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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Personal Restraint of

NOEL E. CALDELLIS,

Petitioner

ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF THE RESPONDENT

The State of Washington, Respondent, asks the Court to deny the motion for review.

II. STATEMENT OF THE CASE

The facts in this case are adequately set out in the Acting Chief Judge's order dismissing the petition and the State's response to personal restraint petition. The State relies on those two sources for the statement of the case.

III. ARGUMENT

A. THE TO CONVICT INSTRUCTION WAS AN ACCURATE STATEMENT OF THE LAW. THE PETITIONER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL IN RELATION TO HANDLING THAT INSTRUCTION BY EITHER TRIAL OR APPELLATE COUNSEL.

The petitioner argues the Court of Appeals erred when it concluded that the "to convict" instruction properly informed the jury of all of the elements of first degree murder by extreme indifference. Specifically he argues that it did not include the mens rea element that the defendant "knew and disregarded" the grave risk of death from his actions. Petition at 5. He claims because the instruction omitted this language it relieved the State of its burden of proof. Id. He argues that review by this court is appropriate because the decision of the Court of Appeals conflicts with other

decisions of the Court of Appeals and it raises an important constitutional question which should be decided by this Court. Motion at 3. Because neither standard is met the motion for review should be denied.

The trial court gave the standard instruction in effect at the time of the defendant's trial. Compare Response, ex 2, instruction number 4, with Response Ex. 3. As the Court of Appeals recognized the instruction tracked the language of the statute. Order of Dismissal (hereinafter Order) at 4. See RCW 9A.32.030(1)(b). This Court has said that the trial court should use the language of the statute when instructing the jury where the law governing the case is expressed in the statute. State v. Hardwick, 74 Wn.2d 828, 830, 447 P.2d 80 (1968), State v. Phillips, 108 Wn.2d 627, 636, 741 P.2d 24 (1987). The essential elements of murder by extreme indifference are that "the defendant acted (1) with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) cause the death of a person." State v. Pastrana, 94 Wn. App. 463, 470, 972 P.2d 557, review denied. 138 Wn.2d 1007, 984 P.2d 135 (1999), RCW 9A.32.030(1)(b). Since the instruction given contained all of these elements it did not relieve the State of its burden of proof.

After the petitioner's case was tried the WPIC committee amended the standard instruction for first degree murder by extreme indifference in part by including as an element "that the defendant knew of and disregarded the grave risk of death." Response, Ex. 4. The amended language came from State v. Barstad, 93 Wn. App. 553, 970 P.2d 324, review denied, 137 Wn.2d 1037 (1999). The petitioner states that the standard instruction as currently written reflects all of the essential elements of the crime. He argues that since it includes the "knew of and disregarded" language in the second element, and that phrase was not in the instruction given in his case, the instruction given at trial that did not contain that language must have been deficient.

The language at issue came from a discussion regarding the mens rea of the offense. Barstad, 93 Wn. App. at 568; Response Ex. 4, comments to WPIC 26.06. It is clear from that discussion that the language in question did not create a new element, but rather was a definition of "manifesting extreme indifference to human life." A proper to convict instruction need not include all pertinent law, such as the definition of terms. State v. Allen, 161 Wn. App. 727, 755, 255 P.3d 784 (2011), affirmed, 176 Wn.2d 611, 294 P.3d 679 (2013); State v. Fisher, 165 Wn.2d 727, 754-55, 202

P.3d 937 (2009). Because the language added by the WIPC committee in 2008 is a definition of an element, and not an additional element not specifically expressed in RCW 9A.32.030(1)(b), the omission of that language in the to convict instruction given did not relieve the State of its burden of proof.

The trial court did define “manifesting extreme indifference” in instruction number 5. Response, Ex 2. That definition was articulated by this Court in State v. Dunbar, 117 Wn.2d 587, 594, 817 P.2d 1360 (1991). The petitioner proposed this instruction. Response, Ex. 5, Instruction 9. Dunbar has not been overturned, and the petitioner has not shown that the definition drawn from that case is incorrect.

Nonetheless the petitioner argues that the instructions were misleading because the jury would have to parse out the meaning of words from various instructions. The jury was instructed to consider the instructions as a whole. Response, Ex. 2, Instruction 1. When considered together instructions 4, 5, and 8 properly defined the offense in terms of an aggravated form of recklessness that required a knowing disregard of a very high degree of risk of death to another person.

The "to convict" instruction included all of the essential elements of the crime. The definitional instructions were a correct statement of the law. Therefore, trial counsel's decision to not challenge what had been a standard instruction at the time of trial, was neither deficient performance nor did it prejudice the petitioner. Similarly he received effective assistance of appellate counsel even though appellate counsel did not choose to challenge the standard instruction given in light of amendments adopted by the WPIC committee.

B. IT WAS A REASONABLE TRIAL STRATEGY TO PROCEED ON A DEFENSE OF EXCUSABLE HOMICIDE RATHER THAN JUSTIFIABLE HOMICIDE.

The petitioner faults his trial attorney for failing to propose a self-defense instruction to the murder charge. He claims the Court of Appeals ignored his trial attorney's affidavit stating that he had no tactical reason for failing to seek that instruction and that self-defense instruction would have supported, not detracted from his theory of the case.

The petitioner misstates what his trial attorney said in his affidavit. Mr. McFarland stated that (1) he sought jury instructions that were an accurate statement of the law and were helpful to the petitioner's defense, (2) that he defended on the basis that the

petitioner did not fire the shot that killed Mr. Clements, but if he did it was excusable, and (3) the standard self-defense instruction did not apply because in the petitioner's statement admitted at trial the petitioner did not intend to shoot Mr. Clements. Petition, App. B, ¶8, 9, 10. The record at trial supports trial counsel's affidavit. See 19 RP 3112-13. (Stating that the defense theory of the case was that the petitioner did not shoot Mr. Clements, but if he did it was an accident.) This defense was supported by the petitioner's own statements to the police. Petition, App. G at 21-22. Where the defense is accident excusable homicide is the proper instruction, not self-defense. State v. Brightman, 155 Wn.2d 506, 524-25, 122 P.3d 150 (2005). Given that the petitioner's statements may have supported a defense of accident, but not justifiable homicide, trial counsel made a reasonable strategic decision to request an excusable homicide instruction, not a self-defense instruction. The petitioner fails to show why the Court of Appeals decision finding counsel did not perform deficiently merits review.

C. THE PROSECUTOR'S LIMITED RESPONSE TO COUNSEL'S CLOSING ARGUMENT WAS FAIR. JURY INSTRUCTIONS CURED ANY POSSIBLE PREJUDICE TO THE PETITIONER.

During closing argument defense counsel developed a theme that portrayed the petitioner as young and vulnerable in the

face of the criminal justice system. He talked about the petitioner's character, stressing his family and community activities. 12-10-07 RP 3224-27. The argument related to the defense position that the petitioner was not the kind of person who would act with extreme indifference to human life. Immediately preceding this argument defense counsel suggested five possible reasons why the petitioner would choose not to testify. 12-10-07 RP 3221-24.

In rebuttal closing the prosecutor responded that defense counsel forgot one reason, and inquired if the jurors could think of what that may be. Defense counsel objected, but after consultation with co-counsel withdrew the objection. The prosecutor did not revisit the argument after that. 12-10-07 RP 3275-76, Response, Ex. 11. The Court of Appeals found the prosecutor's response was a fair one, and the petitioner had failed to show that it had affected the jury's verdict. Order at 14-15.

The petitioner asks this Court to review (1) whether the prosecutor's remark was justified, and (2) whether trial counsel was ineffective for opening the door to argue his silence can be used to infer guilt. Motion at 14. The petitioner does not identify what ground under RAP 13.4(b) would justify review of the Order.

The Court of Appeals relied on this Court's decision in Russell to conclude that even if the prosecutor's remarks were improper reversal is not required if the defense invited or provoked the remarks, unless they are so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 25, 86, 882 P.2d 747 (1994), cert denied, 514 U.S. 1129 (1995). Whether the prosecutor's remarks met this standard is a fact specific analysis that does not justify review. Given the prosecutor's remarks directly related to the specific argument counsel made, were brief, and quickly abandoned when counsel raised an objection, the petitioner fails to show that the Court of Appeals misapplied the rule set out in Russell.

The petitioner also fails to establish prejudice because even though defense counsel withdrew his objection, the court had already given the jury curative instructions. The court instructed jurors that the law they were to apply was contained in the court's instructions to the jury, and any remark or argument made by the lawyers that was not supported by that law should be disregarded. It was also instructed that the defendant was not required to testify, and the fact that he did not testify "cannot be used to infer guilt or prejudice him in any way." Response, Ex. 2, Instruction 1, 25.

Thus, even if jurors concluded, as the petitioner argues, that the prosecutor's argument was an indirect suggestion that the petitioner was guilty, the jurors had been instructed to ignore it. Jurors are presumed to follow the court's instructions. State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987). The petitioner presented no evidence that the brief, oblique reference to potential reasons for the petitioner's decision not to testify affected the verdict. He has therefore failed to establish the requisite prejudice necessary for relief on collateral review. For that same reason he has failed to show that counsel's decision to address the subject, thereby opening the door to the prosecutor's rebuttal, constituted ineffective assistance of counsel which entitled him to relief. In re Crace, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012)¹.

Alternatively, counsel's decision to address the reasons why his client may have chosen not to testify was a reasonable strategic decision. The argument wove into the defense theme that the petitioner was himself a vulnerable young man, whose background

¹ This Court held that on collateral review a petitioner who successfully demonstrates prejudice in an ineffective assistance of counsel claim necessarily demonstrates the necessary actual prejudice for relief from personal restraint. Crace, 174 Wn.2d at 846-47. If that is so the reverse should likewise hold true; a petitioner who fails to establish that he was prejudiced also fails to show that his counsel's conduct prejudiced him.

made him unlikely to have shot and killed someone in the manner alleged by the State. It did not directly conflict with the court's instruction that the jury could not use the fact that he had not testified against him, so the jury would not have been expected to reject it based on the court's instruction to disregard any argument not supported by the law as given to them by the court. The petitioner has not shown why the order dismissing the petition on this ground should be reviewed.

D. SEALING JUROR QUESTIONNAIRES AFTER THE JURY HAD BEEN SELECTED DID NOT CONSTITUTE A CLOSURE THAT ENTITLED THE PETITIONER TO A NEW TRIAL.

The petitioner seeks review of the Court of Appeals decision finding there was no courtroom closure when the trial judge entered an order sealing juror questionnaires after the jury was selected. The Court relied on two recent decisions from this Court dealing with that challenge under factually similar circumstances. Order at 16-17; State v. Beskurt, 176 Wn.2d 441, 448, 293 P.3d 1195 (2013), In re Yates, 177 Wn.2d 1, 29-30, 296 P.3d 872 (2013).

The petitioner challenges the Order on the basis that it should have granted an evidentiary hearing on the question of whether all of the information in those questionnaires was revealed during oral argument. He also challenges the Order asserting that

it failed to evaluate the constitutional violation and resulting harm from the error. He argues review is appropriate because the Order conflicts with decisions of this Court and because the issue raises a significant constitutional issue. Motion at 18.

In order to be entitled to a reference hearing the petitioner must first make a prima facie showing of actual prejudice. In re Rice, 118 Wn.2d 876, 885, 828 P.2d 186, cert denied, 506 U.S. 958 (1992). The petitioner points to his trial attorney's affidavit stating that jurors were orally examined regarding some but not all responses on the questionnaire and his own affidavit stating that he would not knowingly waive his constitutional right to an open courtroom in an attempt to meet this burden.

This Court found no open court violation in both Beskurt and Yates when juror questionnaires were sealed post jury selection reasoning that no courtroom closure occurred. Beskurt, 176 Wn.2d at 447. Just as in this case there was some indication that the answers on the written forms would remain confidential. Id.; Appendix H to petition. Similarly, despite this indication the lawyers used some but not all of the information relayed by potential jurors to conduct jury selection. Id.; Appendix B to petition; Response, Ex. 7 and 11. Because the Order is consistent with this Court's

decisions in factually similar circumstances the petitioner has not shown that he was actually prejudiced when the trial court sealed juror questionnaires after jury selection concluded. Because no courtroom closure occurred, the petitioner was not deprived of his right to choose whether to exercise or waive a constitutional right. He is thus not entitled to a hearing. Review on the basis of an alleged courtroom closure should be denied.

E. THE COURT HAS PROVIDED A FRAMEWORK FOR HANDLING ALLEGATIONS THAT THE JUDGE AND SOME JURORS WERE SLEEPING DURING PORTIONS OF THE TRIAL.

The petitioner argued that he was entitled to a new trial because the judge and three jurors were sleeping for short periods of time during portions of the trial. The Court of Appeals rejected his argument that the judge sleeping for any portion of the trial is per se prejudicial. The Court also found that even taking the petitioner's evidence at face value, without considering conflicting evidence, he had failed to establish the requisite prejudice. Order at 11-13.

The petitioner asks this Court to review this decision. He argues review is appropriate for this Court to address what a personal restraint petitioner must show in order to merit an

evidentiary hearing and a new trial on a claim that either the judge or jurors slept during portions of the trial. Motion at 22.

The petitioner argues that a sleeping juror should be considered a structural error because jurors who are asleep cannot perform their duty to weigh evidence and judge witness credibility. Motion at 24. The petitioner did not argue that sleeping jurors were a structural error in his petition before the Court of Appeals. Rather he acknowledged that a sleeping juror was not per se error. Petition at 44. Because the petitioner did not raise the issue of whether a sleeping juror was a structural error in the Court of Appeals, this Court should deny review of that issue. State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993), In re Lord, 152 Wn.2d 182, 188 n.5, 94 P.3d 952 (2004).

The petitioner provides no authority for the proposition that either a sleeping judge or juror is a structural error entitling him to relief, regardless of whether he established judge or juror was actually sleeping, and what if anything that participant in the trial may have missed. Instead he offers speculation that a sleeping judge cannot take corrective action for a sleeping juror. He speculates that a sleeping juror would rely on other jurors assessment of the evidence rather than his own during

deliberations. This Court has said that speculation does not justify holding a hearing. Rice, 118 Wn.2d at 886.

The petitioner queries how he is supposed to uncover what impact a sleeping judge or juror had on the outcome of his case if he bears the burden of proving prejudice. Motion at 24. The answer lies in the burden this Court has placed on litigants to raise the issue at the time of trial, rather than to wait to see what the outcome of his case before raising it. "Unless counsel objects to the juror's inattentiveness during trial, the error is waived on appeal." State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986). Similarly had the petitioner had concerns about trial judge's attentiveness, it should have been raised at trial, and not years later in a personal restraint petition.

This Court has already set out adequate rules to establish when a personal restraint petitioner is entitled to relief in the context of a claim of a sleeping juror or judge. The Court of Appeals conclusion that even if the petitioner had not waived the issue, and even if his contested evidence were considered true, his allegations are too speculative to show that he was prejudiced from either a sleeping judge or juror is supported by application of those rules. This Court should not accept review of that decision. However if

this Court does accept review, it should also consider whether in the context of a personal restraint petition, a petitioner has waived the issue of whether he is entitled to relief on this basis when he failed to raise the issue at the time of trial.

IV. CONCLUSION

The petitioner has failed to show that there is a basis under RAP 13.4(b) to review any of the claims decided by the Court of Appeals in its order dismissing the personal restraint petition. Therefore the State asks the Court to deny review.

Respectfully submitted on January 14, 2014.

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Diane.

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