Original

NO. 34615-0-II
Cowlitz Co. Cause NO. 05-1-00798-0

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO RIAL, JR.,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Katrina "Kat" Weir and Nick "Little Nick" Marsden were a young couple who had been involved in an on-again off-again relationship for about four years. RP 446-47. In the end, Katrina, or Kat as she is called, would give birth to Nick Marsden's child, but not before they had split up for the last time. Id. By the time Kat gave birth to their child, Kat was involved in a new relationship with the defendant, Antonio "Tony Cahoney" Rial. Id. By all accounts, the defendant and Marsden had been friends, but in the two to three months prior to the events at issue, that relationship had deteriorated. RP 447. Not surprisingly, their relationship had soured as a result of the defendant's relationship with Kat. RP - 458.

On several occasions in the weeks before the shooting, Nick and the defendant had been in physical fights and several verbal arguments. RP 449–461, 518–20. On July 1, 2005, Nick Marsden and his friend "Leto" came to Kat's house and Nick and the defendant got into an argument. RP 519. While the defendant and Nick were outside arguing,

"Leto" went to his cars and grabbed a gun. RP 519. Brandon Davis, who was friends with both the defendant and Nick Marsden, intervened and broke up the fight. RP 519.

Later that night, the defendant complained to Richard White (Kat's cousin who also at the time lived with Kat and her family) that Nick Marsden had taken his pride from him. RP 839. At that time, Richard White saw that the defendant had a gun. RP 840. At trial, Richard White was able to identify Exhibit 26 as the gun he saw in the defendant's possession the day before the fatal shooting of Nick Marsden. RP 841. This was the same gun that forensic scientist concluded fired the fatal shots to Marsden. RP 272, 762-63.

In the early afternoon of July 2, 2005, Nick Marsden was hanging out in the garage at the residence of Richie Barker at 268 Baltimore Street. RP 819. Also hanging out in the garage were Jennifer Herman, Jennifer Brockett, Jessica Hogman and her husband Darrel. RP 284, 302, 401, 558.

Several witnesses saw the defendant walking towards Richie Barker's house that early afternoon. RP 193, 501, 538. Richie Barker, in fact, greeted the defendant as he was walking past him towards Richie's garage. RP 193. The defendant ignored Richie's greeting, and continued

making his way towards the garage. Id. Once in the garage, and in front of the several eye-witnesses, the defendant fired several shots at Nick Marsden, killing him. RP 285, 302, 402, 558.

The defendant quickly left the garage, followed by Jessica and Darrel Hogman. RP 302-03. Jennifer Herman would later come out of the garage, covered in blood, and hysterically repeatedly screaming, "Tony shot Nick. Tony shot Nick." RP 175, 528-29.

Meanwhile, the defendant returned to Kat's house (not too far from Richie Barker's residence). Word of this tragic incident had spread quickly through this small neighborhood, and not long after the defendant returned to Kat's house, Kat's mom, Corena ran into Jennifer Herman covered in Nick Marsden's blood and crying out that "Tony shot Nick." RP 528-29. Corena quickly returned home to confront the defendant about the allegation, and told him to leave the house. RP 529.

The defendant then jumped into Richard White's car with him, pulled a gun on him, and told him to drive him away. RP 840. Richard White, who was admittedly high on methamphetamine at the time, and had been up "tweaking" and pulling his car apart, quickly reassembled the steering on his car, and drove off with the defendant. RP 838–40. The

defendant did not tell Richard White where to take him, he only asked him to take him somewhere safe. RP 841. The defendant then placed the gun under his car seat. RP 841.

Richard drove the defendant across the Columbia River into Rainier, Oregon, where Richard's friends and family lived. Id. While in route, Richard White asked the defendant if what Corena had said was true. RP 849. In response, the defendant nodded in the affirmative. Id. Once Richard got the defendant to Richard's friends house in Rainier, Oregon, and while the defendant was occupied, Richard removed the defendant's gun from under the car seat and hid it under a rock. RP 843–845.

The gun was eventually recovered from that hiding place by Steve Johnson. RP 616. Mr. Johnson was a good friend of Nick Marsden's who retrieved the murder weapon in hopes of getting it into the hands of police. RP 617. Mr. Johnson testified that he gave the gun to a guy named "Joey." Id.

The gun then ended up with Jeremy Andersen, who in turn deposited the gun across the street from the crime scene where police were directed to find it. RP 904. Once the police located the gun, DNA testing

was performed on the gun, and the defendant's DNA was found inside the gun, on the top of the magazine where the bullets are loaded. RP 780–782. Moreover, forensic analysis confirmed that the bullets that killed Marsden had been fired from this same gun (Exhibit 26). RP 272, 762–63.

On July 5, 2005, three days after the fatal shooting of Nick Marsden, Detectives Huhta and Deisher interviewed the defendant at the Columbia County Jail in Rainier, Oregon. At one point during the State's questioning of Detective Huhta, Detective Huhta testified that during his interview of the defendant he started asking the defendant questions to test his memory. RP 978. The defendant indicated that he didn't remember anything about his last birthday, Christmas, or New Years. RP 978. At that point, the prosecutor asked, "Were you concerned that he didn't know what the heck was going on?" Detective Huhta responded, "No." Id.

Detective Huhta then went on to testify that although the defendant had told them that he did not remember much of what happened, he did remember that Nick was upset about a dog. RP 982. The defendant would also go on to explain that after the defendant entered the garage, Nick pulled a gun on the defendant and tried to shoot him. Id. The defendant told detectives that he kicked the gun out of Nick's hand, the

gun fell to the floor, the defendant picked the gun up, and although he didn't remember shooting the gun, it fired. RP 983. The defendant couldn't remember if the firearm was a pistol, or a rifle, or anything about the gun itself. RP 981–983.

This case proceeded to trial on March 20, 2006 on the charge of murder in the first degree with a firearm enhancement. RP 116, CP 23.

During pre-trial discussions prior to the jury entering the courtroom, the trial court cautioned the defendant:

> Mr. Rial, I noticed that you are tending to react to some things that go on. You know, to some degree, that's natural. All right. That's going to happen. I caution you, one, that if it gets extreme, I will take - - I'll send the jury out and we'll talk about it. Two, it may actually damage your case.
>
> So, you know, you need to – as – remain as poker-faced as possible, everybody in the courtroom, because the jury needs to decide this case solely on the evidence, and the evidence presented in open court. All right. RP 145.

The record also reveals pre-trial discussion regarding trial counsel's prior representation of one of the State's witnesses, Steve Johnson. RP 140. There is no indication that Mr. Scudder represented Mr. Johnson on a matter in any way related to the case at bar, nevertheless, in response to trial counsel's suggestion, the court appointed

another attorney to handle the cross-examination of Mr. Johnson. RP 140, 603.

Additionally, the court asked the defense if they were planning to argue self-defense. RP 126. Trial counsel indicated to the court that the defense was one of general denial, and they would not be proceeding under a self-defense theory. RP 126.

After the presentation of evidence, the following occurred between the court and defense counsel:

> COURT: Counsel, you were not going to raise self-defense; is that correct, that was a conscious decision?
>
> COUNSEL: It was a conscious decision.
>
> COURT: And you've discussed that with your client, you're not raising that; is that correct?
>
> COUNSEL: That's correct.
>
> COURT: All right. Okay. Because I will give that instruction, if you request. I just want to be sure that that's on the record. Okay? All right.
>
> COUNSEL: I understand.

RP 1000–1001.

During closing argument, defense counsel urges the jury not to find premeditation or intent. RP 1040. He argued, "We had Mr. Rial

going in quickly and reacting, and that's not deliberation. It may not be that he even had time to form the intent. He's in the – basically in a spot where he's had significant problems with Mr. Marsden, sees this weapon, and reacts." RP 1043.

The jury found the defendant guilty of murder in the first degree with a firearm enhancement. CP 83, 84.

ARGUMENT

I. THE TRIAL COURT'S CAUTION TO THE DEFENDANT TO REMAIN "POKER FACED" DID NOT DENY HIM DUE PROCESS.

Although not objected to at trial, issues of constitutional magnitude may be raised for the first time on appeal. *State v. Scott*, 110 Wash.2d 682, 688, 75 P.2d 492 (1988). When analyzing an alleged constitutional error raised for the first time on appeal, the reviewing court will first determine whether the error indeed raises an issue of constitutional magnitude *Id.* Once a determination of constitutional error has been made, the reviewing court will determine whether the error is harmless. *Id.* An error of constitutional magnitude is harmless if it can be said beyond a reasonable doubt that the untainted evidence is so overwhelming

that it necessarily leads to a finding of guilt. *State v. St. Pierre*, 111 Wash.2d 105, 119, 759 P.2d 383 (1988). The State bears the burden of showing that a constitutional error was harmless. *State v. Easter*, 130 Wash.2d 228, 242, 922 P.2d 1285 (1996).

It is doubtful that the trial court's caution to the defendant to remain "poker faced" constitutes error of constitutional magnitude, however, assuming for the sake of argument that the trial court's admonishment was constitutional error, it was harmless.

While the trial court's caution to the defendant to remain "poker faced" was arguably inappropriate, there is nothing in the record that indicates that the defendant indeed remained poker faced, or that the defendant's expression affected the jury's determination of his guilt. Unquestionably, the testimony of the several eye witnesses who testified to having seen the defendant shoot and kill the victim are what lead to their verdict, not defendant's facial expressions -- or lack thereof. Accordingly, due to the overwhelming evidence presented at trial, it cannot be said that the court's admonishment to the defendant had any impact on the jury's determination, and thus, his instruction to the defendant was harmless beyond a reasonable doubt.

II. THE DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL DECLINED THE COURT'S INVITATION TO INCLUDE A SELF-DEFENSE INSTRUCTION IN LIGHT OF THE STATE'S EVIDENCE THAT THE DEFENDANT STATED TO DETECTIVES THAT THE VICTIM HAD PULLED A GUN ON HIM PRIOR TO HIS SHOOTING THE VICTIM.

The defendant argues that trial counsel's performance fell below the standard of reasonableness for failing to argue self-defense. In order to be entitled to a self-defense instruction, a defendant bears the initial burden of producing some evidence tending to prove circumstances amounting to self-defense. *State v. Acosta*, 101 Wash.2d 612, 619, 683 P.2d 1069 (1984). Specifically, that evidence must establish the statutory elements of a reasonable apprehension of great bodily harm and imminent danger. RCW 9A.16.050. Moreover, the evidence must establish a confrontation or conflict, not instigated or provoked by the defendant, which would induce a reasonable person, considering all the facts and circumstances known to the defendant, to believe that there was imminent danger of great bodily harm about to be inflicted. *State v. Walker*, 40 Wash.App. 658, 662, 700 P.2d 1168, *review denied*, 104 Wash.2d 1012 (1985).

The evidence that the defendant must produce would show that (1) he had a good faith belief that the use of force was necessary, and (2) that his belief, from an objective standpoint, was reasonable. *State v. Bell,* 60 Wn.App. 561, 805 P.2d 815 (1991).

In the present case, the defendant did not take the stand, nor present any evidence. The only evidence put forth that could arguably support self-defense were the statements defendant made to detectives and revealed during their testimony in the State's case-in-chief.

In sum, detectives testified that the defendant had told them that he did not remember much of what happened, although he did remember that Nick was upset about a dog. RP 978–984. He further told detectives that after he the entered the garage, Nick pulled a gun on him and tried to shoot him. Id. The defendant told detectives that he kicked the gun out of Nick's hand, the gun fell to the floor, the defendant picked the gun up, and although he didn't remember shooting the gun, it fired. Id.

The evidence on the record, if deemed credible, would establish that Nick pulled a gun on the defendant. Unquestionably, pulling a gun would be an act that could reasonably lead a person to feel compelled to defend himself. However, the defendant's statement also indicates that the

defendant had succeeded in disarming Nick Marsden. At that point, any previously perceived danger was eliminated, and it cannot be said that shooting Nick at that point could be reasonably justified.

Moreover, its unclear whether the defendant's statement to detectives implied that the firing of the gun was accidental. In closing argument, defendant's attorney argues that the jury should not find his client guilty of premeditated, intentional murder. Consequently, it appears that the defense may have been that the shooting was accidental. In that case, self-defense is not available. *State v. Baker*, 58 Wash.App. 222, 792 P.2d 542 (1990).

Most importantly in this case, however, trial counsel could not argue self-defense if the defendant's communications with him were contrary to such a defense. Trial counsel will always be limited by the version of events relayed to him by his client. After all, the evidence admitted that appellant counsel is pointing to for self-defense was not presented by the defense, but rather the State. Defense counsel could not argue self defense if his client during consultation denied the events presented by the State's witnesses.

The test for ineffective assistance of counsel is whether (1) the defense counsel's performance fell below an objective standard of reasonableness, and (2) whether this deficiency prejudiced the defendant. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

The reviewing appellate court must indulge in a strong presumption that counsel's performance is within the broad range of reasonable professional assistance. *State v. McCollum*, 88 Wn. App. 977, 981-82, 947 P.2d 1235 (1997), *citing Strickland v. Washington*, 466 U.S. at 689, 104 S.Ct. at 2065*; In re Peters*, 50 Wn. App. 702, 704, 750 P.2d 643 (1988). The presumption is that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment. For this reason, if defense counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *State v. Benn*, 120 Wn.2d 631, 665, 845 P.2d 289, *cert. denied* 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993).

In the present case, there was no evidence presented by the defense, nor did the defendant choose to testify. Instead, the case proceeded based upon a defense of general denial (RP 126), and during closing, defense argued insufficient evidence of premeditation and intent. This argument is inconsistent with self-defense. Appellant has not overcome the strong presumption that trial counsel was acting in furtherance of trial strategy by not asking for a self-defense instruction, as such an instruction would clearly have been incongruent with the arguments given during closing, and with the statements defendant made to detectives.

What is more, contrary to appellate counsel's suggestion, it is not appropriate for trial counsel to choose a defense that fits the facts as presented by the State if such a theory would be contrary to his understanding of the facts as relayed to him by his client. Based upon the record, there is no way of knowing *why* self-defense was not pursued, we only know that it was trial counsel's intent from the beginning to the end of the trial not to pursue self-defense. The law presumes that trial counsel's decisions are based upon sound trial tactics, and defendant has not bore his burden of showing that his general denial defense was not counsel's sound trial tactics.

III. DETECTIVE'S TESTIMONY THAT THE DEFENDANT WAS COHERENT DURING QUESTIONING WAS NOT A COMMENT OF DEFENDANT'S VERACITY.

The defendant argues on appeal that the State elicited impermissible opinion testimony regarding the defendant's credibility when the State asked Detective Huhta if during his questioning of the defendant he was concerned that the defendant "didn't know what the heck was going on." However, the State's question was attempting to bolster, not discredit, the statements made to detectives. In other words, the State disagrees with the defendant's interpretation of the questioning at issue, and contends that the testimony was not opinion testimony commenting on defendant's credibility, but instead, an attempt to assure the jury that the defendant was lucid at the time of questioning. Nevertheless, if the reviewing court determines that admission of such testimony was error, it was harmless error.

Unquestionably, opinion testimony is generally forbidden. *State v. Demery*, 144 Wash.2d 753, 759, 30 P.3d 1278 (2001). In the present case, the defendant argues that the State was attempting to elicit opinion testimony regarding defendant's veracity. Specifically, the defendant argues that Detective Huhta's testimony that the defendant did know what

was going on, meant that Detective Huhta was implying that the defendant was lying when he said he didn't remember the events he was being questioned about.

Instead, the line of questions appears to clarify that although the defendant explained he was forgetful and rather confused regarding the past events he was being questioned about, he appeared coherent at the time of the interview. While Detective Huhta was explaining the defendant's apparent state of mind during the time of the murder, and his inability to recollect in much detail what had transpired, the State was simply ensuring that at the time of the interview, the defendant appeared coherent and capable of otherwise recollecting events in order to give some assurance that the events defendant did recall were accurate.

Contrary to appellant counsel's claim, the State's questioning in this regard did more to bolster the credibility of defendant's statements – especially since those statements were highly incriminating. In other words, the State was just making sure that the jury knew the defendant appeared coherent when he admitted to detectives that he had fatally shot Nick Marsden.

IV. DEFENDANT DID NOT ESTABLISH THAT HIS ATTORNEY PROCEEDED TO TRIAL WITH A CONFLICT OF INTEREST.

The Sixth Amendment to the United States Constitution provides that "[in] all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. Amend. VI This right includes the right to the assistance of an attorney who is free from any conflict of interest in this case. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); *State v. Davis*, 141 Wash.2d 798, 860 10 P.3d 977 (2000).

The defendant bears the burden of proving that there was an actual conflict that adversely affected his or her lawyer's performance. *Mickens v. Taylor*, 535 U.S. 162, 172, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002). The possibility of a conflict is not enough to warrant reversal of a conviction. Instead, a defendant must show that his counsel actively represented conflicting interests. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct.1708, 64 L.Ed.2d 333 (1980).

In the case at bar, what is clear from the record is that trial counsel had previously represented one of the State's witnesses, Steve Johnson. However, defendant has failed to show that this conflict in any way

effected his counsel's performance. In fact, additional counsel was appointed for purposes of conducting examination of Mr. Johnson so that no actual conflict was present.

Accordingly, defendant has not met his burden of establishing that his trial counsel's conflict in any way affected the performance of either trial counsel on this case.

CONCLUSION

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

Respectfully submitted this 22nd day of February, 2007.

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Deputy Prosecuting Attorney
Representing Respondent

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,	)	**NO. 34615-0-II**
	)	**Cowlitz County No.**
Appellant,	)	**05-1-00798-0**
	)	
vs.	)	**CERTIFICATE OF**
	)	**MAILING**
ANTONIO RIAL, JR.,	)	
	)	
Respondent.	)	
	)	

COURT OF APPEALS
DIVISION II
07 FEB 26 PM 1:30
STATE OF WASHINGTON
BY _____
DEPUTY

I, Audrey J. Gilliam, certify and declare:

That on the 23 day of February, 2007, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

ANNE M. CRUSER
Attorney at Law
P. O. Box 1670
Kalama, Wa 98625

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

Dated this 23 day of February, 2007.

Audrey J. Gilliam

Audrey J. Gilliam