No. 94294-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMASDINH BOWMAN,

Petitioner.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION

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Washington State:

A IDENTITY OF RESPONDENT

The State of Washington is the Respondent in this case.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is State v. Bowman, No. 73069-0-I, filed January 23, 2017.

C. ISSUES PRESENTED FOR REVIEW

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

1. The Court of Appeals concluded that defense trial counsel was not deficient in making the decision to forego a lesser included offense instruction. As an alternative ground to affirm, the State renews its argument that even if the defense attorney's performance was deficient in giving excessive deference to Bowman's choice, Bowman has not established resulting prejudice, that is, either that the decision would have changed, or that the result of the trial would have changed if a lesser included offense instruction had been given.

2. The Court of Appeals concluded that the trial court properly sustained an objection by the State during the defense closing argument, based on defense counsel's arguing facts that were not in evidence. As an alternative ground to affirm, the State renews its argument that any error in sustaining that objection was harmless.

D. STATEMENT OF THE CASE

The defendant, Thomasdinh Bowman, was convicted of murder in the first degree. CP 17, 18. The relevant facts are set forth in the State's briefing before the Court of Appeals. Brief of Respondent at 2-10.

The Court of Appeals affirmed the conviction in a unanimous unpublished opinion. State v. Bowman, No. 73069-0-I (Wash. Ct. App. Jan. 23, 2017).

E. ARGUMENT

As to Issues 1-5 raised in the Petition, the State's briefing at the Court of Appeals adequately responds to the issues raised in

the petition for review. If review is accepted, the State seeks cross-review of corresponding issues it raised in the Court of Appeals but that the Court's decision did not address. RAP 13.4(d). The provisions of RAP 13.4(b) are inapplicable because the State is not seeking review, and believes that review by this Court is unnecessary. However, if the Court grants review, in the interests of justice and full consideration of the issues, the Court should also grant review of the alternative arguments raised by the State in the Court of Appeals, which the State believes are consistent with existing law. RAP 1.2(a); RAP 13.7(b). Those arguments are summarized in Sections 2 and 3 below and set forth more fully in the briefing in the Court of Appeals.

1. THE STATE OBJECTS TO PRO SE ARGUMENTS UNSUPPORTED BY ANALYSIS.

The State objects to consideration of the many grounds for the petition for review that were raised by Bowman in his pro se briefing in the Court of Appeals below and are not supported by legal analysis in the petition for review. Issues 6 through 11 in the petition for review were issues not raised in the Brief of Appellant in

the Court of Appeals. The Court of Appeals did not ask counsel to file additional briefing addressing those issues in the Court of Appeals pursuant to RAP 10.10(f) and neither counsel briefed these issues. With respect to most of these issues, the petition for review cites no legal authority, as to the others, it cites general legal principles but includes only conclusory statements that error occurred, with no explanation of the reason why review should be accepted, as required by RAP 13.4(c)(7). These potential issues should not be considered as they have not been properly presented.

The State further objects to consideration of matters unsupported by citation to the record and matters outside the record referred to in the petition and in the Statement of Additional Grounds filed by Bowman in the Court of Appeals.[1] Grounds for review that include allegations premised on matters outside the record should be rejected. On direct appeal, a reviewing court will not consider matters outside the trial record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

[1] The arguments supporting issues 6-11 contain many characterizations of events at trial (including alleged statements of the prosecutors) and description of the computer systems used by Bowman in his business. Only four factual assertions are supported by citations to the record. Pet. Rev. at 24-30.

2. BOWMAN HAS NOT ESTABLISHED PREJUDICE RESULTING FROM THE ALLEGED DEFICIENCY OF HIS TRIAL COUNSEL.

The Court of Appeals properly concluded that defense trial counsel was not deficient in making the decision to forego a lesser included offense instruction. State v. Bowman, slip op. at 18-19. If this Court grants review on this issue, the State cross-petitions to preserve its argument that even if the defense attorney's performance was deficient in giving excessive deference to Bowman's choice, Bowman has not established resulting prejudice: either that defense counsel would have made a different decision if he had given less weight to Bowman's opinion, or that the result of the trial would have changed.

To establish that his counsel provided constitutionally ineffective assistance, the defendant must show deficient performance and must affirmatively show prejudice. Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To show prejudice, the defendant must establish that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109

Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland, 466 U.S. at 694. Without a showing of prejudice, an ineffectiveness claim fails, even if the representation was deficient. In re Pers. Restraint of Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992).

The claimed deficiency in this case is defense counsel's allegedly excessive deference to Bowman's choice not to offer the jury lesser included offenses. Bowman has not established that if defense counsel had given less weight to Bowman's opinion, counsel would have decided to offer a lesser offense, so he has not shown that there would have been any effect at all on the trial.

In making the decision regarding offering a lesser offense, this Court has advised that "it is the defendant's prerogative to take this gamble, provided her [or his] attorney believes there is support for the decision." in State v. Grier, 171 Wn.2d 17, 39, 246 P.3d 1260 (2011). There is no evidence in the record that defense trial counsel did not believe there was support for the decision. Counsel's reference to Bowman's intellectual ability to make the decision[2] suggests that counsel believed that the decision had

[2] "We all know that he is certainly capable intellectually of making decisions, and I think it could be characterized easily as a tactical decision." 21RP 5.

logical support. If so, counsel would have made the same decision, respecting the defendant's choice not to request instructions on the lesser offenses.

Bowman has argued that it is reasonably probable that there would have been a different result because the lesser offense instructions would have been given and the evidence supported conviction on a legally available lesser. This argument not only ignores the specific alleged deficiency in this case (the basis of counsel's decision), it also nullifies the second prong of the Strickland analysis, as it asserts no more than that the lesser included instructions would have been given.

This Court in Grier addressed the issue of prejudice resulting from the failure to request instruction on a lesser offense. It held that the defendant there had not established prejudice under the second prong of the Strickland analysis, because the court must assume the jury would not have convicted the defendant of the charged crime (second degree murder) unless the State met its burden of proof,[3] so the availability of lesser offenses

[3] 171 Wn.2d at 44 (citing Strickland, 466 U.S. at 694 (holding that a reviewing court should presume the judge or jury acted according to law)).

(manslaughter) would not have changed the outcome. Grier, 171 Wn.2d at 43-44 (citing Autrey v. State, 700 N.E.2d 1140 (Ind. 1998)). For the same reason, Bowman has not established prejudice in this case: the jury found Bowman guilty of premeditated murder and must be presumed to have followed their instructions, so the availability of lesser offenses would not have changed the outcome.

3. IF THE TRIAL COURT ERRED IN SUSTAINING AN OBJECTION TO DEFENSE COUNSEL REFERRING TO FACTS THAT WERE NOT IN EVIDENCE, THAT ERROR WAS HARMLESS.

The Court of Appeals properly concluded that the trial court did not err in sustaining two objections during the defense closing argument: the first was as to a misleading statement as to the law, the second was as to a reference to facts not in evidence. State v.Bowman, slip op. at 19-20. In this petition for review, Bowman seeks review of only the second ruling, that defense counsel was improperly referring to facts not in evidence. If this Court grants review on this issue, the State cross-petitions to preserve its argument that even if the trial court erred, the error was harmless because there is no reasonable probability it affected the verdict.

The argument at issue follows:

> And then he's going to go on, and I'm repeating myself, go on, and do what the State believes he did as a student of murder. The thrill kill concept makes no sense in light of the facts. And I don't mean to be condescending because I'm not at all. I have the most respect for juries. You wouldn't believe how much I do. But if we can -- if you can focus on the facts. The thrill kill thing makes no sense at all.
>
> If Dinh Bowman was a student of murder because he possessed this manual, and this book, he certainly did not follow the lessons, all the lessons prescribed in those books. Don't do anything in broad daylight. Two, don't do anything in heavy traffic. Three, don't do anything in a flashy car.
>
> MS. RICHARDSON: Your Honor, I'm going to object. This is facts not in evidence.
>
> THE COURT: Sustained.
>
> MR. BROWNE: The book is in evidence. You can read what's in there. I will continue talking about the factors that do not apply to Mr. Bowman. Semiautomatics leave shell casings. Using -- committing a crime, and having your cellphone on will, we now know from the experts, record your area where you are.

21RP 117 (emphasis added). After this objection, defense counsel continued to characterize Bowman's behavior as inconsistent with the general advice given in Murder Inc., without further objection. 21RP 117-18.

A trial court has the authority to restrict closing argument, including argument by the defense. State v. Perez-Cervantes, 141 Wn.2d 468, 474, 6 P.3d 1160 (2000). The trial court should always

restrict the argument of counsel to the facts that are in evidence; otherwise a jury may be confused or misled. Id. at 474-75. Even if the trial court errs in precluding an argument, the error is reversible only if there is a reasonable probability that it affected the verdict. State v. Frazier, 55 Wn. App. 204, 212, 777 P.2d 27 (1989).

Bowman asserts that the judge precluded a defense argument that the State had not proven premeditation. That claim is entirely unsupported by the record, as much of the defense closing addressed that issue. 21RP 107-13, 116-18.

The jury was properly instructed that its role was to determine the case based on the testimony and exhibits at trial. CP 20-22. It had the opportunity to review the portions of Murder Inc. and The Death Dealer's Manual that were admitted. If it agreed that defense counsel's statements were justifiable as an inference from the actual advice given in those books, the jury would not be influenced by the objection or ruling of the court. Counsel was permitted to continue to refute the State's theory that Bowman was a student of murder, although counsel did not re-cast the general advice as specific lessons again. Bowman has not established that

there is a reasonable probability that the proffered argument would have affected the verdict, so any error does not warrant reversal.

F. CONCLUSION

The State respectfully asks that the petition for review be denied. However, if review is granted, in the interests of justice the State seeks cross-review of the issues identified in Section C and E, supra.

DATED this 26TH day of April, 2017.

Respectfully submitted,

DANIEL T. SATTERBERG
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By: _____
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Kevin A. March, containing a copy of the Answer To Petition For Review And Cross-Petition in State v. Thomasdinh Bowman, Cause No. 94294-3, in the Supreme Court for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

04-26-17

Date

Done in Seattle, Washington

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

April 26, 2017 - 1:42 PM

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