74333-3

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NO. 74333-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION NO. I

STATE OF WASHINGTON

Appellant

v.

OSCAR RAUL LOPEZ,

Respondent.

REPLY TO STATE'S APPEAL FROM

THE SUPERIOR COURT FOR KING COUNTY

THE HONORABE BRUCE E. HELLER

RESPONDENT'S REPLY BRIEF

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A. STATEMENT OF THE CASE

The matter before the court is a result of the State appealing the trial court's granting of Mr. Lopez's motion to set aside his conviction and granting him a new trial. On March 13th, 2015, Mr. Lopez was convicted of one count of child molestation in the first degree. On June 15, 2015, Mr. Lopez filed the motion for a new trial through his new attorney.

The motion for a new trial is based on arguments the ineffective assistance of counsel that Mr. Lopez received from, a since disbarred attorney, Mr. Steve Witchley. According to Mr. Lopez, the ineffective assistance of counsel consists of a number of actions and conduct, including the failure by Mr. Witchley to call a number of witnesses, a failure to adequately investigate the case, the failure to communicate a settlement offer, and the failure to act on Mr. Lopez's complaints that Mr. Lopez was unable to understand one of the interpreters in particular during the trial. In addition, Mr. Lopez seeks a new trial based on Mr. Witchley's clinical depression, which was compounded by his pending disciplinary hearings before the Washington State Bar that he knew was going to lead to his disbarment.

On May 13, 2015, two months after Mr. Lopez's conviction, Mr. Witchley resigned permanently from the Washington State Bar in lieu of contesting the disciplinary action against him. This was approximately two months following Mr. Lopez' conviction.

https://www.mywsba.org/LawyerDirectory/LawyerProfile.aspx?Usr_ID=20106

The charges against Mr. Witchley included, in addition to trust account violations, the failure to communicate with a number of clients regarding the status of

their cases. Mr. Lopez submits that Mr. Witchley's troubles with the Bar and his mental health issues are relevant to the ineffective assistance of counsel allegations.

Mr. Lopez' motion for new trial raised issues beyond simply the failure to call reputation testimony. Really, the question is whether Mr. Witchley's handling of the entire case, including pretrial investigation and communications with client, was adversely affected by his mental health and personal problems. More importantly, the declaration of Karen Sanderson, Mr. Witchley's highly experienced long-time investigator, confirmed that this was likely the case. CP at 102. The trial court read a few parts of that declaration as well as the attached memorandum that shed light on this issue. But the entire declaration exemplified Mr. Lopez' argument. CP at 102.

Ms. Sanderson stated in paragraph 5, "I also prepared the attached memo because of my strong belief that Mr. Witchley was suffering from severe depression in the months leading up to Mr. Lopez's trial and including trial. I feel strongly that Mr. Witchley's compromised mental state impacted and restricted his ability to represent Mr. Lopez adequately."

Furthermore, in the memorandum in paragraph B, Ms. Sanderson states, "Steve [Witchley] told me several times that he was having an emotional breakdown, or at least referred to it as this. I have an e-mail where he apologized for his mental breakdown." Ms. Sanderson created the memorandum during Mr. Lopez' trial preparation stage.

Then in paragraph F, Ms. Sanderson states, "Steve told me that everything kind of fell apart for him in October, or whenever the Bar was investigating him. He told me that the Bar was investigating him for the misuse of his trust account. He told me that since the Bar's investigation of him, he basically checked out of Mr. Lopez's case. He told me that he was distracted and depressed. I asked him during this December

conversation if he had an obligation to tell Mr. Lopez. He said essentially no. Steve said that he didn't want to get off the case and intimated that he was financially dependent on Mr. Lopez's case."

According to Ms. Sanderson, "Steve told me in December that he had other worries and concerns that would make him contemplate suicide. He was also contemplating filing for bankruptcy and had some medical issues. He was going to start some new experimental treatment for his depression. He told me he was going to have some type of alternative electric shock therapy."

In paragraph H, Ms. Sanderson stated, "I don't think that Steve ever pulled his head out from depression before or during the trial."

And then lastly, in paragraph I, Ms. Sanderson stated, "Steve told me that he had e-mailed the court that morning and called in sick." And this was when Mr. Witchley was 80 minutes late for court ***during trial***. "He told me that he shouldn't have taken the case to trial and that he was not emotionally capable of working on it. He said that he struggled to get out of bed in the morning and never wanted to come to court."

So much of what the trial court read in open court repeats in much greater detail what Mr. Witchley stated in his declaration that he filed with the court when the court was sanctioning him based on his tardiness. 11RP 1314. The court quoted from Mr. Witchley's October 21 e-mail where he stated, "I can see from recently filed pleadings that my medical condition at the time of trial has already been put into play.[1] The disclosure of the mental health parts of my declaration do not significantly

[1] This court should disregard the baseless accusation by the State that somehow Mr. Witchley was attempting to help Mr. Lopez. See State's opening brief at p. 54, fn.

add to my loss of privacy." The court agreed with Mr. Witchley, and unsealed the part of the declaration beginning on page 2, line 25 to the end, including the letter from Mr. Witchley's psychologist, Dr. Hatchmay Ladd (ph.). 11RP 1315. The court read into the record only a few portions of Mr. Witchley's declaration, which corroborated what Ms. Sanderson testified to at the hearing. On page 2, line 25, Mr. Witchley wrote, "I think the court was also inviting me to include in this declaration any information that might explain how on the one hand I appeared to be a reasonably competent trial attorney while on the other hand I can't master something as basic as showing up for court on time, despite being warned repeatedly about being late. I certainly don't want to sound dramatic, but it is not far from the truth to say that any day that I got out of bed and made it out the door is a victory of sorts. With this declaration, I have included a letter from my primary therapist who briefly summarizes my mental health situation."

The letter that Mr. Witchley referred to is dated March 6, 2015, and it reads as follows. 11RP 1315-1316. "To Who It May Concern: This letter is intended to document diagnosis for the treatment of Steve Witchley's major depression recurrent severe over several years. I have seen Steve for individual psychotherapy since 2006 and am part of a treatment team that includes a psychiatrist and consultant from the Pacific Center for Neuro Stimulation. His symptoms have worsened due to multiple global stressors in the past year affecting his productivity and ability to manage life and professional affairs. Despite these difficulties, Steve is able to work very productively in focused areas, though has difficulty with managing the various demands of a full-time legal practice."

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11. Counsel for Mr. Lopez never even spoke to Mr. Witchley before or after the filing of the motion for a new trial.

The trial court made it clear that, taking the mental health issues into consideration, that this case really is not a typical Strickland analysis because under Strickland, the court would be required to actually find that as a result of Mr. Witchley's depression that Mr. Lopez was convicted and that the result would have been different. However, the trial court continued on to state that had Mr. Witchley not been handicapped by his depression, he would have been more effective. And even though the court finds it difficult to make any conclusions on a more probable than not basis as to what the result would have been had Mr. Witchley been functioning at full capacity, it seems to the court that, as a matter of due process, a defendant is entitled to be represented by somebody who is not suffering from mental illness. And so this is essentially a different way of approaching the issues, and it's really an independent basis for finding that Mr. Lopez should be given a new trial.

B. ARGUMENT

1. LEGAL STANDARDS FOR EVALUATING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioners' trial counsel declined to interview or present witnesses who were willing to testify and who would have provided evidence important to the defense. To render effective assistance, an attorney must be familiar enough with the relevant facts and law to make informed strategic choices. Informed choices are those based on adequate investigation. Trial counsel did not conduct an adequate investigation. Had either of them conducted such an investigation, one of them would have discovered there was evidence that bolstered the Lopez defense and that would have provided actual reputation testimony. Because trial counsel failed in his respective duties to investigate, trial decisions were uniformed and prejudiced the defendant. A new trial

should be granted and the convictions should be vacated.

Mr. Lopez contends that, by failing to prepare his case properly, his trial attorney rendered ineffective assistance. Mr. Lopez indicated to his attorney he had witnesses that wished to testify at trial, but his attorney failed to investigate to have his investigator contact the witnesses.

Mr. Lopez' trial counsel failed to render effective assistance, because he failed to investigate the case adequately. Counsel declined to interview witnesses who knew facts relevant to the defense, who knew facts that undermined the primary claim of the State's case, and otherwise produce witnesses on behalf of Mr. Lopez who made known their willingness to testify.

Counsel's failure even to interview these witnesses meant that the investigation was insufficient to allow him to make informed choices. These uninformed choices prejudiced Mr. Lopez. Trial counsels' performance affected the result of the trial. The trial court's order granting a new trial should be affirmed.

2. THE FAILURE TO PRESENT EVIDENCE OF THE DEFENDANT'S REPUTATION FOR GOOD SEXUAL MORALITY AND DECENCY WAS ADMISSISBLE AND THE FAILURE TO PRESENT SUCH EVDIENCE WAS DEFICIENT PERFORMANCE BY TRIAL COUNSEL

Under the Strickland test, in order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, (1987) (applying the two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

The first prong of the test requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all of the

circumstances. And the second prong requires a showing that there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different.

Mr. Lopez's failure to investigate allegation relates primarily to Mr. Witchley's failure to contact and call certain witnesses to testify. Mr. Lopez argues that Mr. Witchley should have called a number of witnesses to provide positive reputation character evidence, from the following. Mr. Lopez submits that a defendant is allowed to present testimony that he has a good reputation or a pertinent character trait under 401(a)(1).

In this case, the pertinent character trait is sexual morality or decency. Mr. Lopez has submitted declarations from Ricardo and Cecilia Rivera; Ruth Acosta; Jocelyn Leon; and Helen Smith. These witnesses would have provided reputation testimony on behalf of Mr. Lopez. They were either friends of Mr. Lopez or part of the daycare community who would have been prepared to offer reputation evidence regarding Mr. Lopez's sexual morality and decency had Mr. Witchley asked them to. But Mr. Witchley failed to do so. And the reason that he did not is that he concluded, on his own accord, that such evidence was inadmissible or otherwise failed to present the same to the trial court for an independent determination. Judge Heller indicated in his ruling that had he been presented with the evidence, he would have found it to be admissible.

Again, as Mr. Witchley stated in the June 25 interview with Deputy Prosecutor Celia Lee, "It was hard for me to come up with a theory under which any of those people had admissible testimony. If I'm wrong, I'm happy to be corrected on that." The court determined that Mr. Witchley was in fact wrong.

Was Mr. Witchley wrong? And if so, is there a reasonable probability that the failure to put on reputation evidence affected the outcome of the trial?

In State v. Thomas, 110 Wn.2d 859 (1988), the defendant was accused of statutory rape. The trial court permitted three character witnesses to testify that the defendant had a good reputation for being sexually moral or sexually righteous, and for being sexually decent person. The issue before the Washington Supreme Court was whether the trial judge should have given a jury instruction that addressed the character evidence. The Supreme Court affirmed the trial judge's failure to give the instruction, but in doing so, the Supreme Court stated, "Defendant's evidence of a character trait was admitted in careful compliance with ER 404 (a)(1)." Id at p. 864. And on the next page, the court said, "And we now turn to the matter of an appropriate instruction when defendant has properly introduced testimony of character of trait under ER 404 and 405.

Two years earlier, in State v. Jackson, 46 Wn. App. 360 (Div. 1 1986), the court held that the trial court did not abuse its discretion in excluding such testimony. So two years earlier, they reached a result that was different from at least the dicta in the Washington Supreme Court case. And in Jackson, -- and this is a case relied upon by the State in this case—the court expressed doubt regarding whether sexual morality or decency is a specific trait pertinent to the charge of indecent liberties.

Contrary to Division One, Division Two and Three have both permitted reputation evidence regarding sexual morality. And those are State v. Griswald, 98 Wn. App. 817 (Div III 2000), and State v. Harper, 35 Wn. App. 855 (Div II 1983) where, in dicta, the court expressed approval of admitting such reputation evidence.

As Judge Heller ruled, " . . . had this court been presented with these cases and asked to decide whether to admit reputation evidence regarding Mr. Lopez's sexual

morality, the court would have followed the Supreme Court in Thomas and permitted that testimony. And the court concludes that the fact that the case law is somewhat muddy in this area does not mitigate or excuse Mr. Witchley's failure to call the reputation witnesses. It would be one thing if Mr. Witchley's failure to call the witnesses were a tactical decision. But we know that it wasn't because in his e-mail to the court dated October 21, 2015, which has been provided to counsel, Mr. Witchley stated very candidly that he did not have any tactical reasons for not calling the reputation witnesses." 11RP 1309.

Judge Heller continued, "Similarly, if Mr. Witchley had examined the case law and concluded that he could not make the argument in good faith, then this would be a closer question. But here, Mr. Witchley simply failed to spot the issue. What seems to have happened is that his client, Mr. Lopez or Mrs. Lopez's wife, suggested that certain character witnesses be called to give inadmissible testimony, and Mr. Witchley properly rejected their request, but he never took the additional step if asking whether the proposed testimony might be recast as admissible reputation testimony. And this, the court concludes, was a serious mistake and constitutes deficient performance under the first prong of Strickland. Id.

In terms of the prejudice prong, Judge Heller continued,

> So the next question is whether there is a reasonable probability that the absence of reputation evidenced affected the outcome. In other words, would the verdict likely have been different with such reputation testimony? And the court answers this question in the affirmative.
>
> I think most prosecutors would acknowledge that obtaining a conviction in child molestation cases is often difficult. Child molestation often occurs away from the public eye, which means that there are rarely any third-party witnesses and there's often no physical evidence one way or the other. And this case was no exception. Ultimately, the jury had to decide who they believed: the alleged victim or Mr. Lopez. And given the high burden of proof on the State,

> any additional evidence favorable to the defense would likely have been significant.
>
> And the court believes that reputation evidence can be particularly impactful. When asked during voir dire what kind of evidence they would expect to hear, jurors commonly mention prior pattern of behavior by the defendant. They want to know what kind of person the defendant is before they make a judgment about whether he committed a crime. In a way, they hunger for character evidence, but they rarely get o hear it, and for good reason, because the rules of evidence are structured to force jurors to based their verdict on the evidence that's related to the crime, not on the defendant's disposition to either commit or not commit a crime.
>
> Reputation evidence is an important exception to this rule because it allows jurors to view the defendant in a broader context. Depending on the credibility of the witnesses giving this type of character evidence, it can potentially have a significant impact on the out come, particularly in close cases. And this was a close case. It could have gone the other way. And for the this reason, the court concludes that the failure to put on reputation evidence prejudiced Mr. Lopez." 11RP 1311.

While this failure by itself justifies a new trial, Mr. Witchley's mental health before and during the trial also influenced the court in its ultimate decision that a new trial is warranted.

3. THE DEFENSE THAT TRIAL COUNSEL PROVIDED WAS DEFICIENT AND FAR FROM EXCELLENT AS ARGUED BY THE STATE

We will not reiterate the factual recitation contained throughout this brief. However, through counsel's own admission and the trial court's oral ruling, it is clear that Mr. Witchley's trial performance was deficient. It is incredulous that the State would make such a ludicrous argument that Mr. Witchley's performance was "excellent" given his mental health problems, suicidal ideologies and own admission that he was in no state of mind to conduct the trial.

The e-mail from Mr. Witchley regarding the unsealing of this March 23rd, 2015 declaration contains information about Mr. Witchley's severe depression. In the e-

mail to the trial Court, Mr. Witchley raised the question of why his mental health is relevant. As he put it, "My performance at trial was either deficient or it wasn't." Mr. Witchley is correct if the focus is just on his failure to call reputation witnesses. As the trial court ruled, "Whether that failure to call reputation witnesses was the result of depression or simply legal misjudgment, it still constitutes ineffective assistance of counsel." 11RP 1312. It certainly does not amount to an excellent defense.

It is no wonder that the court found that it is fairly obvious that Mr. Witchley was severely handicapped by his depression both before and during the trial. And as Mr. Witchley told his longtime investigator, Ms. Sanderson, he shouldn't have taken the case to trial because he was not emotionally capable of working on it. In fact, the trial court concluded that this in and of itself warrants a new trial.

Justice Talmadge put it best in In re Brett, 142 Wn.2d 868 (2001), "We should find as a matter of law that counsel's representation of a client falls below an objective standard of reasonableness as a matter of law when the lawyer is disbarred for conduct contemporaneous in time with representation and that conduct affects their representation and that conduct affects their representation of that client."

Brett, supra, was a capital murder case, but the rationale there applies equally here. In fact, the trial court focused less on Mr. Witchley's disbarment as it is on the fact that Mr. Lopez' trial appears to have contributed to Mr. Witchley's severe depression. And as the court noted in the beginning of its oral ruling, one of the recurrent themes in the Washington State Bar charges were Mr. Witchley's failure to communicate adequately with his client.

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4. TRIAL COUNSEL'S DEFICIENT PERFORMANCE BOTH IN TERMS OF HIS MENTAL HEALTH PROBLEMS, PENDING DISBARMENT AND SUICIDAL IDEOLOGIES COUPLED WITH HIS LONGTIME INVESTIGATOR'S TESTIMONY CLEARLY ESTABLISH PREJUDICE AT TRIAL

To demonstrate ineffective assistance of counsel, a defendant must make two showings:

(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and

(2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 225-26, (1987) (applying the two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). Competency of counsel is determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225 (1972) (citing State v. Gilmore, 76 Wn.2d 293, (1969)).

The defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation. Thomas, 109 Wn.2d at 225-26.

Mr. Lopez incorporates by reference the factual rendition in this brief as if fully set forth herein. Apart from the trial court's finding of its belief that given the closeness of the case and that the failure to introduce reputation evidence prejudiced Mr. Lopez, by way of brief recap, to illustrate the multitude of manners in which Mr. Lopez was prejudiced, he points the following out to this court regarding Mr. Witchley;

1. He was pending disbarment in which he opted to resign in lieu of disbarment approximately two months following Mr. Lopez conviction;
2. He was suffering from severe depression during trial;
3. He had suicidal ideologies during trial;
4. He knew he should not take the case to trial;
5. He could barely get out of bed each morning;
6. He was suffering from medical issues;
7. He was preparing for electro shock therapy;
8. He was on the verge of bankruptcy;
9. He could not withdraw from Mr. Lopez' case because of his financial needs to list some.

This partial list of Mr. Witchley's shortcomings clearly establishes how Mr. Lopez was prejudiced by his trial counsel's numerous problems. This does not even take into account his failure to investigate, failure to meet with certain identified witnesses and failure to present character evidence. Contrary to the State's argument, Mr. Witchley did not provide Mr. Lopez with an excellent defense.

5. THE TRIAL COURT DID NOT ERR WHEN IT FOUND, AS AN INDEPENDENT BASIS FOR A NEW TRIAL THAT THE DEFENDANT HAS A DUE PROCESS RIGHT TO COUNSEL FREE FROM ILLNESS OR DISABILITY.

The well-known standards for ineffective assistance claims were established in 1984 in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

Under Strickland, "the defendant must show that counsel's performance was deficient -"counsel made errors so serious [he] was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 104 S.Ct. 2052. In addition, the defendant "must show that the deficient performance prejudiced the defense-"counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. For this prejudice prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". Id. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. The failure to present key significant evidence such as reputation testimony in, as the trial court indicated, a close trial, undermines the confidence in the outcome.

Even so, Strickland observed that, "[i]n certain Sixth Amendment contexts, prejudice is presumed ". Id. at 692, 104 S.Ct. 2052 (emphasis added). Such contexts were described as "[a]ctual or constructive denial of the assistance of counsel altogether" and "various kinds of state interference with counsel's assistance". Id. "Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." Id. "[S]uch circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent". Id. "[A] similar, though more limited, presumption of prejudice" applies "when counsel is burdened by an actual conflict of interest". Id. It is submitted that the prejudice in the instant case is easy to identify so as further inquiry is not necessary.

In United States v. Cronic, 466 U.S. at 666, 104 S.Ct. 2039 the Court observed "[t]here are ¬ circumstances ¬ so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified". Cronic, 466 U.S. at 658, 104 S.Ct. 2039. Such circumstances include where counsel fails to subject the prosecution's case to meaningful adversarial testing." Id. It is submitted that this is true when defense counsel fails to present key evidence at trial.

Obviously, the State was not responsible for Mr. Witchley's failures. Of course, "[t]he fact that the accused can attribute a deficiency in his representation to a source external to trial counsel does not make it any more or less likely that he received the type of trial envisioned by the Sixth Amendment, nor does it justify reversal of his conviction absent an actual effect on the trial process or the likelihood of such an effect". Cronic, 466 U.S. at 662 n. 31, 104 S.Ct. 2039. At the same time Mr. Witchley's failures "involve impairments of the Sixth Amendment right that are easy to identify". Strickland, 466 U.S. at 692, 104 S.Ct. 2052.

It is absurd to argue that an attorney suffering from mental illness or disability can represent a defendant who proceeds to trial. This is the very core of the Sixth Amendment and Article 1, §22 of the Washington State Constitution. Any accused person, who is represented by an attorney with these shortcomings is deprived of the right to the effective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 225-26, (1987) (applying the two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

In any event, the trial court found that this would have been a separate independent basis to grant Mr. Lopez a new trial. Assuming arguendo, that this basis is inapplicable, the other grounds for a new trial still exist.

C. CONCLUSION

Mr. Lopez respectfully requests that this honorable court affirm the trial court and remand the matter to the Honorable Superior Court Judge Bruce E. Heller for the retrial.

Respectfully submitted this 22nd day of August, 2016.

THE TREJO LAW FIRM

s/George Paul Trejo, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that I have electronically delivered this document to the following:

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DATED this 22nd day of August 2016.

THE TREJO LAW FIRM

s/George Paul Trejo Jr.
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