COA No. 29284-3-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JUSTIN W. CRENSHAW, Appellant.

BRIEF OF APPELLANT

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B. Mr. Crenshaw received ineffective assistance of counsel, who refused to request additional specific testing his expert required in order for him to show by scientific evidence that his client suffered from pathological intoxication, the crux of his diminished capacity defense.

Issues Pertaining to Assignments of Error

1. Because defense counsel was running for Spokane County Prosecutor while representing Mr. Crenshaw, should he have withdrawn from the case because of this irreconcilable conflict of interest that was ineffective assistance of counsel? (Assignment of Error A).

2. Is Mr. Crenshaw entitled to a new trial because he received ineffective assistance of counsel, who refused to request additional specific testing his expert required in order for him to show by scientific evidence that Mr. Crenshaw suffered from

pathological intoxication, the crux of his diminished capacity defense? (Assignment of Error B).

II. STATEMENT OF THE CASE

On June 18, 2010, Mr. Crenshaw was charged by second amended information with two counts of aggravated first degree murder:

> COUNT I: PREMEDITATED MURDER IN THE FIRST DEGREE, WITH AGGRAVATING CIRCUMSTANCES, committed as follows: That the defendant, JUSTIN W. CRENSHAW, in the State of Washington, on or about February 28, 2008, with premeditated intent to cause the deaths of SARAH A. CLARK did cause the deaths of SARAH A. CLARK, human beings, and the murders were part of a common scheme or plan as contained in Count II, the result of a single act, and the defendant being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.602 and 9.94A.533(4), and the current offense was aggravated by the following circumstance: the defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim, as provided by RCW 9.94A.535(3)(a).
>
> COUNT II: PREMEDITATED MURDER IN THE FIRST DEGREE, WITH AGGRAVATING CIRCUMSTANCES, committed as follows: That the defendant, JUSTIN W. CRENSHAW, in the State of Washington, on or about February 28, 2008, with premeditated intent to cause the deaths of TANNER E. PEHL did cause the deaths of TANNER E. PEHL, human beings, and the murders were part of a common scheme or plan as contained in Count I, the result of a single act, and the defendant being at said time armed with a deadly weapon, other than a firearm under the provisions of RCW 9,94A.602 and 9.94A.533(4), and the current offense was

> aggravated by the following circumstance: the defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim, as provided by RCW 9.94A.535(3)(a). (CP 846-47).

At a pretrial hearing, testimony revealed Mr. Crenshaw had told police officers he got aggressive and violent when he drank. (11/6/09 RP 136). On January 7, 2010, the court held a pretrial hearing in which the State commented:

> This is the date and time set for pretrial in this matter. We do have a trial date pending now of February 1st. And as the court recalls, we were last here and this case was continued so that [defense counsel] could have Mr. Crenshaw evaluated and have an expert witness, diminished capacity defense presented. I have not received a report. I will let [defense counsel] explain what the status of that is and go from there. (1/7/10 RP 284).

Defense counsel responded:

> I do have an expert that I have been consulting with. He has not been disclosed, although I have disclosed the nature of our defense generally. The expert has not been disclosed because he has suggested and required as a part of his ultimate opinion a suggestion that there be further testing. I'm not at liberty to disclose what that is, although I do understand from [the State] some of my purportedly sealed documents may have reached the court file, which may explain some of that if court has reviewed the file.
>
> At any rate, the testing that we are asking to have done has been – I sought various agencies to do that. I have now had three agencies who have agreed to do this. I've then sought preauthorization to have each of those agencies appointed. They were preauthorized to do so

> and then after calling to schedule the testing, I received calls from the various attorneys indicating that they have changed their mind and they will not do it. That's happened. (1/7/10 RP 284-85).

The court noted that the testing and report on Mr. Crenshaw had been authorized to be paid. (1/7/10 RP 285). Defense counsel represented to the court that the agencies refusing to do the testing were private. (*Id.* at 286). But he had found another agency that had agreed to do the testing and was involved with an assistant attorney general representing the agency:

> I have talked with that person. We expect the testing is going to happen now, but it will take a little bit of time to get the proper arrangements. . . (*Id.*).

Defense counsel further advised the court he was very confident that the testing was going to happen. (1/7/10 RP 286). He represented to the court that he needed to have this testing done so he could see how it would assist in the defense and, without this testing and this expert, he was unable to provide an adequate defense:

> Frankly, if I don't have that expert or, you know, that information, I would have to completely reformulate the defense. So, yes, it's absolutely necessary. (*Id.* at 287).

The court recognized the dilemma:

> You want these things to happen in a timely fashion,

> but when you look at the severity of the consequences of a conviction, you look at what's at stake here, and [defense counsel], who is a very experienced criminal attorney, says he can't do an adequate job for you unless he has an expert and a theory of the case, and without that he's putting you in jeopardy to go to trial. If I let it go to trial postured like this, then if there is a conviction, it will be reversed on appeal for ineffective assistance of counsel to shortcut the argument for you. (*Id.* at 290).

Subsequently, on February 22, 2010, defense counsel advised the court his pursuit of testing relating to the diminished capacity defense was moving along pending approval for payment. (2/22/10 RP 305-07). Mr. Crenshaw would have to be transported outside the jail for the testing, but counsel assured the court proper arrangements had been made and it was just a matter of scheduling the test. (*Id.* at 310). The University of Washington had agreed to do the testing. (2/24/10 RP 311). Although it appears the logistics were finally settled and another test was done by a medical provider, the test for pathological intoxication requested by the defense expert was not. (*See* 4/9/10 RP 317-27; 6/8/10 RP 2622-28).

At the June 8, 2010 status conference, Mr. Crenshaw advised the court that he felt there was a conflict with his attorney, who was running for prosecutor, and new counsel should be

assigned. (6/8/10 RP 2619). The court did not act on his request, but made his concerns of record. (*Id.* at 2625-2628).

With respect to testing, the record shows Mr. Crenshaw's counsel advised him that Dr. Jerry Larsen, the defense expert, had requested such additional testing on pathological intoxication:

> [Mr. Crenshaw]: However, I am more concerned for this reason, and specifically more this main reason, Your Honor, that on May 26 it was brought to my attention for the first time ever that there is testing that could further my defense, bring scientific evidence to my doctor diagnosed with my defense. . .
>
> My attorney claims at this time he is unable to recall the name of this testing and I have still not yet to learn it from my attorney. I would like to say, for the record, and make it clear, that if there is a possibility that this testing can bring scientific evidence to my defense, that I absolutely would take this opportunity to be able to get it. I do not know why I have never been told about this testing before May 26 of 2010. (6/8/10 RP 2618).

Defense counsel, however, failed to ask the trial court for this test, even though funding was available:

> [Defense counsel]: . . . So I was prepared in relation to this testing that Mr. Crenshaw refers to to ask Judge Moreno to have an in-camera hearing and a closed hearing, because I think that really goes more towards funding and some of this availability of the things that we have already pursued. (*Id.* at 2620).

Because his counsel did not pursue it, Mr. Crenshaw himself had to ask the trial court for the testing. (6/8/10 RP 2618-28). In response, defense counsel told the court he was ready to go with what he had and later described the test:

> . . . Your Honor, the testing would involve taking Mr. Crenshaw physically out of the jail and putting him in a controlled environment. I'm told by my doctor, who is Dr. Larsen, that's now being disclosed to the State, I am told that that testing would involve taking him to a controlled environment. It would have to be a hospital. A hospital would have to agree to this, and, of course, so would the court and the authorities who are responsible for confining Mr. Crenshaw. And he would be fed alcohol in controlled doses and observed and then in some way that I don't quite understand provoked to see if his use of liquor and alcohol results in unreasonable and strange reactions. I'm told by my doctor that that testing is possible; that he has done it on prior occasions, but only been when he was the director of the hospital to have this occur. (6/8/10 RP 2623).

Counsel went on to say:

> I have asked whether if we were to conduct this testing it would substantially impact your opinion on either one way or the other, and I think the best thing I could say is it does not appear that it would substantially impact his opinion either way because he has already reached an opinion based on observable facts and circumstances from the record in this case and then from other occurrences in Mr. Crenshaw's past which allow him to make that diagnosis.
>
> I have come to my own conclusions based on my experience and my training that that testing would

> not further Mr. Crenshaw's defense and has the potential to hurt it. And I guess, for the record, that's enough said. (*Id.* at 2623-24).

Apparently relying on defense counsel's representations that conflicted with Dr. Larsen's opinion the testing was required and necessary, the court assumed the request for testing was not going to be pursued. (6/8/10 RP 2625). The court also said, however, that it was not going to foreclose any further testing even though it eventually had to pass the relevance and *Frye* tests in order to be admissible. (*Id.* at 2626). Defense counsel failed to pursue the test even though Dr. Larsen had advised him it was crucial in order for him to substantiate his diagnosis of pathological intoxication by scientific evidence. (1/7/10 RP 284-87).

In his opening statement at trial, defense counsel asked the jurors to pay very close attention as he told them twice that Mr. Crenshaw was responsible for the deaths of Ms. Clark and Mr. Pehl. (7/12/10 RP 1181). The only defense was that Mr. Crenshaw "was not in a state of mind that night that these events occurred that he planned out and weighed and deliberated the consequences of any action that he was about to take and planned to take such action." (*Id.* at 1179). Counsel went on to explain:

> You are going to hear that Mr. Crenshaw suffers

> from a condition that is called alcohol idiosyncratic intoxication [pathological intoxication]. It is a condition, which, among other things, has the prerequisite that a small amount of alcohol consumed by an individual has the ability to change their mental capacity and the way that they think now I know you're thinking, well, of course, . . . that's what alcohol does. What you will hear is the reaction to a small amount of alcohol from somebody who suffers from this condition is qualitatively different than somebody who is merely intoxicated. So what this condition is not, you will hear, is it is not just a sensitivity to alcohol so that a person suffering from this condition just gets merely intoxicated easier than a normal person. That is not what it is. It is a condition that so affects the mind that it creates with a very small amount of alcohol very bizarre behavior. It often results in violent behavior. (*Id.* at 1181-1182).

Defense counsel reiterated the case was not a "who-done-it." (7/12/10 RP 1184). Rather, "[t]he issue is did Mr. Crenshaw suffer from this condition and how did it affect his ability to think and weigh consequences on the night of these crimes and the early morning. (*Id.* at 1185).

Defense expert Dr. Larsen was a psychiatrist. (7/21/10 RP 2244). In making a diagnosis and preparing for his testimony, the doctor went through records, but there was no additional testing done for pathological intoxication. (*Id.* at 2253-2254). He

diagnosed Mr. Crenshaw as suffering from pathological intoxication:

> In the late 1800s, the first record of, written record was that of a person becoming unreasonably intoxicated on small amounts of alcohol. The amount ingested is disproportional to the behavior. These people often become confused, their thinking becomes disorganized. They often become belligerent. They can become violent and it does not appear to be related to large amounts of alcohol. (*Id.* at 2259).

At trial, in the absence of this additional testing, the State was able to cross-examine Dr. Larsen with devastating effect on Mr. Crenshaw's sole defense:

> [State]: Is there any way to diagnose pathological intoxication in someone who has drank more than a small amount of alcohol?
>
> [Dr. Larsen]: If I had access to the individual in a controlled setting, yes, you could test and find out.
>
> [State]: So you can only do it if you had like very reliable observations from others looking at the onset, the amount a person drank and the behavior?
>
> [Dr. Larsen]: Correct.
>
> [State]: You don't have that in this case do you?
>
> [Dr. Larsen]: I do not.
>
> [State]: So you really can't diagnose pathological intoxication because of that?
>
> [Dr. Larsen]: I can't make that firm diagnosis, no. (7/21/10 RP 2623-2624).

Not surprisingly, the only defense offered by counsel failed.

Mr. Crenshaw was convicted of two counts of aggravated first degree murder. (CP 1132-1139). The court sentenced him to two consecutive life terms without the possibility of parole. (8/5/10 RP 2495-2r98; CP 1177). He appealed. (CP 1212).

III. ARGUMENT

A. Mr. Crenshaw received ineffective assistance of counsel, who was running for Spokane County Prosecutor just before and at the time of trial and should have withdrawn from the case because of this irreconcilable conflict.

Defense counsel was running for prosecutor when his decision to pursue the testing for pathological intoxication was being made and at the time of trial. Mr. Crenshaw advised the court that he objected to the conflict and wanted new counsel. (6/8/10 RP 2619). The court did not rule on his request. (*Id.* at 2625-2658).

RPC 1.7 provides in pertinent part:

> (a) Except as provided in paragraph (b), a lawyer not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of exists if:
>
> . . .

> (2) there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> . . .
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client . . .

Facing two counts of aggravated first degree murder at a horrific crime scene, Mr. Crenshaw voiced concern to the court about defense counsel's concurrent conflict between his duty to zealously represent his client and his personal interest in running for prosecutor. He could not defend Mr. Crenshaw to the best of his ability and obtain a good result for him without undermining and seriously damaging his credibility as the best candidate for Spokane County Prosecutor. The conflict is obvious, clear, and irreconcilable.

There is no indication in the record that defense counsel even recognized the conflict. And if he did, he did not advise the court that he reasonably believed he could provide competent and diligent representation to Mr. Crenshaw, who squarely raised the

issue. RPC 1.7(a)(2), (b)(1). Defense counsel failed to pursue the additional testing for pathological intoxication despite his acknowledgement to the court that it was absolutely necessary to have that testing done or he could not provide an adequate defense (1/7/10 RP 2887). He then failed to provide an adequate defense, just as he told the court, when he had the authorization to pursue that testing to back up the diagnosis of Dr. Larsen. The clear inference is that defense counsel compromised his representation of Mr. Crenshaw in a high-profile aggravated first degree murder case so as not to jeopardize his run for prosecutor.

In these circumstances, counsel should have withdrawn from such representation. *See* RPC 1.7, Comment 4. He did not. Then the court did not act on Mr. Crenshaw's request to remove counsel. This irreconcilable conflict of interest clearly prejudiced his client as the failure to provide an adequate defense resulted in Mr. Crenshaw's conviction.

The Sixth Amendment affords a criminal defendant the right to effective assistance of counsel, free from conflicts of interest. *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). An attorney's conflict of interest may create reversible error in two situations without a showing of actual prejudice. *State v. White*, 80

Wn. App. 406, 411, 907 P.3d 310 (1995), *review denied*, 129 Wn.2d 1012 (1996). First, reversal is always necessary when a defendant shows an actual conflict of interest adversely affecting his lawyer's performance. *In re Richardson*, 100 Wn.2d 669, 677, 675 P.2d 209 (1983). Second, a trial court commits reversible error if it knows or reasonably should know of a particular conflict into which it fails to inquire. *Id.* This is such a case and involves both situations that do not require a showing of prejudice. Mr. Crenshaw's convictions must therefore be reversed and a new trial granted. *Id.*

B. Mr. Crenshaw received ineffective assistance of counsel, who refused to request additional specific testing his expert required in order for him to show by scientific evidence that his client suffered from pathological intoxication, the crux of his diminished capacity defense.

To establish ineffective assistance of counsel, a defendant must prove deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). In any such claim, the court engages in a strong presumption counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Legitimate

trial strategy or tactics will not support a claim of ineffective assistance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

A lawyer's performance is deficient if he made errors so serious that he was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Prejudice requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986). But the defendant need not show that counsel's deficient performance more likely than not altered the outcome of the case. *Strickland*, 466 U.S. at 693.

Here, counsel's failure to get the additional testing for pathological intoxication that his expert "suggested and required as a part of his ultimate opinion" was deficient performance by any measure. (1/7/10 RP 284). Acknowledging his obligation to get the testing done, Mr. Crenshaw's counsel had advised the court the test was "absolutely necessary" so he could see how it would assist in the defense and, without it, he was unable to provide an adequate defense. (*Id.* at 287). The court agreed. (*Id.* at 290). Counsel knew what he had to do and he did not do it.

Five months later in the midst of his campaign for prosecutor, defense counsel abruptly changed his mind about the testing and told the court "I think the best thing I could say is it does not appear that [the testing] would substantially impact [Dr. Larsen's] opinion either way because he has already reached an opinion based on observable facts and circumstances from the record in this case and then from other occurrences in Mr. Crenshaw's past which allow him to make that diagnosis." (6/8/10 RP 2623). Counsel's actions reflected the conflict between representing his client zealously and his personal interest in becoming prosecutor.

This complete about-face from counsel's prior position on the testing ignored his clear representation to the court that his expert required that there be further testing as a necessary part of his ultimate opinion. (1/7/10 RP 284). Just before trial, counsel then advised the court he had come to his own conclusions "based on [his] experience and [his] training that that testing would not further Mr. Crenshaw's defense and has the potential to hurt it." (6/8/10 RP 2624).

But he was not the expert. Dr. Larsen was and he required that test so he could substantiate his diagnosis with scientific

evidence. Without it, Dr. Larsen was only able to testify at trial that he could not make a firm diagnosis Mr. Crenshaw suffered from pathological intoxication as there had been no testing. (7/21/10 RP 2624). Mr. Crenshaw's sole defense was destroyed by counsel's deficient performance in failing to pursue the test for his client, who had to ask for it himself and was rebuffed. (6/810 RP 2618-2628). There can be no legitimate trial strategy or tactics justifying counsel's decision to forego the testing he knew was absolutely necessary to the only defense he offered at trial. The first prong of the *Strickland* test is satisfied.

Mr. Crenshaw suffered prejudice from counsel's deficient performance because it deprived him of a fair trial. *Jeffries*, 105 Wn.2d at 418. Counsel's failure to test destroyed Dr. Larsen's diagnosis and, along with it, the diminished capacity defense because he could not substantiate his opinion with scientific evidence. *See State v. Furman*, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993) (diminished capacity is a medical condition not amounting to insanity that prevents defendant from possessing the requisite mental state to commit the crimes charged). The record contains testimony corroborating Mr. Crenshaw's bizarre and violent behavior when drinking. (7/14/10 RP 1621; 7/21/10 RP

2229-2243, 2252-2253). Dr. Larsen also testified it was possible for a person to have pathological intoxication even when highly intoxicated. (7/22/10 RP 2367). The diminished capacity defense based on pathological intoxication was essentially taken away and not even before the jury after Mr. Crenshaw's expert admittedly could not make a firm diagnosis in the absence of the testing he required.

With counsel not contesting his client killed the victims and not pursuing the testing necessary to support his only defense, Mr. Crenshaw suffered extreme prejudice to his case from counsel's deficient performance because there could be no verdict other than guilty. Had Dr. Larsen been able to make a firm diagnosis of pathological intoxication based on the testing, Mr. Crenshaw would have at least presented a viable defense and had a fair trial. Without it, he had no defense and no trial at all, much less a fair one. The second *Strickland* prong is satisfied as well.

Counsel gave ineffective assistance by failing to get the testing done for pathological intoxication. He thus presented no defense and his client was doomed to a conviction. This case is unlike *State v. A.N.J.*, 168 Wn.2d 91, 112, 225 P.3d 956 (2010), where counsel's failure to secure an expert witness was ineffective

assistance. Rather, Mr. Crenshaw's counsel did secure an expert, but failed to use that expert competently by ignoring his request to have necessary testing done in order to substantiate his opinion. This was ineffective assistance of counsel as well. Mr. Crenshaw must be granted a new trial.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Crenshaw respectfully urges this court to reverse his convictions and remand for new trial.

DATED this 7th day of November, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 7, 2012, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Justin W. Crenshaw, # 342568, Wash. St. Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362; and by email, as agreed between counsel, on Mark E. Lindsey at kowens@spokanecounty.org.