

NO. 40617-9

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHRIS ANTHONY LINDHOLM, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 05-1-03828-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in denying a motion for new trial that was untimely and which failed to show that the court was required to disqualify itself under the Code of Judicial Conflict or that the defendant's trial had been unfair?
2. Has defendant failed to meet his burden of showing either deficient performance or resulting prejudice necessary to succeed on a claim of ineffective assistance of counsel?

B. STATEMENT OF THE CASE.

Appellant Chris Lindholm ("defendant") was found guilty of kidnapping in the first degree, assault in the second degree and felony harassment following a jury trial¹ before the Honorable John R. Hickman in Pierce County Cause No. 05-1-03828-6. CP 50-61, 106-115. Prior to sentencing, defendant successfully moved for a new trial on the grounds of evidentiary error; the State appealed Judge Hickman's order granting a new trial. CP 106-115. While the Court of Appeals initially affirmed the grant of a new trial, the State sought further review in the Supreme Court,

¹ The verbatim report of the trial proceedings were not included in defendant's statement of arrangements for this appeal and are not part of the record of review. Some of the facts underlying defendant's convictions are set forth in the opinion from the Court of Appeals when it reversed the order granting new trial. CP 106-115.

which remanded the matter to the Court of Appeals for reconsideration in light of a recent decision.² On further review, the Court of Appeals vacated the order granting new trial and further remanded the matter to the trial court for entry of judgment and sentence on the jury's verdicts. CP 106-115.

Back in the superior court, the defendant – represented by new counsel- filed another motion for a new trial alleging that “newly discovered evidence” regarding the trial judge’s representation of the defendant’s brother, when the judge was in private practice, showed that the court should have disqualified itself from hearing the case. CP 8-27. Defendant alleged that the recent “discovery” of this information now required the court to grant defendant a new trial. CP 8-27.

The record shows the following facts pertinent to grounds alleged as the basis for the motion for new trial. The defendant’s case was assigned to the Honorable John R. Hickman for trial on January 30, 2006. CP 93-103. At some point, the court’s judicial assistant alerted the judge that the defendant’s last name was the same as one of the judge’s former clients. CP 8-27 (*see* Appendix A); 85-88 (FOF II), 93-103 (2/2/06 entry). The court determined that the former client was the brother of the defendant then promptly notified the parties. *Id.* The notification occurred on February 2, 2006, early in the State’s case in chief; the judge

² *State v. Magers*, 164 Wn.2d 174, 189 P.3d 126 (2008).

informed the parties of this connection, recalled that he represented the brother, Steve Lindholm, in a “one time estate planning/drafting will situation,” and directed the parties to state any concerns they had about the situation on the record. CP 8-27(see Appendix A), 93-103 (2/2/06 entry). No one pursued the matter at that time and the trial proceeded over the course of several days with the case being submitted to the jury on February 7, 2006, and the jury returning its verdict the same day. CP 93-103.

At trial, defendant was found guilty of crimes committed on August 4, 2005, against his estranged wife. CP 50-61, 93-103, 106-115. As mentioned earlier, defendant obtained an order granting a new trial on the grounds of evidentiary error from the trial court and the State successfully overturned that order on appellate review.

In the motion for new trial filed post- appellate review, defendant presented information that the trial judge’s representation of his brother was more extensive than the court had remembered at the time of trial. CP 8-27. He presented a declaration from his brother, Steve, documenting representation on several matters including the previously mentioned estate planning issues. CP 8-27 (see Appendix B). Steve Lindholm indicated that the last time he had retained the judge as his attorney was in December 2003, when he revised his will to remove the defendant as his personal representative and to remove both defendant and his wife as beneficiaries of his estate. *Id.* There may have one additional phone call

between Steve Lindholm and John Hickman in December 2004, regarding a nephew's discharge from the military, but there is no indication that this resulted in any formal retention of the attorney's services. *Id.* The declaration from Steve Lindholm states that he did not attend his brother's trial and "only later learned that [Judge Hickman] had presided over his brother's case." *Id.* While his declaration does not provide a date as to when he learned of this fact, it is known that he was aware of it no later than April 21, 2006, as he wrote a letter to Judge Hickman asking the court to set a low bail amount while the order granting a new trial was on appellate review. CP 104-105.

After hearing oral argument on the defendant's motion for new trial, the court denied it for two reasons. RP 17-21. First the court found that this claim had been waived by inaction as the court had disclosed the court's representation of Steve Lindholm to both parties at the time of trial and neither party investigated the matter further despite having time to do so before the case went to the jury. RP 19-20, CP 85-88. The court found that any motion based upon this information should have been brought in a timely manner as the information was readily available to the Lindholm family. RP 20-21, CP 85-88. The court noted that disqualification was not sought while there was a favorable ruling by the court in effect and it was only after an unfavorable ruling from the appellate court that defendant brought his motion. RP 20-21.

Secondly, at the time of trial the court's recollections regarding the Lindholm family were non-existent other than the fact that he had done some estate planning work for the defendant's brother. RP 19-21, CP 85-88. As a consequence there was no information within the court's knowledge that created any actual or potential bias. The court considered that it had presided over the trial in a neutral and unbiased manner and could see no deprivation or harm to any of the defendant's rights to a fair trial. RP 21; CP 85-88. The court entered findings of fact regarding this ruling. CP 85-88.

After denying the motion for new trial, the court proceeded to sentencing; it imposed a total period of confinement of 171 months comprised of concurrent standard range sentences of 57 months, 6 months, 3 months, and 3 months for the four convictions to be followed by three consecutive firearm enhancements of 60 months, 36 months and 18 months. RP 42-47, CP 50-61. Defendant filed a timely notice of appeal from entry of this judgment. CP 67-84.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR NEW TRIAL WHEN IT WAS UNTIMELY AND FAILED TO ESTABLISH ANY BASIS THAT THE COURT WAS UNFAIR OR BIASED SO AS TO REQUIRE DISQUALIFICATION.

A new trial in a criminal proceeding is required only when the defendant has been so prejudiced that nothing short of a new trial can insure that he or she will be treated fairly. *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). Denial of a motion for a new trial is within the discretion of the trial court, which an appellate court will reverse only for abuse of discretion. *State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). An abuse of discretion occurs when no reasonable judge would have made the same decision. *Bourgeois*, 133 Wn.2d at 406.

- a. Except for one portion of Finding of Fact II, the court's findings should be treated as verities.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. *Id.* Substantial

evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Hill*, at 644. Credibility determinations are for the trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court's conclusions of law are reviewed de novo. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

The trial court entered findings of fact (FOF) on its order denying the motion for new trial. CP 85-88. It should be noted that two of the findings are both labeled as "II." The State will simply treat both paragraphs labeled "II" as if it were a single finding of fact. In applying the above law to the case now on appeal, this court should treat all but a small portion of FOF II as verities. Defendant assigned error to Findings of fact II, III, and IV. Brief of Appellant at p.1. The only argument in the brief, however, pertains to a portion of Finding of Fact II regarding the timing of when the court notified the parties as to his former representation of the defendant's brother; the finding indicates that it happened before jury selection while defendant contends that it happened after a few days into the trial proceeding. As to this challenge, the State concedes that it has merit; the record below indicates that the prosecution was presenting its case in chief when the court notified the parties about its earlier representation of the defendant's brother. *See* Respondent's brief at p. 2-3. There is no other argument in the Appellant's brief,

however, as to why the remainder of the challenged findings are erroneous or unsupported by the record.

In *Henderson Homes, Inc v. City of Bothell*, 124 Wn.2d 240, 877 P.2d 176 (1994), the Supreme Court was faced with an appellant who assigned error to the findings of fact but did not argue how the findings were not supported by substantial evidence; made no cites to the record to support its assignments; and cited no authority. The court held that under these circumstances, the assignments of error to the findings were without legal consequence and that the findings must be taken as verities.

It is elementary that the lack of argument, lack of citation to the record, and lack of any authorities preclude consideration of those assignments. The findings are verities.

Henderson, 124 Wn.2d at 244; *see also State v. Jacobson*, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998).

Because the defendant has failed to support his assignment of error to the trial court's FOF III and IV and the balance of FOF II with argument, citations to the record, and citations to authority, this court should treat the assignments as being without legal consequence. With the exception of the portion of FOF II discussed above, all of the court's findings should be considered as verities upon appeal.

- b. The trial court did not abuse its discretion in finding that the motion was untimely and involved information that could have been discovered earlier with due diligence.

A motion for new trial, regardless of whether it is based upon newly discovered evidence or an irregularity in the proceedings, must be served and filed within ten days after the verdict unless the court grants additional time. CrR 7.5(b). If the motion is based upon newly discovered evidence, the defendant must show that the evidence is material and that it could not have been discovered with reasonable diligence and produced at trial. CrR 7.5(a)(3).

The jury returned its verdicts finding defendant guilty on February 7, 2006. CP 93-103. Defendant's motion for new trial based on the court's previous representation of defendant's brother was filed on September 25, 2009, over two years later. CP 8-27. In the motion, defendant contended that CrR 7.8(b)(2) provided authority for his late filing of his motion. *Id.* CrR 7.8(b), provides in the relevant part:

On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

...

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

...

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, ...

CrR 7.8(b). While this provision provides a longer time frame for filing a motion for new trial than CrR 7.5, it still has a one year time limit for bringing such motion

For defendant's motion for new trial to have been proper before the court under this provision his must show that his "newly discovered evidence" could not have been discovered with the exercise of due diligence in time to bring a timely motion for new trial under CrR 7.5 and further, that it was filed within one year of the verdict.

The court found that defendant could have discovered this evidence with due diligence in time to bring a timely motion for new trial under CrR 7.5. It found:

Both counsel had ample opportunity to contact Steve Lindholm and confirm the court's representation. No further mention of the disclosure was raised any time by either counsel throughout the many months and years since the court's initial disclosure. Both counsel acknowledged the disclosure, waived it, and proceeded to trial. ... None of the additional information as to the court's prior contacts with Steve Lindholm was disclosed to the court until after the court of appeals ruled on the case and just before sentencing. If this information were a concern, it should have been brought to the court's attention in a timely manner. This information was readily available to the Lindholm family, yet it was not communicated until after an unfavorable ruling by the Court of Appeals.

CP 85-88, FOF III; Appendix A. The denial of the motion as being based on matters that could have been discovered earlier with due diligence is not an abuse of discretion. The court found that the motion was also untimely. The motion was filed more than two years after the verdicts had been returned. The record shows that the motion was not filed within the one year time limit established by CrR 7.8. Thus the court properly denied the motion as being untimely. Defendant has failed to show that the trial court abused its discretion in denying his motion on this basis.

- c. The trial court was not required to disqualify itself under the Code of Judicial Conduct and defendant failed to provide any evidence of actual or implied bias.

Due process, the appearance of fairness doctrine and the Code of Judicial Conduct (CJC) require a judge to disqualify himself if he is biased against a party or his impartiality may reasonably be questioned. *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955); *see also* Wash. Const. art. I, § 22. “Impartial” means the absence of bias, either actual or apparent. *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). A judge is presumed to act without bias or prejudice. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 692, 101 P.3d 1 (2004).

On September 9, 2010, the Washington Supreme Court adopted significant revisions to the Code of Judicial Conduct (“CJC”), effective January 1, 2011. CJC 2.11 now contains the language that was formerly

found in Canon 3(D)(1). Former Canon 3(D)(1), which was in effect at the relevant time in this case, provides in part:

Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge previously served as a lawyer ... in the matter in controversy ...;

A party alleging judicial bias must present evidence of actual or potential bias. *State v. Post*, 118 Wn.2d 596, 618, 619 n. 9, 826 P.2d 172, 837 P.2d 599 (1992). An appellate court uses an objective test to determine if a judge's impartiality might reasonably be questioned by a reasonable person who "knows and understands all the relevant facts." *In re Marriage of Davison*, 112 Wn. App. 251, 256, 48 P.3d 358 (2002) (quoting *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)). "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." *Post*, 118 Wn.2d at 618 (quoting *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972)). But "[w]ithout evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit." *Post*, 118 Wn.2d at 619. If a party moves to recuse a judge after rulings have been made, he must

demonstrate prejudice on the part of the judge. *State v. Cameron*, 47 Wn. App. 878, 884, 737 P.2d 688 (1987).

In *State v. Dominguez*, 81 Wn. App. 325, 329, 914 P.2d 141 (1996) the court held that the “mere fact” that the judge earlier represented the defendant and also had previously prosecuted him, both times in his professional capacity as an attorney, did not establish potential bias. The court went on to discuss that the code of judicial conduct requires disqualification when a judge has participated as a lawyer *in the case being adjudicated*. *Id.* “A judge is not disqualified merely because he or she worked as a lawyer for or against a party in a previous, unrelated case.” *Id.* citing *Mustafoski v. State*, 867 P.2d 824, 832 (Alaska.Ct.App.1994); *Commonwealth v. Darush*, 279 Pa.Super. 140, 420 A.2d 1071, 1074 (1980), *vacated on other grounds*, 501 Pa. 15, 459 A.2d 727 (1983); accord *State v. Eastabrook*, 58 Wn. App. 805, 817, 795 P.2d 151, *review denied*, 115 Wn.2d 1031, 803 P.2d 325 (1990). The court in *Dominquez* found that the defendant failed to present sufficient evidence of potential bias for the appearance of fairness doctrine to apply and affirmed the trial court’s denial of the motion to disqualify itself. *Id.* at 330.

In the case at bar, as in *Dominquez*, there was no showing that the trial court was required to disqualify itself under the CJC. The trial judge representation of the defendant’s *brother* on estate and other matters do not fall with the categories where disqualification is required. Under

Dominquez, even if the court had represented the defendant himself, disqualification would not be required. Defendant made no showing of any potential bias in the trial court; nor does he argue it on appeal. The judge stated that he had no recollection of facts regarding the defendant's family. The judge could certainly have no information about the facts at issue in the criminal trial as those events occurred many months after his last professional contact with the defendant's brother.

Defendant appears to argue that the trial judge had information regarding the defendant's use of street drugs and acts of domestic violence and that this information about what was happening in 2003 could be imputed forward to be information about the criminal acts that occurred in 2005. *See* Appellant's brief at p. 9. First, there is no competent evidence in the record below that Steve Lindholm discussed the defendant's drug use or domestic violence issues with the judge when he hired him to revise his will. In his declaration, Steve Lindholm indicated that when he wanted to change his will to remove his brother as his personal representative and as a beneficiary, the "nature of the ill feelings that motivated the change of will were explained to John R. Hickman," but his declaration does not give any details about what was explained except to say that the reasons "were not flattering" to defendant and his wife. CP 8-27(*see* Appendix B). The defendant's declaration purports to offer more detail about the content of the conversation between his brother and attorney Hickman than is contained in the brother's declaration. CP 8-27 (compare Appendix B

with Appendix C). Defendant does not have any testimonial knowledge as to the content of the conversation between his brother and his attorney and therefore he can offer no competent evidence on this point. *See In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992) (proper affidavits “contain matters to which the affiants may competently testify”); *In re Lord*, 123 Wn.2d 296, 303, 313, 868 P.2d 835 (1994) (allegations supporting a personal restraint petition must be proven by “competent, admissible evidence.”).

Defendant further asserts in his declaration that the contents of their conversation “relate to the allegations in this case.” CP 8-27 (*see* Appendix C). It is unclear how a conversation that occurred in December 2003 could be about events that happened on August 2005. There is no evidentiary support in the record for defendant’s assertions that any information given by his brother in the course of the conversation regarding the will revision was relevant to the facts of the crimes for which he was tried

Finally, defendant makes no showing that he received anything other than a fair trial. Defendant raises no claims of trial error on appeal. The last appeal in this case was regarding a grant of a new trial that had been requested by defendant. This is proof that the court was willing to listen to any claim defendant had regarding the fairness of his trial and give him relief if justified. As it turned out, the court’s ruling was not supported by the law, which was in flux at the time of trial. As defendant

can offer no example to demonstrate how the court was supposedly biased or unfair, this court need not even consider his claims regarding the appearance of fairness.

Defendant has failed to meet his burden of proof in showing any bias and has failed to demonstrate that the trial court had to disqualify itself in order to comply with the Code of Judicial Conduct. He has failed to show any abuse of discretion in the denial of his untimely motion for new trial.

2. DEFENDANT HAS FAILED TO MEET HIS BURDEN UNDER STRICKLAND OF SHOWING DEFICIENT PERFORMANCE AND RESULTING PREJUDICE NECESSARY TO SUCCEED ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v.*

Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to

find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Defendant argues that his attorney was deficient for failing promptly investigate the full scope of the professional contacts between the trial judge and the defendant's brother after the court disclosed that the

brother had been a former client. As argued above, there was nothing about the content of nature of these interactions that would have indicated a legal basis existed for disqualification. The information known to trial counsel was that there was no recent contact between the court and the defendant's brother and that the last contact had occurred well before the events that were the basis of the defendant's criminal charges. The court indicated that it could remember virtually nothing about the defendant's brother other than the fact of employment. Thus defense counsel knew that the court had no prior relationship with the defendant, had no recollections about the defendant's extended family, and could have no knowledge about the facts of the case from the previous contacts. Defendant fails to show any deficiency for not investigating this matter further based upon this information. Moreover, this initial disclosure came during the trial and defense counsel had the opportunity to observe how the judge conducted the trial. That there was no challenge or concerns about the judge's professional contacts with the brother, likely flowed from the fact that defense counsel perceived that defendant was receiving a fair trial from the court and had no desire to seek another forum. This indicates a tactical decision that will not support a claim of deficient performance.

Nor can defendant demonstrate resulting prejudice. First, he cannot show that the trial court would have granted a motion to disqualify itself had counsel brought one in a more timely manner setting forth the

full details of the court's contacts with the defendant's brother. As noted above, there is nothing about the court's contacts with the brother that required the court to disqualify itself under the Code of Judicial Conduct. Defendant cannot show that the motion would have been granted. Nor has he made any showing that he received an unfair trial by a biased court. The fact that defendant has not challenged a single trial ruling on appeal further demonstrates that he can point to no error or action of the trial court that impacted the fairness of his trial. He has failed to show resulting prejudice.

Finally, the party seeking review has the burden of perfecting the record so that the appellate court has before it all of the proceedings relevant to the issue. RAP 9.2(b). *Allemeier v. University of Washington*, 42 Wn. App. 465, 472, 712 P.2d 306 (1985). An appellate court need not consider alleged error when the need for additional record is obvious, but has not been provided. *Marriage of Ochsner*, 47 Wn. App. 520, 528, 736 P.2d 292 (1987). While the Rules of Appellate Procedure allow for the court to correct or supplement the record, they do not impose a mandatory obligation upon the appellate court to order preparation of the record in order to substantiate a party's assignment of error. *Heilman v. Wentworth*, 18 Wn. App. 751, 754, 571 P.2d 963 (1977). In *Heilman*, the appellant assigned error to the trial court's decision to deny his request for a continuance in order to obtain some

medical testimony, but did not provide the relevant report of proceedings.

The appellate court refused to consider the assignment of error stating:

We decline the implied invitation to search through an incomplete record, order that which should be obvious to support an assignment of error, and then make a decision.

Heilman, 18 Wn. App. at 754. An appellate court errs when it decides an issue on the merits when the necessary record for review is missing. *State v. Wade*, 138 Wn.2d 460, 979 P.2d 850 (1999). The *Strickland* standard requires the court to review the entirety of the record to assess the performance of trial counsel and whether there was any prejudicial effect. Defendant has failed to provide the necessary record for a proper review of his claim because he has not provided any of the verbatim report of proceedings for the trial itself. He asks this court to declare his trial counsel deficient for a single alleged deficiency, then fails to provide the court with the record necessary to assess trial counsel's entire performance as *Strickland* requires. This failure to provide the necessary record should result in the summary dismissal of this claim.

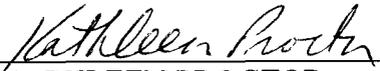
Defendant has failed to meet his burden of showing both deficient performance and resulting prejudice necessary to succeed on his claim of ineffective assistance of counsel.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the judgment entered below as well as denial of the motion for new trial.

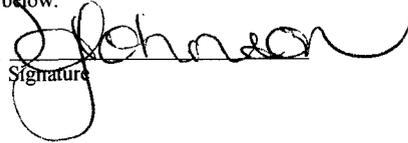
DATED: February 18, 2011.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

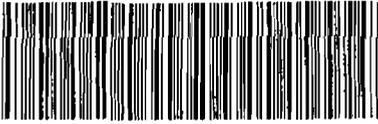
Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant's attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

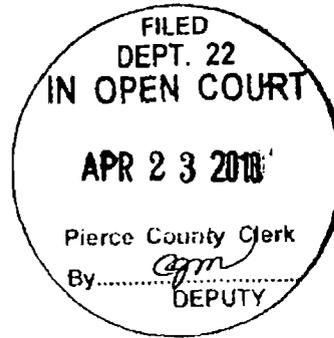

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Signature

APPENDIX “A”

Findings and Conclusions



05-1-03828-6 34181877 FNCL 04-26-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-03828-6

vs.

CHRIS ANTHONY LINDHOLM,

Defendant.

FINDINGS AND CONCLUSIONS

THIS MATTER having come on before the Honorable John R. Hickman on the 23 day of April, 2010, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions.

I. That on August 5, 2005, the defendant was charged with Kidnapping in the First Degree, Assault in the Second Degree, Felony Harassment, Assault 3 and Unlawful Use of Drug Paraphernalia. The first three counts were alleged to be domestic violence offenses wherein the defendant's wife Jill Lindholm was the victim.

II. The matter proceeded to trial on January 30, 2006 in front of the Honorable John R. Hickman, who had been assigned the case just that day. When the case first came before Judge Hickman, the judicial assistant indicated that the last name of the defendant sounded familiar. She then confirmed that the defendant's brother Steve Lindholm was a former client who Judge Hickman had represented prior to becoming a judge. Even though Judge Hickman had opened over 4,000 files during the course of his private practice, he remembered Mr. Lindholm and

1 immediately disclosed his former relationship to both counsel. This occurred before the jury
2 was seated.

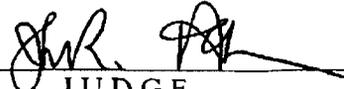
3 II. The most recent work that Judge Hickman had performed for Steve Lindholm
4 occurred in 2003. Prior to that, Judge Hickman had performed estate planning work in 1993.
5 Without reviewing past records, Judge Hickman disclosed the legal work that he recalled
6 performing, which centered around estate planning, which was the last formal contact he had
7 with Steve Lindholm. Judge Hickman did not see Steve Lindholm outside of his office, and
8 Steve Lindholm was not a personal friend.

9 III. While the court does not dispute that there were additional professional contacts with
10 Steve Lindholm prior to 2003, the only contact the court recalled at the time of trial was the
11 estate planning work that was promptly disclosed. There was no intent by the court to deceive or
12 minimize the prior contact with Steve Lindholm. Both counsel had ample opportunity to contact
13 Steve Lindholm and confirm the court's representation. No further mention of the disclosure
14 was raised any time by either counsel throughout the many months and years since the court's
15 initial disclosure. Both counsel acknowledged the disclosure, waived it, and proceeded to trial.
16 The court believed that if a request for recusal would have been made, it would have been from
17 the State since the inference would be favorable toward the defense as the court had represented
18 the defendant's brother. The total extent of the court's present recollection of Steve Lindholm's
19 family was that he was married, lived in the Fife-Milton area, and worked for the City of Milton.
20 The court was wrong, and the judicial assistant correctly indicated that Steve Lindholm worked
21 for the City of Fife. Prior to this case being assigned, the court recalled nothing about Steve
22 Lindholm's estate planning, including his immediate family and siblings, and the court certainly
23 recalled nothing regarding whether Steve Lindholm had a brother, or any history with a brother.
24
25

1 Over the course of 29 years of private practice, Judge Hickman drafted 200 to 300 estate
 2 planning documents. Judge Hickman's memory of any details of estate planning, outside of the
 3 court's immediate family, is nonexistent. If the court had any recollection of Steve Lindholm's
 4 brother, the court would have disclosed such information and would have recused itself. None of
 5 the additional information as to the court's prior contacts with Steve Lindholm was disclosed to
 6 the court until after the court of appeals ruled on this case and just before sentencing. If this
 7 information were a concern, it should have been brought to the court's attention in a timely
 8 manner. This information was readily available to the Lindholm family, yet it was not
 9 communicated until after an unfavorable ruling by the Court of Appeals.

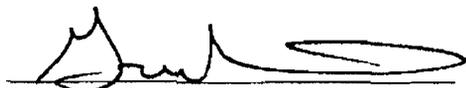
10 IV. This case does not present a probability of actual bias by the court that was so high
 11 as to violate the defendant's constitutional rights. The court had no knowledge that would have
 12 tempted the court to disregard neutrality. The actual rulings of the court demonstrate that the
 13 court was in fact a neutral fact finder. The court's knowledge of Steve Lindholm's brother (the
 14 defendant) was nonexistent prior to the trial. The court's conduct during the trial in this case, in
 15 no way deprived the defendant of a fair hearing. There was no actual or potential bias by the
 16 court, nor was there a likelihood of such actual or potential bias, as the court had no knowledge
 17 of the defendant. The court therefore respectfully denies the defendant's motion for a new trial.
 18

19 DONE IN OPEN COURT this 23 day of April, 2010. **JOHN R. HICKMAN**



 JUDGE

21 Presented by:

22 
 23 GRANT E. BLINN
 24 Deputy Prosecuting Attorney
 25 WSB # 25570

FILED
 DEPT. 22
 IN OPEN COURT
 APR 23 2010
 Pierce County Clerk
 By  DEPUTY

Approved as to Form *form rec'd*

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Barbara L. Corey

BARBARA L. COREY
Attorney for Defendant
WSB # 11778

geb

PIERCE COUNTY PROSECUTOR

February 18, 2011 - 11:39 AM

Transmittal Letter

Document Uploaded: 406179-Lindholm Response Brief.pdf

Case Name: State v. Chris Lindholm

Court of Appeals Case Number: 40617-9

Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

■ Other: Response Brief

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us