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DIVISION II

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NO. 38011-1-II

STATE OF WASHINGTON

BY *[Signature]*

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

STATE OF WASHINGTON,

Respondent,

v.

QUINCY VALENTINO HAWKINS,

Appellant.

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

The Honorable James R. Orlando

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to effective assistance of counsel where defense counsel changed appellant's defense from self-defense to excusable homicide.

2. Appellant was denied his right to effective assistance of counsel where defense counsel failed to properly cross-examination the medical examiner.

3. The trial court erred in calculating appellant's offender score.

Issues Pertaining to Assignments of Error

1. Was appellant denied his constitutional right to effective assistance of counsel where defense counsel failed to conduct a reasonable investigation and consequently changed appellant's defense from self-defense to excusable homicide to the detriment of his defense?

2. Was appellant denied his constitutional right to effective assistance of counsel where defense counsel failed to properly cross-examine the medical examiner as to the cause of death?

3. Did the trial court err in finding that the crimes of burglary and custodial interference did not constitute same criminal conduct when the offenses involved the same victim, same time and place, and same criminal intent?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On October 1, 2007, the State charged appellant, Quincy Valentino Hawkins, with one count of murder in the second degree while armed with a firearm, one count of assault in the first degree while armed with a firearm, and one count of unlawful possession of a firearm in the first degree. CP 1-2. Following a trial before the Honorable James R. Orlando, on June 26, 2008, a jury found Hawkins guilty of murder in the second degree while armed with a firearm, assault in the second degree while armed with a firearm, and unlawful possession of a firearm in the first degree. 8RP 830-33; CP 108, 109, 111, 112, 113. On July 2008, the court sentenced Hawkins to a total of 391 months in confinement and community custody. CP 20-21. Hawkins filed a timely appeal. CP 128-42.

2. Substantive Facts

Delena Alexander lives at 4303 South Cedar Street in Tacoma. 3RP 80-81. On September 29, 2007, she heard what she thought were fire crackers outside her townhouse, "I heard this pop, pop, pop, pop." 3RP 85. Thinking that teenagers were playing around her SUV that was parked in

¹ There are eight verbatim report of proceedings: 1RP - 10/18/07; 2RP - 5/20/08; 3RP - 6/5/08, 6/11/08, 6/12/08; 4RP - 6/16/08; 5RP - 6/17/08; 6RP - 6/18/08; 7RP - 6/23/08; 8RP - 6/24/08, 6/25/08, 6/26/08, 7/10/08.

front, she went out the front door to check on her vehicle and saw a young black male lying behind her SUV. He cried out for help, saying he was shot. 3RP 86-87. Her next-door neighbors also heard the noise and came outside and one of them called 911. 3RP 87. The young male was wounded in the leg so Alexander “wrapped his leg up real tight,” put a pillow behind his head, and covered him with a blanket. 3RP 88. Alexander kept him talking and taking deep breaths until the paramedics arrived and transported him to the hospital. 3RP 89-90. The police came at about the same time and she gave a statement to the officers. 3RP 89-90.

Officer Donald Stodola was the first officer on the scene. 3RP 99. While parked about two miles away, he heard a radio call that someone had been shot at the 4300 block of South Cedar. 3RP 98. Stodola reported to the scene and saw several people standing around a man on the ground who was bleeding from his leg. 3RP 101, 103. He asked the man what happened and he said he was walking down the street and a blue car pulled up and he was shot in the leg. 3RP 111-12. Stodola managed to find out that the man’s name was Michael Chelly but he “was not very cooperative.” 3RP 103, 112. Fire department medics arrived and transported Chelly to the hospital. 3RP 104-05.

While remaining at the scene to question witnesses, Stodola learned that a "second victim," who had also been shot, was found at South 40th and Warner. 3RP 106. Lashae Levingston, who lived two houses down at 4307 South Cedar, approached him and appeared to be in shock, "shaking, very low voice." 3RP 105, 115-16. Levingston claimed that Hawkins, "her baby's daddy," shot Chelly. 3RP 116-17. Levingston said that Hawkins showed up at her house uninvited and they got into an argument. Her boyfriend started fighting with Hawkins and she went inside the house. She heard gunshots and came outside and saw Hawkins speed away in a blue Impala chased by her boyfriend. She saw Chelly hiding behind her neighbor's SUV. 3RP 116-17. Stodola transported Levingston to the police department for an interview with detectives. 3RP 107-08.

Officer Steven Piotrowski arrived on the scene just after Stodola. 3RP 123-24. He saw a group of people gathered around a man on the ground who had been shot in the leg. 3RP 125. Piotrowski did not approach the man because there were too many people surrounding him but he interviewed witnesses. 3RP 125-27. He found two shell casings, which he left for forensics, and noticed what appeared to be "spin-out or burn-out" tire marks at the end of the driveway. 3RP 127-28. Piotrowski learned that other officers were investigating the scene of a vehicle that

had crashed into a telephone poll in the area of 40th and South Warner, six or seven blocks away. 3RP 128-29. He searched the vicinity for a weapon but none was found. 3RP 129-30.

Detective Gene Miller conducted a crime scene investigation and found three 9-millimeter shell casings along the driveway and a bullet in the wall of a house across the street. 4RP 144-46. Forensic specialist Donovan Velez collected, sealed, and marked the evidence. 3RP 60-68. Velez also retrieved a 9-millimeter cartridge from Hawkins' car and processed it for latent fingerprints but found no prints. 7RP 645-47.

Paramedic Michael Ferguson was dispatched to 43rd and Cedar from his fire station located a "couple of minutes away." 5RP 404-05. Ferguson arrived at the scene at 11:54 a.m. and administered aid to Chelly who had sustained a gunshot wound to his lower left leg. 5RP 407-08. Chelly was bleeding "moderately" and had no other injuries. 5RP 411-13. Ferguson transported Chelly to Tacoma General but was directed to take him to St. Joseph's Hospital because the bleeding "was controlled" and his "vital signs were normal." 5RP 413-14. A registered nurse and emergency room technician met him as he arrived at St. Joseph's and he released Chelly to the hospital. 5RP 413-14.

Dr. Kimberly Thayer treated Chelly for a gunshot wound and prescribed pain medication. 7RP 631-32. Thayer examined a "through

and through” bullet wound in Chelly’s left leg, “that means it goes in one side and comes out the other.” 7RP 634-35. Thayer ordered x-rays and a CAT scan of Chelly’s leg and based on the findings, she had Chelly transferred to the trauma center at Tacoma General. 7RP 637-43.

Officer Manuela Loth reported to the scene of a collision at 40th and Warner. 4RP 160. Loth parked behind a Pontiac that was “resting all the way against the curb.” 4RP 160-62. As she approached the car, two or three people were standing on the driver’s side. The door was open with a black male in the driver’s seat “slumped over to the right to the passenger’s side.” 4RP 162. The male, later identified as Dowell Thorn, had a sweatshirt placed over his face. Loth removed the sweatshirt and saw that Thorn’s eyes were closed. 4RP 163. Loth examined Thorn and detected no breathing and no pulse. 4RP 164-65. Loth pulled up his shirt and saw a bullet wound to the torso but very little blood. 4RP 165. Shortly thereafter, fire department medics arrived and transported Thorn to the hospital. 4RP 166.

Officer Kenneth Davidson investigated how the collision occurred. 4RP 153. He determined that two cars were “side-swiped” by Thorn’s car based on the damage to all three cars. 4RP 155-56. Forensic specialist Ranae Campbell took a video of the overall scene. 4RP 173. Thorn’s car

was partially over the sidewalk and she detected damage to a light pole and damage to the front end of his car. 4RP 176.

Paramedic Joseph Louck, of the Tacoma Fire Department, was dispatched to South 40th and Warner for "a roll-over into a pole." 6RP 558-59. When Louck arrived at the scene, he saw a car "kind of off-centered in the street." 6RP 560. Medics from the engine company had removed a man from the car and were initiating CPR. 6RP 561. The man had a single gunshot wound to his abdomen and was not responding to efforts to revive him. 6RP 562-66. Louck's unit transported the man, later identified as Thorn, to Tacoma General. 6RP 566-67. Louck notified Tacoma General enroute to the hospital so trauma physicians were awaiting Thorn's arrival and wheeled him into the emergency room. 6RP 567.

Officer Joseph Canion was dispatched to Tacoma General "for a shooting" and waited outside the emergency room as numerous medical personnel worked "very aggressively" on Thorn. 6RP 545-46. A doctor informed Canion that Thorn was pronounced dead. 6RP 546. Canion viewed the body and noticed a small hole below Thorn's chest but above his belly and an incision across his chest area made by the ER physicians while trying to revive him. 6RP 547-48. Medical investigator Ryann Thill placed Thorn in a body bag and transported him to the medical

examiner's office where she logged him in and moved him to the morgue. 6RP 570-71.

Dr. Eric Kiesel conducted an autopsy on Thorn on October 1, 2007. 6RP 590. He took x-rays and photographs of Thorn's body and performed an external examination, which revealed "evidence of surgical intervention" and a gunshot wound in the stomach. 6RP 591-94, 98. Kiesel also performed an internal examination and recovered a bullet from Thorn's body. 6RP 601. He explained the path of the bullet from Thorn's abdomen to ultimately coming to rest "in the psoas muscles, one of the muscles that basically support the spine." 6RP 602-03. The internal examination revealed swelling in the brain and a fracture of the right hyoid bone. 6RP 610. Kiesel concluded that the gun was fired from six inches to four feet away and the gunshot wound caused Thorn's death. 6RP 611-12. He could not determine whether Thorn was standing or lying down when he was shot, "There's no way for me to tell what the relative positions of the shooter and Mr. Thorn were." 6RP 613.

Detectives John Ringer and Daniel Davis interviewed Levingston at the Tacoma Police Department.² 6RP 499-00, 524-25. Levingston said that Hawkins went to Tennessee for the summer but returned early and

² The detectives' testimonies were permitted under ER 613, Prior Statement of Witness. 5RP 301, 303, 306-07.

started "hassling" her, calling her continuously and driving by her house everyday. 6RP 502-03. Levingston had been dating Thorn and they wanted to keep the relationship quiet. 6RP 503. On September 29, 2007, she and Hawkins got into a physical altercation in front of her house while Thorn was there. 6RP 499, 504-06. Levingston went inside the house and came back out when she heard gunshots. 6RP 505. She saw Thorn sitting on the ground with Hawkins standing over him with a gun. Thorn was flailing his arms trying to knock the gun away. 6RP 506. Hawkins fired two rounds but she "wasn't sure if they had hit or gone over" Thorn's head. 6RP 507. Levingston yelled "[s]top, stop, stop," and Hawkins drove off in his car with Thorn following him. 6RP 507. Levingston said Hawkins shot Thorn and that Thorn never had a firearm. 6RP 508. She refused to give a taped statement. 6RP 502.

Lead Detective John Bair went to Tacoma General to interview Chelly who was conscious and able to answer questions. 4RP 193. Bair showed Chelly a photo montage and he identified Hawkins as the man who shot him in the leg. 4RP 195-97. Based on his interview with Chelly and information detectives obtained from their interview with Levingston, Bair determined that he had probable cause to arrest Hawkins. 4RP 204. A warrant was issued and a bulletin was sent to various agencies. 4RP 206. In early October, Bair received a call from the Chicago Police

Department informing him that authorities found Hawkins in a motel room. 4RP 207. Deputy Eric Carlson flew to Chicago for Hawkins' extradition. 7RP 658. Hawkins was transported from the Cook County jail back to Washington and booked into the Pierce County jail. 7RP 658-61.

Michael Chelly, Thorn's brother, testified that Thorn was dating Levingston during the summer of 2007. 4RP 237-38. Chelly went over to Levingston's house with Thorn three or four times. 4RP 238. Levingston had a four or five-year-old daughter. Hawkins was the daughter's father and Chelly knew who Hawkins was but never met him. 4RP 239-41. On September 29, 2007, Chelly drove Thorn to Levingston's house to pick her and her daughter up to give them a ride to Lacey. 4RP 242. He pulled up to the house and moved over to the passenger's seat, and Thorn got out to take things from the back seat to the trunk to make room for Levingston and her daughter. 4RP 242-44. Chelly noticed Levingston and Hawkins arguing outside the house and saw Levingston snatch a chain off of Hawkins' neck. 4RP 248-49. He did not pay much attention to them until Hawkins came over to their car and said "he was cool with us, he wasn't worried about nothing going on, he knows us, and then walked away." 4RP 247-28.

Hawkins walked to his car and walked back toward them with something tucked under his shirt. 4RP 251-52. Thorn was standing

outside of the car and suddenly Hawkins pulled out a gun and a struggle ensued. 4RP 252-54. Chelly scooted to the driver's side of the car where they were "fighting" but they moved to the rear of the car and "then one shot goes off." 4RP 254. Chelly got out of the car and saw Hawkins and Thorn grappling over the gun when Hawkins grabbed the gun. 4RP 255-57. Chelly ran toward them and Hawkins pointed the gun at him and shot him in the leg. 4RP 258. He hopped on one leg and fell down behind a neighbor's SUV then heard another shot. 4RP 259-60. Chelly could only see Thorn holding his stomach, "I didn't see any blood or anything, just seen that he had got hit." 4RP 264-65. Hawkins got in his car and drove off and Thorn got in his car and chased after him. 4RP 268-69. A neighbor came out and comforted him until an ambulance arrived and transported him to Tacoma General 4RP 269-71.

Under cross-examination, Chelly acknowledged that according to Detective Bair's police report, he told Bair that when they arrived at Levingston's house, she walked over and told them that Hawkins was driving them to Lacey. 4RP 279-81. Bair's report indicated that Chelly told him that Levingston said, "I am going to go with Quincy." 4RP 281. Chelly knew Thorn "liked" guns but he did not own one. 4RP 292-93. He did not actually see Hawkins shoot Thorn. 4RP 295.

Lashae Levingston testified that she and Hawkins met while they were in high school and he was the father of their four-year-old daughter. 5RP 310-12. In the summer of 2007, they were no longer seeing each other when Hawkins left for Tennessee and she began dating Thorn. 5RP 318-20. Levingston saw Thorn everyday and he spent the night every other night. 5RP 350-51. She saw Chelly, Thorn's younger brother, "often." 5RP 351-52.

Levingston found out that Hawkins returned from Tennessee when she saw him drive by her house several times and at other times he parked in front of her house. 5RP 358-59, 367. On September 29, 2007, she and Thorn made plans to drop her daughter off at her uncle's house in Spanaway and spend the rest of the day together. 5RP 370-72. Thorn and Chelly came to her house and Thorn parked his car on the street. 5RP 374-75. About ten minutes before they arrived, Hawkins showed up uninvited and she agreed to let him take care of their daughter for the day. 5RP 375-77. When Levingston saw Thorn park, she called him on her cell phone and explained that Hawkins was taking their daughter for the day and she was going to pack her belongings. 5RP 380. Thorn said he would be back and left. 5RP 380-81.

Thorn returned shortly thereafter and parked behind Hawkins' car in front of the house. 5RP 388-90. When Thorn got out of his car,

Hawkins “walked over and shook his hand to greet him and see who he was.” 5RP 425-46. This provoked a heated argument between Levingston and Hawkins, “I didn’t trust the fact that them greeting each other would be right. I was just angry.” 5RP 428. The argument escalated into a physical altercation on the porch in front of the house. 5RP 431-36. Hawkins got angry when Levingston ripped a chain off of his neck. 5RP 435-38.

Their daughter was outside at the time so Levingston took the daughter into the house. 5RP 441. While she was in the house she heard gunshots. 5RP 442. She went outside to see what happened and saw Hawkins standing over Thorn with a gun in his hand. 5RP 445-47. Thorn was trying to “fight off” Hawkins. 5RP 454. She went back in the house and heard more gunshots so she rushed out and saw Hawkins drive away and Thorn chased after him. 5RP 454-58. She saw that Chelly had been shot in the leg and went over to help him and called 911. 5RP 460.

Levingston acknowledged that she was taken to the police department but could not recall telling detectives that Hawkins shot Chelly and Thorn. 5RP 461-64. She recognized the gun that Hawkins had in his hand because she saw Thorn with it a few days before the shooting, but she told the detectives that Thorn never had a gun. 5RP 470-71, 478-79.

Levingston could not recall various statements that she may have given to the detectives and a defense investigator. 5RP 479-88.

Quincy Hawkins testified that on September 29, 2007, he went over to Levingston's house to see their daughter. 8RP 681. About ten minutes after he arrived and stood outside talking to Levingston, Thorn and Chelly drove up and parked on the street for a few minutes before driving away. 8RP 682-84. They returned five or ten minutes later and parked behind his car in front of the house. 8RP 684. By then, he and Levingston got into a heated argument and she grabbed a chain he had around his neck and broke it. 8RP 685. He went to put the chain in his car and walked up to Thorn who was standing outside his car and Chelly who was in the passenger seat, "I just greeted them, gave them a hand shake." 8RP 686. He met Thorn and Chelly before but did not know them. 8RP 686.

Hawkins walked back to his car and was leaning against the back of it. He glanced over at Thorn and heard him say in a rude tone, "Don't look at me." 8RP 687. He started walking toward Thorn who had his front door open and he saw a gun sticking out from under the driver's seat. 8RP 687-88. Thorn reached into the car for the gun and had it in his hand so Hawkins tried to grab the gun. While they were grappling over the gun a shot went off in the air. 8RP 690-91. Chelly walked toward them

during the struggle and when Hawkins snatched the gun away from Thorn, another shot went off striking Chelly. 8RP 692-93. Thorn yelled, "You shot my brother," and they began grappling over the gun again when another shot fired and they both fell to the ground. 8RP 693-94.

Hawkins yanked the gun away from Thorn and backed away. He kept the gun and drove off in his car, not yet realizing that Thorn had been shot. 8RP 694-96, 732. He drove to University Place and abandoned his car in a parking lot of an apartment complex. 8RP 734-36. Thorn damaged his car when he "crashed" into the back of his car during a chase. 8RP 735. Hawkins threw the gun away into some bushes and called a friend who came to pick him up. 8RP 737-39. He panicked and took a train to Chicago the next day. 8RP 740-42.

C. ARGUMENT

1. HAWKINS IS ENTITLED TO A NEW TRIAL ON HIS CONVICTION FOR MURDER IN THE SECOND DEGREE BECAUSE HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Hawkins was denied his constitutional right to effective assistance of counsel where defense counsel failed to properly cross-examine the medical examiner on the cause of Thorn's death and changed Hawkin's defense from self-defense to excusable homicide at the end of the trial to the detriment of his defense. Reversal is required because counsel's

performance was deficient and his deficient performance prejudiced Hawkins' defense.

This Court reviews claims for ineffective assistance of counsel *de novo*. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). Both the Sixth Amendment of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend VI; Wash. Const. art I, sec 22. See also, Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)(the substance of this guarantee is to ensure that the accused is accorded a fair and impartial trial).

To establish ineffective assistance of counsel, a defendant must show first that counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Counsel's performance is deficient when it falls below an objective standard of reasonableness and prejudice occurs when, except for counsel's errors, there is a reasonable probability that the outcome would have been different. In re Det. of Stout, 159 Wn.2d 357, 377, 150

P.3d 86 (2007); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 693-94. The defendant need not show that counsel's deficient performance more likely than not altered the outcome in the case. Id. There is a strong presumption that counsel's conduct is not deficient. However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

- a. Defense counsel failed to properly cross-examine the medical examiner on the cause of Thorn's death.

The record reflects that after Thorn was shot during a struggle with Hawkins, he got in his car and followed Hawkins who drove away. 4RP 268-69, 5RP 457-58. During the chase, he rear-ended Hawkins' car. 8RP 735. Thorn drove six or seven blocks and side-swiped two other vehicles before colliding into a light pole on a sidewalk. 3RP 128-29, 4RP 155-56, 4RP 176. Officer Loth found Thorn slumped over in the driver's seat. 4RP 162.

Michael Chelly testified about why Thorn chased after Hawkins after he was shot:

I just know that my brother's a strong guy and he's not really -- he doesn't -- he triggers like that. I mean, he's been shot, he's looking for that guy. He's not worried about it. He knows -- not going to sit there and just lay down. He hopped in the car and intended to follow him.

4RP 294.

Dr. Kiesel, who performed an autopsy on Thorn's body, explained the path of the bullet:

The bullet basically went through the skin of the muscles of the abdomen, it perforated or made holes through multiple loops of the bowel. It injured the mesentery. Mesentery is the part of the body that actually holds the bowel to the back wall of the abdomen. And it's got a lot of blood vessels there, so very vascular. That was injured. And the bullet ultimately came to rest in the psoas muscles, one of the muscles that basically help support the spine, connects the pelvis to the back bone, if you will, and that's where the bullet fragments were identified and collected.

6RP 602-03.

When Kiesel performed an internal examination of Thorn's body, he discovered a fracture of the right hyoid bone:

The hyoid bone is a little horseshoe shaped bone that's in your neck and your tongue attaches to it up at the very top. And if you feel in your neck, and you can wiggle it around, it's a little bone that moves around, but it's at the upper portion of it. That's the hyoid bone. There was fracture on the right side of it, so there was some trauma to his neck.

6RP 610.

During cross-examination, defense counsel did not ask Kiesel whether a gunshot to the abdomen would have fractured the hyoid bone;

whether he was aware that Thorn had driven several blocks and collided with two vehicles and crashed into a light pole after he was shot; whether Thorn's reckless actions caused trauma unrelated to the gunshot that contributed to his death; and whether Thorn could have survived if he had remained at the scene and received immediate medical attention because the bullet did not harm any of his vital organs.

The record substantiates that defense counsel failed to ask Kiesel critical questions focusing on the actions that Thorn took after he was shot that were clearly to his detriment. Defense counsel only asked Kiesel if the shooting range of six inches to four feet could be consistent with two people struggling over a firearm when it went off. 6RP 612. As a consequence of counsel's failure to properly cross-examine Kiesel, all the jury heard was that the gunshot wound caused Thorn's death. 6RP 611. The State charged Hawkins with murder in the second degree, alleging that while committing or attempting to commit assault in the second degree, he shot Thorn thereby causing his death. CP 1. It is evident from the record that even if the jury believed that Hawkins shot Thorn, a proper

and thorough cross-examination of Kiesel would have raised reasonable doubt as to whether the assault caused Thorn's death.³

- b. Defense counsel changed Hawkins' defense from self-defense to excusable homicide at the end of the trial to the detriment of his defense.

“Counsel is not expected to perform flawlessly or with the highest degree of skill. But he will be considered ineffective if his lack of preparation is so substantial that no reasonably competent attorney would have performed in such manner.” State v. Jury, 19 Wn. App. 256, 264, 576 P.2d 1302 (1978). Defense counsel must, at a minimum, conduct a reasonable investigation enabling counsel to make informed decisions about how best to represent the client. This includes investigating all reasonable lines of defense, especially the defendant's most important defense. In re Personal Restraint of Davis, 152 Wn.2d 647, 721-22, 101 P.3d 1 (2004); In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

On February 21, 2008, defense counsel stated at the omnibus hearing that Hawkins was asserting self-defense as his defense. CP 5-6. On June 5, 2008, Hawkins asked for new counsel because his attorney was not conducting a proper investigation and not getting statements from

³ As historically cited in many cases by the courts, cross-examination is “beyond any doubt the greatest engine ever invented for the discovery of truth.” 5 Wigmore on Evidence sect. 1367 (3rd ed. 1940).

witnesses. 3RP 4. The court denied Hawkins' request after defense counsel assured the court that he was prepared to proceed with a defense of self-defense:

Our self defense witness who was present at the scene has been subpoenaed by our investigator. We got a statement from her. I believe I turned that over to the State as well in sharing discovery properly. So as far as I am concerned professionally, I am not sure I am going to be any more prepared. So our self defense witness has been subpoenaed.

3RP 5.

During opening statements, defense counsel told the jury that this was a case about self-defense. 8RP 754-55. However, during jury instruction discussions after resting, defense counsel conceded that the evidence did not support justifiable homicide and that he would instead argue excusable homicide in closing. 8RP 746-48.

The record substantiates that defense counsel failed to conduct a reasonable investigation to determine Hawkins' best defense based on the evidence. As a consequence of counsel's failure to properly investigate all reasonable lines of defense, counsel asserted a defense unsupported by the evidence. By arguing to the jury that Hawkins acted in self-defense and then changing his defense to excusable homicide, defense counsel critically damaged Hawkins' credibility. Furthermore, the glaring change

in defense counsel's theory of the case allowed the State to discredit

Hawkins during closing argument:

I submit to you, ladies and gentlemen, you heard on opening statement from Mr. Shaw what he said was ladies and gentlemen, this is a case of self defense. This is a case of self defense. But it didn't pan out. The testimony of Lashae Levingston and the testimony of the defendant did not support self defense. So the defendant then has to claim, well, it wasn't self defense, "It was actually an accident I shot these people." Ladies and gentlemen, when you become jurors, you don't give up your common sense. I submit to you, ladies and gentlemen, common sense dictates this was not an accident. This was an intentional act on the part of the defendant.

8RP 794.

"Under the Sixth Amendment, defense counsel is required to conduct a reasonable investigation." In re Davis, 152 Wn.2d at 735. Defense counsel's failure to conduct a reasonable investigation, to the detriment of Hawkins' defense, constitutes an egregious dereliction of his duties as Hawkins' counsel.

- c. Reversal is required because Hawkins was denied his constitutional right to effective assistance of counsel.

The record substantiates that defense counsel failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances. Reversal is required because counsel's failure to properly cross-examine Dr. Kiesel and properly

conduct a reasonable investigation fell below an objective standard of reasonableness and but for counsel's deficient performance the result of the trial would have been different.

2. SHOULD THIS COURT CONCLUDE THAT REVERSAL IS NOT WARRANTED, REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN CALCULATING HAWKINS' OFFENDER SCORE.

Remand for resentencing is required because the trial court erred in finding that Hawkins' prior convictions for burglary in the second degree and custodial interference did not constitute same criminal conduct.

Sentencing is a critical stage of a criminal case. State v. Bandura, 85 Wn. App. 87, 97, 931 P.2d 174, review denied, 132 Wn.2d 1004 (1997). Two or more crimes constitute the same criminal conduct if they victimize the same person, occur at the same time and place, and involve the same criminal intent. RCW 9.94A.589(1)(a); State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999).

At sentencing, defense counsel argued that Hawkins' prior convictions for burglary in the second degree and custodial interference constitute same criminal conduct. 8RP 842-43. The court reviewed the probable cause filed on August 31, 2005 which states that Hawkins entered Lashae Levingston's bedroom window by removing the screen and she called the police when she heard a noise from the bedroom and

saw him leaving the house with their baby. 8RP 843-44; Ex. 3. The court concluded that the burglary and custodial interference were separate crimes:

I think not only is there anti-merger issues, but those would appear to be distinctly different conducts that allegedly occurred on that date, first the entry, which is the burglary, and then the removing the child and not returning the child directly to the mother would be the custodial interference charge. I think they are in fact, separate points.

8RP 844.

It is evident that the crimes involved the same victim, Levingston, and they occurred at the same time and place. Furthermore, under State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992), the crimes involved the same criminal intent. In Lessley, the Washington Supreme Court held that we objectively view whether a defendant's criminal intent changed from one crime to the next and "if one crime *furthered* another, and if the time and place of the crimes remained the same, then the defendant's criminal purpose or intent did not change and the offenses encompass the same criminal conduct." Id. (emphasis added by the court). Here, Hawkins intended to take his baby and entering the house through the window furthered his purpose of getting his baby. Consequently, the burglary and custodial interference encompassed the same criminal conduct.

The burglary antimerger statute permits a sentencing judge to punish, separately, a crime committed during a burglary regardless of whether it and the burglary encompassed the same criminal conduct. State v. Kisor, 68 Wn. App. 610, 844 P.2d 1038, review denied, 121 Wn.2d 1023, 854 P.2d 1084 (1993). However, the record reflects that the court did not exercise its discretion under the antimerger statute but erroneously concluded that the crimes did not constitute same criminal conduct by misapplying the law. 8RP 843-44.

A remand for resentencing is required because the court erred in counting Hawkins' burglary and custodial interference convictions separately toward his offender score.

D. CONCLUSION

For the reasons stated, this Court should reverse Hawkins' conviction for murder in the second degree. In the alternative, this Court should remand for resentencing.

DATED this 25th day of February, 2009.

Respectfully submitted,



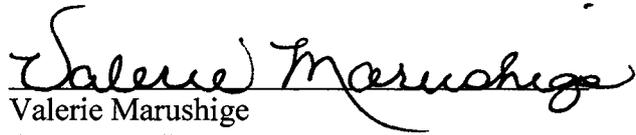
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Quincy Valentino Hawkins, DOC # 891817, Washington State Penitentiary, 1313 N 13th Avenue, Walla Walla, Washington 99362.

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

DATED this 25th day of February, 2009 in Kent, Washington.



Valerie Marushige
Attorney at Law
WSBA No. 25851

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