29284-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JUSTIN W. CRENSHAW, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

29284-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JUSTIN W. CRENSHAW, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

SUPREME COURT CASES

FEDERAL CASES

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. Defendant received ineffective assistance of counsel because counsel was seeking election as the county prosecuting attorney while representing defendant.

2. Defendant received ineffective assistance of counsel because counsel refused to request additional specific alcohol testing that the defense expert initially indicated was necessary to support his diagnosis of pathological intoxication as the basis for a diminished capacity defense.

II.

ISSUES PRESENTED

1. Has defendant shown that counsel rendered ineffective assistance because his counsel was seeking election as the county prosecuting attorney during representation of defendant?

2. Has defendant shown that he received ineffective assistance because counsel did not pursue additional alcohol testing to support expert's diagnosis that defendant suffered diminished capacity due to pathological intoxication?

III.

STATEMENT OF THE CASE

"Trust no one", a broken heart, a knife, are symbols on a belt found in a plastic bag stuffed with the bloody clothes and a pair of bloodstained black Nike sneakers in a green storage bin in Kate Crenshaw's garage on April 25, 2008. Clothes Ms. Crenshaw knew belonged to her nephew, Justin Crenshaw, defendant. Report of Proceedings ("RP") 1165.

About 4:30 a.m. on February 28, 2008, Dale Day called 911 when he saw smoke coming from the home at E. 512 Elm, St., Spokane County, WA. RP 1235-1237. Spokane County Sheriff Office ("SCSO") deputies arrived on scene within a couple of minutes (RP 1818); kicked in the front door, but were stopped from entering by heavy smoke. RP 1239-1241.

Spokane County Fire Dist. 9 ("SCFD") arrived on scene at 4:37 a.m. (RP 1537), entered the home and found that the fire was mostly in the kitchen. RP 1248. SCFD attacked the fire in the kitchen while checking for residents. RP 1248. In the hallway from the kitchen to the bedrooms, SCFD saw something draped with a cloth. RP 1249-50. When SCFD removed the cloth, there was a deceased male in a pool of blood on the hallway floor with a large broadsword sticking out of his chest. RP 1249-1251. SCFD then found a deceased female slumped against a blood-soaked bed with a Samurai sword apparently through her neck. RP 1252-1254. The double murder scene that SCFD discovered was so

horrific and surreal that they were shocked to the point of illness by what they saw. RP 1252-1254, 1267-1269. SCFD investigation concluded the fire was intentionally started on the kitchen stovetop with pizza boxes. RP 1273-1293.

SCSO homicide investigation determined that the male-victim was Tanner Pehl ("TP"), 20 years of age, who lived at the house with his Mom (Laurie), brother Matt & a renter, none of whom were home that night. RP 1306. The female victim was identified as 18 year old Sarah Clark, a senior at Mead HS, who lived with her parents Teesha & Steve Clark. RP 1192-1203.

The victim Tanner Pehl was found in the hallway outside his bedroom with his guitar, wearing basketball shorts, and covered in a blanket. A broadsword was slicing through the blanket, his abdomen, his spine and lodged firmly into the floor. He had numerous knife wounds on his head and neck, including one that pierced his skull, as well as finger marks around his neck. RP 1363-1391. The victim, Sarah Clark was found in a tee-shirt and boxer shorts in Tanner Pehl's bedroom leaning against the bed next to the nightstand with her legs on the floor. A Samurai sword was leaning against her neck. She was extremely bloody and her head was nearly severed. It appeared the sword had been placed against her neck. Sarah Clark had numerous knife wounds around her head, neck and upper torso, including a knife wound that pierced her skull. RP 1393-1409.

The autopsies on Tanner Pehl and Sarah Clark were completed by John Howard, M.D., Spokane Medical Examiner. Dr. Howard found that both victims were killed prior to the fire because they did not have any smoke in their lungs. RP 1785, 1801. The broadsword stuck in Tanner Pehl's spine was put there after the body had been covered and he was deceased. RP1789-1790. The finger marks on Tanner Pehl's neck were consistent with being held by the neck. RP 1797-1798. Tanner Pehl also had defensive wounds on his hands and arms evidence of his trying to fend off an attack. RP 1799. Sarah Clark had at least six separate incisions across her neck made in a side-to-side motion, which nearly severed off her head. RP 1772-1784. Sarah Clark also had defensive wounds. RP 1770. The bed mattress was absolutely saturated with blood and the house had been ransacked. RP 1400; 1362; 1394.

SCSO investigation found that defendant had come up from Las Vegas two weeks prior to the murders to visit his Sister, Nikki Vanvlymen. RP 1544-1551. Defendant had planned to stay a week (RP 1545), but decided to stay longer after he obtained a job where Tanner Pehl was working. RP 1550, 1555. Defendant became friends with Tanner Pehl.

Nikki Vanvlymen's best friend was Sarah Clark. RP 1546. Nikki Vanvlymen introduced defendant and Sarah Clark and they started seeing each other. RP 1549. However, a few days before the murder, Nikki Vanvlymen was

greatly upset when she came home to find defendant and Sarah Clark in her bed. RP 1550-1551.

On February 27, 2008, Sarah Clark arranged to meet defendant. That same night Sarah Clark had a fight with her Parents, so she packed her bags to go stay the night at Gabe Walters' house. RP 1194-1197. Gabe Walters was a co-worker of Sarah Clark. RP 1578. Sarah Clark picked up defendant and went to Gabe Walters' apartment where they hung out with Gabe Walters and his girlfriend, Kelcey Bartholomew. RP 1582. Eventually, Gabe Walters and Kelcey Bartholomew left, telling Sarah Clark and defendant that they could stay the night. RP 1581-1583. Later that night, Sarah Clark and defendant went to Tanner Pehl's house.

On February 28, 2008, Kelsey Holubik, a hostess at the restaurant where Tanner Pehl and defendant worked, received a call from the defendant about 12:14 a.m. RP 1629. Defendant wanted her to come over and party at Tanner Pehl's house. RP 1629. Ms. Holubik spoke with Tanner Pehl and a young woman she did not know who tried to convince her to come over. RP 1629-1630. Ms. Holubik noted that defendant sounded fine, like he had been drinking a little, but did not sound like there was anything wrong. RP 1629-1630. Ms. Holubik declined the invitation.

The defendant's Aunt, Kate Crenshaw, advised SCSO that the defendant may have been at Tanner Pehl's house the night before. RP 1666-1667. About an hour later, defendant called to advise SCSO that he had been at the Pehl home the night before. RP 1666-1667. SCSO detectives went to the Crenshaw home to contact defendant. RP 1667-1668. Before SCSO arrived, defendant told his Aunt something she thought very odd, "the police are going to want my clothes." RP 1608. When SCSO arrived at the Crenshaw home, defendant was waiting for them outside and invited them inside to talk. RP 2065. Defendant admitted being at Tanner Pehl's house the night before with Tanner Pehl and Sarah Clark. RP 2071. Defendant advised that they all drank, but he became really drunk and asked to be taken back to Gabe Walters' apartment. RP 2071. Defendant claimed that Sarah Clark and Tanner Pehl drove him back to Mr. Walters' apartment in Sarah Clark's car, dropped him off and then returned to Tanner Pehl's home. RP 2072. Defendant claimed that he slept at Mr. Walters' then walked home in morning. RP 2973.

While SCSO detectives were talking to defendant, Nikki Vanvlymen came home, so one SCSO detective left to talk with Ms. Vanvlymen and Ms. Crenshaw downstairs. RP 2079. SCSO found out that defendant had a pair of black Nike sneakers. RP 2079. Defendant initially denied owning a pair of black Nike shoes. RP 2106. However, when confronted that SCSO knew that defendant had a pair of the shoes, he admitted that he had thrown his shoes away a few days

earlier because he had stepped in oil or dirt and that the garbage had already been collected. RP 2081, 2106. At that time, the bloody fingerprint on the Pehl backdoor had not been processed; yet SCSO asked defendant if he could explain his print in blood at the murder scene. RP 2082. Defendant responded that the prints in blood were not his, yet he refused to provide a fingerprint exemplar. RP 2082. SCSO obtained a search warrant to take defendant's fingerprints and he was transported downtown for processing. RP 2108. SCSO investigation confirmed that the bloody fingerprint on the back door of the Pehl home in the kitchen next to the stove where the fire was started belonged to defendant. RP 1357-1359; 1898-1899.

When defendant was being fingerprinted, SCSO noticed a cut on one of defendant's fingers and asked how it had happened. RP 2125. Defendant said that he had cut himself on a handicap sign at Gabe Walters' apartment. RP 2126. When SCSO processed Mr. Walters' apartment, they found no handicap parking sign as described by defendant. RP 1964. The SCSO Forensic Unit also compared defendant's fingerprints to the bloody print found on the backdoor doorknob and found it to be a match to defendant's palm print. RP 1992-1994. SCSO then arrested defendant for the murders of Tanner Pehl and Sarah Clark.

On February 29, 2008, SCSO received a call from Roundy's Kawasaki indicating that employees had recovered a knife in the median of the road with apparent blood on the blade. RP 2129-2135. SCSO retrieved the knife and noted

that it was a Tools of the Trade knife, just like the type of knives the Pehl's had in their kitchen. RP2136-2138. DNA testing of the knife showed a mixture of the DNA profiles of Sarah Clark and the defendant. RP 2183. SCSO investigation located Sarah Clark's car abandoned by a park not far from defendant's residence the night of February 28th. SCSO Forensics found defendant's fingerprints on the exterior driver's door (RP 1935-1940) while the blood found in the car and on the gearshift matched defendant's DNA while excluding the DNA of Tanner Pehl and Sarah Clark. RP 2177-2179. SCSO search of Gabe Walters' apartment discovered defendant's prints in the shower and a pair of men's underwear with blood on the waistband that was the same brand that defendant was wearing when arrested. RP 1968-1982. DNA testing of that waistband blood was a mixture of the DNA of Sarah Clark and Tanner Pehl. RP 2167-2170.

The knife that SCSO recovered from on top of the refrigerator in the kitchen of the Pehl home was tested and found to have blood on it that matched the defendant's DNA with traces of the DNA of Tanner Pehl and Sarah Clark also present. RP 2175-2176. SCSO Forensics found defendant's fingerprints in the blood on the wall of Tanner Pehl's room as well as an Easy Off oven spray can. RP 2016. The blood on Tanner Pehl's wallet found on his bed was identified as a mixture of the DNA of Sarah Clark, Tanner Pehl, and defendant. RP 2185-2186.

On April 2, 2008, the defendant was charged with two counts of Premeditated Murder in the First Degree with Aggravating Circumstances for the killings of Tanner Pehl and Sarah Clark. CP 1-2.

On April 25, 2008, the defendant's aunt, Kate Crenshaw, was preparing for a neighborhood sale when she found a K-Mart bag containing bloody clothes that she recognized as belonging to the defendant. RP 1609-1611. SCSO found inside the bag a pair of blood-soaked jeans and a pair of black Nike shoes. RP 1838-1840, 1845-1884. DNA testing determined that the blood on the jeans matched the DNA of Sarah Clark and Tanner Pehl. RP 2179-2181. DNA testing of the blood on defendant's black Nike shoes matched the DNA of Tanner Pehl. RP 2181-2183. Forensic investigation of the plastic bags found defendant's fingerprints on both bags found inside the green storage bin in Ms. Crenshaw's garage. RP 1949-1956. The same bag that had the belt with the symbol "trust no one, broken hearts and knives."

On October 29, 2008, Mr. Bugbee appeared as counsel for the defendant and continued the trial with defendant's consent. RP 43-49. On September 8, 2009, the trial court continued the trial to facilitate counsel's preparation, including whether there was a possible diminished capacity defense, while noting defendant's claim that it was his last waiver of his speedy trial right. RP 64-75. On November 6, 2009, the court held a CrR 3.5 hearing and determined which of defendant's statements to SCSO would be admissible at trial. RP 83-280.

At the January 7, 2010, status conference, counsel advised the court that he was consulting with an expert regarding a diminished capacity defense. Counsel advised that the expert had "suggested and required as part of his...opinion...that there be further testing." RP 284-285. The three agencies counsel initially found to conduct the testing, eventually all declined to do the testing. RP 285. Counsel found another agency to conduct the test and was finalizing the arrangements with the attorney general. RP 286. Counsel advised that the expert and the suggested testing were "absolutely necessary" to completely formulate the defense, so a continuance of the trial was necessary. RP 287. Defendant objected to the continuance (RP 288), but the court continued the trial to facilitate preparation of the defense. RP 288-294.

At the February 22, 2010, status conference, counsel advised that he had an agency available to conduct the suggested testing, yet he was having trouble satisfying the concerns of the County Jail. RP 306.

At the February 24, 2010, status conference, the court noted its concern regarding the transportation and security measures being taken in light of the fact that no provider in eastern Washington could conduct the testing. RP 311. Counsel advised that the University of Washington had agreed to conduct the test (RP 311) and that he had come to terms with the County Jail regarding safety and transportation issues to facilitate the testing. RP 312. The court then notified

counsel that it wanted formal acknowledgement from the County Jail confirming the means and fact of transportation of defendant for the testing. RP 314-315.

At the April 9, 2010, status conference, counsel advised the court that the main thing that had caused the continuances had been accomplished, but that there was still some analysis of what was done that needed to occur. RP 317-318. The court noted that it was never able to reach an agreement with the University of Washington to facilitate the testing. RP 318. Counsel advised the court that he had explained that fact to the defendant. RP 318. Thereafter, defendant advised that he believed his speedy trial rights had been violated by the continuances to facilitate a testing that was not completed. RP 321-322. The court noted defendant's objection, then advised that the case could go to trial immediately if defendant decided to forego his diminished capacity defense. RP 323. The court noted that the proposed test had not yet been shown to be admissible pursuant to the *Frye*[1] test. RP 324-325. The court advised defendant 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. RP 325.

On April 23, 2010, counsel advised the court that he still had not received the report from his expert, Dr. Larsen, but that he was not in a position to ask for a continuance due to defendant's objection. RP 332-333. Counsel advised that he

---

[1] *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923).

was not prepared for trial knowing that there might be additional evidence developed during testing of defendant by State's expert. RP 334. Defendant advised the court that this situation was not his fault because the testing is crucial to his defense and that there had been trouble obtaining the testing for about a year, still he should not be forced to go to trial without the testing. RP 334. The court advised defendant that the trial would start on May, 3rd and defendant agreed. RP 335. Then the court warned defendant that counsel had advised that he could not provide effective assistance if the trial started on the 3rd. The court inquired whether defendant wanted to go to trial on the 3rd. Defendant said that he needed the testing, but that he was not willing to give more time to complete the test (RP 335-336); nevertheless, the court continued the trial over defendant's objection for trial preparation. RP 336.

On May 10, 2010, counsel advised that he had received the report from his expert, Dr. Larsen, but had not finished going through it with defendant and that a few questions had been raised. Nevertheless, counsel would have the report to the State by the end of the day. RP 2603.

On May 18, 2010, the State advised that it had received the report from Dr. Larsen and had forwarded same to Eastern State Hospital for review and evaluation of defendant. RP 2607-2609.

On June 8, 2010, the State advised that Dr. Grant from Eastern State Hospital had gone to the Jail to examine defendant, but that defendant had refused

to cooperate. The State asked the court to order defendant to cooperate with Dr. Grant and answer all his questions, even if incriminatory. RP 2614-2615. Counsel advised that defendant was prepared to cooperate. RP 2615. The court advised defendant that the trial was going to start on the 28th regardless of how it was postured. Defendant indicated that he had refused to cooperate because he had not completed reviewing Dr. Larsen's report and making the appropriate changes prior to the report being released to the State. RP 2618. Defendant claimed that he had not been informed that there was testing that could further his defense and he wanted that testing. RP 2618-2619. Next, defendant advised the court that counsel had said that he was seeking election as County Prosecutor, so defendant did not believe that counsel could properly represent defendant with such a conflict. RP 2619. The court immediately asked defendant if he was making a motion, but defendant responded that he was not prepared for such a motion. RP 2619.

Thereafter, the court noted that the issue was an unidentified test that might be available. Counsel responded that defendant knew exactly what the test entailed, but that counsel was ready to put on a defense because he had what was needed. RP 2620-2621. Counsel then advised the court that:

> the testing would involve taking defendant out of jail...putting him in a controlled environment...a hospital would have to agree to this...so would the court and authorities responsible for confining defendant...he would be fed alcohol...and... provoked to see if his use of...alcohol results in unreasonable and strange reactions...Dr.

> Larsen has done it...but only when he was the director of the hospital...Dr. Larsen...says...there is no way that he is aware of [to] find a hospital in Washington that would allow this to occur...[and there is no] hospital in Portland that would allow this testing...Dr. Larsen has always expressed...opinion that defendant's capacity was diminished by his voluntary use of alcohol on the occasion of this offense ...[that he] has published an opinion that defendant suffered from a condition called pathological intoxication...*I have asked whether if we were to conduct this testing it would substantially impact [his]opinion...the best thing I could say is it does not appear that it would substantially impact his opinion...because Dr. Larsen has already reached an opinion based on observable facts and circumstances from the record in this case and...other occurrences in defendant's past which allow Dr.Larsen to make that diagnosis...I have come to my own conclusions based upon my experience and...training that the testing would not further defendant's defense and has the potential to hurt it...I didn't pursue the cost because we don't know what hospital would allow it since it appears none would.*

RP 2622-2624 (emphasis added).

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. RP 2625. Finally, the court observed that the evidence would have to be compelling for the court to even consider allowing 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. RP 2626. The court concluded by warning defendant that if he did not cooperate with Dr. Grant's evaluation, then he would not be permitted to present a diminished capacity defense. RP 2630.

The defendant cooperated with Dr. Grant's evaluation and the case proceeded to trial without further testing. Nevertheless, July 9, 2010, counsel succeeded in getting the court to find that Dr. Larsen's evaluation and diagnosis satisfied the *Frye* test and that he would be permitted to offer his diagnosis that defendant suffered from diminished capacity based upon pathological intoxication to the jury. RP 1041-1114.

Dr. Larsen and Dr. Grant presented their opposing diagnoses regarding defendant's capacity which the jury reconciled with the overwhelming evidence of defendant's commission of the horrific murders. Ultimately, the jury found defendant guilty of the aggravated murders. Defendant filed this appeal.

IV.

ARGUMENT

A. THE DEFENDANT HAS NOT SHOWN THAT HIS COUNSEL RENDERED INEFFECTIVE ASSISTANCE WHILE SEEKING ELECTION AS PROSECUTING ATTORNEY.

The defendant contends defense counsel was ineffective because counsel was seeking election as the Spokane County Prosecutor just before and at the time of trial. Defendant claims that there existed a clear, obvious, and irreconcilable conflict which prejudiced his case because counsel was focused on the election.

"The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The burden to be carried by the defendant is to meet a two-pronged test: the defendant **must** show (1) that counsel's performance fell below an objective standard of performance, **and** (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to "an objective standard of reasonableness based on consideration of all of the circumstances." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). To prevail on the second prong of the test, the defendant must show that, "but for the ineffective assistance, there is a reasonable probability that the outcome would have been different." *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (*citing Strickland*, 466 U.S. at 687). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. . .that course should be followed." *Strickland*, 466 U.S. at 697.

The record reflects that defendant's counsel rendered more than reasonably effective assistance in defending this case. Counsel appeared as counsel for defendant in 2008, two years prior to the election for county prosecutor. When counsel appeared for defendant, he faced a legal "Hobson's choice" of significant proportions. Defendant faced two counts of aggravated premeditated first degree murder arising out of a crime scene so horrific that it caused those who discovered it to become ill and go into shock. Defendant had indicated to law enforcement that he had been at the scene the night before, but had been driven home by the victims prior to the murders. Countering defendant's version of events was overwhelming forensic evidence that clearly tied defendant to being at the crime scene at the time of, or after, the murders.

Starting with that circumstance, counsel had to fashion a defense that fit the evidence and supported defendant's statements to the SCSO. Counsel researched a basis to explain defendant's actions and determined that the best defense would be to claim that defendant was suffering from diminished capacity at the time of the murders. Counsel knew that diminished capacity is a court-created doctrine involving whether a mental condition limited the defendant's ability to have the mental state necessary to commit the offense. *E.g., State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). Counsel knew that voluntary intoxication was not a complete defense, so counsel had to find a viable expert that could explain to the jury that his client was impaired to the extent that he did not have the mental

capacity to form the requisite intent to commit aggravated premeditated murder. Counsel found Dr. Jerry Larsen, M.D., a licensed Psychiatrist, who had a wealth of experience diagnosing and treating individuals with alcohol-related mental problems. Dr. Larsen diagnosed defendant with a rarely documented condition of pathological intoxication or alcohol idiosyncratic intoxication.

Counsel was sufficiently effective to convince the court that Dr. Larsen's diagnosis was viable enough in the scientific community to pass the *Frye* test and, thus, be presented to the jury. The record reflects that the court noted its initial skepticism that the diagnosis could pass the strictures of the *Frye* test, yet ultimately counsel was effective enough to have the diagnosis admitted into evidence. RP 1111-1114.

As noted, defendant contends that counsel rendered ineffective assistance by virtue of his seeking election as county prosecutor. The record reflects only one time during the entire course of this case that the issue arose. Defendant brought up the issue to the court, then immediately declined to pursue it when the court inquired if he was making a motion. RP 2619. Such is the only mention of this issue in almost 2,700 pages of transcript that is the record of this case excluding exhibits. Defendant has failed to satisfy the threshold showings required: (1) that counsel's performance fell below an objective standard of performance, **and** (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. at 687.

The defendant's ineffective assistance of counsel argument based upon counsel seeking election as county prosecutor fails under the provisions of *Strickland* based upon a lack of support in the record. Moreover, defendant has not shown that any of the actions taken by his counsel vis-à-vis his seeking election as county prosecutor prejudiced defendant. Quite the contrary is the fact. Counsel fashioned a defense despite overwhelming evidence implicating defendant as the perpetrator of horrific murders. Except for counsel fashioning the defense proffered to the jury, defendant literally would have had no defense at all. As noted, a lack of prejudice will terminate a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

B. THE DEFENDANT HAS NOT SHOWN THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY NOT PURSUING THE ADDITIONAL ALCOHOL TESTING THAT HAD BEEN DENIED BY THE TRIAL COURT.

Defendant claims that he received ineffective assistance because counsel failed to request additional testing that defendant's mental health expert suggested to support his diagnosis. The extensive record offers no support for this contention.

As previously noted, to prevail with an ineffective assistance of counsel claim, defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced his case. *State v. McFarland*,

127 Wn.2d at 334-335. Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-335. Prejudice results if the outcome of the trial would have been different had defense counsel not rendered deficient performance. *McFarland*, 127 Wn.2d at 337. Review of an ineffective assistance of counsel claim begins from the strong presumption that counsel is effective and that the defendant must show the absence of any legitimate strategic or tactical reason supporting defense counsel's actions. *McFarland,* 127 Wn.2d at 336. To rebut this presumption, the defendant bears the heavy burden of "establishing the absence of any *'conceivable* legitimate tactic explaining counsel's performance.'" *State v. Grier,* 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (emphasis added) (*quoting State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Here, defendant asserts that he received ineffective assistance because counsel failed to secure the additional testing that Dr. Larsen initially *suggested* was required to support his pathological intoxication diagnosis of defendant. There is no evidence in the record to support the claim that counsel failed to request the testing initially *suggested* by Dr. Larsen. Defendant's claim at the June 8, 2010, hearing that the first time defendant knew about the additional test was on May 26, 2010, is contradicted by the record as follows.

On September 8, 2009, defendant knew that counsel was contemplating a capacity defense. RP 64-76.

On January 7, 2010, defendant knew that counsel had been consulting with a mental health expert and had found three agencies that initially agreed to conduct the additional *suggested* test, yet had ultimately refused to follow through. RP 284-293. Defendant knew that after the initial agencies had refused to conduct the test, counsel had secured the agreement of the University of Washington to conduct the test and was finalizing the logistics. RP 286.

On February 22, 2010, defendant was on notice that counsel was working with the court and County Jail to have the testing conducted to support a diminished capacity defense. RP 305-306.

On February 24, 2010, defendant knew that counsel had resolved the security and transportation concerns of the County Jail regarding the testing, but that no agency in eastern Washington had agreed to conduct the test. RP 311-312. Defendant knew that counsel had encountered further difficulties getting his expert, Dr. Larsen, to comply with the University's request for additional information. RP 313.

On April 9, 2010, defendant knew that the court, not his counsel, was never able to reach an agreement with the University, so the suggested test would not be conducted there. Defendant acknowledged that fact while he registered his objection to any further continuances due to his speedy trial rights. RP 322. Defendant knew that the trial had to be continued if he wanted to present a

diminished capacity defense. The court reiterated its perspective that the suggested test still had not passed the *Frye* test. RP 324-325.

On April 23, 2010, defendant knew that counsel was not prepared for trial because Dr. Larsen still had not submitted his report and the State's mental health expert had not had the opportunity to evaluate defendant. RP 332-334. Defendant objected to a continuance of the trial while he claimed that the testing was crucial. RP 334-336. Ultimately, the court was forced to continue the trial over defendant's objection to facilitate counsel's preparation of a defense. RP 335-337.

On May 10, 2010, defendant knew that Dr. Larsen had finally submitted his report and what that report entailed because he was in the process of reviewing it with counsel. RP 2603. Defendant knew then that Dr. Larsen had advised that the initially suggested testing was no longer required for his diagnosis, yet did not raise that subject with the court.

On May 18, 2010, defendant knew that the State had finally received Dr. Larsen's report and that an evaluation by the State's expert would be forthcoming. RP 2607.

On June 8, 2010, defendant admitted that he had refused to cooperate with the State's evaluator, Dr. Grant, to complete the process. RP 2614. Defendant advised that he had refused to cooperate because the changes to Dr. Larsen's report that defendant had discussed with counsel had not been incorporated into

the report prior to it being turned over to the State. RP 2616-2619. Defendant reiterated his complaint concerning how long the process had taken and the motivations of counsel yet declined to make a formal motion to remove counsel when invited to by the court. RP 2618-2619. Counsel described the testing and the lengths to which counsel had gone to facilitate the completion thereof. Counsel acknowledged that Dr. Larsen had advised that the testing was not required for his diagnosis. RP 2622-2633. Counsel advised that Dr. Larsen had reached his diagnosis completely independent of any such testing. RP 2623. Finally, counsel advised the court that he ceased seeking the suggested additional testing because he had concluded that the results would not further support Dr. Larsen's diagnosis, and could potentially damage the credibility of that diagnosis. RP 2623-2624.

Thereafter, counsel convinced the court that Dr. Larsen's diagnosis satisfied the *Frye* test. RP 1111-1114. At trial, the jury was presented with the diagnoses of Dr. Larsen and Dr. Grant, which agreed that defendant's blood alcohol level was 0.30, almost four times the legal limit, when he committed the murders. Both experts acknowledged that defendant was a functioning alcoholic which was contrary to Dr. Larsen's diagnosis of pathological intoxication presented to the jury. Any test results that established that defendant did not become overly violent with the ingestion of a small amount of alcohol would have completely negated the very basis of Dr. Larsen's diagnosis. Accordingly,

counsel's decision not to pursue the suggested test after Dr. Larsen had advised it was no longer required could have very well completely undermined the proffered defense.

To demonstrate ineffective assistance of counsel in the context of this case, defendant must show that counsel's decision not to continue to seek the suggested additional testing (1) was a decision that no other reasonable attorney would make that same tactical or strategic decision under the circumstances, and (2) that the result of the trial would have been different. *State v. McFarland,* 127 Wn.2d at 336-337. The extensive record offers no support for this contention.

Counsel proffered a diminished capacity defense to the jury to mitigate the power of the overwhelming evidence that defendant had committed these horrific murders. The additional testing, at best, would have offered support for Dr. Larsen's diagnosis, but that diagnosis faced inconsistencies at its very core. Defendant's own statement was that he had consumed an enormous amount of alcohol that night. RP 2266-2275. Dr. Larsen estimated defendant's blood alcohol level at 0.30 before the murders. RP 2269. That fact significantly impacted the viability of Dr. Larsen's diagnosis. Dr. Larsen noted that defendant was observed on more than one occasion to not react violently to the ingestion of small amounts of alcohol. RP 2294. Dr. Larsen diagnosed defendant as alcohol and drug dependent, basically, an alcoholic. RP 2266.

As previously noted, to prevail with an ineffective assistance of counsel claim, defendant must show that his defense counsel's performance was deficient and that the deficient performance prejudiced his case.

Deficient performance means that counsel's performance fell below an "objective standard of reasonableness" and prejudice is established by showing a reasonable probability that, except for counsel's unprofessional errors, the result of the case would have been different. *State v.Rosborough*, 62 Wn. App. 341, 348, *review denied*, 118 Wn.2d 1003 (1991). "Reasonable probability" means "sufficient to undermine confidence in the outcome." *Id.*, at 349, 814 P.2d 679. When counsel's conduct can be characterized as legitimate trial strategy or tactics, it does not support a claim of ineffective assistance of counsel. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Here, counsel was advised by Dr. Larsen that the subject testing was not required for his diagnosis. At that point, counsel faced a tactical decision and decided that the two year pursuit of the testing "suggested" by the expert was no longer viable. Counsel made a tactical decision that is not an actionable basis for a claim of ineffective assistance of counsel. *Flournoy v. Small*, 681 F.3d 1000 (9th Cir. 2012). Defendant has not shown that he was prejudiced by counsel's decision not to continue to pursue a test that had his own expert admitting that he could not find an agency willing to conduct the test. Accordingly, defendant has neither

proved that his case was prejudiced by counsel's decision nor that the result of his case would have been different.

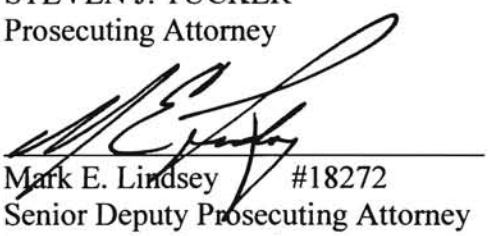
V.

CONCLUSION

For the reasons stated above the defendant's conviction should be affirmed.

Dated this 25TH day of January, 2013.

STEVEN J. TUCKER
Prosecuting Attorney



Mark E. Lindsey #18272
Senior Deputy Prosecuting Attorney
Attorney for Respondent