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Court of Appeals
Division III
State of Washington
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NO. 36626-0-III

IN THE COURT OF APPEALS OF STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, RESPONDENT

v.

THIEDE, CARLOS MICHAEL, APPELLANT

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

Superior Court Cause No. 17-1-00468-8

The Honorable Judge David G. Estudillo

BRIEF OF RESPONDENT

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Table of Contents

I. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR.....1

A. VICTIM S.R. AFFIRMED THAT SHE WAS “CONCERNED” ABOUT THE THREATS MR. THIEDE MADE TO KILL HER, BLOW UP HER SCHOOL AND KILL HER FAMILY AND ALL HER FRIENDS. S.R. ALSO STATED THAT SHE WAS “AFFECTED BY” MR. THIEDE. MOREOVER, S.R.’S FRIEND, A.R., WHO RECORDED PART OF MR. THIEDE’S VERBAL THREAT, AFFIRMED THAT SHE WAS CONCERNED FOR HER OWN SAFETY AND S.R.’S, AND THAT A.R. TOOK THE THREATS SERIOUSLY. WAS THE EVIDENCE SUFFICIENT TO SUPPORT THAT A RATIONAL TRIER OF FACT COULD HAVE FOUND S.R. SUBJECTIVELY FEARED THAT MR. THIEDE WOULD CARRY OUT HIS THREATS WHEN VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION? (ASSIGNMENT OF ERROR NO. 1)1

B. BOTH THE PROSECUTION ATTORNEYS AND DEFENSE COUNSEL MISSED THAT THERE WERE TWO RECORDED VIDEOS ON A CD PROVIDED BY ONE OF THE INVESTIGATING LAW ENFORCEMENT OFFICERS. THE EXISTENCE OF THE RECORDINGS WERE DISCOVERED DURING TRIAL AT WHICH TIME THE DEFENSE ATTORNEY REQUESTED TO RECESS EARLY SO THAT HE COULD REVIEW THE RECORDINGS WITH HIS CLIENT, CONTACT PEOPLE REGARDING THE RECORDINGS, AS WELL AS THINK ABOUT AND RESEARCH THE ISSUE. THE COURT GRANTED THE DEFENSE ATTORNEY AN EARLY RECESS AND WHEN THE COURT WAS BACK IN SESSION DEFENSE COUNSEL STATED THAT THERE WERE NO ISSUES WITH THE VIDEOS. THE DEFENSE ATTORNEY USED THE EXISTENCE OF THE VIDEOS AND THE CONTENT TO SUPPORT THE DEFENSE’S THEORIES IN THE CASE. WAS THE DEFENSE COUNSEL’S ASSISTANCE OBJECTIVELY UNREASONABLE, AND IF DEFENSE COUNSEL’S ASSISTANCE WAS OBJECTIVELY UNREASONABLE, DID MR. THIEDE SUFFER PREJUDICE AS A RESULT OF DEFENSE COUNSEL’S DEFICIENT ASSISTANCE? (ASSIGNMENT OF ERROR NO. 2).1

II.	STATEMENT OF THE CASE.....	2
A.	VICTIM, S.R., AND HER CLOSE FRIEND, A.R.'s, TESTIMONY.....	2
B.	DEFENSE COUNSEL'S HANDLING OF THE PROCEEDINGS.....	3
III.	ARGUMENT	6
A.	WHEN VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, THE EVIDENCE WAS SUFFICIENT TO SUPPORT A RATIONAL TRIER OF FACT FINDING S.R. SUBJECTIVELY FEARED MR. THIEDE WOULD CARRY OUT HIS THREATS.	6
	1. <i>Standard of Review</i>	6
	2. <i>Legal Principles on Review</i>	6
	a. The evidence in the record supports that a reasonable juror could find that S.R. subjectively feared Mr. Thiede would carry out his threats.....	7
	b. A reasonable juror could have inferred that S.R. bluffed when she messaged Mr. Thiede that she was not afraid of him.....	12
B.	DEFENSE COUNSEL'S ASSISTANCE WAS OBJECTIVELY REASONABLE, AND EVEN IF DEFENSE COUNSEL'S ASSISTANCE WAS OBJECTIVELY UNREASONABLE, MR. THIEDE DID NOT SUFFER PREJUDICE AS A RESULT OF DEFENSE COUNSEL'S DEFICIENT ASSISTANCE.	12
	1. <i>Standard of Review</i>	12
	2. <i>Legal Principles on Review</i>	13
	a. Defense counsel's assistance was objectively reasonable.....	14

b. Defense counsel's assistance did not prejudice the defendant in such a way that there is reasonable probability that the outcome of the trial would have been different.....16

IV. CONCLUSION.....18

Table of Authorities

State Cases

<i>In re Fleming</i> , 142 Wn.2d 853, 865, 16 P.3d 610 (2001).....	12
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	6
<i>State v. C.G.</i> , 150 Wn. App. 2d 604, 80 P.3d 594 (2003).....	10
<i>State v. Gomez Cervantes</i> , 169 Wn. App. 428, 434, 282 P.3d 98 (2012).....	12
<i>State v. Gonzalez</i> , 2 Wn. App. 2d 96, 115, 408 P.3d 743 (2018)	6
<i>State v. Grier</i> , 171 Wn.2d 17, 33, 246 P.3d 1260 (2011)	16
<i>State v. Jones</i> , 183 Wn.2d 327, 339, 352 P.3d 776 (2015).....	13
<i>State v. Lopez</i> , 190 Wn. App. 2d 104, 117–18, 410 P.3d 1117 (2018).....	13
<i>State v. Melland</i> , No. 76617-1-1, 2019 WL 3886661, at *7 (Wash. Ct. App. Aug. 19, 2019)	6, 7
<i>State v. Rich</i> , 184 Wn.2d 897, 903, 365 P.3d 746 (2016).....	6

Federal Cases

<i>Jackson v. Virginia</i> , 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979).....	7
--	---

Strickland v. Washington, 466 U.S. 668, 690–91, 104 S. Ct. 2052, 80
L. Ed. 2d 674 (1984).13

Statutes

RCW 9A.46.020.7

Other Authorities

MERRIAM-WEBSTER.COM, [https://www.merriam-webster.com/
dictionary](https://www.merriam-webster.com/dictionary)8. 9

MERRIAM-WEBSTER.COM, [https://www.merriam-webster.com/
thesaurus](https://www.merriam-webster.com/thesaurus)8

I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

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- B. BOTH THE PROSECUTION ATTORNEYS AND DEFENSE COUNSEL MISSED THAT THERE WERE TWO RECORDED VIDEOS ON A CD PROVIDED BY ONE OF THE INVESTIGATING LAW ENFORCEMENT OFFICERS. THE EXISTENCE OF THE RECORDINGS WERE DISCOVERED DURING TRIAL AT WHICH TIME THE DEFENSE ATTORNEY REQUESTED TO RECESS EARLY SO THAT HE COULD REVIEW THE RECORDINGS WITH HIS CLIENT, CONTACT PEOPLE REGARDING THE RECORDINGS, AS WELL AS THINK ABOUT AND RESEARCH THE ISSUE. THE COURT GRANTED THE DEFENSE ATTORNEY AN EARLY RECESS AND WHEN THE COURT WAS BACK IN SESSION DEFENSE COUNSEL STATED THAT THERE WERE NO ISSUES WITH THE VIDEOS. THE DEFENSE ATTORNEY USED THE EXISTENCE OF THE VIDEOS AND THE CONTENT TO SUPPORT THE DEFENSE'S THEORIES IN THE CASE. WAS THE DEFENSE COUNSEL'S ASSISTANCE OBJECTIVELY UNREASONABLE, AND IF DEFENSE COUNSEL'S ASSISTANCE WAS OBJECTIVELY UNREASONABLE, DID MR. THIEDE SUFFER PREJUDICE AS A RESULT OF DEFENSE COUNSEL'S DEFICIENT ASSISTANCE? (ASSIGNMENT OF ERROR No. 2).

II. STATEMENT OF THE CASE

The State adopts the Statement of Facts in Mr. Thiede's Appellate Brief, except for and in addition to the following:

A. Victim, S.R., and Her Close Friend, A.R.'s, Testimony

Unlike Mr. Thiede asserts in his appellate brief, S.R. did not indicate that she was "prepared to identify with certainty Mr. Thiede's voice on the recording" nor did she later identify Mr. Thiede's voice. *See* Br. Appellant at 3. Rather, S.R. affirmed that the caller stated his name, Carlos Michael Thiede, and threatened to kill her. Report of Proceedings (RP) (Jan. 16, 2019) at 79, 88; *cf.* Ex. P7 (containing the recordings of the relevant audio recorded threats). Mr. Thiede's citation directs the reader to the attorney's discussing S.R.'s testimony providing part of the necessary foundation to authenticate the recording. RP (Jan. 17, 2019) at 135.

During her testimony, S.R. described her interactions with a person claiming to be Carlos Michael Thiede and admitting she never met him in person. RP (Jan. 16, 2019) at 53. S.R. also described the threats this person made. RP at 56. The male person said he was going to kill her, blow up her school, kill her family and all her friends. RP at 56. Two different witnesses who were familiar with the defendant's voice confirmed that the voice A.R. recorded threatening S.R. was the defendant's voice. RP (Jan. 17, 2019) at 206, 230.

Furthermore, the context for S.R.'s "affected by" comment during her testimony, referred to in Mr. Thiede's appellate brief, at 4, is as follows:

[Q.] One of the messages that are on here is it's "XIV," and I'm thinking that refers to Roman numeral 14, "got my back nigga," and your response was, "I don't care."

Do you know what "XIV" is?

A. I don't. But then after he speaks about that, he's not going alone, and that he's coming out with my head.

Q. Okay.

A. So he would speak as if he'd bring people with him, I would assume.

Q. Okay. A gang, perhaps?

A. Yeah. I would not be completely sure. I wasn't – I would say that I was affected by him, but I was going to be calling the police in the morning, either way.

RP (Jan. 16, 2019) at 73.

Additionally, the State notes that S.R.'s friend who recorded the phone conversation with Mr. Thiede, affirmed that she was concerned for S.R. and her own safety. RP at 105. A.R. also affirmed that she took the threats seriously. RP at 106.

B. Defense Counsel's Handling of the Proceedings

Appellant's brief also inaccurately states that the defense attorney had not reviewed the recordings, and did not ask for a recess, continuance,

or mistrial. Br. Appellant at 3. While defense counsel (nor either prosecutor) did not find the videos prior to trial, and thus did not view the videos prior to trial, defense counsel requested that the court recess early once he discovered the existence of the videos. RP at 108. Defense counsel needed time to “listen to [the recordings] with my client while I’m out here and potentially make a couple phone calls to some people who usually only work until five” RP at 108. Counsel went on to say, “I need some time to think about it and do a little bit more research before I make a further request of the court.” RP at 108. The Court granted the defense counsel’s request and proceedings were adjourned at 3:56 p.m. RP at 112.

The Court was back in session at 8:33 the next morning and defense counsel stated that both the prosecution and defense counsel had found the videos. RP (Jan. 17, 2019) at 113. Defense counsel also verified that there were no issues “on the video.” RP at 113.

It was discovered that the prosecutor’s office produced the CD with the two videos (totaling 17 seconds in length) during discovery. RP at 114–15; Ex. P7. However, both of the prosecutors on this case and the defense counsel missed that there were two video clips after “a long line of pictures” on a CD received from an investigating police officer. RP at 113–14; *see* Ex. P7.

Defense counsel expressed the defense's theories of the case in closing arguments. RP at 348. Those theories were that Mr. Thiede's phone was stolen and the State did not fully investigate the case. RP at 348. During closing, defense counsel made the following remarks:

the most interesting part of this case is that they've got a video recording for two years while we're waiting to get this case to trial, and the morning of trial, they have them listen to it and say, hey, can you go up there and say this is Carlos Thiede? They didn't do anything else with it. There certainly wasn't any investigation.

RP at 350. Additionally, he also argued:

If you listen to it, why would Carlos Thiede, if he's calling some girls -- or a girl to make some threats, start with or in the conversation, "This is Carlos Michael Thiede, I'm going to kill you." Would he need to announce who he is? Does that make sense, ladies and gentlemen? Does it make sense that he would do that or does it make more sense that his phone was stolen and it's someone doing some sort of frame-up job or sham job?

RP at 352-53.

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III. ARGUMENT

A. WHEN VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, THE EVIDENCE WAS SUFFICIENT TO SUPPORT A RATIONAL TRIER OF FACT FINDING S.R. SUBJECTIVELY FEARED MR. THIEDE WOULD CARRY OUT HIS THREATS.

1. *Standard of Review*

The appellate court reviews challenges to the sufficiency of the evidence de novo as it presents a question of constitutional law. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

2. *Legal Principles on Review*

“An appellant challenging sufficiency of the evidence ‘necessarily admits the truth of the State’s evidence and all reasonable inferences that can be drawn from [that evidence].’” *State v. Gonzalez*, 2 Wn. App. 2d 96, 115, 408 P.3d 743 (2018) (quoting *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010)), *review denied*, 190 Wash. 2d 1021, 418 P.3d 790. “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Melland*, No. 76617-1-I, 2019 WL 3886661, at *7 (Wash. Ct. App. Aug. 19, 2019) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). The reviewing court must defer to the finder of fact in resolving conflicting evidence and credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Under the federal constitution, the test to establish evidentiary sufficiency is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979). This is also the standard in Washington. *Melland*, No. 76617-1-I, 2019 WL 3886661, at *7.

- a. The evidence in the record supports that a reasonable juror could find that S.R. subjectively feared Mr. Thiede would carry out his threats.

Mr. Thiede offers two statements made by the victim, S.R. to attempt to undermine the jury’s finding of guilt in Count 2. Br. Appellant at 5–7. Rather than undermining the statements offered by Mr. Thiede, these statements support the sufficiency of facts for the jury’s finding of guilt for Count 2. In addition, S.R.’s close friend, A.R.’s, testimony supports this.

The jury found Mr. Thiede guilty of felony harassment under RCW 9A.46.020. The statute states:

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person . . .
 - and
 - (b) A person who harasses another is guilty of a

class C felony if any of the following apply . . . (ii) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person

A jury could reasonably infer that S.R. subjectively feared that Mr. Thiede would carry out his threats. When S.R. responded, “Yes,” to the State’s question, “Were you concerned about these threats,” a jury could reasonably infer that she subjectively feared Mr. Thiede would carry out his threats to kill her, blow up her school and kill her family and all her friends. *See* RP (Jan. 16, 2019) at 56, 66.

Merriam-Webster’s Online Dictionary gives several relevant definitions of “fear” which include: 1) “an unpleasant often strong emotion caused by anticipation or awareness of danger”; 2) “*anxious concern*”; and 3) “reason for alarm.” *Fear*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/fear> (last visited Sept. 23, 2019) (emphasis added). Additionally, Merriam-Webster Online Thesaurus relates the word “fear” with “concern.” *Fear*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/thesaurus/fear> (last visited Sept. 23, 2019). In the explanation of the verb form of the word “fear,” the thesaurus explains the word “fear” as “to experience concern or anxiety.” *Id.* For the noun form of the word “fear,” the thesaurus shows the word “concern” as either a synonym or a word related to “fear.” *Id.*

As the dictionary and thesaurus demonstrate, the words “fear” and “concern” are interrelated. Because the dictionary and thesaurus demonstrate this interrelationship, a juror could reasonably infer S.R.’s affirmation that she was “concerned about these threats.” demonstrated a subjective fear that the defendant would carry out his threat. As such, S.R. statement supports the sufficiency of the evidence.

Additionally, the statement S.R. made that she was “affected by” Mr. Thiede affirmatively demonstrates that S.R. subjectively feared Mr. Thiede would carry out his threats to kill her, blow up her school, and kill her family and all her friends. *See* RP (Jan. 16, 2019) at 56, 73. Here again, an evaluation of the English language usage is beneficial in understanding whether S.R.’s statement supports a sufficiency of the evidence that she subjectively feared the defendant would act upon his threats to kill.

According to the Merriam-Webster Online Dictionary, the verb form of the word “affected” means, “to produce an effect upon: such as . . . to produce a material influence upon or alteration in [or] to act upon (a person, a person’s mind or feelings, etc.) so as to effect a response.” *Affect*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/affect> (last visited Oct. 2, 2019).

In this case, S.R. stated that she was “affected by” Mr. Thiede. RP at 73. In other words, Mr. Thiede produced a material influence upon S.R. and “effected a response” on S.R.’s mind or feelings to the point that S.R. made up her mind to call the police. Based on the English language usage of the word “affected” and the fact that S.R. stated she made up her mind to call the police, the jury could have reasonably found that S.R. subjectively feared that Mr. Thiede would act upon his threats.

Mr. Thiede cites to *State v. C.G.*, 150 Wn.2d 604, 80 P.3d 594 (2003), as demonstrating that the victim in a felony harassment case must subjectively fear that the threat to kill will be carried out. Br. Appellant at 6 n. 4, 7. In *C.G.* the victim, who was an adult male and vice-principle of a High School, only expressed that he was concerned that one of his female, high school students would harm either him or someone else in the future after the student exclaimed, “I’ll kill you Mr. Haney, I’ll kill you.” 150 Wn.2d at 606–07.

Contrasting with the victim in *C.G.* who was an adult male, in the position of authority (vice-principle at the high school the defendant attended), in the case at hand, the victim, S.R., was a fourteen-year-old female at the time of the incident. Also different from *C.G.*, the appellant in *C.G.* was a female high school student, and here, the appellant, an adult male, was 20 years old at the time of the incident. Further differentiating

the cases, in *C.G.* the victim only expressed a generalized concern of harm, whereas in the present case, S.R. affirmed her concern specifically about the threats, which were threats to kill. *See* RP at 64, 66.

In addition to S.R.'s testimony, S.R.'s close friend, A.R., testified that she saw and heard the threats. RP at 104–05. When asked whether A.R. was concerned for her safety and S.R.'s, she replied “Yeah.” RP at 105. Additionally, when A.R. was asked whether she took the threats seriously, she replied, “Yes.” RP at 106. A reasonable inference would be that because A.R. took the threats seriously, her close friend S.R. took the threats seriously as well.

Because S.R. affirmed that she was concerned about the threats which were threats to kill her, her family and all her friends, and stated that Mr. Thiede affected her, there was sufficient evidence to support a jury's finding that S.R. subjectively feared that Mr. Thiede would carry out his threats to kill. Additionally, S.R.'s close friend A.R. affirmed that she was concerned for both her own safety and for S.R.'s safety and that she took the threats seriously, which also supports that S.R. would have taken the threats seriously.

- b. A reasonable juror could have inferred that S.R. bluffed when she messaged Mr. Thiede that she was not afraid of him.

The jury could have also reasonably weighed S.R.'s Facebook conversation claim that she was not scared of Mr. Thiede, with the evidence in the record to reasonably infer that it was a bluff and S.R. was in fact afraid of Mr. Thiede. *See* RP (Jan. 16, 2019) at 72; Ex. P4. The jury heard S.R.'s testimony that:

1. She was "concerned" about the threats. RP at 66; and
2. She was "affected by" Mr. Thiede.

RP at 73. Additionally, S.R.'s friend, A.R., asserted that A.R. took the threats seriously. RP at 106. Based on all the evidence, a reasonable juror may have concluded that S.R.'s Facebook messenger statement to Mr. Thiede that she was not afraid of him may have been a bluff.

- B. DEFENSE COUNSEL'S ASSISTANCE WAS OBJECTIVELY REASONABLE, AND EVEN IF DEFENSE COUNSEL'S ASSISTANCE WAS OBJECTIVELY UNREASONABLE, MR. THIEDE DID NOT SUFFER PREJUDICE AS A RESULT OF DEFENSE COUNSEL'S DEFICIENT ASSISTANCE.

1. *Standard of Review*

Claims of ineffective assistance of counsel present mixed questions of law and fact. *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)). Factual findings made by the trial court will be reviewed based on the substantial evidence, whereas legal conclusions flowing from the factual findings and testimony will be reviewed de novo. *State v. Lopez*, 190 Wn. App. 2d 104, 117–18, 410 P.3d 1117 (2018). The ultimate question of whether counsel’s performance was ineffective will be reviewed de novo. *Id.* at 118.

2. *Legal Principles on Review*

An appellant who asserts ineffective assistance of counsel must satisfy a two-part test: (1) that his counsel’s assistance was objectively unreasonable and (2) that he suffered prejudice as a result of counsel’s deficient assistance. *Strickland v. Washington*, 466 U.S. 668, 690–91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “To show prejudice, the appellant need not prove that the outcome would have been different but must show only a “reasonable probability”—by less than a more likely than not standard—that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015) (citing *Strickland*, 466 U.S. at 694; *State v. Hendrickson*, 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996)).

Appellate courts presume counsel was effective. *State v. Gomez Cervantes*, 169 Wn. App. 428, 434, 282 P.3d 98 (2012).

- a. Defense counsel's assistance was objectively reasonable.

Defense counsel's assistance was objectively reasonable. Both of the prosecutors on this case and the defense counsel missed that there were two video clips after "a long line of pictures" on a CD received from an investigating police officer. RP (Jan. 17, 2019) at 113–14. As multiple attorneys missed the same evidence, the miss was reasonable.

In addition, defense counsel requested that the court recess early once he discovered the existence of these videos in order to allow him to investigate. RP (Jan. 16, 2019) at 108. Specifically, defense counsel needed time to "listen to [the recordings] with my client while I'm out here and potentially make a couple phone calls to some people who usually only work until five" RP at 108. Counsel went on to say, "I need some time to think about it and do a little bit more research before I make a further request of the court." RP at 108. The Court granted the defense's request and proceedings were adjourned at 3:56 p.m. RP at 112. The Court was back in session at 8:33 the next morning and the defense counsel stated that there were no issues "on the video." RP (Jan. 17, 2019) at 113.

The videos together are only seventeen (17) seconds long. Ex. P7. Given the short length of the video clips, defense counsel's actions once

he learned of the videos were objectively reasonable as he requested time to review the videos with his client, in addition to doing research and calling people.

Defense counsel expressed the defense's theories of the case in closing arguments. Those theories were that Mr. Thiede's phone was stolen and the State did not fully investigate the case. RP at 348.

Throughout closing arguments, defense counsel used the video clips to bolster his theories that someone stole Mr. Thiede's phone and that the State did not fully investigate the case. RP at 348–53. Defense counsel argued that while the State established that Mr. Thiede had access to a Facebook account via his computer, the evidence also supported that Mr. Thiede's phone was stolen. RP at 350. At one point in the closing arguments, defense counsel referred to the video clips and stated:

If you listen to it, why would Carlos Thiede, if he's calling some girls -- or a girl to make some threats, start with or in the conversation, "This is Carlos Michael Thiede, I'm going to kill you." Would he need to announce who he is? Does that make sense, ladies and gentlemen? Does it make sense that he would do that or does it make more sense that his phone was stolen and it's someone doing some sort of frame-up job or sham job?

RP at 352–53.

In addition, defense counsel argued that the videos also supported that the State did not fully investigate the case. Defense stated:

the most interesting part of this case is that they've got a video recording for two years while we're waiting to get this case to trial, and the morning of trial, they have [witnesses] listen to it and say, hey, can you go up there and say this is Carlos Thiede? They didn't do anything else with it. There certainly wasn't any investigation.

RP at 350.

It was objectively reasonable that the defense attorney tactically decided that the videos were actually helpful to both his case theories. The Washington State Supreme Court has stated, "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (citing *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). As such, defense counsel's assistance was objectively reasonable.

- b. Defense counsel's assistance did not prejudice the defendant in a way that there is a reasonable probability that the outcome of the trial would have been different.

Even if the defense counsel's assistance was objectively unreasonable, the attorney's actions did not prejudice the defendant in such a way that there is reasonable probability that the outcome of the trial would have been different. Mr. Thiede argues that having witnesses identify Mr. Thiede's voice on the video recording demonstrates that the outcome would have been different. *See* Br. Appellant at 9–10. However,

Mr. Thiede does not offer a different theory that would have succeeded had defense counsel found the video clips prior to trial and conducted a longer investigation. As such, Mr. Theide's argument that there was a reasonable probability that the outcome of the trial would have been different fails.

Additionally, as discussed above, rather than being hampered by the video, the defense attorney used the new evidence to bolster his argument that the phone was stolen and the State did not properly investigate. As such, the defense counsel's action of failing to find the video clips prior to trial, would not have affected the outcome of the trial with reasonable probability.

Mr. Thiede fails to overcome the presumption that counsel was effective. The record of the trial shows that defense counsel's assistance was objectively reasonable. Even if defense counsel's assistance was objectively unreasonable, Mr. Thiede has not demonstrated that there was reasonable probability that the outcome of the case would have been different but for counsel's unprofessional errors.

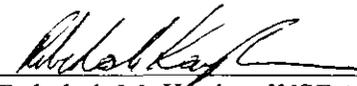
IV. CONCLUSION

As the State provided sufficient evidence for Count 2 and the defense attorney's assistance was objectively reasonable and in the alternative did not prejudice the outcome of the trial with reasonable probability, the State asks the Appellate Court to deny Mr. Thiede's appeal and affirm the convictions.

DATED this 4th of October, 2019.

Respectfully submitted,

GARTH DANO
Grant County Prosecuting Attorney


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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:

Jodi R. Backlund
Manek R. Mistry
backlundmistry@gmail.com

Dated: October 4, 2019.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

October 04, 2019 - 10:46 AM

Transmittal Information

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