

NO. 46330-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

BRIAN DELISLE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01448-7

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL R. PROBSTFELD, WSBA #37878
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 I. THE TRIAL COURT PROPERLY DENIED DELISLE’S CrR 7.8 MOTION TO WITHDRAW HIS GUILTY PLEA..... 1

 a. THE TRIAL COURT PROPERLY FOUND THAT DELISLE DID NOT SHOW HIS DEFENSE COUNSEL WAS INEFFECTIVE..... 1

 b. THE TRIAL COURT PROPERLY FOUND THAT DELISLE DID NOT SHOW HE WAS INCOMPETENT AT THE TIME HE ENTERED HIS GUILTY PLEA 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 9

 I. THE TRIAL COURT PROPERLY DENIED DELISLE’S CrR 7.8 MOTION TO WITHDRAW HIS GUILTY PLEA..... 9

 a. The Findings of Fact to which Delisle assigns Error are Supported by Substantial Evidence 10

 b. The Trial Court Did Not Err in Finding Delisle did Not Meet His Burden in Showing Ineffective Assistance of Counsel 13

 c. The Trial Court Did Not Err in finding Delisle did Not Meet His Burden in Showing Incompetency at the Time of his Guilty Plea 20

D. CONCLUSION ,..... 25

TABLE OF AUTHORITIES

Cases

<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997)	10
<i>In re Pers. Restraint of Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992)	19
<i>In re Riley</i> , 76 Wn.2d 32, 454 P.2d 820, <i>cert. denied</i> , 396 U.S. 972, 90 S. Ct. 461, 24 L. Ed. 2d 440 (1969)	11
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)	16
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999)	15
<i>State v. Armstead</i> , 13 Wn.App. 59, 533 P.2d 147 (1975)	23
<i>State v. Calvert</i> , 79 Wn.App. 569, 903 P.2d 1003 (1995)	21, 23
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2011)	14
<i>State v. Declue</i> , 157 Wn.App. 787, 239 P.3d 377 (2010). 20, 21, 22, 24, 25	
<i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994)	15, 16
<i>State v. Gomez Cervantes</i> , 169 Wn.App. 428, 282 P.3d 98 (2012)	19
<i>State v. Hardesty</i> , 129 Wn.2d 303, 915 P.2d 1080 (1996)	9
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994)	10, 11
<i>State v. Hystad</i> , 36 Wn.App. 42, 671 P.2d 793 (1983)	23
<i>State v. Kyлло</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	15, 16
<i>State v. Marshall</i> , 144 Wn.2d 266, 27 P.3d 192 (2001)	21, 22
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	15
<i>State v. Michael</i> , 160 Wn.App. 522, 247 P.3d 842 (2011)	17
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995)	10
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	15
<i>State v. Renfro</i> , 96 Wn.2d 902, 639 P.2d 737 (1982)	15
<i>State v. Schwab</i> , 141 Wn.App. 85, 167 P.3d 1225 (2007)	18
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990)	22
<i>State v. Taylor</i> , 83 Wn.2d 594, 521 P.2d 699 (1974)	24
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	14, 16
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	14, 15, 16, 17, 20
<i>Tomlinson v. Clarke</i> , 118 Wn.2d 498, 825 P.2d 706 (1992)	11

Statutes

RCW 10.77	13, 18, 19, 20
RCW 10.77.010(15)	24

Rules

CrR 7.8..... 20, 21, 25
CrR 7.8(c)(2)(ii)..... 4, 25

Constitutional Provisions

U.S. Const. amend. VI..... 14
Wash.Const. art.I, § 22..... 14

A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT PROPERLY DENIED DELISLE'S
CrR 7.8 MOTION TO WITHDRAW HIS GUILTY PLEA

- a. THE TRIAL COURT PROPERLY FOUND THAT DELISLE DID NOT SHOW HIS DEFENSE COUNSEL WAS INEFFECTIVE
- b. THE TRIAL COURT PROPERLY FOUND THAT DELISLE DID NOT SHOW HE WAS INCOMPETENT AT THE TIME HE ENTERED HIS GUILTY PLEA

B. STATEMENT OF THE CASE

According to police reports, Brian Delisle (hereafter 'Delisle') was observed driving a motor vehicle by Corporal Duane Boynton of the Vancouver Police Department ('VPD') on August 15, 2011. CP 63. Corporal Boynton knew Delisle and recognized him. *Id.* Corporal Boynton knew Delisle had a suspended license and he attempted to execute a traffic stop. *Id.* at 63-64. Corporal Boynton activated his patrol vehicle's lights and sirens in an attempt to execute a traffic stop. *Id.* at 64. Delisle drove in excess of the speed limit, ignored traffic devices and did not stop for Corporal Boynton. *Id.* Delisle successfully eluded Corporal Boynton on that date. *Id.* Delisle was arrested on August 24, 2011, and appeared in court the next day. *Id.* The trial court found probable cause and set bail at \$10,000. Delisle posted the bail and was released upon conditions on

August 29, 2011. *Id.* Delisle was charged by Information with Attempting to Elude a Pursuing Police Officer and Driving While Suspended in the Third Degree. CP 1. On September 30, 2011, Delisle was taken into custody and bail was increased to \$30,000. *Id.* Delisle posted that bail and was again released on conditions. *Id.* Delisle failed to appear for a court date on March 1, 2012, and a warrant was authorized for his arrest. *Id.* Delisle surrendered himself on March 22, 2012, and was kept in custody. *Id.* On April 18, 2012, Delisle entered a guilty plea to Attempting to Elude a Pursuing Police Vehicle pursuant to a plea negotiation and was sentenced to a standard range sentence. *Id.*; CP 5-13, 18. Delisle was represented at his guilty plea by attorney George Trejo. CP 12, 23; RP 1-11, 60-61.

At the guilty plea hearing, Delisle affirmed that he had read and signed the guilty plea statement and had adequate time to confer with his attorney. RP 2-3. Delisle affirmed he understood he had the constitutional rights to a trial, to remain silent, to confront witnesses and present witnesses of his own, and the right to appeal. RP 3-4. The following exchange then took place:

COURT: You look like you're having questions. You don't get a trial. You don't have to remain silent—

DELISLE: Right-

COURT: -you can remain silent-you have to go through all those-

DELISLE: -right-

COURT: -you're giving it all up?

DELISLE: Right.

COURT: Do you understand that?

DELISLE: I'm giving it up.

RP 4. Delisle continued to affirm to the court his understanding of his rights, the consequences of pleading guilty and the standard sentencing range. RP 4-6. Delisle indicated he did not have any questions for the court. RP 6. Delisle indicated his plea was being made voluntarily. RP 9. Delisle answered the court's questions, admitting to facts which satisfy the elements of Attempt to Elude. RP 6-8. Delisle also indicated he believed that a jury could find him guilty of the crime if the police officer testified consistently with the prosecutor's rendition. RP 8. Delisle affirmed his desire to plead guilty and indicated no one had made any threats or promises to procure his guilty plea. RP 9. The court accepted his guilty plea and sentenced Delisle to the low end of the standard range. RP 11; CP 18.

On April 15, 2013, through new counsel, Delisle filed a motion to withdraw his guilty plea. CP 28-38. Delisle asserted he received

ineffective assistance of counsel, that he was incompetent, and that he was not adequately advised of the consequences of his guilty plea. CP 32-37. The State filed a response brief. CP 63-75. The trial court found that a factual hearing was warranted under CrR 7.8(c)(2)(ii). CP 120. The trial court, then Judge Melnick, took testimony from Delisle and George Trejo. RP 27-44, 48-84.

Delisle testified at the hearing that he was represented by Mr. Trejo on both a criminal matter and a forfeiture matter. RP 27. Delisle testified he met with Mr. Trejo four times altogether. *Id.* Delisle claims he never saw the police reports and that Mr. Trejo never read them to him. RP 28. Delisle testified he gave Mr. Trejo a witness list of alibi witnesses who would indicate where Delisle was on the date the incident occurred. RP 29. Delisle testified he had been seeing a psychologist for mental health issues for a decade. RP 31. Delisle claimed that around the time of his guilty plea he had not taken his prescribed medication, making him confused and not coherent. RP 32. Delisle testified he suffers from a closed head injury, dementia, seizure disorders, PTSD, bi-polar disorder, cognitive disorders, and psycho-social and environmental problems. RP 33. Delisle claimed that he was just “going through the motions” at the guilty plea hearing. RP 37.

Attorney George Trejo also testified at the CrR 7.8 hearing.

Mr. Trejo testified that in his capacity as a criminal defense attorney in the State of Washington he represented Delisle in a matter in 2011. RP 48-49. Mr. Trejo represented Delisle in both his civil forfeiture and the criminal matter arising from the same incident. RP 50. Mr. Trejo testified that he met with Delisle on eight occasions prior to his entry of his guilty plea. RP 51. Mr. Trejo spoke with Delisle on the phone on a few occasions. RP 53. He also corresponded via e-mail through an intermediary that Delisle designated. RP 53. Trejo read the police reports verbatim to Delisle. RP 52. He discussed the police reports with Delisle. RP 53. Delisle asked Mr. Trejo to negotiate his criminal case. RP 55. Delisle and Trejo discussed what Delisle wanted out of a plea bargain, including doing less time and doing any time on an alternative means of confinement. RP 55. Mr. Trejo saw his job in representing Mr. Delisle was to get the best possible deal from the prosecuting attorney, to make sure Delisle is aware of all the facts and circumstances, and explain to him the likelihood of success at trial as he sees it. RP 56. Mr. Trejo discussed these things with Delisle and based on what Delisle had said to Mr. Trejo, he could not have Delisle testify, and the evidence showed the police officer clearly viewed Delisle driving, so Mr. Trejo did not believe Delisle had any viable

defense. RP 57-58. Delisle never brought up the possibility of alibi and never notified Mr. Trejo of any potential witnesses. RP 58.

Mr. Trejo also testified that it was Delisle's decision to plead guilty. RP 58. Mr. Trejo went over all of Delisle's rights with him prior to pleading guilty. RP 59. He answered any questions Delisle had and gave him a copy of the plea paperwork. RP 60. Mr. Trejo was aware of Delisle's prior mental health issues, but felt Delisle was competent at the time he entered his plea on this matter. RP 62-64. Delisle never showed signs of incompetency or psychosis; he was able to consult with Mr. Trejo about his case; he responded appropriately and appeared to have a full understanding of what was happening. RP 62. Mr. Trejo testified that he has previously represented clients he believed to have competency issues and had them evaluated. RP 64. Mr. Trejo was aware of the competency process and when it may be needed. RP 64. Mr. Trejo did not believe Delisle was incompetent, nor did he ever present in such a way as to cause Mr. Trejo to doubt his competency. RP 64. Mr. Trejo testified that Delisle did not tell Mr. Trejo he had any potential witnesses on this case. RP 76. The only defense Delisle claimed to Mr. Trejo is in direct opposition to the alibi he claimed during the CrR 7.8 hearing. Delisle claimed to Mr. Trejo that he had permission to drive a confidential informant around. RP 76. Though there is nothing from Delisle to Mr. Trejo indicating that

permission to drive extended to permission to elude police officers. This claim of Mr. Delisle's was false according to information Mr. Trejo had. RP 76.

Mr. Trejo testified that he found Delisle to be fully functioning, rational, and competent. Trejo testified that Delisle "seemed fine. He understood what we were talking about. He understood the questions and the answers that the court made of him, and he did not hesitate to plead guilty." RP 82.

After taking testimony from both Delisle and attorney George Trejo, the trial court set the CrR 7.8 hearing over. In the meantime, the case was transferred to Judge Stahnke. At a second hearing, the trial court took testimony from Dr. Jerry Larson concerning Delisle's allegation he was not competent to enter a guilty plea. RP 99-115.

Dr. Jerry Larson testified that he was a psychiatrist hired by Delisle to evaluate him for competency. RP 100-01. Dr. Larsen evaluated Delisle on August 21 and 22, 2013, for his competency on April 18, 2012. RP 101; 108. Dr. Larsen conducted several psychological tests, which in his opinion showed the defendant was suffering from a cognitive deficit. RP 102. Delisle also scored high on Dr. Larsen's test on malingering, a test used to determine whether a person is making up symptoms. RP 102.

Dr. Larsen testified that Delisle had previously suffered from seizures and was on medications for some disorders. RP 104.

Dr. Larsen initially wrote a report that Delisle was presently competent in Fall of 2013. RP 108. Dr. Larsen was then asked to indicate his opinion on Delisle's competency on April 18, 2012. RP 109.

Dr. Larsen sent an e-mail to the defense attorney indicating that Delisle was "unable to understand the nature of the agreement." RP 109.

Dr. Larsen made this opinion of Delisle's competency on April 18, 2012, without having reviewed the jail medical records leading up to that date and just after that date, and without having reviewed a video recording or transcript of Delisle's guilty plea. RP 110, 112. Dr. Larsen indicated his opinion on Delisle's competency was not changed despite learning that jail medical records in the days prior to Delisle's guilty plea indicated things such as "thoughts okay for now, no paranoia or voices," and that Delisle was "responding appropriately, speaking in full sentences and was calm." RP 110-11. Dr. Larsen's opinion also was not affected by jail medical recordings indicating that Delisle stated "he feels fine now, no hallucinations, vision or hearing changes, dizziness or weakness," or that his "speech was clear." RP 110-11. Dr. Larsen never observed Delisle in April 2012, the month of his guilty plea, and did not meet him until August 2013, 16 months later. RP 112. Dr. Larsen agreed his opinion on

Delisle's competency might change if he had seen the video of Delisle's guilty plea and been able to observe Delisle's behavior, demeanor, and speech patterns. RP 114. Dr. Larsen relied on a lot of facts that Delisle himself told him, but indicated that Delisle may suffer memory impairment and that could have caused the facts Delisle told him to be inaccurate. RP 114.

After taking testimony from Dr. Larsen, the trial court then heard argument from Delisle's counsel and the State on whether it should grant or deny Delisle's CrR 7.8 motion to withdraw his guilty plea. RP 115-130. The trial court denied Delisle's motion and entered findings of fact and conclusions of law. CP 115-23.

C. ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DELISLE'S CrR 7.8 MOTION TO WITHDRAW HIS GUILTY PLEA

Delisle assigns error to the trial court's denial of his CrR 7.8 motion to withdraw his guilty plea. This court reviews a lower court's ruling on a CrR 7.8 motion for an abuse of discretion. *State v. Hardesty*, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996). A trial court abuses its discretion if its decision "is manifestly unreasonable or based upon

untenable grounds or reasons.” *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court’s decision is based on an untenable reason if “it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). Further, a trial court’s decision is manifestly unreasonable if “it is outside the range of acceptable choices, given the facts and the applicable legal standard.” *Id.* The trial court heard testimony, considered the briefing and argument of counsel, and made a rational, sound decision to deny Delisle’s CrR 7.8 motion based on the law. The trial court did not abuse its discretion and its decision should be affirmed.

a. The Findings of Fact to which Delisle assigns Error are Supported by Substantial Evidence

Delisle appeals the trial court’s ruling on his CrR 7.8 motion. The trial court entered findings of fact and conclusions of law in this CrR 7.8 motion. CP 115-23. Delisle assigns error only to Findings of Fact 8, 12(g) and 12(k). This Court limits its review of findings of fact to those to which error has been assigned. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). “It is well-established law that an unchallenged finding of fact will be accepted as a verity upon appeal.” *Hill*, 123 Wn.2d at 644 (citing *In re Riley*, 76 Wn.2d 32, 33, 454 P.2d 820, *cert. denied*, 396 U.S. 972, 90 S.

Ct. 461, 24 L. Ed. 2d 440 (1969) and *Tomlinson v. Clarke*, 118 Wn.2d 498, 501, 825 P.2d 706 (1992)). Findings of fact which are not contested are treated as verities on appeal. *Hill*, 123 Wn.2d. at 644. Apart from Findings of Fact 8, 12(g) and 12(k), the trial court's findings of facts should be treated as verities. *See id.* Findings of Fact to which error has been assigned are reviewed for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). There is ample evidence in the record to support the trial court's findings in Finding of Fact 8, 12(g) and 12(k). When substantial evidence exists to support the findings of fact entered by the trial court, they are treated as verities on appeal.

Delisle assigns error to Finding of Fact #8. In Finding of Fact 8, the trial court found “[t]he discussion during sentencing regarding alternative confinement was more about accommodation than competency. The questions regarding his work was about helping Brian Delisle keep his job and was not about competency. The court granted Brian Delisle’s request to do work release.” CP 116-17. Findings of fact are reviewed for substantial evidence. After reviewing an audio and video recording of the guilty plea hearing, and reviewing the transcript, it is clear that Judge Melnick was questioning Delisle about his employment to determine whether to give him alternative confinement of work release, a sentence which he ultimately imposed. *See* RP 9-11. This factual finding is evident

from the record as at the guilty plea hearing, the trial court had accepted Delisle's guilty plea when he raised questions regarding Delisle's work and whether he had a job. RP 10. It was during counsels' arguments regarding sentencing that the trial court interjected, "[d]oes he work?" RP 10. The very next statement of the court was that work release is more appropriate for punishment. RP 10. It is clear that the trial court's discussion during sentencing was not about competency. The trial court had already found Delisle guilty and was considering sentence. Finding of Fact #8 is supported by substantial evidence and should be treated as a verity on this appeal.

Delisle also assigns error to Finding of Fact #12(g). This finding of fact states, "Attorney George Trejo testified during this motion hearing to the following: ... g. It was fully Brian Delisle's decision to enter a guilty plea." CP 117-18. Attorney George Trejo testified at the hearing that it was Delisle's decision to plead guilty. RP 58. Mr. Trejo testified that, "I mean I can give him advice, but ultimately it's the client's decision of whether or not to plead guilty." RP 58. Though Delisle's testimony may have conflicted with Mr. Trejo's, it is the province of the trial court to determine credibility issues between conflicting witnesses, and this trial court found Mr. Trejo to be credible and entered a finding that he testified

that it was Delisle's decision to enter a guilty plea. CP 117-18. This finding of fact is supported by substantial evidence and should be treated as a verity on appeal.

Delisle also assigns error to Finding of Fact #12(k). This finding of fact states, "Attorney George Trejo testified during this motion hearing to the following: ... k. George Trejo is aware of RCW 10.77 and the process for having a client evaluated; he has had clients evaluated for competency in the past. He did not have any reason to believe Brian Delisle was incompetent." Findings of Fact are reviewed for substantial evidence. This finding of fact is not just supported by substantial evidence, but it is verifiably, undeniably true. Attorney George Trejo is on the record testifying at this hearing and he testified to the substance of the finding of fact quoted above. RP 64. Delisle cannot show the trial court erred in entering this finding of fact. This finding should be treated as a verity on appeal.

b. The Trial Court Did Not Err in Finding Delisle did Not Meet His Burden in Showing Ineffective Assistance of Counsel

Delisle argues that his trial counsel was ineffective for failing to interview witnesses pretrial, and for failing to obtain a competency evaluation of Delisle prior to entering a guilty plea. Delisle had the benefit of effect counsel. The trial court properly found Delisle did not show his

trial counsel was ineffective and did not show prejudice. Delisle's claim should be denied.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Strickland*, 466 U.S. at 685-86. Under *Strickland*, ineffective assistance is a two-pronged inquiry;

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable."

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kylo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of

defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly

deferential to trial counsel's decisions. *State v. Michael*, 160 Wn.App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a basis for finding error in counsel's performance. *Strickland*, 466 U.S. at 689-91.

Delisle first alleges his trial counsel was ineffective for failing to interview pretrial witnesses. From the testimony of Mr. Trejo, which the trial court found to be credible, it is clear that Delisle did not provide Mr. Trejo with any list of potential alibi witnesses. CP 118, 122. In fact, from Mr. Trejo's testimony, Delisle's only indicated defense was that he was allowed to drive because police gave him permission to drive a confidential informant around. RP 76. These statements Delisle made to Mr. Trejo regarding his possible defense are in direct contradiction to a now-claimed alibi defense. From Mr. Trejo's testimony, it is clear that Delisle was guilty of the crime, and Mr. Trejo's purpose was to seek the best possible resolution for his client, as his client wished. RP 57.

Interviewing witnesses would not have changed the outcome of the case; and when negotiating a plea agreement, there are tactical reasons why defense counsel may choose to forego conducting witness interviews.

Delisle did not show during the CrR 7.8 hearing that his attorney failed to interview witnesses that Delisle asked him to, and he did not show that any failure to do interviews was not tactical or resulted in prejudice. The

trial court did not err in denying Delisle's claim based on his attorney failing to interview witnesses.

Delisle also claims his attorney was ineffective for failing to investigate Delisle's mental health issues prior to his entry of the guilty plea. However, the evidence presented to the trial court during the CrR 7.8 hearing is clear: Mr. Trejo had no reason to suspect his client had mental health problems which might amount to incompetency. Mr. Trejo found Delisle to appear to have a full understanding of the criminal process and guilty plea; Mr. Trejo did not believe Delisle was incompetent; he did not show signs of incompetency or psychosis; Delisle was able to consult with Mr. Trejo about the case, responding appropriately. RP 62-64. Mr. Trejo did not find any reason to doubt Delisle's competency. RP 64.

Defense counsel is not ineffective for failing to raise meritless arguments that the defendant did not request. *State v. Schwab*, 141 Wn.App. 85, 96, 167 P.3d 1225 (2007). From what was known and observed by Mr. Trejo, there was no reason for him to have requested an evaluation pursuant to RCW 10.77. The presence of a seizure disorder and mental health issues does not equate to incompetency. There is nothing more in the record than Delisle's claim that his incompetency was obvious to support his contention that his defense attorney was ineffective because he should have suspected incompetency. The presence of a prior injury to

the head does not establish a present incompetence. “Mental health issues” do not equate legal incompetency. Experienced attorneys who have dealt with incompetency issues under RCW 10.77, like Mr. Trejo, know that there is a legal standard, which can at times be difficult to meet, to show a defendant is legally incompetent. From how Mr. Trejo describes Delisle- able to rationally discuss his case, understand the legal process, and discuss potential resolutions and defenses- Delisle was not legally incompetent and would not have been found to have been incompetent.

Furthermore, bald assertions and conclusory allegations are insufficient to support a claim of ineffective assistance of counsel. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). There is no corroborative evidence of Mr. Trejo’s alleged ineffectiveness. *See State v. Gomez Cervantes*, 169 Wn.App. 428, 434, 282 P.3d 98 (2012). With scant evidence, and no corroboration of this purported ineffectiveness, the court should deny Delisle’s claim. Not only is defense counsel’s conduct presumed competent, but Delisle must show prejudice. There was overwhelming evidence of Delisle’s guilt. He proceeded with a guilty plea, a reasonable tactic given the situation, and received a low-end sentence to work release. Even if Delisle’s attorney had raised a competency issue, there is no likelihood the outcome would have been better for Delisle; Delisle is clearly competent, and any evaluation would

have done no more than lengthen the amount of time Delisle spent in custody awaiting an evaluation. Delisle cannot satisfy either prong of the *Strickland* standard for proving ineffective assistance of counsel. The trial court below properly found Delisle had failed his burden under CrR 7.8 to show his counsel was ineffective or that he suffered any prejudice. The trial court did not abuse its discretion in so finding. The trial court's findings should be affirmed.

c. The Trial Court Did Not Err in finding Delisle did Not Meet His Burden in Showing Incompetency at the Time of his Guilty Plea

Delisle alleges the trial court abused its discretion in finding that he did not present substantial evidence to show he was incompetent at the time of his plea. The trial court applied the proper legal standard and properly held Delisle to his burden, by making a substantial showing that he was entitled to relief.

Delisle argues the trial court held a formal competency hearing and erred by requiring Delisle make a substantial showing he was incompetent. Br. of Appellant, p. 21-23. However, it is clear from case law and CrR 7.8 that the defendant moving to withdraw his guilty plea must make a substantial showing that he is entitled to relief. *State v. Declue*, 157 Wn.App. 787, 793, 239 P.3d 377 (2010). It is true, the trial court referenced RCW 10.77 and a "competency hearing," in discussing the

evidentiary hearings on this matter. RP 99. However, Delisle does not get the windfall of a reduced burden on his CrR 7.8 motion simply because the trial court misspoke. It is clear from the posture of the hearing and the trial court's rulings, that it was always framed under CrR 7.8, and Delisle had a burden to show he was incompetent prior to obtaining any relief. The trial court was under no obligation to hold a formal competency hearing because it found Delisle did not present substantial evidence that he was incompetent. *See DeClue*, 157 Wn.App. at 793.

It is only when a defendant supports his motion to withdraw a guilty plea with substantial evidence of incompetency that the trial court must employ the statutes governing competency and hold a formal competency hearing. *State v. Marshall*, 144 Wn.2d 266, 281, 27 P.3d 192 (2001). “[W]hen an incompetency claim is not supported by substantial evidence, the defendant has not demonstrated a manifest injustice and the trial court may deny the motion without holding a formal competency hearing.” *See DeClue*, 157 Wn.App. at 793 (citing *State v. Calvert*, 79 Wn.App. 569, 576, 903 P.2d 1003 (1995)). In *DeClue*, this Court considered whether the trial court erred in holding an evidentiary hearing on the defendant's motion to withdraw his guilty plea for incompetency instead of holding a formal competency hearing. *DeClue*, 157 Wn.App. at 794. This Court reasoned that a formal competency hearing is only

required when a legitimate question of competency arises and when a defendant supports the motion with “substantial evidence” of incompetency. *Id.* (citing *Marshall*, 144 Wn.2d at 281).

As in *DeClue*, the trial judge hearing Delisle’s motion below did not find substantial evidence calling Delisle’s competency into question and the court was therefore not required to hold a formal competency hearing. CP 121; *see DeClue*, 157 Wn.App. at 794-95. The trial court employed the proper standard, requiring Delisle to present substantial evidence of his incompetency.

The trial court’s determination that Delisle did not present substantial evidence of his incompetency is reviewed for abuse of discretion. The trial court based its decision, in part, on Dr. Larsen’s testimony and the trial court’s finding that Dr. Larsen was not persuasive. CP 121. This Court leaves to the trial court issues such as credibility of witnesses. *State v. Swan*, 114 Wn.2d 613, 637, 790 P.2d 610 (1990) (deferring credibility issues to the trial court which had the opportunity to evaluate the witnesses’ demeanor). Though no other evidence was presented to the contrary, it was reasonable for the trial court to discredit Dr. Larsen. Dr. Larsen did not review the jail medical records prior to making a determination on Delisle’s competency; Dr. Larsen did not review a transcript or the video of the guilty plea hearing. RP 110, 112.

Dr. Larsen admitted reviewing the transcript and the video might change his opinion on Delisle's competency. RP 114. And, inexplicably, Dr. Larsen's opinion on Delisle's competency would not have changed with having medical evidence of Delisle's behavior, demeanor and speech patterns in the days prior to and after his guilty plea hearing, as found in the jail medical records. RP 110-11; CP 50-58. Dr. Larsen's entire opinion appeared to be based on facts as told by Delisle. RP 114. Case law has held that a trial court need not accept a defendant's unsupported incompetency claim. *See State v. Calvert*, 79 Wn.App. 569, 576, 903 P.2d 1003 (1995) (rejecting a defendant's incompetency claim based on a head injury sustained nine days prior to the plea hearing where neither the defendant's medical records nor the doctor's testimony supported the defendant's claim that he was incompetent when he pleaded guilty); *State v. Hystad*, 36 Wn.App. 42, 45, 671 P.2d 793 (1983) (rejecting defendant's unsupported incompetency claim because "defendant's bald claim of methadone-induced confusion does not meet the demanding standard required to show manifest injustice"); *State v. Armstead*, 13 Wn.App. 59, 63-65, 533 P.2d 147 (1975) (rejecting a defendant's unsupported claim that he was "drunk off barbiturates" when he pleaded guilty). When Dr. Larsen did little more than repeat Delisle's claims to him as fact, and applied a medical standard to them that, if the facts were true, may have

merit, the defendant has not met his burden of showing by substantial evidence that he was incompetent. The trial court did not abuse its discretion in finding Dr. Larsen's testimony to be unpersuasive and lacking credibility.

Delisle had a demanding burden when moving to withdraw his guilty plea because "ample safeguards exist to protect his rights before the trial court accepts the plea." *DeClue*, 157 Wn.App. at 795 (citing *State v. Taylor*, 83 Wn.2d 594, 596-97, 521 P.2d 699 (1974)). Delisle needed to have shown that his mental disease or defect interfered with his capacity to understand the nature of the proceedings against him or to assist in his own defense. RCW 10.77.010(15). In *DeClue*, the trial judge relied upon her own memory of the guilty plea hearing, a nurse's testimony, defense counsel's testimony that the defendant did not have trouble communicating, was sharp, astute and paying close attention and participated in plea negotiations. *DeClue*, 157 Wn.2d at 795. This Court found the defendant in *DeClue* presented no credible evidence that the medications affected his ability to understand the consequences of pleading guilty. *Id.* at 796. The evidence relied upon by the trial court in *DeClue* is very similar to the evidence relied upon by the trial court in Delisle's case. The judge reviewed a video of Delise's plea hearing; the judge reviewed medical documentation from Delisle's time in the jail; the

judge heard testimony from Delisle's defense attorney who indicated he saw no reason to believe Delisle was incompetent, and that he participated in his defense and in plea negotiations. CP 115-22. As in *DeClue*, Delisle presented no credible evidence that he was unable to understand the proceedings or assist in his defense. The trial court properly denied Delisle's CrR 7.8 motion.

The trial court below applied the proper standard under CrR 7.8 to determine that Delisle did not make the necessary showing of incompetency in order to justify withdrawal of his guilty plea under CrR 7.8(c). The trial court did not abuse its discretion. The trial court's finding on Delisle's CrR 7.8 motion should be affirmed.

D. CONCLUSION

The trial court properly held a hearing pursuant to CrR 7.8(c)(2)(ii) on Delisle's motion to withdraw his guilty plea. The trial court properly applied the legal standard that Delisle had the burden to show, by substantial evidence, that he was incompetent to enter a guilty plea and/or that his attorney provided ineffective assistance of counsel. Delisle did not make this showing at the trial court level. The trial court properly

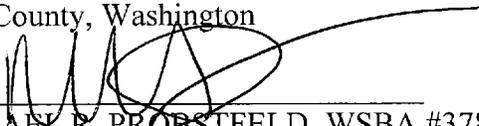
considered the evidence and the law in denying Delisle's motion. The trial court's findings on Delisle's CrR 7.8 motion should be affirmed.

DATED this 23rd day of December, 2014.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:



RACHAEL R. PROBSTFELD, WSBA #37878
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

December 23, 2014 - 12:24 PM

Transmittal Letter

Document Uploaded: 1-463300-Respondent's Brief.pdf

Case Name: State v. Brian DeLisle

Court of Appeals Case Number: 46330-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

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

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Abby Rowland - Email: abby.rowland@clark.wa.gov

A copy of this document has been emailed to the following addresses:

markmuen@ix.netcom.com