

No. 38515-9-III

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT TODD THYSELL, SR.,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KLICKITAT COUNTY

The Honorable Randall C. Krog

APPELLANT'S SUPPLEMENTAL BRIEF
PURSUANT TO RAP 10.10(f)

Laura M. Chuang
WSBA #36707
Northwest Appellate Law
PO Box 8679
Spokane, WA 99203
(509) 688-9242
laura@nwappellatelaw.com

TABLE OF CONTENTS

A. INTRODUCTION..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 3

 1. Whether Mr. Thysell’s right to counsel was denied when, without legal representation, the following occurred: (a) a finding of probable cause was entered by the court; (b) no counsel was appointed at a preliminary hearing because of an undetermined indigent status; (c) court proceeded with preliminary hearing while Mr. Thysell was without counsel; (d) conditions of release and bail were set without appointment of counsel; (e) the conditions of release could not be adequately challenged without assistance of counsel; (f) waiver of extradition was signed without advice of counsel; (g) trial court abused its discretion when requesting defendant sign a waiver of extradition; and (h) preaccusatorial delay occurred when arraignment was not held in a timely manner..... 4

 2. Whether Mr. Thysell’s right to effective assistance of counsel was denied when defense counsel (a) failed to challenge any of defendant’s right to counsel issues; (b) did not challenge any violations of due process, pretrial conditions of release and amount of bail, nor challenge the delay of arraignment; (c) failed to challenge comments made by the State in regards to the video of the incident; (d) failed to request a CrR 3.6 hearing; and (e) failed to investigate or provide expert witnesses 7

3. Whether cumulative error warrants reversal.....	9
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

United States Supreme Court

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	7
---	---

Washington State Supreme Court

<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	9
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011)	9
<i>State v. Hicks</i> , 163 Wn.2d 477, 181 P.3d 831 (2008)	9
<i>State v. Lopez</i> , 95 Wn. App. 842, 980 P.2d 224 (1999).....	8-9
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	8
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	8
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	8
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	8

Washington Courts of Appeal

<i>In re Sanchez</i> , 197 Wn. App. 686, 391 P.3d 517 (2017)	4, 5, 6
---	---------

Constitutions

Const. art. I, sec. 22	4
------------------------------	---

U.S. Const. amend. VI..... 4

Court Rules

CrR 3.1(b)(1)..... 5

CrR 3.2 6

RAP 2.5(a)(3)..... 8

RAP 10.10 3

RP 10.10(a)..... 7, 9, 10

RAP 10.10(f) 1, 3

RAP 18.17 10

A. INTRODUCTION

The Court requested supplemental briefing pursuant to RAP 10.10(f) as to whether “Mr. Thysell was denied assistance of counsel at any critical stage of his criminal proceeding.” For this reason, Appellant’s counsel files this supplemental brief. RAP 10.10(f).

B. STATEMENT OF THE CASE

The following facts are offered in addition to those presented in the Appellant’s prior briefing. (Appellant’s Opening Brief, filed 5/11/2022; Appellant’s Reply, filed 9/30/22).

On June 21, 2021, at a preliminary appearance in this case, the trial court inquired whether Mr. Thysell qualified for a public defender. (Supp. RP 6-12). The trial court ultimately determined Mr. Thysell was not indigent at this initial appearance and not eligible for counsel at public expense. (Supp. RP 11-12). The trial court proceeded to address release conditions and adopt the ones requested by the State. (Supp.

RP 18). No attorney was present for Mr. Thysell to consult. (Supp. RP 3-22). The State requested one of the conditions of Mr. Thysell's release was that he sign a waiver of extradition. (Supp. RP 16). The trial court explained what a waiver of extradition was, advising Mr. Thysell it must be signed before the trial court would be willing to release him, along with an address and posting of bail. (Supp. RP 20-21).

On July 6, 2021, Mr. Thysell reappeared for arraignment. (Supp. RP 23-29). Having been told a variety of things about whether he would be appointed an attorney, Mr. Thysell had not retained one at this point. (Supp. RP 23-24). The trial court continued arraignment because it felt uncomfortable proceeding when Mr. Thysell did not yet have counsel; and Mr. Thysell agreed to the continuance. (Supp. RP 25-26).

At the next hearing on July 19, 2021, Mr. Thysell retained Christopher Lanz to represent him. (Supp. RP 28). Mr. Lanz assisted Mr. Thysell in entering a plea of not guilty to the

charged crime of assault in the second degree and set a schedule for trial. (Supp. RP 28-29).

On May 11, 2022, Appellant's undersigned counsel filed an opening brief. (Appellant's Opening Brief, filed 5/11/2022). Since then, the State has responded, Appellant's counsel has filed a reply brief, and Mr. Thysell filed a Statement of Additional Grounds pursuant to RAP 10.10. (State's Resp., filed 9/1/22; Appellant's Reply, filed 9/30/22; Statement of Additional Grounds, filed 7/26/22). On November 29, 2022, this Court requested additional briefing on "whether Mr. Thysell was denied assistance of counsel at any critical stage in his criminal proceeding." (COA letter, filed 11/28/22).

As requested by the Court and pursuant to RAP 10.10(f), counsel for Appellant files this supplemental briefing.

C. ARGUMENT

The following additional authorities are offered to address issues raised in the Mr. Thysell's Statement of Additional Grounds, filed on July 26, 2022.

- 1. Whether Mr. Thysell’s right to counsel was denied when, without legal representation, the following occurred: (a) a finding of probable cause was entered by the court; (b) no counsel was appointed at a preliminary hearing because of an undetermined indigent status; (c) court proceeded with preliminary hearing while Mr. Thysell was without counsel; (d) conditions of release and bail were set without appointment of counsel; (e) the conditions of release could not be adequately challenged without assistance of counsel; (f) waiver of extradition was signed without advice of counsel; (g) trial court abused its discretion when requesting defendant sign a waiver of extradition; and (h) preaccusatorial delay occurred when arraignment was not held in a timely manner.**

Mr. Thysell argues his right to counsel was denied for numerous reasons. The following legal authorities may aid this Court in review of this issue.

Under both the Washington and U.S. Constitutions, a defendant is entitled to the assistance of counsel at all critical stages of the proceedings. U.S. Const. amend. VI; Const. art. I, sec. 22; *In re Sanchez*, 197 Wn. App. 686, 698, 391 P.3d 517 (2017). “An accused’s right to be represented by counsel is a fundamental component of our criminal justice system.” *Id.* at 698 (citation omitted). “[T]he period from arraignment to trial

is perhaps the most critical period of the proceedings during which the accused requires the guiding hand of counsel.” *Id.* at 698 (quotations and citations omitted).

CrR 3.1(b)(1) states the right to counsel accrues “as soon as feasible after defendant is taken into custody, appears before committing magistrate, or is formally charged, whichever occurs earliest.” *Sanchez*, 197 Wn. App. at 698-699 (citing CrR 3.1(b)(1)).

Denial of counsel at a critical stage in the proceedings is presumptively prejudicial and calls for automatic reversal. *Sanchez*, 197 Wn. App. at 699. A “critical stage is one in which a defendant’s rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.” *Id.* at 699 (citations and quotations omitted). Constitutional harmless error analysis applies to the denial of the constitutional right to counsel at all stages of criminal proceedings except for those where the “deprivation of the right to counsel affected—and

contaminated—the entire criminal proceeding.” *Sanchez*, 197 Wn. App. at 699-700 (citation omitted).

CrR 3.2 sets forth the factors trial courts are to consider when imposing conditions of release. CrR 3.2.

Here, Mr. Thysell might argue because he was not represented by counsel at the time the determination of probable cause was made, he was not provided counsel at a critical stage of the proceedings. (Statement of Additional Grounds; CP 7; Supp. RP 15). Mr. Thysell may also argue were he represented at the preliminary hearing he would not have lost rights, waived defenses, or waived privileges. (Supp. RP 3-22). Mr. Thysell made statements as to his defense in open court while unrepresented by counsel. (Supp. RP 17-18). These statements may have been waiver as to any defenses he could have presented in court later at trial. (Supp. RP 17-18). Mr. Thysell was asked to sign a waiver of extradition, without the benefit of counsel’s advice. (CP 8; Supp. RP 16, 19-20, 22). Also, pretrial conditions of release and bail were set

without presence and advice of counsel. (Supp. RP 5, 12, 13, 15, 17-21).

Counsel requests this Court perform its review of these potential issues raised in the Statement of Additional Grounds. RP 10.10(a).

- 2. Whether Mr. Thysell’s right to effective assistance of counsel was denied when defense counsel (a) failed to challenge any of defendant’s right to counsel issues; (b) did not challenge any violations of due process, pretrial conditions of release and amount of bail, nor challenge the delay of arraignment; (c) failed to challenge comments made by the State in regards to the video of the incident; (d) failed to request a CrR 3.6 hearing; and (e) failed to investigate or provide expert witnesses.**

Mr. Thysell argues his trial counsel was ineffective for numerous reasons. The following legal authorities may aid this Court in review of this issue.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is

an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a)(3). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Prejudice can also be established by showing that “‘counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” *State v. Hicks*, 163

Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

Counsel requests this Court perform its review of these potential issues raised in the Statement of Additional Grounds. RP 10.10(a).

3. Whether cumulative error warrants reversal.

Several trial errors “standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). “It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless.” *State v. Lopez*, 95 Wn. App. 842, 857, 980 P.2d 224 (1999).

Constitutional error requires reversal unless the court is certain beyond a reasonable doubt a jury would have reached the same

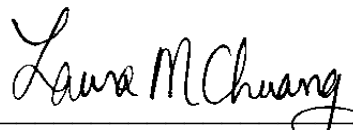
conclusion absent the error. *Id.* at 857. “Nonconstitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.” *Id.*

D. CONCLUSION

Mr. Thysell respectfully requests this Court perform its independent review of the potential issues raised by Mr. Thysell’s Statement of Additional Grounds and the authorities cited herein, and grant his requested relief. RP 10.10(a).

I certify this document contains 1,572 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 21st day of February, 2023.



Laura M. Chuang, WSBA #36707

