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No. 37675-0-II

DIVISION II OF THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KI KANG LEE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 06-1-05223-6

REPLY BRIEF

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STATEMENT OF THE CASE

Appellant adopts the statement of the case as set forth in his opening brief.

ARGUMENT

I. COUNSEL WAS INEFFECTIVE FOR FAILING TO INSTRUCT THE JURY TO CONSIDER ATTEMPTED MURDER IN THE SECOND DEGREE, AND FOR FAILING TO INCLUDE MR. LEE IN THE DECISION AS TO WHETHER THE LESSER-INCLUDED INSTRUCTION WOULD BE OFFERED.

The State concedes that attempted murder in the second degree is a lesser-included offense to attempted murder in the first degree. Brief of Respondent (BOR) at 36. Additionally, the State correctly points out that, "all-or-nothing" trial strategies are disfavored in Washington. BOR at 35; See State v. Ward, 125 Wn.App. 243, 104 P.3d 670 (2004); State v. Pittman, 134 Wn.App. 376, 166 P.3d 720 (2006). However, the State also urges this court to ignore established Washington case law in favor of rulings from other jurisdictions that refer to "all-or-nothing" trial strategies as "reasonable." BOR at 36. Respectfully, Mr. Lee requests that this Court follow established Washington precedent.

A recently published Division II case is on point. In State v. Grier, 208 P.3d 1221, 30

(2009), the Court cited State v. Pittman, 134 Wn.App. 376, 390, 166 P.3d 720 (2006), for the proposition that "deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance." Grier, 208 P.3d at 31. In determining that trial counsel's decision not to request a lesser-included instruction constituted ineffective assistance of counsel, the Court evaluated the following three "themes:" (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial. Id. at 30.

In Grier, the defendant was accused of shooting an aggressive man at short range - however, because the weapon was never found, defense counsel argued (1) that Ms. Grier wasn't the shooter, (2) that if she was involved, she acted in self-defense, and (3) that either way, Ms. Grier did not intend to kill. Because the facts in Grier are so similar to Mr. Lee's case -

especially considering the "intent" of the defendant was at issue in both cases - analysis of the "themes" set forth in Grier is appropriate.

a. Because the standard range sentence for attempted murder in the first degree is roughly double the range for attempted murder in the second degree, there is a significant difference between the penalties.

In Grier, the defendant was found guilty of second degree murder and thus, faced a sentencing range of 123-220 months in prison. Id. at 33. Had she been convicted of the lesser-included charge of first degree manslaughter (which was not offered), her range would have been 78-102 months. Id. at 33-34. The Court stated that "[t]he difference between the maximum sentences for second degree manslaughter and second degree murder is 193 months, a significant amount of time." Id. at 34. In its analysis, the Court stated:

> In Ward and Pittman, Division One of our court explained the significant difference in penalties for the charged crimes and the omitted lesser-included offenses. Ward was charged and convicted of two counts of second degree assault, for which he faced 89 months incarceration, even though some evidence demonstrated that he was guilty of only unlawful display of a weapon, a gross misdemeanor, for which the maximum

> sentence was one year of incarceration. Ward, 125 Wn.App. at 247-49. Pittman was charged and convicted of attempted residential burglary, for which he faced 9 to 10 ½ months in prison, even though some evidence tended to show that he was guilty of only attempted first degree criminal trespass, which carried a maximum sentence of 90 days in jail. Pittman, 134 Wn.App. at 380, 389. In both cases, the court explained that such a significant difference in penalties exposed the defendants to an unreasonably high risk. Id. at 388-90; Ward, 125 Wn.App. at 250-51. In both Pittman and Ward, Division One reversed and remanded for new trials, based on counsel's failure to request instructions on lesser-included offenses. Pittman, 134 Wn.App. at 390; Ward, 125 Wn.App. at 250-51.
>
> Similarly here, there is a significant difference between the sentences for second degree murder and for first and second degree manslaughter . In failing to request lesser-included manslaughter instructions, defense counsel abandoned the chance that Grier would be exposed to a much lower sentencing range.

Grier, 208 P.3d at 33-34.

Mr. Lee had no prior criminal history before he was convicted of attempted murder in the first degree and thus, his sentencing range was 180-240 months. RCW 9.94A.510; RCW 9.94A.515. He was sentenced to the low-end - 180 months. RP at 601. Had Mr. Lee been convicted of attempted murder in the second degree, his range would have been 92.25-123 months - roughly half the amount of

prison time. RCW 9.94A.510; RCW 9.94A.515. Because of this, there is clearly a "significant difference between the penalties," and the first "theme" is satisfied.

b. Defense theory that Mr. Lee suffered from mental illness, was intoxicated and did not either premeditate or intend to kill Ms. Kim would have been consistent with an instruction for attempted murder in the second degree.

During Mr. Lee's trial, his only witness was Dr. Paul Leung, M.D. RP at 379. Dr. Leung testified that Mr. Lee did not intend to assault or kill Ms. Kim. RP 387, 397. His opinion was based on Mr. Lee's history of depression as well as Mr. Lee's consumption of antidepressants and sleep medication - combined with the consumption of alcohol. RP 388-89. Given that the only difference between first and second degree attempted murder is "premeditation," and that both charges require "intent," no argument can be made that the defense strategy at trial would be inconsistent with an instruction for attempted murder in the second degree.

c. Defense counsel's "all-or-nothing" strategy created a significant risk for Mr. Lee, especially when counsel was unable to present the "voluntary intoxication" instruction.

The final theme concerns "the overall risk to the defendant, given the totality of the developments at trial." Grier, 208 P.3d at 32. In Grier, the Court stated that "the 'all-or-nothing' defense tactic is effective when one of the elements of a crime is highly disputed and the State has failed to establish every element beyond a reasonable doubt; in such a situation, the jury must acquit the defendant based on a reasonable doubt about proof of that element." Grier, 208 P.3d at 35; Ward, 125 Wn.App. at 250 (*quoting* Keeble v. United States, 412 U.S. 205, 212-13, 93 S.Ct. 1993 (1973). The Grier Court theorized that defense counsel was probably hoping for an acquittal - relying on the weak evidence that the defendant intended to kill the victim, or was even armed, and the strong evidence that the defendant was acting in self defense. Grier, 208 P.3d at 35. However, the Court found the "all-or-nothing" strategy troubling. Id. The Court stated:

> But defense counsel's asking the jury to acquit Grier on the insufficient evidence of the intent element alone was unreasonable because of the overwhelming evidence that Grier was guilty of some offense: In short, [the victim's] being shot and killed was highly disproportionate to his advancing toward Grier and shoving her.

Id. at 36.

In Mr. Lee's case, defense counsel was seemingly basing his "all-or-nothing" strategy on a lack of premeditation while ignoring that the jury would probably find Mr. Lee guilty of something. This was precisely the situation the Grier Court considered when it analyzed Pittman and Ward - which both quoted the following from Keeble:

> [I]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction . precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

Grier, 208 P.3d at 36 (*quoting* Keeble, 412 U.S. at 212-13); Pittman, 134 Wn.App. at 388; Ward, 125 Wn.App. at 250.

Here, while Mr. Lee's counsel may have been correct that the evidence of premeditation was not overwhelming, there was still plenty of evidence of wrongdoing and - like Grier, Keeble, Pittman and Ward - it was ludicrous of defense counsel to believe that a jury would not convict Mr. Lee of *something*. Additionally, because the final theme in Grier concerns "the overall risk to the defendant, given the totality of the developments at trial," it is outrageous that defense counsel would not request the lesser-included instruction following his inability to secure a voluntary intoxication instruction. Defense counsel's entire approach to Mr. Lee's case was seemingly based on his ability to include the voluntary intoxication instruction, and when this became impossible, counsel had a duty to forgo the "all-or-nothing" strategy and ensure that his client wasn't at risk of being over-punished.

Mr. Lee was supremely prejudiced by his defense counsel's failure to request a lesser-

included jury instruction. Consistent with the analysis set-forth in Grier and Keeble, Mr. Lee's jury was unable to fairly consider all of the evidence and mitigating factors that might support an appropriate conviction for murder in the second degree because of defense counsel's recklessly employed "all-or-nothing" strategy.

Finally, counsel's actions were particularly egregious in this case because he failed to include Mr. Lee in the decision whether to request the lesser-included instruction. This failure to communicate was supremely prejudicial to Mr. Lee - perhaps doubling his prison sentence - in addition to being a violation of several rules of professional conduct.

II. COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL WITNESSES ON MR. LEE'S BEHALF, HIS FAILURE TO INVESTIGATE, HIS FAILURE TO COMPETENTLY EXAMINE AND CROSS-EXAMINE WITNESSES, HIS FAILURE TO DILIGENTLY SEEK ESSENTIAL DISCOVERY, AND HIS FAILURE TO PRESENT MITIGATING EVIDENCE.

As this court is aware, failure of defense counsel to properly investigate or interview witnesses is a recognized basis upon which ineffective assistance of counsel may rest. State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991).

When a defense attorney fails to investigate the facts, he or she fails to perform an essential duty which a reasonably competent attorney would have performed under similar circumstances. Hawkman v. Parratt, 661 F.2d 1161 (8th Cir. 1981); *accord* State v. Thomas, 109 Wn.2d 222, 230-31, 743 P.2d 816 (1987) (counsel's failure to investigate defense expert's qualifications was an omission which no reasonably competent counsel would have committed); State v. Jury, 19 Wn.App.256, 263-64, 576 P.2d 1302, *rev. denied*, 90 Wn.2d 1006 (1978) (counsel's failure to acquaint himself with the facts of the case by interviewing witnesses was an omission which no reasonably competent counsel would have committed); State v. Byrd, 30 Wn.App. 794, 638 P.2d 601 (1981) (counsel's failure to call a key witness to testify could not be justified and constituted ineffective assistance of counsel).

In State v. Visitacion, 55 Wn.App. 166, 776 P.2d 986 (1989), the Court held that defense counsel's performance was deficient where he rejected two possible witnesses, based upon their

police statements, without making any effort to contact or interview them. Id. at 174.

In Byrd, the defendant was charged and convicted of raping a hitchhiker that he and a friend had picked up and taken to their apartment. Byrd, 30 Wn.App. at 796. At trial, Byrd's counsel failed to subpoena a neighbor who heard three people enter the apartment "in a jovial mood" - despite the fact that this testimony, had it been given, would have directly contradicted that of a prosecuting witness. Id. at 798. Citing ineffective assistance of counsel, Division I remanded Mr. Byrd's personal restraint petition for a hearing to determine the truth of the neighbor's affidavit. Id. at 800. The court cited Jury for the proposition that the presumption of counsel's competence can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial.

Here, the alleged victim, Ms. Kim, was not interviewed by defense counsel until after trial began. RP 5, 23. Additionally, the only defense witness, Dr. Leung, did not receive a copy of the State's expert report from Western State Hospital from defense counsel. RP at 401. Defense counsel also failed to provide Dr. Leung with separate witness statements which were part of the discovery in the case, and he has not provided a copy of the transcribed victim statement. RP 402-403. Finally, Dr. Leung was not provided with the victim's medical records, photos of the scene, nor the 911 tapes. RP 403. Without the above materials, the witness's performance obviously fell below an objective standard of reasonableness.

Mr. Lee's attorney also failed to interview Jongwon Yi and Dr. Steve Baek - two individuals who were present at the dinner immediately proceeding the incident - who would have provided evidence necessary to secure a voluntary intoxication instruction. The State argues that to not interview these two individuals constituted effective representation despite the overwhelming

case law to the contrary. Additionally, the State argues that Dr. Baek's testimony would not have assisted Mr. Lee because Dr. Baek "gave no information as to how the alcohol affected [the] defendant's mind or body." BOR at 28-9. The State makes this claim in the same paragraph it acknowledges that Dr. Baek's testimony would have been that "he observed defendant consume nearly two bottles of alcohol and was obviously intoxicated." Id. at 29. Somehow the State contends that a witness observation of someone who is "obviously intoxicated" is insufficient to prove that alcohol had an effect on the persons mind or body - and that counsel is acting effectively when he/she fails to interview witnesses who were with the defendant and the victim in the minutes leading up to the crime.

The State also argues that counsel was not deficient for failing to investigate how much alcohol was in a bottle of the beverage the defendant consumed at dinner, the amount of medication Mr. Lee had taken that day, and the effects of mixing the alcohol and the medication. However, a lawyer's duty is to be a zealous

advocate for his or her client; consistent with Jury, Byrd and Visitacion, counsel is ineffective when he fails to conduct witness interviews, fails to conduct appropriate factual or legal investigations and fails to allow himself enough time for reflection and preparation for trial.

III. RESPECTFULLY, THIS COURT SHOULD ORDER A REFERENCE HEARING TO DETERMINE WHETHER TRIAL COUNSEL COMMUNICATED WITH MR. LEE REGARDING THE DECISION TO NOT REQUEST A LESSER-INCLUDED JURY INSTRUCTION.

The State contends that it spoke with Mr. Lee's trial counsel in early June about counsel's willingness to make a declaration relating to this issue. BOR at 37. The State further asserts that Mr. James Kim advised the State that he "would review defendant's pleadings and let [the State] know if he would do a declaration," but that the State has not hear back from Mr. Kim. Id. Because of this, the State, in its brief has joined the defendant's request for a reference hearing, "if the Court finds that it needs additional facts to resolve the issue." Id.

Respectfully, Mr. Lee renews his request for a reference hearing relating this issue, based on the aforementioned facts and authorities.

CONCLUSION

Mr. Lee was subjected to numerous blunders on the part of his defense counsel - such that he was prejudiced to the point of not receiving a fair trial. His counsel's failure to request a lesser-included jury instruction prevented the jury from fairly considering all of the evidence and mitigating factors that would support a conviction for attempted murder in the second degree. Additionally Mr. Lee was prejudiced by numerous other mistakes, oversights and instances of incompetence on the part of his own defense attorney, such that he did not receive the constitutionally guaranteed effective assistance of counsel.

RESPECTFULLY SUBMITTED this 24th day of July, 2009.

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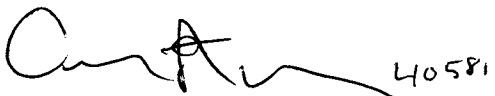

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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 24th day of July, 2009.

Lee Ann Mathews