

No. 49444-2-II
Consolidated with 49530-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ROWLAND,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Mr. Rowland was denied the effective assistance of counsel when his attorney inexplicably withdrew the previously requested affirmative defense to first degree felony murder jury instruction.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A criminal defendant has the constitutionally protected right to the effective assistance of counsel. Where counsel's actions fall below the standard of practice and there is a reasonable probability the outcome would have been different absent the error, the appellate court must order a new trial. Counsel for Mr. Rowland offered an affirmative defense instruction in this first degree murder trial but inexplicably withdrew it thereby crippling Mr. Rowland's defense. Taking the evidence in the light most favorable to Mr. Rowland, he was entitled to the instruction. Is reversal and remand for a new trial required based upon the deficient performance of defense counsel?

C. STATEMENT OF THE CASE

Juan Hildago Mendoza was a major drug dealer in Pierce County. In 2012 when he was arrested and prosecuted in federal court, police seized 32 pounds of heroin and two kilograms of methamphetamine as well as \$37,800 in cash. 6/27/2016RP 912-23.

Alberto Mendoza Ortega worked as a mechanic at a garage in Lakewood. 6/22/2016RP 739. Mr. Ortega also assisted his cousin, Mr. Mendoza, in selling drugs. 6/22/2016RP 738.

In 2012, William Alvarez Calo also began assisting Mr. Mendoza in selling drugs. 6/22/2016RP 739. In addition, Calo worked as a mechanic at the garage where Alberto Ortega worked. *Id.* Mr. Mendoza fired Calo because Calo was stealing drugs and money from him. 6/22/2016RP 743-45. As part of his association with Mr. Mendoza, Calo knew where Mr. Mendoza kept his drugs and money. 6/22/2016RP 743. Calo was angry about being fired by Mr. Mendoza and began selling drugs for another dealer. 6/29/2016RP 1266.

Calo lived in a house at 70th and Pine in Lakewood with a detached garage. 6/27/2016RP 946-47. This garage became a meeting place where friends and associates of Calo gathered. Mr. Rowland was one of the people who went to the garage. 7/14/2016RP 2066; 7/18/2016RP 2151-52.

In October 2012, Calo was arrested and his associates posted bail for his release. 6/29/2016RP 1275. Calo was still angry at Mr. Mendoza and had met a man while in jail to whom Mr. Mendoza owed money. 6/29/2016RP 1276. Calo vowed to collect this debt by robbing

and killing Mr. Mendoza. 6/29/2016RP 1276. Calo repeatedly talked about his plan all of the time. 6/29/2016RP 1277. Calo invited his friends and associates to join his plan, including co-appellant, Mazzar Robinson, who frequented the garage. 6/29/2016RP 1280.

In November 2012, the plan to rob and kill Mr. Mendoza began to take shape. 6/29/16RP 1286. On November 12, 2012, approximately seven to 10 associates of Calo arrived at the garage. 7/13/2016RP 1811. The plan that developed was that the group would go to Mr. Mendoza's house where they would restrain him so Calo could come and kill him. 6/29/2016RP 1285. The group would then go to the house where Mr. Mendoza kept his drugs, his "stash house," and steal the drugs. 6/29/2016RP 1285. Calo passed out firearms with one being handed to Mr. Robinson. 7/13/2016RP1814-15.

As the group was beginning to leave to execute Calo's plan, Mr. Rowland arrived. 6/29/2016RP 1286. Mr. Rowland had not been involved in any of the prior planning. 6/30/2016RP 1363. Calo offered Mr. Rowland money if Mr. Rowland engaged in the robbery. 7/14/2016RP 2066. Mr. Rowland drove his car with two of the other men and Mr. Robinson drove his car with one other associate. 6/29/2016RP 1287. Mr. Rowland was not armed.

The group started towards Mr. Mendoza's house but a phone call from Calo redirected them to Mr. Mendoza's stash house. 7/11/2016RP 1510. According to the information they had, no one was supposed to be in this house. 6/30/1016RP 1438.

The group arrived at the house and gathered outside. 6/29/2016RP 1290. As they approached the house, Mr. Rowland was the last in line. 6/29/2016RP 1292. Mr. Robinson and another individual went to the door, opened it and entered. *Id.* Mr. Robinson encountered an individual inside the house and shot him. *Id.* This person later died. 6/20/2012RP 444-50, 6/21/2012RP 574. Everyone immediately fled. *Id.* Mr. Rowland was subsequently arrested in Portland. 7/18/2016RP 2176.

Mr. Rowland was charged with first degree felony murder, conspiracy to commit first degree murder, first degree burglary and attempted first degree robbery. CP 15-17. All counts except the conspiracy count included firearm enhancements. CP 15-17.

Mr. Rowland requested that the affirmative defense instruction to first degree felony murder, *Washington Pattern Jury Instruction* 19.01, be given to the jury. CP 231. The instruction states that it is a

defense to first degree felony murder if the jury finds by a preponderance of the evidence that the defendant:

- (i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
- (ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and
- (iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
- (iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

CP 231.

At the conclusion of the trial, Mr. Rowland's attorney unexpectedly and inexplicably withdrew the affirmative defense jury instruction that he had originally requested. 7/20/2016RP 2450. When confronted by the prosecutor that the decision in *State v. Fisher*¹ had recently been decided where the failure to give WPIC 19.01 was found to be error, counsel failed to provide a valid reason for withdrawing the instruction:

¹ 185 Wn.2d 836, 374 P.3d 1185 (2016).

Yes, Your Honor. I spent a lot of time looking at this and deciding whether or not I could use it or if it was appropriate in this case, and I made the decision to withdraw it. Other than that, I don't have anything to add to the record. But if, you know, if the State thinks it's -- or if the Court thinks it's error not to include it, I can't stop you from including it, but I'm not asking for it.

7/20/2016RP 2453. In light of defense counsel's withdrawal of the instruction, the trial court did not give the instruction.

Mr. Rowland was found guilty as charged of first degree felony murder, first degree burglary and attempted first degree robbery, all with firearm special verdicts. CP 213-14, 216-19. Mr. Rowland was acquitted of the conspiracy to commit murder count. CP 215. At sentencing, the trial court merged the attempted robbery and burglary counts into the murder conviction and imposed a 300 month standard range sentence. CP 323; 9/15/2016RP 2623.

D. ARGUMENT

1. Mr. Rowland’s right to the effective assistance of counsel and the right present a defense were violated when his trial attorney withdrew the requested affirmative defense jury instruction

- a. *Mr. Rowland had a constitutional right to effective assistance of counsel.*

A person accused of a crime has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI;² Const. art. I, § 22;³ *United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

² The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”

³ Article I, § 22 of the Washington Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel”

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”), *quoting Strickland*, 466 U.S. at 688. While an attorney's decisions are treated

with deference, his or her actions must be reasonable under all the circumstances. *Wiggins*, 539 U.S. at 533-34.

b. *Mr. Rowland was entitled to have the jury instructed on his theory of the case.*

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee a defendant's right to a trial by jury. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (the Sixth Amendment protects the defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'"). Similarly, the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

A defendant has the right to have the jury accurately instructed. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Thus, as part of the constitutionally protected right to present a defense, the defendant is entitled to instructions embodying his theory of the case if the evidence supports that theory. *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993).

“Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case.” *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

Further, due process requires that jury instructions allow the parties to argue all theories of their respective cases supported by sufficient evidence, fully instruct the jury on the defense theory, inform the jury of the applicable law, and give the jury discretion to decide questions of fact. *State v. Allen*, 161 Wn.App. 727, 734, 255 P.3d 784 (2011), *aff'd*, 176 Wn.2d 611 (2013). A criminal defendant has a right to have the jury instructed on a defense that is supported by substantial evidence. *State v. Walters*, 162 Wn.App. 74, 82, 255 P.3d 835 (2011). Thus, the court must give jury instructions that accurately state the law, that permit the defendant to argue his theory of the case, and that the evidence supports. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

When considering whether a proposed jury instruction is supported by sufficient evidence, the trial court must take the evidence and all reasonable inferences in the light most favorable to the requesting party. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56,

6 P.3d 1150 (2000). The evidence for the instruction may come from “whatever source” that tends to show the defendant is entitled to the instruction. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The trial court is justified in denying a requested instruction only where no credible evidence appears in the record to support it. *Id.*

c. *Taking the evidence in the light most favorable to Mr. Rowland, there was sufficient evidence to support the affirmative defense requested instruction.*

Under RCW 9A.32.030((1)(c)), a defendant is guilty of first degree murder where, among other offenses, he commits a first degree robbery or first degree burglary, *except*:

that in any prosecution under this subdivision (1)(c) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

- (i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and
- (ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and
- (iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and
- (iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

RCW 9A.32.030(1)(c).

As referenced by the State at trial, the decision in *Fisher* reversed a first degree murder conviction where the affirmative defense instruction referenced in RCW 9A.32.030(1)(c) was not given. 185 Wn.2d at 851-52. In *Fisher*, Ms. Fisher's boyfriend and her brother were unhappy with cocaine they had purchased and they decided to return to the dealer's home and rob him in order to get their money back. *Id.* at 839. Ms. Fisher was aware of the two men's plans and set up a drug deal so the men could return to the dealer's home. *Id.* The two men went to the home, confronted the dealer and shot him to death. *Id.* Ms. Fisher was charged with first and second degree felony murder and sought to have the jury instructed on the affirmative defense in RCW 9A.32.030(1)(c). *Id.* at 840. The trial court refused, noting Ms. Fisher did not call any witnesses on her behalf. *Id.* She was subsequently convicted of first degree murder. *Id.* at 841.

The Supreme Court reversed and ordered a new trial. *Fisher*, 185 Wn.2d at 851-52. The Court rejected a requirement that the defendant must produce evidence to support the instruction and noted the defendant can rely on any evidence in the record to support the request for the instruction. *Id.* at 851. After reviewing all of the evidence presented introduced at trial, the Court determined:

Read in this context, it is possible that a juror could decide that Fisher had shown by a preponderance of the evidence that she had no reasonable grounds to believe that the men were armed or that they intended to engage in conduct likely to result in death or serious injury. While not overwhelming, a defendant is required to produce only some evidence to satisfy the burden of production. The affirmative defense instruction should have been given to the jury. *See United States v. Zuniga*, 6 F.3d 569, 570 (9th Cir.1993) (“Even if the alibi evidence is ‘weak, insufficient, inconsistent, or of doubtful credibility,’ the instruction should be given.” (quoting *United States v. Washington*, 819 F.2d 221, 225 (9th Cir.1987))).

Fisher, 185 Wn.2d at 852.

Mr. Rowland was in the same position as Ms. Fisher. Here, as in *Fisher*, Mr. Rowland did not commit the murder of the victim, nor did he aid in its commission. Mr. Rowland was not armed with a deadly weapon, and since he arrived as the crew was leaving the garage, he had no reasonable grounds to believe that anyone else was armed. Finally, Mr. Rowland believed that the group was going to a house where no one was present in order to steal drugs and money and thus, he had no reasonable grounds to believe anyone was going to engage in conduct that was likely to result in death or serious injury. As a result, if the instruction had been requested, the trial court would have been obligated to instruct the jury on the affirmative defense. The

withdrawal of the instruction by Mr. Rowland's attorney was constitutionally deficient.

- d. *Defense counsel's deficient performance should leave this Court with no confidence in the outcome of Mr. Rowland's trial.*

If there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. *Thomas*, 109 Wn.2d at 226.

Viewing the evidence in the light most favorable to Mr. Rowland, if requested, the trial court would have had to instruct the jury on the affirmative defense to first degree felony murder. Defense counsel's requesting the instruction, then inexplicably withdrawing it without explanation crippled Mr. Rowland's defense. If the affirmative defense instruction been given, the jury may have acquitted Mr. Rowland of first degree murder. As a consequence, there is a reasonable probability the outcome of Mr. Rowland's trial would have

been different, thus requiring reversal of his convictions for in effective assistance of defense counsel.

2. Mr. Rowland adopts the arguments of co-appellant Mazzar Robinson.

To the extent applicable, pursuant to RAP 10.1(g)(2),⁴ Mr. Rowland adopts by reference the arguments set forth in co-appellant Mazzar Robinson's Brief of Appellant.

E. CONCLUSION

For the reasons stated, Mr. Rowland asks this Court to reverse his conviction with instructions to dismiss, or reverse and remand for a new trial.

DATED this 26th day of June 2017.

Respectfully submitted,

s/Thomas M. Kummerow

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⁴RAP 10.1(g) provides in relevant part:

In cases consolidated for the purpose of review and in a case with more than one party to a side, a party may. . . (2) file a separate brief and adopt by reference any part of the brief of another.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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v.)	
)	
MICHAEL ROWLAND,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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