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State of Washington  
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NO. 53335-9-II

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

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STATE OF WASHINGTON, Respondent

v.

JOSHUA CODY HEGRE, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00560-3

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

### **I. The trial court properly found that Hegre received the benefit of effective counsel.**

#### **STATEMENT OF THE CASE**

Joshua Hegre (hereafter ‘Hegre’) was previously convicted of Rape of a Child in the Second Degree, Child Molestation in the First Degree, and Residential Burglary. CP 6-14; 29-46. The trial court sentenced Hegre, on June 6, 2014, pursuant to the Special Sentencing Sex Offender Sentencing Alternative (‘SSOSA’). CP 29-46. On September 3, 2015, the State moved to revoke Hegre’s SSOSA sentence, alleging he had contact with a minor and had committed a new law violation, an assault in the fourth degree – domestic violence. CP 47-49. On September 30, 2015, Hegre admitted to the allegations involved in the motion to revoke SSOSA and asked the court to allow him to remain on his SSOSA sentence. RP 70. The trial court allowed Hegre to remain on his SSOSA sentence and imposed a 120 day sanction. CP 62. The following year, the State filed another motion to revoke Hegre’s SSOSA sentence, alleging he had committed the crime of assault in the fourth degree – domestic violence against his wife. CP 67. Hegre was represented by counsel, Steve Rucker, and decided to admit to the violation and once again ask that he not be revoked from his SSOSA sentence. RP 186-87. The trial court

revoked Hegre's SSOSA sentence. CP 67-68. Thereafter, Hegre moved to withdraw his admission to the violation of his SSOSA sentence, and the trial court held a hearing pursuant to CrR 7.8. CP 86-116; RP 125-328. The trial court heard testimony from Hegre's defense attorney, Steve Rucker, the prosecutor involved in the case, Colin Hayes, another prosecutor, Nicholas Barnabas, and Hegre himself. The trial court denied Hegre's motion to withdraw his admission and entered findings of fact and conclusions of law to that effect. CP 134-47. Hegre then filed the instant appeal.

At the evidentiary hearing on Hegre's motion to withdraw his admission to the SSOSA sentence violation, the following evidence was heard: Colin Hayes is a Senior Deputy Prosecuting Attorney for Clark County. RP 253. He was the assigned prosecutor on Hegre's case. RP 254. He filed charges of Child Molestation in the First Degree, Rape of a Child in the Second Degree, Child Molestation in the Second Degree, and Rape of a Child in the Third Degree against Hegre, handled the case at Hegre's guilty plea, handled a first motion to revoke the SSOSA sentence Hegre received, and then handled the second motion to revoke the SSOSA sentence. RP 254-55; CP 1-3. At Hegre's first motion to revoke the SSOSA sentence in September 2015, he admitted to the allegations involved in the motion to revoke, and asked the Court not to revoke him,

but to sanction him instead. RP 255-56. The court sanctioned Hegre and allowed him to remain on SSOSA. RP 256. Hegre's second motion to revoke the SSOSA sentence was handled in July 2017. RP 129. The allegation was that Hegre had committed a new law violation, an assault in the fourth degree domestic violence against his wife. RP 132. Mr. Hayes, representing the State, was prepared to proceed on the motion to revoke SSOSA on the set hearing date and had the victim of Hegre's new crime present in court and ready to testify. RP 258. Mr. Hayes was also prepared to proceed with police officers as witnesses, and had exhibits to present, including a 911 call and photos. RP 258. It was known that the victim was likely to recant her allegation that Hegre had assaulted her during her anticipated testimony. RP 258-59. She had previously recanted her allegation, and this was made known to Hegre's counsel, Mr. Rucker, as well. RP 264. The victim had filled out a *Smith* affidavit; Mr. Hayes had attached that affidavit to his filed motion to revoke Hegre's SSOSA sentence. RP 270-71. Instead of proceeding with the contested revocation hearing, Hegre decided to admit to the allegation upon which the motion to revoke was based and ask the court to sanction him and allow him to continue on SSOSA.

Hegre was represented at the 2017 motion to revoke SSOSA by Steve Rucker. RP 129. Steve Rucker has been an attorney for 29 years and

has practiced criminal defense for 27 years. RP 128. For the 27 years as a criminal defense attorney, Mr. Rucker has represented individuals charged with sex offenses, including Class A sex offenses, as well as with domestic violence offenses. RP 129.

Mr. Rucker represented Hegre in the motion to revoke the SSOSA sentence in July 2017. RP 129. The basis of the motion to revoke Hegre's SSOSA was an allegation of a new law violation – that he had committed the crime of assault in the fourth degree – domestic violence between the period of September 1, 2016 to June 8, 2017. RP 132. Mr. Rucker met with Hegre on July 13, 2017 to review the SSOSA revocation allegation. RP 132. The matter was set for a contested revocation hearing a few weeks later. RP 132-33. Mr. Rucker reviewed the relevant documents with Hegre on July 13, including the *Smith* affidavit filled out by the victim of the assault, a letter from the victim to the court, police reports, the 911 call, photographs, etc. RP 135-40, 144. Mr. Rucker also had multiple telephone calls with Hegre before the contested revocation hearing. RP 144. In those meetings and calls, Mr. Rucker and Hegre discussed the facts of the case, the options of how to proceed at the revocation hearing, etc. RP 133-35, 144-45. Hegre made admissions to the assault to Mr. Rucker during these conversations. RP 145. Hegre's admission to the conduct affected Mr. Rucker's thinking on how the case should be

handled. RP 145. Hegre told Mr. Rucker that he wanted to plead guilty to the district court assault charge as he had assaulted the victim by pushing her and pulling her hair. RP 145.

Mr. Rucker testified that due to ethical requirements he would not be able to present Hegre as a witness at a revocation hearing if he were to testify that he did not assault the victim as he did admit to Mr. Rucker that he had assaulted her. RP 145-46. Mr. Rucker was aware that the victim had recanted her allegations of assault. RP 146. However, Mr. Rucker was aware the *Smith* affidavit would be admissible at the revocation hearing. RP 147. The *Smith* affidavit indicated that Hegre had forcibly grabbed her, pinned her against the car door, and choked her with both hands. RP 148. The affidavit also detailed the text message that the victim sent to a friend; it was a panic word message to a friend, typical of domestic violence victims who have had safety planning. RP 148. The victim was also present for the revocation hearing and Mr. Rucker was aware of that. RP 161.

Mr. Rucker did receive an email from Hegre's district court attorney who indicated she believed the assault charge against him was "pretty defensible." RP 153. However, Mr. Rucker was dealing with a different burden of proof on the SSOSA revocation issue, and a large period of time during which any assault allegation could be grounds for

revocation, i.e. the September 1, 2016 to June 8, 2017 allegation window. RP 153. The 911 call and the *Smith* affidavit detailed a lot of abuse by Hegre, including threats to kill, stalking and controlling behavior, increased level of violence, forced sex, and specific instances of choking and rape. RP 154. When Mr. Rucker discussed this with Hegre, Hegre responded “What the F, she’s my wife.” RP 154. Mr. Rucker explained it could still be a crime to rape your wife and Mr. Rucker worried about the potential for a second of two strikes coming if Hegre were charged with a sex crime. RP 155. Mr. Rucker also worried about Hegre facing an Assault 2 charge for strangulation. RP 155. Based on this concern, Mr. Rucker believed it was important to proceed on what the State was alleging at the time, a simple assault in the fourth degree charge and SSOSA revocation, instead of waiting to see and chancing that the State would build a stronger case which would include much more serious crimes. RP 156.

Mr. Rucker believed there was a tactical advantage to having Hegre admit a violation of his SSOSA rather than contest it. RP 157. Despite Hegre having been told on his last SSOSA revocation hearing that it was his last chance, Mr. Rucker knows that is not always true. RP 158. Mr. Rucker believed if Hegre was accountable early on that he would have a chance of getting a sanction instead of revocation. RP 158. Mr. Rucker

believed Hegre's best shot was to appear cooperative, and willing to work. RP 162. Mr. Rucker believed if all the evidence was presented at the revocation hearing that Hegre would have assuredly been revoked from SSOSA. RP 196.

Mr. Hayes testified that he has worked in the Domestic Violence Unit of the prosecutor's office and in his experience it is common for victims of domestic violence to recant. RP 273. A recanting victim does not preclude a conviction in a domestic violence case and often times actually strengthen the State's case with a jury. RP 273, 275-76.

Nicholas Barnabas is an Assistant City Attorney for the City of Vancouver and worked at the Clark County Domestic Violence Prosecution Unit. RP 282. Mr. Barnabas represented the City of Vancouver in a misdemeanor prosecution of Hegre on an assault in the fourth degree – domestic violence charge in 2017. RP 283. The victim on the case, Hegre's wife, recanted her allegations of assault. RP 284. However, Mr. Barnabas believed he could still go forward with the charges because he had a good *Smith* affidavit. RP 284. However, he could not get the victim to attend the trial as she was in California. RP 284. Mr. Barnabas's supervisor was unwilling to have the City expend the funds to fly the victim up to Washington for the trial on a misdemeanor charge. RP 285. Without the victim present, Mr. Barnabas knew he could

not admit the *Smith* affidavit at trial. RP 285-86. In addition, there were no eye-witnesses, no admissible statements on the 911 call without the victim being present, and no confession from which he could obtain a conviction based on substantive evidence without the victim being present at trial. RP 285-86. For this reason, the City dismissed the assault charge against Hegre. RP 286. Part of the reason Mr. Barnabas's supervisor decided not to pay to fly the victim up for trial was because they knew Hegre had been revoked on his SSOSA and had a lengthy prison sentence to serve, and they felt justice had been served in the case. RP 286-87.

Instead of sanctioning Hegre as Mr. Rucker had hoped the court would do, the trial court revoked Hegre's SSOSA sentence. RP 92-112; CP 67, 73. Thereafter, Hegre filed a motion to withdraw his admission to the basis for the SSOSA revocation. CP 86-106. He alleged his attorney, Mr. Rucker, was ineffective for advising him to admit to the violation. *Id.* The trial court held an evidentiary hearing on Hegre's motion to withdraw. RP 127-300. The trial court denied Hegre's motion to withdraw and entered written findings of fact and conclusions of law. CP 134-47. Hegre subsequently appealed. CP 148.

## ARGUMENT

### **I. The trial court below properly found that Hegre had the benefit of effective counsel on the motion to revoke his SSOSA sentence.**

Hegre alleges he was denied the benefit of effective assistance of counsel at his motion to revoke SSOSA because his attorney gave him bad advice, failed to adequately investigate the case, and pursued an unreasonable strategy. In fact, Hegre had the benefit of effective counsel who advised him based on sound strategy in an attempt to obtain the best possible outcome for Hegre. Simply because his attorney's strategy was not ultimately successful does not mean that he did not receive the benefit of effective counsel. Accordingly, Hegre's claim fails.

This Court is in the position to review the trial court's decision on Hegre's post-conviction motion to withdraw his admission to a SSOSA violation. An appellate court reviews a trial court's ruling on a motion for relief from judgment under the abuse of discretion standard. *State v. Robinson*, 193 Wn.App. 215, 217, 374 P.3d 175 (2016) (citing *State v. Zavala-Reynoso*, 127 Wn.App. 119, 122, 110 P.3d 827 (2005)). Under the abuse of discretion standard, a trial court's decision will not be reversed unless it was manifestly unreasonable or based on untenable grounds or

reasons. *Id.* (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

To prevail on a claim of ineffective assistance of counsel, the defendant must show both that defense counsel representation was deficient, and that the deficient performance prejudiced him. *State v. Estes*, 188 Wn.2d 450, 457-58, 395 P.3d 1045 (2017). There is a strong presumption that counsel's performance was effective. *Id.* at 458. Counsel's representation may be deficient if, considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* The reasonableness of counsel's conduct is evaluated by its reasonableness at the time the conduct was undertaken. *In re Yates*, 177 Wn.2d 1, 36, 296 P.3d 872 (2013). Prejudice exists if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Estes*, 188 Wn.2d at 458.

There is scant case law addressing withdrawals of admissions to probation violations or alternative sentences, however, case law regarding withdrawals of guilty pleas are analogous and should be relied upon by this Court. "In the context of a guilty plea, the defendant must show that his counsel failed to 'actually and substantially assist his client in deciding whether to plead guilty,' and that but for counsel's failure to adequately

advise him, he would not have pleaded guilty.” *State v. McCollum*, 88 Wn.App. 977, 982, 947 P.2d 1235 (1997), *review denied*, 137 Wn.2d 1035, 980 P.2d 1285 (1999) (quoting *State v. Cameron*, 30 Wn.App. 229, 232, 633 P.2d 901 (1981)). Counsel has the obligation to aid a defendant “in evaluating the evidence against him and in discussing the direct consequences of a guilty plea.” *State v. Holley*, 75 Wn.App. 191, 197, 876 P.2d 973 (1994) (quoting *State v. Malik*, 37 Wn.App. 414, 417, 680 P.2d 770, *review denied*, 102 Wn.2d 1012 (1984)). Mr. Rucker fulfilled his obligations to his client: he investigated the case, he considered the options, he considered the pros and cons of different possible ways of proceeding, discussed those with his client, and allowed his client to make the decision on the action to take. A case of buyer’s remorse is not sufficient cause to allow withdrawal of an admission to a SSOSA violation. *See State v. Blanks*, 139 Wn.App. 543, 551, 161 P.3d 455 (2007).

A defendant’s change of heart is not a sufficient basis to withdraw an admission to a SSOSA violation. *See Blanks*, 139 Wn.App. at 551. In *Blanks*, the defendant moved to withdraw a guilty plea claiming his attorney was ineffective for failing to properly advise him on the State’s recommendation and the consequences of pleading guilty. *Id.* On appeal,

the Court found that Blanks had not met his burden of showing that his attorney failed to actually and substantially assist him in his decision to plead guilty. *Id.* The Court of Appeals affirmed the trial court's conclusion that the defendant had a case of "buyer's remorse," and had simply changed his mind about pleading guilty. *See id.* This does not render a guilty plea involuntary, nor does it mean that the advice counsel gave was inadequate or deficient.

In *In re Elmore*, 162 Wn.2d 236, 172 P.3d 335 (2007), the defendant claimed his attorney was ineffective for incorrectly advising him to plead guilty. *Elmore*, 162 Wn.2d at 255-56. He argued that his attorney's advice fell below an objective standard of reasonableness and that there was no advantage to him pleading guilty. *Id.* at 255. He also argued his attorney was advised to take the case to trial, and was unreasonable in his advice to Elmore to plead guilty. *Id.* His attorney indicated that his defense "strategy was built around the dual themes of remorse and taking responsibility." *Id.* at 256. In addition, the defendant did not have a viable defense to the charge and his attorney believed that taking the focus off the circumstances of the crime and focusing more on taking responsibility was a better defense strategy. *Id.* The Supreme Court

concluded that counsel's advice to plead guilty was reasonable in these circumstances. *Id.*

Similarly, Mr. Rucker's advice to Hegre was reasonable. Given the evidence against Hegre, the admissibility of the evidence at a revocation hearing, where evidence rules do not apply, the potential exposure if the case were delayed, and the low burden of proof, Mr. Rucker was correct in determining his client did not have a valid defense to the allegation. When a defendant has no valid defense, it is not unreasonable to then focus on the best outcome, presuming a finding of guilt. A defendant who confesses, accepts responsibility, and demonstrates remorse is more likely to receive a less harsh sentence. This is where Mr. Rucker found Hegre to fall: clearly would be found to have violated the terms of SSOSA, and if he contested, much less likely to receive a sanction as opposed to a revocation. The fact that in hindsight counsel's strategy did not pay off does not amount to ineffective assistance of counsel. An attorney's performance is still effective if reasonably made for tactical reasons. As found by our Supreme Court, the same tactic used by Mr. Rucker is reasonable and constitutes effective assistance of counsel. *See Elmore, supra.* The fact that the City later dismissed a case it likely would not have, had Hegre not admitted to the SSOSA violation, is not sufficient

grounds to find Mr. Rucker was ineffective. The City only dismissed the case because it did not wish to expend the funds to fly the victim up for trial, not because it believed it could not prove the case even with the victim present, or because it believed the crime did not occur.

Furthermore, Hegre clearly voluntarily entered the admission to the violation and is now simply remorseful that he chose to do so because he thinks he could have escaped responsibility all together. That does not amount to ineffective assistance of counsel and does not qualify for relief from judgment.

The trial court correctly denied Hegre's motion to withdraw his admission to the SSOSA violation. The trial court's decision here was not manifestly unreasonable or based on untenable grounds or reasons. The trial court reasonably found that Mr. Rucker's recommendation to Hegre to admit the new violation was a legitimate tactic. *See* CP 146. As the trial court found, there was a substantial likelihood that the Court would find the new violation was committed after a contested hearing based on the evidence available. CP 146. Mr. Rucker's advice to Hegre allowed Hegre to make the decision about whether to admit the allegation or proceed to a contested hearing. That decision was Hegre's, and Hegre's alone. The trial court properly found that Hegre knowingly and voluntarily

entered into his admission of the SSOSA violation after sufficient advice from counsel. Mr. Rucker was reasonable and tactical in his representation of Hegre. For this reason, the trial court did not err in finding Mr. Rucker was not ineffective, and the trial court's decision should be affirmed.

### CONCLUSION

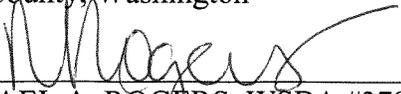
Hegre has not established deficient performance or prejudice from such performance. Mr. Rucker was strategic and reasonable in his representation of Hegre and properly advised him on his options surrounding his revocation hearing. Hegre has not established that the trial court's decision was manifestly unreasonable and therefore the trial court's decision should be affirmed.

DATED this 23<sup>rd</sup> day of January, 2020.

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