S. Ct. No. 89588-1
COA No. 29284-3-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JUSTIN W. CRENSHAW, Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Justin W. Crenshaw asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this motion.

B. COURT OF APPEALS DECISION

Mr. Crenshaw seeks review of the October 22, 2013 decision of the Court of Appeals affirming his convictions. A copy of the decision is in the Appendix at pages A-1 through A-10.

C. ISSUES PRESENTED FOR REVIEW

1. Because defense counsel was running for Spokane County Prosecutor while representing Mr. Crenshaw, should he have withdrawn from the case because this irreconcilable actual conflict of interest adversely affected his performance?

2. Is Mr. Crenshaw entitled to a new trial because of ineffective assistance of counsel, who refused to request additional specific testing his expert required to show by scientific evidence that his client suffered from pathological intoxication, the basis for his diminished capacity defense?

D. STATEMENT OF THE CASE

On June 18, 2010, Mr. Crenshaw was charged by second amended information with two counts of aggravated first degree murder:

> COUNT I: PREMEDITATED MURDER IN THE FIRST DEGREE, WITH AGGRAVATING CIRCUMSTANCES, committed as follows: That the defendant, JUSTIN W. CRENSHAW, in the State of Washington, on or about February 28, 2008, with premeditated intent to cause the deaths of SARAH A. CLARK did cause the deaths of SARAH A. CLARK, human beings, and the murders were part of a common scheme or plan as contained in Count II, the result of a single act, and the defendant being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.602 and 9.94A.533(4), and the current offense was aggravated by the following circumstance: the defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim, as provided by RCW 9.94A.535(3)(a).
>
> COUNT II: PREMEDITATED MURDER IN THE FIRST DEGREE, WITH AGGRAVATING CIRCUMSTANCES, committed as follows: That the defendant, JUSTIN W. CRENSHAW, in the State of Washington, on or about February 28, 2008, with premeditated intent to cause the deaths of TANNER E. PEHL did cause the deaths of TANNER E. PEHL, human beings, and the murders were part of a common scheme or plan as contained in Count I, the result of a single act, and the defendant being at said time armed with a deadly weapon, other than a firearm under the provisions of RCW 9,94A.602 and 9.94A.533(4), and the current offense was aggravated by the following circumstance: the defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim, as provided by RCW 9.94A.535(3)(a). (CP 846-47).

At a pretrial hearing, testimony revealed Mr. Crenshaw

told police officers he got aggressive and violent when he drank. (11/6/09 RP 136). On January 7, 2010, the court held a pretrial hearing in which the State commented:

> This is the date and time set for pretrial in this matter. We do have a trial date pending now of February 1st. And as the court recalls, we were last here and this case was continued so that [defense counsel] could have Mr. Crenshaw evaluated and have an expert witness, diminished capacity defense presented. I have not received a report. I will let [defense counsel] explain what the status of that is and go from there. (1/7/10 RP 284).

Defense counsel responded:

> I do have an expert that I have been consulting with. He has not been disclosed, although I have disclosed the nature of our defense generally. The expert has not been disclosed because he has suggested and required as a part of his ultimate opinion a suggestion that there be further testing. I'm not at liberty to disclose what that is, although I do understand from [the State] some of my purportedly sealed documents may have reached the court file, which may explain some of that if court has reviewed the file.
>
> At any rate, the testing that we are asking to have done has been – I sought various agencies to do that. I have now had three agencies who have agreed to do this. I've then sought preauthorization to have each of those agencies appointed. They were preauthorized to do so and then after calling to schedule the testing, I received calls from the various attorneys indicating that they have changed their mind and they will not do it. That's happened. (1/7/10 RP 284-85).
>
> The court noted that the testing and report on Mr. Crenshaw

had been authorized to be paid. (1/7/10 RP 285). Defense counsel represented to the court that the agencies refusing to do the testing were private. (*Id.* at 286). But he had found another agency that had agreed to do the testing and was involved with an assistant attorney general representing the agency:

> I have talked with that person. We expect the testing is going to happen now, but it will take a little bit of time to get the proper arrangements. . . (*Id.*).

Defense counsel further advised the court he was very confident that the testing was going to happen. (1/7/10 RP 286). He represented to the court that he needed to have this testing done so he could see how it would assist in the defense and, without this testing and this expert, he was unable to provide an adequate defense:

> Frankly, if I don't have that expert or, you know, that information, I would have to completely reformulate the defense. So, yes, it's absolutely necessary. (*Id.* at 287).

The court recognized the dilemma:

> You want these things to happen in a timely fashion, but when you look at the severity of the consequences of a conviction, you look at what's at stake here, and [defense counsel], who is a very experienced criminal attorney, says he can't do an adequate job for you unless he has an expert and a theory of the case, and without that he's putting you in jeopardy to go to trial. If I let it go to trial postured like this, then if there is a

> conviction, it will be reversed on appeal for ineffective assistance of counsel to shortcut the argument for you. (*Id.* at 290).

Subsequently, on February 22, 2010, defense counsel advised the court his pursuit of testing relating to the diminished capacity defense was moving along pending approval for payment. (2/22/10 RP 305-07). Mr. Crenshaw would have to be transported outside the jail for the testing, but counsel assured the court proper arrangements had been made and it was just a matter of scheduling the test. (*Id.* at 310). The University of Washington had agreed to do the testing. (2/24/10 RP 311). Although it appears the logistics were finally settled and another test was done by a medical provider, the test for pathological intoxication requested by the defense expert was not. (*See* 4/9/10 RP 317-27; 6/8/10 RP 2622-28).

At the June 8, 2010 status conference, Mr. Crenshaw advised the court that he felt there was a conflict with his attorney, who was running for prosecutor, and new counsel should be assigned. (6/8/10 RP 2619). The court did not act on his request, but made his concerns of record. (*Id.* at 2625-2628).

With respect to testing, the record shows defense counsel advised Mr. Crenshaw that Dr. Jerry Larsen, the defense expert, had requested additional testing on pathological intoxication:

> [Mr. Crenshaw]: However, I am more concerned for this reason, and specifically more this main reason, Your Honor, that on May 26 it was brought to my attention for the first time ever that there is testing that could further my defense, bring scientific evidence to my doctor diagnosed with my defense. . .
>
> My attorney claims at this time he is unable to recall the name of this testing and I have still not yet to learn it from my attorney. I would like to say, for the record, and make it clear, that if there is a possibility that this testing can bring scientific evidence to my defense, that I absolutely would take this opportunity to be able to get it. I do not know why I have never been told about this testing before May 26 of 2010. (6/8/10 RP 2618).

Defense counsel, however, failed to ask the trial court for this test, even though funding was available:

> [Defense counsel]: . . . So I was prepared in relation to this testing that Mr. Crenshaw refers to to ask Judge Moreno to have an in-camera hearing and a closed hearing, because I think that really goes more towards funding and some of this availability of the things that we have already pursued. (*Id.* at 2620).

Because his counsel did not pursue it, Mr. Crenshaw himself asked the trial court for the testing. (6/8/10 RP 2618-28). In

response, defense counsel told the court he was ready to go with what he had and later described the test:

> . . . Your Honor, the testing would involve taking Mr. Crenshaw physically out of the jail and putting him in a controlled environment. I'm told by my doctor, who is Dr. Larsen, that's now being disclosed to the State, I am told that that testing would involve taking him to a controlled environment. It would have to be a hospital. A hospital would have to agree to this, and, of course, so would the court and the authorities who are responsible for confining Mr. Crenshaw. And he would be fed alcohol in controlled doses and observed and then in some way that I don't quite understand provoked to see if his use of liquor and alcohol results in unreasonable and strange reactions. I'm told by my doctor that that testing is possible; that he has done it on prior occasions, but only been when he was the director of the hospital to have this occur. (6/8/10 RP 2623).

Counsel went on to say:

> I have asked whether if we were to conduct this testing it would substantially impact your opinion on either one way or the other, and I think the best thing I could say is it does not appear that it would substantially impact his opinion either way because he has already reached an opinion based on observable facts and circumstances from the record in this case and then from other occurrences in Mr. Crenshaw's past which allow him to make that diagnosis.
>
> I have come to my own conclusions based on my experience and my training that that testing would not further Mr. Crenshaw's defense and has the potential to hurt it. And I guess, for the record, that's enough said. (*Id.* at 2623-24).

Apparently relying on defense counsel's representations that obviously conflicted with Dr. Larsen's opinion the testing was required and necessary, the court assumed the request for testing was not going to be pursued. (6/8/10 RP 2625). The court also said, however, that it was not going to foreclose any further testing even though it eventually had to pass the relevance and *Frye* tests in order to be admissible. (*Id.* at 2626). Defense counsel failed to pursue the test even though he had acknowledged Dr. Larsen advised him it was crucial in order for him to substantiate his diagnosis of pathological intoxication by scientific evidence. (1/7/10 RP 284-87).

In his opening statement at trial, defense counsel asked the jurors to pay very close attention as he told them twice that Mr. Crenshaw was responsible for the deaths of Ms. Clark and Mr. Pehl. (7/12/10 RP 1181). The only defense was Mr. Crenshaw "was not in a state of mind that night that these events occurred that he planned out and weighed and deliberated the consequences of any action that he was about to take and planned to take such action." (*Id.* at 1179). Counsel explained:

> You are going to hear that Mr. Crenshaw suffers from a condition that is called alcohol idiosyncratic intoxication [pathological intoxication]. It is a

> condition, which, among other things, has the prerequisite that a small amount of alcohol consumed by an individual has the ability to change their mental capacity and the way that they think now I know you're thinking, well, of course, . . . that's what alcohol does. What you will hear is the reaction to a small amount of alcohol from somebody who suffers from this condition is qualitatively different than somebody who is merely intoxicated. So what this condition is not, you will hear, is it is not just a sensitivity to alcohol so that a person suffering from this condition just gets merely intoxicated easier than a normal person. That is not what it is. It is a condition that so affects the mind that it creates with a very small amount of alcohol very bizarre behavior. It often results in violent behavior. (*Id.* at 1181-1182).

Defense counsel reiterated the case was not a "who-done-it." (7/12/10 RP 1184). Rather, "[t]he issue is did Mr. Crenshaw suffer from this condition and how did it affect his ability to think and weigh consequences on the night of these crimes and the early morning." (*Id.* at 1185).

Defense expert Dr. Larsen was a psychiatrist. (7/21/10 RP 2244). In making a diagnosis and preparing for his testimony, the doctor went through records, but there was no additional testing done for pathological intoxication. (*Id.* at 2253-2254). He diagnosed Mr. Crenshaw as suffering from pathological intoxication:

> In the late 1800s, the first record of, written record was that of a person becoming unreasonably intoxicated on small amounts of alcohol. The amount ingested is disproportional to the behavior. These people often become confused, their thinking becomes disorganized. They often become belligerent. They can become violent and it does not appear to be related to large amounts of alcohol. (*Id.* at 2259).

At trial, in the absence of this additional testing, the State was able to cross-examine Dr. Larsen with devastating effect to Mr. Crenshaw's defense:

> [State]: Is there any way to diagnose pathological intoxication in someone who has drank more than a small amount of alcohol?
>
> [Dr. Larsen]: If I had access to the individual in a controlled setting, yes, you could test and find out.
>
> [State]: So you can only do it if you had like very reliable observations from others looking at the onset, the amount a person drank and the behavior?
>
> [Dr. Larsen]: Correct.
>
> [State]: You don't have that in this case do you?
>
> [Dr. Larsen]: I do not.
>
> [State]: So you really can't diagnose pathological intoxication because of that?
>
> [Dr. Larsen]: I can't make that firm diagnosis, no. (7/21/10 RP 2623-2624).

Not surprisingly, the defense failed.

Mr. Crenshaw was convicted of two counts of aggravated first degree murder. (CP 1132-1139). The court sentenced him to two consecutive life terms without the possibility of parole. (8/5/10 RP 2495-2498; CP 1177). He appealed. (CP 1212). The Court of Appeals affirmed his convictions on October 22, 2013. (App. A-1).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review is warranted under RAP 13.4(b)(3) because a significant question of law under the Constitution of the State of Washington or of the United States is involved. Mr. Crenshaw raised Sixth Amendment ineffective assistance of counsel issues, which the Court of Appeals dismissed as not prejudicial or a matter of trial strategy and/or tactics when the record reflects neither.

Defense counsel was running for prosecutor when his final decision to pursue the testing for pathological intoxication was being made and at the time of trial. Mr. Crenshaw advised the court that he objected to the conflict and wanted new counsel. (6/8/10 RP 2619). The court did not rule on his request. (*Id.* at 2625-2658).

RPC 1.7 provides in pertinent part:

> (a) Except as provided in paragraph (b), a lawyer not represent a client if the representation involves a concurrent conflict of interest. A concurrent

> conflict of exists if:
>
> . . .
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> . . .
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client . . .

Facing two counts of aggravated first degree murder arising from a horrific crime, Mr. Crenshaw voiced concern to the court about defense counsel's concurrent conflict between his duty to zealously represent his client and his personal interest in running for prosecutor. He could not defend Mr. Crenshaw to the best of his ability and obtain a good result for him without undermining and seriously damaging his credibility as the best candidate for Spokane County Prosecutor. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed.2d 333 (1980). The conflict is obvious, clear, and irreconcilable and it affected counsel's performance. *Id.*

Nothing in the record indicates defense counsel even recognized the conflict. And if he did, he did not advise the court

that he reasonably believed he could provide competent and diligent representation to Mr. Crenshaw, who squarely raised the issue. RPC 1.7(a)(2), (b)(1). Counsel failed to pursue the additional testing for pathological intoxication despite his prior acknowledgement to the court it was absolutely necessary to have the testing done or he could not provide an adequate defense (1/7/10 RP 2887). True to his word, he failed to provide an adequate defense when he did not support it by the necessary testing, despite having the authorization to proceed and a facility willing to test. The clear inference is that defense counsel compromised his representation of Mr. Crenshaw in a high-profile aggravated first degree murder case so as not to jeopardize his run for prosecutor.

In these circumstances, counsel should have withdrawn from representation. *See* RPC 1.7, Comment 4. He did not. Then the court neither inquired further as to the apparent conflict nor acted on Mr. Crenshaw's request to remove counsel. The irreconcilable conflict of interest clearly prejudiced his client, who thus received ineffective assistance by counsel's failure to present a viable defense. *Cuyler*, 446 U.S. at 348.

The Sixth Amendment affords a criminal defendant the right to effective assistance of counsel, free from conflicts of interest. *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). An attorney's conflict of interest may create reversible error in two situations without a showing of actual prejudice. *State v. White*, 80 Wn. App. 406, 411, 907 P.2d 310 (1995), *review denied*, 129 Wn.2d 1012 (1996). First, reversal is always necessary when a defendant shows an actual conflict of interest adversely affecting his lawyer's performance. *In re Richardson*, 100 Wn.2d 669, 677, 675 P.2d 209 (1983). Second, a trial court commits reversible error if it knows or reasonably should know of a particular conflict into which it fails to inquire. *Id.* This case involves both situations where a showing of prejudice is not required.

The nature of the conflict was readily apparent and called for further inquiry. The detrimental effect was counsel's failure to present a viable defense because he acknowledged that, without the testing, he could not provide an adequate defense. (1/7/10 RP 287). There is a dearth of authority on the conflict issue and this case presents the opportunity to squarely address the Sixth Amendment question. RAP 13.4(b)(3).

To establish ineffective assistance of counsel, a defendant must prove deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). In any such claim, the court engages in a strong presumption counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Legitimate trial strategy or tactics will not support a claim of ineffective assistance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

A lawyer's performance is deficient if he made errors so serious that he was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Prejudice requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986). But the defendant need not show that counsel's deficient performance more likely than not altered the outcome of the case. *Strickland*, 466 U.S. at 693.

Here, counsel's failure to get the additional testing for pathological intoxication that his expert "suggested and required as a part of his ultimate opinion" was deficient performance by any measure. (1/7/10 RP 284). Acknowledging his obligation to get the

testing done, Mr. Crenshaw's counsel had advised the court the test was "absolutely necessary" so he could see how it would assist in the defense and, without it, he was unable to provide an adequate defense. (*Id.* at 287). The court agreed. (*Id.* at 290). Counsel knew what he had to do and did not do it.

Five months later while he was campaigning for prosecutor, defense counsel abruptly changed his mind about the testing and told the court "I think the best thing I could say is it does not appear that [the testing] would substantially impact [Dr. Larsen's] opinion either way because he has already reached an opinion based on observable facts and circumstances from the record in this case and then from other occurrences in Mr. Crenshaw's past which allow him to make that diagnosis." (6/8/10 RP 2623). Counsel's actions reflected the conflict between representing his client zealously and his personal interest in becoming prosecutor.

This complete about-face from counsel's prior position on the testing ignored his clear representation to the court that his expert required that there be further testing as a necessary part of his ultimate opinion. (1/7/10 RP 284). Just before trial, counsel then advised the court he had come to his own conclusions "based on [his] experience and [his] training that that testing would not

further Mr. Crenshaw's defense and has the potential to hurt it." (6/8/10 RP 2624).

But he was not the expert. Dr. Larsen was and he required that test so he could substantiate his diagnosis with scientific evidence. Without it, Dr. Larsen could only testify at trial that he could not make the firm diagnosis Mr. Crenshaw suffered from pathological intoxication as there had been no testing. (7/21/10 RP 2624). Mr. Crenshaw's sole defense was destroyed by counsel's deficient performance in failing to pursue the test for his client, who had to ask for it himself and was rebuffed. (6/810 RP 2618-2628).

Although the Court of Appeals characterized counsel's decision as legitimate trial strategy or tactics, nothing supports that conclusion other than counsel's self-serving statements. A criminal defendant can rebut the presumption of reasonable performance by contending that there is no conceivable legitimate strategy or tactic explaining counsel's performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). As the purposeful failure to pursue testing did in fact destroy the only defense proffered at trial, it is inconceivable that counsel had a legitimate strategy or made a sound tactical decision in doing so. Indeed, counsel was aware he was providing ineffective assistance and tried to avoid it by

characterizing his decision as strategy based on his experience and training. (6/8/10 RP 2624). The failure to pursue the required testing, however, was plainly deficient.

Mr. Crenshaw suffered prejudice from counsel's deficient performance because it deprived him of a fair trial. *Jeffries*, 105 Wn.2d at 418. Counsel's failure to test destroyed Dr. Larsen's diagnosis and, along with it, the diminished capacity defense because he could not substantiate his opinion with scientific evidence. *See State v. Furman*, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993) (diminished capacity is a medical condition not amounting to insanity that prevents defendant from possessing the requisite mental state to commit the crimes charged). The record contains testimony corroborating Mr. Crenshaw's bizarre and violent behavior when drinking. (7/14/10 RP 1621; 7/21/10 RP 2229-2243, 2252-2253). Dr. Larsen also testified it was possible for a person to have pathological intoxication even when highly intoxicated. (7/22/10 RP 2367). The diminished capacity defense based on pathological intoxication was thus destroyed, without the necessity for any rebutting testimony from the State. Counsel thus failed to present any defense.

With counsel admitting his client killed the victims and deciding not to pursue the testing necessary to support the sole defense, Mr. Crenshaw suffered extreme prejudice to his case from counsel's deficient performance because there could be no verdict other than guilty. Had Dr. Larsen been able to make a firm diagnosis of pathological intoxication based on the testing, Mr. Crenshaw would have at least presented a viable defense and had a fair trial. Without it, he had no defense and no trial at all, much less a fair one. The second *Strickland* prong is satisfied as well.

Counsel provided ineffective assistance by failing to get the testing done for pathological intoxication. This decision was not legitimate trial strategy or tactics. Rather, he presented no defense and his client was doomed to a conviction. This case is unlike *State v. A.N.J.*, 168 Wn.2d 91, 112, 225 P.3d 956 (2010), where counsel's failure to secure an expert witness was ineffective assistance. Rather, Mr. Crenshaw's counsel did secure an expert, but failed to use that expert competently by ignoring his request to have necessary testing done in order to substantiate his opinion. Mr. Crenshaw's Sixth Amendment right to effective assistance of counsel was violated. This Court should grant review of this

significant constitutional question and right the wrong so Mr. Crenshaw may have a fair trial. RAP 13.4(b)(3).

D. CONCLUSION

Based on the foregoing facts and authorities, Mr. Crenshaw respectfully urges this Court to grant his petition for review.

DATED this 19th day of November, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 19, 2013, I served a copy of the Petition for Review by first class mail, postage prepaid, on Justin W. Crenshaw, # 342568, Wash. St. Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362; and by email, as agreed between counsel, on Mark E. Lindsey at kowens@spokanecounty.org.

Kenneth H. Kato

APPENDIX

FILED
OCT. 22, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JUSTIN W. CRENSHAW, Appellant.	)	No. 29284-3-III UNPUBLISHED OPINION

BROWN, J. — Justin W. Crenshaw appeals his two aggravated first degree murder convictions for the deaths of Sarah A. Clark and Tanner E. Pehl. Mr. Crenshaw's diminished capacity defense was that he lacked the mens rea necessary for aggravated first degree murder because he suffers from pathological intoxication, a condition where a person has a grossly excessive reaction to alcohol. Mr. Crenshaw contends he was denied effective assistance of counsel because his attorney did not pursue further pathological intoxication testing and his attorney was conflicted because he was running for Spokane County Prosecutor at the time of his representation. We disagree for the reasons explained below, and affirm.

FACTS

On February 28, 2008, Mr. Crenshaw killed Ms. Clark, his 18-year-old girl friend, and Mr. Pehl, his 20-year-old coworker. The deceased were found in a house

intentionally set on fire. Firefighters found Mr. Pehl in a pool of blood with a large broadsword protruding from his chest. Firefighters found Ms. Clark with a Samurai sword through her neck. Both had been stabbed repeatedly with a small knife.

The State charged Mr. Crenshaw with two counts of aggravated first degree murder. Mr. Crenshaw consumed "a large amount" of alcohol on the night of the crimes; experts estimated his blood alcohol level at .30. Report of Proceedings (RP) (July 21, 2010) at 2269. Mr. Crenshaw claimed diminished capacity, arguing he lacked the capacity to form the intent necessary for aggravated first degree murder based on pathological intoxication (also referred to as alcohol idiosyncratic reaction). At a pretrial hearing, testimony revealed Mr. Crenshaw had told police officers he got aggressive and violent when he drank.

At the January 7, 2010 status conference, counsel advised the court he was consulting with an expert regarding a pathological intoxication defense and the expert had "suggested and required as part of his . . . opinion . . . . that there be further testing." RP (Jan. 7, 2010) at 284-85. The expert had suggested testing was "absolutely necessary" to completely formulate the defense, so a continuance of the trial was necessary. *Id.* at 287. Mr. Crenshaw personally objected to the continuance, but the court continued the trial to facilitate preparation of the defense.

At the February 22, 2010 status conference, counsel advised he had an agency available to conduct the suggested testing, yet he was having trouble satisfying the jail's transportation concerns.

At the April 9, 2010 status conference, counsel advised the court that the primary reason for the continuances had been accomplished, but there was still some analysis that needed to occur. It was noted that an agreement with the University of Washington to facilitate the testing could not be reached. Counsel advised the court that he had explained that fact to Mr. Crenshaw. Thereafter, Mr. Crenshaw advised that he believed his speedy trial rights had been violated by the continuances to facilitate a testing that was not completed. The court noted Mr. Crenshaw's objection, then advised that the case could go to trial immediately if Mr. Crenshaw decided to forego his diminished capacity defense. The court noted the proposed test had not yet been shown to be admissible pursuant to the *Frye*[1] test. The court advised Mr. Crenshaw that his counsel was a very experienced criminal defense attorney who knows that a diminished capacity defense triggers the State's opportunity to have their own expert and testing.

On April 23, 2010, counsel advised the court he still had not received a report from his expert, Dr. Jerry K. Larsen (a forensic psychiatrist), but was not in a position to ask for a continuance due to Mr. Crenshaw's objection. Counsel advised he was not prepared for trial knowing that there might be additional evidence developed during testing of Mr. Crenshaw by the State's expert. Mr. Crenshaw advised the court about his testing delays and concerns. The court advised Mr. Crenshaw that trial was set to start on May 3. Mr. Crenshaw acknowledged that more testing needed to be done, but

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[1] *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (standard for admitting novel scientific theory or principle is whether it has achieved general acceptance in the relevant scientific community).

he was not willing to give more time to complete the test. The court continued the trial over Mr. Crenshaw's objection.

Counsel notified the court on May 10, 2010, that he had received the report from his expert, Dr. Larsen, indicating Mr. Crenshaw may suffer from pathological intoxication. Psychiatrist, William Grant, then assessed Mr. Crenshaw for the State.

At a June 8, 2010 status conference, defense counsel brought up the issue of further testing and requested an in camera hearing to address funding for the test. Counsel explained the testing would involve taking Mr. Crenshaw out of jail, transporting him to a hospital that would agree to host the test, and then giving him alcohol while Dr. Larsen would observe Mr. Crenshaw's reaction. While Dr. Larsen was willing to perform the test, counsel acknowledged it was difficult to find a willing hospital. Counsel informed the court he asked Dr. Larsen whether the test would alter his opinion, to which the doctor responded that the test would not "substantially impact his opinion." RP (June 8, 2010) at 2623. Counsel reasoned Dr. Larsen had already reached an opinion based on observable facts and circumstances from the record that Mr. Crenshaw's capacity to commit the crimes was diminished. Counsel explained: "I have come to my own conclusions based on my experience and my training that that testing would not further Mr. Crenshaw's defense and has the potential to hurt it." RP (June 8, 2010) at 2623-24.

The court reiterated its concern that the subject test would not pass the *Frye* test since no facility had been found that was willing to conduct the test. Finally, the court observed that the evidence would have to be compelling for the court to even consider

allowing the defendant to be taken out of jail for any testing. Nevertheless, the court advised that it would not foreclose counsel from pursuing the testing; provided, the court was presented with evidence that the test is relevant and would pass the *Frye* prerequisites.

At the June 8, 2010 hearing, Mr. Crenshaw advised the court his attorney was running for prosecutor. The court inquired whether Mr. Crenshaw was making a motion. Mr. Crenshaw responded, "I'm not sure if I'm prepared at this time for a motion." RP (June 8, 2010) at 2619. The issue was not raised again.

In July 2010, the case proceeded to trial without further testing. The court found Dr. Larsen's evaluation and diagnosis satisfied the *Frye* test and that he would be permitted to offer his diagnosis. Dr. Larsen testified he spent a "significant amount of time looking at [Mr. Crenshaw's] use of alcohol" and tendency for violence when drinking. RP (July 21, 2010) at 2255-57. He opined Mr. Crenshaw may suffer from pathological intoxication. Dr. Larsen made this assessment based on Mr. Crenshaw's "history . . . his own report and the amount of alcohol he reports ingesting." RP (July 21, 2010) at 2269. On cross examination, the State pointed out pathological intoxication is the extreme reaction to a small amount of alcohol and Mr. Crenshaw admitted consuming a large amount. Dr. Larson responded without a controlled study, he could not make a "firm diagnosis." RP (July 21, 2010) at 2301.

The State's expert, Dr. Grant, opined Mr. Crenshaw suffered from alcohol dependency but that condition did not negate Mr. Crenshaw's intent. To support his opinion, Dr. Grant pointed to "the force that was used to strike the death blows," the

location of the wounds, the fact Mr. Crenshaw had to "overcome resistance," the multiple wounds which shows "repetitious behavior" and "the arson in an attempt to cover up the crime." RP (July 22, 2010) at 2330.

The jury found Mr. Crenshaw guilty as charged. He appealed.

ANALYSIS

The issue is whether Mr. Crenshaw was denied effective assistance of counsel. He contends counsel was ineffective for failing to demand additional pathological intoxication testing and was conflicted by running for county prosecutor at the time of representation.

In order to prevail on these claims, Mr. Crenshaw must show counsel's performance was deficient and that this deficiency prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Performance is deficient when it falls "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Performance is not deficient if counsel's conduct can be characterized as a legitimate trial strategy. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). The fundamental question is whether defense counsel's conduct so undermined the adversarial process that the trial cannot be relied on as having a just result. *Strickland*, 466 U.S. at 686.

Diminished capacity is an affirmative defense that can negate the specific intent or knowledge elements of a crime. *State v. Eakins*, 127 Wn.2d 490, 496, 902 P.2d 1236 (1995). "Diminished capacity arises out of a mental disorder, usually not amounting to insanity that is demonstrated to have a specific effect on one's capacity to

achieve the level of culpability required for a given crime." *State v. Gough*, 53 Wn. App. 619, 622, 768 P.2d 1028 (1989). A trial court may admit evidence of the defendant's diminished capacity "only if it tends logically and by reasonable inference to prove that a defendant was incapable of having the required level of culpability." *Gough*, 53 Wn. App. at 622. Additionally, "[t]o maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

The sole case in our state where pathological intoxication is addressed is *State v. Wicks*, 98 Wn.2d 620, 627, 657 P.2d 781 (1983). There, our Supreme Court held, "[O]ne whose consumption of alcohol or drugs is voluntary but who is unaware of some atypical effect which such consumption may have upon him or her should be permitted to claim the defense." *Pathological Intoxication and the Voluntarily Intoxicated Criminal Offender*, 1969 Utah L. Rev. 419, 426-28 (complete defense should be allowed for person having "grossly excessive" reaction of which he or she was previously unaware). Pathological intoxication is intoxication that is:

> self-induced in the sense that the defendant knew what substance he was taking, but which was 'grossly excessive in degree, given the amount of the intoxication.' . . . [T]he intoxication is involuntary only if the defendant was unaware that he is susceptible to an atypical reaction to the substance taken.

2 LaFave Substantive Criminal Law (2d ed), § 9.5(g), at 56 (quoting Model Penal Code § 2.08(5)).

Defense attorneys have a responsibility to be advocates for their clients and to explore viable defenses. *State v. Gonzales*, 111 Wn. App. 276, 45 P.3d 205 (2002). Here, counsel chose to pursue a novel defense and located an expert to support his argument. Considering his assessment that further testing potentially could "hurt" his diminished capacity defense, counsel's decision not to seek additional pathological intoxication testing can be characterized as a legitimate strategy and trial tactic and, thus, cannot be the basis for Mr. Crenshaw's ineffective assistance of counsel claim. RP (June 8, 2010) at 2624. Mr. Crenshaw expressed on the record his desire that the case go forward and that no further continuances be granted. Dr. Larsen provided a detailed report and was willing and prepared to testify Mr. Crenshaw suffered from pathological intoxication. Further, counsel could not locate a facility to allow the novel testing, and jail personnel expressed grave concerns about transportation. Given all, counsel made a sound tactical decision not to pursue more testing in support of his trial strategy. Counsel's conduct did not so undermine the adversarial process that the trial cannot be relied on as having a just result. *Strickland*, 466 U.S. at 686.

Even assuming counsel's decision was deficient, Mr. Crenshaw fails to establish prejudice. Dr. Larsen testified to the condition and Dr. Grant rebutted it. We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Baker*, 162 Wn. App. 468, 473, 259 P.3d 270 (2011). Even if Dr. Larsen testified with complete certainty of the condition, it would still be subject to rebuttal by the State. Thus, Mr. Crenshaw cannot show the outcome would have been any different with additional testing.

Turning to Mr. Crenshaw's conflict argument, under Washington's Rule of Professional Conduct (RPC) 1.7(a)(2), "A lawyer shall not represent a client if the representation . . . will be materially limited . . . by a personal interest of the lawyer." The Sixth Amendment right to counsel includes the right to conflict-free counsel. *State v. Davis*, 141 Wn.2d 798, 860, 10 P.3d 977 (2000) (citing *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981)). To establish a Sixth Amendment violation, a defendant must demonstrate that an actual conflict of interest adversely affected his attorney's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). Prejudice is presumed if the defendant makes this showing. *Id.* at 349-50. A trial court must inquire if it knows or reasonably should know that a particular conflict exists. *Id.* at 346. But even if the trial court fails to inquire, the defendant must still establish that the conflict of interest adversely affected his counsel's performance. *Mickens v. Taylor*, 535 U.S. 162, 173-74, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).

In *Price v. State*, 66 S.W.3d 653 (Ark. 2002), the Arkansas Supreme Court rejected the appellant's argument that his defense counsel had a conflict of interest because counsel had won the prosecuting attorney's election approximately two weeks prior to the commencement of appellant's trial. In that case, the court set forth the *Cuylar* requirements for a conflict-of-interest argument and held that the appellant failed to apprise the court of the nature of the conflict; failed to show that his counsel actively represented conflicting interests; and even if such a conflict existed, failed to show that the conflict had a detrimental effect on his counsel's representation.

Here, Mr. Crenshaw mentioned that defense counsel was running for county prosecutor, but did not advise the court of the nature of the conflict and did not request additional action. He further failed to show that defense counsel was actively representing his own interest and failed to show that, even if there was a conflict, that it had a detrimental effect. Overwhelming evidence existed against Mr. Crenshaw. Counsel researched and pursued a novel defense to attempt to negate Mr. Crenshaw's murderous intent. The record shows Mr. Crenshaw's counsel zealously and skillfully represented him. Accordingly, we conclude Mr. Crenshaw was not denied effective assistance of counsel.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Siddoway, A.C.J.

Kulik, J.