No. 99124-3

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TYLER J. McVEY,

Petitioner

APPEAL FROM DIVISION II
OF THE COURT OF APPEALS
#53345-6-II

PETITION FOR REVIEW

BRETT A. PURTZER
WSB #17283

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I. IDENTITY OF PETITIONER

Tyler J. McVey, petitioner, respectfully requests that this Court accept review of the Court of Appeals decision in case number 53345-6-II terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Petitioner respectfully requests that this Court review the Court of Appeals decision, affirming the trial court's decision in this case.

A copy of the decision from the Court of Appeals, Division II, terminating review which was filed on September 15, 2020 is attached as Exhibit "A".

III. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the trial court's decision that Mr. McVey received effective assistance of counsel when his trial attorney failed to interview and call at trial a critical defense witness and failed to effectively cross examine the complaining witness?

IV. STATEMENT OF THE CASE

A. *Procedural History*

On June 11, 2015, the State charged Tyler McVey with one count of Rape of a Child in the First Degree and one count of Child Molestation in the First Degree for an incident that occurred on or between March 1, 2015 and April 17, 2015. CP 6. On August 26, 2016, the State filed a First Amended Information to correct a clerical mistake in Count I related to the initials of the minor child. CP 42.

On August 29, 2016, trial was held before the Honorable Carol Murphy and on September 1, 2016, the jury returned guilty verdicts on both counts. CP 126-127. On October 13, 2016, the Court sentenced Mr. McVey to an indeterminate sentence of 160 months to life as well as other conditions of sentence. CP 149-162. On October 25, 2016, Mr. McVey filed his notice of appeal with the Court of Appeals.

On January 30, 2018, the Court of Appeals affirmed the conviction and the Supreme Court denied a Petition for Review on June 6, 2018. The Mandate issued on June 14, 2018.

In April 2018, the defense obtained a declaration from E.S.'s grandfather, Mark Schmidt. Per his declaration, there was no physical contact between Mr. McVey and E.S. at any time on the date of the allegation. Mr. Schmidt was neither interviewed by the police nor trial counsel and was not called as a witness at trial. CP 67-68.

On August 29, 2018, Mr. McVey filed a motion for a new trial, which was heard before the Honorable James Dixon on October 11, 2018. CP 144-154. After the hearing, Judge Dixon ordered a show cause hearing as to why defendant's motion for a new trial should not be granted pursuant to Cr 7.8(c)(3). CP 109. The motion for new trial was heard before the Honorable Chris Lanese on January 14-16, 2019. At the conclusion of the hearing, Judge Lanese entered Findings of Fact and Conclusions of Law on March 11, 2019 denying defendant's motion for a new trial. CP 129-132. The defense took exception to specific findings and conclusions entered by Judge Lanese. CP 126-128.

On March 13, 2019, Mr. McVey filed his notice of appeal regarding the judge's decision. On June 6, 2019, Mr. McVey filed a Personal Restraint Petition (PRP) alleging ineffective assistance of counsel for prior defense counsel's failure to effectively cross-examine E.S. and to allow Mr. McVey to testify at trial. The Court of Appeals joined Mr. McVey's PRP with the current appeal on July 17, 2019.

On September 15, 2020, the Court of Appeals affirmed the trial court's order and denied his personal restraint petition. This petition follows.

B. *Facts*

Kecia Johnson and Jason Seevers are the parents of E.S., a minor child born October 21, 2010. RP 39:13-40:18. In 2012, when E.S. turned two, her parents separated. RP 41:3-9. After their separation, Ms. Johnson and Mr. Seevers had split custody of E.S., and then Mr. Seevers obtained full custody. RP 41:14-21.

In approximately 2014, Ms. Johnson was in a romantic relationship with the defendant, Tyler McVey, who she met while working at the Manor Care long term care facility. RP 41:25-42:21. During the period of Ms. Johnson's relationship with Mr. McVey, Jason Seevers obtained full custody of E.S., but Ms. Johnson had visitation with her daughter two to three times per week, which would occur at her house. RP 44:4-45:12. During the 2014-2015 period, Ms. Johnson's nanny, Peggy Cluck, and her stepfather, Mark Schmidt, lived in her home. RP 45:8-18. At times when E.S. came for visits, Mr. McVey was present. RP 47:10-18.

After Ms. Johnson's nanny moved out of the home, Mr. McVey watched E.S. on three or four occasions. RP 48:6-13. This would occur when Ms. Johnson had to leave for work. *Id.* Mr. Schmidt, who was also living at the house during this time, was not able to watch E.S. by himself because he suffered a stroke that prevented him from being able to care for E.S. RP 49:13-50:14.

After one of E.S.'s visits with Ms. Johnson, Mr. Seevers picked her up and E.S. disclosed that something had happened to her by Mr. McVey. RP 51:8-56:12; RP 100:19-103:14. Mr. Seevers called Ms. Johnson and asked E.S. to tell her what she had just told him. RP 103:16-19. E.S. did not explain anything about the touches, even though Mr. Seevers asked her to describe the touches. RP 103:20-104:14. Even though Mr. Seevers attempted to talk to E.S. more during the drive, she would not speak with him. RP 105:19-21.

When Ms. Johnson confronted Mr. McVey about what she had learned, he stated that the allegation was false and fabricated because neither Mr. Seevers nor E.S. liked him. RP 56:10-15. Mr. Schmidt was present at the time Mr. McVey was with E.S. on the day of the disclosure. RP 52:1-7. Schmidt Declaration.

In March, 2015, Mr. Seevers complained to the child custody court that E.S. was living in unsanitary conditions when she visited her mother. RP 119:10-17. Mr. Seevers made this complaint approximately two and one-half weeks before E.S.'s April 7, 2015 allegations. *Id.* at 18-20. When Ms. Johnson was questioned by law enforcement regarding the allegations, she believed that E.S.'s allegations were the result of the custody battle she was having with Mr. Seevers. RP 66-21-23.

When E.S. testified, she said that she told her dad that Mr. McVey touched her privates. RP 125:2-3. E.S. also stated that she told her mother and her babysitter about what occurred, but never saw a doctor. RP 125:20-21. E.S. said that the event only happened one time, RP 126:9-10, and occurred the same day she told her dad. RP 126:22-23. E.S. also testified that no one else was at the house at the time. RP 126:15-16.

During cross examination, E.S. stated that she told her mother first and then told her father later in the day about what had occurred. RP 127:8-23. E.S. acknowledged that when this event occurred, her grandfather was home. RP 128:18-20. Later, during cross examination, E.S. stated that the only persons present were Mr. McVey and her babysitter, Peggy. RP 129:11-20; RP 130:5-9. Based upon Mr. Schmidt's declaration, he was present during the time E.S. and Mr. McVey were in the living room, and nothing occurred, physically, between them. CP 67-68. What did occur, however, is that Mr. McVey scolded her for doing cartwheels in the living room near the television. *Id.*

On April 30, 2015, Sue Villa (Batson) conducted a recorded forensic child interview of E.S. at the Monarch Children's Justice and Advocacy Center in Lacey. RP 172:12-21. At the time, E.S. was 4 ½ years old. RP 173:22-23. During the interview, E.S. said that she was there to talk about Tyler. RP 176:12-23. She reported that Mr. McVey touched her with his hands, that she didn't like it, and that he "screwed" her and it hurt. RP 177:7-14. E.S. stated that his hand went inside her body. RP 177:15-16. E. S. said the event happened more than

one time in the dining room. RP 177:20-178:8. E.S. also stated that her grandfather was present in the house when the touching occurred. RP 179:7-12.

After the State rested, the defense also rested. Mr. McVey did not testify. RP 258:19-261:23.

During the motion for new trial hearing, the State called various witnesses, including the prior deputy prosecutor, Craig Juris, the child witness interviewer, Sue Villa, and the parents of the minor child, Keisha Johnson and Jason Seevers. These witnesses testified consistently with what they testified to in the original trial.

Additionally, and more importantly, the State also called the trial attorney's investigator, David Haller (01/14/19; RP 97-113) and Mr. McVey's trial attorney, Robert Brungardt (01/14/19; RP 117-157). In response, the defense called Mark Schmidt (01/15/19; RP 170-192), expert witness, attorney Don Winskill (01/15/19; RP 193-225) and Tyler McVey (01/15/19; RP 227-235)[1].

David Haller was the investigator who worked on the McVey case on behalf of Mr. Brungardt. RP 97:22-25. Previously, Mr. Haller was employed as a police officer by the Los Angeles Police Department and for 22 years with the Thurston County Sheriff's Department, 17 as a detective. RP 97:15-17. Attorney Brungardt asked Mr. Haller to make personal contact with Mark Schmidt, but he was unable to do so. Rather, Mr. Haller attempted contact with Mr. Schmidt by text with "someone who said he was Mr. Schmidt." RP 98:5-11. Mr. Haller made a report for Mr. Brungardt regarding his contact with Mr. Schmidt. RP

[1] Except where specifically identified, all further RP citations relate to the hearing conducted January 14-16, 2019.

98:12-16. Sub #109 – Haller's report – supplementing Clerk's Papers. After providing the report to Mr. Brungardt, Mr. Brungardt asked Mr. Haller to find a physical address for Mr. Schmidt, but he was unable to do so. RP 109:12-25.

Mr. Haller acknowledged that he did not know who he was communicating with during this text communication. RP 106:15-22; 107:1-6. Significantly, Mr. Haller noted that Mr. Schmidt would have had an unobstructed view of the dining area where the events purportedly occurred based upon the information Mr. Haller learned. RP 107:10-12. Mr. Haller understood the significance of Mr. Schmidt's testimony as he would have been an eyewitness to the specific events. RP 109:9-16. After Mr. Haller provided Mr. Brungardt the information regarding Mr. Schmidt, Mr. Haller took no other actions to try to contact Mr. Schmidt. RP 109:17-20.

Mr. Brungardt has been a lawyer since April, 1978. RP 117:23-24. Mr. Brungardt has significant experience representing individuals in child sex cases, and he was retained to represent Mr. McVey in this case soon after he was charged with the offenses. RP 118:6-10, 141:1-7.

Mr. Brungardt became familiar with Mr. Schmidt immediately upon speaking with Mr. McVey. RP 124:13-16. Mr. Brungardt acknowledged that Mr. McVey stated that Mr. Schmidt would be an alibi witness for him. RP 124:18-125:2, 231:7-21. Mr. Brungardt stated that he did not look into Mr. Schmidt further after not receiving a physical address because E.S. had stated that Mr. Schmidt was in his room at the time of the event. RP 128:9-20. Significantly, however, E.S. also testified that Mr. Schmidt was in the living room during the

event, and that he was in his own room. RP (08/31/16) 179:7-12. E.S. provided inconsistent statements as to who was present during the time the purported event occurred, including no one, her babysitter, her grandfather, Mr. Schmidt, and Mr. McVey. *See generally* (08/30/16) RP 125-130 and (08/31/16) RP 179.

Significantly, Mr. Schmidt, in his declaration, indicated he was in the living room the entire time. CP 67-68. Mr. Brungardt acknowledged he took no efforts to try to find Mr. Schmidt after he received the memo from Mr. Haller regarding Mr. Schmidt's information. RP 140:3-10.

Mr. Brungardt was aware that Mr. Schmidt was referenced in the discovery provided to Mr. Brungardt for his representation of Mr. McVey. RP 141:11-25. Mr. Brungardt was also aware that Keisha, E.S's mother, explained that, although Mr. Schmidt had some physical disabilities because of a stroke, he was home the afternoon of the incident, was seated on the couch in the living room when the allegations arose, he had not seen anything unusual occurring between Mr. McVey and E.S., and E.S. had not made any complaints to Mr. Schmidt about Mr. McVey, either before or after the purported event. RP 143:3-20.

Mr. Brungardt acknowledged that there was absolutely helpful information obtained by the investigator regarding the communication that he had with Mr. Schmidt as it related to a defense of Mr. McVey in this case. RP 144:25-145:4. Mr. Brungardt also acknowledged that, even if Mr. Schmidt did not have a line of sight view for the entire 45 minutes, he was present while Mr.

McVey and E.S. were in the room, and his observations would be critically important for the jury to hear. RP 144:1-6.

Mr. Brungardt acknowledged that he did not seek to impeach E.S. with her testimony of Mr. Schmidt's presence or absence from the house. RP 147:5-22. Mr. Brungardt also did not seek to impeach her about the presence or absence of the babysitter being present in the room. RP 148:2-13. Mr. Brungardt acknowledged he did not call the babysitter to the stand for purposes of impeaching E.S. regarding who was present. RP 148:20-149:4.

At the time of the motion for new trial, Mr. Schmidt was residing in Daytona Beach, Florida, and, before moving to Daytona Beach, lived with Keisha Johnson, E.S.'s mother. RP 170:14-171:3. Mr. Schmidt acknowledged that he knew Tyler McVey. RP 171:11-13. He was aware that Tyler McVey was Keisha Johnson's boyfriend during the period that Mr. Schmidt lived with Ms. Johnson. RP 171:14-17. Mr. Schmidt was aware of E.S. making allegations that Tyler McVey touched her inappropriately during the time that he lived at Keisha Johnson's residence. RP 171:24-172:2. Mr. Schmidt acknowledged that, at no time when he saw E.S. interacting with Mr. McVey, did Mr. McVey touch her inappropriately. RP 172:9-12. Mr. Schmidt affirmed that at no time did E.S. say to him that Tyler McVey touched her inappropriately. RP 178:16-18. Mr. Schmidt acknowledge that, at the time he signed his declaration dated April 20, 2018, the contents of the document were true and accurate. RP 190:7-23.

Attorney Don Winskill has been practicing since 1979. RP 194:7-12. Mr. Winskill is familiar with the standards that a reasonably prudent criminal defense

lawyer must engage in when representing individuals in criminal cases, generally, and in sex offense cases, specifically. RP 195:15-20. Mr. Winskill reviewed the discovery presented in this case as well as the transcripts of Mr. McVey's trial. RP 195:21-25. Typically, in sex offense cases, there are usually only two witnesses: the person saying that something happened and the other person saying something didn't happen. RP 197:11-17. Mr. Winskill acknowledged when a third party is present as a potential witness, such witness' testimony can be very significant to the trial. RP 197:18-20. Mr. Winskill reviewed the declaration of Mark Schmidt, and he acknowledged that what was set forth in the declaration was significant because it contradicted what E.S. stated occurred. RP 198:12-199:1. Mr. Winskill indicated that, based upon the information provided by Mr. Schmidt, this information should have been followed up with, particularly when an ambiguity exists in a statement, and it would be reasonably prudent for the attorney representing the individual to interview the potential witness. RP 198:12-201:7.

Specifically, Mr. Winskill testified a reasonably prudent attorney would talk to a witness who had significant importance to a case such as Mr. McVey's. RP 201:7-19. Failure to investigate a witness is not a trial strategy. RP 201:24-202:2. Mr. Winskill acknowledged that if you have a potential eyewitness to an alleged offense, it would be mandatory to flesh out what the individual knows or doesn't know. RP 202:18-21. Mr. Winskill opined that Mr. Brungardt's failure to investigate Mr. Schmidt as a potential witness and to call him at trial fell below the reasonable standard of care for a reasonably prudent attorney. Mr. Winskill

also opined that a reasonable probability existed that the result of the trial would have been different but for the failure to interview and call Mr. Schmidt as a witness. RP 204:19-205:16. Mr. Winskill's opinion was unrebutted.

Mr. McVey testified at the hearing that he was in the home with Mr. Schmidt and E.S. for about 45 minutes on April 7, 2015. RP 228:2-10. Mr. Schmidt was watching TV and E.S. was running around the house and doing cartwheels near her mother's new TV, for which Mr. McVey scolded E.S. RP 228:16-22.

When Mr. McVey learned that E.S. complained about him touching her inappropriately, Mr. McVey told Keisha that she should speak to Mr. Schmidt as he was present the entire time. RP 229:4-14. Mr. McVey understood that after he instructed Keisha to speak with Mr. Schmidt, she did so and Mr. Schmidt verified that Mr. McVey had not done anything inappropriate to E.S. RP 229:13-22.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Petitioner respectfully requests that this Court accept review of this case as the Court of Appeals' decision conflicts with an earlier decision from this Court in *State v. Jones,* 183 Wn.2d 327, 392 P.2d 776 (2015).

A. Mr. McVey's counsel was ineffective for failing to interview and to offer the testimony of an eyewitness.

1. Ineffective Assistance of Counsel

To show ineffective assistance of counsel, a defendant must show that (1) his or her lawyer's representation was deficient and (2) the deficient performance prejudiced him/her.

2052, 80 L.Ed.2d 674 (1984) . Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when but for counsel's deficient performance, the proceeding's result would have been different. *McFarland*, 127 Wn.2d at 335. If a party fails to satisfy one prong, this Court need not consider the other. *State v. Foster*, 140 Wn.App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

Ineffective assistance of counsel is an exception from the actual and substantial prejudice standard: we presume prejudice where a petitioner successfully establishes ineffective assistance of counsel. *In Re Pers. Restraint of Lui*, No. 92816-9 WL 2691802, at *3 (Wash. June 22, 2017). Ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *In Re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

A criminal defendant has a state and federal constitutional right to effective assistance of counsel. *Strickland*, 466 U.S. at 686; *State v. Tinkham*, 74 Wn.App. 102, 109, 871 P.2d 1127 (1994). To discharge this duty, trial counsel must investigate the case, and investigation includes witness interviews. *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1992) (Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may res)(*citing State v. Visitacion*, 55 Wn.App. 166, 173-74, 776 P.2d 986 (1989))).

2. *Trial Counsel's Failure to Interview and call Mark Schmidt at Trial Constitutes Ineffective Assistance of Counsel.*

As set forth by the cases cited above and the testimony of expert, Donald Winskill, Mr. McVey's trial counsel was clearly deficient and ineffective for failing to interview and call Mark Schmidt at trial regarding his observations of the interaction between E.S. and Mr. McVey. Further, this failure prejudiced Mr. McVey's right to a fair trial as a reasonable probability exists that the result of the proceedings would have been different, particularly since Mr. Schmidt was an eyewitness to the events that were alleged to have occurred and acknowledged that Mr. McVey never touched E.S. at any time, and that E.S. never complained to him about any inappropriate conduct.

The "failure to interview a particular witness certainly constitutes deficient performance." *State v. Jones*, 183 Wn.2d 327, 346, 352 P.2d 776 (2015).

In *Jones*, trial counsel failed to interview several witnesses who had information about the facts of the alleged offense. Although the trial court found that the failure to interview the witnesses constituted deficient performance, the trial court found that such failure was not objectionably unreasonable." *Jones*, 183 Wn.2d at 340.

The Supreme Court disagreed about the reasonableness of trial counsel's actions because trial counsel had no idea what the witnesses would have said about the case. As such, the failure to interview the witnesses and the failure to call the witnesses to testify could not be deemed a strategic decision. Additionally, the Supreme Court determined that this failure to interview or call

the witnesses created a reasonable probability that such failure affected the trial's outcome. *Jones* at 341. Appropriately, the Supreme Court reversed Jones' conviction and remanded for a new trial. *See also In Re Personal Restraint of McAllister,* No. 49417-5-II, 06/25/2017(trial counsel was deficient for failing to use known, exculpatory evidence regarding McAllister's physical limitations, for failing to call expert witnesses, and for failing to effectively cross-examine the alleged victim, S.L.)[2]

The Court of Appeals held that trial counsel's failure to interview and call Mr. Schmidt as a trial witness was trial strategy as opposed to deficient performance. Respectfully that holding is erroneous.

Here, McVey's trial counsel's failure to interview Mr. Schmidt to learn about his observations and call Mr. Schmidt as a defense witness was deficient, prejudicial, and affected Mr. McVey's rights to a fair trial as it undermines confidence in the jury's verdict. Given that the only witnesses to the alleged event were E.S., Mr. McVey and Mr. Schmidt, the failure to meaningfully interview and call Mr. Schmidt cannot be deemed a trial tactic. Accordingly, and based upon *Jones*, *McAllister*, and the *Strickland* test set forth above, Mr. McVey's counsel's performance was deficient and such deficient performance prejudiced Mr. McVey's constitutional guarantee of a fair trial.

In support of its order denying Mr. McVey's motion for a new trial, the Court entered certain Findings of Fact that, respectfully, were not supported by the evidence. With respect to the Court's Finding of Fact #8 that Mr. Schmidt's

[2] Unpublished opinions may be cited pursuant to GR 14.1(a).

abilities at the time of the hearing were the same as they were at trial, no evidence was presented by either party to support such finding. Further, Mr. Schmidt's ability was not such that he was deemed incompetent by the judge.

The Court, in Finding of Fact #9, *sua sponte*, injected itself as being familiar with the effects of strokes, yet it was impossible to challenge this finding with respect to the court's understanding of the possible effects of a stroke. No medical testimony was provided by either party surrounding such issue, and, respectfully, many individuals testify with physical and mental limitations, but such potential deficiencies don't necessarily lessen the witness' ability to report accurately.

The Court's Findings of Fact #13 and 14 that Mr. Schmidt's testimony was unbelievable and that the jury would not have given his testimony any weight and that his testimony would not have affected the outcome of the proceeding is simply not supported by the record as developed. The jury should be presented with this evidence and the jury can give Mr. Schmidt's testimony the weight it deserves.

E.S.'s testimony was the only testimony that set forth a claim of sexual abuse. No physical evidence existed and Mr. McVey was saddled with having his attorney present no evidence to contradict E.S.'s testimony, which is troubling since evidence, Mark Schmidt, existed. Mr. Schmidt's testimony, coupled with the testimony of Mr. McVey, would have provided evidence to overcome E.S.'s inconsistent testimony.

The trial court's Finding of Fact #15 that trial counsel had much of the same information regarding Mr. Schmidt as was presented at the hearing, likewise, is not accurate. The record at the hearing conclusively establishes that trial counsel never had personal contact with Mr. Schmidt even though he knew that he possessed valuable evidence for Mr. McVey's defense, evidence that he knew would be critical for the jury to consider.

As acknowledged by trial counsel, before his trial began, Tyler McVey repeatedly told counsel about the importance of Mr. Schmidt being a witness. Yet, for fully unexplained reasons, trial counsel did not take the appropriate action to locate Mr. Schmidt to learn, first-hand, whether Mr. Schmidt would be a productive witness at trial. As testified to by expert Don Winskill, no follow-up occurred after Investigator Haller noted that Mr. Schmidt was present during the time the allegation arose. RP 223:8-21. The investigation conducted by Mr. Haller, which consisted of text messaging, is simply insufficient. As set forth by the Supreme Court's decision in *State v. Jones*, 183 Wn.2d 327, 346, 352 P.2d 776 (2015), "failure to interview a particular witness certainly constitutes deficient performance."

Here, Mr. Schmidt, a material and necessary witness, was never meaningfully interviewed before trial, and the de minimus contact that Investigator Haller had with the purported Mr. Schmidt, via text messaging, cannot be deemed a meaningful substitute for an interview. It is absolutely impossible to determine whether a potential witness is helpful without some

meaningful contact with the individual. Text messaging does not satisfy such a requirement.

Additionally, the Court of Appeals' decision ignores its holding in the unpublished decision in *In Re Personal Restraint of McAllister*, #49417-5-II, 06/25/2017 whereupon this Court granted McAllister's PRP when trial counsel was deficient for failing to use exculpatory evidence at trial. In Mr. McVey's case, no evidence supports a reasonable decision or trial tactic of not contacting Mr. Schmidt before trial, particularly since Mr. McVey was adamant that Mr. Schmidt was a witness to all that had occurred the date that E.S. made her complaint. *See* generally, RP 140:11-25; 142:11-14. *See* RP 230:12-231:14; 149.5-18.

Trial counsel was deficient by failing to timely contact Mr. Schmidt and call him as a trial witness and, trial counsel's deficient performance prejudiced Mr. McVey's right to a fair trial.

Accordingly, the Court's conclusion that Mr. McVey failed to prove the prejudice prong of the *Strickland* test is simply not supported by the evidence. Rather, the evidence supports a finding that trial counsel was deficient for failing to follow through with interviewing Mr. Schmidt and calling him as a witness at trial, and, even more significantly, his deficient performance resulted in actual prejudice to Mr. McVey. Accordingly, and based upon the aforementioned, as well as the issues raised in the PRP, Mr. McVey respectfully urges this Court to grant his petition.

B. The Court of Appeals did not address petitioner's ineffective assistance of counsel claim regarding trial counsel's failure to effectively cross-examine the complaining witness.

Although raised in the trial court and briefed in the PRP, the Court of Appeal's decision does not address petitioner's ineffective assistance of counsel claim regarding trial counsel's cross-examination of the complaining witness.

At hearing, trial counsel acknowledged that he did not impeach E.S. with her inconsistent statements although he had the opportunity to do so. Further, there were significant inconsistencies in E.S.'s pretrial statements and trial testimony that should have been highlighted during cross examination. RP 145:20-148:7; 148:8-149:4. Although it is correct that cross examining a child witness in a child sex case must be done delicately, the failure to cross examine such witness cannot be deemed a trial tactic when the witness provided inconsistent statements.

Respectfully, and again, this failure was deficient and this deficient performance affected Mr. McVey. Because the defense presented no evidence to rebut the child's testimony and failed to establish, through cross examination, the inconsistences in the child's testimony, no evidence existed to rebut the child's testimony of improper touching. Respectfully, such failure constitutes deficient performance and that deficient performance prejudiced Mr. McVey at trial.

VI. CONCLUSION

Based on the arguments, records and files contained herein, Petitioner respectfully requests that this Court accept review of this matter.

Respectfully submitted this 15th day of October, 2020.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner

By: _____
BRETT A. PURTZER
WSB #17283

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the petition for review to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Counsel for Respondent Joseph Jackson Deputy Prosecuting Attorney 2000 Lakeridge Blvd. SW Olympia, WA	☐U.S. Mail ☐Hand Delivery ☒ABC-Legal Messengers ☒Email
Appellant Tyler McVey DOC #393584 Airway Heights Corrections Center P. O. Box 2049 Airway Heights, WA 99001-1899	☐U.S. Mail ☐Hand Delivery ☐ABC-Legal Messengers ☐Email

Signed at Tacoma, Washington, this 15th day of October, 2020.

LEE ANN MATHEWS

Filed
Washington State
Court of Appeals
Division Two

September 15, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TYLER JUSTIN MCVEY, Appellant.	No. 53345-6-II (Consolidated)
In the Matter of the Personal Restraint Petition of TYLER JUSTIN MCVEY, Petitioner.	No. 53631-5-II UNPUBLISHED OPINION

WORSWICK, J. — Tyler McVey was convicted of first degree child rape and first degree child molestation. In this consolidated case, we consider McVey's direct appeal and personal restraint petition (PRP), both raising ineffective assistance of counsel arguments. In his direct appeal, McVey contends that the trial court erred by denying his CrR 7.8 motion for relief from judgment because he received ineffective assistance of counsel when his trial counsel failed to interview a potential eyewitness and failed to call that witness to testify at trial. In his PRP, McVey contends that he received ineffective assistance of counsel because his trial counsel failed to share discovery with McVey and did not call McVey to testify at trial. We disagree with all of McVey's contentions, affirm the trial court's denial of his motion for relief from judgment, and deny his PRP.

FACTS

I. BACKGROUND FACTS

When ES was four years old her father, Jason Seevers, had full custody of her, but she frequently visited her mother, Kecia Johnson, at Johnson's home. At the time, Johnson's boyfriend, McVey, and her stepfather, Mark Schmidt, often stayed at her home. During ES's visits, when Johnson left for work, McVey would watch ES. Schmidt was incapable of watching ES due to a previous stroke. After one visit to Johnson's house, ES told Seevers that McVey touched her and she did not like it. When Seevers's wife handed ES a doll and asked ES where McVey had touched her, ES pointed at the middle of the doll's groin. ES later told a forensic interviewer that McVey had put his hand inside her body.

The State charged McVey with one count of first degree rape of a child and one count of first degree child molestation. At trial, McVey chose not to testify. McVey's trial counsel did not call any defense witnesses and, during his closing argument, argued primarily that ES fabricated the allegations against McVey at the encouragement of her father as part of an ongoing child custody battle with Johnson. The jury returned guilty verdicts on both counts.

II. CrR 7.8 MOTION

After our court affirmed McVey's convictions following his first appeal, McVey filed a CrR 7.8 motion for relief from judgment. In his motion, McVey argued that he received ineffective assistance of counsel during his trial. The trial court ordered an evidentiary hearing on McVey's motion.

David Haller testified at the CrR 7.8 hearing. He explained that McVey's trial counsel, Robert Brungardt, had hired him as a private investigator and asked him to attempt to make contact with Schmidt. Although Haller did not make contact with Schmidt in person, he did

exchange text messages with someone who said he was Schmidt. Haller asked Schmidt if he could see ES and McVey while waiting for ES's father to pick her up on the day in question, and Schmidt replied, "[N]o." 1 Report of Proceedings (RP) at 101. Haller also contacted Johnson and asked if she had discussed the events with Schmidt. Johnson told Haller that Schmidt told her he had not seen anything unusual that day but he did not have ES and McVey in his sight for the entire time. Haller testified that in the course of his investigation, he learned that Schmidt had moved to Florida, but he was unable to obtain an address for him.

Brungardt also testified at the hearing. Brungardt testified that McVey had told him Schmidt could be an alibi witness, which is why Brungardt directed Haller to attempt to locate Schmidt. Brungardt recalled that ES had stated that Schmidt had been in his room at the time of the rape. Brungardt explained that he did not believe Schmidt would be a helpful witness based on Schmidt's statement that he did not have direct sight of McVey and ES during the relevant time period. Brungardt was also aware that Schmidt had health issues from a previous stroke that limited his ability to communicate, which factored into his decision not to pursue him further as a witness. Instead, Brungardt chose to pursue an alternative defense theory focusing on child custody issues.

Brungardt testified about his pretrial conversations with McVey. Brungardt recalled discussing the report of ES's forensic interview with McVey and explaining to McVey that Brungardt had listened to the audio of the interview. Brungardt also testified that he had multiple conversations with McVey about McVey's right to testify during trial. At the time of their conversations, Brungardt made McVey aware of his investigation into the case including listening to the forensic interview. Brungardt testified, "I never and have never told a client that he or she should not testify." 1 RP at 150.

Schmidt also testified at the CrR 7.8 hearing. Schmidt had significant difficulty testifying audibly and answered each question by nodding "yes" or "no." Schmidt acknowledged that he had lived at Johnson's home with ES, but shook his head "no" when asked if he lived there when ES said McVey touched her inappropriately. Schmidt shook his head "no" when asked if he ever saw McVey touch ES inappropriately. 2 RP at 172. Schmidt shook his head "no" when asked if ES ever told him that McVey touched her inappropriately. 2 RP at 178. Schmidt shook his head "no" when asked if he remembered the day of the incident between ES and McVey. 2 RP at 184. Schmidt did not remember if he was at Johnson's house on the day of the incident and did not have any direct knowledge of whether the allegations did or did not occur.

Schmidt did not recall whether he exchanged text messages with Haller. Schmidt acknowledged that the phone number Haller messaged belonged to him. Schmidt could not recall whether he had ever talked to a lawyer other than McVey's counsel for the CrR 7.8 hearing or if he ever spoke to law enforcement regarding the incident with ES.

Following the CrR 7.8 hearing, the trial court entered written findings of fact and conclusions of law. The court found the State's witnesses credible. The trial court also found that Schmidt's previous stroke adversely affected his cognitive function, ability to communicate, and his memory. The trial court found that Schmidt had difficulty answering yes or no questions appropriately, struggled to answer simple questions, and expressed a lack of comprehension. Due to contradictions in Schmidt's testimony and his lack of comprehension, the trial court found that Schmidt's testimony was unbelievable and that, had he been called to testify at trial, a jury would have given his testimony no weight, such that there was no reasonable probability that testimony from Schmidt would have affected the outcome of trial. Based on these findings,

the trial court concluded that McVey could not show that he was prejudiced by Brungardt's decision not to further investigate Schmidt or call Schmidt as a witness at trial, and the trial court denied McVey's motion for relief from judgment.

McVey appeals the trial court's denial of his motion for relief from judgment.

ANALYSIS

I. LEGAL PRINCIPLES

We review a superior court's denial of a CrR 7.8 motion for relief from judgment for abuse of discretion. *State v. Robinson*, 193 Wn. App. 215, 217, 374 P.3d 175 (2016). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds, or when no reasonable judge would have reached the same decision. *Robinson*, 193 Wn. App. at 217-18; State *v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). We review the findings of fact on a CrR 7.8 motion for substantial evidence. *State v. Ieng*, 87 Wn. App. 873, 877, 942 P.2d 1091 (1997). Substantial evidence is a sufficient quantity of evidence to persuade a rational, fair-minded person that a finding is true. *State v. Schultz*, 170 Wn.2d 746, 753, 248 P.3d 484 (2011). We defer to the trier of fact on credibility issues. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Unchallenged findings of fact are verities on appeal. *State v. Stewart*, 12 Wn. App. 2d 236, 240, 457 P.3d 1213 (2020).

Under CrR 7.8(b)(5), a court may grant relief from judgment for "[a]ny other reason justifying relief from the operation of the judgment." Ineffective assistance of counsel can provide the basis for vacating a judgment under CrR 7.8(b)(5). *See State v. Martinez*, 161 Wn. App. 436, 441, 253 P.3d 445 (2011).

"We review ineffective assistance of counsel claims de novo." *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). Ineffective assistance of counsel is a two-prong inquiry. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To prevail on an ineffective assistance of counsel claim, a defendant must show that defense counsel's performance was deficient, and the deficient performance prejudiced the defendant. *Grier*, 171 Wn.2d at 33. A failure to prove either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

There is no ineffective assistance when counsel's complained of actions are trial tactics or go to the theory of the case. *Grier*, 171 Wn.2d at 33. There is a strong presumption that defense counsel's conduct was not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Because of this presumption, "the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *McFarland*, 127 Wn.2d at 336.

To be effective, trial counsel must investigate the case. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). Counsel's duty includes making reasonable investigations, or making a reasonable decision that renders particular investigations unnecessary. *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 355, 325 P.3d 142 (2014). This duty to investigate includes interviewing witnesses. *Jones*, 183 Wn.2d at 339. The decision whether to call a witness is generally presumed to be a matter of trial strategy or tactics, but this presumption may be overcome by showing that the witness was not presented because counsel failed to conduct appropriate investigations. *State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816 (1987).

II. CrR 7.8 MOTION

McVey argues that the trial court abused its discretion by denying his motion for relief from judgment because he received ineffective assistance from his trial counsel when counsel failed to adequately investigate Schmidt and failed to call him to testify at trial. We disagree.

McVey contends that his trial counsel failed to adequately investigate Schmidt, but the record does not support his contention. Rather, the record reflects that trial counsel conducted a reasonable investigation into Schmidt upon learning he may be a potential alibi witness. Based on counsel's investigator's communications with Schmidt, Schmidt's health challenges, statements by ES in her forensic interview, and Johnson's recollection of conversations with Schmidt, trial counsel made the tactical decision not to further pursue him as a witness. Brungardt testified that he made the strategic decision to present a different defense theory at trial—that the rape accusations were fabricated as part of an ongoing child custody battle. Given this testimony, McVey cannot show that trial counsel's decision not to pursue Schmidt further or call him as a witness at trial was anything other than a legitimate trial tactic. Legitimate trial tactics do not constitute deficient performance. *McFarland*, 127 Wn.2d at 336.

The trial court did not enter findings or conclusions regarding whether trial counsel rendered deficient performance, ending its inquiry after concluding that McVey could not satisfy the prejudice prong of the *Strickland*[1] test. But we may affirm on any grounds supported by the record, and Brungardt's decision not to pursue Schmidt as a witness was clear trial strategy.

[1] *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d. 674 (1984).

State v. Streepy, 199 Wn. App. 487, 500, 400 P.3d 339 (2017). Accordingly, we affirm the trial court's denial of McVey's CrR 7.8 motion.[2]

II. PERSONAL RESTRAINT PETITION

In his PRP, McVey contends that he received ineffective assistance of trial counsel because his counsel failed to review all discovery with McVey and did not call McVey to testify at trial.[3] We disagree.

A petitioner may request relief through a PRP when he is under unlawful restraint. RAP 16.4(a)-(c). One way to prove unlawful restraint is for a personal restraint petitioner to show a constitutional error that results in actual and substantial prejudice. *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 488, 251 P.3d 884 (2010). If such a petitioner makes a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and

[2] In a Statement of Additional Grounds for Review, McVey points out that Schmidt was capable of driving himself to-and-from the casino, arguing it evidences Schmidt's competence and undermines the trial court's finding that a jury would have found Schmidt's testimony unbelievable. But substantial evidence supports the trial court's finding. Schmidt struggled to answer questions at the hearing and had limited recall of the relevant time period. McVey does not assign error to the trial court's findings that Schmidt had difficulty answering yes or no questions appropriately, had difficulty answering simple questions, and demonstrated a lack of comprehension. These findings are now verities on appeal. *Stewart*, 12 Wn. App. 2d at 240. That Schmidt occasionally drove himself to the casino does not overcome the substantial evidence supporting the trial court's findings.

[3] In his petition, McVey occasionally references trial counsel's alleged failure to cross-examine ES as a basis for his ineffective assistance of counsel claim, but the substance of his argument does not mention cross-examination and focuses entirely on counsel's review of discovery and McVey's decision not to testify. "'[P]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012) (quoting *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (internal quotations omitted)). Accordingly, we do not consider McVey's assertion that trial counsel failed to adequately cross examine ES.

substantial prejudice. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

McVey states that he was not aware of ES's forensic interview and that had trial counsel reviewed it with him and called Schmidt as a witness at trial, McVey would have testified at trial. But the record does not support McVey's contention.[4] Brungardt testified that he listened to the audio of ES's forensic interview and discussed the contents of it with McVey. Brungardt also testified that he explained to McVey that he was unable to locate Schmidt.

Brungardt also recalled having multiple conversations with McVey about McVey's right to testify during trial. Brungardt testified, "I never and have never told a client that he or she should not testify." 2 RP at 150. At trial, the court took a brief recess for trial counsel and McVey to discuss whether McVey wanted to testify. Following the recess, trial counsel informed the court that McVey chose not to testify. The trial court confirmed with McVey that that was his choice and that he did not need any more time to make that decision.

The record does not support McVey's contentions in his PRP. Instead, the record shows that trial counsel appropriately reviewed discovery and discussed the case with McVey before and during trial, and that McVey made an informed decision not to testify. Because McVey's arguments are based on incorrect facts, he fails to show that his trial counsel rendered deficient performance such that McVey received ineffective assistance of counsel.

[4] McVey made this identical argument in his CrR 7.8 motion, but conceded the issue at the hearing after evidence was presented that did not support his claim.

We affirm the trial court's denial of McVey's CrR 7.8 motion for relief from judgment and deny McVey's PRP.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

Melnick, J.

Cruser, J.

HESTER LAW GROUP, INC., P.S.

October 15, 2020 - 4:27 PM

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