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NO. 53938-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

KELSEY TYRELL PHILLIPS,

Appellant.

Appeal from the Superior Court of Pierce County

Nos. 17-1-00338-9; 17-1-00980-8

BRIEF OF RESPONDENT

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I. INTRODUCTION

Defendant Kelsey Phillips shot a complete stranger in the chest and bicep when the man stopped to check on Phillips and his friends. A month later, Phillips joined his friends in a planned shooting at a Lakewood Apartment Complex. In addition to testimonial and forensic evidence, the State's case was bolstered by incriminating messages posted on Phillips' Facebook account. As a result, Phillips was charged with eight felonies and six firearm sentencing enhancements across two cases, each carrying a potential de facto life sentence.

Given the evidence against him, Phillips chose to reduce his risk by entering guilty pleas. He did so after being properly informed of the consequences of his pleas. In compliance with longstanding case law and CrR 4.2, Phillips was fully informed of both the standard range sentence and the statutory maximum sentence for his crimes. With this information, he was able to enter voluntary, knowing, and intelligent pleas.

Phillips also had the assistance of experienced criminal attorney Sunni Ko. She provided Phillips with full information and sage legal advice as the cases unfolded. Given the weight of evidence against Phillips, it was remarkable that she was able to negotiate a plea bargain

that protected Phillips from an attempted murder charge and greatly reduced his potential sentence.

Because Phillips was properly informed of the consequences of the sentence, and provided effective legal representation, the trial court properly denied his request to withdraw the pleas. In essence, as the trial court noted, Phillips' attempt to withdraw the pleas boils down to no more than buyers' remorse. His appeal is without merit.

II. RESTATEMENT OF THE ISSUES

1. Does Phillips present a basis to withdraw his guilty plea where he was fully informed of the consequences of his pleas as required by CrR 4.2 and case law? (Appellant's Assignments of Error 1, 4).
2. Did Phillips receive effective assistance of counsel where the trial court found that the defense attorney provided effective legal assistance and he suffered no prejudice from any alleged deficiency? (Appellant's Assignments of Error 2-5).

III. STATEMENT OF THE CASE

Defendant Kelsey Tyrell Phillips participated in two different shootings over a one-month period, resulting in the Pierce County Prosecutor's Office filing two cases and eight felony charges against him. CP 1-3, 91-93.

The cases progressed under separate trial and resolution tracks but were addressed together at Phillips' plea withdrawal hearing and sentencing, and have been consolidated on appeal. During the plea withdrawal hearing, Phillips referred to the respective cases as "the drive-

by case,” and “the attempted murder case.” 06/18/19 RP 12-13. For clarity, the State will refer to the cases in the same manner.

A. Phillips Was Charged with Participating in a 2017, Retaliatory Drive-By Shooting

On January 8, 2017, shooting erupted between two groups at a Lakewood McDonalds. CP 1, 4. Phillips’ friend, Demetrius Crawford, was hit by the gunfire. *Id.* Phillips was not present but was aware that his friend had been shot. CP 18. An hour later, Phillips, Crawford, Shamille Bullard, and T.I.-J.¹ took part in a retaliatory shooting at a Tacoma apartment complex. CP 1, 5. At the apartment complex, Phillips and his friends located a green Tahoe SUV that was seen at the McDonald’s shooting. CP 4-5. In the Tahoe, there were four individuals who had been at the McDonald’s parking lot shooting. *Id.* Phillips’ sedan quickly drove up behind the SUV and fired a barrage of shots. *Id.*

After the shooting, T.I.-J. confessed to the responding police officers that she drove Crawford, Bullard, and Phillips to the apartment complex. CP 5. According to T.I.-J., Phillips and Crawford shot at the SUV. She did not know if Bullard participated in the shooting. CP 5. Bullard initially denied involvement in the shooting and then implicated Phillips and Crawford as shooters. CP 5. Bullard stated that everyone in

¹ The State will refer to T.I.-J. by her initials because she was a minor at the time of the crime.

the car knew the shooting was planned prior to arriving at the apartment complex. *Id.*

After the drive-by shooting, the State charged Phillips with assault in the first degree with a firearm enhancement, assault in the second degree with a firearm enhancement, and assault in the second degree. CP 6-19; Cause No. 17-1-00338-9. The crimes were charged under accomplice-liability theories. Sunni Ko was appointed as counsel for Phillips. CP 47-48 (Finding of Fact I). Ms. Ko had extensive experience as both defense counsel and a prosecuting attorney.

Phillips pleaded guilty as an accomplice. CP 6-7, 18. In his plea, Phillips attested that “[t]wo individuals in my car fired a total of nine shots from .40 and .45 caliber firearms repeatedly into a SUV occupied by four individuals[.] I had a firearm with me at the time but I maintain that I was not one of the shooters.” CP 18. Phillips admitted that he was aware of the plan and was willing to assist and aid the shooters. CP 18. The Statement of Defendant on Plea of Guilty set forth the agreed sentencing recommendation of a total of 180 months, and provided this cautionary statement, “Defendant acknowledges that this global resolution of this cause number and 17-1-00719-8 in no way impacts the State’s right to

refile 17-1-00980-8, which the State dismissed without prejudice so it could further investigate that matter.”² CP 12.

Before accepting Phillips’ guilty pleas, the trial court judge went through a detailed colloquy. 04/03/19 RP 6-15. The judge advised Phillips of the statutory maximum sentence of his charges, the standard range, and the impact of the deadly weapon enhancements. 04/03/18 RP 8. His plea paperwork included the same advisement. CP 9. After concluding the colloquy, the court accepted Phillips’ plea as knowing, voluntary, and intelligent. 04/03/18 RP 17-18.

B. The Plea in the Drive-By Shooting Was Impacted by Phillips’ 2016 Attempted Murder Case

In addition to the 2017 drive-by shooting case, Phillips was involved in a shooting that occurred a year earlier. On December 8, 2016, J. Arroyo and his brother, E. Arroyo saw a Ford Taurus station wagon chasing a red sedan through a gas station parking lot. CP 94. They saw someone from the station wagon jump onto the hood of the red sedan. CP 94.

Concerned, the brothers followed the cars to the Sprinker Recreation Center, where they saw the station wagon block the red sedan

² The global plea agreement also included a resolution for a third cause number, 17-1-00719-8, which involved charges of organized retail theft in the second degree. 04/03/18 RP 3. The theft case is not at issue in this appeal.

from leaving. CP 94. E. Arroyo exited his car to ask if everything was okay. CP 94. The driver of the station wagon exited and shot E. Arroyo in his chest and bicep. CP 94.

Later that night, deputies found the two cars at a McDonalds. CP 95. Shamille Bullard drove the station wagon, and the red sedan was behind to the station wagon in the drive thru. CP 94-95. Although Bullard initially denied knowledge or involvement in the shooting, he eventually identified Phillips as the shooter and described Phillips' gun as a revolver that was "possibly black or grey with a black handle." CP 95. Deputies found a .38 bullet at the shooting scene, covered with what appeared to be blood. CP 94.

The next morning, officers responded to yet another shooting where Phillips was present. CP 95. Someone reportedly had been accidentally shot. CP 95. The officers recovered a Titan Tiger .38 Special revolver, black and brown in color, from Phillips' waistband during their investigation. CP 95-96. A forensic scientist at the state laboratory conducted a ballistics comparison of the .38 bullet that went through E. Arroyo's chest and a test fired bullet from Phillips' .38 revolver. Although the forensic scientist noted that the two bullets had the same "class characteristics and 'some microscopic individual similarities,'" but the

bullet that shot E. Arroyo was too damaged for the scientist to make any definitive conclusions. CP 96.

The State originally charged Phillips with attempted murder in the second degree, first degree assault, and drive-by shooting. CP 91-93; Cause No. 17-1-0089-8. As in the drive-by shooting case, Phillips was represented by criminal defense attorney Sunni Ko. Ko's representation continued through Phillips' plea. CP 48 (Finding of Fact II).

Ms. Ko negotiated the case with the State, thoroughly reviewed the discovery, and convinced the prosecutor that it was reasonably possible that Phillips was not the shooter. CP 49 (Finding of Fact V).

Approximately two weeks before Phillips pleaded guilty on the drive-by shooting case, the State moved to dismiss the attempted murder case without prejudice so that it could further investigate the matter. CP 8, 175-76.

After Phillips pleaded guilty on the drive-by case, but prior to sentencing, the State obtained a search warrant for Phillips' Facebook account. On his account, they recovered incriminating messages covering the time period of the attempted murder case. 06/18/19 RP 69; CP 49 (Finding of Fact VII). They discovered that three hours after the attempted murder, Phillips messaged friends asking for a ride, stating that he thought he was going to be turned into police because "[s]ome hot shit happened,"

and he was worried he was going to “be in jail for some years.” 06/18/19 RP 72-77.

The messages provided the State with sufficient proof to refile the charges in the attempted murder case. 06/18/19 RP 69; CP (Finding of Fact VII). Instead of refiling the case immediately, the State negotiated with Ms. Ko, who was hoping to mitigate the impact of the attempted murder case on Phillips’ ultimate sentence. 05/21/19 RP 22, 24; 06/18/19 RP 118-20.

The parties came before the court having reached a resolution. 05/21/18 RP 22. Rather than charging Phillips with attempted murder, the State filed an amended information charging one count of assault in the first degree. CP 100.

The court went through a second detailed colloquy with Phillips about his potential plea. 05/21/18 RP 25-34. Phillips endorsed the following statement of facts supporting his guilty plea:

On December 8, 2016, in the State of Washington, I fired a .38 caliber revolver at E. Arroyo and the bullet struck him in the chest and bicep. I did so with the intent to inflict great bodily harm, *i.e.*, the probability of death or significant serious permanent disfigurement or a significant permanent loss or impairment of the function of any bodily part or organ.

CP 111. In the colloquy with Phillips, the trial court judge explained to Phillips both the statutory maximum sentence for assault in the first degree,

as well as standard range sentence. 05/21/18 RP 27. Phillips' Statement of Defendant on Plea of Guilty paperwork included a lengthy breakdown of the agreed sentencing recommendation of 228 months, the statutory maximum sentence for assault in the first degree, and his standard range sentence. CP 102, 105. After explaining the recommendation to Phillips, the court accepted his plea as knowing, voluntary, and intelligent. 05/21/18 RP 29, 34.

C. The Trial Court Denied Phillips' Motion to Withdraw His Guilty Pleas

Prior to sentencing, Phillips moved to withdraw his guilty pleas in both cases, pursuant to CrR 4.2(f). CP 23-28, 117-22. His motions alleged that he received ineffective assistance of counsel and contended that he was not fully advised of the evidence against him prior to pleading guilty. CP 25, 119. The court held an evidentiary hearing to explore Phillips' claims.

Phillips alleged that he received discovery from his mother after he pleaded guilty. 06/18/19 RP 11. He claimed that the discovery his mother sent him contained new, exculpatory information he had not received from his attorney. 06/18/19 RP 10, 15. Specifically, Phillips claimed that this new information indicated that in the drive-by case, the victims had identified individuals other than him as a shooter. 06/18/19 RP 13. In the attempted murder case, Phillips learned that the victims described two

different people by their skin tone and positions in the car. 06/18/19 RP 13-14. Phillips claimed that he would not have pleaded guilty had he known about this information. 06/18/19 RP 15.

The State confronted Phillips about the information he claimed not to have known at the time of his guilty plea. 06/18/19 RP 30-31. The State also inquired into Phillips' motivation for pleading guilty, addressing at length his Facebook messages. 06/18/19 RP 24, 33, 40-60, 69, 72-85. The State also called Phillips' defense attorney Sunni Ko to testify. 06/19/19 RP 93. Ms. Ko had been a practicing criminal attorney for 26 years. 06/18/19 RP 93. She represented him in both cases until he pleaded guilty and withdrew when she learned that Phillips was seeking to withdraw his guilty pleas. 06/18/19 RP 94-95.

Ms. Ko described her process in representing Phillips. She explained that although they had a "very good" relationship, Phillips trusted his mother more than he trusted his attorney. 06/18/19 RP 95. To increase his trust, Ms. Ko communicated with Phillips' mother regularly, provided Phillips with copies of all emails she sent to his mother, and provided Phillips' mother everything she provided to Phillips. 06/18/19 RP 95-96.

Ms. Ko stated that she received full sets of discovery from the State in each of the cases and generated her own discovery summaries.

06/18/19 RP 97. She developed discovery summaries to help her clients obtain the information more quickly. She explained that the process of getting defendants redacted copies of discovery can be very time consuming—sometimes requiring up to a year to complete. 06/18/19 RP 97. Ms. Ko shared her discovery summaries with Phillips and his mother and provided updates to the summaries as new information became available. 06/18/19 RP 97. Ms. Ko chose not to include transcripts of witness interviews in her discovery summaries and instead provide them to Phillips in full, with required redactions. 06/18/19 RP 98.

Ms. Ko continued to investigate by interviewing a co-defendant in the drive-by shooting case. 06/18/19 RP 99. She was able to gather “very favorable information,” which she described for Phillips in a hand-delivered letter dated April 1, 2018. 06/18/19 RP 100-02, 103-05 (detailing contents of letter). The letter summarized Ms. Ko and Phillips’ earlier conversation about the drive-by case, the witness interviews, and her impressions about the evidence. *See* 06/18/19 RP 103.

In addition to the written information Ms. Ko provided to Phillips on his cases, she spent time in person going through the evidence with him. 06/18/19 RP 107. She spent “more [time] than [she] normally would explaining to him how devastating the Facebook postings were,”

especially because Phillips was facing such a serious sentence if convicted. 06/18/19 RP 108.

Ms. Ko followed similar procedures in the attempted murder case. 06/18/19 RP 110. Ms. Ko printed out the important portions of the Facebook postings to discuss with Phillips, and outlined “in detail what [she] felt was the most damaging portion of [] the Facebook postings.” 06/18/19 RP 102. She provided the same to his mother via email. 06/18/19 RP 102. Ms. Ko also interviewed the Arroyos and provided transcripts of those interviews to Phillips and Phillips’ mother prior to his plea. 06/18/19 RP 110.

Ms. Ko explained that the specific statements Phillips claimed he was unaware of in the attempted murder case were, in fact, in the first entry of the discovery summary she provided to him. 06/18/19 RP 114-15. Finally, Ms. Ko explained her process of negotiating with the State to help Phillips avoid a de facto life sentence, and instead, face a reduced total sentence of 228 months. 06/18/19 RP 117-19.

Ultimately, the court denied Phillips’ motion to withdraw his guilty pleas, concluding that Phillips had not established that he received ineffective assistance of trial counsel. CP 52. In delivering its ruling, the court noted, “I don’t know how anyone could question that Ms. Ko obviously [conducted an investigation and reviewed discovery],

particularly in light of the ability to persuade Mr. Williams, a very zealous prosecuting attorney, to dismiss an attempted murder charge, which I'm sure was not something that he did quickly or lightly." 06/18/19 RP 148. The court concluded that Ms. Ko's performance was not deficient, but even if it were, evidence was not presented that changed the nature or complexity of the case, such that the court believed Phillips would have reached a different decision. 06/18/19 RP 149-50.

Phillips was sentenced to a total period of confinement of 228 months. CP 35. This appeal follows. CP 56.

IV. ARGUMENT

The trial court properly denied Phillips' request to withdraw his guilty pleas. After accepting a knowing, voluntary, and intelligent plea, the trial court must allow it to be withdrawn only to correct a manifest injustice. CrR 4.2(f); *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). A manifest injustice exists if (1) the defendant did not ratify the plea, (2) the plea was not voluntary, (3) the defendant received ineffective assistance of counsel, or (4) the plea agreement was not kept. *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d 183 (1996). Because Phillips is unable to show a manifest injustice, his motion to withdraw his pleas was properly denied.

A. Phillips Was Properly Informed of the Sentencing Consequences of His Pleas

Before accepting Phillips' guilty pleas, the trial court properly advised Phillips of the sentencing maximum of first-degree assault as well as his standard range, as required by CrR 4.2. Phillips' allegation that his plea was involuntary is the type of constitutional error that may be raised for the first time on appeal. *State v. Knotek*, 136 Wn. App. 412, 422-23, 149 P.3d 676 (2006) (citing *State v. Walsh*, 143 Wn.2d 1, 6, 17 P.3d 591 (2001)). But Phillips was not misinformed of the consequences of his pleas—he was advised of the consequences in the manner the state Supreme Court has deemed appropriate. CrR 4.2.

In enacting CrR 4.2, the Supreme Court mandated that defendants be fully informed of the consequences of their plea. The rule states that:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and **with an understanding of the nature of the charge and the consequences of the plea**. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

CrR 4.2(d) (emphasis added). This requirement is satisfied by the standard Washington plea template, which was used in Phillips' cases. The template requires the parties to complete a grid indicating the "standard range" and "maximum term and fine," as shown below:

6. **In Considering the Consequences of My Guilty Plea, I Understand That:**

- (a) My right to appeal is limited.
- (b) Each crime with which I am charged carries a maximum sentence, a fine, and a **Standard Sentence Range** as follows:

COUNT NO.	OFFENDER SCORE	STANDARD RANGE ACTUAL CONFINEMENT (not including enhancements)	PLUS Enhancements*	COMMUNITY CUSTODY	MAXIMUM TERM AND FINE
1					
2					
3					

Phillips’ contention that he should not have been told the statutory maximum sentence is an argument that has been flatly rejected by Washington courts.³ App. Br. at 9-10. In *State v. Kennar*, 135 Wn. App. 68, 143 P.3d 326 (2006), the defendant claimed his guilty plea was not made knowingly, voluntarily, and intelligently. Like Phillips, Kennar contended that the trial court should not have informed him of both the standard range sentence and the statutory maximum sentence. *Id.* at 71. In rejecting Kennar’s argument, the Court held that “a defendant should be informed of *both* the applicable standard sentence range and statutory maximum sentence established by the legislature for the charged offense.” *Id.* at 74 (emphasis added) (citing *State v. Gore*, 143 Wn.2d 288, 21 P.3d

³ Phillips was actually sentenced to an exceptional downward sentence. CP 43-46.

262 (2001) *overruled on other grounds by State v. Hughs*, 154 Wn.2d 118, 110 P.3d 192 (2005)).

As the Court concluded in *Kennar*, informing the defendant of only the standard sentencing range would result in their “being misadvised of their maximum peril.” *Kennar*, 135 Wn. App. at 76. The defendant must be advised of both consequences because the offender score and standard sentence range are not finally determined until sentencing. *Id.* at 76. The standard range can change between the plea colloquy and sentencing, if a defendant engages in conduct that changes his offender score after the plea colloquy or a prosecutor discovers criminal history that changes the calculation. *Id.* (citing *State v. Thomas*, 79 Wn. App. 32, 42, 899 P.2d 1312 (1995) (defendant bound by guilty plea where additional criminal history found before sentencing and newly calculated offender score with higher standard range applied)).

The Statement of a Defendant on a Plea of Guilty addresses the possibility of changes after the plea colloquy by advising defendants to alert the sentencing judge of any additional criminal history discovered or created between the plea and sentencing. *See* CrR 4.2(g) § 6(d). Phillips’ pleas followed the template and included the required cautionary statement. CP 10, 102. Because Phillips entered a guilty plea on the attempted murder case prior to sentencing on the drive-by case, his

offender score changed. The plea agreement properly informed him of this possibility. *See* CP 105 (“The defendant understands that in pleading guilty in this case, the standard sentencing ranges will change in part for charges he has already pled guilty to and is awaiting sentencing on. [Breakdown of sentencing range increases]”).

Phillips’ reliance on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) is also misplaced. App. Br. at 9, 11. *Blakely* held that the maximum sentence a judge may impose is the sentence supported by the facts reflected in the jury verdict or admitted by the defendant.⁴ But *Blakely* applies at sentencing, not to the plea colloquy. Had Phillips proceeded to trial, there was a risk that the jury verdict or Phillips’ admissions would enable the trial court to impose a sentence outside the standard range. As a result, *Blakely* had no impact on the trial court’s obligation to advise Phillips of the statutory maximum penalty. *See State v. Buckman*, 195 Wn. App. 224, 230, 381 P.3d 79 (2016) (“Before accepting a plea, a trial court must inform a defendant of both the applicable standard sentencing range and the maximum sentence set by the legislature for the charged crime.”).

⁴ Phillips does not challenge that he was properly sentenced *below* his standard range in accordance with the facts he admitted to in his guilty pleas.

In addition to strictly adhering to the requirements of CrR 4.2, Phillips' sentence provided him with a significant benefit. Given the impact of the first plea on Phillips' offender score, the court imposed an exceptional downward sentence. *See* CP 43-46; *See also* 05/24/19 RP 11-12 (discussion of plea negotiations focused on Phillips' respective sentences with the first case's impact on his sentence in the second case); *See* CP 102 ("The offender score of 0 [listed for the attempted murder case] [...] is calculated on the assessment that the defendant will be sentenced at the same time as [the drive-by case.] If the defendant were sentenced on different dates for these [two cases,] his offender score would be 8[.]").

In short, Phillips was properly informed of both the standard range sentences and the statutory maximum imposed by the legislature. Omitting either piece of information would have been contrary to law, impaired his understanding of the full consequences of a plea, and negated his ability to make a knowing decision.

B. Phillips Received Effective Assistance of Counsel that Exceeded Constitutional Requirements

Phillips was entitled to effective assistance of counsel during the plea process and that is precisely what he received. *State v. Estes*, 188 Wn.2d 450, 463, 395 P.3d 1045 (2017). A claim of ineffective assistance of counsel is subject to de novo review as a mixed question of law and

fact. *State v. Jones*, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015) (citing *Strickland v. Washington*, 466 U.S. 688, 698, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). In alleging ineffective assistance of counsel, Phillips has the burden to show (1) that his attorney's performance fell below a reasonable standard, and (2) that the deficiency resulted in prejudice. *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 251-52, 172 P.3d 335 (2007) (citing *Strickland*, 466 U.S. at 687). It is a burden Phillips has not and cannot meet.

Counsel kept Phillips well-informed by providing information regarding witness statements and proceedings, was able to prevent the State from filing the attempted murder charges despite the State's discovery of Phillips' incriminating statements on his Facebook account, and ultimately enabled Phillips to enter highly favorable plea agreements. 06/18/19 RP 72-77. Because Phillips cannot establish that defense counsel's performance was deficient, or that he was prejudiced by the alleged deficiency, there is no legal basis for withdrawing his plea.

1. The record demonstrates that defense counsel's performance met an objective standard of reasonableness

The record establishes that defense counsel met an objective standard of reasonableness. On review, there is a strong presumption that counsel's performance is within the broad range of reasonable professional

assistance. *Strickland*, 466 U.S. at 689; *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). Contrary to Phillips’ assertions, his defense counsel reviewed all discovery, interviewed witnesses, and provided discovery summaries and copies of transcripts to Phillips to apprise him of the evidence against him. Although it was not required, she further aided Phillips by keeping his mother informed of the discovery and developments in the case.

Phillips incorrectly contends that with respect to the attempted murder case, he was not informed that the victim’s statement indicated that the shooter’s skin tone was unlike Phillips’. App. Br. at 14. The record plainly contradicts this argument—defense counsel convinced the State to dismiss this case *because of that inconsistency*. See 06/18/19 117, 121 (Defense counsel testified that “[u]p to the point where we learned about the Facebook postings I was firmly convinced that he had—that the State had basically charged the wrong guy” and that “[t]hat’s one of the reasons why I thought it was a great case and he got—they charged the wrong guy.”); 06/18/19 121; *see also*, CP 97 (Motion and Order of Dismissal Without Prejudice, stating, “The State has exhaustively considered and reconsidered and reconsidered the evidence in this case, including evidence discovered and generated post-charging, *e.g.*, witness interviews. While the State tends to remain confident in the identification of the defendant as the

shooter in this case, it has abiding concerns as to whether it can prove the charges....”) The victim’s description of the shooter was known to the defense, discussed between the parties, and used as a bargaining tool to get the case dismissed far in advance of it being refiled and Phillips entering his plea.

Similarly, Phillips incorrectly claims he was not informed that co-defendant Bullard made inconsistent statements regarding the attempted murder case. App. Br. at 14. But Bullard’s inconsistent statements were in Phillips’ probable cause declaration, outlined in defense counsel’s discovery summary, and discussed between defense counsel and Phillips. CP 95 (lines 9-10); 06/18/19 RP 114-15 (Discovery summaries include Bullard’s statements, provided to Phillips before guilty plea); 06/18/19 121-22 (Bullard was “an issue,” and there were “lengthy conversations” with Phillips about Bullard).

Phillips’ contentions regarding the drive-by shooting are also without merit. Phillips claims that he learned after he pleaded guilty that T.I.-J. did not know if Phillips was a shooter. App. Br. at 14. But at the time of the probable cause declaration, T.I.-J. had identified Phillips as one of the shooters. 06/18/19 RP 30. Phillips claimed to have learned that T.I.-J. changed her story and had a piece of paper with that information that his

attorney could submit for consideration.⁵ 06/18/19 RP 32. Phillips admits that he learned that T.I.-J. changed her story from information his counsel provided to his mother, and that his mother in turn provided to Phillips. 06/18/19 RP 32-33. In addition, Ms. Ko provided T.I.-J.'s interview transcript directly to Phillips. 06/18/19 RP 101. Ms. Ko also provided a letter, dated April 1, 2018, that stated: "This letter is to summarize our discussions about the drive-by case," and then listed the change in T.I.-J.'s story, along with discussions of the newly-discovered evidence. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683, 691 (1984) (No deficient performance where counsel interviewed State witnesses, obtained independent evaluations of the autopsy report, and thoroughly reviewed the evidence with petitioners.)

All of Phillips' claims regarding counsel's provision of information are refuted by the record. Without question, defense counsel met the broad standard for reasonable professional services. This alone is basis for denying the ineffective assistance of counsel claim.

2. Phillips was not prejudiced by defense counsel's performance

In addition to failing to establish that defense counsel's services fell below the required level, Phillips cannot meet his burden to show

⁵ The paper was never submitted.

prejudice. To establish prejudice, he must demonstrate “that there is a reasonable probability that, but for the deficiency, [he] would not have pleaded guilty and would have insisted on going to trial.” *In re Pers. Restraint of Tricomo*, __ Wn. App. __, 2020 WL 2393821 *6 (May 2020) (citing *Elmore*, 162 Wn.2d at 254). Here, there is no basis for such a finding. Phillips obtained a favorable plea, despite the evidence of his involvement in two crimes, and the incriminating evidence found on his Facebook account.

A defendant must demonstrate both deficient performance and prejudice to prevail on a claim of ineffective assistance of counsel. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). In the context of a guilty plea, to establish prejudice, a defendant must show that but for counsel's failure to provide adequate advice, the defendant would not have pleaded guilty. *State v. Sandoval*, 171 Wn.2d 163, 175–76, 249 P.3d 1015 (2011); *Osborne*, 102 Wn.2d at 99.

Given the overwhelming evidence against him, Phillips cannot meet his burden. The prosecutor confronted Phillips with the evidence from his Facebook account, which indicated that Phillips had a gun the night of the drive-by shooting. 06/18/19 RP 43-45. In addition, while Phillips initially denied sending messages regarding selling the same caliber of weapon used in the drive-by shooting, he later contradicted

himself and stated that he did not recall if he sent the messages, and alleged that others had access to his account. 06/18/19 RP 45-46.

Messages a few weeks after the drive-by shooting discussed the arrest of co-defendant Bullard. Co-defendant Crawford's girlfriend messaged Phillips saying, "Brother, it's bad," "you're going to jail," and "Nigga [Bullard] snitched." 06/18/19 RP 47. Phillips acquiesced in the messages, stating, "He don't know my name, though." 06/18/19 RP 48. Other messages from co-defendant Crawford contained pictures of Bullard's booking sheet which showed that the charges were for drive-by shooting and first-degree assault. 06/18/19 RP 52-53. Crawford stated, "Nocca, he told on us, [on my mother.]" 06/18/19 RP 53.

Given the incriminating nature of the Facebook messages, where Phillips all but admits his involvement in the drive-by case and where the evidence suggested he was selling a gun of the same caliber used in the drive-by shooting, it is extremely unlikely that the statements of the driver saying she did not know who was shooting would have changed Phillips' decision to plead guilty. The case against Phillips was particularly strong because he was charged as an accomplice. As a result, the State did not need to prove Phillips was the shooter in order to obtain a conviction. In this case alone, Phillips faced a de facto life sentence if convicted at trial;

but after entering a guilty plea he was sentenced to only 180 months (15 years).

Phillips' made a rational decision given the strength of the evidence against him. He has not demonstrated that any information allegedly withheld from him would have ultimately changed his decision to plead guilty. Thus, he fails to establish prejudice in the drive-by case.

Phillips cannot establish prejudice in the attempted murder case either. Again, even if Phillips had been unaware that the victim gave a description of the shooter apparently inconsistent with Phillips' appearance, the other evidence against him was overwhelming. But it is inconsistent with the procedural posture of this case and the record that Phillips was unaware of the victim's identification statement as it was the basis for the State dismissing the attempted murder case. *See* 06/18/19 RP 66 (Phillips knew the case was dismissed for proof issues). The case was refiled only after the Facebook evidence was uncovered.

The Facebook evidence provided strong incentive for the plea in this case as well. Four hours after the shooting, Phillips sent a message, saying, "[] Can you come get me. It's urgent." "This nigga fina tell on me, and I feel like the police on the way. I'll fill up your tank. I really don't care." 06/18/19 RP 75. Phillips gave his location. 06/18/19 RP 75. When asked how urgent, Phillips responded, "Like, on Crip. I'll be in jail

for some years because I know he going to tell them where I'm at."

06/18/19 RP 75-76. "Fuck, I'll just get cracked. I'm sorry I had to push my situation on you." 06/18/19 RP 76. "Cracked" means arrested.

06/18/19 RP 76.

Phillips messaged someone else three and a half hours after the shooting, saying: "On the hill, I think it's over for me big, big Bro."

06/18/19 RP 77. He explained, "Some hot shit happened and I think this nigga's going to tell that I'm at the Motel 6, Bro." 06/18/19 RP 77.

Phillips ended the exchange with, "It's over." 06/18/19 RP 78. Phillips messaged others asking for rides, and claiming "it's over" or that he was going to get arrested. 06/18/19 RP 78-81.

Considering the weight of the evidence against him, and the lengthy sentence Phillips faced if convicted at trial, it is extremely unlikely that any of the allegedly withheld information would have convinced him to go to trial—particularly since his plea came immediately after this evidence was obtained.

The record indicates that defense counsel zealously fought for her client and substantially assisted in his decisions to plead guilty. Phillips' case is not one of ineffective assistance of counsel, but of buyer's remorse. He cannot demonstrate a basis for his pleas to be withdrawn. This Court should affirm.

C. The Trial Court Properly Denied Phillips' Request to Withdraw the Guilty Pleas

The trial court properly denied Phillips' request to withdraw his guilty pleas. "A written statement on plea of guilty in compliance with CrR 4.2(g) provides prima facie verification of its constitutionality, and when the written plea is supported by a court's oral inquiry on the record, the presumption of voluntariness is well nigh irrefutable." *State v. Davis*, 125 Wn. App. 59, 68, 104 P.3d 11 (2004). In Phillips' case, the trial court's findings would have been sufficient to deny the request to withdraw the plea even under a far less exacting standard.

The trial court's findings at the hearing on Phillips' motion to withdraw his guilty pleas are supported by substantial evidence. Phillips "bears the burden of showing that there is not sufficient evidence to persuade a reasonable person of the trial judge's findings." *State v. A.N.J.*, 168 Wn.2d 91, 107, 225 P.3d 956 (2010). The trial court found Ms. Ko's testimony credible: a determination not available for review by this Court. Challenges to a trial court's Findings of Fact following a plea withdrawal hearing are reviewed for substantial evidence. *A.N.J.*, 168 Wn.2d at 107.

Phillips challenges Finding of Fact IV, which states:

Over the course of Ms. Ko's representation of the defendant under 17-1-00980-8 and 17-1-00338-9, she created summaries of all discovery for the two cases. She provided these summaries to the defendant and also provided him copies of all transcribed interviews. She also provided him with excerpts of all relevant

Facebook postings. In addition, she provided letters to the defendant summarizing the discovery and the strengths and weaknesses of each case. Ms. Ko also repeatedly met with the defendant to go over the evidence and to assess his various options in each case.

CP 48. The record supports the finding that defense counsel created discovery summaries for both cases, provided those summaries to Phillips and his mother and provided witness interview transcripts to Phillips. 06/18/19 RP 97-99; 06/18/19 RP 98, 100-01, 103, 110. Counsel also provided Phillips with the relevant portions of the Facebook messages, and spent more time than she usually does with clients going through the discovery and explaining it to Phillips. 06/18/19 RP 102, 107-08. Accordingly, the trial court's Finding of Fact IV is supported by substantial evidence in the record.

In Findings of Fact IX and X, the trial court found that Phillips' testimony was not credible, while the testimony of defense counsel Ko was credible. Phillips' challenge to the finding that he was not credible is misplaced. "Credibility determinations are for the trier of fact and are not subject to review." *State v. Cardenas*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017).

Phillips also challenges the court's Finding of Fact XI, which states:

The defendant testified to various items of discovery he claimed Ms. Ko had not made him aware of before entering his guilty pleas for 17-1-00338-9 and 17-1-00980-8. These claims are not

credible. Ms. Ko provided all of this information before the defendant entered his guilty pleas.

CP 51. Each of the statements Phillips claims he was unaware of were contained in the materials defense counsel provided to him and his mother prior to Phillips pleading guilty. *See* 06/18/19 RP 120-23. Therefore, the trial court's Finding of Fact XI is supported by substantial evidence in the record.

Phillips has not offered a sufficient basis for overcoming the trial court's Finding of Fact XII, that Phillips' desire to withdraw his pleas was "simply buyer's remorse." CP 50. Based on the testimony and record, the trial court found that after receiving fully effective assistance of counsel, Phillips entered his pleas because he believed it was in best interest. CP 50. "Only after entering those guilty pleas did the defendant come to regret those decisions and wish to proceed to trial on the matters." *Id.* Phillips has not met his burden to overcome the trial court's findings or conclusion.

V. CONCLUSION

With the effective assistance of experienced defense counsel, Phillips weighed his odds and chose to enter a favorable plea bargain. Phillips second-guessing his decision is not a basis to withdraw his knowing, intelligent, and voluntary guilty pleas. The record amply

supports the trial court's decision to deny Phillips' request to withdraw his pleas.

This Court should affirm.

RESPECTFULLY SUBMITTED this 22nd day of May, 2020.

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5/22/2020 *s/ Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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