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Court of Appeals
Division II
State of Washington
11/22/2017 4:25 PM

No. 49444-2-II
(Consolidated w/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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

Defense counsel’s constitutionally deficient performance denied Mr. Rowland his right to present a defense.

1. *Counsel’s performance was deficient.*

As expected, the State contends that counsel’s inexplicable withdrawal of the affirmative defense instruction was a “strong legitimate trial strategy or tactic.” Brief of Respondent at 35. For reasons explained here and in the Brief of Appellant, the State’s argument should be rejected.

It is important to start by noting:

Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel’s choices were strategic, but whether they were *reasonable*.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011) (emphasis added).

More importantly, in this context, in determining whether the evidence supports giving the proposed jury instruction, the court views the evidence in the light most favorable to the defendant. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

As argued in the Brief of Appellant, the decision in *State v. Fisher*, 185 Wn.2d 836, 374 P.3d (2016), establishes why counsel's withdrawal of the affirmative defense instruction was deficient performance. In facts very similar to here, Ms. Fisher requested the same affirmative defense instruction only to be denied by the trial court because the evidence supporting the instruction was not introduced at trial by her. *Fisher*, 185 Wn.2d at 840-41. The Supreme Court found that there was sufficient evidence in the record to support the giving of the instruction despite Ms. Fisher knowing in advance of the plot to rob the victim and setting up the meeting where the victim was subsequently shot and killed. *Id.* at 839-40, 851-52.

The State makes no attempt to distinguish the decision in *Fisher*, nor even cite it. This failure is very telling and is implicitly a concession on the State's part that Mr. Rowland was entitled to the instruction.

Following *Fisher*, there was ample evidence to support the affirmative instruction here. In fact, the evidence against the defendant in *Fisher* was far more incriminating than that against Mr. Rowland, yet the Supreme Court ruled it was error for the trial court not to have given the affirmative defense instruction. *Fisher*, 185 Wn.2d at 851-52.

Here, the evidence established that Mr. Rowland was not armed. Mr. Rowland repeatedly denied knowledge of a plan to rob or kill anyone, a fact confirmed by evidence that he arrived at the meeting planning the robbery just as everyone was leaving to engage in the offenses and after the final plans had been discussed. RP 6/229/2016RP 1286; 7/18/2016RP 2158, 2162-63. In addition, Mr. Rowland did not know where they were going until Jiffray Mendez told him they were driving to the Chocolate City neighborhood. 7/18/2016RP 2158. Mr. Rowland also testified he did not know the details of the plan and merely followed everyone else when they arrived at the apartment where Mr. Solis was subsequently shot. 7/18/2016RP 2161-63. Based on this testimony, Mr. Rowland was entitled to have the court instruct the jury on the affirmative defense. *Fisher*, 185 Wn.w2d at 852.

Finally, Mr. Rowland's entire defense was based upon the elements of the affirmative defense. As a result, an "all or nothing" defense was not reasonable where Mr. Rowland was entitled to the instruction and the result would have been the same; an acquittal. This distinguishes Mr. Rowland's case from *Grier*, upon which the State relies. Brief of Respondent at 31-35.

Grier involved a claim of ineffective assistance for not moving to have the jury instructed on lesser included offenses. 171 Wn.2d at 43. There it was entirely reasonable to drop the request for lesser included instructions, which would have given the jury the ability to offer a compromise verdict but upon which the evidence would have doomed it to failure given the evidence. *Id* at 42-45.¹

Counsel's inexplicable withdrawal of the affirmative defense instruction was not reasonable in light of the evidence before the jury, the fact the trial court would have been required to view the evidence in the light of Mr. Rowland, and also in light of the decision in *Fisher*. Counsel's performance was deficient.

2. *Counsel's deficient performance prejudiced Mr. Rowland requiring reversal of his convictions for ineffective assistance.*

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 v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A reasonable

¹ The State also argues that if Mr. Rowland had requested the instruction he would have had to abandon a defense theory that he lacked the requisite mental state. Brief of Respondent at 34. This is absurd as the defense is entitled to present inconsistent defense to the jury. *Mathews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988); *State v. Frost*, 160 Wn.2d 765, 772, 161 P.3d 361 (2007).

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.

Instructive on this point is the decision in *In re Hubert*, 138 Wn.App. 924, 158 P.3d 1282 (2007). In a second degree rape prosecution under that part of the statute criminalizing sex with a person who is incapable of consent by reason of being physically helpless, defense counsel failed to request an instruction on the statutory defense that the defendant reasonably believed the person was not mentally incapacitated. *Hubert*, 138 Wn.App. at 929. The Court of Appeals found this omission to be ineffective assistance which prejudiced Mr. Hubert:

Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial.

Hubert, 138 Wn.App. at 932. *Accord State v. Powell*, 150 Wn.App. 139, 154-58, 206 P.3d 703 (2009).

The same is true here. Defense counsel failed to request the sole available defense to felony murder where there was ample evidence to

support it. This failure was deficient performance that prejudiced Mr. Rowland and denied him a fair trial.

The State's argument that there was evidence that would lead one to reasonably believe Mr. Rowland knew the others were armed misses the point and attempts to distract from the issue at hand. Brief of Respondent at 36. The question is not one of the sufficiency of the evidence. Rather, the question is whether there was a reasonable probability of a different result had Mr. Rowland's requested instruction been given to the jury. *Strickland*, 466 U.S. at 694. In light of the fact he was entitled to the instruction and, had the jury been instructed on the affirmative defense, there was a reasonable probability of a different result.

This Court should reverse his conviction and remand for a new trial.

B. CONCLUSION

For the reasons stated, Mr. Rowland asks this Court to reverse his felony murder conviction and remand for a new trial.

DATED this 22nd day of November 2017.

Respectfully submitted,

s/Thomas M. Kummerow

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November 22, 2017 - 4:25 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49444-2
Appellate Court Case Title: State of Washington, Respondent v. Michael E. Rowland & Mazzar G. Robinson, Appellants
Superior Court Case Number: 14-1-01145-0

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