IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION

APPEAL FROM SKAGIT COUNTY SUPERIOR COURT

STATEMENT OF ADDITIONAL GRUNDS
Court Of Appeals No. 72934-9-I

State of Washington,
Plaintiff,

VS.

WILLIAM RODGERS,
Defendant.

Date: JANUARY ___, 2016

WILLIAM RODGERS DOC #_____
WASHINGTON STATE PENITENTIARY
1313 N. 13th Avenue
Qalla Walla, Washington 99362

DISCUSSION AND FACTS

Skagit County prosecutor charged appellant William Rodgers with one count of first degree premeditated murder by amended information. Defendant was originally charged with Second degree murder. (CP 14-15). A jury found Appellant guilty of premediated murder and was sentenced to 320 Months. (CP 192-205; 13 RP 156) The trial court imposed 36 Months of Community custody. (CP 193-205). The court never inclused a lesser included offense of Second degree murder, or First or second degree manslaughter, of first degree premeditated murder. William Rodgers submits that the facts of his case warrant the above instructions. That, it was not a tactical decision of all or nothing strategy by defense counsel for not submitting the instructions. And that Counsel was ineffective for not requesting the above instruction. In Appellate's SAG he is requesting a evidentiary hearing to expand the record so this Court has the facts concerning prejudice and counsel and Mr. Rodgers can testify.

This Court can "perform all acts necessary or appropriate to secure the fair and orderly review of a case. **RAP 7.3.** The Rules of Appellate Procedure will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. **RAP 1.2(a).**

ISSUES AND ARGUMENT

I. THE PROSECUTION FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO ESTABLISH THE VALIDITY AND ADMISSIBILITY OF MR. RODGERS GOOGLE, IN VIOLATION OF RCW 10.96.030(2)(e), AND RELIED ON TESTIMONIAL HEARSAY IN VIOLATION OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION.

A. Standard of Review

Constitional questions are reviewed de novo. State V. Schaler, 169 Wn.2d 274, 236 P.3d 858 (2010).

The Court of Appeals has discretion to accept review of any issue argued of the first time on appeal. RAP 2.5(a) This includes both nonconstitutional issues and constitutional errors that are not manifist. Id. Further more, manifest errors affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); State v. Kirwin, 165 Wn.2d 818, 203 P.3d 1044 (2009).

II. THE PROSECUTION FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO MAKE A "PRIMA FACIE" CASE ESTABLISHING DATA WAS VALID AND ADMISSIBLE AND CERTIFIED BY TESTIMONY.

The prosecution relied on testimonial hearsay to show disputed and prejudical alligations. (RP 64-76).

The Sixth Amendment to the U.S. Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." U.S. Const. Amend. VI. This provision is applicable to the states through the due process clause of the Fourteenth Amendment. Pointer V. Texas, 380 U.S.

400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965): U.S. Const. Amend. XIV. A proponent of hearsay evidence bears the burden of establishing that its admission would not violate the confrontation clause. **Idaho v. Wright**, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

The admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable and the accused had prior opportunity for examination. **Crawford v. Washington**, 541 U.S. 35, 124 S.Ct. 1354 (2004); See also, **Melendez-Diaz v. Massachusetts**, 129 S.Ct 2527, 174 L.Ed.2d 314 (2009).

Here, the prosecution relied in part on faulty internet search history for account holder & a disk to establish exaggerated data method the state used to authenticate critical and prejudical facts going to the element of premedated murder. Such evidence the state introduced are hearsay, and are not admissible under any exception to the hearsay rule. see; **Brown v. Illinois**, 422 U.S. 590, , 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) in Brown, unlike this case, the state presented additional testimony establishing the proper use of a preservative and enzyme poison. **Brown** at 76. In Addition, the evidence qualifes as "testimonial hearsay" under **Crawford**, and is thus admissable uneder the confrontation clause. see, e.g.,

Melendez-Diaz, supra; The U.S. Supreme Court has recently heard argument in a case addressing related issues. State v. Bullcoming, 226 P.3d 1 (N.M. 2010), certiorari granted sub nom Bullcomming v. New Mexico, 131 S.Ct. 62, 177 L.Ed.2d 1152, (2010).

The prosecution's reliance on testimonial hearsay to prima facie estaolish the validity and admissibility of internet search history for account holder violated Mr. Rodgers Sixth and Fourteenth Amendment right to confrontation. Melendez-Diaz, supra. Accordingly, his convictions must be reversed and the case remanded for a new trial. Id.

III. MR. RODGERS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring denovo review. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); State v. Horton, 136 Wn.App. 29, 146 P.3d 1227 (2006).

(a)- An Accused Person is Constitutionally Entitled to the Effectiva Assistance of Counsel.

The sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." U.S. Const. Amend VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; Gideon v. Wainwright, 372 U.S. 335, 342, 83

S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Artical I, Section §22 of the Washington Constitution provides, "In Criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. Article I, Section §22. The right to counsel is "one of the must fundamental and cherished rights guaranteed by the Constitution." **United States v. Salemo**, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceedings would have differed." **State v. Reichenbach**, 152 Wn.2d 126, 130, 101 P.3d 80 (2004)(Citing **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)): see also **State v. Pittman**, 134 Wn.App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance.

Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged stratety. See, e.g., **State v. Hendarickson**, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996)(the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.").

THE DECISION TO NOT REQUEST LESSER INCLUDED OFFENSE INSTRUCTION WAS NOT A TACTICAL DECISION.

Second degree murder and second degree manslaughter are lesser inclused offenses of premedated murder under Washington law with respect to the legal prong of the **Workman** test. See **State v. Bowreman**, 115 Wn.2d 794, 805, 802 P.2d 116 (1990); **State v. Warden**, 133 Wn.2d 559, 947 P.2d 708 (1997)(findig that first and second degree manslaughter may be lesser includad offenses of premedated Murder and instructions may be given to a jury when the facts support such and instruction). Moreover, second degree murder is also an inferior degree of first degree murder. **State v. Johnston**, 100 Wn.App. 126, 134, 996 P.2d 629, Review denied, 11 P.3d 827 (2000).

Mr. Rodgers points out, under the factual prong of **Workman** test, the evidence in the case must support an inference tnat the lesser crime was commited, and the

evidence must support an inference that only the lesser offense was committed. **Bowerman**, 115 Wn.2d at 803-06; **State v. Karp**, 69 Wn.App. 369, 376, 848 P.2d 1304, Review denied, 122 Wn.2d 1005 (1993).

Both the inferior degree and lesser included tests the same analysis to determine whether the evidence supported giving the lesser included/inferior offense instruction. See, **State v. Fernandez Medina**, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000); **State v. Ieremia**, 78 Wn.App. 746, 755n.3, 899 P.2d 16 (1995), Review denied, 128 Wn.2d 1009 (1996).

It is undebatable that a factual basis exists for the basis of the lesser included instructions above. The defense below was diminished capacity as well as an associated argument similar to a "heat of passion" argument that the Defendant acted "emotionally" as opposed to acting with premedation or intent.

In any event, the the defense of diminished capacity would apply to second degree murder and second degree manslaughter.

Just like the case of **State v. Bottrell**, 103 Wn.App. 706 (200), with regard to the charge of first degree premeditated murder, Bottrell offered testimony that she

suffered from post-traumatic stress disorder (PTSD), In addition to the medical testimony indicated that Bottrell suffered from PTSD and she might have experenced a flashback at the time of her struggle with Hall, impairing her ability to act with intent. The Case was Remanded and reversed the conviction.

In some old cases the court's recognize the concept of "diminished capacity"; State v. Taylor, 771 S.W.2d 387, 398 (Tenn. 1989). The court observed, "This is the so-called limited defense. Because the court held that because the trial court provided instructions for first degree and second degree murder and all lesser included offenses, "the absence of an instruction on 'diminished capacity' did not preclude the jury's finding defendant guilty of a lesser offense." Id.

In the 1930 Case of State v. Davis, 28 S.W.2d 993 (Tenn. 1930); Davis is a "heat of passion" case with a scope far narrower that indicated at first glance.

Davis held only that a defendant who kills "while under the influence of passion and agiation produced by " information that tha deceased had debauched the defendant's wife, may be found guilty only of voluntairy manslaughter rather than murder. See Also, Drye v. State, 184 S.W.2d 10, 12-13 (Tenn. 1944)(defendant who killed his wife, "a woman without regard for her marital vows," while under influence of passion aroused by her stated

intention to date whom she desired, did not form premeditated deliberation required to find first degree murder).

These old case thus recognized a narrow subset of diminished capacity, "heat of passion." available only to a scorned spouse who kills either the despoiler or despoiled. Washington's notion of diminished capacity is much broader. "Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged." **State v. Warden**, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). It need not - as in Tennessee -- be the result solely of provocation caused by passion.

The report of the proceedings in the record at trial and summed up in closing arguments testimony that William Rodgers suffered from PTSD. (RP 2-175 Vol. 12 Closing). The state never met the burden of proving beyond a reasonable doubt that William Rodgers had the requisite mental state for the crime charge. **State v. James**, 47 Wn.App. 605, 609, 736 P.2d 700 (1987)

CONCLUSION

Appellate pro-se raised enough of facts as applied to legal theory requiring further review and briefing.

RESPECTFULLY SUBMITTED THIS ___day of January 2016.

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