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Washington State
Court of Appeals
Division Two

June 12, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER L. BILLINGS, Appellant.	No. 49204-1-II UNPUBLISHED OPINION

BJORGEN, J. — Christopher L. Billings appeals his convictions of two counts of second degree assault with a deadly weapon.

Billings contends first that the superior court abused its discretion when it provided the jury with an additional jury instruction in response to a question on the transferred intent doctrine received during deliberations. Second, Billings argues that the superior court's additional instruction deprived him of effective assistance of counsel in closing argument. Finally, he claims that the State presented insufficient evidence for a jury to find him guilty of second degree assault with a deadly weapon predicated on transferred intent.

Billings also makes several arguments in his statement of additional grounds (SAG). First, Billings contends he has a right to the verbatim report of proceedings from his first trial. He requests a stay of proceedings until he has had the opportunity to review and compare the transcripts of his first and second trials. Second, Billings contends counsel provided ineffective assistance because a comparative analysis of the verbatim report of proceedings from his first

and second trials would reveal that counsel deficiently changed tactics and strategy from the first trial to the second, which resulted in prejudice. Alternatively, Billings contends we should remand to the superior court for an evidentiary hearing on the issue of ineffective assistance of counsel. Finally, Billings claims we should grant him relief in the interest of justice and equity.

We affirm.

FACTS

A. Substantive Facts

On April 5, 2015, Scott Soden and Angela Frank went to a mobile home park to sell approximately one ounce of marijuana to Cody Wagner. Soden testified that Wagner took the marijuana inside his residence to weigh the product before paying. After Wagner went inside, Billings arrived on the scene and parked two spaces adjacent to Soden. Soden was seated in the driver's seat and Frank was seated in the passenger seat. According to Soden, Billings then approached his vehicle from the passenger side while carrying a machete with a two foot blade.

Soden testified Billings "[w]alked up to my vehicle, opened my driver's door and started shouting at me about some marijuana that had gone missing. Apparently, he was accusing me of stealing it." Verbatim Report of Proceedings (VRP) (May 24, 2016) at 43-44. "He opened it [the door], held the machete up and started telling me to get out of the car." VRP (May 24, 2016) at 45. Soden refused to exit the vehicle despite Billings' threats. Soden testified that Billings "then tried reaching in and grabbing me out. I put my foot in the door jamb [and] pushed away so he couldn't pull me out." VRP (May 24, 2016) at 46-47. Billings then punched Soden a couple of times in the face.

Soden testified, "After he punched me, he realized I wasn't coming out of the car. He tried coming into the car. I then jumped into the back[]seat and started reaching for a knife I had in a backpack." VRP (May 24, 2016) at 49. Soden testified Frank was still in the front passenger seat at that point. After he climbed into the back seat, Billings entered the car swinging the machete. Soden testified that he put his arms up to block his face and that Billings hit him in the wrist with the machete blade. Soden then got out of the vehicle and fled; the machete had cut his wrist to the bone.

Soden testified that as he fled the vehicle, Frank remained in the vehicle and called 911. Soden encountered a resident who had come out of a trailer to see what had happened. Soden explained to the resident that Billings had attacked him with a machete and that Frank remained in the car. As Soden stood by the resident, they

> watched [Billings] run to [Frank's] side of the car. . . . He . . . opened her door, tried pulling her out. . . . He grabbed her up, had both arms around her. He was picking her up out of the car. She was squirming a lot. He let her go. He then grabbed – still had the machete, ran to his car, then drove out of the park.

VRP (May 24, 2016) at 55.

Frank corroborated Soden's account of the facts leading up to Billings' arrival. Frank then testified that Billings

> had went up to [Wagner], the place [Wagner] was staying. . . . I couldn't say what they were doing. When they came back out, [Billings] was upset because he had thought that we took his weed. Or that the weed that was in question was his. That is the time he had grabbed a machete from his car and came over and started trying to pop the tires of the vehicle that we were in. He went over to [Soden]'s side of the car, tried to open the door and was still at the time swinging the machete like at the tires trying to pop them.

VRP (May 24, 2016) at 89-90.

Frank confirmed she was seated in the passenger seat and that Soden was seated in the driver's seat. She testified that after Billings talked with Wagner "[h]e stopped at his car, [and] grabbed the machete." VRP (May 24, 2016) at 92. When asked, she affirmed that the machete scared her. She testified Billings opened the driver's door where Soden was seated and that Billings

> started yelling at [Soden] saying he took his marijuana. [He] [w]as swinging the machete at him. . . . He goes to swing it, like leans a little bit in the car and goes to swing it. It hits [Soden]'s arm because [Soden] had put up his arm. From it basically hitting me because of how far he was leaning in, that is when it had cut his arm.

VRP (May 24, 2016) at 93. At trial, Frank testified that if Billings had not lacerated Scott's arm, the machete would have struck her in the leg. Frank testified the situation scared her, and she was afraid Billings might hit her "with a machete or do something worse." VRP (May 24, 2016) at 102. Frank testified she was concerned they might be further hurt and told Billings she was going to call the police if he did not stop. She testified,

> [A]fter I had said I was going to call the cops, he came around to my side and like spit at me and tried to like lift me up. Because at that time, I had started dial[]ing 911. He tried to lift me up by my arms out of the car and pretty much stop me from making the call.

VRP (May 24, 2016) at 94.

The police later found the machete in an alley, but could not locate Billings immediately following the incident. The police arrested Billings two days later.

B. Procedural Facts

1. First Trial

On April 8, 2015, the State charged Billings by information with the crime of second degree assault with a deadly weapon, on count I, and the crime of fourth degree assault on count II. Count I related to the assault on Soden, and count II to the assault on Frank. On October 1,

the State amended the information on count II, the assault against Frank, to second degree assault. On March 7, 2016, the State filed its second amended information, which added count III, witness tampering.

On March 8, after the jury was selected, testimony began but at the end of trial, the jury was unable to reach a unanimous verdict on counts I and II; the jury acquitted Billings on count III. The superior court declared a mistrial as to counts I and II, and entered an acquittal as to count III.

2. Second Trial

On March 28, 2016, the State filed its third amended information, which mirrored the charges in the original information. On May 5, the State filed its fourth amended information, which, among other things, amended count II, the assault against Frank, to the crime of second degree assault with a deadly weapon, and added count IV, attempted first degree robbery. On May 23, the State filed its fifth amended information, which did not amend the charges but only the language contained in the charging document.

On May 24, the jury panel was sworn in and trial commenced. At the close of evidence, the defense moved to dismiss count IV, arguing the State did not make a prima facie showing to support the attempted first degree robbery charge. The superior court agreed and dismissed count IV. The court then instructed the jury, and both parties presented closing arguments.

3. Jury Instructions

Jury instruction 9 read as follows:

> To convict the defendant of the crime of Assault in the Second Degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

> (1) That on or about the 5th day of April, 2015, the defendant assaulted Angela Frank with a deadly weapon; and
>
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

Clerk's Papers (CP) at 112.

Jury instruction 11 read as follows: "If a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with intent to assault the third person." CP at 114; *see* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.01.01 (WPIC). Neither party objected to instruction 11. Finally, jury instruction 12 read as follows:

> An assault is an intentional touching or striking or cutting of another person that is harmful or offensive, regardless of whether any physical injury is done to the person. A touching or striking or cutting is offensive if the touching or striking or cutting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP at 115.

4. Closing Arguments

In closing, the State argued that the transferred intent doctrine broadly encompassed unintended victims assaulted by any means, including those put in the apprehension of bodily harm. VRP (May 27, 2016) at 397-98. The defense argued that the transferred intent doctrine more narrowly encompassed victims that have suffered actual harm. Defense counsel made his argument based on the jury instructions. VRP (May 27, 2016) at 409-11.

In its rebuttal closing argument, the State offered a rejoinder to defense counsel's legal argument regarding transferred intent and reiterated that the term "harm," provided in instruction 11, is not limited to actual bodily harm but, instead, applies to all three types of assault. VRP (May 27, 2016) at 441-42.

5. Jury Question

During deliberations, the jury presented a question to the court regarding transferred intent. CP at 99. The question read, "Can intent be transferred to a third party in regards to creating apprehension and fear? Reference instruction 11 + 12." CP at 99.

In response the State argued, as it did in closing, "that transferred intent is available for all three of the different types of assault because the transferred intent instruction refers to harm. It doesn't refer to bodily harm or physical harm." VRP (June 1, 2016) at 460. The State cited *State v. Elmi*, 166 Wn.2d 209, 207 P.3d 439 (2009), to support its argument. The State "ask[ed] that the Court either answer [the jury's] question yes or direct them that intent can be transferred in any of those, the three situations set out in Instruction No. 12. In other words, a more general response. I think the answer still is yes either way." VRP (June 1, 2016) at 460-61.

The defense argued, as it did in closing, that in this context transferred intent is limited to situations involving first degree assault. It cited *State v. Abuan*, 161 Wn. App. 135, 257 P.3d 1 (2011), to support its argument. The defense requested the court to answer the jury question with "no" or to refer the jury back to their jury instructions. VRP (June 1, 2016) at 462. Counsel also indicated that because of the difference in closing arguments on the issue of transferred intent, it could appear that the court was siding with the State or defense if it instructed the jury on the matter.

The superior court concluded the jury's question involved a purely legal issue and that transferred intent applied to all three types of assault. Defense counsel noted its exception for the record.

The superior court responded to the jury question, in writing, by stating, "Instruction #11 applies to all three paragraphs of Instruction #12." CP at 99.

6. Verdict and Sentence

The jury found Billings guilty of second degree assault on counts I and II. The jury unanimously agreed that Billings was armed with a deadly weapon at the time of the commission of the crime in counts I and II. The superior court sentenced Billings to 57 months' total confinement on count I and II to run concurrently. It also sentenced Billings to two additional 12 month terms of total confinement for each deadly weapon sentencing enhancement to run consecutively to each other. The superior court noted the actual term of total confinement as 81 months. In addition, the court imposed 18 months of community custody, entered a no contact order for both victims, and ordered Billings to undergo a substance abuse evaluation for treatment.

Billings appeals.

ANALYSIS

I. ADDITIONAL JURY INSTRUCTIONS

Billings contends the superior court abused its discretion when it provided additional instruction on the jury's question regarding the scope of the transferred intent doctrine. Specifically, he claims the law of the case doctrine precluded the superior court from providing additional instruction. We disagree.

A. Standard of Review

Under CrR 6.15(f)(1),[1] the court has discretion to answer questions from the jury during deliberations, and any additional instruction on any point of law must be given in writing. *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). Additional "instructions should not go beyond matters that either had been, or could have been, argued to the jury." *State v. Ransom*, 56 Wn. App. 712, 714, 785 P.2d 469 (1990). A superior court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). Such is the case when the superior court relies on unsupported facts, takes a view that no reasonable person would take, applies an incorrect legal standard, or bases its ruling on an erroneous legal view. *Id.* at 284.

[1] CrR 6.15(f)(1) states:

> The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

B. The Law of the Case Doctrine

Under the law of the case doctrine, when parties fail to object to specific jury instructions, those instructions become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998). The doctrine is based on the notion that regardless of whether a particular instruction is proper, it should have a binding and conclusive effect on the jury that used it to make its decision. *Id.* at 101 n.2.

In this case, neither party objected to instruction 11, but the defense noted its exception to the additional instruction with the superior court, thereby preserving the issue for review. Further, in *State v. Calvin*, 176 Wn. App. 1, 22, 316 P.3d 496 (2013), Division One of our court held that because the superior court has discretion to provide additional instructions, the question is not whether the law of the case doctrine bound the State to the language at the time the jury was given instructions but, instead, whether the superior court abused its discretion when the jury sought further clarification and the superior court identified and corrected a problem. Therefore, we review whether the superior court abused its discretion when it provided additional instruction on the jury's question regarding the scope of the transferred intent doctrine.

C. The Superior Court Did Not Abuse Its Discretion When It Provided Additional Instruction

In *Elmi*, 166 Wn.2d 209, our Supreme Court addressed the doctrine of transferred intent in the context of assault. In *State v. Frasquillo*, 161 Wn. App. 907, 916, 225 P.3d 813 (2011), we concluded that *Elmi* established "that the intent to assault one victim transfers to all victims who are unintentionally harmed or put in apprehension of harm." We also concluded that "*Elmi* applies equally to second degree assault." *Id*. at 916 n.13.

In this case, instruction 11 provided as follows: "If a person acts with intent to assault another, but the act *harms* a third person, the actor is also deemed to have acted with intent to assault the third person." CP at 114 (emphasis added). In *Frasquillo*, we held that an identical transferred intent instruction—modeled on WPIC 10.01.01—was legally erroneous.[2] 161 Wn. App. at 915. We reasoned that this pattern jury instruction required that the victim be *harmed* in order for transferred intent to apply. We held that, under *Elmi*, this was erroneous because transferred intent can also apply to victims who are only put in *apprehension* of harm. *Id*. at 916. Here, as in *Frasquillo*, instruction 11 was legally erroneous because, taken alone, it required a showing of actual harm.

As noted, the State argued in closing that the transferred intent doctrine broadly encompassed unintended victims assaulted by any means, including those put in the apprehension of bodily harm. The defense argued that the transferred intent doctrine narrowly encompassed victims that have suffered actual harm. During deliberations, the jury recognized that the parties argued incompatible theories of the transferred intent doctrine and presented the superior court with a question. The jury's question read, "Can intent be transferred to a third party in regards to creating apprehension and fear? Reference instruction 11 + 12." CP at 99. The superior court notified both parties of the contents of the question and provided them an opportunity to comment on an appropriate response. After receiving comment at a hearing on the matter, the superior court appropriately concluded that transferred intent encompassed victims who are put in the apprehension of bodily harm, stating "Instruction #11 applies to all three paragraphs of Instruction #12." CP at 99.

[2] Although the comments to WPIC 10.01.01 provide reference to *Elmi*, the comments do not take account of our decision in *Frasquillo*.

The superior court did not abuse its discretion when it responded to the jury's question. It based its response on a correct view of the law, and the additional instruction did not go beyond matters that had been argued to the jury. Both parties argued their respective theories of the transferred intent doctrine during closing argument. *See Ransom*, 56 Wn. App. at 714. Accordingly, Billings' argument fails.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Billings argues that the superior court's additional instruction deprived him of effective assistance of counsel during closing arguments. We disagree.

A. Standard of Review and Legal Principles

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To demonstrate ineffective assistance of counsel, Billings must satisfy both prongs of the test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

First, Billings must show that counsel's performance was deficient, that it fell below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-36, 899 P.2d 1251 (1995). To demonstrate deficient performance, the record must show no legitimate strategic or tactical rationale for the trial attorney's decisions. *Id*. at 335-36. Second, Billings must show prejudice. *Id*. at 335. Prejudice exists if there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *Id*.

We must be "highly deferential" in evaluating a challenged attorney's performance. *Strickland*, 466 U.S. at 689. We strongly presume that the appellant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

B. Counsel Was Not Ineffective

Billings argues that issuance of the additional instruction on transferred intent rendered his attorney's argument ineffective, because that argument was based on the original instruction 11, which allowed transferred intent only when the act harms a third person. The additional instruction allowed the jury to find transferred intent also when the third person was put in apprehension and fear of bodily injury. However, contrary to Billings' argument, a superior court cannot "deprive" a defendant of effective assistance of counsel—only counsel can perform in a way that amounts to ineffective assistance. Thus, Billings' argument is best considered as part of the challenge to issuance of the additional instruction, which we considered above.

Even so, defense counsel's failure to object to instruction 11 did not constitute deficient performance. The original instruction 11 erroneously stated that the law required the State to prove actual harm. Because the State could not show actual harm, only apprehension and imminent fear, the erroneous instruction worked to Billings' benefit. Defense counsel argued the State had to prove actual harm during closing arguments, apparently following the erroneous instruction. If the jury had never asked the superior court to clarify the law, perhaps the jury may have acquitted on count II because the evidence did not show Frank suffered actual harm. There were strategic or tactical reasons for not objecting to instruction 11.

Likewise, defense counsel's objection to the superior court's additional instruction did not constitute deficient performance. When the jury inquired whether "intent [can] be transferred to a third party in regard to creating apprehension and fear," CP at 99, defense counsel requested that the court answer no or refer the jury back to their jury instructions. VRP (June 1, 2016) at 462. This was a legitimate strategy or tactic. For example, if the superior court took an erroneous view of the law (by concluding transferred intent required a showing of actual

harm), or simply referred the jury back to the erroneous instruction, Billings would be in a better position before the jury because the State would have had to prove actual harm.[3]

Because counsel's decisions can be characterized as part of a legitimate trial strategy, defense counsel did not perform deficiently. *See McFarland*, 127 Wn.2d at 335-36. Thus, Billings has not shown that he received ineffective assistance of counsel.

III. SUFFICIENCY OF THE EVIDENCE

Billings argues the State presented insufficient evidence for a jury to find him guilty of second degree assault with a deadly weapon predicated on transferred intent. We disagree.

A. Standard of Review

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Jensen*, 125 Wn. App. 319, 325, 104 P.3d 717 (2005). In a challenge to the sufficiency of the evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *Id*. Circumstantial evidence and direct evidence are equally reliable. *Id*. at 325-26. Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

[3] Billings does not argue that his defense counsel performed deficiently by failing to request the opportunity to present argument based on the additional instruction.

B. Jury Instructions and Elements of the Offense

The superior court instructed the jury that, in order to convict Billings of second degree assault, it had to find that he had "assaulted Angela Frank with a deadly weapon." CP at 112. It then instructed the jury on three different types of assault as follows:

> An assault is an intentional touching or striking or cutting of another person that is harmful or offensive, regardless of whether any physical injury is done to the person. A touching or striking or cutting is offensive if the touching or striking or cutting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP at 115. The superior court provided the following transferred intent instruction: "If a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with intent to assault the third person." CP at 114. Finally, in response to a jury question, the court correctly clarified that transferred intent applies to all three types of assault.

Under these instructions, in order to find an assault of Frank, the jury had to find that (1) Billings performed an act with specific intent to inflict bodily injury on Frank (attempted battery), or (2) even though Billings did not actually intend to inflict bodily injury on Frank, Billings performed an act with specific intent to cause bodily injury to or reasonable apprehension of bodily injury on the part of Soden, and (3) Frank had a reasonable apprehension and imminent fear of bodily injury (fear in fact). *See Abuan*, 161 Wn. App. at 155.

C. Evidence Sufficient To Prove Second Degree Assault With a Deadly Weapon

The record viewed in the light most favorable to the State contains sufficient evidence to prove that Billings intended to assault Soden with a machete and, in the process, created a reasonable apprehension and imminent fear of bodily injury on Frank's part. The record shows that Billings approached Soden's vehicle from the passenger side and carried a machete with a two foot blade. Soden was seated in the driver's seat and Frank was in the passenger seat. Billings slashed at Soden with the machete while Frank was in the car and lacerated Soden's wrist to the bone. Frank testified had the machete not hit Soden's wrist, it would have struck her in the leg. She testified the situation scared her, and she was afraid Billings might slash her "with the machete or do something worse." VRP (May 24, 2016) at 102.

Billings acted with specific intent to inflict bodily injury on Soden. However, because the act caused Frank reasonable apprehension and imminent fear of bodily injury, Billings is also deemed to have acted with intent to assault Frank. Accordingly, we hold that the record contains sufficient evidence to permit a rational trier of fact to find Billings guilty of second degree assault with a deadly weapon on count II.

IV. SAG

A. Right To Verbatim Report of Proceedings

In his SAG, Billings contends he has a right to the verbatim report of proceedings from his first trial. He requests a stay of proceedings until he has had the opportunity to review and

compare the transcripts of his first and second trials.

A long line of cases beginning with *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956), instruct that indigent criminal defendants be provided with the basic tools of an adequate defense or appeal, when those tools are available for a price to non-indigents. *State v. Williams*, 84 Wn.2d 853, 856, 529 P.2d 1088 (1975).

> Although the outer limits of this principle have not been made clear by the United States Supreme Court, there can be no doubt that the State must provide indigent defendants with proper transcripts of prior proceedings, or ready access thereto, when such are needed for an effective defense.

Id. Generally, indigent defendants are entitled to transcripts of prior proceedings if they were a party thereto. *E.g.*, *Williams*, 84 Wn.2d 853; *State v. Woodard*, 26 Wn. App. 735, 736, 617 P.2d 1039 (1980); *State v. Cirkovich*, 35 Wn. App. 134, 137, 665 P.2d 440 (1983). Further, a defendant need not make a particularized factual showing to be entitled to a transcript; rather, it is sufficient if the grounds of appeal make out a colorable need for the requested transcript. *State v. Harvey*, 175 Wn.2d 919, 921, 288 P.3d 1111 (2012), *review denied*, 366 P.3d 932 (2016). "[E]ven in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable." *Britt v. N. Carolina*, 404 U.S. 226, 228, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971).

Billings argues that his counsel was ineffective at his second trial and claims that there was a change in tactics from the first trial that would support his argument. Specifically, he argues that in his first trial his attorney challenged the credibility of witnesses, but did not do so in the second trial. He argues that he needs the verbatim report from the first trial to support that

claim. In these circumstances, we can presume that the transcript of a prior mistrial would be valuable. *Britt*, 404 U.S. at 228. Therefore, Billings has made out a colorable need for the requested transcript and is entitled to the transcript under *Harvey*, 175 Wn.2d at 921.

However, RAP 9.2 requires Billings to arrange for the transcription of the verbatim report of proceedings from his first trial within 30 days after the notice of appeal was filed. Billings either could have moved the superior court for a copy of the verbatim report of proceedings or requested his appellate counsel to arrange for their transcription. If Billings had made such a request of appellate counsel, appellate counsel would have been required to provide the transcripts to him under RAP 10.10(e).

As far as the record discloses, Billings did not ask the superior court or his appellate counsel for a copy of the verbatim report of proceedings from his first trial, the superior court did not deny or refuse a request for the verbatim report of proceedings from his first trial, and appellate counsel did not fail to provide a copy of the verbatim report of proceedings from his first trial after a request by Billings.[4] If a defendant wishes to bring a claim of ineffective assistance based on matters that are outside the appellate record, he must do so by means of a personal restraint petition. *McFarland*, 127 Wn.2d at 338 n.5 ("[A] personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record."); RAP 16.3.

Accordingly, we deny Billings' request for the verbatim report of proceedings from his first trial, and we deny his request for a stay of proceedings.

[4] We do not suggest that these are necessarily prerequisites to obtaining a transcript through a personal restraint petition.

B. Effective Assistance of Counsel

Billings contends his counsel provided ineffective assistance because a comparative analysis of the verbatim report of proceedings from his first and second trials would reveal that counsel deficiently changed tactics and strategy from the first trial to the second, which resulted in prejudice. As an alternative, Billings contends that we should remand to the superior court for an evidentiary hearing on the issue of ineffective assistance of counsel.

Billings' additional grounds essentially concern the effectiveness of defense counsel, and particularly whether defense counsel adequately emphasized certain evidence or legal arguments in his first trial, but not his second. However, the record before us does not support Billings' allegations. As noted above, if a defendant wishes to bring a claim of ineffective assistance based on matters that are outside the appellate record, he must do so by means of a personal restraint petition. *McFarland*, 127 Wn.2d at 338 n.5; RAP 16.3. To the extent Billings' arguments concern facts or evidence not in the record, his concerns should be raised in a personal restraint petition.

C. Other Grounds

Finally, Billings makes several claims in his SAG including, but not limited to, denial of liberty and property interests under the due process and equal protection clauses of the Fourteenth Amendment and violation of his First Amendment right to petition for redress of grievances and his right to access to the courts. These and other grounds are vague or seemingly irrelevant. For example, Billings claims we should grant him relief in the interest of justice and equity. While a SAG need not include citations to the record or legal argument, the appellant

must "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c). In addition, we are "not obligated to search the record in support of claims made in a defendant[/appellant]'s statement of additional grounds for review." RAP 10.10(c). Therefore, because we cannot discern the nature and occurrence of the alleged errors contained in Billings' SAG, other than the transcript issue discussed above, his claims fail.

CONCLUSION

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, J.

We concur:

Johanson, J.

Sutton, J.