the Passat and the other traffic. RP 38. At that point, Sgt. Brightbill discontinued pursuing the vehicle based on his department's policies regarding pursuits. RP 38-39. Sgt. Brightbill confirmed that all of the driving after the point where he saw the Passat pass him on the right side occurred within Clark County, Washington. RP 39. After discontinuing the pursuit, Sgt. Brightbill verified Jason White's driving status in Washington State, and confirmed it was suspended. RP 39-40.¹

The following night, March 4, 2016, Sgt. Brightbill and another MCSO deputy, David Hughes, drove to the address for Jason White on file with the DMV. RP 40, 138-139. They did not contact anyone at the address that day. RP 46. They were able to confirm the address was correct based on another truck with license plate 722HJX registered to Appellant which they located in the driveway of his address. RP 46, 134.² Sgt. Brightbill and Deputy David Hughes located the same blue Passat parked about 50 yards away from Appellant's house on Harney which

¹ Susan Campos from the Washington Department of Licensing testified at trial that Jason White's privilege to drive in Washington was suspended on March 3, 2016. RP 61-62, 66.

² Appellant also testified that his address was 8323 SE 62nd Ave, Portland Oregon 97206, and that he thought his truck at the time had a plate number of 722HJX. RP 103, 114, 121.

intersects with SE 62nd Ave. RP 45, 47, 137. The blue Passat had the license plate that Sgt. Brightbill noted on March 3rd, when he attempted to stop the vehicle on I-205. RP 47.

At trial, Michael L. Clark testified for the Appellant. RP 73. He stated he lived in Longview, Washington and was familiar with Mr. White because his daughter used to date Mr. White. RP 73. He stated Mr. White gave him a blue Passat sometime in March of 2016. RP 75. Defense presented a sworn statement that Mr. Clark made to a Cowlitz County Deputy in October of 2016. RP 75-77. In the sworn statement from October 9, 2016, Mr. Clark indicated he'd received the Passat from Mr. White in December of 2015 or January of 2016. RP 90. After reviewing the sworn statement from October 9, 2016, Mr. Clark testified: "I believe that must have been more right than March. I thought it was about March." RP 91. He said he picked the car up from Mr. White's house and then drove it to Longview. RP 91. Mr. Clark said that he only drove the car one other time after he licensed the car on April 15, 2016, and the car broke down. RP 91. Mr. Clark testified that the blue Passat had always had tinted windows and a photo of the Passat was admitted. RP 93-94. Mr. Clark testified that he is disabled and home all the time and that after he received the vehicle, there was no period where the Passat was missing from his property. RP 94-95. On Cross-Examination, Mr. Clark testified

that he spoke with Appellant Jason White in early April 2016 about the vehicle and again at some point before making the sworn statement on October 9, 2016. RP 97-98.

Appellant, Jason White, testified at trial that he could not be the driver of the blue Passat on I-205 on March 3, 2016 because he was at a job site in Beaverton at that time. RP 104-105. He said he was scheduled to do work on Cathy Thompson's³ home for approximately a week around the time of March 3, 2016. RP 105. He stated that he and another employee started work at 8:30 a.m. that morning and Ms. Thompson showed up to the location at 10 am and left around 11. RP 105. He said he remained on the site after she left and continued to work. RP 105. He testified that he did not leave the job site and drive to Washington State on March 3, 2016. RP 113. Defense admitted photos Mr. White stated showed the condition of the house he was working on at the beginning and the end of the weeklong project. RP 106-108. On Cross-Examination, he acknowledged that the pictures admitted as evidence were undated, and had not all been taken on the date in question. RP 115-116.

Mr. White further testified that he was no longer in possession of the blue Passat in March of 2016. RP 109-110. He stated that he'd already

³ The Verbatim Report of Proceedings transcribed the name as Kathy Thompson with a note that it was spelled phonetically. However, the letter from Gino Streano in CP 46 spells the name Cathy Thompson or Cath Thompson. For continuity, this brief uses Cathy Thompson to refer to the individual.

given it to Michael Clark in December of 2015 or January of 2016. RP 109-110. He stated he had not seen the Passat since he gave it to Michael Clark. RP 110. He said he talked with Mr. Clark in April when he got a summons for this case, and he spoke with Mr. Clark about where the title for the Passat would be. RP 110-111. The State admitted a copy of the summons that was issued in this case which did not contain any vehicle information in the summons. RP 118-119.

Sgt. Brightbill testified on rebuttal that he was sure that Michael Clark was not the person he saw driving the blue Passat on March 3, 2016. RP 136.

Also on rebuttal, Sgt. Brightbill was also asked about the photo Mr. Clark provided of the blue Passat and the tint of the windows. RP 135-136. Sgt. Brightbill noted it was hard to gauge the level of the tint from the picture that was admitted because he did not know the lighting at the time of the picture or what type of camera took the picture. RP 135. He also noted that there was no one in the vehicle at the time the picture was taken, and he generally gauges the level of tint in a vehicle by how well he can see the occupant. RP 135. He also noted the picture that was admitted did not show the vehicle's license plate. RP 134.

The State also called MCSO David Hughes as rebuttal. RP 138-139. He testified that he went to an address with Sgt. Brightbill on March 4,

2016 at night. RP 139. He did not write a report about the incident, but he testified that he remembered seeing a red work truck with ladders and painting supplies in the driveway of the address. RP 140. He said they located a blue Passat nearby that address, maybe a block or two away. RP 141.

ARGUMENT

I. Determining whether trial counsel's performance was deficient requires evidence outside the record and cannot be reviewed by this court. Even if the court were to address the merits of the assignment of error, appellant cannot establish actual prejudice.

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That said, a defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel's performance was deficient and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. A court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting

effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 689).

a. Deficient Performance

The analysis of whether a defendant’s counsel’s performance was deficient starts from the “strong presumption that counsel’s performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Hassan*, 151 Wn.App. 209, 217, 211 P.3d 441 (2009) (“Judicial scrutiny of counsel’s performance must be highly deferential.”) (quotation and citation omitted). Thus, “given the deference afforded to decisions of defense counsel in the course of representation” the “threshold for the deficient performance prong is high.” *Grier*, 171 Wn.2d at 33. This threshold is especially high when assessing a counsel’s trial performance because “[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *Id.* (quoting *Kylo*, 166 Wn.2d at 863); *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (“[T]his court will not find ineffective assistance of counsel if the actions of counsel complained of go to the theory of the case or to trial tactics.” (internal quotation omitted)). On the other hand, a

defendant “can rebut the presumption of reasonable performance by demonstrating that ‘there is no conceivable legitimate tactic explaining counsel’s’” decision. *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

1. Investigation of Alibi Witnesses

Generally, a trial attorney’s decision on whether or not to call a witness for trial will not support a finding of deficient performance for the first prong of the Strickland test. *State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816, 820 (1987) (citations omitted). However, the presumption that counsel’s actions or decisions were reasonable can be overcome by a showing that there was a failure to conduct an appropriate factual investigation to prepare for a trial. *State v. Jury*, 19 Wn.App. 256, 265, 576 P.2d 1302, 1308 (1978); *State v. Byrd*, 30 Wash.App. 794, 799, 638 P.2d 601 (1981); *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220, 1230 (1991).

When a defendant’s claim of ineffective assistance of counsel, however, “rests on ‘evidence or facts not in the existing trial record,’ filing a personal restraint petition is the appropriate step.” *In re Hutchinson*, 147 Wn.2d 197, 206-07, 53 P.3d 17 (2002) (quoting *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251, 1256 (1995)). In other words, the “proper

avenue for bringing claims based on evidence outside the record is through a personal restraint petition, not an appeal.” *State v. We*, 138 Wn.App. 716, 729, 158 P.3d 1238 (2007) (citation omitted). Thus, on direct appeal a reviewing court “will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.” *State v. Jasper*, 174 Wn.2d 96, 123-24, 271 P.3d 876 (2012) (quoting *Barker v. Weeks*, 182 Wn. 384, 391, 47 P.2d 1 (1935)).

Here, Mr. White asserts that his trial attorney took no steps to contact, interview, or subpoena his employer, Gino Streano, prior to trial. The assertion is based on the Motion, Memorandum of Law and Declaration for a New Trial and the Declaration of Jason Phillip White in Support of the Motion for New Trial. CP 39-49. However, the assertion requires the Court to presume facts not in the record on appeal. Neither declaration established that the trial attorney was not aware of Mr. Streano’s existence prior to the morning of trial on December 18, 2017. CP 39-49. The declarations merely addressed the attorney’s knowledge, or lack thereof, of a letter written by Mr. Streano in support of Mr. White dated May 1, 2017 and provided to a previous attorney on May 1, 2017. CP 46-47. Counsel did not indicate in the January 18, 2018 hearing on the Motion for New Trial that he was not aware of Mr. Streano prior to trial, only that he was not aware of the letter. RP 214-215. Counsel did not

indicate in the hearing that he or his investigator had not contacted or interviewed Mr. Streano prior to trial. RP 214-215. The record establishes that at least 3 months prior to trial, counsel for Appellant, or his investigator, had interviewed some alibi witnesses, and was given additional funds to interview additional witnesses. 2nd Supp CP filed on 3/14/2019 (Request for Defense Services, Sub 64 and Ex Parte Authorization, Sub 65). There is no record of who was actually interviewed, and whether or not those interviews included Mr. Streano.

That being said, given the overall silence of the record on the issue of what investigations were or were not completed prior to trial and the need to go outside the record to make any determination thereof, this claim should not be resolved by this court but instead through a personal restraint petition.

b. Actual Prejudice

Even if the Court finds that the record in this case contains sufficient facts to make a finding of deficient performance, the Appellant's claim of ineffective assistance of counsel cannot succeed on the prejudice prong of the *Strickland* test. In order to prove that deficient performance prejudiced the defense, the defendant must show that "counsel's errors were so serious as to deprive [him] of a fair trial. . . ." *Grier*, 171 Wn.2d at 33 (quoting *Strickland*, 466 U.S. at 687). In other words, "the defendant

must establish that ‘there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.’” *Id.* at 34 (quoting *Kyllo*, 166 Wn.2d at 862). “In assessing prejudice, ‘a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law’ and must ‘exclude the possibility of arbitrariness, whimsy, caprice, nullification and the like.’” *Id.* (quoting *Strickland*, 466 U.S. at 694–95). Moreover, when juries return guilty verdicts, reviewing courts “must presume” that those juries actually found the defendants “guilty beyond a reasonable doubt” of those charges. *Id.* at 41.

Where the Appellant can only show that the alleged error had some possible effect on the outcome, it is an insufficient basis for a finding of prejudice, because “not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” *State v. West*, 139 Wn.2d 37, 46, 983 P.2d 617, 622 (1999) (citing *Strickland*, 466 U.S. at 693). Mere speculation as to what might have been a witness’ testimony is insufficient for a finding of actual prejudice. *Jury*, 19 Wn. App. at 265. The *Jury* court observed that even where the “incompleteness of the record may be due to counsel’s ineffectiveness, [the court] cannot determine whether this incompleteness is actually prejudicial until we are credibly informed as to what the missing evidence

is.” *Id.* Trial judges serve an important function when considering if evidence presented warrants a new trial on a case. *West*, 139 Wn.2d at 43.

Even assuming the record supports the assertion that Mr. White’s trial attorney was deficient as he alleges, he cannot meet his burden to show that, but for counsel’s deficient performance, the outcome of the proceedings would have been different.

Here, the testimony of Sgt. Brightbill was that he observed a blue Passat driving on I-205 and was able to identify the driver based on the DMV photo after the first pass, but he wanted to be sure and made a second pass with the photo open to be absolutely sure. RP 29-33. Sgt. Brightbill further testified that he and another Deputy went to the registered address and located the same blue Passat parked nearby. RP 45, 47, 137. Deputy Hughes confirmed that while he didn’t write a report, he had independent memory of driving to a location with Sgt. Brightbill and finding a blue Passat a block or two from the address they went to view. RP 139-141.

That was in contrast with Appellant’s assertion that he was no longer in possession of the Passat in March. RP 109-110. He said that he’d given the Passat to Michael Clark in December 2015 or January 2016. RP 109-110. Mr. Clark initially testified that he was given the car in March of 2016, but counsel provided a sworn written statement that Mr. Clark had

written in October of 2016 which said he received the car in December 2015 or January 2016. RP 90-91. Even after reading his previous sworn statement, Mr. Clark stated he thought he received the vehicle around March of 2016. RP 91. If the jury believed that Mr. Clark's memory at trial was correct and he received the car sometime in March, they could find that the Passat was located at Mr. White's address when Sgt. Brightbill and Deputy Hughes went there on the evening of March 4.

Mr. White also testified that he could not have been the driver of the Passat because he was scheduled to be at a job site in Beaverton, Oregon at the time it occurred. RP 105. He however did not testify as to a specific time when he completed work at the jobsite that day, only that he left sometime after Ms. Cathy Thompson left the site at 11 o'clock. RP 105. He also did not testify about where he went after leaving the job site. RP 105-109.

Here, the trial judge also reviewed the evidence that is currently in the record on appeal and determined that Mr. White's testimony was not credible in light of the other evidence. RP 219. The judge also noted that the letter did not establish that Mr. Streano had any personal knowledge of Mr. White's whereabouts on March 3, 2016. RP 219.

Appellant cannot show that the outcome of the trial would have been different if Mr. Streano was called to testify. At best, based on the

information currently in the record, Mr. Streano would have been able to testify that Mr. White was scheduled to be at a job site on March 3, 2019 and the work for that job was completed. CP 46. Mr. Streano's letter does not corroborate where the location of that job site was. *Id.* The letter does not corroborate what hours Mr. White was scheduled to be at that location. *Id.* Most notably, the letter did not corroborate that Mr. White was actually present at the job site as scheduled. *Id.* Appellant cannot establish that it is reasonably probable that counsel's failure to call a witness without personal knowledge of his actual location at the time of the alibi is sufficiently prejudicial to succeed on the second prong of the *Strickland* test.

//

//

//

//

//

//

//

//

//

//

CONCLUSION

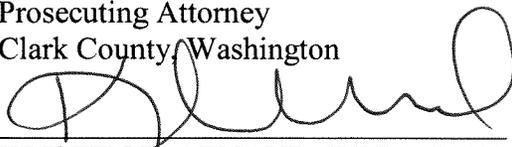
The Appellant's assignment of error required this court to presume facts not included on the record on appeal, and as such, cannot be addressed by this court. If the Court determines the record is sufficient to make a finding of deficient performance, than the Appellant's claim fails to establish that there is a reasonable probability that calling a witness who had no personal knowledge of Appellant's alibi would result in a different outcome at trial.

DATED this 15th day of March, 2019.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


KRISTEN J. ARNAUD, WSBA #46828
Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

March 15, 2019 - 4:11 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51460-5
Appellate Court Case Title: State of Washington, Respondent v. Jason P. White, Appellant
Superior Court Case Number: 16-1-01109-8

The following documents have been uploaded:

- 514605_Briefs_20190315161017D2897010_6996.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Brief - Respondent.pdf

A copy of the uploaded files will be sent to:

- SweigertJ@nwattorney.net

Comments:

Sender Name: Ashley Smith - Email: ashley.smith@clark.wa.gov

Filing on Behalf of: Kristen Leah Arnaud - Email: Kristen.Arnaud@clark.wa.gov (Alternate Email: CntyPA.GeneralDelivery@clark.wa.gov)

Address:
PO Box 5000
Vancouver, WA, 98666-5000
Phone: (360) 397-2261 EXT 5686

Note: The Filing Id is 20190315161017D2897010