

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

January 5, 2021

DIVISION II

In the Matter of the Personal Restraint of
BRANDON CHRISTOPHER BARNES,
Petitioner.

No. 54445-8-II

UNPUBLISHED OPINION

SUTTON, A.C.J. — Brandon Barnes seeks relief from personal restraint imposed as a result of his 2016 conviction for first degree rape of a child.¹ As described in the opinion affirming his conviction, four-year-old TV spent a weekend in the home of Barnes and his girlfriend, Tahjiere Smith. *State v. Barnes*, 4 Wn. App. 2d 1079, 2018 WL 3854916 at *1 (2018). Later that week, TV reported to an adult cousin, and then to her grandmother and mother, that Barnes had had sexual contact with her. *Id.* TV later underwent a forensic interview and a physical examination, during which she also reported sexual contact by Barnes. *Id.* at 2-3. The State charged Barnes with two counts of first degree rape of child. TV, her cousin, her grandmother, her mother and the forensic interviewer testified. Barnes’s counsel listed Smith as a witness, but ultimately did not call any witnesses. In

¹ We issued the mandate of Barnes’s direct appeal on January 17, 2019, making his January 10, 2020 motion for relief from judgment timely filed. RCW 10.73.090(3)(b). Barnes filed his motion with the trial court, which transferred it to us under CrR 7.8(c) to be considered as a personal restraint petition. He argues that his motion was wrongfully transferred, because it was not time-barred and he makes either a substantial showing of merit or that a factual hearing is required to decide the motion. CrR 7.8(c)(2). But as addressed in this opinion, Barnes does not make a substantial showing of merit or that a factual hearing is required. Further, he is not prejudiced by the transfer because the more rigorous pleading standards for personal restraint petitions have not been applied to his motion.

closing argument, Barnes's counsel attacked the credibility of the State's witnesses and questioned the consistency of TV's statements. The jury acquitted Barnes of one count of first degree rape of a child but convicted him of the other count. We affirmed his conviction but remanded his sentence to strike some community custody conditions.

Barnes now argues that he received ineffective assistance when his trial counsel did not call as witnesses Smith and two of her children. He contends that they would have testified that the events that TV reported could not have occurred because they would have seen them, but did not. To establish ineffective assistance of counsel, Barnes must show that his counsel's advice fell below an objective standard of reasonableness and that as a result of that deficient performance, the result of his case probably would have been different. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995), *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This court presumes strongly that trial counsel's performance was reasonable. *State v. Carson*, 184 Wn.2d 207, 216, 357 P.3d 1064 (2015). And where there is a legitimate trial tactic that would explain counsel's actions, those actions do not constitute ineffective assistance of counsel. *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 539, 397 P.3d 90 (2017). Barnes's trial counsel had legitimate tactical reasons for not calling Smith or her children as witnesses. He had successfully prevented testimony that Smith had refused to be interviewed about TV's reports without an attorney present. But the trial judge ruled that if Barnes's counsel called Smith as a witness, he could inquire into Smith's refusal to be interviewed, which could have undercut Barnes's defense by allowing the State to intimate that Smith was failing to cooperate with the investigation of TV's reports. And calling Smith's children, then seven and nine years old, could have undercut Barnes's counsel's

argument that young children are unreliable witnesses. Under *Lui*, Barnes “must establish an absence of any legitimate trial tactic that would explain counsel’s performance.” 188 Wn.2d at 539. He does not meet this burden. Therefore, Barnes does not show ineffective assistance of trial counsel.


Barnes does not show that he entitled to relief from restraint. We deny Barnes’s petition and his request for appointment of counsel.

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.


SUTTON, A.C.J.

We concur:


MELNICK, J. P.T.


CRUSER, J.