FILED
Court of Appeals
Division III
State of Washington
12/13/2019 2:11 PM

36765-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TREVOR JAYMES HAUGEN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brett Pearce
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT'S ASSIGNMENTS OF ERROR 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 7

A. THE EVIDENCE IS SUFFICIENT. 7

1. Corpus delicti. 7
2. Sufficiency of the evidence. 12

B. COUNSEL WAS NOT INEFFECTIVE. 14

1. Any alleged error is invited. 15
2. Rules of law and standard of review. 18
   a. Mr. Haugen cannot demonstrate prejudice. 19
   b. Counsel's performance was not deficient. 22

V. CONCLUSION 22

TABLE OF AUTHORITIES

Federal Cases

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781,
61 L.Ed.2d 560 (1979) 12

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984) 18, 19

Washington Cases

CalPortland Co. v. LevelOne Concrete LLC, 180 Wn. App. 379,
321 P.3d 1261 (2014) 7

City of Bremerton v. Corbett, 106 Wn.2d 569,
723 P.2d 1135 (1986) 9

In re Coggin, 182 Wn.2d 115, 340 P.3d 810 (2014) 15

In re Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000) 15

Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148,
795 P.2d 1143 (1990) 12

State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996) 9, 10

State v. Benn, 120 Wn.2d 631, 845 P.2d 289 (1993) 18

State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006),
as amended (Jan. 26, 2007) 8, 9, 10

State v. Cardenas-Flores, 189 Wn.2d 243, 401 P.3d 19 (2017) 7, 8, 9

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995) 15

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 13

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011) 19

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 19

State v. Homan, 181 Wn.2d 102, 330 P.3d 182 (2014) 12

State v. Hotchkiss, 1 Wn. App. 2d 275, 404 P.3d 629 (2017), *review denied*, 190 Wn.2d 1005 (2018) 10

State v. Kintz, 169 Wn.2d 537, 238 P.3d 470 (2010) 13

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 18

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995) 18, 19

State v. Meyer, 37 Wn.2d 759 226 P.2d 204 (1951) 11

State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) 15

State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995) 12

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 12

State v. Smith, 115 Wn.2d 775, 801 P.2d 975 (1990) 9

State v. Solomon, 73 Wn. App. 724, 870 P.2d 1019 (1994) 11

State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005) 1

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) 13

State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004) 13

State v. Williams, No. 45495-5-II, 2014 WL 7462302, 185 Wn. App. 1016 (2014) (unpublished) 16

Other State Cases

Hardy v. State, 786 N.E.2d 783 (Ind. Ct. App. 2003) 17

Statutes

RCW 9.41.190 11

RCW 9.94A.500 20

RCW 9.94A.660 21

Rules

CrR 7.4 20

CrR 7.5 20

GR 14.1 16

RAP 10.3 ..... 1, 7

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by finding that sufficient evidence exists in the record to support Mr. Haugen's convictions for unlawful possession of a firearm and possession of an unlawful firearm based on shoe prints in the snow and his statements.

2. Mr. Haugen was subjected to ineffective assistance of counsel by his trial counsel failing to assert Mr. Haugen's interests in requesting a continuance of the sentencing hearing to obtain new counsel.

II. ISSUES PRESENTED

1. Does sufficient evidence support Mr. Haugen's convictions, where Mr. Haugen dropped a firearm while attempting to flee from law enforcement, and confessed to police that he had actual possession of the firearm but simply did not intend to use it?

2. Was counsel ineffective for not arguing in support of Mr. Haugen's requested continuance of his sentencing hearing, where Mr. Haugen repeatedly told the trial court that he did not want counsel's representation, repeatedly told counsel not to speak on his behalf, sought to continue the hearing only so he could litigate potential appellate issues rather than sentencing issues, and repeatedly declined the State's recommendation of a DOSA sentence stating that he would not be amenable to treatment?

III. STATEMENT OF THE CASE[1]

Trevor Haugen appeals his convictions for first degree unlawful possession of a firearm and possession of an unlawful firearm after a bench trial. CP 48.

[1] The trial court's findings of fact are verities on appeal because Mr. Haugen has not assigned error to any finding. RAP 10.3(g); *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

On December 23, 2018, law enforcement officers in Spokane were looking for Dakota Ford. CP 40. It was snowing that night, and fresh snow was on the ground. CP 40. While at a location Mr. Ford frequented, Officer Chris LeQuire contacted Mr. Ford's sister. CP 40. During the conversation, he observed two males exit a nearby home; one of the men appeared to match Mr. Ford's description. CP 40. Officer LeQuire requested backup and followed the two men. CP 40.

Law enforcement gave chase and followed footprints that the two had left behind to an alley. CP 40. The footprints went in two different directions, and the officers split up to follow each. CP 40. Officer LeQuire checked the alley and discovered a black bag on the ground in the middle of the alley. CP 40-41. There were two sets of footprints near the bag, and the butt of a firearm was protruding from the bag. CP 41. The firearm was an illegally shortened shotgun. CP 41. It was still snowing at the time, yet there was no snow on the bag or firearm. CP 41.

The other officers tracked the footprints to Mr. Haugen and took him into custody. CP 41-42. Officer Nathaniel Gobble observed the tread pattern of Mr. Haugen's shoes, and traced the pattern backwards to the black bag and illegal firearm found in the alley. CP 42. Officers confirmed Mr. Haugen's identity. CP 42. Officer Ryan Murphy transported Mr. Haugen to the Spokane County Jail. CP 42. During the trip,

Mr. Haugen spontaneously admitted he had possessed the firearm, but that he was not going to use it and intended to dispose of it.[2] CP 42-43. This conversation was recorded, and the State admitted the recording into evidence at trial. Ex. 13. Law enforcement later confirmed the firearm was operable and reconfirmed it did not meet legal dimensional requirements. CP 43-44.

The State originally charged Mr. Haugen with second degree unlawful possession of a firearm, possession of an unlawful firearm, possession of a controlled substance, and obstructing a law enforcement officer. CP 6-7. One week prior to trial, the State discovered that it had incorrectly charged second degree unlawful possession of a firearm, rather than first degree. RP 9-10. The State offered to have Mr. Haugen plead to the incorrectly reduced charge, in exchange for recommending a prison-based drug offender sentencing alternative (DOSA) treatment sentence. RP 10. Mr. Haugen rejected the offer, intending to take the matter to trial. RP 10-12. The court permitted the State to amend the information to include the charges of first degree unlawful possession of a firearm, possession of an unlawful firearm, and obstruction a law enforcement

[2] After conducting a CrR 3.5 hearing, the court ruled this statement was admissible. CP 36-38.

officer. CP 21-22. Mr. Haugen waived his right to a jury trial. CP 20; RP 7-9.

At the conclusion of the bench trial, the court reviewed the pattern instructions for the charged crimes. CP 44-45. The court orally found Mr. Haugen guilty of first degree unlawful possession of a firearm and possession of an unlawful firearm, making several findings of fact and conclusions of law in support of the verdict. RP 165-74. The court's ruling was later summarized and reduced to writing. CP 39-45.

At Mr. Haugen's request, the court ordered a presentence investigation report to determine if he was eligible for a parenting sentencing alternative. CP 27-28. The report concluded that Mr. Haugen was not eligible for the alternative, and that even if he were eligible, he was not a suitable candidate. CP 78.

The sentencing hearing occurred nearly a month after the verdict. RP 179. At the hearing, Mr. Haugen immediately informed the court he no longer wanted counsel's representation.[3] RP 180. Mr. Haugen asked the court to continue the hearing and told the court he would not be sentenced that day. RP 181. The court reminded Mr. Haugen that a request for a continuance was granted at its discretion and asked him for the basis of his

[3] At the time of the trial and sentencing, Mr. Haugen was represented by attorney Travis Jones.

request. RP 181. Mr. Haugen replied that the proceedings were "a joke," that he did not want his current counsel to further represent him, and alleged generally "horrible representation." RP 181-82. The court told Mr. Haugen if he was alleging appellate issues such as ineffective assistance of counsel he could raise them in an appeal, and that the day's hearing concerned only sentencing. RP 182.

Mr. Haugen again renewed his request to continue sentencing. RP 183. The court asked him again for a reason, and he responded that it was due to the "situation," and that he "had some unique things go down here." RP 184. The court noted that Mr. Haugen was not requesting an attorney for the purposes of sentencing and denied his request. RP 184. Mr. Jones did not argue for a continuance. *See* RP 180-84.

The State noted Mr. Haugen's standard range sentence was 87 to 116 months. RP 187. However, the State recommended Mr. Haugen receive a prison-based DOSA sentence, which would result in 50.75 months confinement and 50.75 months of community custody. RP 188. Next, Mr. Haugen's counsel identified that Mr. Haugen did not wish him to speak on his behalf, a recognition that the trial court confirmed:

> THE COURT: Mr. Jones.
> MR. JONES: Your Honor, I'm not exactly sure how the Court wants me to proceed. I'm prepared to argue on Mr. Haugen's behalf, but I don't know that he's comfortable with that.

> THE COURT: So, Mr. Haugen, do you want him to say anything on your behalf at this point as far as sentencing? The State is still willing to offer prison DOSA versus just a straight up DOC sentence. At this point, did you want Mr. Jones to speak on your behalf?
> THE DEFENDANT: No, I don't want to take either of those.
> THE COURT: Okay. So you don't want him to make any remarks on your behalf at this point?
> THE DEFENDANT: Nope.

RP 190.

The court asked Mr. Haugen if he wished to speak on his own behalf. RP 191. Mr. Haugen only stated that everything that had occurred in the past 90 days was illegal. RP 190. The court informed Mr. Haugen that the State recommended a DOSA sentence. RP 191. The court noted that part of its analysis on whether to impose a DOSA sentence included that the subject must be amenable to treatment. RP 191. The court observed that Mr. Haugen might not be amenable to treatment, to which he replied, "Yep." RP 191. The court again asked Mr. Haugen if he was stating that he would not be amenable to treatment, and Mr. Haugen again replied, "Yep." RP 191. The court gave Mr. Haugen a third opportunity to indicate he was willing to do treatment, which he also denied. RP 191. The court did not find Mr. Haugen amenable to treatment, and imposed a sentence of 100 months, which was lower than the midpoint of the standard range. CP 100; RP 192. Mr. Haugen appeals. CP 93.

IV. ARGUMENT

A. THE EVIDENCE IS SUFFICIENT.

Mr. Haugen has not assigned error to or properly briefed his corpus delicti claim. Regardless, his confession was properly considered by the trial court because independent evidence supports it. When viewed in the light most favorable to the State, the evidence is sufficient to sustain Mr. Haugen's convictions.

1. Corpus delicti.

The State agrees with Mr. Haugen that he may bring a corpus delicti claim for the first time on appeal. *State v. Cardenas-Flores*, 189 Wn.2d 243, 263, 401 P.3d 19 (2017). However, that does not obviate the need for a proper assignment of error, or adequately briefing the issue. RAP 10.3(g); *CalPortland Co. v. LevelOne Concrete LLC*, 180 Wn. App. 379, 392, 321 P.3d 1261 (2014). Mr. Haugen did not assign error to the trial court considering his confession as substantive evidence, nor did he assign error alleging independent evidence did not support his confession. Additionally, he did not brief legal authority concerning corpus delicti other than to assert that it may be challenged for the first time on appeal if not preserved at trial. This is insufficient to command appellate

review.[4] This Court should not assume that Mr. Haugen made a "false confession" without any supporting authority. Br. at 9.

Alternatively, when a defendant raises a corpus delicti claim and sufficiency claim together for the first time on appeal, the Washington Supreme Court appears to have applied a two-part analysis. *See Cardenas-Flores*, 189 Wn.2d at 263-67. First, the reviewing court determines whether independent evidence supports the confession. *Id*. at 264. If so, the next step is to determine whether all of the evidence, including the properly considered confession, supports the conviction under the usual sufficiency analysis. *Id*. at 265-67. Presumably, if the corpus delicti rule is not satisfied, this Court would consider the evidence absent the confession. *See Id.* at 263-67 ("Here, because the State satisfied corpus delicti, Cardenas-Flores's statements to the police were properly considered by the jury").

Corpus delicti means "body of the crime." *State v. Brockob*, 159 Wn.2d 311, 327, 150 P.3d 59 (2006), *as amended* (Jan. 26, 2007). The rule of corpus delicti provides that a trial court may not admit the defendant's incriminating statements unless the State presents independent evidence that corroborates the statements. *Id*. at 328. In other words, the

[4] Similarly, Mr. Haugen appears to begin to brief a search and seizure issue in his sufficiency claim but abandons it without identifying what the alleged error is. This claim also has not been assigned error. Because no error was identified, the State cannot respond.

State must present evidence independent of the defendant's incriminating statement that the crime the defendant described actually occurred. *Id*. The rule stems both from the recognition that juries are likely to accept confessions uncritically and from a distrust of confessions because they may be misreported, misconstrued, elicited by force or coercion, based on a mistaken perception of the facts or law, or falsely given by a mentally disturbed individual. *State v. Aten*, 130 Wn.2d 640, 657, 927 P.2d 210 (1996). The body of the crime usually consists of two elements: (1) an injury or loss and (2) someone's criminal act as the cause thereof. *City of Bremerton v. Corbett*, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986). Some crimes do not require the first element. *See State v. Smith*, 115 Wn.2d 775, 781, 801 P.2d 975 (1990).

In considering whether the State has presented sufficient corroborating evidence, this Court must view the independent evidence in a light most favorable to the State. *Cardenas-Flores*, 189 Wn.2d at 264. The State must only produce prima facie evidence supporting the statement; it is not required to prove the corpus delicti beyond a reasonable doubt or even by a preponderance of the evidence. *Aten*, 130 Wn.2d at 656. Rather, the corroborating evidence is sufficient if it supports a logical and reasonable inference that the crime occurred. *Cardenas-Flores*, 189 Wn.2d at 252. Moreover, such evidence must be consistent with guilt and inconsistent with

a hypothesis of innocence. *Brockob*, 159 Wn.2d at 329. This Court reviews this claim de novo. *State v. Hotchkiss*, 1 Wn. App. 2d 275, 279, 404 P.3d 629 (2017), *review denied*, 190 Wn.2d 1005 (2018).

The first step is to identify the "independent evidence." *Aten*, 130 Wn.2d at 657. Here, the independent evidence is: the black bag containing the firearm; the illegal firearm itself; testimony that it was snowing outside but there was no snow on the gun or bag; law enforcement identified footprints in the snow, testimony the footprints in the snow matched Mr. Haugen's shoe pattern; and testimony law enforcement traced Mr. Haugen's footprints from where he was apprehended back to the location where the bag was freshly discarded in the snowstorm.

Keeping in mind that the State only bears the burden to produce evidence corroborating the crime described by Mr. Haugen—and does not bear a burden of persuasion—that independent evidence is clearly sufficient to support Mr. Haugen's videotaped confession. The evidence, when viewed in the light most favorable to the State, supports an inference that Mr. Haugen had possession of the illegal firearm, ran from law enforcement, and abandoned the black bag with the firearm in the alley during the pursuit. Mr. Haugen admitted to actually possessing the firearm, he only claimed that he did not intend to use it. He confessed that he needed

the firearm to obtain money or food. He explained that he had actually possessed the firearm for a day and a half.

The independent evidence that Officer LeQuire saw an illegal firearm arguably satisfies corpus delicti in itself. To establish corpus delicti, the State need only offer proof that *someone* committed a crime. *State v. Meyer*, 37 Wn.2d 759, 763 226 P.2d 204 (1951). By example, in possession of controlled substances cases, "it is clear that a crime occurred if drugs are in the possession of someone." *State v. Solomon*, 73 Wn. App. 724, 728, 870 P.2d 1019 (1994) (distinguishing crimes that require proof of identity). In other words, the fact that a controlled substance was found suggested that someone possessed it, which satisfies the corpus delicti rule. Similarly, the discovery and existence of the illegal firearm supports the body of the crime. No one may possess the firearm law enforcement found, absent limited exceptions. RCW 9.41.190. It had to be possessed by someone to be deposited in the snow where it was immediately located. This concept is distinct from the State proving the identity of who possessed the illegal firearm, or did so illegally, at trial.

In sum, the State introduced sufficient prima facie independent evidence to support the confession. The trier of fact properly considered the confession in determining guilt.

2. Sufficiency of the evidence.

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In evaluating the sufficiency of the evidence, the court must determine whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995). All reasonable inferences must be interpreted most strongly in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Specifically, following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Id*. However, unchallenged findings of fact are verities on appeal. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990).

Reviewing courts must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the

evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). This Court does not reweigh the evidence or substitute its judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). For sufficiency of evidence claims, circumstantial and direct evidence carry equal weight. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). A claim of insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from that evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010).

Mr. Haugen does not challenge or assign error to the trial court's findings of fact, so they are verities on appeal. His argument that the State never proved the possession element for either charge also requires this Court to disregard his confession. However, as analyzed under corpus delicti above, the trier of fact properly considered the confession because independent evidence supports it. Relevant to first degree unlawful possession of a firearm and possession of a firearm, the trial court found that: (1) Mr. Haugen confessed to possessing the illegal firearm; (2) officers found the bag and firearm during snowfall but neither were covered in snowfall; (3) law enforcement traced the tread pattern on Mr. Haugen's shoes back to the bag and firearm. CP 40-43

The trial court's oral ruling illuminates those findings. The court addressed Mr. Haugen's videotaped confession in more detail:

"Mr. Haugen admitted he had the gun, but he said he was not going to use it. He just was needing it so he could get some money to get food. He only had the gun for a day and a half." RP 170. The court also offered more reasoning pertaining to the recent abandonment of the black bag and firearm: "[Officer LeQuire] indicated that bag had no snow accumulation on it, and it was still snowing at that time." RP 167.

The unchallenged findings, when viewed in the light most favorable to the State, support the possession element of both charges. Mr. Haugen provided direct evidence that he possessed the illegal firearm when he confessed he actually possessed the illegal firearm and abandoned it during the pursuit. The circumstances of how law enforcement located the firearm and tracked it to Mr. Haugen lead to an inference that Mr. Haugen possessed the firearm. A rational trier of fact could find the State proved the possession element beyond a reasonable doubt. This Court should affirm.

B. COUNSEL WAS NOT INEFFECTIVE.

Mr. Haugen asserts his trial counsel was ineffective for failing to argue in favor of his request for a continuance of his sentencing hearing. Mr. Haugen wished to continue the hearing to have new counsel argue appellate issues, and repeatedly told the court that he did not want trial counsel representing him any longer. Because this alleged error is invited, is not deficient performance, and is not prejudicial, this Court should affirm.

1. Any alleged error is invited.

A party who sets up an error at trial cannot claim that action as error on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In determining whether the invited error doctrine applies, our courts consider "whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it." *In re Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). The doctrine requires affirmative actions by the defendant. *In re Thompson*, 141 Wn.2d 712, 724, 10 P.3d 380 (2000). Courts apply the doctrine when a defendant took knowing and voluntary actions to set up the error. *Id*.

Some instances of ineffective assistance of counsel cannot be invited. For instance, appellate courts in Washington will not apply the invited error doctrine to a claim of ineffective assistance of counsel, where the claimed error is instructional. *State v. Gentry*, 125 Wn.2d 570, 646-47, 888 P.2d 1105 (1995) ("We will adhere to our normal use of the invited error doctrine, but will review any invited instructional error in connection with an ineffectiveness of counsel argument"). Despite the narrow holding of *Gentry* to invited instructional issues only, some unpublished opinions have cited the holding—without any analysis—to encompass all claims of

ineffective assistance. *See, e.g.*, *State v. Williams*, No. 45495-5-II, 2014 WL 7462302, 185 Wn. App. 1016 (2014) (unpublished).[5]

Here, unlike an instructional error, the alleged error was set up wholly by the defendant himself. After the trial court found Mr. Haugen guilty, the case proceeded to sentencing. Mr. Haugen refused to comply with any instructions of the court or sign any documents. Mr. Haugen immediately told the court, "I don't even want [counsel] as my lawyer anymore, and on top of that, we can move this out or something" and concluded that he was "not going to get sentenced today." RP 180-81. Mr. Haugen requested a continuance, and when the court asked him why he stated, "[d]ue to the horrible representation," "situation," and because he had some "unique things go down here." After engaging in further conversation with Mr. Haugen, the trial court correctly surmised that he sought a continuance to litigate appellate issues in the trial court—matters outside the scope of the sentencing hearing—not the terms of his sentence. The court denied the requested continuance on the ground that Mr. Haugen was not seeking new counsel "for the purposes of sentencing." RP 184. Mr. Haugen again clarified he did not want his attorney to make remarks on

[5] Under GR 14.1, a party may cite to an unpublished decision of the Court of Appeals filed on or after March 1, 2013. Unpublished opinions have no precedential value, are not binding on any court, and may be accorded such persuasive value as the court deems appropriate. GR 14.1(a).

his behalf or regarding the State's DOSA recommendation. RP 190. Mr. Haugen was given every opportunity to have his counsel address the court.

Now Mr. Haugen complains that his counsel did not join his request to ask for a continuance of the sentencing to litigate issues unrelated to the sentence. However, Mr. Haugen repeatedly made clear that his assigned counsel was not to represent him, and when counsel asked permission to make an argument regarding the sentence, the court instructed him to abide by his client's wishes and not speak. In an Indiana case, the appellate court found a remarkably similar situation was invited error. *See Hardy v. State*, 786 N.E.2d 783 (Ind. Ct. App. 2003). The defendant in that case did not wish to speak at sentencing, and also instructed his counsel to remain silent. The defendant reasoned, "I don't feel that [counsel] performed his job to show what I wanted." *Id*. at 787. On appeal, the court found his ineffective assistance claim invited and pointed out that the defendant instructed his attorney to remain silent for both tactical reasons and as an expression of dissatisfaction with counsel's performance. *Id*. Similarly, only Mr. Haugen's affirmative actions set up the situation that he now claims is ineffective assistance of counsel, when he repeatedly told the trial court he did not want counsel representing him at the hearing. Counsel cannot be faulted for not joining in Mr. Haugen's request to continue the sentencing

hearing to argue issues unrelated to sentencing, when Mr. Haugen repeatedly told the court during his request he did not want counsel's representation. This Court should decline review.

2. Rules of law and standard of review.

To meaningfully protect the right to counsel, an accused is entitled to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts apply a two-pronged test to determine if counsel provided effective assistance: (1) whether counsel performed deficiently, and (2) whether the deficient performance prejudiced the defendant, i.e., there is a reasonable probability the attorney's conduct affected the case's outcome. *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993). This is a mixed question of law and fact, reviewed de novo. *Strickland*, 466 U.S. at 698.

To satisfy the first prong, the defendant must show that, after considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). Performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *Id*. Prejudice exists if there is a reasonable probability that but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Kyllo*,

166 Wn.2d 856, 862, 215 P.3d 177 (2009). To prove prejudice, the defendant must show more than a "conceivable effect on the outcome" to prevail. *Strickland*, 466 U.S. at 693.

The burden is on the defendant to show deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). When this Court can characterize counsel's actions as legitimate trial tactics or strategy, it will not find ineffective assistance. *Id*. Appellate courts strongly presume trial counsel was effective. *Id*. Furthermore, this Court reviews trial counsel's performance in the context of the entire record below. *McFarland*, 127 Wn.2d at 335. If a defendant fails to establish one prong of the test, this Court need not address the remaining prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

a. Mr. Haugen cannot demonstrate prejudice.

The State disagrees with Mr. Haugen's assertion that the court would have granted his request if: (1) he had simply said he wanted private counsel and (2) Mr. Jones joined that request. The point of the colloquy with Mr. Haugen was that he was attempting to argue issues outside the scope of sentencing, not whether his attorney was private or publicly provided. This is the basis the court identified when finally declining the request, that Mr. Haugen was not seeking a new attorney "for purposes of sentencing." RP 184.

There was no question or dispute about Mr. Haugen's criminal history, offender score, or standard range sentence. There was no question or dispute that Mr. Haugen did not qualify for the parenting sentencing alternative he sought. The court has discretion to grant a continuance of the hearing for good cause shown. RCW 9.94A.500(1). The court did not believe Mr. Haugen had a good faith basis to request a continuance so he could argue about how everything was "completely illegal." RP 190. The time had already passed to file a CrR 7.4 or 7.5 motion,[6] and Mr. Haugen never filed a CrR 7.8 motion. Mr. Haugen does not demonstrate a reasonable probability that the trial court would have granted a continuance for Mr. Haugen to argue trial errors at his sentencing hearing.[7]

Mr. Haugen also argues that a potential different outcome he would have received is that the court would have granted him a DOSA sentence had it continued his case so he could seek alternative counsel. However, the record is clear that Mr. Haugen was opposed to a DOSA sentence and

---

[6] These motions must be served and filed within 10 days of the verdict or decision. CrR 7.4; CrR 7.5. The trial court issued the verdict on February 26, 2019, and the sentencing hearing was held March 21, 2019.

[7] Additionally, Mr. Haugen's appeal does not allege or identify any other error or instance of ineffective of counsel. Logically, litigating non-existent errors at a continued sentencing hearing would not have affected the outcome for this reason as well.

would refuse to participate in treatment if the court ordered a DOSA sentence.

The State recommended DOSA, and there is no question that Mr. Haugen was *eligible*. Mr. Haugen had previously rejected the State's offer of recommending a DOSA sentence if he pleaded guilty to the lesser charge, prior to trial. Mr. Haugen, through counsel, noted that he sought a presentencing investigation report for the purposes of determining eligibility for the parenting alternative because one would not be necessary if he was seeking entry into a DOSA treatment program. RP 175-77. Clearly, Mr. Haugen had ample opportunity over the next month to consider DOSA. The court was entitled to rely on his representations that he: (1) did not want DOSA, RP 190; (2) would not be amenable to treatment, RP 191; (3) and that he wished a standard range sentence, RP 191. The court ultimately found that DOSA was not appropriate because Mr. Haugen was not amenable to treatment. RCW 9.94A.660(3). He does not appeal that decision. Eligibility is only one part of the equation. Whether new counsel might potentially opine that a DOSA sentence would be appropriate despite Mr. Haugen's admissions that he did not want and would not participate in treatment is irrelevant. Mr. Haugen cannot show prejudice, so this claim cannot succeed. This Court need not address the second prong of the test.

b. Counsel's performance was not deficient.

Mr. Haugen also fails to establish that his counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. Mr. Haugen ordered his attorney not to argue on his behalf, and repeatedly informed the court he did not want his attorney's representation. Mr. Haugen was not confused about the DOSA sentence; he wanted to argue issues more properly addressed in an appeal. It is reasonable for trial counsel here not to make argument for Mr. Haugen, when Mr. Haugen admitted he did not want counsel to do so. Under the circumstances, counsel also had no reason to join in the request to continue the sentencing hearing because the basis for the continuance was an opportunity for Mr. Haugen to argue appellate issues: alleged trial errors or illegality. Neither are appropriate issues at sentencing. Mr. Haugen does not meet this prong of the test.

V. CONCLUSION

Mr. Haugen does not assign error to or provide briefing on the admissibility of his confession, so he has waived that claim. Regardless, the trier of fact properly considered Mr. Haugen's confession because prima facie independent evidence supports it. The evidence, including the properly considered confession, supports the possession element of Mr. Haugen's two convictions when viewed in the light most favorably to

the State. Mr. Haugen invited alleged error when ordering his attorney not to speak at the sentencing hearing and told the court he did not want his counsel's representation. His claim of ineffective assistance does not constitute error because it does not meet either prong of the applicable test. The State respectfully requests this Court affirm.

Dated this 13 day of December, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney

Brett Pearce, WSBA #51819
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON, Respondent, v. TREVOR HAUGEN, Appellant.	NO. 36765-7-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on December 13, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Robert Cossey
rcossey@robertcossey.com; svanning@robertcossey.com

12/13/2019	Spokane, WA	
(Date)	**(Place)**	**(Signature)**

SPOKANE COUNTY PROSECUTOR

December 13, 2019 - 2:11 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36765-7
Appellate Court Case Title:	State of Washington v. Trevor Jaymes Haugen
Superior Court Case Number:	18-1-05591-2

The following documents have been uploaded:

- 367657_Briefs_20191213141035D3711857_9725.pdf
  This File Contains:
  Briefs - Respondents
  The Original File Name was Haugen Trevor - 367657 - Resp Br - BBP.pdf

A copy of the uploaded files will be sent to:

- lsteinmetz@spokanecounty.org
- rcossey@robertcossey.com
- svanning@robertcossey.com

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org
Filing on Behalf of: Brett Ballock Pearce - Email: bpearce@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20191213141035D3711857