SUPREME COURT NO. 97011-4

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHELE ANDERSON,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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A. IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Anderson, No. 75074-7-I, filed February 19, 2019 (unpublished).

C. ADDITIONAL ISSUES PRESENTED FOR REVIEW

If this Court accepts review of this case, the State seeks cross-review of the following additional issues the State raised in the Court of Appeals, which were not reached by that court:

1. The Court of Appeals held that Anderson waived her claim that the trial court erred in denying her initial request for substitution of retained counsel because she abandoned that request. As an alternative ground to affirm, the State renews its argument that the request was properly denied because it included a request for appointed counsel, which required compliance with SPRC 2, and the retained counsel was not qualified under that rule.

2. As an alternative ground to affirm the Court of Appeals, the State renews its argument that if the trial court erred in denying Anderson's initial request for substitution of retained counsel, the

error does not warrant reversal where Anderson instantly changed her mind and any violation was for only one brief hearing over seven years before trial and caused Anderson no prejudice.

3. The Court of Appeals assumed without deciding that Anderson's claim regarding the preliminary instructions to the prospective jurors was a manifest constitutional error, but the court found any error harmless. As an alternative ground to affirm the Court of Appeals, the State renews its argument that Anderson cannot raise this claim of error for the first time on appeal because it was not manifest constitutional error.

D. STATEMENT OF THE CASE

The defendant, Michele Anderson, and codefendant Joseph McEnroe were charged with six counts of aggravated murder in the first degree, occurring on December 24, 2007, for the killings of Anderson's parents, Wayne and Judith Anderson, and Anderson's brother and his family: Scott and Erika Anderson, and their children, Olivia and Nathan. CP 1-5; RCW 9A.32.030(1)(a); RCW 10.95.020(10). The relevant facts are set forth in the State's briefing before the Court of Appeals. Brief of Respondent at 6-14.

On October 16, 2008, the State filed a notice that there would be a special sentencing proceeding to determine whether the death penalty should be imposed, as there was reason to believe there were not sufficient mitigating circumstances to merit leniency. CP 1549. On January 31, 2013, the trial court granted a defense motion to strike the notice of special death penalty sentencing proceeding. CP 601-13. On September 5, 2013, this Court unanimously reversed the trial court's ruling striking the notice of the special death penalty sentencing proceeding.[1] CP 945-59; State v. McEnroe, 179 Wn.2d 32, 309 P.3d 428 (2013).

On January 2, 2014, the trial court adopted the defense argument that the absence of sufficient mitigation to merit leniency is an element of aggravated murder if death may be the punishment. CP 960-67. On January 31, 2014, the trial court ordered the State to amend the information to allege insufficient mitigation to merit leniency, stating that if the State did not do so, the court would strike the notice of special death sentencing proceeding again. CP 960-67, 971-85. On July 14, 2014, this Court unanimously reversed the trial court's ruling by summary

[1] The mandate issued December 12, 2013. CP 943.

order, with an opinion that followed.[2] CP 1004-05; State v. McEnroe, 181 Wn.2d 375, 333 P.3d 402 (2014).

On July 29, 2015, the State withdrew the notice of special death sentencing proceeding. CP 1709.

The jury returned verdicts of guilty as charged on all counts on March 4, 2016. CP 1352, 1354, 1356, 1358, 1360, 1362, 1364-68. Anderson was sentenced to six consecutive terms of life without parole. CP 1422-29.

The Court of Appeals affirmed the convictions in a unanimous unpublished opinion. State v. Anderson, 75074-7-I (Wash. Ct. App. February 19, 2019) (unpublished).

E. ARGUMENT

The State's briefing at the Court of Appeals adequately responds to the issues raised by Anderson in her petition for review. If review is accepted, the State seeks cross-review of alternative arguments it raised in the Court of Appeals that the court did not address. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review, and believes

[2] The mandate issued November 5, 2014. CP 1237.

that review by this Court is unwarranted. However, if this Court grants review, in the interests of justice and full consideration of the issues, this Court also should grant review of the alternative arguments raised by the State in the Court of Appeals, identified in the issue statement above. RAP 1.2(a); RAP 13.7(b). Those arguments are summarized below and set forth more fully in the briefing in the Court of Appeals.

1. THE INITIAL REQUEST FOR SUBSTITUTION OF RETAINED COUNSEL AND NEW APPOINTED COUNSEL WAS PROPERLY DENIED.

Anderson claims that on three occasions she was denied her choice of retained counsel in violation of the Sixth Amendment. U.S. CONST. amend. VI. The first instance identified, July 14, 2008, was the only occasion where Anderson requested substitution of retained counsel for her existing appointed counsel. CP 1474-77. That written request was withdrawn: one of the retained attorneys withdrew before the hearing on the motion, and the second (Julian Denes) requested concurrent appointment of counsel to assist him. CP 1478, 1500-01, 1508-09. Two weeks later, Anderson stated that she had changed her mind and had decided she did not want retained counsel. CP 1490; 7/31/08RP 5-6, 18-21.

The Court of Appeals held that by affirmatively withdrawing her request for representation by Denes, Anderson waived this claim of error. Anderson, Slip op. at 6. The Court did not reach the State's alternative argument, that appointment of an attorney would require compliance with the rules for appointment of counsel in a capital case, Superior Court Special Proceedings Rules - Criminal (SPRC) 2, and that Denes was not qualified to be appointed under SPRC 2. CP 1497, 1509.

Washington's Superior Court rules for capital cases apply to any case where the death penalty may be decreed. Superior Court Special Proceedings Rules - Criminal (SPRC) 1(a). These rules were applicable to this case until July 29, 2015, the date when the State withdrew its notice of special sentencing proceeding, which precluded imposition of the death penalty. CP 1709. SPRC 2 sets minimum qualification requirements for appointment of counsel in capital cases, including appointment of two trial counsel, and "[b]oth counsel at trial must have five years' experience in the practice of criminal law." SPRC 2 (Appointment of Counsel).

This Court regulates the practice of law in Washington. GR 12. It has the authority to require that attorneys in capital litigation meet particular qualifications. This Court has the authority to

establish criteria for lawyers appearing before it and an independent interest in ensuring that criminal trials appear fair to those who observe them. United States v. Gonzalez-Lopez, 548 U.S. 140, 151-52, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). A defendant does not have the right to be represented by an attorney who does not meet the minimum qualification requirements of the governing court. Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)
(must be licensed attorney).

The trial court ruled that SPRC 2 requires that even retained counsel have the qualifications listed in that rule.[3] CP 1510-13. The trial court relied on the rule's provision that, "All counsel for trial and appeal must have" the specified proficiency in death penalty litigation. CP 1510. The trial court's interpretation of SPRC 2 can be justified by the court's interest in fairness to the defendant in highly-specialized death penalty litigation, as the trial court observed. CP 1509, 1512. At least one court has held that if an attorney does not meet the qualification standards of the Standards

[3] That was the position advocated by the Death Penalty Committee of the Washington Association of Criminal Defense Lawyers (WACDL) in an amicus brief filed with the trial court and in argument before the court. CP 1480-81, 1504-07.

for Indigent Defense, that is evidence of deficient performance, to be considered in assessing possible ineffective assistance of counsel. State v. Flores, 197 Wn. App. 1, 14, 386 P.3d 298 (2016).

It is unnecessary for this Court to reach the issue of the relationship between SPRC 2 and the right to choice of retained counsel, because Anderson was requesting appointment of counsel to serve along with her retained counsel. If the court is appointing counsel, it must comply with the terms of SPRC 2, which requires that "all counsel for trial" have the specified proficiency. Although the trial court did not rely on this analysis, this court may affirm the lower court's decision on any ground supported by the record. State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).

By its terms, SPRC 2 applies whenever a court appoints counsel in a capital case. The rule is titled "Appointment of Counsel" and begins with the mandate: "At least two lawyers shall be appointed for the trial." SPRC 2. The motion to substitute counsel before the trial court on July 14, 2008, was to substitute one retained attorney and appoint a second attorney to represent Anderson. CP 1500-01, 1508.

Because the court was appointing counsel, it was required to comply with SPRC 2, which requires at least two qualified attorneys

be appointed. The intent of the rule is clear – to ensure representation by qualified counsel in capital cases. If the trial court is responsible for appointment of trial counsel in a capital case, at least two counsel must be appointed, who both have five years' criminal law experience and have demonstrated specified proficiency in capital litigation. SPRC 2. If counsel is appointed, the rule plainly requires that "all counsel" must meet its requirements. SPRC 2. There was no dispute that Denes did not have the qualifications required by SPRC 2. CP 1509.

Under the terms of SPRC 2, hybrid representation by qualified appointed counsel and unqualified retained counsel is not permitted. If an attorney had been appointed to assist Denes, the result would still be an attorney not qualified under SPRC 2 directing the litigation.[4] There is no constitutional right to representation by both retained and appointed counsel.

Moreover, even if Anderson was denied her choice of retained counsel, reversal is not an appropriate remedy. None of the cases cited by Anderson involve an instant change of heart, with the defendant requesting appointed counsel again. If a

[4] The motion for reconsideration specifies that Anderson agreed only that the SPRC 2 counsel would be an advisor. CP 1493.

defendant is erroneously deprived of her right to retained counsel of her choice during trial, the remedy is automatic reversal, because it affects the framework of the trial and defies harmless error analysis. Gonzalez-Lopez, 548 U.S. at 152. That analysis does not extend to a violation for one hearing long before trial. The effect of this violation is easily evaluated – it was for one brief hearing, over seven years before trial, and caused Anderson no prejudice; any error was harmless.

2. THE TRIAL COURT DID NOT COMMIT ANY MANIFEST CONSTITUTIONAL ERROR IN ITS PRELIMINARY INSTRUCTIONS TO THE JURY.

As previously argued, Anderson did not object to the trial court's preliminary instructions to the prospective jurors. Anderson's claim—that the instruction allowed the jury to consider matters outside the evidence—is an evidentiary error that is not constitutional in nature. Moreover, because the presumption of innocence was repeatedly communicated to the jury, any error in the trial court's preliminary instructions cannot be considered manifest. Th issue may not be raised for the first time on appeal.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the

State seeks cross-review of the issues identified in Sections C and E, supra.

DATED this 19th day of April, 2019.

Respectfully submitted,

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