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NO. 53154-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY ROOSEVELT BAUGH,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 18-1-01156-8

BRIEF OF RESPONDENT

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I. INTRODUCTION

The defendant, Timothy Roosevelt Baugh, was charged with three counts of theft in the second degree, each with a vulnerable victim aggravator due to the victim's advanced age. Baugh was facing a sentencing range of up to 60 to 120 months if convicted at trial. After plea negotiations, Baugh pled guilty to two counts of theft in the second degree with no aggravating factors, giving Baugh a significantly lower sentencing range of 22 to 29 months. Prior to sentencing, Baugh sought to withdraw his guilty plea, claiming ineffective assistance of counsel based on his attorney's alleged failure to interview the 90-year-old victim prior to the plea.

The trial court properly concluded that Baugh made a knowing, intelligent, and voluntary plea and properly exercised its discretion to deny Baugh's motion to withdraw his guilty plea. Baugh fails to show a manifest injustice occurred to warrant the withdrawal. Further, Baugh fails to show he received ineffective assistance of counsel that resulted in an invalid guilty plea. Counsel assisted Baugh in making an informed decision about pleading guilty to reduced charges after reasonably evaluating the State's evidence. Baugh fails to show that there is a reasonable probability he would have proceeded to trial if the victim had been interviewed prior to the plea. The record shows that the evidence against Baugh was strong and that the victim had a good memory of the incident. Finally, this Court should

remand to the trial court to strike the interest accrual provision in Baugh's judgment and sentence.

I. RESTATEMENT OF THE ISSUES

- A. Did the trial court properly exercise its discretion in denying Baugh's motion to withdraw his guilty plea where the plea was knowing, intelligent, and voluntary and where Baugh failed to show withdrawal was necessary to correct a manifest injustice?
- B. Did Baugh receive ineffective assistance of counsel resulting in an invalid guilty plea where counsel reasonably evaluated the State's evidence and assisted Baugh in making an informed plea decision, and where Baugh has not shown a reasonable probability that he would have insisted on going to trial had an earlier victim interview occurred?
- C. Should this Court remand to the trial court to strike the interest accrual language in the judgment and sentence?

II. STATEMENT OF THE CASE

A. Information and Guilty Plea

On March 3, 2018, Timothy Roosevelt Baugh contacted 90-year-old Betty Grimes at her residence and offered to clean her gutters and perform some yard work for \$900. CP 1. As they walked around her yard, Baugh told Ms. Grimes that he had performed work for some of her neighbors. CP 1. Ms. Grimes agreed to Baugh's work proposal, and Baugh promised to return in a day or two to do the work. Two days later, on March 5, 2018, Baugh returned to Ms. Grimes's residence and asked her to pay the \$900 upfront. CP 1. Ms. Grimes wrote Baugh a check for \$900. CP 1. Baugh returned within a day or two, claiming he had locked the check and his keys

in his vehicle. CP 1. Baugh told Ms. Grimes he needed the \$900 immediately to obtain insurance to perform the work. CP 1. Baugh promised he would not cash the first check if she gave him a second check for \$900. CP 1. Ms. Grimes complied and wrote Baugh another check for \$900. CP 1.

Over the next several days, Baugh obtained two additional checks from Ms. Grimes — one for \$900 and another for \$950. CP 1-2. Ms. Grimes could not recall how Baugh had convinced her to write the checks, but she remembered him standing very close to her in an intimidating manner, staring intently at her as she wrote the check. CP 1-2.

Ms. Grimes ultimately wrote Baugh four different checks totaling \$3,650. CP 2. Baugh cashed all four checks but never performed any of the promised yard work. CP 1-2. Ms. Grimes eventually realized Baugh had no intention of performing the work and went to her bank where she learned all four checks had been cashed. CP 2. Baugh drained Ms. Grimes's bank account, leaving her unable to pay her bills. CP 2. Baugh was on probation when he committed these crimes, and his release conditions prohibited him from doing yard work for employment without authorization from his Community Corrections Officer. CP 2.

On March 23, 2018, the State charged Baugh with three counts of theft in the second degree, each with an aggravating factor due to the

victim's vulnerability based on her advanced age. CP 3-4; *see* 09/06/2018 RP 4.¹ Two checks were cashed for \$900 a piece on March 5th (Count 1). CP 2-3. A third check, also for \$900, was cashed on March 6th (Count 2). CP 2-4. A fourth and final check for \$950 was cashed on March 8th (Count 3) CP 2-4.

On September 6, 2018, the State filed an amended information, based on plea negotiations, charging Baugh with two counts of theft in the second degree with no aggravating factors. CP 12-14. The State's statement regarding the amendment explains, "[t]he parties are in agreement that this is a fair resolution of the matter and spares the 90 year old victim from coming to court and testifying in this matter." CP 14. The resolution also included a provision that Baugh pay the restitution up front. CP 18. The original information containing the aggravating factors and additional theft count gave the court the sentencing option of up to 60 to 120 months. 09/06/2018 RP 4. The amended information greatly reduced the sentencing range to 22 to 29 months. 09/06/2018 RP 11; CP 37.

Baugh admitted to committing the thefts and entered a guilty plea to the amended information. CP 14-24. Baugh made the following statement in his guilty plea:

¹ The verbatim reports of proceedings (RP) will be referred to by date of proceeding.

In Pierce County, Wa., on/about 3.5.18 or 3.6.18, I feloniously and wrongfully obtained control over property/money belonging to another, in a value exceeding \$750.00 but less than \$5,000.00, with the intent to deprive the owner of the same.

CP 23. Baugh initialed this statement and indicated that he fully understood the plea. CP 23-24.

Baugh assured the court that his attorney explained to him “every paragraph” of the statement on plea of guilty and made clear as to why Baugh should enter a guilty plea. 09/06/2018 RP 8. Baugh’s attorney, Bryan Hershman, informed the court that he worked “zealously” to reach a resolution in the case and that he discussed the case and guilty plea with Baugh at length:

[Hershman]: I prepped an opinion letter, an eight-page, single-spaced opinion letter. I’m not boring the Court. I want you to know what has happened in the last couple of days.

[Court]: I perceive that there has been activity.

[Hershman]: Yes. I sent it to the client. I went over it with him at length. I don’t mind telling you an eight page single space - - that took me about three to four hours. I’m not the fastest typist on the block. We spoke at length. Then I sent him the plea form. We were able to go through that during the noon hour. A lot has happened in the last two days. I want to make sure he gets a fair sentencing.

09/06/2018 RP 15.

The trial court engaged in a detailed colloquy with Baugh regarding his guilty plea and the rights he was giving up by pleading guilty. 09/06/2018 RP 5-13. The court explained to Baugh his right to a jury trial where he has the right to call witnesses and the right to cross-examine witnesses who testify against him. 09/06/2018 RP 10. The court also informed Baugh of the State's burden to prove beyond a reasonable doubt every element of each crime Baugh has allegedly committed. 09/06/2018 RP 10. Baugh stated that he understood he was waiving those rights by pleading guilty. 09/06/2018 RP 10-11. Baugh understood that the charges carried a sentencing range of 22 to 29 months and that the court was not obligated to follow the sentencing recommendation of either party. 09/06/2018 RP 11-12. Baugh informed the court that no one promised him anything to persuade him to plead guilty and that he "came to an agreement with the attorney and the prosecutor." 09/06/2018 RP 12-13.

The court continued to question Baugh and asked him if he has chosen this plea based on his own decision, to which Baugh responded, "Yes. With all of the circumstances involved, yes." 09/06/2018 RP 12. The court asked Baugh if he had considered all of his options, and if this decision to plead guilty is based on that consideration. 09/06/2018 RP 12-13. Baugh affirmatively answered, "Yes." 09/06/2018 RP 13. At the end of the detailed colloquy, the court asked Baugh what his plea is to the two counts of theft

in the second degree in the amended information, and Baugh responded, “I plead guilty.” 09/06/2018 RP 13. The court entered guilty pleas to both counts. *Id.*; *see* CP 24. The court noted it is an “informed plea” that is not induced by any promises or threats and is made with an understanding of the direct and collateral consequences of the plea. 09/06/2018 RP 13. The court determined that there is a factual basis for the plea, and concluded Baugh’s guilty plea was “knowingly, intelligently, and voluntarily made.” CP 24.

The court released Baugh on bond pending sentencing on the condition that he maintain law abiding behavior. 09/06/2018 RP 17-18; CP 81-82. Sentencing was set over at Baugh’s request in order to present a strong mitigation packet for the joint recommendation for a low-end sentence of 22 months. 09/06/2018 RP 14-16.² While awaiting sentencing, Baugh was arrested for incidents occurring on September 19, 2018 and charged with two counts of theft in the third degree. CP 83-84. A bench warrant was issued on October 11, 2018 just before the scheduled sentencing hearing. CP 83-84; *see* 09/06/2018 RP 16-17, 19. On October 15, 2018, the court quashed the bench warrant and ordered Baugh be held in custody without bail pending sentencing. CP 88-90.

² Baugh also wanted to continue sentencing due to upcoming dental surgeries. *Id.*

B. Motion to Withdraw Guilty Plea and Sentencing

On October 11, 2018, the court received an “Affidavit in Support of Motion to Withdrawal [sic] of Guilty Plea (CrR 7.8)”³ written by Baugh, claiming ineffective assistance of counsel and a desire to withdraw his guilty plea. CP 85-87. At Baugh’s request, the trial court allowed Baugh’s attorney to withdraw, and appointed new counsel to address Baugh’s request to withdraw his guilty plea. 12/14/2018 RP 3-7; CP 27; *see also* 10/26/2018 RP 9-15, 11/02/2018 RP 3-12. The court scheduled the motion to withdraw the guilty plea and sentencing for January 4, 2019. 12/14/2018 RP 6-7, 01/04/2019 RP 3.

On January 4, 2019, Baugh’s new attorney, Jessica Ritzmann, filed a motion to withdraw the guilty plea pursuant to CrR 4.2(f) based on a declaration filed by Baugh and their investigator’s “quick conversation” with Ms. Grimes. CP 50-54. Baugh’s attorney conceded that the interview of the victim was “very brief and limited” and was done solely to inform the court as to Baugh’s position on the motion to withdraw his plea. 01/04/2019 RP 4. Baugh’s attorney alleged that the conversation reveals Ms. Grimes “denied the most damning allegation made by law enforcement” and that the lack of a victim interview deprived him of the

³ CrR 7.8 provides relief from judgment or order.

knowledge to make an informed decision on whether or not to plead guilty.
CP 51.

As part of this motion, Baugh's attorney submitted a short email containing the results from the "quick conversation" between Ms. Grimes and his investigator that took place the evening before the hearing. CP 52. The investigator asked the now 91-year-old victim some limited questions pertaining to the thefts. CP 52.⁴ When asked how many checks she wrote to Baugh, Ms. Grimes recalled writing four or five checks. CP 52. Although Ms. Grimes did not specifically recall the incident where Baugh told her he would not cash a check that he locked in his truck, she recalled all other aspects of the thefts when questioned. *See* CP 52.⁵ Ms. Grimes told the investigator that she "waited and waited and waited" for Baugh to show up and eventually went to her bank only to discover he had cashed the checks. CP 52. She reported that the bank informed her it could not put a stop on the checks because they had been cashed and recommended she report the incident to the police. CP 52. When Ms. Grimes reported the incident to the police, she recalled the sergeant told her, "we know the guy." CP 52. When the investigator asked Ms. Grimes if she has any issues with her memory or

⁴ The trial court pointed out that the victim is now 91 years old. 01/04/2019 RP 7.

⁵ The victim's lack of recall about Baugh telling her he would not cash a check he had locked in his truck is what Baugh's attorney refers to as "the most damning allegation made by law enforcement." *See* CP 51.

any cognitive issues that result in her taking medication, she replied, “No.” CP 52.

Baugh submitted a two-page declaration in support of the motion to withdraw his guilty plea. CP 53-54. In his declaration, Baugh claims he was initially under the belief that he would serve no jail time if he paid the restitution in full. CP 53. He asserts that his prior attorney subsequently advised him of a plea offer allowing him to plea to a sentencing range of 22 to 29 months, with a low-end recommendation of 22 months. CP 53-54. He claims he “panicked” and entered a guilty plea “without an opportunity for rational thought” after his prior attorney informed him that he could receive a 60-month sentence if convicted. CP 53-54. Baugh also claims he was deprived of “the opportunity to proceed knowingly and intelligently” because the victim was allegedly not interviewed prior to September 5, 2018. CP 54. Despite this allegation, nothing in the record indicates that the victim had not been interviewed.

On January 4, 2019, the trial court denied Baugh’s motion to withdraw his guilty plea. CP 55: 01/04/2019 RP 5. The court noted it clearly explained the circumstances of the plea to Baugh prior to accepting his guilty plea, and Baugh knew what the potential sentencing range was and did not indicate any confusion. 01/04/2019 RP 5. The court concluded there

was no basis to withdraw the plea and denied Baugh's motion. 01/04/2019 RP 5; CP 55. The court then proceeded with sentencing. 01/04/2019 RP 5.

At sentencing, Baugh's attorney acknowledged the "bumpy road" in getting to sentencing but argued that Baugh paid restitution in full to Ms. Grimes and that he "did ultimately take responsibility when he entered his plea." 01/04/2019 RP 7. The court noted that Baugh's actions "smack of...taking advantage of an elderly woman" and that "irrespective of the check in the truck," there is documentation of \$3,650 in checks that were extracted from a 90-year-old victim over time. 01/04/2019 RP 8-9. When asked by the court if he had anything to say, Baugh apologized, stating that "[n]o one on this planet can feel more shame" and that "I know I can't go down these kind of roads no more because God won't let me into heaven...with anything of this nature." 01/04/2019 RP 9-10.

The court followed the joint recommendation of the parties and sentenced Baugh to a low-end standard range sentence of 22 months. CP 37, 40; 01/04/2019 RP 5-8, 11. The court found Baugh indigent and imposed only the mandatory crime victim assessment fee of \$500 and restitution to Ms. Grimes. CP 38; 01/04/2019 RP 12. Baugh paid restitution in full to Ms. Grimes prior to sentencing. CP 39. Baugh timely appealed. *See* CP 58.

III. ARGUMENT

- A. **The trial court properly denied Baugh's motion to withdraw his guilty plea where it was knowing, intelligent, and voluntary and where he failed to show a manifest injustice.**

The trial court properly denied Baugh's motion to withdraw his guilty plea because he failed to meet his burden of showing a manifest injustice occurred. Appellate courts review a trial court's denial of a motion to withdraw a guilty plea for an abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Pugh*, 153 Wn. App. 569, 576, 222 P.3d 821 (2009). A guilty plea is valid when the totality of the circumstances show it was knowing, intelligent, and voluntary. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996); *Wood v. Morris*, 87 Wn.2d 501, 503, 505-06, 554 P.2d 1032 (1976). Courts will only allow a guilty plea to be withdrawn to correct a "manifest injustice." *State v. Codiga*, 162 Wn.2d 912, 922-23, 175 P.3d 1082 (2008) (citing CrR 4.2(f)).

Our Supreme Court has suggested four indicia of manifest injustice that would allow a defendant to withdraw his guilty plea: (1) the defendant did not ratify his plea; (2) the plea was not voluntary; (3) counsel was ineffective; or (4) the State did not honor the plea agreement. *Pugh*, 153 Wn. App. at 577 (citing *State v. Taylor*, 83 Wn.2d 594, 597, 521 P.2d 699

(1974)). It is the defendant's burden to prove a manifest injustice, which is injustice that is obvious, directly observable, overt, and not obscure. *State v. Ross*, 129 Wn.2d 279, 283-84, 916 P.2d 405 (1996). "Without question, this imposes upon the defendant a demanding standard." *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984) (quoting *Taylor*, 83 Wn.2d at 596). Given the procedural safeguards inherent in plea proceedings, the defendant's burden of proof requires more evidence than a "mere allegation by the defendant." *See Osborne*, 102 Wn.2d at 97.

Due process requires that a defendant's guilty plea be knowing, intelligent, and voluntary. *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); *State v. Robinson*, 172 Wn.2d 783, 794, 263 P.3d 1233 (2011). The criminal rules mirror this principle by requiring that the trial court not accept a guilty plea without first determining that the plea was made "voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d). The trial court must also be satisfied that "there is a factual basis for the plea." *Id.* This rule provides sufficient safeguards to protect a defendant against an involuntary plea. *Robinson*, 172 Wn.2d at 792.

The voluntariness of a plea is determined by considering the relevant circumstances surrounding it. *State v. Williams*, 117 Wn. App. 390, 398, 71 P.3d 686 (2003). "When a defendant completes a plea statement and admits

to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary.” *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998); *see also Branch*, 129 Wn.2d at 642 (a defendant’s signature on a plea statement is strong evidence of a plea’s voluntariness). “When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well-nigh irrefutable.” *State v. Perez*, 33 Wn. App. 258, 262, 654 P.2d 708 (1982).

A criminal defendant must be aware of the nature of the offense and the consequences of pleading guilty for the plea to be knowing, intelligent, and voluntary. *State v. Holsworth*, 93 Wn.2d 148, 153, 607 P.2d 845 (1980) (citing *Boykin*, 395 U.S. at 243-44). “To be made sufficiently aware of the nature of the offense, the defendant must be advised of the essential elements of the offense[.]” *Holsworth*, 93 Wn.2d at 153. An information detailing the acts and state of mind necessary to constitute the charged crime to which the defendant is pleading, adequately informs the defendant of the nature of the offense and thus creates a presumption that the plea was knowing, intelligent, and voluntary. *Osborne*, 102 Wn.2d at 93; *In re Pers. Restraint of Ness*, 70 Wn. App. 817, 821, 855 P.2d 1191 (1993).

Here, the totality of the circumstances demonstrates that Baugh’s plea was knowing, intelligent and voluntary. Baugh acknowledged that he

was prepared to plead guilty to the amended information, which outlined the essential elements of theft in the second degree. *See* CP 12-13, 23-24; *see also* 09/06/2018 RP 5-13. Baugh confirmed that he reviewed the elements of these offenses with his attorney. CP 23-24; *see also* 09/06/2018 RP 8-9. The court detailed the rights Baugh was waiving by pleading guilty, and Baugh acknowledged that he understood he was forfeiting those rights:

[Court:] Mr. Hershman tells me he went over your statement on plea of guilty with you before the hearing today. Is that right?

[Baugh]: That's true

[Court]: Every paragraph?

[Baugh]: Yes.

[Court]: Was Mr. Hershman able to explain or answer any questions that you had when you went over the statement with him?

[Baugh]: He made things pretty clear as to why we were going about this plea - -

[Court]: Do you need any additional - -

[Baugh]: - - at this time and what he thought was best.

[Court]: That's what lawyers do.

[Baugh]: There was some things that I didn't understand. I was going to ask you about them, but I've kind of said a few things here already.⁶

⁶ Baugh did eventually address his concerns, which were ultimately health related. He also expressed his need for dental work in hopes that the court would release him pending sentencing. 09/06/2018 RP 9, 15-16.

[Court]: Well, sir, it's not my role to provide legal advice. I'm here to judge the facts and apply the law. Do you need any more time to speak with Mr. Hershman before we go ahead with your plea?

[Baugh]: We can proceed.

[Court]: Mr. Baugh, if at any time during this plea you don't understand something that you want to talk to your lawyer about, just tell me. I'll stop, and you can talk to Mr. Hershman, okay?

[Baugh]: I've got issues with my eye here. It's really, really bothering me. And I've got some other health stuff. I'll bear with you the best I can, but I'm in a lot of pain right now.

[Court]: I just want to make sure that you understand the nature of the plea, that you have had your Statement of Defendant on Plea of Guilty explained to you to your complete satisfaction. You may not like the answers, but I need to know that you understood what was being told to you about the contents of the plea, so if at any time you have any questions about that, you tell me so that I can let you speak to Mr. Hershman and have your questions answered, okay?

[Baugh]: Yes.

[Court]: All right. You have the right to have a trial by jury right here in Pierce County on the charges the State filed against you. But if you plead guilty, you don't get a trial. Do you understand that.

[Baugh]: I do.

[Court]: If you did go to trial on the charges that the State filed against you, your lawyer would have the right to cross-examine witnesses, that is, to ask questions of any of the

witnesses that the State brought in to testify against you. And you would have the right to have witnesses brought in that might provide favorable testimony for you. They would be brought in at no expense to you, and the Court would make them come, whether they wanted to or not. Do you understand that you are giving up that right?

[Baugh]: Yes.

09/06/2018 RP 8-10; *see also* 09/06/2018 RP 5-7, 11-13; CP 15-24.

The court explained to Baugh that by pleading guilty to a crime, his right to appeal is greatly restricted. 09/06/2018 RP 11. Baugh again stated that he understood. 09/06/2018 RP 11. The court explained the standard sentencing range of 22 to 29 months, and Baugh informed the court that he understood the sentencing range. 09/06/2018 RP 11. Baugh acknowledged that no one had threatened him or forced him to plead guilty and that it was his own decision to plead guilty. 09/06/2018 RP 12-13; CP 23.

The court inquired of Baugh about his statement on plea of guilty, which Baugh initialed, signed, and orally agreed to, demonstrating further evidence of voluntariness. CP 23-24; 09/06/18 RP 10-13; *See Smith*, 134 Wn.2d at 852; *see also Branch*, 129 Wn.2d at 642. Baugh acknowledged that he had read through the statement on the plea of guilty and reviewed it fully with his attorney and that he had no further questions to ask the court. CP 23-24; 09/06/2018 RP 8-9. The court found that there was a factual basis

for the plea and that Baugh understood the charges and the consequences of the plea:

The Court will find that Mr. Baugh's plea of guilty to Counts I and II in the Amended Information is an informed plea. It's made with an understanding of the direct and the collateral consequences that follow the entry of such a plea. It's not a plea that is induced by a promise or a threat.

09/06/2018 RP 13; CP 24. After engaging in an oral colloquy with Baugh on the circumstances of the plea, the court was satisfied that Baugh's guilty plea was knowingly, intelligently, and voluntarily made. CP 23-24; 09/06/2018 RP 12-13; *see Perez*, 33 Wn. App at 262 (presumption of voluntariness is "well nigh irrefutable" when the defendant indicates an understanding of the written plea and the court orally inquires as to the voluntariness of the plea).

The record thoroughly demonstrates that Baugh was aware of the nature of the offenses to which he knowingly, intelligently, and voluntarily pled guilty. It is the defendant's burden to show a manifest injustice, and nothing beyond Baugh's mere allegation demonstrates such an injustice. *See Osborne*, 102 Wn.2d at 97. The trial court did not abuse its discretion by denying Baugh's motion to withdraw his guilty plea because the totality of the circumstances demonstrates that the plea was knowing, intelligent, and voluntary. Therefore, this Court should affirm the Baugh's valid guilty plea.

B. Baugh fails to show he received ineffective assistance of counsel where counsel assisted Baugh in making an informed decision about the plea after reasonably evaluating the evidence and where there is no showing Baugh would have insisted on going to trial had an earlier victim interview occurred.

Baugh has failed to show that he received ineffective assistance of counsel that resulted in an invalid plea. A claim of ineffective assistance of counsel is a mixed question of fact and law that is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the defendant must show: (1) that counsel's representation was deficient and fell below an objective standard of reasonableness; and (2) that the deficient performance prejudiced the defendant. *Id.* (applying two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The failure to satisfy either prong is fatal to an ineffective assistance of counsel claim. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

To establish deficient performance so egregious as to necessitate reversal of a conviction, the defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In order to establish that the deficient performance prejudiced the defendant, the defendant must show that counsel's errors were so serious that it could not have produced a just result. *Id.* at 686-87.

Courts assume counsel is effective, and the defendant must show there was no legitimate strategic or tactical reason for counsel's actions. *Sutherby*, 165 Wn.2d at 883. Counsel's performance is not deficient if it can be characterized as a legitimate trial strategy or tactic. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. There is a "strong presumption that counsel's performance was reasonable." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Kylo*, 166 Wn.2d at 862). Judicial scrutiny of a defense attorney's performance must be "highly deferential" and 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." *Strickland*, 466 U.S. at 689.

To establish prejudice, a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *In re Clements*, 125 Wn. App. 634, 646, 106 P.3d 244 (2005). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Grier*, 171 Wn.2d at 34.

“When counsel's alleged error is the failure to investigate exculpatory evidence, the assessment of whether the error prejudiced the defendant involves the likelihood that the evidence ‘would have led counsel to change his recommendation as to the plea.’” *Clements*, 125 Wn. App. at 646. “This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.” *Id.* “And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.” *Strickland*, 466 U.S. at 691.

Baugh fails to establish either prong of the ineffective assistance of counsel claim. Here, Baugh fails to show that his former attorney's performance was deficient for allegedly not conducting a victim interview. Baugh cites no authority to show that a victim interview was required for counsel to be effective. Rather, the degree and extent of investigation varies depending on the issues and facts of each case. *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010). Counsel has a duty to assist a defendant in making an informed decision when evaluating a plea offer and “must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.” *Id.* at 111-12.

Baugh has not shown that his attorney failed to evaluate the evidence against Baugh and the likelihood of a conviction. Instead, the record demonstrates the opposite and shows that his attorney reasonably evaluated the evidence against Baugh and assisted him in making an informed decision about the plea. 09/06/2018 RP 3-4, 14-15; *see also* CP 54.⁷ Thus, Baugh fails to establish deficient performance.

Even assuming counsel's performance was deficient, Baugh has failed to show that he was prejudiced. Contrary to Baugh's assertion that the victim's memory was vague and differed from the facts alleged by the State, the record shows that she had a good recall of the crimes. Ms. Grimes was able to demonstrate that she accurately recalled the thefts and even told the investigator that she has no issues with her memory and has no cognitive issues requiring any medication. CP 52. Ms. Grimes recalled that she wrote Baugh four or five checks and that she went to the bank after she "waited and waited and waited" for Baugh to return. CP 52. She recalled that she went to the police after she was told that the checks had been cashed and that the bank could not put a stop payment order on them. CP 52. The investigator strategically avoided the overarching question of whether or not the thefts occurred, which when considering the entirety of the

⁷ Baugh details the letter he received from Mr. Hershman indicating that Mr. Hershman's "objective assessment" of the case is that Baugh would receive an exceptional sentence of 60 months if convicted after trial. CP 54.

conversation reveals that Ms. Grimes remembers the thefts did indeed occur. *See* CP 52.

Although Ms. Grimes could not recall Baugh telling her about locking one of the checks in his truck, this is not an element of the crime that the State is required to prove. A person commits theft in the second degree if he or she commits theft of property or services that exceeds \$750 in value but does not exceed \$5,000 in value. RCW 9A.56.040. “Theft” means to “wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services[.]” RCW 9A.56.020. These are the elements the State would have been required to prove beyond a reasonable doubt, and nothing in the record suggests that the State had any evidentiary issues in proving these elements. The State was not required to prove that Ms. Grimes remembered Baugh telling her that he locked the initial check in his car and that he would not cash it if she gave him another check. The “very brief and limited” interview of Ms. Grimes, conducted by the defense solely for the purpose of Baugh’s motion to withdraw his plea,⁸ does not undermine the State’s evidence.

⁸ 01/04/2019 RP 4.

In *Clements*, the Court rejected the defendant's argument that the trial court violated his due process rights by refusing to allow him to withdraw his guilty plea. *Clements*, 125 Wn. App. at 638. The defendant argued that before advising him to plead guilty, his attorney should have interviewed his girlfriend and roommate which would have provided a "more optimistic assessment" of his trial chances and he would not have pled guilty. *Id.* at 646. The Court concluded this did not constitute ineffective assistance, "Given these circumstances and the witnesses' close relationship to [the defendant], defense counsel could reasonably have concluded that their testimony was unlikely to be helpful at trial." *Id.* at 647. The Court determined that the defendant's conclusory assertions were insufficient to establish a reasonable probability that he would have proceeded to trial had his attorney interviewed the witnesses. *Id.*

Similar to *Clements*, Baugh has not established a reasonable probability that he would have proceeded to trial if an earlier interview with Ms. Grimes had occurred. The State's evidence in the case was strong. Despite being 91 years old, Ms. Grimes had a detailed recollection of the events of the thefts, which could be corroborated by the multiple checks cashed by Baugh. Further, Baugh's attorney likely knew Baugh was guilty of the thefts in light of his admissions at sentencing. Baugh apologized for his crimes, stating that "[n]o one on this planet can feel more shame" and

that “I know I can’t go down these kind of roads no more because God won’t let me into heaven...with anything of this nature.” 01/04/2019 RP 9-10. Baugh informed the court that he cares, which is why he paid the money back to the victim when his attorney told him to do so. 01/04/2019 RP 9.

Nothing in the record supports the assertion that Baugh’s attorney was ineffective for making a strategic decision to accept the State’s plea offer and not conduct an interview of a 90-year-old victim. Given the strength of the State’s evidence and the lengthy sentence Baugh was facing, Baugh’s attorney negotiated a deal for a joint recommendation of only 22 months. *See* 09/06/2018 RP 14; CP 54. With the aggravating factors, Baugh was facing a sentence of up to 60 to 120 months if convicted after trial. 09/06/2018 RP 4.⁹ Further, even after Baugh pled guilty to the reduced charges, he informed the trial court that he wanted to keep his attorney on his case:

I personally want to keep Mr. Hershman onboard. He has a good reputation with the courts and law and everything here. This stuff that’s going on - - I don’t know. Like I said I need to - - if I can, I would like to be able to talk to him. There’s a lot at stake.

11/02/2018 RP 8-9. Baugh later reiterated to the court that the “most important thing” is “to keep Mr. Hershman on the case.” *Id.* at 11.

⁹ Baugh’s initial charges involved vulnerable victim sentence enhancements attached to each of the three counts of theft in the second degree. CP 3-4.

Baugh's entire argument rests on a baseless allegation that his attorney did not conduct a reasonable investigation solely because he did not interview the victim prior to the plea. Not only is the record silent as to whether Baugh's former attorney interviewed the victim, but Baugh cites no authority for his assertion that the lack of a victim interview constitutes ineffective assistance of counsel. The record demonstrates that Baugh's attorney acted as a strong advocate for Baugh, working "zealously" to negotiate a favorable plea deal for Baugh. *See* 09/06/2018 RP 14-15; *see also* CP 14, 54; *see also* 11/02/2018 RP 8-9. Baugh has not shown that there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial if the victim had been interviewed prior to his plea. Baugh has not established either prong of the *Strickland* test. Thus, this Court should deny his meritless ineffective assistance of counsel claim.

C. The State concedes that remand is appropriate to strike the interest accrual language in the judgment and sentence.

Because Baugh was found indigent at sentencing, the judgment and sentence should not have included an interest accrual provision for non-restitution legal financial obligations. *See* CP 38; *see also* 01/04/2019 RP 12. This Court should remand for the trial court to strike the interest accrual

provision. Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) amended the legal financial obligation (LFO) system in Washington State. The bill is now codified as RCW 10.82.090. Particularly, the amendment eliminated interest accrual on nonrestitution LFOs as of June 7, 2018. RCW 10.82.090.

Baugh's judgment and sentence contains a provision that allows for interest accrual on unpaid LFOs. CP 39. The only legal financial obligation the court imposed was a \$500 crime victim assessment fee. CP 38.¹⁰ Here, Baugh pled guilty after this bill went into effect, so the judgment and sentence is subject to its provisions. Because the court found Baugh was indigent at sentencing, this Court should remand for the trial court to strike the interest accrual provision in the judgment and sentence.

IV. CONCLUSION

The record demonstrates that Baugh's guilty plea was knowing, intelligent, and voluntary and that he was provided with effective assistance of counsel. The trial court properly exercised its discretion in denying Baugh's motion to withdraw his guilty plea. This Court should affirm

¹⁰ Although the trial court also ordered Baugh to pay \$3,650 in restitution to Ms. Grimes. Baugh paid this restitution in full prior to sentencing. CP 38-39.

Baugh's valid guilty plea, but remand for the trial court to strike the interest accrual provision in the judgment and sentence.

RESPECTFULLY SUBMITTED this 5th day of September, 2019.

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Pierce County Prosecuting Attorney



MALENA BOOME
Legal Intern



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WSB #32764

Certificate of Service:

The undersigned certifies that on this day she delivered ~~by E-file~~ or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her 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.

9.5.19 _____
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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