FILED
Court of Appeals
Division III
State of Washington
5/28/2019 10:41 AM

NO. 36015-6-III

IN THE COURT OF APPEALS OF STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, RESPONDENT

v.

AMEL WILLIAM DALLUGE, APPELLANT

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

Superior Court Cause No. 17-1-00401-7

The Honorable David Estudillo, Judge

BRIEF OF RESPONDENT

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C. DID THE COURT LACK LEGAL AUTHORITY TO IMPOSE DISCRETIONARY COSTS AND INTEREST ON AN INDIGENT DALLUGE? (Assignment of Error No. 3)

II. STATEMENT OF THE CASE[1]

A. THE CONVICTION

A Grant County jury convicted Amel William Dalluge of Failure to Register as Sex Offender on April 23, 2018, agreeing with the State's allegation that Dalluge, lacking a fixed residence, failed to provide an

[1] The State cites to the sequentially paginated volumes of the Verbatim Report of [Trial] Proceedings, (Charlene Beck), as 1RP ____, to the sequentially paginated FTR Gold Report of [Hearing] Proceedings, (Susan E. Anderson), as 3RP ____, and to the related clerk's papers as CP ____.

accurate weekly accounting to the Grant County Sheriff (GCSO) of where he stayed each night between March 29, 2017 and May 26, 2017. CP 8 – 87. Dalluge conceded he had been convicted of a felony sex offense prior to March 29, 2017 and was required to register during the charging period. 1RP 522. The jury unanimously found Dalluge guilty of only one of the three alternative means charged. CP 87. Jurors could not agree on whether Dalluge provided signed, written notice to GCSO within three business days after ceasing to have a fixed residence. CP 87. They unanimously found he did comply with the duty to report weekly, in person, to GCSO during normal business hours, but that he failed to provide an accurate accounting of where he stayed during the week. CP 87.

B. TRIAL EVIDENCE OF DALLUGE'S COMMUNICATION WITH THE GRANT COUNTY SHERIFF'S OFFICE BETWEEN MARCH 29, 2017 AND JUNE 19, 2017

Grant County Deputy Sheriff Greg Hutchinson was the Sex Offender Registration Deputy when Amel Dalluge became homeless at the end of March 2017. 1RP 346. Hutchinson kept a "hard file" on each offender he supervised containing "any documents, notes, any paper, photographs, [and] correspondence" related to that offender. 1RP 347. The offenders Hutchinson supervised were given his cell telephone number for calling and texting, and could also send email. 1RP 348. Dalluge had Hutchinson's cell number. 1RP 349. Transient paperwork listing the

locations where the offender slept and stayed during the previous seven days was to be delivered to GCSO each Monday, where it was date and time stamped, and put in a Special Operations box for Hutchinson. 1RP 350. Hutchinson would attempt to contact anyone who did not timely turn in paperwork to determine the reason. 1RP 350.

Hutchinson received a one-page handwritten note from Dalluge dated March 29, 2017 stating: "[a] domestic dispute has arose. It may resolve expediently. But if not, we need to talk or stay in contact. Sincerely, Amel Dalluge." 1RP 353. Hutchinson attempted to call Dalluge the next day and left an unreturned voicemail on the number Dalluge had provided him. 1RP 353.

Dalluge did not make contact again until April 14, 2017, when he spoke with Deputy Sheriff Joe Wester in the GCSO lobby. 1RP 353–54. Wester met with Dalluge after Dalluge arrived at the Ephrata office asking about homeless/transient offender registration paperwork. 1RP 307–08. Hutchinson was on his way out of town for training and instructed Wester by telephone concerning the information Dalluge was to be given and the procedure for filling out the required transient forms. 1RP 354.

Wester gave a transient form to Dalluge and explained the information required. 1RP 309–10. Dalluge told Wester he understood, Wester emphasized Dalluge needed to read the instructions on the form,

and Dalluge agreed he would. 1RP 310. Dalluge had no questions. 1RP 310. Wester told Dalluge he had to bring the form into the office every Monday, during the business hours of 8:00 a.m. and 5:00 p.m., and there was no bending of that rule. 1RP 310–11.

Three days later, on April 17 at 7:46 in the morning, Dalluge texted: "This is Amel looking for Greg. It is important, so please reply. Thank you." 1RP 357. Hutchinson responded immediately. 1RP 357. Dalluge replied at 9:06 a.m.:

> This is Amel again. Please note this is not my phone. My new address is 4209 Airway Drive Northeast, Moses Lake. I do not have a ride to you or a phone. I will stay in contact and come see you when possible, so please be specific, and thanks for your patience.

1RP 358. Hutchinson responded at once that he would come to the Airway Drive residence at 2:00 p.m. that day with a verification form, and that Dalluge did not have to come from Moses Lake to Ephrata. 1RP 358. The following exchange ensued:

DALLUGE:	"I am not able to be there at 2:00, and I already have that sheet. I will try to be more punctual. Thanks."
HUTCHINSON:	"You have the homeless sheet. Need to have you sign a verification sheet. When are you going to be available?"

DALLUGE:	I will need as much time as you allow me. I will have to be going soon. K. Rarely am I there.
HUTCHINSON:	I'm not sure what you're talking about. Are you living at 4209 Airway? If so, I need to contact you there and sign a Verification sheet. You going to be available?
DALLUGE:	Rarely am I there. But it is the best I may accomplish currently or until the estate probate. Apologies.
HUTCHINSON:	Tell me when you are going to be there so I can contact you. I'm busy for the first part of tomorrow, but my week is open so far.
DALLUGE:	Okay. And thank you. I will do that later.

1RP 358–59. Dalluge's message ended the communication. 1RP 359. Later that day, Hutchinson went to the Airway Drive address and spoke with another person. 1RP 359–60. Dalluge was not there and Hutchinson was not able to verify this was Dalluge's address. 1RP 360.

A little over two weeks later, on May 4, 2017 Dalluge sent Hutchinson another text: "This is Amel Dalluge. I should have everything sorted out soon. Thank you for being patient and kind." 1RP 360–61. That was the extent of Dalluge's message. 1RP 361.

Pam Dove, the GCSO records custodian, works in the front GCSO Ephrata office and, as part of her job, answers phones and assists people

who come to the lobby window. 1RP 324–25. Five GCSO employees handle lobby traffic. 1RP 325. Dove recalled Dalluge coming to the lobby on multiple occasions during the charging period. 1RP 326. He usually came in "wanting mainly to see Deputy Hutchison in reference to transient paperwork that he has to fill out." 1RP 326. Hutchinson's office is in a different location than the main office. 1RP 327.

Dalluge usually turned in paperwork when he came in. 1RP 326. Dove testified all sex offender paperwork was received, date stamped, and put in a box for Hutchinson. 1RP 327. Dove did not recall any time when the GCSO had lost or misplaced paperwork. 1RP 331. Nobody at GCSO would have refused to take any paperwork Dalluge wanted to deliver. 1RP 327. Dalluge never asked Dove for help filling out his transient paperwork forms, although she overheard him say he did not know how to fill out the forms. 1RP 328.

The paperwork Dalluge turned in did not contain any addresses or descriptions of where he had stayed the previous week. 1RP 373. It did contain handwritten notes. In one such note, dated May 9, 2017, Dalluge wrote: "Dear Mr. Greg Hutchison. Please contact Doug Anderson regarding Amel Dalluge's sex offender registration. If this is an issue or not appropriate, et cetera, please express such immediately so that we may remedy. Thank you for your patience, kindness and understanding.

Sincerely, Amel Dalluge." 1RP 361–62. The note included two telephone numbers and the notation: "Doug Anderson, Amel Dalluge's attorney." 1RP 362. Hutchinson had received no other communication from Dalluge in the three-plus weeks between Dalluge's April 17 text exchange and this May 9 letter. 1RP 362. None of the various phone numbers Dalluge had given Hutchinson panned out—the people answering would say they did not know who Hutchinson was talking about or that Dalluge was not there and the person answering did not know how to reach him. 3RP 425. Some of Dalluge's text messages were prefaced with: "This isn't my phone." 3RP 425. On May 23, 2017, Dalluge delivered another handwritten note to the GCSO, using his old 550 Castle Drive, Moses Lake address. 1RP 363. Dalluge was restrained from that location. 1RP 364–65. The message read:

> Saturday. Dear Mr. Hutchison. As I understand, I am fulfilling all necessaries. Please correct if I am incorrect. One omission I am aware of is the paperwork. I talked to my attorney and showed him, but he advised, so it must be done again, but because five or six documents are necessary and each is hundreds of pages I want to lodge a formal complaint because you do have the authority to make the appropriate changes, and it's going to save a lot of work. Trust me. You do have integrity. Amel. Thanks.

1RP 363–64.

Dalluge complained about having to come in to the office, and a few times told Dove he did not have time to wait around for Hutchinson, that "if Deputy Hutchinson wanted him, he could come look for him."

1RP 329. Dove recalled a specific day when Dalluge asked her to call Hutchinson to tell him Dalluge was at the lobby window. 1RP 330. This was May 24, the day after Dalluge left the note asserting he was "fulfilling all necessaries" and, almost two months after becoming homeless, acknowledging his paperwork "omission." 1RP 423–24. Dove made the call, then told Dalluge Hutchinson was on his way. 1 RP 330. Hutchinson's office is a five-to-seven minute drive from the GCSO lobby. 1RP 375. Dalluge left the lobby a few minutes later and was gone by the time Hutchinson arrived. 1RP 330, 375. Later that day, Dalluge again appeared at GCSO, asking for Hutchinson, and, again, was gone by the time Hutchinson arrived, leaving the message that he did not have time to wait and Hutchinson could come find him "up by the juvenile." 1RP 375–76, 420. It had taken Hutchinson, at most, ten or fifteen minutes, to get to the GCSO lobby. 1RP 424. The juvenile court is located some distance from the main courthouse complex and Hutchinson did not try to find Dalluge. 1RP 424.

On another transient form dated May 29 and delivered to GCSO on June 1, 2017, Dalluge wrote, among other things, "[h]ave a home. It's just your office intimidates people." 1RP 365–67. Dalluge had crossed out the words "transient/homeless" and written: "I have a home so." 1RP 367. In the space where he was to write where he slept or stayed, he wrote:

"Omitted due to copious amounts and available time. Will provide asap. Thank you for being patient. And please read prior page re address and people intimidated." 1RP 367. On the back of the note, Dalluge wrote: "Dear Greg Hutchinson. I tried to see you. Anyways, get in touch with me asap. Hope you have a good day. Best wishes. Amel Dalluge." 1RP 367.

On June 6, Dalluge delivered another note, 1RP 368, "Sex Offender Registration of Amel Dalluge. Dear Mr. Greg Hutchison. I missed you again. Apologies. Resources are scarce. I am having an outside agency help me with the forms because of my disabilities and county don't provide for. Respectfully submitted, Amel Dalluge. Please have a good day." 1RP 370. Dalluge had never before mentioned disabilities to Hutchinson. 1RP 370.

Dalluge's hand-delivered June 13 letter contained the header: "Note, vulnerable disabled adult." 1RP 370. It said: "Dear Mr. Greg Hutchison. It seems you are never in your office. Anyways, I am discussing you to the County Commissioners. Please do not take that wrong. I am simply trying to make everyone's work easier by actually giving some feedback. You have been most helpful, patient and kind. In thanks, Amel Dalluge." 1RP 370–71. This note was stapled to a blank transient form. 1RP 371. Dalluge wrote on another otherwise-blank transient form dated June 19, 2017: "(Cannot read or write)". 1RP 371–72.

That form was stapled to a document concerning assistance in filling out protection order paperwork, with words written in Dalluge's handwriting: "(Legal document drafted by a mentally disabled person)". 1RP 372. The note went on:

> Dear Mr. Greg Hutchison. Today I am meeting with the commissioners again and the Human Resources Department so I may supplement the omission with their help. On Friday I have a hearing in the superior court about this registration. May I call you if needed? Thanks for being cool, patient and kind. Praying you the best in sincerity, Amel Dalluge.

1RP 372.

Hutchinson never received a transient form or any other communication containing any address or other description of where Dalluge may have stayed from March 29, 2017, the day Hutchinson first learned Dalluge was homeless, through June 19, 2017. 1RP 373.

C. DALLUGE'S SELF-REPRESENTATION AND MID-TRIAL ASSERTION OF DEBILITATION RESULTING IN THE COURT'S FINDING HE VOLUNTARILY WAIVED HIS RIGHT TO BE PRESENT AT A CRITICAL STAGE OF TRIAL

Dalluge asked the court to be allowed to represent himself on a morning trial had been scheduled to start, November 1, 2017. 1RP 26. During his colloquy with the court, he said he had done "independent studies" in the law, had filed a personal restraint petition, and had taken classes about the law while in prison. 1RP 28. He complained the prison

classes lacked substance, stating he had taught himself most of what little he knew. 1RP 28–29. He said he completed a year and a half of college. 1RP 29. He had represented himself twice in criminal matters, once successfully defending himself at trial, and had "represented" someone else in a civil matter. 1RP 29–30. During that colloquy, he asserted the manner in which the State charged him was "an obfuscation." 1RP 32. After considerable further discussion between the court, Dalluge, counsel, and the State, and a recess during which the court reviewed a number of cases concerning last-minute requests for self-representation, 1RP 52, the court found Dalluge's waiver of his right to counsel to be knowing and voluntary and granted his motion to represent himself. 1RP 70. Trial was continued at Dalluge's request. 1RP 71.

At the start of the final morning of the eventually-held three-day trial, Dalluge announced he was having medical issues:

> I have a problem where I start to lose my sight in this side of my eye. This eye over here is going to where it's getting fuzzy and I barely can see. And this eye over here I'm starting to get double and triple vision. And then out of this nostril I'm having trouble to breathe and I've been having trouble standing. Everything this morning. I was going to see if the court would give me permission at least to go see medical. I'm here, you know, because -- but I should be in the hospital right now. . . . Hey, seriously, Your Honor, I am having trouble even standing up.

3RP 5. This was the first time the court, standby counsel, and the State had heard anything from anyone about Dalluge having vision problems or his other purported symptoms. 3RP 7. When the court explained standby counsel could take over, Dalluge said: "Having trouble following you, your honor. It's not that I'm trying to be rude or nothing like that, but if I could please go to medical." 3RP 6. After a 29 minute recess, 3RP 9, Physician Assistant Kathleen Holloway told the court the most likely scenario was that Dalluge was having a panic attack. 3RP 9. Holloway had been a nurse, then a physician assistant, at the Grant County jail for almost 20 years. 3RP 18. She had examined Dalluge in the past. 3RP 18.

Dalluge had told Holloway he thought he was having a panic attack. 3RP 13. He reported he was having a problem on the right side of his face, as well as vision problems, and that he had been told at one time he had a neurological disorder but that he had never followed up. 3RP 10. However, Holloway reported all his body signs were stable. 3RP 10. "His blood pressure's beautiful. His oxygen levels are beautiful. He has no fever. His pulse is regular." 3RP 10. Holloway told the court she could not tell whether Dalluge was suffering a true panic attack at that point, it was just the most likely scenario. 3RP 11. She then told the court Dalluge did not look like someone having a panic attack. 3RP 11. She hesitated to prescribe medication because he did not have any symptoms. 3RP 11–12.

She said people experiencing panic attacks are normally jittery and shaky, sweating and displaying a lot of other symptoms. 3RP 12. Dalluge exhibited none of those symptoms. 3RP 12. In her professional opinion, nothing prevented Dalluge from participating at trial, at least to the extent of sitting and listening to testimony. 3RP 12. Holloway rejected standby counsel's suggestion that perhaps a "high concentration of caffeine" earlier in the day had exacerbated some other issue, pointing out Dalluge's pulse was 80, his respiration was normal, and this was a "mental issue." 3RP 16–17. Holloway would have expected to see objectively verifiable indicators of a panic attack, such as being shaky, a high pulse, sweating, and heavy breathing. 3RP 17. After confirming Holloway failed to identify any objective symptoms of a panic attack, the court said: "I just want to make sure you're saying at this point you have no basis to believe that he has a panic attack other than his subjective history that he's giving." 3RP 19. Holloway replied: "Yes. That's correct." 1RP 19.

As the court, the State, and standby counsel discussed how best to proceed, the State argued: "It does not appear that [Dalluge] is actually suffering a physical condition, but he's trying to use this because all of his prior attempts to get this case continued have failed." 3RP 21–22. The

State asked the court to issue a "drag order"[2] to have Dalluge brought to court by force, if necessary, "so that he can be made aware that we could continue this case without him." 3RP 21.

Explaining that procedures existed that would allow trial to continue without Dalluge and, perhaps, without standby counsel, the State said, "he needs to know that if he wants to persist in claiming that he [couldn't] proceed and [wants] to make sure that his lawyer can't proceed either, then we are going to go ahead without either one of them." 3RP 22. Standby counsel valiantly argued Dalluge was entitled to a continuance. 3RP 26. The State read a passage from *State v. Thurlby*, 184 Wn.App. 918, 339 P.3d 252 (2014), concerning actions available to the court when a defendant voluntarily absents himself during trial. 3RP 27–28.

The court asked whether Dalluge needed to be physically brought back to court and the State responded it did not know the answer, but it did not "really like the idea of putting him in one of those chairs and dragging him up here." 3RP 22. The court responded that was exactly why it, also, did not want to issue a drag order. 3RP 22. The State suggested standby counsel could explain the circumstances to Dalluge and asked for a recess for that purpose. 3RP 22–23.

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[2] The transcriptionist, apparently unfamiliar with this terminology, transcribed "drag order" as "drag roller." 3RP 21. The transcription is incorrect.

The court asked standby counsel to go to the jail and explain this discussion to Dalluge. 3RP 30. The court instructed counsel to discuss specifically both Holloway's inability to find objectively verifiable symptoms of the self-reported panic attack and the court's options, including the option to proceed without Dalluge or standby counsel. 3RP 30. The court also asked that Holloway check Dalluge one more time. 3RP 31. The court told standby counsel it could not find anything supporting a conclusion Dalluge was actually suffering a panic attack. 3RP 31. The parties and the court agreed continuance would be proper if Dalluge's absence was involuntary. 3RP 32. Trial recessed for an hour. 3RP 33.

After the recess, Holloway reported Dalluge's vital signs were still stable, his pulse was regular in the 70s to 80s, there was no distress with his breathing, and his gait and his perception were normal. 3RP 34. He ate the two cookies she offered him without any problem. 3RP 34. He did not look or act any differently than he had when she first examined him. 3RP 35. Dalluge had complained of weakness, however, and wanted to lie down instead of sit up. 3RP 34. He told Holloway he did not think he could go back to court. 3RP 35. Holloway told the court that, in her opinion, Dalluge was physically able to stand and walk into the courtroom. 3RP 34.

Standby counsel reported Dalluge did not want to come to court and had authorized counsel to proceed without him. 3RP 36. Dalluge wanted to stay in his cell while trial continued and did not want to testify. 3RP 36. Dalluge gave standby counsel full authority to continue cross-examination. 3RP 36. Counsel had asked whether Dalluge wanted him to ask for a continuance, and confirmed Dalluge was not objecting to trial resuming that day without him. 3RP 36. Counsel said: "I'm taking over for Mr. Dalluge." 3RP 37. The State moved the court for an order appointing standby counsel. 3RP 37.

The court recited its findings of fact into the record: that immediately after trial resumed at 8:30 that morning, Dalluge complained of problems with focusing his right eye, and perhaps some other issues; that the physician's assistant examined Dalluge and could not find any objective findings to support any type of diagnosis but that it could be a panic attack; that she could find no objective evidence of Dalluge's subjective complaints; that she examined Dalluge again during a recess; that standby counsel had gone over with Dalluge the in-court discussion of procedural options; and that the physician assistant "could still find no symptoms that would allow her to diagnose any type of physical condition or mental health condition that might be affecting Mr. Dalluge at this point in time." 3RP 38–39. The court took note that Holloway could find no

objective reason Dalluge could not physically stand up, walk into the courtroom, and at least sit through the remainder of trial. 3RP 40. The court found Dalluge had decided he did not want to come to court for the remainder of the day and authorized counsel to proceed on his behalf. 3RP 40. The court found, "Mr. Dalluge has made a decision to voluntarily waive his presence here in the courtroom for the remainder of the trial." 3RP 40. The court then said Dalluge would still be welcome in court if he did want to come. 3RP 40. Based on the fact of Dalluge's discussion with standby counsel about all the various options available, the court found Dalluge's decision was knowingly and intelligently made. 3RP 41. Defense counsel did not object to these findings. 3RP 41.

When trial finally got underway, the court told the jury, "as you may notice, Mr. Dalluge is not present. And you are not - - I'm instructing you you are not to speculate as to the reasons for this absence nor are you to consider his absence for any purpose in this trial." 1RP 402–03. The court told the jury standby counsel had taken over Dalluge's representation. 1RP 403.

D. JURY INSTRUCTION CONFERENCE CONCERNING THE AFFIRMATIVE DEFENSE ESTABLISHED BY RCW 9A.44.130(6)(C)

The state objected to Dalluge's proposed statutory affirmative defense instruction, arguing it merely reiterated in the positive the

question of whether Dalluge did or did not comply with statutory registration requirements. 1RP 450–51. The parties and the court were discussing the form of the proposed instruction when the court announced: "Well, I think it needs to come directly from the statute that's being referred to . . . the statute is what governs[.]" 1RP 451. Defense counsel responded: "I actually looked up the statute. I couldn't find the WPIC instruction, so I went to the statute." 1RP 451. The state summed up its concern: "So [the instruction] basically says: 'If the offender followed all of the rules, it's an affirmative defense that they have followed all the rules.' " 1RP 453–54. The court repeated: "So if the statute has it, it's the law." 1RP 453. The instruction submitted to the jury contained the language from each subsection of RCW 9A.44.130 relevant to the affirmative defense established by RCW 9A.44.130(6)(c), in the order established after discussion between the state, defense counsel and the court as to how best present this statutory language. 1RP 463–71; CP 83.

III. ARGUMENT

A. OVER THE STATE'S OBJECTION, THE TRIAL COURT AGREED TO DEFENSE COUNSEL'S REQUESTED STATUTORY AFFIRMATIVE DEFENSE INSTRUCTION, STATING: "IT'S THE LAW." DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR PROPOSING A STATUTORY AFFIRMATIVE DEFENSE WHEN NO COURT HAS FOUND IT UNCONSTITUTIONAL OR PREJUDICIAL AND WHEN UNCONTROVERTED AND OVERWHELMING TRIAL EVIDENCE DEMONSTRATED DALLUGE'S UTTER FAILURE TO PROVIDE AN ACCURATE WEEKLY ACCOUNTING OF HIS WHEREABOUTS.

1. Standard of review

Claims of ineffective assistance of counsel present mixed questions of law and fact which appellate courts review de novo. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001) (citing *Strickland v. Washington,* 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. S.M.,* 100 Wn.App. 401, 409, 996 P.2d 1111 (2000)).

The two-prong standard established in *Strickland, supra,* 466 U.S. at 686, and *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), examines both deficient performance and prejudice and applies even when the alleged error is of constitutional magnitude, flowing from counsel's request for a jury instruction that misstates the law. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Under *Strickland, McFarland*, and *Kyllo,* Dalluge bears the burden of establishing both that his attorney's request for the statutory affirmative defense instruction was deficient, and that he was prejudiced by this deficiency. *Strickland,* 466 U.S. at 687; *McFarland*, 127 Wn.2d at 334–35; *Kyllo,* 166 Wn.2d at 862–63. To prove prejudice, Dalluge must establish there is a reasonable probability the result would have been different but for counsel's performance. *Strickland,* 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome after

considering the totality of evidence before the jury. *Strickland,* 466 U.S. at 694–95.

If either prong is unsatisfied, this Court need not consider the other. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

In cases where prejudice is presumed and the constitutional issues are not embodied in a claim of ineffective assistance of counsel, the State bears the burden of demonstrating error was harmless beyond a reasonable doubt. *State v. Caldwell*, 94 Wn.2d 614, 618, 618 P.2d 508 (1980). Constitutional errors are harmless beyond a reasonable doubt when the evidence is so overwhelming any rational trier of fact would necessarily have found the defendant guilty. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (citing *State v. Aumick*, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995); *State v. Whelchel,* 115 Wn.2d 708, 728, 801 P.2d 948 (1990)).

2. *Dalluge fails to demonstrate ineffective assistance of counsel because counsel's request for an unexamined statutory defense is not deficient performance and Dalluge cannot establish prejudice.*

a. Counsel's request for an instruction on the statutory defense established by RCW 9A.44.130(6)(c) was not deficient performance.

The State charged a single count of failure to register as a sex offender, alleging Dalluge violated three registration requirements

required by RCW 9A.44.130(6): (1) failure to provide signed, written notice to the sheriff within three business days after ceasing to have a fixed residence, RCW 9A.44.130(6)(a); (2) failure to report weekly to the sheriff's office, in person during normal business hours, on a day specified by the sheriff's office, RCW 9A.44.130(6)(b); and (3) failure to provide an accurate accounting of where he stayed during the week, RCW 9A.44.130(6)(b). CP 9–10.

RCW 9A.44.130(6)(c) establishes an affirmative defense to all three means charged in the State's information:

> If any person required to register pursuant to this section does not have a fixed residence, it is an affirmative defense to the charge of failure to register, that he or she provided written notice to the sheriff of the county where he or she last registered within three business days of ceasing to have a fixed residence and has subsequently complied with the requirements of subsections (4)(a)(vi) or (vii) and (6) of this section. To prevail, the person must prove the defense by a preponderance of the evidence.

This is not a case where, by the time of trial, there was case law holding a given instruction erroneous, case law "counsel should have discovered." *State v. Kyllo*, 166 Wn.2d at 862.

No Washington case, published or unpublished, declares the statutory defenses in RCW 9A.44.130 unconstitutional, nor do any of the

handful of cases[3] in which these defenses appear address the significance of the legislature's assignment of the burden of proof to the defendant. This Court briefly noted the availability of this statutory defense in 2009, holding an appellant's failure to attempt to prove the defense established under RCW 9A.44.130(6)(c)—the defense at issue here—was immaterial when the State failed to meet its burden of proof. *State v. Drake,* 149 Wn. App. 88, 95, 201 P.3d 1093 (2009).

In the context of the Washington Pattern Jury Instructions (WPICs), defense counsel is not ineffective when proposing a jury instruction based on an unquestioned WPIC, especially where the instruction is consistent with the defendant's theory of the case. *State v. Studd,* 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). *See, also, State v. Gallagher,* 112 Wn.App. 601, 51 P.3d 100 (2002) (counsel cannot be said to have rendered deficient representation by requesting a WPIC instruction before the Supreme Court stated it was defective), *review denied,* 148 Wn.2d 1023 (2003).

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[3] In addition to *Drake,* the statutory affirmative defenses for failure to register as a sex offender are recognized without discussion in *State v. Furtwangler,* 152 Wn.App. 1034, note 1 (2009) (unpublished); *State v. Mehaffey,* 101 Wn.App. 1012 (2000) (unpublished); *State v. Bassett,* 97 Wn. App. 737, 740, 987 P.2d 119 (1999); *State v. Pickett,* 95 Wn. App. 475, 480 note 9, 975 P.2d 584 (1999); *State v. Alvarez,* 92 Wn.App. 1067 (1998) (unpublished). The State has found no other cases specifically mentioning the statutory defenses of RCW 9A.44.130.

The affirmative defense here, including its burden of proof, was established by the legislature. In the context of statutory affirmative defenses, "[f]ailure to request an instruction on a potential defense can constitute ineffective assistance of counsel." *State v. Flora*, 160 Wn. App. 549, 556, 249 P.3d 188 (2011) (citing *In re Pers. Restraint of Hubert,* 138 Wn. App. 924, 929, 158 P.3d 1282 (2007) (Counsel for defendant charged with rape was "plainly" ineffective for failing to be aware of and request instruction on a statutory defense that allocated a burden of proof to the defendant.) In the circumstance of a statutory affirmative defense, counsel is held ineffective for failing to request the instruction unless the trial court would have not have given it. *State v. Powell,* 150 Wn.App. 139, 154, 206 P.3d 703 (2009); *Flora*, 160 Wn. App. at 556.

The affirmative defense here was consistent with Dalluge's theory of the case. Dalluge asserted he had complied to the best of his ability with all the requirements of RCW 9A.44.130(6). Trial evidence included his various dash-in-and-dash-out visits to the Grant County Sheriff's Office, 1RP 329–330, 375–76, 423–24, his text messages to Hutchinson reporting unspecified issues with his residential circumstances and the exchange with Hutchinson giving a new residential address, albeit one that could not be verified, 1RP 357–59, 360–61, and the notes and comments he wrote on the transient report forms he delivered from time to time to GCSO, 1RP

361–368, 370–72. Defense counsel argued the statutory defense in closing, asserting the evidence established Dalluge was sincerely trying to comply and did not know he had failed. 1RP 539–41, 543. "In his mind he has completed these forms." 1RP 544.

This Court should find requesting a statutory affirmative defense no court has declared defective or unconstitutional is not deficient performance and that counsel did not render ineffective assistance.

b. Dalluge fails to demonstrate a reasonable probability that, but for the affirmative defense instruction, the outcome of the proceedings would have been different.

Dalluge asserts prejudice is presumed to flow from counsel's deficient performance because the affirmative defense instruction misstated the law by assigning him the burden of proving an element of the State's case by a preponderance of the evidence when the burden belonged solely to the State to prove the same element beyond a reasonable doubt. Br. of Appellant at 23. He also asserts counsel made an objectively unreasonable argument when he argued that the fact the State did not charge violations through the last day of trial proved his affirmative defense. Br. of Appellant at 24. Relying on this Court's decision in *State v. Carter*, 127 Wn. App. 713, 718, 112 P.3d 561 (2005), Dalluge argues the affirmative statutory defense instruction gave the jury a

clear misstatement of the law, a "misstatement presumed to have misled the jury in a manner prejudicial to the defendant." Br. of Appellant at 25 (internal quotation marks omitted).

As argued in more detail below, substantial uncontroverted evidence established Dalluge did not provide GCSO with an accurate accounting of where he spent each night as required by RCW 9A.44.130(6)(b). Evidence established he did not provide, orally or in writing, even one such location in any of his submissions, including the weeks encompassing the charging period. 1RP 361–368, 370–72.

Considering this uncontroverted evidence, there is no reasonable probability the jury would have refused to convict had it not been given the statutory affirmative defense instruction. *Strickland,* 466 U.S. at 694; *McFarland,* 127 Wn.2d at 335. Dalluge has failed to establish any probability the trial result would have been different but for counsel's performance. *Strickland,* 466 U.S. at 694.

This Court should conclude Dalluge fails to meet either of the two prongs necessary for finding ineffective assistance of counsel.

3. The State meets its burden of establishing Dalluge's guilt with substantial, uncontroverted evidence, rendering any error harmless beyond a reasonable doubt.

Assuming, *arguendo*, the statutory affirmative defense instruction misstated the law and prejudice is presumed,[4] a new trial is not required when the error can be declared harmless beyond a reasonable doubt. *Caldwell,* 94 Wn.2d at 618; *Easter*, 130 Wn.2d at 242. When error is presumed prejudicial, the State has the burden of proving the error harmless beyond a reasonable doubt. *Caldwell*, 94 Wn.2d at 618 (citing *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980), *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

The jury unanimously found Dalluge guilty of only one of the three alternative means charged. CP 87. Jurors could not agree on whether Dalluge provided signed, written notice to the Grant County sheriff within three business days after ceasing to have a fixed residence. CP 87. They unanimously found he complied with the duty to report weekly, in person, to the sheriff's office during normal business hours, but that he failed to provide an accurate accounting of where he had stayed during the week. CP 87. Regardless of whether the affirmative defense instruction could have misled the jury on the burden of proof or whether counsel rendered deficient performance when he argued objectively unreasonable "facts not

[4] The State does not take any position here on whether the unchallenged statutory defense misstates the law, having noted this defense, with its burden-shifting provision, has never been examined by a Washington appellate court. That issue does not need to be decided here in light of the facts of this case.

in evidence", there is no possibility whatsoever the outcome of Dalluge's trial would have been any different.

Overwhelming, uncontested evidence supported the jury's guilty verdict. Dalluge conceded he had been convicted of a felony sex offense prior to March 29, 2017 and was required to register during the charging period, March 29, 2017 through May 26, 2017. 1RP 522. The sole issue remaining concerning the means on which Dalluge was convicted was whether he had submitted to GCSO an accurate accounting of where he stayed during each week of the charging period. CP 77. The uncontroverted evidence summarized below has left no doubt that he did not—not once, not ever.

Pam Dove, the GCSO records custodian, testified all transient paperwork submitted by registered offenders was received, date stamped, and put in Hutchinson's box. 1RP 326–27. No GCSO employee would have refused to take any paperwork Dalluge wanted to deliver. 1RP 327. Dove could not recall any time GCSO had lost or misplaced paperwork from Dalluge or anyone else. 1RP 331. Deputy Joe Wester instructed Dalluge, in person, on how to fill out the transient paperwork on April 14, 2017. 1RP 307–08. Dalluge had come to the office specifically to inquire about homeless/transient paperwork, 1RP 307–08, demonstrating he was already aware special reporting requirements existed. Dalluge told Wester

he understood Wester's oral instructions and promised to read the instructions printed on the form. 1RP 310. There is no evidence he expressed any confusion or asserted he could not read. 1RP 310.

None of the various phone numbers Dalluge gave Hutchinson panned out—the people answering said they did not know who Hutchinson was talking about or that Dalluge was not there and the person answering did not know how to reach him. 3RP 425. Some of Dalluge's text messages were prefaced with: "This isn't my phone". 3RP 425.

Dalluge had Hutchinson's cell phone number and used it April 17, three days after he met with Wester, when he gave Hutchinson an apparently bogus residence address and multiple excuses for not being able to meet Hutchinson at that location. 1RP 358–59. Although Hutchinson went later that day to the address Dalluge gave him, Dalluge was not present and Hutchinson was unable to verify Dalluge lived there. 1RP 359–60. Dalluge used Hutchinson's cell number again on May 4, texting: "This is Amel Dalluge. I should have everything sorted out soon. Thank you for being patient and kind." 1RP 360–61.

On May 9, Dalluge wrote: "Dear Mr. Greg Hutchison. Please contact Doug Anderson [a local attorney] regarding Amel Dalluge's sex offender registration. If this is an issue or not appropriate, et cetera, please express such immediately so that we may remedy. Thank you for your

patience, kindness and understanding. Sincerely, Amel Dalluge." On May 23, five weeks after his first appearance at the GCSO lobby and over seven weeks after becoming transient, Dalluge wrote:

> Saturday. Dear Mr. Hutchison. As I understand, I am fulfilling all necessaries. Please correct if I am incorrect. *One omission I am aware of is the paperwork.* I talked to my attorney and showed him, but he advised, so it must be done again, but because five or six documents are necessary and each is hundreds of pages I want to lodge a formal complaint because you do have the authority to make the appropriate changes, and it's going to save a lot of work. Trust me. You do have integrity. Amel. Thanks.

1RP 363–64 (emphasis added). The day after writing this letter, Dalluge appeared twice at the GCSO lobby, asking to see Hutchinson, yet declined to wait the ten or fifteen minutes it might have taken for Hutchinson to arrive. Dalluge skedaddled as soon as he knew Hutchinson was on his way, demanding Hutchinson go searching for him. 1RP 423–24.

Although outside the charging period, the June 6 handwritten note delivered to GCSO demonstrates Dalluge's escalating avoidance strategy: "Sex Offender Registration of Amel Dalluge. Dear Mr. Greg Hutchison. I missed you again. Apologies. Resources are scarce. I am having an outside agency help me with the forms because of my disabilities and county don't provide for. Respectfully submitted, Amel Dalluge. Please have a good day." 1RP 370. It was now over two months since Dalluge's eviction and the first time he mentioned "disabilities" to Hutchinson. 1RP 370. A week

later, on June 13, he hand-delivered a letter with the header: "Note, vulnerable disabled adult." 1RP 370. It said: "Dear Mr. Greg Hutchison. It seems you are never in your office. Anyways, I am discussing you to the County Commissioners. Please do not take that wrong. I am simply trying to make everyone's work easier by actually giving some feedback. You have been most helpful, patient and kind. In thanks, Amel Dalluge." 1RP 370–71. This note was stapled to a blank transient form. 1RP 371.

These facts establish beyond a reasonable doubt a literate, articulate Dalluge knew how to reach Hutchinson, was fully aware he was required to provide information concerning his whereabouts, and was flat-out refusing to do so. Not one of Dalluge's transient forms, notes or texts contained a single address or other description of a location where he had stayed from March 29, 2017, the day Hutchinson first learned Dalluge was homeless, through June 19, 2017. 1RP 373.

The evidence establishes Dalluge went to astonishing lengths in an unsuccessful effort to avoid legal consequences for refusing to let Hutchinson know where he was staying. There is no probability any juror would have refused to convict on this evidence had defense counsel not requested the statutory affirmative defense. This Court should conclude the State has proved any instructional error was harmless beyond a reasonable doubt.

B. DALLUGE AFFIRMATIVELY WAIVED HIS CONTINUED PRESENCE AT TRIAL WHEN HE REFUSED TO RETURN TO COURT, DID NOT OBJECT TO TRIAL RESUMING WITHOUT HIM, AND AUTHORIZED STANDBY COUNSEL TO TAKE OVER, AFTER A PHYSICIAN'S ASSISTANT COULD FIND NO OBJECTIVE SIGNS OF ILLNESS IN EITHER OF TWO PHYSICAL EXAMINATIONS. THE TRIAL COURT DID NOT VIOLATE DALLUGE'S CONSTITUTIONAL RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF HIS TRIAL.

1. Standard of review

A trial court's decision regarding voluntary absence from trial is reviewed for abuse of discretion. *State v. Garza*, 150 Wn.2d 360, 365–66, 77 P.3d 347, 349 (2003).

2. The trial court did not abuse its discretion by finding Dalluge voluntarily waived his right to be present at a critical stage of trial when this finding was made following two physical examinations by an experienced physician assistant who believed he was able to sit in court after finding no objective symptoms of Dalluge's complaints, and when Dalluge had instructed standby counsel, after consultation, to tell the court he had no objection to trial continuing in his absence.

An accused may waive the constitutional right to be present during trial when the waiver is voluntary and knowing. *State v. Thomson*, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). Criminal Rule (CrR) 3.4(b) provides, in part: "The defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict." Once a trial has begun with the defendant present, a subsequent voluntary absence operates as an implied

waiver, and the trial may continue without the defendant. *State v. Garza*, 150 Wn.2d at 367. Although disfavored, trial in absentia is thus proper in Washington when the trial commenced in the defendant's presence and the defendant's absence is voluntary. *State v. Jackson*, 124 Wn.2d 359, 361, 878 P.2d 453 (1994) (citing CrR 3.4).

Whether a defendant's absence is voluntary depends on the totality of the circumstances. *State v. Garza*, 150 Wn.2d at 367 (citing *State v. Thomson*, 123 Wn.2d at 881). To make that determination, a trial court must engage in a three-step analysis: (1) make a sufficient inquiry into the reasons for the defendant's absence to justify its finding whether the absence was voluntary; (2) make a preliminary finding of voluntariness if justified; and (3) afford the defendant an adequate opportunity to explain his absence before sentence is imposed. *Id.*

In Dalluge's case, the trial court's actions satisfy these three factors. Unlike the common circumstance where a defendant mysteriously fails to show up for trial and the court can only speculate as to the reasons for the absence, Dalluge announced the morning of the third day of trial he was too physically debilitated to remain in the courtroom. 3RP 5. The court allowed Dalluge to return to the jail for an examination by Holloway, an experienced physician assistant, who then appeared and gave the court her assessment of Dalluge's condition. 3RP 9. Holloway

had examined Dalluge before. 3RP 18. Holloway recited the issues Dalluge had reported to her and his assertion that he had been told at some time he had an unspecified "neurological disorder" which he never investigated further. 3RP 10. Holloway told the court there were no objective markers to substantiate Dalluge's alleged suffering: "His blood pressure's beautiful. His oxygen levels are beautiful. He has no fever. His pulse is regular." 3RP 10. She told the court Dalluge did not look like someone having a panic attack. 3RP 11. Holloway could not determine whether Dalluge was suffering a "true panic attack" and thought it was the most likely scenario. 3RP 11. She said she hesitated to prescribe medication because he had no symptoms. 3RP 11–12. She said people experiencing panic attacks are normally jittery and shaky, sweating and displaying a lot of other symptoms. 3RP 12. Dalluge exhibited none of those symptoms. 3RP 12. It was her professional opinion that nothing prevented him from, at least, sitting in the courtroom and listening to testimony. 3RP 12. The court said: "I just want to make sure you're saying at this point you have no basis to believe that he has a panic attack other than his subjective history that he's giving." 3RP 19. Holloway replied: "Yes. That's correct." 1RP 19.

The court's inquiry did not stop there. After extensive discussion between the court, the State, and standby counsel on how best to proceed,

the court asked Holloway to examine Dalluge a second time. 3RP 31. An hour later, Holloway reported Dalluge's vital signs were still stable, his pulse was regular, there was no distress with his breathing, his gait and his perception were normal. 3RP 34. He ate the two cookies she offered him without any problem. 3RP 34. He did not look or act any differently than he had when she first examined him. 3RP 35. He complained of "weakness" and wanted to lie down, telling Holloway he did not think he could go back to court. 3RP 34. Holloway again expressed her professional opinion that Dalluge was physically able to stand and walk into the courtroom. 3RP 34.

Standby counsel had also spoken with Dalluge during the recess and reported Dalluge wanted to stay in his cell while trial continued. 3RP 36. He did not want to testify. 3RP 36. Counsel asked Dalluge whether he wanted a trial continuance and confirmed to the court Dalluge did not object to trial resuming without him. 3RP 36.

The court recited its findings of fact into the record, reciting Dalluge's complaints and that the physician assistant could not find any objective findings to support any type of diagnosis; that she could find no objective evidence of Dalluge's subjective complaints or of a panic attack; that after examining Dalluge again during the second recess she "could still find no symptoms that would allow her to diagnose any type of

physical condition or mental health condition that might be affecting Mr. Dalluge at this point in time" and that stand-by counsel had gone over with Dalluge the in-court discussion of procedural options. 3RP 38–39. The court took note that Holloway could find no objective reason Dalluge could not physically stand up, walk into the courtroom, and at least sit through the remainder of trial. 3RP 40. The court found Dalluge decided he did not want to come to court for the remainder of the day and had authorized counsel to proceed on his behalf. 3RP 40.

These actions satisfied the first step of making a sufficient inquiry into the circumstances of Dalluge's nonappearance to justify a finding of voluntary absence.

The court then satisfied the second step when it found "Mr. Dalluge has made a decision to voluntarily waive his presence here in the courtroom for the remainder of the trial." 3RP 40. The court said Dalluge would still be welcome in court if he did want to come. 3RP 40.

The third step, a formal hearing affording Dalluge an opportunity to explain his absence before sentencing, was not required under these facts. Dalluge dramatically and completely explained his absence to the court at the beginning of the proceeding and again twice to Holloway and once to standby counsel, knowing these two professionals would relay that

information to the court. There was nothing more he could have told the court before sentencing, other than: "I really *was* sick, Your Honor."

This Court should find the trial court did not abuse its discretion when it continued trial in Dalluge's absence after finding a knowing and voluntary waiver of his right to be present at critical stages of trial.

C. THE COURT LACKED LEGAL AUTHORITY TO IMPOSE DISCRETIONARY COSTS AND INTEREST ON AN INDIGENT DALLUGE.

The State concedes recent changes in Washington law necessitate resentencing to correct erroneously-imposed fees and costs.

IV. CONCLUSION

This Court should affirm Dalluge's conviction for failure to register as a sex offender and remand to Grant County Superior Court to amend judgment and sentence as to fees, costs, and interest imposed.

DATED this 28th day of May, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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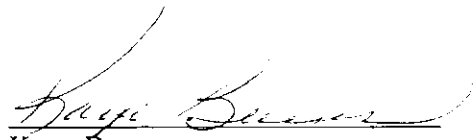
Dated: May 28, 2019.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

May 28, 2019 - 10:41 AM

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