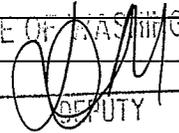


79143-1  
NO. 31645-5 (Consolidated No.)

FILED  
COURT OF APPEALS  
DIVISION II

06 JAN -6 AM 8:51

STATE OF WASHINGTON  
BY  DEPUTY

---

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

PHILLIP VICTOR HICKS, APPELLANT  
RASHAD DEMETRIUS BABBS, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Thomas J. Felnagle

No. 01-1-02238-7

No. 01-1-02239-5

---

**SUPPLEMENTAL BRIEF OF RESPONDENT**

---

GERALD A. HORNE  
Prosecuting Attorney

By  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. ..... 1

    1. Has defendant Babbs failed to meet his burden of showing deficient performance and resulting prejudice necessary to support his claim of ineffective assistance of counsel? ..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 1

    1. DEFENDANT BABBS HAS FAILED TO MEET HIS BURDEN OF SHOWING BOTH PRONGS OF THE TEST FOR INEFFECTIVE ASSISTANCE OF COUNSEL. .... 1

D. CONCLUSION..... 8

## Table of Authorities

### Federal Cases

<u>Campbell v. Knicheloe</u> , 829 F.2d 1453, 1462 (9th Cir. 1987), <u>cert. denied</u> , 488 U.S. 948 (1988).....	4
<u>Cuffle v. Goldsmith</u> , 906 F.2d 385, 388 (9th Cir. 1990) .....	4
<u>Harris v. Dugger</u> , 874 F.2d 756, 761 n.4 (11th Cir. 1989) .....	3
<u>Hendricks v. Calderon</u> , 70 F.3d 1032, 1040 (9 <sup>th</sup> Cir. 1995) .....	3
<u>Kimmelman v. Morrison</u> , 477 U.S. 365, 374, 91 L.Ed.2d 305, 106 S. Ct. 2574, 2582 (1986).....	1-2, 4, 7
<u>Strickland v. Washington</u> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	2, 3, 4, 7
<u>United States v. Cronic</u> , 466 U.S. 648, 656, 80 L.Ed.2d 657, 104 S. Ct. 2045 (1984).....	1
<u>United States v. Layton</u> , 855 F.2d 1388, 1419-20 (9th Cir. 1988), <u>cert. denied</u> , 489 U.S. 1046 (1989) .....	4
<u>United States v. Molina</u> , 934 F.2d 1440, 1447-48 (9th Cir. 1991).....	4

### State Cases

<u>State v. Benn</u> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993) .....	3
<u>State v. Brett</u> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995), <u>cert. denied</u> , 516 U.S. 1121, 133 L. Ed. 2d 858, 116 S. Ct. 931 (1996).....	2
<u>State v. Carpenter</u> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	3
<u>State v. Ciskie</u> , 110 Wn.2d 263, 751 P.2d 1165 (1988).....	3, 7
<u>State v. McFarland</u> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) .....	2
<u>State v. Studd</u> , 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) .....	6, 7
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	2, 4

**Constitutional Provisions**

Sixth Amendment, United States Constitution..... 1, 7

**Other Authorities**

11 Washington Pattern Jury Instructions,  
WPIC 26.06 at 289 (West 1994)..... 7

WPIC 26.06..... 7

A. ISSUES PERTAINING TO APPELLANT'S SUPPLEMENTAL ASSIGNMENT OF ERROR.

1. Has defendant Babbs failed to meet his burden of showing deficient performance and resulting prejudice necessary to support his claim of ineffective assistance of counsel?

B. STATEMENT OF THE CASE.

The statement of the case was set forth in the State's response brief.

C. ARGUMENT.

1. DEFENDANT BABBS HAS FAILED TO MEET HIS BURDEN OF SHOWING BOTH PRONGS OF THE TEST FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 80 L.Ed.2d 657, 104 S. Ct. 2045 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v.

Morrison, 477 U.S. 365, 374, 91 L.Ed.2d 305, 106 S. Ct. 2574, 2582 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 133 L. Ed. 2d 858, 116 S. Ct. 931 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn. 2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that

defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9<sup>th</sup> Cir. 1995).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." Harris v. Dugger, 874 F.2d 756, 761 n.4 (11<sup>th</sup> Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for

counsel's unprofessional errors, the result would have been different."

Strickland, 466 U.S. at 694.

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Defendant Babbs asserts that his trial counsel was ineffective for:

- 1) allowing the jury to be informed that it was a non-death penalty case,
- and 2) proposing a instructions that defendant now asserts are faulty.

As argued in the previously filed response brief, there was a legitimate trial strategy in informing Juror No. 9 that the case did not involve the death penalty. Juror No. 9 was disqualifying herself from being a juror in the case until she was certain that her religious beliefs would not interfere with her ability to follow the court's instructions. RP (4/22) 73-75, 154-55. As Juror No. 9 ultimately sat on the jury, it is clear that both defendants wanted her continued eligibility for jury duty. BCP 203-205. Moreover, both counsel for Hicks and counsel for Babbs referenced that the case did not involve the death penalty later in voir dire. RP (4/23) 43, 63-64. Thus, it is clear that each thought it was to his tactical advantage to do so. Tactical decisions cannot be the basis for a claim of deficient performance.

Nor can defendant show that he was actually prejudiced by the jury being informed that it was not a death penalty case. Defendant argues that the jury was less careful in determining guilt because it knew the death penalty would not be imposed. The record does not support this argument. The jury in question did not convict of the more serious charge of aggravated (premeditated) murder or on the attempted murder charge, which also required a finding of premeditation. RP (5/14) 13-24; CP 25-80. Instructions Nos. 15, 16, 40, 41,42. The verdicts of the first jury showed that it wrestled with the question of whether the evidence showing premeditation was sufficient. It was unable to agree on this question, but did agree that Chica Webber was killed in the course of an

attempted robbery and returned a verdict of felony murder. RP (5/14) 13-24. The evidence that the homicide occurred during the course of an attempted robbery, based upon the testimony of Jonathon Webber, was compelling and uncontested. Defendant argues that it might have made the jury less careful with regard to proof of defendant being one of the shooters. However, this issue did not arise in the retrial on the attempted murder charge and that second jury convicted both defendants of that crime. Thus, the record indicates that the evidence of identity, showing the defendants to be the shooters, was compelling to both juries. Defendant has failed to show that he was actually prejudiced by the first jury being informed that the case did not involve the death penalty.

Defendant contends that his attorney was deficient for either proposing or failing to object to allegedly erroneous to-convict instructions on felony murder. Defendant contends that Instructions No. 25 (Babbs) and 26 (Hicks) were incorrect statements of the law and that he was prejudiced by the giving of these instructions. As argued in the State's response brief, the instructions are not erroneous. See Respondent's Brief at pp. 41-46. However, even if the instructions were erroneous, the Supreme Court's decision in State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999), would preclude counsel's action with regard to these instructions from supporting a claim of ineffective assistance. In Studd the court held that trial counsel could not be faulted for requesting a then-unquestioned pattern instruction that was later ruled

unconstitutional. Studd, 137 Wn.2d at 551. Here, the challenged “to convict” instructions were based upon the standard pattern instruction WPIC 26.06. See, 11 Washington Pattern Jury Instructions, WPIC 26.06 at 289 (West 1994). Defendant fails to cite any authority that such a pattern instruction is faulty or that counsel should have been aware that these instructions were being questioned in the appellate courts. Thus, defendant has failed to show deficient performance with regard to the instructions.

Finally, defendant fails to make any argument that trial counsel was so deficient that “the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. at 374. As noted by the court in State v. Ciskie, 110 Wn.2d at 263, the determination that counsel was ineffective must be based on a review of the entire record and not isolated decisions. Defendant makes no effort to engage in this type of analysis – analysis which is necessary before he can meet his burden under Strickland. A review of the whole record shows that the trial remained an adversarial proceeding as anticipated by the Sixth Amendment. Defendant has failed to meet his burden of showing ineffective assistance of counsel.

D. CONCLUSION.

The State asks this court to affirm the convictions below.

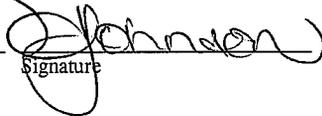
DATED: JANUARY 5, 2006

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
\_\_\_\_\_  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/5/06   
Date Signature

FILED  
COURT OF APPEALS  
DIVISION II  
06 JAN -6 AM 8:51  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY