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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

31517-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL LEE WEST, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

ASSIGNMENTS OF ERROR

1. Defendant's trial counsel rendered ineffective assistance of counsel when he failed to move the trial court to enter a judgment of acquittal by reason of insanity
2. Trial counsel rendered ineffective assistance of counsel when he failed to object to the testimony of the State's mental health expert.
3. Cumulative error deprived defendant of a fair trial.

II.

ISSUES

1. Did defendant receive ineffective assistance of counsel when counsel failed to move the trial court to acquit him by reason of insanity?
2. Did defendant receive ineffective assistance of counsel when counsel failed to object to the testimony of the mental health expert called by the State?
3. Was Mr. West denied a fair trial by the cumulative effect of his counsel's alleged deficient performance?

III.

STATEMENT OF THE CASE

The Respondent accepts the Appellant's statement of the case for purposes of this appeal only.¹

IV.

ARGUMENT

- A. THERE IS NO BASIS FOR FINDING INEFFECTIVE ASSISTANCE BASED UPON COUNSEL'S FAILURE TO MOVE THE TRIAL COURT FOR AN ACQUITTAL BY REASON OF INSANITY PURSUANT TO RCW 10.77.080.

Appellant contends that he received ineffective assistance when his trial counsel failed to file a motion for an acquittal by reason of insanity under RCW 10.77.080. RCW 10.77.080 provides, in pertinent part:

The defendant may move the court for a judgment of acquittal on the grounds of insanity: PROVIDED, that a defendant so acquitted may not later contest the validity of his or her detention on the grounds that he or she did not commit the acts charged. At the hearing upon the motion the defendant shall have the burden of proving by a preponderance of the evidence that he or she was insane at the time of the offense or offenses with which he or she is charged. If the court finds that the defendant should be acquitted by reason of insanity, it shall enter specific findings...If the motion is denied, the question may be submitted to the trier of fact in the same manner as other issues of fact.

RCW 10.77.080

¹ The State has decided not to litigate the cross-appeal filed herein.

It is important to note that a motion for an acquittal by reason of insanity pursuant to RCW 10.77.080 is not the same procedure as proffering a Not Guilty by Reason of Insanity (“NGRI”) affirmative defense at trial. A motion for an acquittal by reason of insanity is a “statutory alternative to a jury trial, available to the defendant at his own election.” *State v. Jones*, 84 Wn.2d 823, 832, 529 P.2d 1040 (1975). The motion requires a procedure with a specialized format, including: pleadings whereby defendant acknowledges and waives his constitutional rights, including the right to a trial; and a colloquy with the trial court much like that required when a guilty plea is offered and accepted. *State v. Barrows*, 122 Wn. App. 902, 907, 96 P.3d 438 (2004). Here, defendant would have necessarily had to elect to effectively plead guilty to the facts supporting the first and second degree assaults while maintaining that he lacked the comprehension of the wrongfulness of his acts.

One of the primary reasons that specific pleadings and colloquy are required before an NGRI plea can be accepted by the trial court short of a trial verdict is the distinct difference in how such pleas are handled post-adjudication pursuant to RCW 10.77. An NGRI plea or verdict results in the defendant being committed to the custody of the Washington State Department of Social and Health Services (“DSHS”) for the statutory maximum of the charged crime. RCW 10.77.025. A crime that is classified as class A would result in the defendant being committed to the DSHS for life; a class B crime would result in a

ten year commitment to the DSHS; a class C crime would result in a five year commitment. RCW 9A.20.021. The evidence before this trial court and jury is that defendant was too violent and dangerous to other inmates to be held in a DSHS facility. It is reasonable to conclude that if the defendant had been found NGRI by either plea or verdict, then the DSHS would have declared him unsuitable for housing in a DSHS facility and placed him with the Washington State Department of Corrections. RCW 10.77.091. Such housing could result in Mr. West being committed to the DOC for life instead of a determinate sentence based upon his offender score since First Degree Assault in a class A felony.

Finally, a motion for acquittal by reason of insanity herein would require the trial court to evaluate the body of evidence offered, including the evaluations by the mental health professionals to determine whether defendant satisfied his threshold burden of proof. The trial court and jury were presented with evidence that Michael West was an extremely dangerous and violent individual who could not be controlled by the DSHS. It is highly improbable that the trial court would have accepted an NGRI plea by Mr. West even if trial counsel had made such a motion since defendant's mental health professional, Dr. Muscatel, agreed that defendant knew the wrongfulness of his acts.

Dr. Muscatel specifically noted during his direct examination that:

[defendant] had a fairly concrete understanding of his case...he indicated that he was not taking medications at that time or not taking them on a regular basis...said that he stopped taking his

medication in Walla Walla... didn't feel it was doing him any good... he had no interest really in NGRI...there is no question that...[defendant] understood the nature and quality of his actions...the issue...was did he understand the wrongfulness of his conduct at the time... the key is what is the link between the delusions and the violence...In terms of legal insanity...that prong has to be met connecting the mental disorder...and their understanding of the wrongfulness of their conduct... *I couldn't opine conclusively that he was unable to understand and appreciate the wrongfulness of his conduct at that time...The law requires that he has to be unable to understand that it's wrong, not that he's just crazy...*whether he was legally insane...I don't have that information, so I can't fill in that blank...

RP 401-419.

Dr. Muscatel's evaluation agreed with Dr. Grant's in this crucial aspect of defendant's insanity defense. Accordingly, it is reasonable to infer that defense counsel did not file a motion for an acquittal by reason of insanity pre-trial because defendant was not interested in entering such a plea. Finally, it is reasonable to infer that defense counsel did not seek a directed verdict of NGRI from the trial court at the end of the testimony because the evaluation of his own mental health professional could not satisfy the preponderance of evidence threshold required to prevail on such a motion.

Assuming, *arguendo*, that the body of evidence did support a conclusion that defendant was legally insane at the time of the assaults; the Legislature

enacted another condition precedent that must be satisfied before such a motion can even be filed. RCW 10.77.030(3) specifically provides that:

No condition of mind proximately induced by the voluntary act of a person charged with a crime shall constitute insanity.

RCW 10.77.030(3).

The record herein includes uncontroverted evidence that the defendant knowingly and voluntarily ceased taking his prescribed antipsychotic medications when he was transferred to the Airway Heights Corrections Center. RP 401-419. Accordingly, trial counsel had no legitimate basis in fact or law to have moved the trial court for an acquittal by reason of insanity due to the condition precedent established by RCW 10.77.030(3).

The choice of defense is a strategic decision of counsel that cannot be second-guessed herein. There also was no evidentiary basis to file a motion for an acquittal by reason of insanity. For both reasons, appellant has failed to show that his counsel rendered ineffective assistance.

Washington has adopted the standard for reviewing the effectiveness of trial counsel set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See *State v. Leavitt*, 49 Wn. App. 348, 355-59, 743 P.2d 270 (1987), *affirmed* 111 Wn.2d 66, 758 P.2d 982 (1988); *State v. Sardinia*, 42 Wn. App. 533, 713 P.2d 122, *review denied* 105 Wn.2d 1013 (1986). That standard employs a two-part test. First, a defendant must show that counsel made

errors so serious that he was not functioning as counsel. A standard of reasonableness is applied, and the defense must overcome a presumption that the attorney may be engaged in trial strategy. *Strickland*, 466 U.S. at 689; *Leavitt, supra* at 358-359. An attorney's strategic choices are "virtually unchallengeable" and thus are not a basis for finding counsel to be ineffective. *Strickland*, 466 U.S. at 690.

Secondly, counsel's error must undermine the confidence in the fairness of the trial. *Leavitt, supra* at 358-359. The reviewing court must consider the entire case in making its determination of counsel's effectiveness. Additionally, courts do invoke a presumption that counsel was competent and rendered effective assistance. *State v. Serr*, 35 Wn. App. 5, 12, 664 P.2d 1301 (1983); *Strickland*, 466 U.S. at 694. "[T]his presumption will only be overcome by a clear showing of incompetence." *State v. Varga*, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). When one prong of the *Strickland* test is not met, a reviewing court need not consider the other prong. It is proper for a reviewing court to reject a claim by addressing the prejudice prong if that is dispositive. *In re PRP of Riley*, 122 Wn.2d 772, 780, 863 P.2d 554 (1993).

The final sentence of RPC 1.2(a) states the division of responsibility between a criminal defendant and his attorney: "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." All other decisions belong to counsel. The choice of the defense to present is a quintessential strategy

decision. It simply is not a basis for claiming counsel rendered defective assistance.

Strickland v. Washington, supra.

Appellant has failed to demonstrate that defendant received ineffective assistance of counsel with regard to not filing a motion for an acquittal by reason of insanity under RCW 10.77.080.

B. THERE IS NO BASIS FOR FINDING INEFFECTIVE ASSISTANCE OF COUNSEL BASED UPON COUNSEL'S FAILURE TO OBJECT TO THE TESTIMONY OF DR. GRANT.

Appellant claims that he received ineffective assistance when his counsel failed to object to the testimony of the State's mental health expert regarding his evaluation of defendant. Appellant characterizes the testimony of Dr. Grant as misleading, prejudicial, and improper because he was asked whether Mr. West would be best served by being incarcerated or hospitalized. Dr. Grant opined that Mr. West's history indicated that hospitalization was not a viable alternative. Appellant speculates that Dr. Grant's response was so "inflammatory, prejudicial, and misleading" that it overwhelmed the jury into rejecting defendant's insanity defense. However, appellant proffers no tangible support in the record for this speculation regarding how the jury received Dr. Grant's testimony.

As previously noted, to establish ineffective assistance of counsel:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel'

guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. at 687. The threshold for deficient performance by counsel is high due to the deference accorded decisions made by counsel in the course of representing a client. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). To prevail on a claim of ineffective assistance of counsel, the defendant must overcome the “strong presumption that counsel’s performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). This threshold showing must establish that counsel’s conduct cannot be characterized as legitimate trial strategy or tactics. *Id.*, 166 Wn.2d at 863. If appellant establishes that counsel’s performance was deficient, then appellant must show that the deficient performance actually prejudiced appellant to the extent that the result of trial would have been different. *Id.*, 166 Wn.2d at 862. “[A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland v. Washington*, 466 U.S. at 689. “Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.” *Id.*, 466 U.S. at 687.

Evidence Rule (“ER”) 702 permits the admission of expert testimony where (1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact. *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984). Here, the record establishes that both Dr. Grant, Eastern State Hospital, and Dr. Muscatel, defendant’s mental health professional, qualified as experts in the area of evaluating the competency and sanity of subject individuals. The record also establishes that the two experts agreed in their evaluations of defendant that he knew the wrongfulness of his conduct at the time he committed the charged criminal acts. RP 401-419, 462-479. The body of evidence reasonably leads to the conclusion that defense counsel objecting to the answer by Dr. Grant would have been of little or no moment since Dr. Muscatel’s evaluation very reasonably could have been interpreted to offer the same opinion.

Appellant has failed to rebut the presumption that his trial counsel’s failure to object to the testimony by Dr. Grant was strategic or tactical. Defense counsel relied upon aspects of Dr. Grant’s testimony to support the defense theory of the case that Mr. West was not guilty due to his insanity. Admission of Dr. Grant’s testimony, therefore, could have been strategic. Objecting to the admission of Dr. Grant’s testimony would have likely negatively impacted the defense theory of the case. Admission of the interview, therefore, could be

strategic. Even if it was not, appellant cannot show prejudice from the failure to object since most of the testimony, according to counsel, was supportive of the evaluation proffered by defense mental health expert, Dr. Muscatel. Finally, Dr. Muscatel's expert opinion ultimately agreed with Dr. Grant that defendant did not qualify to be considered insane at the time of the assaults. Appellant has not met his burden to show that any of trial counsel's actions were deficient, so he cannot establish that he received ineffective assistance of counsel.

C. DEFENDANT HAS NOT SHOWN THAT THE ALLEGED CUMULATIVE EFFECT OF HIS ASSIGNED ERRORS DEPRIVED HIM OF A DUE PROCESS.

Appellant contends that cumulative errors by his trial counsel resulted in a fundamentally unfair trial which requires the reversal of his convictions. The cumulative error doctrine provides for reversal of a conviction if the combined effect of trial errors effectively denied the defendant a fair trial, even if each error standing alone may be considered harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007). The doctrine does not apply where the errors are few and have little or no effect on the trial outcome. *Id.* Here, appellant's other assigned errors both focus on claims of ineffective assistance of counsel. As previously noted, appellant has failed to prove that he received ineffective assistance of counsel, hence the cumulative error doctrine does not apply.

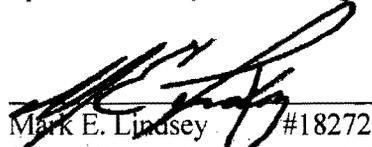
V.

CONCLUSION

For the reasons stated, the convictions, judgment, and sentence should be affirmed.

Respectfully submitted this 9th day of December, 2013.

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