Supreme Court No. 100993-3
Court of Appeals No. 83418-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN BRUCE PERRA,

Petitioner.

PETITION FOR REVIEW

PETER B. TILLER
Attorney for Petitioner
THE TILLER LAW FIRM
118 North Rock Street
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS Page

TABLE OF AUTHORITIES

OTHER AUTHORITIES **Page**

A. IDENTITY OF PETITIONER

Petitioner, Steven Perra, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Perra seeks review of the unpublished opinion of the Court of Appeals in cause number 83418-5-I, 2022 WL 837052 (Slip Op. March 21, 2022). A copy of the decision is attached as Appendix A at pages A-1 through A-15. The Court of Appeals denied Perra's motion for reconsideration on May 6, 2022. A copy of the order denying reconsideration is attached as Appendix B.

C. ISSUE PRESENTED FOR REVIEW

Should this Court grant review where the petitioner's constitutional right to effective assistance of counsel was denied when his attorney failed to move to withdraw from the case and failed to notify the court in a timely manner of counsel's belief that the petitioner and/or petitioner's son would commit perjury in his testimony, and where the trial court abused its discretion by not granting a continuance so that the petitioner could retain alternate,

conflict-free counsel.

D. STATEMENT OF THE CASE

1. Procedural History

The State charged Steven Perra by information filed on May 13, 2020, in Lewis County Superior Court with four counts of second-degree burglary, two counts of third-degree theft, one count of first-degree theft, one count of second-degree theft, and one count of first degree organized retail theft, stemming from theft of merchandise from Walmart alleged to have been committed on four date between September 24, 2019 and March 14, 2020. Clerk's Papers (CP) 1-5. The State filed a second amended information on October 20, 2020, alleging that first-degree organized retail thefts had a cumulative value exceeding $5000 and took place within a period of 180 days. CP at 64-68. Attorney Don Blair was appointed to represent Perra.

At trial confirmation on October 16, 2020, Perra made clear that he was dissatisfied with his appointed counsel and that he wanted to retain private counsel. 1Report of Proceedings (RP) at 5-9. Blair said that court that Perra wanted to retain

attorney Richard Woodrow and requested a two-week continuance. 1RP at 6. Perra addressed the court and said that his alibi witness is in Texas and that the witness could not get from Texas to Lewis County in time for trial the following week. 1RP at 7. He stated that he had contacted Woodrow's office and learned that Woodrow was willing to appear in the case. 1RP at 8. Perra said that he needed two weeks to secure the money to hire Woodrow. 1RP at 9. The court said that the case was already confirmed for trial, that the case had been filed in May and that it had been pending for five months, and that this "appears to be an attempt just to delay this trial," and denied the request to continue. 1RP at 9, 10.

Several cases originally set in front of Perra's case were resolved and Perra's case came on for trial. 1RP at 22-253, 2RP at 259-483.

After jury selection on October 19, 2020, Perra again asked for a continuance, telling the court that his Texas witness would be able to testify that Perra was in Texas during the time of the alleged offenses, but that the witness has a business in Texas

and cannot be present in Washington on short notice. 1RP at 78. Perra stated that he believed that the trial due to the cases set "before" his case, and that it was not likely to proceed to trial, and that he was led to believe that there was "a small, small chance" that the case would proceed that week because of the number of cases in front of his, including a "big sex trial," and so "I didn't prepare for this[.]" 1RP at 78, 80. The prosecution responded that Perra should have mentioned this at the hearing on Friday but did not do so. 1RP at 79. Perra told the court that he said that he was going to hire an attorney and said that he had spoken with the attorney that morning and was told that unless there was a continuance granted, the attorney could not represent him at trial. 1RP at 79, 80-81. Blair told the court that on Friday, October 16, 2020, he had contacted Woodrow's office and left a message, and Woodrow did not return his call. 1RP at 81. Perra told the court that Woodrow's secretary said to ask for a continuance. 1RP at 81. The court denied the request for continuance based on the length of time that the matter had been set. 1RP at 81.

Following the noon recess on October 19, 2020, Perra's

hands were photographed by Officer Jason Roberts. 1RP at 101. After returning from the recess, the State told the court that the prosecutor interviewed Perra's son K.P., and that they "were able to interview him in front of Detective McGinty from the Lewis County Sheriff's Office[.]" 1RP at 101. Perra said that court that his son "felt threatened by him, they brought an armed officer in there and ---to demand his phone." 1RP at 102. He said that he heard them yelling in the hallway and that "[i]f I was to yell at their witnesses, I would get a charge for that." 1RP at 102. Blair stated that he was involved in the interview of K.P. and that "nobody yelled at anyone during the interview." 1RP at 102-03. Blair stated that K.P. was told that if he was lying, he could be charged with an offense. 1RP at 103.

Perra told the court that he had spoken to attorney Richard Woodrow and reiterated that he did not want Blair to represent him and that "he's working against me." 1RP at 102. The court denied the request for a continuance. 1RP at 103.

On appeal, this Court found that he received effective assistance of counsel and that the trial court did not deny Perra his

right to choice of counsel and did not err by denying his motion to continue the trial to retain Woodrow as alternate counsel. ***Perra***, 2022 WL 837052, at *5-9. The Court affirmed his convictions and remanded for resentencing. ***Perra***, at *2. Perra moved for reconsideration of the Court's ruling, which was denied on May 6, 2022.

2. Trial testimony

Sean Gabignaud is an asset protection employee at Walmart in Chehalis, Washington. 1RP at 110. Gabignaud investigated the theft of PlayStation game console after a report from the Electronics Department that a game case was broken into, and a PlayStation 4 console was missing. 1RP at 114. Gabignaud reviewed the camera surveillance video and saw a male force open the locked case by using something in his hand to pry the case lock away from the case, and then remove a PlayStation console from the case. 1RP at 114-16, 129. The man, who was wearing a black sweater and black pants, was visible on the video from the time he arrived at the store at about 4:00 a.m. until he left the property. 1RP at 117, 128, 131.

Gabignaud watched the man on video take the PlayStation in a shopping cart into Housewares Department where there is a blind spot in the surveillance system, and when he emerged from Housewares, he had a box fan but did not appear to have the PlayStation. 1RP at 120. He went to the checkout registers and paid for the box fan and other small items but did not pay for a PlayStation. 1RP at 120. Gabignaud compiled the videos of the man and provided them to police. 1RP at 118.

Chehalis Police Sergeant Warren Ayers responded to the theft complaints and received a report and video of the PlayStation. 1RP at 291. The PlayStation is valued at $269.00. 1RP at 124. Gabignaud identified Perra in court as the person in the video that he observed. 1RP at 117, 118.

Gabignaud investigated the theft of jewelry reported to him by the Walmart Jewelry Department manager, who had discovered a display case was unlocked and jewelry was missing. 1RP at 137. Gabignaud reviewed the surveillance video and saw a male entering the store at about 6 a.m., open the case and take jewelry, then go to another department and place the jewelry

outside the fence. 1RP at 137, 139, 140. The man walked to the Garden Center and then returned to a car. 1RP at 137, 146. Gabignaud testified that the video showed that the man had a tattoo on the right side of his neck. 1RP at 142.

Gabignaud saw that a cabinet in the Jewelry Department was damaged a count of the remaining merchandise revealed that multiple gold necklaces were missing. 1RP at 148. The value of the missing items was $6090.06. 1RP at 151.

Chehalis Police officer Mike Bailey responded to a report of theft on December 24, 2019, and received the incident report prepared by Gabignaud that included still photos of the suspect and the man's vehicle, a DVD, and receipts for the stolen items showing their retail value. 1RP at 297.

In surveillance video of the parking lot, a car is seen being parked and a man wearing a black hat, black jacket and face mask entered the store through other doors. 1RP at 156, 157. The man is seen on surveillance video opening the display case and removing a home security camera system, putting it in the cart, and then went to another department. 1RP at 162. Gabignaud said

that the man had tattoos on knuckles of his right hand and a tattoo on the back of this right hand. 1RP at 168.

Gabignaud said that the same man, now wearing a white shirt, purchased a fan. 1RP at 163. The man went to the Garden Department and then left the store. 1RP at 164.

Gabignaud compiled the surveillance videos and provided them to law enforcement, along with still pictures from the videos and his report. 1RP at 154. The value of the home camera security system is $399.00. 1RP at 173.

Walmart employees discovered that a lock on a spindle display case in the Jewelry Department was broken on March 14, 2020. 1RP at 174. The video showed that the man returned to the Jewelry Department and attempted to tamper with another spindle display case, was unable to open it, and then left. 1RP at 185. The man went to the Garden Department and put an empty partition from one of the jewelry boxes on a shelf. 1RP at 193.

When the man returned from the Garden Center, he did not have backpack and did not have the shopping cart. 1RP at 195. He left the store through the Grocery Doors and walked outside the

building to the Garden Center and then back to his parked car. 1RP at 199-200. The missing jewelry was valued at $3502.00. 1RP at 205.

Gabignaud said that the man had a neck tattoo and that he was the same the man from the video in the other three incidents. 1RP at 190-91.

Gabignaud testified that he saw the man in person inside the store during the time period between March 7 and March 14, 2020. 1RP at 112-13, 202.

Chehalis police officer Noel Shields responded to Walmart following reports of theft. 2RP at 309. Officer Roberts reviewed the theft report package prepared by Gabignaud, including still photographs, and testified that he recognized the suspect in the pictures as Steven Perra. 2RP at 331. He provided the name of the suspect Steven Perra to Gabignaud. 1RP at 112, 2RP at 312, 313.

In court, Officer Roberts identified Perra as the person he saw in the still photographs. 2RP at 331. Gabignaud searched the database of names of people "trespassed" from any Walmart, and determined that the name Steven Perra was in the database as

having been "flagged as trespassed" on December 6, 2011. 1RP at 208-09, 214, 216, 281. Gabignaud provided the "trespass notice" to Officer Shields. 2RP at 314. Officer Shields identified Perra in court as the person in the photo. 2RP at 317. Officers took photos of Perra's hands and neck. 2RP at 318. The court heard from defense counsel and Perra outside the presence of the prosecutor. 2RP at 342-43. Outside the presence of the prosecution and jury, counsel noted that Perra wanted to testify and that Perra had previously made statements to him that he knows to be false, and that Perra wanted to testify consistently with those statements. 2RP at 341-42. Defense counsel cited RPC 3.3(4)(a)(4). 2RP at 338, 341, 342. Perra said that Blair had misunderstood what he said that he denied that he admitted to Blair that he committed the offenses and said "[t]hat's why I tried to get a new lawyer." 2RP at 343.

Blair said that Perra "admitted to me that he had committed these acts[.]" 2RP at 343. Blair said that Perra admitted to him that he committed crimes and agreed that a still shot from the store surveillance video from March 7, 2020, showed his hand with

tattoos. 2RP at 346. Perra denied that he admitted that he committed the offenses. 2RP at 343.

Blair said that he had negotiated an agreement with the State where his client could plead to four burglaries with an agreed recommendation of 51 months, and that the defense could ask for sentencing under DOSA. 2RP at 344.

The court told Perra that he could take the stand and the court would allow him to testify to "whatever it is that you want the jury to hear." 2RP at 347.

The trial resumed and after being sworn in, Perra had Exhibits 5 through 14 admitted. 2RP at 365., he told the jury that he has tattoo on his neck and chest in Exhibit 5 and that the video from September 24 does not show a tattoo on the neck or chest of the person in the video. 2RP at 365. Perra noted that that Exhibit 9 shows tattoos on the knuckles of both hands, and that on the in video of three of the incidents, the man's knuckles and tattoos were not visible. 2RP at 366.

Perra testified that he could not have been seen by the Walmart security guard and followed to his car because between

March 7 and March 17, 2020, he was in Texas. 2RP at 370. He said that he was there from March to March, and that he was not in Washington during the March 7 and March 14 incidents. 2RP at 373. He said that he stayed with his friend in Texas until the end of March and left he left on March 26 or 27 and returned to pick up his son in December. 2RP at 371. He then said he was wrong, and it was at the beginning of September when he dropped his son off and December is when he picked him up, and that he stayed there three weeks. 2RP at 372. He stated that he left Texas on March 26 or March 27, and then returned to pick up his son in September. 2RP at 371-72. He said that he bought a motorcycle while he was there, returned to Washington and was arrested in June. 2RP at 372. He said that December 23, 2020, is on the only charge with a time period where he was in the state. 2RP at 373.

Perra said the got a neck tattoo reading "Lilyana" in 2010 and hand tattoos in 2018. 2RP at 396. Perra acknowledged he was convicted of two counts burglary in 2014, one count of burglary in 2015 and theft in 2011. 2RP at 399-401. He acknowledged that

he was previously "trespassed" from Walmart in 2011. 2RP at 376.

K.P., Perra's son, testified that his father took him to stay with his grandmother in Shelton, Texas in September and that his dad picked him up in March. 2RP at 406.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of this issue because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. THIS COURT SHOULD GRANT REVIEW BECAUSE PERRA'S TRIAL COUNSEL PROVIDED INEFFECTIVE REPRESENTATION, PERRA'S COUNSEL DID NOT DEMONSTRATE AN ACTUAL CONFLICT OF INTEREST, AND THE TRIAL COURT ERRED BY DENYING PERRA'S REQUEST TO RETAIN ALTERNATE COUNSEL

In the representation of a client, a lawyer may not knowingly use perjured testimony or false evidence. RPC 3.3(a)(2) and (4); RPC 3.3(e) and (f). A potential conflict exists when defense counsel

feels compelled to align himself against his client by telling the court he thinks his client is about to lie on the stand.

In this case, on the second day of trial, after the State rested, defense counsel told the court that he was precluded from eliciting testimony from Perra and his son and would not be calling them as witnesses, and that he was precluded from arguing the testimony during closing, because doing so would put forward untruthful testimony in violation of Rule of Professional Conduct (RPC) 3.3. ***State v. Fleck***, 49 Wn.App. 584, 744 P.2d 628 (1987) (RPC 3.3 in conjunction with RPC 1.6 requires attorney to disclose client's plan of perjury to the court if necessary to avoid assisting such criminal act), review denied, 110 Wn.2d 1004 (1988). RPC 3.3(a)(4) prohibits an attorney from presenting evidence that they know is false. RPC 3.3(e) lets an attorney "refuse to offer evidence that the lawyer reasonably believes is false." Defense counsel alleged that Perra told him prior to trial that he had committed the offenses and that he intended to testify that he was in Texas when the crimes were committed and that he was not the person in the security camera footage. 2RP at 341-42, 346. Perra denied admitting that he

committed the offenses and denied that he admitted that it was his hand in the video. 2RP at 343. The court permitted Perra to testify by telling "the jury whatever it is you want them to know." 2RP at 348. On the second day of trial Blair told the court that under RPC 3.3 that he was precluded from eliciting testimony from Perra and his son K.P. and alleged that Perra told him that he had committed the offenses, which Perra denied. The court permitted Perra to testify by telling "the jury whatever it is you want them to know." 2RP at 348. Perra did not have counsel to assist in offering his testimony and asking questions to help him present his full testimony and highlight important facts. Perra's testimony regarding the time he was in Texas was contradictory and very difficult to follow. Perra's son's testimony was somewhat clearer but left unanswered basic questions such as when it was that his father left Texas after dropping him off and when he returned to pick him up. Any alibi evidence that Perra wanted to present to the jury was almost entirely without persuasive value.

Defense counsel told the court that the conversations with Perra took place prior to trial when he was discussing the State's plea

offer of 51 months. 2RP at 343. Counsel was therefore aware of the looming problem that he would be precluded from assisting Perra during his testimony but took no steps to seek to withdraw from the case. As a result, Perra was allowed to testify, but was unable to effectively present his position; Perra's testimony regarding the time that he was in Texas was incoherent and contradictory. Perra was entitled to effective representation through assistance in eliciting testimony from the defendant and his son and assisting during their cross examinations. Defense counsel was not able to assist Perra in presenting his defense. Counsel was ineffective by failing to recognize the dilemma of remaining in the case without being able to assist during his testimony. Counsel's failure to recognize the problem prejudiced Perra in the form of his disastrous testimony.

Criminal defendants have a constitutional right to present relevant evidence in their defense, as long as that evidence is not otherwise inadmissible. ***State v. Rehak***, 67 Wn.App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993). The right to present relevant evidence is not, however, absolute. A trial court may exclude relevant evidence

where other considerations outweigh its value, such as misleading the jury. ***State v. Hawkins***, 157 Wn.App. 739, 750, 238 P.3d 1226 (2010). A defendant has no right to force his lawyer to present evidence, even if helpful for his defense, that would cause the attorney to violate his ethical obligations under the Rules of Professional Conduct. ***State v. Berrysmith***, 87 Wn.App. 268, 276-77, 944 P.2d 397 (1997).

By waiting until the 11th hour to tell the court about the alleged RPC violation and creating an actual conflict of interest that would have been avoided by informing the court of the potential violation at a pre-trial hearing when Perra first asked for a continuance to retain attorney Woodrow, or at the beginning of trial on October 19, 2021, when a continuance may have been granted in order to allow appointment of new conflict-free counsel, defense counsel provided ineffective assistance. To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance occurs when counsel's performance falls below an

objective standard of reasonableness. ***State v. Stenson***, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). A strong presumption of effective assistance exists, and the defendant bears the burden of demonstrating an absence of a strategic basis for the challenged conduct. ***State v. McFarland***, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). "To show such error, it must be established that the assistance rendered by counsel was constitutionally deficient in that 'counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment.'" ***Nix v. Whiteside***, 475 U.S. 157, 164-65, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) (quoting ***Strickland***, 466 U.S. at 687).

In ***Nix v. Whiteside***, the issue was whether an attorney's advice to a client that the attorney would seek to withdraw if the client insisted on committing perjury was a violation of defendant's Sixth Amendment right to assistance of counsel. Nix held that because a criminal defendant does not have a right to commit perjury, the attorney's response was correct and therefore no prejudice could be shown under the ***Strickland*** test for ineffective assistance of counsel. However, in ***Nix*** there was a specific factual finding that the

defendant contemplated perjury, and the fact was never disputed. *Nix*, 106 S.Ct. at 1002-03. Here, defense counsel's in camera discussion with the trial court demonstrates that he only had suspicions his client and his client's son might perjure themselves. He stated that "my client made statements to me that if he were to repeat those statements on the stand, that definitely would not be in his best interest" and that "my client has indicated to me that he wants to testify, and he wants his son to testify. And I believe he wants to testify consistently with statements that he previously made to me." 2RP at 341-42. Counsel then went into a lengthy recitation of plea negotiations with the prosecutor and then said:

> So I agree, he did say all of that to me; but included in that, he did admit to me that he had committed these crimes and he brought up a good point, when I was reviewing these all of these videos, specifically I think it was 49, I actually took still shots from---on my phone, I had paused it on the video, took still shots and then presented those still shots to my client when we were in the conference and he agreed that that was his hand.
>
> RP at 346.

The trial court's denial of his motion to either allow a continuance so Woodrow could appear as substitute counsel was

manifestly unreasonable. Defense counsel's assertion that Perra or his son would offer perjured testimony was not supported by anything other than counsel's claim; Perra denied that he made the admission alleged by his attorney, telling the court that he was asking for a new attorney because his attorney was "saying I said stuff I didn't" and "twisted my words" and that "he thinks I admitted that crime." RP at 347, 348. This type of situation was discussed by Justice Blackmun in his concurring opinion in ***Nix***. Justice Blackmun cautioned in ***Nix***, supra, 475 U.S. 157, that only in the "rarest of cases" should a defense attorney "reveal, or threaten to reveal, a client's anticipated perjury to the court." (*Id.* at 189.) Justice Blackmun refers to ***Wilcox v. Johnson***, 555 F.2d 115 (3d Cir.1977), in stating:

> Whether an attorney's response to what he sees as a client's plan to commit perjury violates a defendant's Sixth Amendment rights may depend on many factors: how certain the attorney is that the proposed testimony is false, the stage of the proceedings at which the attorney discovers the plan, or the ways in which the attorney may be able to dissuade his client, to name just three.... Except in the rarest of cases, attorneys who adopt "the role of the judge or jury to determine the facts," [citing *Wilcox*] pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.

Nix, 106 S.Ct. at 1006. See ***Lowery v. Cardwell***, 575 F.2d 727, 731 n. 5 (9th Cir.1978). See also ***Wilcox v. Johnson***, supra, 555 F.2d 115, 122 ["an attorney may not volunteer a mere unsubstantiated opinion that his client's protestations of innocence are perjured. To do so would undermine a cornerstone of our system of criminal justice].)

In ***State v. James***, 48 Wn.App. 353, 366-68, 739 P.2d 1161 (1987), it was noted that an attorney should have a firm basis for believing his client plans perjury and should first communicate his suspicions to his client and attempt to dissuade him before revealing his knowledge to the court. Otherwise, there is a serious conflict between defense counsel's loyalty to his client and his perceived ethical obligations. Here, as in ***Wilcox***, there is no evidence or factual finding that Perra or his son intended to or did perjure themselves, other than the trial counsel's contention that Perra "agreed" with counsel that it was his hand in the still shot after being confronted with the still by Blair. 2RP at 346. During the in-camera hearing, Perra denied making an admission, stated that his attorney "twisted" his words and that was one reason why he wanted another

attorney to represent him. 2RP at 347. If counsel did not have a firm basis to discuss his belief that Perra and his son would testify falsely prior to discussing his belief with the judge and without first communicating his suspicions to his client and his witness and trying to dissuade them from false testimony, he violated his duty of loyalty to his client. As the court in ***Wilcox*** emphasized:

> If an attorney faced with this situation were in fact to discuss with the Trial Judge his belief that his client intended to perjure himself, without possessing a firm factual basis for that belief, he would be violating the duty imposed upon him as defense counsel. While defense counsel in a criminal case assumes a dual role as a "zealous advocate" and as an "officer of the court," neither role would countenance disclosure to the Court of counsel's private conjectures about the guilt or innocence of his client.

Wilcox, 555 F.2d at 122

Not knowing with any specificity the discussions that occurred between Blair and his client, the Court of Appeals (and the trial court) should not have relied upon Blair's allegation that Perra intended to commit perjury, particularly because the ramifications of the allegation is that Perra was essentially left without representation and forced to fumble his was through presentation of his testimony. It should be noted that "the fine line between premature disclosure of

suspicions and ethically mandatory disclosure of perjury can easily be crossed if an attorney does not have more than a "gut level belief" his clients plan to testify falsely." ***State v. James***, 48, Wn.App. 353, 367, 739 P.2d 1161 (1987). Here, counsel's actions were especially suspect because no record was made as to whether he tried in any way advise Perra or his son of possible perjury prosecution, in order to get them to testify to what trial counsel believed the truth was.

Here, the record does not demonstrate that defense counsel had an adequate basis for his belief or show that he attempted to persuade Perra not to testify falsely before he advised the trial judge of his concerns. Instead, the record shows an almost adversarial, confrontational relationship between Blair and Perra, with Blair exhibiting apparently frustration that Perra would not accept a plea agreement for 51 months and possible DOSA sentence. 2RP at 341-46.

It is clear that trial counsel violated his relationship of confidence and trust with his client and his action of essentially abandoning Perra is truly a violation of Perra's right to the effective assistance of counsel.

Division One overlooked or misapprehended the arguments presented. This Court should accept review and reverse the convictions remand this matter for a new trial and appointment of conflict-free counsel.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

DATED: June 3, 2022.

Certification of Compliance with RAP 18.17:

This petition contains 4992 words, excluding the parts of the petition exempted from the word count by RAP 18.17.

DATED: June 3, 2022.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for Steven Perra

CERTIFICATE OF MAILING

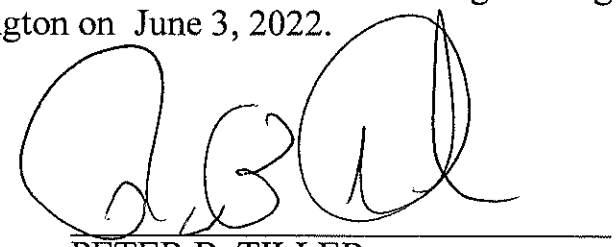
The undersigned certifies that a copy of this Petition for Review was sent by JIS to Ms. Lea Ennis, Clerk of Court of Appeals, Division I, and to Sara Beigh, Lewis County Deputy Prosecuting Attorney, and a copy was mailed, postage prepaid on June 3, 2022, to the appellant at the following address:

Sara Beigh
Lewis County Prosecutor's Office
345 W Main St # 2, Chehalis, WA 98532
Sara.Beigh@lewiscountywa.gov

Ms. Lea Ennis
Clerk of the Court
Court of Appeals
Division I
600 University St.
Seattle, WA 98101

Mr. Steven Bruce Perra
DOC # 377799
Washington State Penitentiary (WSP)
1313 North 13th Avenue
Walla Walla, WA 99362
LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on June 3, 2022.



PETER B. TILLER

APPENDIX A

FILED
3/21/2022
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. STEVEN BRUCE PERRA, Appellant.	)	No. 83418-5-I UNPUBLISHED OPINION

VERELLEN, J. — Steven Perra took over $10,000 in goods from a Chehalis Walmart and was convicted on four counts of second degree burglary, one count of first degree organized retail theft, one count of first degree theft, one count of second degree theft, and two counts of third degree theft.

Perra contends retrial is required because the trial court denied his motion for a continuance to retain private, rather than appointed, counsel. Because the right to counsel of choice does not include the right to unduly delay trial or to seek appointment of counsel one cannot afford, he fails to show the court abused its discretion by denying his motion.

He also contends retrial is required because he received ineffective assistance of counsel. But he fails to show defense counsel was deficient for declining to assist with introducing false testimony.

Perra contends resentencing is required because his convictions for theft merge with his conviction for organized retail theft. The first degree theft conviction and a third degree theft conviction merge with the conviction for organized retail theft, but the other theft convictions do not. Resentencing is also required to strike several legal financial obligations and to recalculate Perra's offender score after removing a conviction voided by State v. Blake.[1]

Perra also argues resentencing is required because his exceptional sentence was excessive. Removing several convictions will lower Perra's offender score. Because the court imposed a "free crimes" exceptional sentence based, in part, on his high offender score, on remand, the court must reconsider whether to impose an exceptional sentence based upon Perra's corrected offender score.

Therefore, we affirm Perra's convictions and remand for resentencing in accordance with this opinion.

FACTS

From fall of 2019 through spring of 2020, the same man entered a Chehalis Walmart four times and stole over $10,000 in goods, mostly jewelry. Security cameras recorded each incident, and Sean Gabignaud, an asset protection employee, watched the footage and filed reports with the Chehalis Police Department after each incident. Gabignaud recognized the same culprit in each video, but his identity was unknown.

[1] 197 Wn.2d 170, 481 P.3d 521 (2021).

In March of 2020, Officer Noel Shields received Walmart's report of a jewelry theft that had occurred on the 14th. The report included pictures of the man identified by Gabignaud as the culprit. Officer Jason Roberts happened to see the pictures and recognized the culprit as Steven Perra. Officer Shields requested a copy of Perra's driver's license from the Department of Licensing and, comparing the photos, concluded Perra was the man in the security footage. Officer Shields gave the name to Gabignaud, and he confirmed that Perra had been permanently trespassed, or prohibited, from Walmart since 2011.

The State charged Perra with four counts of second degree burglary, first degree organized retail theft, first degree theft, second degree theft, and two counts of third degree theft. He was arraigned on July 23, 2020, and trial was set for October 19. Perra was found to be indigent and had defense counsel appointed.

At a pretrial hearing on October 16, Perra personally requested a two-week continuance to retain private counsel, explaining he needed the time to obtain the money to pay for an attorney, Richard Woodrow, that he had contacted. Perra noted he had wanted to retain private counsel since "I first started this matter."[2] The court denied the continuance, explaining that Perra "had a long time to retain an attorney" because the case had been pending for months.[3] The court believed Perra was attempting to delay the trial.

---

[2] Report of Proceedings (RP) (Oct. 16, 2020) at 7.

[3] Id. at 9.

On the first day of trial and after a jury was empaneled, Perra again personally requested a continuance, but this time, it was to allow for an alibi witness from Texas to give testimony. Defense counsel told the court that the only defense witness would be Perra's son and that the Texas witness "won't be relevant" for reasons he would explain privately to Perra.[4]

Perra also renewed his request for a continuance to retain Woodrow, saying he had obtained the money but could only retain him if granted a continuance. Defense counsel explained he had spoken with Woodrow's office, and Woodrow had not been paid or made any arrangements to appear on Perra's behalf. The court denied the request for a continuance.

After opening statements, Perra asked to personally address the court. He requested another continuance. He contended a continuance was required because, first, the police officers who interviewed his son yelled and were threatening, and, second, because he needed a continuance to retain Woodrow since his appointed defense counsel was "working against me."[5] Both defense counsel and the prosecutor were present during the interview. Defense counsel contradicted Perra, telling the court nobody yelled or made threats. The court again denied Perra's request for a continuance.

After the State rested its case the following day, defense counsel asked to speak with the court without the State present. Defense counsel believed Perra

---

[4] RP (Oct. 19, 2020) at 84.

[5] Id. at 102.

and his son planned on giving false testimony and brought his concern to the court's attention. The court ruled both Perra and his son would be allowed to testify and could be called to the stand by defense counsel, but defense counsel would not be required to do more than ask both witnesses to tell their version of events.

The jury found Perra guilty of all charges. During sentencing, Perra stipulated to the accuracy of his lengthy criminal history and the State's calculations of the offender score on each conviction. Depending on the conviction, Perra's offender score ranged from 16.5 to 25. The court found Perra's high offender scores "result[ed] in some of the current offenses going unpunished," and it imposed an exceptional sentence.[6] The exceptional sentence runs each burglary conviction consecutively and runs the other convictions concurrently with those, resulting in 210 months of incarceration. The court also imposed legal financial obligations.

Perra appeals.

ANALYSIS

I. Right to Choose Defense Counsel

Perra argues his Sixth Amendment right to choice of counsel was violated by the trial court's denial of his continuance motions.

[6] Clerk's Papers (CP) at 174-75.

The Sixth Amendment generally guarantees a defendant the right to choose their counsel.[7] But it does not guarantee "representation by an attorney [they] cannot afford."[8] And it does not "permit a defendant to unduly delay the proceedings."[9] When a defendant requests a continuance to retain new counsel, the trial court weighs the right to counsel of choice "against the public's interest in the prompt and efficient administration of justice."[10] This decision is "highly fact dependent" and can be made considering "all relevant information."[11]

We review denial of a continuance requested for the purpose of retaining new counsel for abuse of discretion.[12] A court abuses its discretion when its decision rests on untenable grounds or was made for untenable reasons.[13]

Perra first requested a continuance to hire Woodrow as defense counsel on October 16, only three days before trial, and before he had the money to do so. He requested a continuance again on October 19 after trial began, and he still lacked the money to retain Woodrow. Indeed, it was uncertain whether Woodrow

---

[7] State v. Aguirre, 168 Wn.2d 350, 365, 229 P.3d 669 (2010) (citing Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)).

[8] Id. (citing State v. Roberts, 142 Wn.2d 471, 516, 14 P.3d 713 (2000)).

[9] Id. (citing State v. Roth, 75 Wn. App. 808, 824, 881 P.2d 268 (1994)).

[10] Id. at 365 (citing Roth, 75 Wn. App. at 824).

[11] State v. Hampton, 184 Wn.2d 656, 669, 361 P.3d 734 (2015) (citing Ungar v. Sarafite, 376 U.S. 575, 589, 84 S. Ct. 841, 11 L. Ed 2d 921 (1964)).

[12] Id. at 662 (citing Aguirre, 168 Wn.2d at 365).

[13] Id. at 670 (quoting State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

could actually be retained because neither Perra nor his family appeared to be able to pay for a private defense attorney.[14]

Perra asserted he would require only two weeks to secure Woodrow as defense counsel. But this does not account either for the time his new attorney would need to prepare for trial or for the existing demands on Woodrow's schedule that could impact rescheduling. With such an uncertain, open-ended request, granting a continuance could have unduly delayed the proceedings.[15] Under these circumstances, Perra fails to show the court abused its discretion by denying his continuance motions.

II. Ineffective Assistance of Counsel

Perra contends he received ineffective assistance of counsel because of an actual conflict of interest between himself and his defense counsel.[16] We review a claim of ineffective assistance of counsel de novo.[17]

---

[14] See Aguirre, 168 Wn.2d at 365 (no right to choose an unaffordable defense counsel) (citing Roberts, 142 Wn.2d at 516).

[15] See id. (Sixth Amendment does not require an "undue delay" of proceedings) (citing Roth, 75 Wn. App. at 824).

[16] For the first time, in his reply brief, Perra contends defense counsel provided deficient representation by violating his duty of communication. Perra argues "counsel failed to communicate to Mr. Perra that he could not present [his] testimony . . . essentially blindsiding Mr. Perra and leaving him without a cogent defense." Reply Br. at 1. Perra is mistaken. Defense counsel told him before trial began that he could not present false testimony, RP (Oct. 20, 2020) at 341-42, which was one reason he first requested a continuance to obtain new counsel, RP (Oct. 20, 2020) at 347.

[17] State v. Koeller, 15 Wn. App. 2d 245, 257, 477 P.3d 61 (2020) (citing State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009)).

A defendant bears the burden of proving defense counsel was ineffective.[18] The defendant must prove defense counsel's performance was deficient and prejudiced the outcome of trial.[19] Failure to prove either deficiency or prejudice ends the analysis.[20]

After the State presented its case-in-chief, defense counsel asked for a hearing without the State present in order to discuss an issue involving RPC 3.3(a)(4), which prohibits a lawyer from "knowingly . . . offer[ing] evidence that the lawyer knows to be false." Defense counsel, after Perra consented to him doing so, recounted a pretrial conversation in which Perra admitted committing the alleged crimes due to drug addiction. In the same conversation, Perra also admitted that he was captured by a security camera while committing at least one theft. Perra, however, intended to testify that he was in Texas when the crimes were committed and that he was not the man in the security camera footage.

On appeal, Perra does not argue defense counsel lacked a reasonable basis to conclude he would present false testimony. "[A] defendant has no legitimate interest that conflicts with his or her attorney's obligation not to tolerate perjury and to adhere to the Rules of Professional Conduct."[21] RPC 3.3(a)(4)

---

[18] Id. (citing State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011)).

[19] Id. (citing Grier, 171 Wn.2d at 32-33).

[20] State v. Woods, 198 Wn. App. 453, 461, 393 P.3d 886 (2017) (citing State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996)).

[21] State v. Berrysmith, 87 Wn. App. 268, 277, 944 P.2d 397 (1997) (citing Nix v. Whiteside, 475 U.S. 157, 187, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986) (Blackmun, J. concurring)).

prohibits an attorney from presenting evidence that they know is false. RPC 3.3(e) lets an attorney "refuse to offer evidence that the lawyer reasonably believes is false." Every attorney has a "special duty . . . to prevent and disclose frauds upon the court."[22] Thus, an attorney's duty of loyalty "is limited to legitimate, lawful conduct" and does not require "taking steps or in any way assisting the client in presenting false evidence."[23] Because Perra fails to demonstrate an actual conflict between himself and defense counsel, Perra fails to demonstrate ineffective assistance.[24]

III. Double Jeopardy & Merger

Among his convictions, the jury found Perra guilty of first degree theft, second degree theft, two counts of third degree theft, and first degree organized retail theft. Perra contends the first degree organized retail theft conviction must be vacated either because being punished for that crime and the thefts violates double jeopardy or because organized retail theft merges with the other thefts.

---

[22] Nix, 475 U.S. at 168-69; accord Berrysmith, 87 Wn. App. at 276-77 ("A lawyer who reasonably believes that his or her client intends to commit perjury may neither advocate nor passively tolerate the client's position.") (citing RPC 3.3; RPC 1.6; State v. Fleck, 49 Wn. App. 584, 744 P.2d 628 (1987)).

[23] Nix, 475 U.S. at 166; see RPC 1.6(b)(2) ("A lawyer to the extent the lawyer reasonably believes necessary: . . . may reveal information relating to the representation of a client to prevent the client from committing a crime.").

[24] See id. at 171 (representation was not deficient when defense counsel's adherence to ethics and refusal to aid in presenting false testimony resulted in an alleged conflict with their client); see also State v. Elwell, No. 99546-0, slip op. at 22, (Wash. Mar. 3, 2022), https://www.courts.wa.gov/opinions/pdf/995460.pdf ("'[A] conflict over strategy is not the same thing as a conflict of interest.'") (quoting State v. Cross, 156 Wn.2d 580, 607, 132 P.3d 80 (2006)).

Because the merger doctrine is "an extension of double jeopardy principles,"[25] we review both allegations de novo.[26]

The United States and Washington constitutions "provide the same protections" against double jeopardy,[27] which prohibits imposing multiple punishments for the same offense.[28] "In this context, 'the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.'"[29]

The State does not argue the legislature intended to expressly authorize different punishments, so we apply the Blockburger[30] test to decide whether Perra's right against double jeopardy was violated.[31] He was not placed in double

---

[25] State v. Berg, 181 Wn.2d 857, 864, 337 P.3d 310 (2014) (citing U.S. CONST. amend. V).

[26] State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005) (citing State v. Johnston, 100 Wn. App. 126, 137, 996 P.2d 629 (2000); State v. Knutson, 88 Wn. App. 677, 680, 946 P.2d 789 (1997)).

[27] State v. Muhammad, 194 Wn.2d 577, 615-16, 451 P.3d 1060 (2019) (quoting In re Pers. Restraint of Francis, 170 Wn.2d 517, 522 n.1, 242 P.3d 866 (2010)).

[28] Id. at 616 (quoting Whalen v. United States, 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980)).

[29] Id. (quoting Missouri v. Hunter, 459 U.S. 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)).

[30] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

[31] Muhammad, 194 Wn.2d at 617 (citing State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008)).

jeopardy if each crime is distinct and requires the State to prove a fact that the other crime does not.[32]

To apply this test, we examine if the different crimes, "as charged and proved, are the same in law and fact, [then] they may not be punished separately absent clear legislative evidence to the contrary."[33] To convict Perra on each of the theft counts, the State had to prove he "wrongfully obtained or exerted control over the property of another" on a particular date and for a particular value.[34] To convict Perra of organized retail theft, the State had to prove he "wrongfully obtained or exerted control over property from one or more mercantile establishments over a period of 180 days."[35] Because the theft and organized retail theft charges are based upon the same prohibited conduct, occurring at the same time, with the same retail store victim, these crimes are the same in law and fact.

"However, the mere fact that the same conduct is used to prove each crime is not dispositive."[36] To determine whether the legislature intended to impose multiple punishments for the same conduct, we apply the merger doctrine.[37]

---

[32] State v. Parmelee, 108 Wn. App. 702, 708-09, 32 P.3d 1029 (2001) (quoting Blockburger, 284 U.S. at 304).

[33] Freeman, 153 Wn.2d at 777 (citing Blockburger, 284 U.S. at 304).

[34] CP at 44, 46, 48, 50.

[35] CP at 51.

[36] Freeman, 153 Wn.2d at 777 (emphasis omitted) (citing United States v. Dixon, 509 U.S. 688, 704, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993)).

[37] Muhammad, 194 Wn.2d at 617; Freeman, 153 Wn.2d at 777.

"Under that doctrine, a lesser included offense merges 'into a more serious offense when a person is charged with both crimes, so that the person is not subject to double jeopardy.'"[38]

In State v. Parmalee, this court concluded a defendant charged with several lesser included offenses and one more serious offense could be found guilty of the lesser included offenses that were not needed to prove the more serious offense.[39] An ex-husband argued his three convictions for violating a protection order shielding his ex-wife merged with his conviction for stalking her.[40] To prove felony stalking, the State had to demonstrate the ex-husband repeatedly harassed his ex-wife.[41] Thus, two of the protection order violations were necessary to prove the more serious felony stalking charge, merging with it.[42] The remaining protection order violation was not necessary for the stalking conviction and did not merge with it.[43] This court remanded for the ex-husband to be resentenced on the felony stalking conviction and for one protection order violation.[44]

Here, Perra contends his conviction for first degree organized retail theft merges with his theft convictions. But he confuses how merger works because, if

---

[38] Id. at 618 (quoting BLACK'S LAW DICTIONARY 1184 (11th ed. 2019)).

[39] 108 Wn. App. 702, 710, 32 P.3d 1029 (2001).

[40] Id.

[41] Id. at 711.

[42] Id.

[43] Id.

[44] Id.

the doctrine applies, lesser included theft convictions merge into the more serious first degree organized retail theft conviction.[45] Regardless, the State concedes Perra's conviction for first degree theft and one conviction for third degree theft merge into the first degree organized retail theft conviction.[46] We accept its concession.

Perra was found guilty on count XI for first degree organized retail theft, which meant he "wrongfully obtained or exerted unauthorized control over property" with a value of at least $5,000 "from one or more mercantile establishments over 180 days."[47] As charged, this required proving at least two thefts. He was also found guilty on count II, a third degree theft charge for taking about $230 in goods in September of 2019, and on count IV, a charge for first degree theft of goods worth more than $5,000 in December of 2019. Because Perra could not have been found guilty of the more serious organized retail theft charge without the less serious charges, counts II and IV merge with count XI.[48]

---

[45] Muhammad, 194 Wn.2d at 618. First degree theft and first degree organized retail theft are both class B felonies, but first degree organized retail theft has a higher seriousness level. RCW 9A.56.030(2); RCW 9A.56.350(2); RCW 9.94A.515.

[46] We note that Perra does not dispute that these particular convictions, rather than others, merge into first degree organized retail theft.

[47] RCW 9A.56.350(1)(c), (2).

[48] See Berg, 181 Wn.2d at 865 (explaining the merger doctrine "represents an 'aversion to prosecuting a defendant . . . based on acts which are so much the part of another substantive crime that the substantive crime could not have been committed without such acts and that independent criminal responsibility may not fairly be attributed to them'") (quoting State v. Green, 91 Wn.2d 431, 458-59, 588 P.2d 1370 (1979) (Utter, J. dissenting)) (internal quotation marks omitted).

However, the remaining theft charges do not merge because, as in Parmalee, they were not needed to convict Perra of the more serious charge.

IV. Sentencing

Perra argues remand is required to strike several discretionary legal financial obligations and to recalculate his offender score after removing a conviction that State v. Blake rendered void. The State concedes resentencing is required to remove the legal financial obligations and strike the conviction voided by Blake. We accept its concession.

Perra also contends remand is required for resentencing because his exceptional sentence was excessive.[49] The trial court imposed an exceptional sentence, at least in part, under RCW 9.94A.535(2)(c), the "free crimes" enhancement, which allows an exceptional sentence when a defendant "committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished."[50] The court explained Perra had "an extraordinary record and an extraordinary criminal history."[51] Because the basis of Perra's exceptional sentence was, in part, a high offender

---

[49] We note that Perra asserts his 210-month sentence was "30 times the high end of his standard range of 58 months," App. Br. at 38, but he is mistaken. Second degree burglary is a class B felony with a seriousness level of III. RCW 9A.52.030(2); RCW 9.94A.515. With an offender score of 9 or greater, it has a standard range of 51 to 68 months. RCW 9.94A.510. At most, Perra's sentence was about four times higher than the low end of the standard range.

[50] CP at 174.

[51] RP (Oct. 28, 2020) at 505.

score that will be lowered on remand, the trial court must reconsider whether to impose an exceptional sentence.

Therefore, we affirm Perra's convictions and remand for resentencing in accordance with this opinion.

WE CONCUR:

APPENDIX B

FILED
5/6/2022
Court of Appeals
Division I
State of Washington

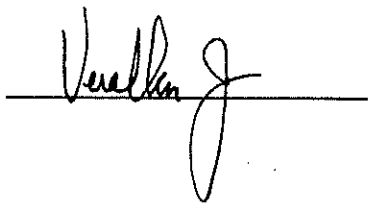
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. STEVEN BRUCE PERRA, Appellant.	No. 83418-5-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of the court's March 21, 2022 opinion. The panel has determined the motion should be denied. Now, therefore, it is hereby

ORDERED that the appellant's motion for reconsideration is denied.

FOR THE PANEL:



THE TILLER LAW FIRM

June 03, 2022 - 3:54 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	83418-5
Appellate Court Case Title:	State of Washington, Respondent v Steven Bruce Perra, Appellant
Superior Court Case Number:	20-1-00400-1

The following documents have been uploaded:

- 834185_Petition_for_Review_20220603154759D1349220_8601.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR FINAL.pdf

A copy of the uploaded files will be sent to:

- appeals@lewiscountywa.gov
- sara.beigh@lewiscountywa.gov

Comments:

Sender Name: Kayla Paul - Email: kpaul@tillerlaw.com
Filing on Behalf of: Peter B. Tiller - Email: ptiller@tillerlaw.com (Alternate Email: Kelder@tillerlaw.com)

Address:
PO Box 58
Centralia, WA, 98531
Phone: (360) 736-9301

Note: The Filing Id is 20220603154759D1349220