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No. 53345-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

TYLER JUSTIN MCVEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Lanese, Judge
Cause No. 15-1-00783-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court's findings of fact are supported by substantial evidence where each finding was related to the testimony presented and the direct observations of the witness testimony by the trial court.

2. Whether the trial court properly found that McVey failed to demonstrate prejudice caused by his trial counsel not securing and calling Mark Schmidt to testify at trial where Schmidt's testimony at an evidentiary hearing demonstrated that he had difficulty answering even yes or no questions, consistently contradicted himself, indicated that a declaration attached to McVey's motion was inaccurate, and indicated that he had absolutely no recollection of the time period when the charged events occurred.

3. Whether McVey can demonstrate deficient performance based on his trial counsel not reviewing evidence and discussing it with him, when the evidence presented during the evidentiary hearing clearly indicated that his trial counsel did view the child forensic interview and discuss the evidence with McVey prior to McVey electing to not testify at trial.

B. STATEMENT OF THE CASE.

1. Substantive History.

Kecia Johnson and Jason Seevers are the parents of E.S., who was born on October 21, 2010. EX 2 at 1, 18. Ms. Johnson and Mr. Seevers separated when E.S. was approximately two years old. EX 2 at 41. Ms. Johnson began a relationship with Tyler McVey in 2014. EX 2 at 42, 43. Mr. McVey would stay at Ms. Johnson's residence often and would be at her house when she was not there. EX 2 at 43. Ms. Johnson would usually leave for work about 6:30 or 6:45 and Mr. McVey would watch E.S. EX 2 at 48. This arrangement occurred three or four times. EX 2 at 48.

Mr. Seevers indicated that he picked up E.S. when Mr. McVey was there and not Ms. Johnson on April 7, 2015, March 11, 2015, March 14, 2015 and March 24, 2015. EX 2 at 97, 99, 100. On April 7, 2015, Mr. Seevers picked up E.S. and Mr. McVey came to the door and said "Here you go, here is your daughter." EX 2 at 101-102. Mr. Seevers noticed that E.S. wouldn't say anything,

¹ The report of proceedings from the trial that occurred in August of 2016 is referenced as RP in both McVey's Personal Restraint Petition and Brief of Appellant, however, it does not appear that the record of his direct appeal was transferred as the record in this case. A copy of the Verbatim Report of Proceedings from the trial was admitted as an exhibit during the CrR 7.8 hearing which is the subject of this appeal, therefore, citations to the trial will be referred to as EX 2 and citations to the CrR 7.8 hearing will be referred to as RP for purposes of this brief.

which was very unusual. EX 2 at 102. E.S. was also skittish and acting funny, in a manner that Mr. Seevers had not seen her act before. EX 2 at 102. Mr. Seevers asked E.S. what was wrong and E.S. stated, "Tyler touches me, and I don't like it." EX 2 at 103. When Mr. Seevers asked E.S. where did he touch you, E.S. clammed up and was quiet. EX 2 at 103.

Mr. Seevers called Ms. Johnson and E.S. told Ms. Johnson what she had said to Mr. Seevers. EX 2 at 104. When he got home, Mr. Seevers and his wife gave E.S. a doll and asked her where Tyler had touched her and she pointed to the doll's vaginal area. EX 2 at 106-108. The next day, Mr. Seevers made an appointment at Oakland Bay Pediatrics and was referred to the sexual assault clinic. EX 2 at 109, 111.

Detective Alfred Stanford testified regarding his role in the investigation of the case. Detective Stanford contacted Monarch Children's Justice and Advocacy Center to set up a forensic interview for E.S. EX 2 at 140. During his investigation, Detective Stanford determined that Mr. McVey's date of birth was October 7, 1989. EX 2 at 143.

Sue Villa, also known as Sue Batson, a child forensic interviewer at Monarch Children's Justice and Advocacy Center in

Lacey, WA, interviewed E.S. on April 30, 2015, at the Monarch Children's Justice and Advocacy Center. EX 2 at 163-164, 164, 165, 172. Ms. Villa described E.S. as kind of a spunky little girl with a bit of an opinion of her own and giving an unusually clear statement. EX 2 at 174. E.S. communicated very effectively and was very articulate. EX 2 at 175. When asked "Why are you here to talk to me?" E.S. stated that she was there to talk about Tyler. EX 2 at 176. E.S. stated that he had touched her with his hands and she didn't like it. She specifically identified him as touching the area of her body that she used to go potty and said he "screwed" it and it hurt. EX 2 at 177. E.S. clarified that his hand went inside her body and that Tyler was her mom's boyfriend. EX 2 at 177. E.S. told Ms. Villa that it happened more than one time in the dining room. EX 2 at 177-178.

E.S. described specific details to Ms. Villa about an incident where his hand went inside her body where E.S. used the term screwed. EX 2 at 178. E.S. indicated that the touch was inside her underpants. EX 2 at 181.

Dr. Joyce Gilbert, a Pediatrician at Providence St. Peter's Sexual Assault Clinic and Child Maltreatment Center, conducted an examination of E.S. on April 10, 2015. EX 2 at 198, 230. Dr. Gilbert

indicated that E.S. had great communication skills for a four-year-old. EX 2 at 223. Dr. Gilbert conducted a medical interview with E.S. EX 2 at 225. When asked why she was at the doctor's office, E.S. stated it was because Tyler pinched her and she immediately pulled down her leggings and showed Dr. Gilbert her upper thigh and pinched it in three different areas. Dr. Gilbert asked her if Tyler pinched her anywhere else and E.S. would look down, say no, or just be quiet. EX 2 at 226. Dr. Gilbert stated that E.S. brought up the name Tyler when asked why she was at the doctor's office by stating because Tyler pinched me and saying that in was inappropriate. EX at 227. When E.S. demonstrated the pinching she pinched her anterior thigh close to the groin but not in the genital area three times and twisted and said, "This is what Tyler did." EX 2 at 227. Dr. Gilbert asked E.S. if it hurt when Tyler pinched her and she said yes. E.S. described that he pinched her in the dining room when mommy was at work. E.S. also stated that Tyler was mommy's boyfriend. EX 2 at 228.

Dr. Gilbert then conducted an examination using a colposcope. As soon as a blanket was pulled back and E.S. visualized her genital area, as Dr. Gilbert was using the colposcope, E.S grabbed her clitoral hood, pulled it out and twisted

it and said, "This is what Tyler does." EX 2 at 237. During the next part of the exam, the nurse was assisting with the labia traction where she gently has her hands on the labia, one hand on each one, and she just separates them, and that way the inner opening area can be visualized. When the nurse did this, E.S. put her hands inside the nurse's hands, pushed the nurse's hands away and said, "I can do this." Dr. Gilbert asked how she knew how to do that and she said, "This is what Tyler taught me to do when he puts in fingers in here" and she pointed with her fingers right into the vaginal opening. EX 2 at 238. E.S.'s examination was normal which Dr. Gilbert testified was not surprising medically because 95 percent of the children who describe or disclose penetrating injury have a normal exam. EX 2 at 241- 242.

E.S. testified that she told her dad that Tyler touched her private and identified Mr. McVey as Tyler in the courtroom. EX 2 at 124-125. E.S. described her privates as being below the waist and stated that it happened once in the dining room of her mom's old house while her mom was at work. EX 2 at 126.

2. Procedural History.

On September 1, 2016, a jury found McVey guilty of Rape of a Child in the First Degree and Child Molestation in the First

Degree. CP 76-89.² This Court affirmed McVey's convictions in his direct appeal. Unpublished Opinion, No 49635-6-II; CP 91-96. A mandate entered on June 6, 2018. CP 97.

McVey then filed a Motion for a New Trial in the Thurston County Superior Court which was set for an evidentiary hearing. CP 144-154; 109. McVey's motion alleged that McVey's trial attorney, Robert Brungardt provided ineffective assistance of counsel by failing to interview and offer the testimony of Mark Schmidt and by failing to obtain the child forensic interview and review it with McVey prior to trial. CP 144-154. The evidentiary hearing occurred January 14-16, 2019. RP (generally).

The Honorable Judge Chris Lanese denied the motion finding that McVey had failed to demonstrate prejudice and declining to rule on whether or not McVey had met his burden of demonstrating deficient performance of counsel. CP 132. McVey then filed this appeal of the trial court's order denying his motion for a new trial. While the appeal was pending, McVey separately filed a Personal Restraint Petition on June 6, 2019, which has been consolidated with this appeal.

²The Judgment and Sentence was attached to the State's Response to McVey's CrR 7.8 motion for a new trial and is not otherwise designated in this record.

3. CrR 7.8 Evidentiary Hearing.

During the evidentiary hearing, the State admitted transcripts of the pretrial child hearsay hearing, the report of proceedings from the trial, a transcript of the child forensic interview, and the report from Sue Villa, the child forensic interviewer. EX 1, 2, 3, and 4. Former Thurston County Deputy Prosecuting Attorney Craig Juris, who was the deputy prosecutor at trial, testified that the child forensic interview is provided to law enforcement from the forensic interviewer. RP 11, 17. Juris did not obtain a copy of the interview prior to trial, but elected to rely upon Villa's report. RP 18. Juris indicated that Villa's report was provided to defense counsel prior to the child hearsay hearing, and that Mr. Brungardt asked Ms. Villa to provide a copy of the forensic interview during the child hearsay hearing. RP 19-20.

Juris indicated that he informed Brungardt that the forensic interview was in the custody of law enforcement and indicated that Brungardt could arrange to view it with law enforcement. RP 21. Juris indicated that he was aware of a potential witness, Mark Schmidt, but did not attempt to call him because "the information [he] had received was that [Schmidt] had not witnessed anything,

and due to physical issues, medical issues, communication and testimony was difficult.” RP 23.

Forensic Interview Sue Villa testified during the evidentiary hearing regarding the child forensic interview that she conducted. RP 42. Villa compared the transcript of her interview with her report and indicated that her report was a summary of the interview. RP 45-46; Ex 3 and 4. Villa did not have a copy of the child forensic interview while testifying at trial but compared the forensic interview with her testimony at trial and testified that they were consistent with one another. RP 46, 47-48.

Kecia Johnson indicated that Mark Schmidt is her sister’s father and Schmidt resided in her residence at the time the incidents related to this case occurred. RP 60. Schmidt had suffered a stroke years before and would typically spend his time between the bedroom and the couch to watch TV. RP 60. Johnson did not authorize Schmidt to watch E.S. RP 60. Johnson testified that Schmidt could say “yeah” or “no” but sometimes would get them mixed up. RP 63. Sometime after the disclosure occurred, Schmidt moved to Florida. RP 64. Johnson provided his phone number to the defense. RP 64. While Johnson stated that Schmidt lived at the residence at the time, she could not remember if

Schmidt was present when McVey was there on the date in question. RP 67.

Johnson spoke to Schmidt after the disclosure and asked him if he had seen anything happen while living with her and he said, "no." RP 68. Jason Seevers indicated that when he picked E.S. up at the residence on April 7, 2015, he could see the couch and the TV area and did not see Schmidt. RP 79, 80.

During pretrial discovery, Brungardt retained the services of investigator David Haller. RP 97. Haller assisted Brungardt in attempting to contact Schmidt regarding the case. RP 98. Haller contacted Johnson and asked her if she "had asked Mr. Schmidt if he had seen anything unusual going on between Mr. McVey and [E.S.]," and she indicated that she had asked him and he said he hadn't seen anything unusual. RP 101-102. Using Schmidt's phone number, Haller was able to communicate with Schmidt via text message and asked him "Did you have both [E.S.] and Mr. McVey in sight while waiting for [E.S.]'s father to pick her up? I am told that's about 45 minutes," to which Schmidt responded "No." RP 101. Following that text conversation, Brungardt asked Haller to find an address for Schmidt, but Haller's efforts were not responded

to. RP 102-103. Haller detailed his investigation in a report to Brungardt. EX 5, 6, and 8.

McVey's defense attorney at trial, Robert Brungardt has been a defense attorney since 1978. RP 117. Brungardt testified that he obtained the investigative reports from the state in this case. RP 118. He specifically testified that he arranged to view the child forensic interview prior to trial and described the interview. RP 120-121. He also testified regarding his cross examination of E.S., indicating that his tactic was to imply that her father, Seevers, had tainted her disclosure. RP 121-122. He was cautious in his cross examination due to E.S.'s age. RP 123. He noted that he did not ask E.S. or Villa about E.S. making a statement to Villa that "Grandpa Mark" was in his room because "if he was in his room, he wasn't an alibi witness for my client." RP 124.

When asked about his attempts to interview and secure Schmidt's testimony, Brungardt indicated that he hired Haller. RP 125. Haller attempted to locate Schmidt at Brungardt's direction. RP 126. From Haller, Brungardt learned that Schmidt "was not going to be able to supply any factual alibi regarding his sighting of the victim." RP 128. Brungardt was also aware that Schmidt had difficulty communicating and testified

I understood that – initially he had had some health crisis, and from speaking with the family members at the - - from speaking with the family members we had really initially no idea even where he was. There was some concern about his well-being, and we came - - I came to the information that this individual from either a stroke or some type of cerebral event had very limited resources, abilities to communicate.

RP 129.

Based on all of the facts known to him at the time, Brungardt testified that he did not take greater efforts to locate Schmidt because he didn't feel that was going to benefit McVey's case. RP 129. Brungardt testified that he went over his investigation with McVey and specifically told him that he was not able to locate Schmidt. RP 130. He also discussed the report of the forensic interviewer with McVey and the content of the forensic interview that he viewed with law enforcement. RP 130-131.

Mark Schmidt was called to testify during the hearing. He had difficulty audibly responding to questions and specifically indicated that the he had no recollection of April 7, 2015. RP 170, 184-185. Schmidt acknowledged that his ability to communicate in April of 2015 was similar to the abilities he presented during the evidentiary hearing. RP 182. When asked about the text message statement to Haller, Schmidt indicated that he had no reason to

dispute that occurred. RP 184. Schmidt did not remember providing specific details for the declaration provided by McVey, which was admitted as Exhibit 9. RP 185-186. He acknowledged that the document was inaccurate with regard to his knowledge of the events of April 7, 2015. RP 186, 187, 189-190, 191. When asked if he read the document before he signed it, he indicated he didn't remember. RP 191. When the State specifically asked, "So at the time that this was - - this document was prepared by Mr. Purtzer, you didn't remember what had happened on April 7th of 2015?" Schmidt responded with a "thumbs up and a nod." RP 191.

McVey offered expert testimony from attorney Don Winskill who acknowledged that, if Brungardt reviewed the child forensic interview prior to trial, "he did exactly what he should have done under those circumstances." RP 214. Following Winskill's testimony, the defense offered testimony from McVey.

Following McVey's statements, the State offered rebuttal testimony from Schmidt's daughter, Jacqueline Rickards. RP 236. Rickards indicated that her father had a stroke in 2009, has memory issues and is easily confused. RP 237. She agreed that he has exhibited those symptoms since his stroke. RP 237. She testified that Schmidt had indicated to her that he did not read the

declaration submitted by the defense before he signed it. RP 238. She further clarified that since his stroke, Schmidt has had confusion with even yes-or-no questions. RP 241.

Following the evidentiary portion of the hearing, the trial judge asked defense counsel “do you still contend that the issues concerning the video of the forensic interview justify the relief in this case?” to which counsel responded, “No, I don’t.” RP 246. The issues were at that point narrowed to the investigation and decision whether or not to call Schmidt as a witness. RP 246-247. Following arguments, the trial court found that McVey had failed to demonstrate prejudice because Schmidt’s testimony lacked credibility. RP 278-279; CP 129-132.

C. ARGUMENT.

1. The trial court’s findings of fact were supported by substantial evidence.

Appellate review of a trial court’s findings of fact and conclusions of law for abuse of discretion is limited to determining whether the trial court’s findings are supported by substantial evidence in the record and, if so, whether the conclusions of law are supported by those findings of fact. Scott v. Trans-Sys., Inc., 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003). Findings of fact are

reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. Croton Chem. Corp. v. Birkenwald, Inc., 50 Wn.2d 684, 685, 314 P.2d 622 (1957).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

During his verbal ruling, the trial court noted the difficulties that Schmidt presented when he testified, stating:

We have evidence here, and I'm making this finding, that he had a stroke at about 2009 that adversely affected his cognitive functioning, his ability to communicate and his memory. I'm also finding that his functioning in those areas are the same today as they were at the time of the events at issue here during 2015 and 2016.

RP 278. The trial court noted that he has personal familiarity with the effects of a stroke and has presided over a number of child sex abuse trials. RP 278. The trial court continued

I'll also note that I had an opportunity to observe him and I could see the full scope of his face while he was testifying as well as his body language. This is important because on one side of his body he has lost significant motor control . . .

RP 278-279. The trial court later observed

I'll also note that I am finding that the record is well supported that he had difficulty at times answering "yes" or "no" appropriately. We had testimony from Kecia Johnson indicating that sometimes he would say "yes" when he meant "no," and sometimes he would say "no" when he means "yes." That was something that she as recently as 2015 would have been in a position to observe. I will note that I also had that observation when I was watching him testify at trial. It was clear that it was difficult at times for him to answer "yes" or "no" appropriately.

RP 279. The trial court continued,

He also had at times difficulty I believe understanding questions that were fairly simple and would answer - - or make an expression of "I don't know" before turning to "yes" or "no." I'll also noted that I observed his demeanor while testifying on...at the evidentiary hearing, and that his expression was one of lacking comprehension an understanding. Even viewed through the lens of the fact that he suffered a stroke in 2009 and viewing through that context, it still appeared that his functioning was such that he was having difficulty understanding or comprehending matters.

RP 279-280.

The trial court then made a point of indicating that it was not finding that Schmidt lied because the court did not believe he had intent to lie before stating

I do find, however, that his testimony, both here during this hearing as well as if he had been called at trial, would have been unbelievable. I do not believe that a jury could have afforded his testimony any meaningful or material amount of weight given that he would contradict himself at times while testifying and given that his demeanor was such that he did not appear to fully understand the questions that he was being asked.

RP 280. Despite the trial court's detailed explanation of his findings, McVey now assigns error to several of the trial court's findings of fact.

First, McVey assigns error to finding #8,

Mark Schmidt suffered a stroke in 2009, that adversely affected his cognitive function, ability to communicate and memory. The court finds that his abilities today are the same as they were at the time of trial 2015-2016.

CP 130-131. The finding was supported not only by the trial court's direct observations of Schmidt's testimony, but also by the testimony of Kecia Johnson and Jacqueline Rickards. Johnson testified that Schmidt had suffered a stroke years before and would typically spend his time between the bedroom and the couch to

watch TV. RP 60. Johnson did not authorize Schmidt to watch E.S. RP 60. She further indicated that Schmidt could say “yeah” or “no” but sometimes would get them mixed up. RP 63. Rickards testified her father had a stroke in 2009, has memory issues and is easily confused. RP 237. She agreed that he has exhibited those symptoms since his stroke. RP 237. Even Schmidt acknowledged that his ability to communicate in April of 2015 was similar to the abilities he presented during the evidentiary hearing. RP 182. The trial court’s finding was supported by the evidence.

Next, McVey assigns error to finding #9,

The Court observed Mr. Schmidt’s testimony during trial. His responses were largely limited to yes or no via head nodding. The Court is familiar with the effects of strokes and notes Mr. Schmidt’s presentation is consistent with the Court’s understanding of the possible effects of a stroke. The Court could see the full scope of Mr. Schmidt’s motor control during his testimony.

CP 131. While no expert on the effects of a stroke testified during the hearing, stroke symptoms are of generally common knowledge and the record indicated that Schmidt was suffering the effects of a stroke. Johnson testified as such, Rickards testified as such, and the record made during Schmidt’s testimony clearly indicated that he was having difficulties. RP 60-63, 237, 170-192. There was no

error in the trial court's finding based on his observations of Schmidt's testimony.

The trial court correctly found that Schmidt's testimony was contradictory and unbelievable. CP 131. The trial court also correctly concluded, based on the evidence, that had Mr. Schmidt been called to testify at trial, the jury would have given no weight to his testimony due to contradictions and lack of comprehension. CP 131. During his testimony, Schmidt did not provide consistent answers to any questions and repeatedly indicated that he had no recollection whatsoever of the events of April 7, 2015. RP 170-192, 184-185. During his testimony, Schmidt repeatedly indicated that the declaration that McVey relied upon for his motion was inaccurate. RP 186, 187, 189-190, 191. This Court should defer to the trial court's judgment as to the credibility and persuasiveness of Schmidt's testimony. State v. Walton, 64 Wn. App. at 415-16. The trial court correctly found that there was no reasonable probability that testimony from Mr. Schmidt at trial would have affected the outcome of the proceeding. CP 131.

Finally, McVey's argument that the trial court's finding that Brungardt "was in a position, prior to trial, where he had much of the same information regarding Mr. Schmidt, which could have

informed his position,” was not supported by the evidence is likewise without merit. CP 131. Brungardt testified that he was aware of Schmidt’s limitations. RP 129. His investigator had texted with McVey who indicated that he did not have a direct line of sight of E.S. and McVey. RP 128. Brungardt testified that, based on all of the facts known to him, he did not take greater efforts to locate Schmidt because he didn’t feel that was going to benefit McVey’s case. RP 129. The trial court’s findings of fact are supported by the record.

2. The trial court correctly concluded that McVey had not met his burden of demonstrating that the performance of counsel prejudiced him.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel’s performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial

strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Strickland permits counsel to "make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washington, 466 U.S. at 691. There are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id. at 689. Counsel has the latitude to "formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." Harrington v. Richter, 131 S. Ct. 770, 789, 178 L. Ed. 2d 624 (2011). An attorney is not required to conduct an investigation that would be fruitless or harmful to the defense. Strickland, 466 U.S. at 691. Defense

counsel is not incompetent just because his strategy did not work out as well as he had hoped.

Here, McVey's trial counsel did investigate the potential witness, Mark Schmidt. He spoke with Kecia Johnson who indicated that Schmidt had indicated that he did not see anything, he reviewed the child forensic interview and was aware that the child had said that Schmidt was in his bedroom at the time of the allegations, and his investigator contacted Schmidt via text message and learned that Schmidt did not have a line of sight on McVey and E.S. during the time period. RP 101-102, 102-103, 120-121, 121-122, 124. Brungardt's representation was not deficient in investigating and deciding not to pursue Schmidt's testimony. This is especially true given that Brungardt was aware of Schmidt's medical difficulties in comprehension and communication and the fact that Schmidt did not respond to Haller's request for an address. RP 129, 102-103, Ex 5, 6 and 8. Counsel's performance at trial is entitled to great deference and any reviewing court should avoid the distorting effects of hindsight. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289, *cert. denied*, 510 U.S. 944, 126 L.Ed.2d 331, 114 S.Ct. 382 (1993).

While the State contends that the record clearly demonstrates that McVey failed to meet his burden of demonstrating deficient performance, the trial court exercised its discretion and ruled only based on the prejudice prong. CP 131. The trial court's conclusion of law was correct. The trial court found

Based on the lack of credibility of Mr. Schmidt's testimony and declaration, the Court finds the State has demonstrated that Mr. McVey has not met his burden of proving the second prong of the Strickland test. McVey has shown no prejudice to the outcome of his case based on Mr. Brungardt not further investigating or calling Mr. Schmidt as a witness at trial.

CP 131. Simply put, Schmidt's testimony was not credible and the defense provided absolutely no evidence to suggest that the outcome of the proceeding would have been different if Brungardt had secured Schmidt's testimony for trial. The trial court correctly found that McVey had not met his heavy burden of demonstrating that he was prejudiced by his trial counsel's performance.

3. McVey fails to meet his burden of demonstrating that his trial counsel failed to review discovery and allow McVey to testify or that his trial counsel's performance prejudiced him in any way.

In his personal restraint petition, McVey argues that Mr. Brungardt failed to review the child forensic interview with McVey prior to trial and that somehow affected McVey's decision not to

testify at trial. Personal Restraint Petition at 7. McVey made the same argument in his CrR 7.8 motion. CP 153-154. During the CrR 7.8 evidentiary hearing, McVey's counsel abandoned the argument that Brungardt did not review the discovery.

The trial judge asked defense counsel "do you still contend that the issues concerning the video of the forensic interview justify the relief in this case?" to which counsel responded, "No, I don't." RP 246. The concession was tactical based on the evidence that had been presented. Brungardt testified that he went over his investigation with McVey and specifically told him that he was not able to locate Schmidt. RP 130. He also discussed the report of the forensic interviewer with McVey and the content of the forensic interview that he viewed with law enforcement. RP 130-131. The defense expert, Don Winskill, testified that if Brungardt reviewed the child forensic interview prior to trial, "he did exactly what he should have done under those circumstances." RP 214.

Brungardt testified that he discussed McVey's right to testify at trial with McVey on more than one occasion, and McVey was aware of the child forensic interview and the status of the defense investigation of Schmidt at the time of that discussion. RP 131. Brungardt indicated that, with that information, McVey elected not

to testify. RP 132. When asked about McVey's decision not to testify at trial by defense counsel, Brungardt stated, "I never and have never told a client that he or she should not testify." RP 150. During McVey's testimony at the evidentiary hearing, it was pointed out that McVey made the decision not to testify. RP 233; Ex 2 at 258-259. When the trial court asked him, "Mr. McVey, did your attorney adequately relay your position?" McVey responded, "He did, your Honor." RP 259.

As part of his argument, McVey contends that Brungardt failed to cross examine E.S. about the differences between E.S.'s statements in the forensic interview and during her testimony at trial. Personal Restraint Petition at 7. Brungardt was specifically questioned about this during the CrR 7.8 evidentiary hearing. RP 145. Defense counsel at the evidentiary hearing pointed out that during the forensic interview, E.S. stated that Grandpa Mark was in his room, but during trial she said nobody else was present. RP 145-145. During re-direct, it was pointed out that Brungardt did ask E.S. about "Grandpa" being home during his cross-examination of E.S. RP 152; Ex 2 at 128-129. The record demonstrates that he did so tactically, without pointing out that she had said that Schmidt

was in his room, away from where the events occurred. RP 123-124, 152; Ex 2 at 128.

With the addition of the record made during the CrR 7.8 evidentiary hearing, it is clear that McVey's argument that Brungardt failed to investigate the case and discuss that with McVey is without merit. He clearly reviewed the child forensic interview, discussed the evidence with McVey, and with that knowledge, the record demonstrates that McVey knowingly, voluntarily and intelligently waived his right to testify. McVey failed to demonstrate deficient performance in this regard during the evidentiary hearing and fails to do so here. The fact that his counsel abandoned the argument prior to closing arguments in the evidentiary hearing should be a strong indication to this Court that he did not and cannot meet his burden.

Moreover, given the record that Brungardt did review the child forensic interview and that McVey made the decision to not testify at trial, even if McVey could somehow indicate that Brungardt's performance at trial was deficient, he cannot and did not demonstrate any prejudice. The record indicates that Brungardt acted strategically in his representation, and McVey elected not to testify after consultation with Brungardt. At the time McVey elected

not to testify, he was aware that Schmidt would not be called, and was aware of the substance of E.S.'s interview with the forensic interviewer. Nothing in McVey's argument suggests that he would have elected to testify at trial if Brungardt had somehow acted differently. His ineffective assistance of counsel claim failed at the evidentiary hearing and must also fail here.

D. CONCLUSION.

This case presents the somewhat unique circumstance of presenting this Court with review of a collateral attack that has been fully litigated in the Superior Court. The record made during the evidentiary hearing demonstrated that McVey's defense counsel did not render ineffective assistance by not securing the testimony of Mark Schmidt. Mr. Brungardt followed the lead on Schmidt, learned that Schmidt had indicated that he did not have a view of E.S. and McVey, had difficulty with communication and comprehension, and that efforts to obtain an address for Schmidt had been fruitless. It was not unreasonable for Brungardt to not conduct further efforts to secure Schmidt's testimony. Even if he had, the record at the evidentiary hearing clearly demonstrated that Schmidt was not and could not have been a credible witness. McVey neither demonstrated deficient performance nor prejudice in

his ineffective assistance of counsel claim. This Court should affirm the trial court's ruling denying McVey's motion for collateral relief.

Despite abandoning the argument during his CrR 7.8 motion, McVey argues in his personal restraint petition that Mr. Brungardt failed to conduct an investigation of the case prior to trial, specifically by not reviewing the child forensic interview, and that caused McVey to elect not to testify at trial. That argument was defeated by the evidence presented during the evidentiary hearing and remains belied by the record. McVey does not and cannot demonstrate ineffective assistance of counsel. The relief requested in his personal restraint petition should be denied.

Respectfully submitted this 20th day of November, 2019.



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Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: November 20, 2019

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

November 20, 2019 - 11:13 AM

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