

NO. 42832-6

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

STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA BLANCAFLOR,
OTHNIEL BLANCAFLOR,

Appellants.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR1

II. STATEMENT OF THE CASE1

 A. Facts1

III. LAW AND ARGUMENT.....6

 A. Sufficient Evidence Was Presented By The State For A Jury To Infer Beyond A Reasonable Doubt That Mr. Blancaflor Intended To Deprive His Employees Of Their Wages.....7

 1. Testimony By Prior Employees Regarding Mr. Blancaflor’s Multiple Failures To Provide Proper Compensation Reveals A Pattern Of Intentional Deprivation.....9

 2. None Of Mr. Blancaflor’s Assertions On Appeal Refute Intent Such That The Jury’s Finding Of All Requisite Elements Could Be Considered Unreasonable15

 B. Ms. Blancaflor’s Defense Counsel At Trial Performed Above An Objective Standard Of Reasonableness And She Was Not Prejudiced By His Defense Strategy Or His Choice Of Objections.....17

 1. There Was No Confrontation Clause Issue To Which Mr. Ryan Should Have Objected, And As Such, His Failure To Do So Did Not Constitute Ineffective Assistance18

 2. Mr. Ryan Presented A Consistent Defense Throughout Trial23

 C. The Evidence Presented At Trial Was Sufficient To Prove Employers False Reporting28

D.	Trial Court Did Not Err In Denying Motion To Substitute Counsel As It Was A Proper Exercise Of Discretion	36
1.	The Nature And Extent Of The Conflict Did Not Warrant Substitution Of Counsel	39
2.	The Hearing Before A Superior Court Judge Provided A Sufficiently Searching Inquiry Into The Dispute.....	41
3.	Denial Of The Motion Was Proper As It Was Found To Be Untimely	42
IV.	CONCLUSION	44

TABLE OF AUTHORITIES

Cases

Arnold v. Laird, 94 Wn.2d 867, 621 P.2d 138(1980).....	37
Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992).....	37
Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004).....	18
In re Rice, 118 Wn.2d 876, 828 P.2d 1086 (1992).....	18
Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 50 (1979).....	7, 28
Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983).....	41
Lawson v. Boeing Co., 58 Wn. App 261, 792 P.2d 545 (1990).....	36
Melendez-Diaz v. Massachusetts 129 S.Ct. 2527 (2009).....	20, 21, 22, 23
Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610 (1983).....	39
State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990).....	8, 29
State v. Carter, 56 Wn. App. 217, 783 P.2d 589 (1989).....	17
State v. Cross, 156 Wn.2d 580, 132 P.3d 80 (2006).....	41

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980).....	8, 29
State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....	7, 28
State v. Hensler, 109 Wn.2d 357, 745 P.2d 34 (1987).....	37
State v. Hermann, 138 Wn. App. 596, 158 P.3d 96, 99 (2007).....	18, 28
State v. McNeal, 145 Wn.2d 352, 37 P.3d 280 (2002).....	8, 9
<i>State v. O’Cain</i> , ___ Wn. App. ___, 279 P.3d 926 (2012).....	22
State v. Ralieggh, 157 Wn. App. 728, 238 P.3d 1211 (2010), <i>rev’ denied</i> , 170 Wn.2d 1029 (2011).....	16
State v. Renfro, 96 Wn.2d 902, 639 P.2d 737 (1982).....	26
State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992).....	8, 15, 28
State v. Staten, 60 Wn. App. 163, 802 P.2d 1384 (1991).....	38
State v. Stenson, 142 Wn.2d 710, 16 P.3d 1 (2001).....	38, 39, 41, 42
State v. Stevenson, 128 Wn. App. 179, 114 P.3d 699 (2005).....	24
State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987).....	17, 23

State v. Walton, 64 Wn. App. 410, 824 P.2d 533 (1992)	8, 29
Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).....	17, 23, 27
Thomas v. French, 99 Wn.2d 95, 659 P.2d 1097 (1983).....	37
United States v. Moore, 159 F.3d 1154 (9 th Cir. 1998)	39, 42
United States v. Prince, 474 F.2d 1223 (9 th Cir. 1973)	42
West v. Thurston County, 168 Wn. App 162, 275 P.3d 1200 (2012)	36, 37

Statutes

RCW 9A.56.010(18)(c)	8, 9
RCW 9A.56.020(1)(a)	9
RCW 9A.56.030(1)(a)	8
RCW 51.28.020(1)(a)	29
RCW 51.48.020(1)(b)(i-ii).....	24, 28
RCW 51.48.020(b).....	29

Rules

RAP 10.3(a)(6).....	36
RPC 1.1.....	38

Constitutional Provisions

Const. amend. VI	21
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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did defense attorney provide ineffective assistance of counsel by failing to object to an issue that was not present or presenting a defense strategy disagreed with by his client?
2. Was sufficient evidence presented to support the jury verdict of guilty for employers false reporting when evidence revealed that the defendant personally contacted L&I to report zero hours at a time when she knew her employees should have been covered?
3. Is it proper for a trial court to deny a motion for substitution of counsel when the disagreement goes to trial strategy and a complete breakdown in communication had not occurred?

II. STATEMENT OF THE CASE

A. Facts

The Appellants, Othniel and Cynthia Blancaflor, owned and operated an adult family home facility in Pierce County, Washington. RP 76, 98. The Blancaflors purchased My Grandma's House, LLC ("MGH") on July 5, 2005. RP 745. The adult family home facility had a patient capacity of six (6), and required employees to provide care twenty four (24) hours, seven (7) days a week. RP 499, 750. The Blancaflors continued to operate MGH until it closed in June of 2009. RP 100, 190, 885. According to Othniel Blancaflor, MGH suffered from financial instability as early as 2006. RP 749. Mr. Blancaflor stated at separate times in both 2006 and 2007 that the occupancy of the house dropped to

between two (2) to four (4) patients, and the Blancaflors had difficulty meeting payroll. The Blancaflors ultimately had to use personal assets to pay wages. RP 749, 760. Despite their knowledge that they could not pay their employees for the work they provided, the Blancaflors continued to operate the business, making up for the shortfall in operating capital by failing to pay the agreed upon wages to their employees. RP 760. In 2007, Mr. Blancaflor failed to pay the outside accounting firm Sutton McCann, who had until that point, been responsible for calculating MGH's payroll. RP 596-597. After an extended period of nonpayment, Sutton McCann withdrew their services from MGH and on or about January 1, 2008. Mr. Blancaflor then took over bookkeeping and payroll. RP 750 - 751.

Eddie Hoff and Elvira Viray were MGH employees whose wages were shorted on several occasions. RP 387-390, 503, 506-507, 521-522. According to Ms. Viray, in the last quarter of 2007, MGH had five (5) patients. RP 519. In 2008, the Blancaflors ceased issuing paychecks with a proper paystub, and began paying them in cash in an envelope including a running balance of how much they were each still owed. RP 522, 761, 763. Hoff and Viray were told by the Blancaflors that this was as a result of the financial problems facing MGH, and that they would eventually pay them everything they had earned. RP 510. Ms. Viray experienced

unauthorized deductions from her pay. 501 – 503, 504, 505, 506 – 507. Mr. Hoff never received the agreed upon wage, and was not paid at all for two separate pay periods. RP 387 -389. Despite failing to pay full wages to Mr. Hoff and Ms. Viray, MGH did not decrease their workload. RP 526. Finally, after repeatedly rendering services without proper compensation, both Mr. Hoff and Ms. Viray quit in April and May of 2008 respectively. RP 391-392, 508. Mr. Hoff was still owed \$3,820.80, and Ms. Viray was owed \$2,669.23. RP 294.

In May 2008, Mr. Hoff and Ms. Viray contacted the Department of Labor and Industries (“L&I”) and submitted wage complaints alleging outstanding payroll for previous employment services. RP 283. In reviewing these wage complaints, the Employment Standards Unit determined that the wages the employees claimed to be owed were during a period in which MGH had reported zero (0) employee hours to L&I. RP 447.

L&I commenced an audit of MGH in September 2009 based on the referral from Employment Standards. RP 79. It was during the audit investigation that L&I determined the Blancaflors had improperly classified all their workers as “independent contractors” for tax purposes and failed to pay required L&I premiums in 2008 and 2009. RP 132, 193, 370, 497, 754. The investigation also determined that the Blancaflors had

several employees whom they had not reported to L&I in 2007. RP 192-193, 753-757. As early as February 4, 2008 Mr. Blancaflor stated that the 4th quarter employee hours, were the “final hours” for MGH, although he later stated that the L&I account should have been closed. RP 445, 447. On April 21, 2008, Mr. Blancaflor reported to Employment Security Department (“ESD”) that he had no employees and was not sure when he would have employees. RP 634. However, both Mr. Hoff and Ms. Viray were still employed by MGH at the time the L&I and ESD accounts were closed in 2008. RP 100, 391-392, 508, 790.

Despite multiple requests from L&I for time records of employees, the Blancaflors failed to produce any records, and most payroll documents were acquired as a result of a search warrant on the Blancaflors’ personal residence. RP 114-115. The audit made it clear that despite the Blancaflors’ failure to pay prior employees, they continued to operate MGH and to employ others until it closed in June of 2009; effectively operating and collecting revenues for over a year without paying any required L&I premiums or back wages due. RP 162, 189-190, 193, 784-785.

Following L&I intervention the Blancaflors established a payment plan for the past wages owed to Mr. Hoff and Ms. Viray, and even though both employees agreed to accept less than 100% of the amount owed, the

Blancaflors again failed to provide the agreed upon payment. The only checks he submitted to the employees were returned due to insufficient funds. RP 302; 790-791. Mr. Blancaflor claims to have made efforts to procure funds to pay back wages, such as selling off personal assets; however even at the time of trial neither Hoff nor Viray had received any more of the outstanding balance. CP 224, RP 303, 524, 790-792.

Ms. Blancaflor was a full time journey level auditor at the Department of Labor and Industries (L&I) during the time she was a co-owner of MGH. RP 94, 341-342. She had extensive training in performing complex audits and even completed an audit of another adult family home. RP 359, 363, 896-897. As such, she had personal experience making determinations of which employees are considered “covered workers,” requiring payment of L&I premiums. RP 343-344, 363.

Ms. Blancaflor’s responsibilities as co-owner of MGH included hiring employees and occasional supervision. RP 260, 262, 310. Edward Hoff, Elvira Viray and Cecily Kubita, reported that in 2008, when MGH began paying its employees in cash, Ms. Blancaflor would often be the one to distribute the cash. RP 263, 380, 507. Mr. Hoff and Ms. Viray testified that their pay often contained only partial payment with a running balance of what was still owed. RP 410-411, 522. These two (2)

employees did not receive their full wage, and for Mr. Hoff this outstanding balance reached over three (3) thousand dollars. RP 508, 510, 294. In January 2008, Ms. Blancaflor told Mr. Hoff and Ms. Viray that they were now being classified as “independent contractors,” and that they would be receiving a 1099. RP 383 -384, 506. Ms. Blancaflor told them they would no longer have deductions taken out of their pay checks. RP 505-506.

On August 26 2008, Ms. Blancaflor contacted L&I by email to report that the MGH account had zero employee hours for the first three (3) quarters of 2008 and the account should be closed. RP 451, 529, 533, 535-536. During the first two quarters of 2008, however, Mr. Hoff and Ms. Viray continued to work at MGH. RP 392, 508, 880-881.

On May 19, 2010, the Blancaflors were each charged with three counts of Employer’s False Reporting or Failure to Secure Payment of Compensation and one count of Theft in the First Degree. CP 1-4. On September 12, 2011, First Amended Charges were filed with the same charges. CP 30-33. On September 22, 2011 a jury found the Blancaflors guilty of all counts. CP 106 -109.

III. LAW AND ARGUMENT

Othniel Blancaflor challenged the sufficiency of the evidence on appeal. Cynthia Blancaflor also challenged the sufficiency of the evidence

on her conviction and also raised a claim of ineffective assistance of counsel and took exception to the trial court's denial of her motion to substitute counsel. Othniel Blancaflor's claim will be addressed first.

A. Sufficient Evidence Was Presented By The State For A Jury To Infer Beyond A Reasonable Doubt That Mr. Blancaflor Intended To Deprive His Employees Of Their Wages

Mr. Blancaflor claims that insufficient evidence was presented to prove that he had the required "intent to deprive" necessary for a conviction of Theft in the First Degree. This argument must fail as the jury, after viewing extensive evidence presented by the State and defense, found all elements of the crime beyond a reasonable doubt. Indeed, the facts relied on by Mr. Blancaflor to support his contention on appeal do not refute the element of intent.

On a challenge to the sufficiency of the evidence, this court must decide whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all of the required elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 50 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a challenge to the sufficiency of evidence, the Appellant "admits the

truth of the State's evidence and all inferences that can reasonably be drawn from it." *State v. McNeal*, 145 Wn.2d 352, 360, 37 P.3d 280 (2002). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), citing *State v. Casbeer*, 48 Wn. App. 539, 740 P.2d 335, (1987). Thus, this Court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992). The elements of a crime may be established by direct or circumstantial evidence, one being no more or less valuable than the other. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Mr. Blancaflor was charged with Theft in the First Degree under RCW 9A.56.030(1)(a), and RCW 9A.56.010(18)(c). To prove he committed Theft in the First Degree the State must prove beyond a reasonable doubt the theft of property or services (not a firearm) which exceeds \$5,000 dollars.

RCW 9A.56.030(1)(a). This may be met whenever:

Any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are a part of a criminal episode or a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the

value considered in determining the degree of theft involved.

RCW 9A.56.010(18)(c). Theft is further defined as:

“Wrongfully obtain[ing] or exert[ing] unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.”

RCW 9A.56.020(1)(a). (Emphasis added)

1. Testimony By Prior Employees Regarding Mr. Blancaflor’s Multiple Failures To Provide Proper Compensation Reveals A Pattern Of Intentional Deprivation

The evidence presented by the State established beyond a reasonable doubt all elements of the crime of Theft in the First Degree. This includes the inference amply supported by the evidence, that not only did Mr. Blancaflor fail to pay employees Mr. Hoff and Ms. Viray their wages, this deprivation was intentional. *McNeal*, 145 Wn.2d 352, 37 P.3d 280 (2002). The jury heard testimony and viewed evidence that even as MGH continued to operate throughout periods of financial instability, Mr. Blancaflor kept Mr. Hoff and Ms. Viray employed with the full knowledge that he would not be able to pay them their wages. To avoid additional costs to his struggling business, he refused to pay agreed upon wages, made incomplete payments on payday, and altered the L&I status to “independent contractors” to avoid paying L&I premiums, yet never

proportionally reduced the duties or hours required of his employees. Further, on several prior occasions, he attempted to avoid proper payment of wages by claiming the employees had already been paid or otherwise shorting their paychecks. Additionally, the jury was able to consider Mr. Blancaflor's nonpayment of other workers, such as Joann Razon, who never received her final pay. RP 785. In rendering a guilty verdict, the jury determined that Mr. Blancaflor's knowledge that he would be unable to pay wages, coupled with prior attempts to escape payment owed to employees, showed a pattern of behavior from which a reasonable trier of fact could find that he never intended to pay Mr. Hoff and Ms. Viray for the full value of their services.

Contrary to Mr. Blancaflor's assertions, financial troubles do not, standing alone, refute intent to deprive. In fact, financial troubles can provide the basis for a motive to make only incomplete payments, if any at all. Workers at MGH were strung along in order for Mr. Blancaflor to be able to get as much work out of them for the least amount of cost to him as possible. In doing so, Mr. Blancaflor committed theft from two particular employees, Edward Hoff and Elvira Viray. These two, who filed formal complaints with L&I in May 2008, testified that their agreed upon wages had not been paid, that there had been unauthorized deductions, and that neither had received their final paycheck. RP 283.

Mr. Hoff was a resident manager and caregiver at MGH. RP 366. He was employed at MGH from approximately 2006 to 2008, and testified to two separate time periods where Mr. Blancaflor fell behind in paying wages, once in 2007 and again in 2008. RP 366, 380, 383. He further testified, that within this period, multiple wage checks were returned for insufficient funds, costing him additional money in overdraft fees. RP 391.

However, contrary to what is now alleged on appeal, it was not simply an issue of inability of the Blancaflors to pay. From the very start, Mr. Hoff did not receive the correct wage. When he began, he received an employment contract from MGH that noted his bimonthly wage would be \$1,500.00. RP 371. Despite this, he never once received that amount. Instead, checks signed by Mr. Blancaflor were issued in the amount of \$677.50, and Mr. Hoff was given another \$59.00 in cash each pay period, effectively receiving less than half of the agreed upon wage. RP 372. Further, Mr. Hoff testified that in 2008, without any warning or reason, he suddenly started receiving only \$650.00. RP 379. This change occurred without an opportunity to question it, and most importantly, without any changes in the services Mr. Hoff provided or the hours he worked. RP 390. Hoff testified that even after this wage dropped, he often did not receive the full amount of \$650 on pay day. RP 423. Despite this,

Mr. Hoff stayed on at MGH, knowing that due to economic conditions, other jobs were scarce. RP 381.

In addition to MGH's failure to pay Hoff the proper wages, there were two separate instances where Mr. Hoff was not paid at all for an entire two week pay period in which he had worked. In both 2007 and 2008, Mr. Hoff, who took vacation in January to visit his family in the Philippines, was never paid his wages for the period of December 16th through December 31st. RP 387-390. Both years, before leaving for vacation, but after finishing that work period, Mr. Hoff asked Mr. Blancaflor if he could be paid before he left since he would still be out of the country on January 10th, the regular payday RP 387-390. Both times, Mr. Blancaflor told Mr. Hoff that he would not be getting any money because he had already been paid for that period. RP 387-390. Ms. Miquelita Luna worked at MGH as a caregiver from 1996 to 2007. Ms. Luna testified that Mr. Blancaflor failed to pay her for the work performed during December 2006 after she went to the Philippines in January 2007 to February 2007. RP 477. When she returned and asked for her December 2006 pay, Mr. Blancaflor stated she had already received her pay, even though she had not. RP 477-478. By deliberately withholding her earned pay and then claiming that she had already received that pay, the Blancaflors denied both Ms. Luna and Mr. Hoff of

wages earned and owed. Mr. Hoff knew he had not already been paid and testified that he didn't think it was fair, but thought he had no choice but to accept what his boss told him. RP 389.

Mr. Hoff testified that when he finally did leave MGH, he made the decision to quit because he knew that Mr. Blancaflor would never pay the agreed upon wage. RP 392. At that time he was still owed back wages, and believing he would never in fact receive that money, Mr. Hoff made a wage claim with L&I in May 2008. RP 393-395. Mr. Hoff ended up agreeing to take \$2,300.00 even though he was owed \$3820.80, "just to get it all over with." RP 395. Even once the payment agreement was instituted, he only received one installment and the full agreed-upon amount was never completed. RP 303, 396.

The jury was entitled to find from this evidence that Mr. Hoff's repeated difficulties in obtaining proper and complete compensation were the result of the Blancaflors' intentional deprivation of wages for services rendered. Their rejection of the Blancaflors' attempt to excuse his actions by claiming an inability to pay, simply demonstrates the jurors determination that this claim lacked sincerity and credibility; especially in light of the Blancaflors' failure to pay other employees proper wages. Even after making an agreement with L&I to pay the owed back wages,

the Blancaflors' revealed that they had no intention of paying the amount due, as they never followed through on those agreements. RP 524.

This testimony from both Mr. Hoff and Ms. Viray, as well as other MGH employees, reveal that the failure to pay occurred multiple times, and exposes not just isolated incidents coinciding with the business' financial issues, but a pattern of deceit and deprivation. This was an ongoing scheme, and the financial instability of MGH provided even more motive for Mr. Blancaflor to decrease his labor costs by intentionally shorting his employees' portions of their wages. He took advantage of the employees' situations, and the poor economy, by continuing to have them work their full hours, with no intention of paying them the full value of their labor, until they had no choice but to quit. His intent was revealed further through his failure to make any payments of back wages, despite his business continuing to operate well into 2009.

Viewed in the light most favorable to the State, the testimony of all the witnesses makes it clear that there are more than enough facts from which a jury could find that the undisputed failure to pay both Eddie Hoff and Elvira Viray was intentional. On appeal, reasonable inferences, such as this finding of intent, must be drawn in favor of the State. Salinas, 119 Wn.2d 192, 829 P.2d 1068.

2. None Of Mr. Blancaflor's Assertions On Appeal Refute Intent Such That The Jury's Finding Of All Requisite Elements Could Be Considered Unreasonable

Mr. Blancaflor claims that he made every effort to meet his obligations to pay his employees: liquidating his personal assets, and attempting to sell a remaining parcel of property to pay the outstanding wages; keeping records of the back pay due; also by making an agreement with L&I to pay back the money. These factors, it is claimed, refute any possible intent, and show only a pure inability to pay. Appellant['s] Br. 9. The jury, however, was free to reject these claims as self serving and not credible, and clearly did so in finding him guilty. His argument must therefore fail as none of these facts alone, or together, outweigh or refute the evidence presented by the State from which the jury determined intentional deprivation.

Mr. Blancaflor's argument that he liquidated personal assets rests only on vague references by him, does not indicate which resources were sold or when, and makes no indication of whether the money went specifically to pay back wages or simply to keep the business afloat. RP 749, 760, 791. He further claims that his record keeping of what was still owed refutes intent to deprive; despite the fact that these records could also indicate an attempt at placating his employees throughout his continued deception. Furthermore, Mr. Blancaflor's agreement to a

payment plan with L&I fails to refute intent, because the payment plan was a result of L&I involvement only after the employees filed official complaints. RP 301. While not specifically imposed, this agreement could hardly be said to be voluntary. In fact, the subsequent failure to follow through on this payment plan directly contradicts a lack of intent. Further, despite all of these “efforts” to pay Ms. Viray and Mr. Hoff, neither employee ended up receiving what they were due. RP 303, CP 224.

Mr. Blancaflor’s argument that the evidence proves only an inability to pay, and does not prove intentional deprivation, ignores the evidence presented by the State and seeks to nullify the jury duly empanelled to hear this case. The jury made clear their determination of credibility and the persuasive force of the evidence when finding Mr. Blancaflor guilty beyond a reasonable doubt and deference is given to their decision. *State v. Ralieg*, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010), *rev’ denied*, 170 Wn.2d 1029 (2011). The finding of intent to deprive is a reasonable inference drawn from the evidence, and as such, it should be admitted as truth and remains undisturbed on appeal.

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B. Ms. Blancaflor's Defense Counsel At Trial Performed Above An Objective Standard Of Reasonableness And She Was Not Prejudiced By His Defense Strategy Or His Choice Of Objections

Ms. Blancaflor advances two theories for the proposition that Mr. Ryan, her trial counsel, provided deficient and prejudicial assistance of counsel. First, that his failure to object to the testimony of Mary Tunis violated his client's Sixth Amendment right to confrontation. Second, that Mr. Ryan failed to present a defense.

To demonstrate ineffective assistance of counsel, Ms. Blancaflor must prove both that the attorney's performance was: (1) deficient, i.e., that it fell below an objective standard of reasonableness; and (2) the deficiency resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under *Strickland* courts ascertain prejudice by asking whether the defendant received a fair trial. *State v. Carter*, 56 Wn. App. 217, 224, 783 P.2d 589 (1989); *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052 (1984). This standard is "highly deferential and courts will indulge in a strong presumption of reasonableness." *Id.* at 226. Deference is given to trial counsel's performance in order to "eliminate the distorting effects of hindsight." *State v. Hermann*, 138 Wn. App. 596, 605, 158 P.3d

96, 99 (2007), (internal quotation marks deleted, citations omitted.)
Reviewing courts presume that counsel's conduct constituted sound trial strategy. In re Rice, 118 Wn.2d 876, 888–89, 828 P.2d 1086 (1992). As such, decisions regarding trial strategy or tactics will not establish deficient performance by counsel. Hermann, 138 Wn. App. at 605.

1. There Was No Confrontation Clause Issue To Which Mr. Ryan Should Have Objected, And As Such, His Failure To Do So Did Not Constitute Ineffective Assistance

There is no merit to the argument that Mr. Ryan was ineffective because he did not object to the testimony of Mary Tunis regarding the L&I audit of MGH created by Pamela Cormier. A violation of the confrontation clause exists only where a witness's testimony is admitted without the defendant having an opportunity to cross examine the witness before or at trial. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). As Mary Tunis was intimately involved in the creation of the audit, her testimony covered only first hand knowledge, and did not constitute hearsay such that it would be a violation of the sixth amendment right to confrontation as Ms. Blancaflor alleges. Id at 43. Because no constitutional violation existed, a meritless objection would not have been sustained, and therefore did not result in prejudice.

Ms. Blancaflor's contention that Mary Tunis did not have the first hand knowledge of the report necessary to testify appears to rely on Tunis' statement that the audit was assigned to Pamela Cormier. RP 96. This argument ignores extensive additional testimony by Ms. Tunis that shows personal knowledge and involvement in the auditing process that extends beyond mere supervision. RP 242. Her testimony made it clear that in addition to supervising the audit she was also assisting in its preparation, rendering the completed report a joint work product. RP 194, 242.

This involvement included personally meeting with Ms. Blancaflor's accountant, Betty Jutte, and contacting DSHS to determine MGH resident census for 2008 and 2009 when no other independent sources of information could be found. RP 186, 104-110, 147. Additionally, she was part of the team that executed the search warrant on Ms. Blancaflor's personal residence, and worked alongside Pamela Cormier to copy and sort all of the retrieved documents which were later used in the audit itself. RP 114-116. Because of this first hand involvement, she was able to authenticate several documents admitted by the State and identified the records as being obtained during the search warrant and relied on in conducting the audit. RP 116, 148. She was also able to identify documents obtained through a search warrant to US Bank and relied upon in the audit. RP 122, 125, 126, 133, 135, 137. Through

out her direct testimony, Ms. Tunis identified documents that she obtained from Ms. Jute, that were obtained through search warrants, which documents were used in the audit, and how each document was relied upon. See generally, RP 96-193.

Before the audit was finalized, Ms. Tunis reviewed the report completely and thoroughly. RP 174, 240. Part of doing so was reviewing all supporting documents to verify they were appropriately used and accurately analyzed. RP 174, 241. After her own personal review, Ms. Tunis referred the report to a statewide technical expert for additional review, not only because of the audits complexity, but due to her assistance in applying some of the judgments. RP 242. She stated that she, "...wanted an independent set of review just because you can't review your own work." RP 242.

It is precisely this personal knowledge and involvement by Mary Tunis, despite her title of "supervisor," that distinguishes this situation from that in *Melendez-Diaz v. Massachusetts* as relied on by Ms. Blancaflor. 129 S.Ct. 2527 (2009). In *Melendez-Diaz*, the court held that the report prepared by lab analysts required their own testimony, and the defendant's Sixth Amendment right to confrontation was violated when they were not available for cross examination either at trial or before. *Id.* at 2532. Corroboration of the reports was attempted in that case through

circumstantial evidence, as none of the witnesses called to testify had been involved in the laboratory analysis or creation of the report. *Id.* The court identified the issue to be that the testifying witness lacked personal knowledge of the analysis, and the results of the reports were therefore inadmissible hearsay. *Id.* at 2533.

Ms. Blancaflor's contention that Pamela Cormier should have testified under the interpretation of *Melendez-Diaz* ignores the distinguishing factor: that the audit report at issue here is the joint work product of both Mary Tunis and Pamela Cormier. *Id.* at 2533. Because Mary Tunis not only personally reviewed the audit and all supporting documents for accuracy, but actively participated in its creation herself, her testimony did not constitute hearsay. This is exactly the type of personal knowledge that none of the witnesses had in *Melendez-Diaz*. 129 S.Ct. 2527 (2009). However here, Ms. Blancaflor's right to confront the witnesses against her has clearly been satisfied. RP 242; U.S. Const. Amend. VI.

Furthermore, this audit report does not qualify for confrontation clause protection because it is a record prepared and kept in the ordinary course of business. Ms. Blancaflor's reliance on *Melendez-Diaz* fails to recognize that, "business and public records are generally admissible absent confrontation not because they qualify under an exception to the

hearsay rules, but because - having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial - they are not testimonial.” *Id.* at 2540; citing Crawford 541 U.S. 36 (2004). Here, when the audit report was introduced, as a business record, into evidence by the State, it was never objected to by defense as hearsay or otherwise. RP 190, 191¹. This is likely due to the fact that it is clearly exempt under the business and official records exception, and was created for the administration of L&I affairs, not for the purpose of proving facts at trial as the analyst's reports were in *Melendez-Diaz*. RP 190-191; 129 S.Ct. 2527. Indeed, the audit was authenticated before the court as being a business record kept and created for business purposes. RP 190. Therefore under the exception recognized in *Melendez-Diaz*, Mary Tunis' testimony regarding the audit does not present the conflict alleged by Ms. Blancaflor. 129 S.Ct. 2527 (2009).

Due to the business record exception, and Mary Tunis' extensive personal involvement in the creation of the audit report, the result in *Melendez-Diaz*, as suggested by Ms. Blancaflor, is not implicated here.

¹ Recent Washington case law confirms that failing to object at trial waives the confrontation right on appeal. *State v. O'Cain*, __ Wn. App. __, 279 P.3d 926 (2012). Furthermore, "... the remedy for (failing to object at trial) must be obtained pursuant to a claim of ineffective assistance of counsel." *O'Cain*, 279 P.3d 926 citing *Strickland*, 244 U.S. at 687-89 Because of this, appellant was forced to bring this objection under a title of ineffective assistance whether or not she is of the opinion that other prejudice actually existed.

Id. In fact, it is clear that for multiple reasons, no confrontation clause issue existed at all. It therefore cannot be argued that counsel's representation fell below an objective level of reasonableness for failure to object to an issue that was not present. *Thomas*, 109 Wn.2d 222, 743 P.2d 816. In light of the highly deferential standard of review, and strong presumption of reasonableness in favor of Mr. Ryan, it is evident that Ms. Blancaflor was afforded all constitutional protections she was due. Id at 226. Because, an objective standard of reasonableness was maintained by Mr. Ryan throughout defense's case in chief, the defendant's claim must fail. In the event that the Court should find that his conduct did somehow fall below that objective standard of reasonableness, the defendant's claim still fails as the defendant has not shown any actual prejudice let alone demonstrated that the outcome of the trial would have been different but for Mr. Ryan's representation. *Strickland*, 466 U.S. 668 (1984).

2. Mr. Ryan Presented A Consistent Defense Throughout Trial

There is also no merit to the argument that Mr. Ryan's assistance was ineffective because he failed to present a defense. Ms. Blancaflor's allegation that no evidence was presented to refute intent to evade and/or knowledge of unreported workers cannot stand as counsel called Ms. Blancaflor as a witness to testify in her own defense. RP 836. The fact

that the jury did not find her testimony persuasive does not indicate that counsel was ineffective, as credibility determinations are for the jury alone and not the reviewing court. *State v. Stevenson*, 128 Wn. App. 179, 114 P.3d 699 (2005). Further, review of the record clearly shows that the defense counsel had a coherent strategy, with a consistent defense presented throughout the proceedings, including during cross examination of Mr. Blancaflor. RP 795 – 813, 869, 907-908.

Ms. Blancaflor’s defense throughout trial was the same as is now presented on appeal; namely that she had no involvement with the reporting of employees nor did she have any knowledge that proper L&I premiums were not being paid. RP 789, 800-802, 812-813, 958. Further, that this lack of involvement inherently negates the elements of intent to evade and knowing misrepresentation needed by the State to prove Employers False Reporting under RCW 51.48.020(1)(b)(i-ii). This defense was further explored during Mr. Ryan’s cross examination of co-defendant, Othniel Blancaflor and reiterated by Mr. Ryan in closing arguments. RP 796, 812-813, 958-959, 961, 963, 965. Ms. Blancaflor’s argument that Mr. Ryan did not present evidence of “the methods used or person used to report such workers” fails as the record is replete with examples of Mr. Ryan eliciting testimony that Mr. Blancaflor was solely

responsible for the reporting of MGH's employees' hours. RP 587-588, 800-802, 881.

When Mr. Ryan called Ms. Blancaflor to the stand, his line of questioning clearly outlined the defense strategy, giving her every opportunity to factually verify her claim that Mr. Blancaflor, alone, reported employee hours. This was also an attempt to increase the credibility of her arguments. On direct examination, Mr. Ryan elicited the response that over the course of three years, 2007 to 2009, she was never asked to review any of MGH's financial documentation. RP 869. Further, her testimony was that she never handled any of the payrolls in 2008 and 2009. RP 881. She also testified that she had no knowledge of the failure to pay L&I claims until September of 2009, when Othniel Blancaflor finally told her. RP 871. In fact, in both direct exam and redirect, counsel clearly allowed Ms. Blancaflor to list her own duties in the business, and distinguish those from Mr. Blancaflor's duties, claiming he had the sole responsibility to report workers to L&I. RP 841-844, 881-882, 905, 907-909.

This was a coherent defense that was consistently presented throughout direct examination, cross, closing, and is the same defense now presented on appeal. However, caselaw holds that courts cannot find ineffective assistance of counsel if the complained about actions of

defense counsel go to the theory of the case or trial tactics. *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982). Ms. Blancafor's counsel had a clear strategy for her defense and presented that evidence existed to support that theory. The verdict in favor of the State was not due to ineffective counsel, but represented simply the jury's weighing of evidence and credibility.

Not only did Mr. Ryan clearly present a defense, his overall assistance did not fall below an objective standard of reasonableness. Counsel raised many objections, several of which were sustained, during the State's examination of its main witness. RP 82, 85, 88, 92, 94, 99, 124, 146, 155, 156, 176. Further, he presented a vigorous and thorough cross examination of Ms. Tunis. RP 194-214. He also cross examined the other witnesses presented by the State, and took the opportunity for redirect when Ms. Blancaflor was on the stand. RP 265, 303, 317, 327, 397, 431, 478, 525, 575, 637, 700, 728, 795, 904. Finally, at the end of the State's case, Mr. Ryan moved to dismiss the case against Ms. Blancaflor. RP 731. All of these are indicia of effective assistance provided by a reasonable defense attorney.

Hence, to establish a claim of ineffective assistance, it is not enough to take issue with trial counsel not making a particular objection or presenting a defense not accepted by the jury. It has to be demonstrated

that the conduct was deficient and but for the deficient conduct, the outcome of the proceeding would have differed. Strickland, 466 U.S. 668, 104 S. Ct. 2052. The record contains multiple examples of effective representation including vigorous cross examination, proper objections, and coherent strategy based on a consistent defense. Given the overwhelming evidence of her knowledge and guilt, it is evident that Ms. Blancaflor was not prejudiced to the point that the outcome would have been different, such that she did not receive a fair trial. Courts have strongly emphasized that arguments for ineffective assistance must be based on more than disagreement with counsel's decisions regarding trial strategies and tactics. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737. Even if Mr. Ryan's decision to forego the hearsay objection or his decision to forego additional witnesses was deficient, a jury's finding of guilt where there was sufficient evidence does not constitute prejudice. Based upon the evidence, there is no reasonable probability that the outcome of the jury would have been different.

As Ms. Blancaflor is unable to demonstrate that her trial counsel's performance was deficient and thereby prejudiced her, her claim of ineffective assistance of counsel must fail.

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C. The Evidence Presented At Trial Was Sufficient To Prove Employers False Reporting

Ms. Blancaflor claims that the evidence presented at trial was insufficient to prove the charged crime of Employers False Reporting or Failure to Secure Compensation under RCW 51.48.020(1)(b)(i-ii). This argument must fail, as evidence unequivocally revealed that not only did Ms. Blancaflor knowingly misrepresent the status of workers to L&I, she did so with the intent to evade paying premiums for the employees who continued to render services for MGH.

On a challenge to the sufficiency of the evidence, this court must decide whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all of the required elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 50 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a challenge to the sufficiency of evidence, the Appellant “admits the truth of the State’s evidence and all inferences that can reasonably be drawn from it.” *State v. Hermann*, 138 Wn. App. 596, 602, 158 P.3d 96, 99 (2007), citing *State v. McNeal*, 145 Wn.2d 352, 360, 37 P.3d 280

(2002). “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), citing *State v. Casbeer*, 48 Wn. App. 539, 740 P.2d 335, (1987). Thus, this Court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992). The elements of a crime may be established by direct or circumstantial evidence, one being no more or less valuable than the other. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Ms. Blancaflor was charged with Employer’s False Reporting or Failure to Secure Payment of Compensation. To prove she committed this, the State needed prove, beyond a reasonable doubt that Ms. Blancaflor knowingly misrepresented to the Department of Labor and Industries employee hours upon which premiums are based. RCW 51.28.020(1)(a). The employer is guilty if:

- (i) The employer, with intent to evade determination and payment of the correct amount of the premiums, knowingly makes misrepresentations regarding payroll or employee hours; or
- (ii) The employer engages in employment covered under this title and, with intent to evade determination and payment of the correct amount of the premiums, knowingly fails to secure payment of compensation under this title or knowingly fails to report the payroll or employee hours related to that employment.

RCW 51.48.020(b).

The evidence and testimony presented by the State, and defense, establish beyond a reasonable doubt that Ms. Blancaflor knowingly misrepresented employee hours to L&I with the intent to evade paying premiums. Ms. Blancaflor's defense was, despite her experience in auditing, she never reviewed her own business' books, never reported its employees to any taxing agency, and never organized the payroll as she had other responsibilities within the business. Appellant[s] Br. 19. This, Ms. Blancaflor contends, refutes the requisite mens rea of knowingly and intentionally. However, the jury was free to reject this claim as false, insincere, or not credible. In fact, the jury heard testimony and viewed evidence that Ms. Blancaflor specifically reported having zero covered workers during a period in which MGH had employees to whom she paid cash directly. Additionally, that as an L&I auditor, trained to enforce exactly these laws, she knew that each of these employees were covered workers who should have been accounted for through payments of L&I premiums. Based on this evidence, the jury determined that she knowingly failed to report covered workers, as she did so to evade paying L&I premiums.

Ms. Blancaflor claims her only contact with L&I regarding MGH was a single interoffice phone call. Appellant[s] Br. 22. The evidence at

trial contradicts this assertion: the jury read the series of email correspondences that she had with L&I Revenue Agent Fnot Lingreen on August 26, 2008. Ex. 8, RP 451, 529, 533, 535-536. In fact, the evidence showed Ms. Blancaflor initiated contact by sending an email claiming that MGH's L&I account should be adjusted to reflect no employees for the first two quarterly reporting periods of 2008. RP 451, 529. Specifically, as introduced as States exhibit 10-A, she said, "[w]e didn't have any workers for '08-1 and '08-2... and we should (sic) update L&I should we hire any caretakers down the road." RP 533. After Ms. Lingreen responded for clarification, Ms. Blancaflor also wrote to say "there is zero hours for '08-3 also, and you can go ahead and close the account." RP 535-536. Thus, Ms. Blancaflor claimed and directly reported to L&I that between January 1st and September 30, 2008, MGH had no covered workers whose employment required any payment of L&I premiums. Further she acknowledged that if they hired new workers, she would ask that the L&I account be re-opened.

Despite this statement, the record and evidence presented by the State indicate that during this time several employees who should have been reported to L&I worked at MGH. RP 886, 261, 310, 379, 501, 506. It was also during this time that Ms. Blancaflor had switched to paying all her employees in cash only and forgoing any proper documentation such

as paystubs. RP 263, 379, 408, 501, 504, 506, 507. Ms. Elvira Viray testified that she was employed at MGH until May 5, 2008, well into the second quarter of 2008. RP 508. Further, that throughout her 2008 employment, she received her pay in cash directly from Ms. Blancaflor. RP 507. Similarly, Mr. Edward Hoff worked as a caregiver until April 30, 2008, and was paid in cash by Ms. Blancaflor. RP 392, 408. After these two employees quit, Cecily Kubita was hired, and worked from September through the first part of November 2008. RP 261. All three of these employees worked at MGH at some point during the first three quarters of 2008, the same three quarters for which Ms. Blancaflor personally reported zero employee hours. RP 529-536. Further, under the six part L&I test to determine if premiums need to be paid for a worker, a test with which Ms. Blancaflor was intimately familiar, each of these employees was considered a “covered” worker, such that premiums should have been paid for each one. RP 886.

The testimony by those employees regarding Ms. Blancaflor herself paying them in cash is supported by other evidence introduced by the State. Several checks for large amounts of money written from the MGH business account made payable to cash, had “Payroll,” written in the memo section. RP 149. These were discovered during the search warrant pursuant to the audit process, and dates in which these checks were written

to cover payroll, such as on February 15, 2008 and March 15, 2008, coincide with times where Ms. Blancaflor had reported zero hours. RP 149, 250.

Additionally, Ms. Blancaflor admitted that MGH had workers, including the beginning in the 4th quarter of 2008, including Ryan and Christopher Sharp. RP 881. Ms. Blancaflor admitted under oath that she knew that the Sharpes were paid for their work at MGH in cash. RP 895. Furthermore, Ms. Blancaflor testified that in May of 2009, while Sharpes still worked at MGH, there were five (5) patients at MGH. RP 189, 897. Ms. Blancaflor also acknowledged that when Ms. Cicily Kubita was hired in 2008 that the L&I account should have been reopened. RP 881. Additionally, she admitted that Ms. Kubita was paid without any taxes being withheld, and that she even wrote at least one of the paychecks to Ms. Kubita. RP 889 -890.

Also during 2007 MGH failed to report other employees to L&I. RP 184, 192. For example, the hours worked by Joanne Razon, and Theresa DeLeon were not reported to L&I in 2007. Joanne Razon was hired by Ms. Blancaflor. RP 310 -311, 318. Ms. Razon received a flat amount for her services as arranged by Ms. Blancaflor. RP 313, 318. When she was hired by Ms. Blancaflor she was not asked to fill out a W-2 or any other taxing information. RP 313.

Mr. and Ms. Blancaflor went to California to pick up Ms. DeLeon and her husband so that they could work at MGH. RP 552-553, 893. While Ms. DeLeon worked there she was paid an “allowance” according to Ms. Blancaflor, but Ms. Blancaflor claims she did not know Ms. DeLeon’s hours were not reported to L&I. RP 893-894. The jury did not find this claim credible.

Ms. Blancaflor originally told the auditor that she did not know a Joann Razon. However, she and Ms. Razon had gone to church together which is where Ms. Blancaflor had approached Ms. Razon about working at MGH. RP 317. Ms. Blancaflor also told the auditor that she did not know Theresa DeLeon, even though she had known Ms. DeLeon since Ms. Blancaflor was in high school in the Philippines and even though Ms. Blancaflor had made the arrangements to have Ms. DeLeon come to work for MGH. RP 551, 893. Additionally, Ms. Blancaflor told the auditor at the beginning of the audit that there would be unreported worker hours in 2008 and 2009, during the time that the L&I account was closed, and that there would be some unreported worker hours in 2006 and 2007. RP 894, 895.

Further, not only was Ms. Blancaflor personally paying the employees while reporting zero employee hours to L&I, as an L&I auditor herself, she knew this was illegal. Testimony presented by the State made

it clear that not only would any journey level auditor have extensive training in determining which types of workers should be reported to L&I and require payment of premiums, but that Ms. Blancaflor personally received this training. RP 342-345. Ms. Blancaflor specifically acknowledged her training and experience on cross-examination. RP 896-98. Further, that she had performed these determinations multiple times over the course of her professional experience. RP 363. Her own testimony confirmed her knowledge that simply because an employee was an “independent contractor” for tax purposes, did not automatically mean they were not to be reported to L&I. RP 871. She was well informed of who should be reported and how it should be done, yet failed to do so in her own business.

In reviewing the evidence presented at trial, the evidence was overwhelming that Ms. Blancaflor, as a trained auditor, knew when employees should be reported to L&I. The evidence showed she personally paid full time employees in cash under the table during 2008, and at the same time reported directly to L&I that MGH should be paying no industrial insurance premiums. The jury found this evidence to be persuasive, and in rendering a guilty verdict, determined that all elements of Employers False Reporting were met beyond a reasonable doubt, including knowing misrepresentation and intent to evade. Further, in the

face of this direct evidence, the jury found Ms. Blancaflor's conflicting testimony to lack credibility.

Applying the standard required for a challenge to the sufficiency of the evidence, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all of the required elements of the crime beyond a reasonable doubt. The evidence in this case was overwhelming and no rational trier of fact could have found otherwise.

D. Trial Court Did Not Err In Denying Motion To Substitute Counsel As It Was A Proper Exercise Of Discretion

Ms. Blancaflor claims that she was prejudiced at trial due to the court's error in denying a pretrial motion for substitution of counsel. This court should decline to review this claim because this portion of Ms. Blancaflor's brief does not contain a single citation to the record, in direct violation of the Rules of Appellate Procedure. RAP 10.3(a)(6).

Under RAP 10.3(a)(6) the Court of Appeals does not consider conclusory arguments that do not cite to the record. *West v. Thurston County*, 168 Wn. App 162, 275 P.3d 1200 (2012). The failure to provide proper citations is not a mere formality, but places an unacceptable burden on opposing counsel and on the court as it is nearly impossible to properly respond to a conversation that occurred outside of the record. *Lawson v. Boeing Co.* 58 Wn. App 261, 792 P.2d 545 (1990). The court created this

rule in aid of expeditious and orderly appellate procedure and it is the result of a long background of experience. *Thomas v. French*, 99 Wn.2d 95, 659 P.2d 1097 (1983). To assure that it accomplishes this intended purpose, it must be enforced by requiring full compliance with its clear requirements, and severe measures may be imposed for failure to comply. *Arnold v. Laird*, 94 Wn.2d 867, 621 P.2d 138(1980). It therefore would be well within the discretion of the court to decline to reach any issues supported by inadequate citation to the record. See e.g. *West* 168 Wn. App 162 (holding that bald assertions lacking cited factual and legal support will not be considered.) Indeed, non-consideration of the claimed error is a proper sanction, as assignments of errors not supported by specific citation to pertinent portions of the record are deemed waived. See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992). Therefore imposition of sanctions or non-consideration of the claimed error should be no surprise to lawyers who fail to comply. *State v. Hensler*, 109 Wn.2d 357, 745 P.2d 34 (1987).

Ms. Blancaflor's noncompliance occurred through continued reference without citation to a hearing held on September 2, 2012. This hearing, where her motion to substitute counsel was denied, was neither mentioned anywhere in the brief nor included in the record. In order to properly respond to these alleged errors, the State had to procure a

transcript of the proceedings. Further, Ms. Blancaflor's claim of error due to counsel's alleged failures at trial is unpersuasive as it occurred after the hearing and was thus not presented before the judge whose ruling is at issue. Appellant[s] Br. 23. All supporting evidence must refer to that which was presented at the September 2nd hearing to determine if the judge abused his discretion in denying the motion.

If the court does choose to consider this alleged error, the proper standard of review is not inquiry into counsel's competence under RPC 1.1, but into possible abuse of discretion by the trial judge in denying the motion to substitute. Appellant[s] Br. 23; *State v. Stenson*, 142 Wn.2d 710, 16 P.3d 1 (2001). Unsupported, general allegations of deficient representation are not enough to require substitution of counsel. *State v. Staten*, 60 Wn. App. 163, 170, 802 P.2d 1384 (1991). Importantly, an attorney client conflict may justify granting a substitution motion only when the defendant and counsel "are so at odds as to prevent presentation of an adequate defense." *Id.* To justify appointment of new counsel, a defendant "must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Id.* However, the court notes there is a difference between complete collapse and mere lack of accord, and there is no constitutional right to a

“meaningful relationship” between attorney and client. *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610 (1983). It is clear that the right to counsel of choice, unlike the right to counsel in general, is not absolute. *Stenson* 142 Wn.2d 710, 16 P.3d 1. The factors to be considered in assessing whether a trial court erred in failing to substitute counsel go to the determination of whether an irreconcilable conflict exists. *United States v. Moore*, 159 F.3d 1154 (9th Cir. 1998). The factors of the test are (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion. *Id.* At 1158.

1. The Nature And Extent Of The Conflict Did Not Warrant Substitution Of Counsel

In examining the extent of the conflict, the court also considers the nature of the breakdown in the relationship and its effect on the representation actually presented. *Stenson* 142 Wn.2d. Further, a breakdown in communication that has only a negligible impact on attorney performance will not warrant substitution. *Id.*

Here, the source of conflict appears to be an accusation of failure to prepare, along with a lack of communication, and disagreement over trial strategy between Ms. Blancaflor and her defense counsel at trial, Mr. Ryan. Pretrial Hearing Report of Proceedings of Sept 2 (PTH RP), 5-6. At the hearing, Mr. Ryan clearly explained to the judge that he

understood the issues in this case, that it was fairly straightforward, and that he had prepared the case carefully. PTH RP 13. While he admits to some difficulties in communication, he did meet personally with Ms. Blancaflor multiple times to review evidence, and provided his professional assessment to her of what to expect at trial. PTH RP 13. After hearing all parties, and referencing his personal experience previously observing Mr. Ryan in court, the judge told Ms. Blancaflor that while he understood she was frustrated, her attorney was very experienced and knew how to try a case. PTH RP 16.

Ms. Blancaflor further argues that she presented Mr. Ryan with evidence to support her defense, including what she claims to be a possible violation of her 4th amendment rights, and claims that his failure to utilize these in her case in chief warranted new counsel. PTH RP 9. Mr. Ryan summed the issue up in saying, “[w]e have differing views as to how to proceed with this case at this point.” PTH RP 3. The judge did not abuse his discretion in finding that this disagreement did not demand substitution of counsel shortly before trial was scheduled to begin. In fact, case law holds that a disagreement over defense theories and trial strategy does not by itself constitute an irreconcilable conflict entitling the defendant to substitute counsel. *State v. Thompson*, 2012 WL 2877533 (Wn. App. Div. 1). This is because decisions on those matters are

properly entrusted to defense counsel, not the defendant. *Id.* In the appellate context, the Court has stated specifically that if counsel decides not to present a point requested by the client, this is a matter of professional judgment and should not be second guessed by judges on appeal. *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983). Further, the goal of vigorous and effective advocacy would be done a disservice by imposing on counsel a duty to raise every “colorable” claim suggested by the client. *Id.* It is clear in examining the nature and extent of the breakdown in attorney client relationship that the judge was well within his discretion to decide that nothing rose to a level that warranted new counsel.

2. The Hearing Before A Superior Court Judge Provided A Sufficiently Searching Inquiry Into The Dispute

The adequacy of the trial court’s inquiry into the breakdown will be met where it is sufficiently searching and provides a basis for reaching an informed decision. *Stenson* 142 Wn.2d 710. “An adequate inquiry must include a full airing of the concerns ... and a meaningful inquiry by the trial court.” *State v. Cross*, 156 Wn.2d 580, 610, 132 P.3d 80 (2006). This has been met where defendants were allowed to express all concerns at a pretrial hearing. *Id.* Here, Ms. Blancaflor was allowed to fully express her concerns in a hearing before a Superior Court Judge. PTH RP 4-15.

Further, both Mr. Ryan and plaintiff's attorney took the opportunity to express their perspectives on the motion. PTH RP 2-3, 11-12. Only after hearing all parties' positions and having all vital information, did the court reach the decision to deny substitution of counsel. This constituted a sufficient basis for reaching an informed decision and it was as such an adequate inquiry into the source of the conflict. Moore 159 F.3d at 1158

3. Denial Of The Motion Was Proper As It Was Found To Be Untimely

The last factor for consideration is the timeliness of the motion for substitution of counsel. Moore 159 F.3d at 1161. "Where the request for change of counsel comes during the trial or on the eve of trial, the Court may, in the exercise of its sound discretion, refuse to delay the trial to obtain new counsel and therefore may reject the request." United States v. Prince, 474 F.2d 1223 (9th Cir. 1973). In Stenson, the court held that where a jury had already been empanelled and new counsel would likely need 30 days to review the case material and 30 days to prepare for trial, the motion for substitution was untimely. 142 Wn.2d 710, 16 P.3d 1. A reviewing court must also consider the timeliness of the motion and the effect of any substitution on the scheduled proceedings. Id. At 723-24, 734. Here, the judge noted specifically that there was an issue with the timeliness of the motion. PTH RP 15. Namely, that it was brought 10

days before trial, while the case itself had been pending for a year and a half. PTH RP 15. Also, the trial court noted that Mr. Ryan had been the attorney on the case since January 5, 2011. Despite Ms. Blancaflor's concerns, the judge stated "I have to look at whether there is a basis for the Court to remove Mr. Ryan as the attorney and bring in another attorney with the understanding that that is going to set these trials over for an extended period of time." PTH RP 15. This observation also recognizes that not only would substitution delay Ms. Blancaflor's own trial, it would affect the right of her co-defendant to a speedy trial and result almost surely in de facto severance. It is evident that with these considerations the court's finding of untimeliness was consistent with authority and within its discretionary bounds.

After reviewing the testimony and argument presented before the trial court at the September 2, 2012 hearing, it is clear that the decision to deny substitution was not an abuse of discretion. The court performed a sufficiently searching inquiry, and in doing so found Ms. Blancaflor's motion untimely, and that the extent and nature of the conflict did not warrant substitution. Based on these findings, there is no reason to believe that an irreconcilable conflict existed which would warrant an untimely substitution of counsel.

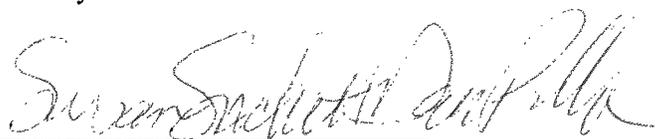
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IV. CONCLUSION

For the forgoing reasons the defendants' convictions should be affirmed and their sentences upheld.

RESPECTFULLY SUBMITTED this 13th day of September, 2012.

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WASHINGTON STATE ATTORNEY GENERAL

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- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
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- Other: _____

Comments:

No Comments were entered.

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