RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jan 05, 2017 12:33 PM
CLERK'S OFFICE

RECEIVED VIA PORTAL

SUPREME COURT NO. 93888-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER HOOD,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Hollis Hill, Judge

REPLY TO STATE'S ANSWER TO PETITION

KEVIN A. MARCH
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

A. IDENTITY OF REPLYING PARTY

Christopher Robin Hood, the petitioner here and the appellant below, replies to the State's answer to his petition for review, filed December 21, 2016.

B. ADDITIONAL ISSUES PRESENTED FOR REVIEW

1. Does CrR 6.15(a) oblige defense counsel to propose duplicative instructions of those already offered by the State or to otherwise stipulate to or join in the State's proposed instructions?

2. Does it constitute ineffective assistance of counsel to propose duplicative instructions of those already offered by the State or to otherwise stipulate or join in the State's proposed instructions?

C. ARGUMENT IN REPLY

1. THE INVITED ERROR DOCTRINE DOES NOT APPLY TO THESE FACTS

As the Court of Appeals recognized, "'The [invited error] doctrine appears to require affirmative actions by the defendant.'" State v. Hood, 196 Wn. App. 127, 382 P.3d 710, 713 (2016) (quoting In re Pers. Restraint of Thompson, 141 Wn.2d 712, 724, 10 P.3d 380 (2000)). Defense counsel never stated Hood joined in or stipulated to the State's instructions. RP 16 (defense counsel stating he was not submitting jury instructions), RP 290 (trial court, not defense counsel, stating defense counsel stipulated to or joined in

prosecution's jury instructions), RP 415-16 (same). Defense counsel did not affirmatively assent to the State's instructions or contribute to them. Cf. In re Pers. Restraint of Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014); Thompson, 141 Wn.2d at 724. He did not once say anything about the State's proposed jury instructions. Instead, he indicated he would not be proposing any instructions on behalf of Hood and then took issue with particular instructions the State had proposed. RP 16, 417-20. At most, the record shows defense counsel acquiesced in the State's instructions. Because there is no affirmative conduct on the part of defense counsel, there is no record to support the State's claim of invited error.

The State asserts that the "Court of Appeals appears to have overlooked the context and assumed that the trial court was simply irrational; that it repeatedly stated on the record that Hood had stipulated to the State's instructions despite having no basis to do so." Answer to Petition for Review (Answer) at 4. The Court of Appeals did not overlook context and it certainly did not assume the trial court was irrational. The Court of Appeals instead simply and correctly concluded, "There is no record of Hood formally stipulating to the correctness of the instructions. The court's remarks may have simply been intended to memorialize the fact that Hood had not proposed a competing set of instructions." Hood, 382 P.3d at 713. Without a record

showing affirmative conduct on the part of defense counsel, the State's invited error claim fails. Review of this issue is unwarranted.

2. DEFENSE COUNSEL HAS NO OBLIGATION TO SUBMIT A SET OF JURY INSTRUCTIONS AND PROVIDES INEFFECTIVE ASSISTANCE BY JOINING IN, STIPULATING TO, OR SUBMITTING A DUPLICATIVE SET OF THE PROSECUTION'S JURY INSTRUCTIONS

The State next complains that the Court of Appeals held that a defendant has no duty to propose jury instructions, arguing that this "may confound trial courts in their attempts to solicit assistance from trial counsel on preparing accurate jury instructions." Answer at 4. The State's argument rests on the mistaken premise that the defense cannot assist the trial court in preparing accurate jury instructions without submitting its own set. Though the State ignores it, the Court of Appeals thoroughly addressed this precise concern:

> This is not to say that defense counsel can safely ignore the process of developing the instructions in a criminal case. An attorney has an obligation to object to instructions which appear to be incorrect or misleading and must also propose instructions necessary to support argument of the client's theory of the case.

Hood, 382 P.3d at 714. Contrary to the State's claim, the Court of Appeals decision does not create any risk that defense lawyers will not be "thoughtfully engaging in jury instructions" but instead "shrugging their shoulders and

waiting to see what an appellate attorney thinks should have been done." Answer at 5-6.

The real issue is whether defense counsel must submit a set of jury instructions, not whether defense counsel must "thoughtfully engage in jury instructions." In the Court of Appeals, the State argued defense counsel must always invite instructional error by joining the State's instructions because "it is fair and efficient to allow the defense to satisfy its CrR 6.15(a) obligations by joining in the State's submission." Br. of Resp't at 11. What CrR 6.15(a) obligations? No Washington court has ever held that CrR 6.15(a) obliges defense counsel to propose duplicative instructions or stipulate to the State's. This is likely due to the basic recognition that defense counsel has constitutional and ethical obligations to advance and protect their clients' current and future claims, not undermine them.[1]

The language of CrR 6.15 does not require the submission of jury instructions from the defense. The rule states, "Proposed jury instructions shall be served and filed when a case is called for trial by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one copy for each party to the trial judge." This

[1] Of course, the defense might very well be obliged to submit jury instructions pertaining to issues on which the defense bears the burden of proof, such as with affirmative defenses. But the issue raised by the State is whether CrR 6.15 obliges the defense to duplicate or join in the State's jury instructions, thereby potentially forfeiting any claims against the jury instructions under the invited error doctrine.

does not require the defense to submit instructions, but rather establishes the timing and service requirements if the defense does. The Court of Appeals correctly concluded that CrR 6.15's language does not require submission of jury instructions, but merely "sets forth the time and procedure to be followed" when a party proposes them. Hood, 382 P.3d at 713.

In addition, criminal defendants are entitled to constitutionally effective counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To sustain an ineffective assistance of counsel claim, "the defendant must show that counsel's performance was deficient" and that "the deficient performance prejudiced the defense." Id. There is no reasonable defense tactic in foreclosing or burdening a client's future arguments by stipulating to or joining the State's proposed instructions rather than just not objecting to them. The only effect of joining the prosecution's instructions is to make a client's future claims more arduous in light of the invited error doctrine. No reasonable defense attorney would or could ever legitimately wish to harm his or her client in this way. Proposing or stipulating to duplicate instructions that are not necessary for the defense to advance its theory of the case constitutes deficient performance.

And requiring the defense to submit duplicative instructions or stipulate to the State's makes Strickland's prejudice prong self-fulling. The result of defense counsel submitting a duplicative set of instructions or joining

in the State's is to potentially bar the claim from future consideration by trial or appellate courts. Taken to its endpoint, the State's position would foreclose almost all instructional errors from judicial review, resulting in substantial prejudice.

This court should not review the State's invited error arguments or overreaching interpretation of CrR 6.15. If this court does grant review of these issues, it should also review Hood's interpretation of CrR 6.15 and ineffective assistance of counsel claim.

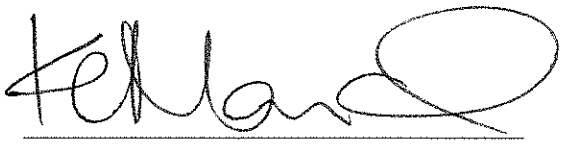
C. CONCLUSION

Hood asks that his petition for review be granted but that review of the additional issues raised in the State's answer be denied.

DATED this 5th day of January, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



KEVIN A. MARCH
WSBA No. 45397
Office ID No. 91051

Attorneys for Petitioner

NIELSEN, BROMAN & KOCH P.L.L.C.

January 05, 2017 - 12:33 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	93888-1
Appellate Court Case Title:	State of Washington v. Christopher Robin Hood

The following documents have been uploaded:

- 938881_20170105122716SC767716_4208_Answer_Reply.pdf
  This File Contains:
  Answer/Reply - Reply to Answer to Petition for Review
  The Original File Name was State v. Christopher Hood 93888-1.Reply to States Answer.pdf

A copy of the uploaded files will be sent to:

- jennifer.joseph@kingcounty.gov
- Sloanej@nwattorney.net
- paoappellateunitmail@kingcounty.gov
- MarchK@nwattorney.net
- Jim.Whisman@kingcounty.gov
- bakerk@nwattorney.net

Comments:

Sender Name: Jamila Baker - Email: Bakerj@nwattorney.net
Filing on Behalf of: Kevin Andrew March - Email: MarchK@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20170105122716SC767716