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COURT OF APPEALS

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NO. 29358-7-II

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IN THE COURT OF APPEALS, DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF

ARMONDO SHELBY

Petitioner.

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

REPLY BRIEF OF PETITIONER

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A. REPLY ARGUMENTS

1. *THE REFERENCE HEARING COURT FOUND THAT THERE WAS AN ACTUAL CONFLICT OF INTEREST IN SHELBY'S CASE THAT RESULTED IN A LAPSE IN REPRESENTATION AND THAT SHELBY IS ENTITLED TO A NEW TRIAL. THE STATE'S ARGUMENT TO THE CONTRARY IS NOT PERSUASIVE.*

The parties appear to agree that the controlling precedent is *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). That case says: “An ‘actual conflict,’ for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel’s performance.”

- a. Conflict of Interest

The State concedes that the Department of Assigned Counsel (DAC) had a conflict of interest because it represented both Danion Singleton and Shelby simultaneously.

- b. Lapse in Representation

The State’s argues that the conflict did not result in a lapse in representation by Shelby’s trial lawyers. The evidentiary hearing established two important facts relevant to this issue. First, throughout the proceedings, trial counsel knew that Shelby was asserting that he acted in self-defense. Second, although the DAC attorneys acknowledged that representation of both a defendant and potential witness raised actual conflicts of interest, they resolved the issue by failing to interview or challenge their clients, who were also witnesses in this case and who had evidence that supported Shelby’s defense. The State’s argument that “Singleton was not a viable

witness” is not supported by the record. Trial counsel had evidence that Singleton supported Shelby’s claim of self-defense and yet they did nothing.

The Ninth Circuit has repeatedly found that “a lawyer who fails adequately to investigate, and to introduce into evidence, [evidence] that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.” *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) (finding defense counsel's performance deficient because he failed to review or introduce at trial documents corroborating defense witness's testimony); see also *Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999) (finding defense counsel's performance deficient because he failed to interview or call at trial three witnesses who had told police and investigators that they saw the victim alive a day after the defendant allegedly killed her).

In order to prevail on Shelby’s defenses, the defense needed to present all the available corroborating evidence – including the evidence from Mr. Singleton. It is clear from the record that Singleton had information that supported the claim of self-defense. *See* Exhibit 2. The failure to further investigate and call Singleton as a witness prejudiced Shelby’s defense. The State’s evidence was not so strong that Shelby might not have prevailed on his claim of self-defense. For example, the jury found that the evidence did not demonstrate that Shelby premeditated the murders. Had the proper and available evidence been presented, the jury may well have concluded that Shelby broke into the apartment in an effort to protect Ms. Bohlen and fired the gun only after Mr. Butler came at him or feigned having a gun himself.

The State also argues that there was no lapse in representation in this case because Shelby cannot claim “self-defense” in a prosecution for felony murder. First, it must be remembered that Shelby was actually charged with premeditated murder. Thus, self-defense was clearly at issue. Second, this is the first time the State has raised this issue in this litigation. The State did not file any cross-appeal or make this argument during the evidentiary hearing. Finally, the trial court gave the self-defense instructions at the first trial and thus, they are the “law of the case.”

Moreover, mens rea for felony murder is based solely on the mens rea for the predicate offense--here, burglary in the first degree:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

RCW 9A.52.020. Thus, intent to commit a crime against a person or property in the unlawfully entered building is the mens rea required of a burglar. "A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). "When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally." RCW 9A.08.010(2).

In this case, Shelby testified that he entered the house to defend Ms. Bohlen, not to commit a crime inside. Thus, evidence that the alleged victim was violent was relevant to the charge of felony murder based upon burglary. Under those circumstances Shelby was entitled to present testimony that supported his claim that he was not engaged in a burglary, but rather protecting the welfare of another. Singleton’s testimony would have supported that claim.

The facts of this case are clearly distinguishable from *State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990), the only case cited by the State. In *Dennison* the Supreme Court described the facts as follows:

While burglarizing the home of Robert Yates, Randall Dennison killed Daniel Stracner. Stracner lived in an apartment above the home of Yates, a known drug dealer. Dennison had been tipped off that Yates had a supply of marijuana in his bedroom.

After driving by Yates' home and not seeing anyone there, Dennison parked his car at a nearby convenience store and telephoned Yates; no one answered the phone. Dennison walked to Yates' house and knocked on the door. After no one answered, he kicked open the door and went to the bedroom looking for the marijuana. Dennison carried a pillowcase, a grocery sack, a hammer, and was armed with a gun.

Shortly after Dennison entered Yates' home, Stracner, also armed with a gun, appeared in the bedroom doorway. According to Dennison, Dennison grabbed Stracner's hand which was on the gun and pushed it into the air. Dennison held his own gun in Stracner's stomach. Dennison asserted that he backed Stracner out of the house and onto the porch. Dennison testified that he told Stracner that he had not taken anything, that it was all over, that he did not intend to hurt Stracner, and that he just wanted to leave. According to Dennison, Stracner said "okay." Dennison then pointed his gun down at the ground and released his grip on Stracner's hand which held the gun. After Dennison's hand was released, Dennison claims, Stracner shot at him. In response, Dennison claims he fired at Stracner, resulting in Stracner being knocked onto a couch. Stracner assertedly aimed at Dennison again and Dennison fired more shots. It was subsequently determined that Stracner's gun had in fact been fired and had jammed after the first shot. Dennison fled the scene leaving the pillowcase and burglary tools at Yates' home. Stracner died of the gunshot wounds.

Id. at 612-613. The Court permitted Dennison to testify that he acted in self-defense. But the Court refused to give self-defense instructions because Dennison admitted that he was engaged in a burglary and the facts demonstrated that he shot the victim while fleeing from the burglary.

Shelby, unlike Dennison, denied that he intended to commit a crime inside the apartment. And, he is not complaining about the lack of jury instructions on the issue of self-defense or the

defense of others. Instead, he is complaining that his trial counsel failed to present all of the available evidence that he was acting in the defense of Bohlen or himself. This evidence directly supported his claim that he was not engaged in any criminal activity at all. And, if he was not committing a burglary, he could not be found guilty of felony murder.

In *State v. Robinson*, 79 Wn. App. 386, 902 P.2d 652 (1995), the Court reversed the defendant's conviction when defense counsel failed to call a helpful witness whom the attorney also represented. "When an attorney's loyalty is divided between a witness and the defendant, the attorney's decision not to call that witness readily leads to reversal under the *Cuyler v. Sullivan* test and can almost be said to epitomize it." *Robinson* at 396. The Court noted that determining an adverse affect in a conflict case was different from analyzing the first prong of the *Strickland*¹ analysis, because in the conflict situation "there can be no presumption of effectiveness when an attorney refrains from calling a helpful witness whose interests he is obliged to protect." *Robinson* at 399.

2. *THE GOVERNMENT INCORRECTLY PRESUMES MR. SHELBY ABANDONED HIS CLAIMS THAT THE REFERENCE HEARING COURT'S CONCLUSION OF LAW NUMBER 4 WAS ERRONEOUS*

The State's argument that Shelby has abandoned his claim that defense counsel's decision not to call witnesses Danion Singleton and Tony Howard was reasonable is meritless.

¹ *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Shelby's supplemental brief filed on February 10, 2006, stated: "In order to avoid needless duplication, he hereby incorporates by reference that briefing, the amended personal restraint petition and the reply brief (authored by counsel)." Brief of Petitioner at 3.

In its presumption, the State cites *Lassila v. Wenatchee*, 89 Wn.2d 804, 809, 576 P.2d 54 (1978) and *State v. Wood*, 89 Wn.2d 97, 99, 569 P.2d 1148 (1977). The cases cited by the State are easily distinguished. In *Lassila*, a civil matter, the court held that the trial court's findings of fact were not briefed to the appellate court. In *Wood*, a child support case, the appellate court held that it could make no ruling on claims that were not briefed at all and without authority. In Shelby's case, this Court has a significant amount of briefing and authority on this issue from Shelby.

The record reflects that Mr. Shelby has in fact briefed the issue and provided authority to show that defense counsel's failure to call Danion Singleton and Tony Howard as witnesses was not reasonable. First, Petitioner's PRP opening and reply briefs articulate Shelby's position on this matter. Shelby then made the same arguments during the reference hearing. Shelby made arguments it was unreasonable not to call Howard and Singleton during the reference hearing closing briefs. Shelby then argued in his objections to the reference hearing court's finding of facts that it was unreasonable to call the two witnesses that had provided information that supported Shelby's claim of self-defense. This court of appeals has all of the above briefing and authority for its consideration of this important issue.

Additionally, the issue of whether it was reasonable not to call Singleton as a witness is inherently intertwined and inter-related to the reference hearing court's finding that there was an

actual conflict of interest in the representation of both Shelby and Singleton that adversely affected counsel's performance.

3. *THE STATE IS INCORRECT IN ARGUING THAT THE REFERENCE HEARING COURT ERRED IN FINDING IT WAS UNREASONABLE FOR TRIAL COUNSEL NOT TO CROSS-EXAMINE WITNESS CUBEAN TO ILLICIT TESTIMONY CONTRARY TO THE STATE'S OTHER WITNESSES*

In its brief, the State argues that the reference hearing court erred in finding it was unreasonable not to cross-examine witness Kevin CUBEAN regarding scuffling he heard before he heard shots. The State goes through great lengths to lay out the standards in *Strickland v. Washington* and other cases to determine whether trial counsel's conduct was ineffective. See State's Supplemental Brief Following Reference Hearing pages 15-16.

The State sums up its argument by noting that CUBEAN's testimony was related to Shelby's claim of self-defense and thus irrelevant, despite the reference hearing court's findings, and listing two reasons why the testimony would not have helped.

First, the State argues the testimony would not have helped Shelby's case, citing overwhelming evidence that Shelby was the first aggressor. In this first reason, the State overstates the evidence, which is based on state witnesses who were not properly cross-examined due to lack of preparation, if they were cross-examined at all, a lack of defense counsel following up and calling witnesses on behalf of Shelby, and not preparing or calling Shelby to testify in his own defense.

The State also argues that CUBEAN's testimony would not have helped is that Shelby's case of self-defense because it was weak, marred by inconsistencies, and unsupported. The

record supports Shelby's contention that his trial counsel failed to put on an effective case on his behalf. The State's argument that the evidence against Shelby's self-defense claim was weak is again based on the fact that his trial counsel failed to follow-up with witnesses, call any witnesses on Shelby's behalf, and prepare cross-examinations. Trial counsel did not even present opening statements on behalf of Shelby. The State's argument that Cuban's testimony would not have helped is not based on supporting facts and evidence, but rather on trial counsel's lack of preparation and poor presentation at trial.

Simply by reading the trial transcript one can see trial counsel was ill prepared for Cuban as a witness. The reference hearing court's finding that it was unreasonable to cross-examine Cuban was a correct, just, and logical conclusion. The reference court, however, did err in its finding that defense counsel's failure to prepare and cross-examine Cuban prejudiced Shelby. Cuban's testimony was doubly important, and in all likelihood, would have affected the outcome of Shelby's trial and his sentence of 47 years incarceration.

4. *THE REFERENCE HEARING COURT SHOULD HAVE CONSIDERED SHELBY'S CLAIM THAT DEFENSE COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO PREPARE SHELBY FOR TESTIFYING AND FAILED TO CALL SHELBY AS A WITNESS*

The State incorrectly argues that Shelby was properly prepared to testify and advised of his right to testify at trial. In support of its argument, the State starts by citing the trial court's advisement to Shelby prior to the CrR 3.5 hearing that *if* he were to testify at the hearing, his testimony could be used against him if he testified at trial. RP 97-98. The State's conclusion that this was a clear advisement by the court to Shelby that he could testify during his trial is a

stretch at best. The trial court was only speaking of Shelby's right to testify at the pre-trial hearing and never said anything about Shelby's right to testify at trial.

The State then argues that testimony at the reference hearing shows that defense counsel discussed with Shelby his testifying at trial. The State cites Shelby's reference hearing statements that he discussed his self-defense claim and the possibility of testifying at trial. After the State's citation, Shelby went on to state:

- Q: Did she [counsel] ever prepare you to testify at trial?
A: No, she didn't
Q: Did she ever run through a practice run of you testifying with you?
A: No, she didn't.

RP 172.

- Q: Did he go through any practice runs of you testifying?
A: No, he didn't.

RP 183. The State can only establish that Shelby attempted to discuss testifying with his attorneys – nothing more. The record clearly shows that after Shelby attempted to discuss testifying with his attorney's, they did absolutely nothing to prepare him to testify, and they ultimately decided not to call him, in addition to calling no other witnesses.

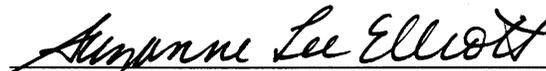
The U.S. Supreme Court stated, "the most important witness for the defense in many criminal cases is the defendant himself." *Rock v. Arkansas*, 483 U.S. 44, 52, 107 S.Ct. 2704, 2709, 97 L.Ed.2d 37 (1987). Not only did trial counsel fail to prepare to cross-examine the State's witnesses, but they also failed to call any witnesses on Shelby's behalf, and as the Supreme Court states, the most important witness in his case is Shelby himself. The jury was never allowed to hear from Shelby, which made it nearly impossible for them to identify with

Shelby's defense. Because counsel failed to prepare Shelby and did not allow him to make the decision whether to testify, and, despite having self-defense jury instructions, counsel called no other witnesses on Shelby's behalf, counsel's performance was deficient and prejudiced Shelby's defense.

B. CONCLUSION

The only explanation for counsel's failure to investigate, interview or call Singleton as a witness is that he was Pierson's client in another matter. Thus, the DAC attorneys chose to honor their duties to Singleton over their duties to Shelby. Thus, this Court should find that this is a separate basis for granting Shelby a new trial.

Respectfully submitted this 27th day of June, 2006.



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CERTIFICATION OF SERVICE

I declare under penalty of perjury that on June 27, 2006, I placed one copy of this document in the United States Mail, postage prepaid, to:

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