

NO. 67294-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

DONALD MOORE,

Respondent.

2012 JUL 12 AM 10:18  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE SUSAN CRAIGHEAD

BRIEF OF APPELLANT

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

CELIA A. LEE  
Deputy Prosecuting Attorney  
Attorneys for Appellant

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

ORIGINAL

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	5
a. Facts Elicited During The 2007 Trial .....	5
b. Additional Facts Elicited In The 2009 Retrial... 8	8
C. <u>ARGUMENT</u> .....	10
1. THE SUPERIOR COURT MISAPPLIED THE <u>STRICKLAND</u> STANDARD IN FINDING "PATENT INEFFECTIVE ASSISTANCE OF COUNSEL" .....	11
2. THE FORMER TRIAL TESTIMONY OF AN UNAVAILABLE WITNESS SATISFIES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT .....	22
3. THE FORMER TESTIMONY OF AN UNAVAILABLE WITNESS SATISFIES ER 804(b)(1) .....	28
D. <u>CONCLUSION</u> .....	31

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Barber v. Page, 390 U.S. 719,  
88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968)..... 24

California v. Green, 399 U.S. 149,  
90 S. Ct. 1930, 26 L. Ed. 489 (1970)..... 25, 26

Coy v. Iowa, 487 U.S. 1012,  
108 S. Ct. 2798 (1987) ..... 23

Delaware v. Fensterer, 474 U.S. 15,  
106 S. Ct. 292, 88 L. Ed. 2d 15 (1985)..... 23

Kentucky v. Stincer, 482 U.S. 730,  
107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987)..... 25

Strickland v. Washington, 466 U.S. 668,  
104 S. Ct. 2052,  
80 L. Ed. 2d 674 (1984)..... 1, 2, 10-13, 15, 27, 28, 31

United States v. Owens, 484 U.S. 554,  
108 S. Ct. 838 (1988) ..... 25

United States v. Salerno, 505 U.S. 317,  
112 S. Ct. 2503, 120 L. Ed. 2d 255 (1992)..... 30

Washington State:

In re Personal Restraint of Rice, 118 Wn.2d 876,  
828 P.2d 1086 (1992)..... 13

State v. Benn, 161 Wn.2d 256,  
165 P.3d 1232 (2007)..... 25, 29

State v. Bland, 128 Wn. App. 511,  
116 P.3d 428 (2005)..... 18

<u>State v. DeSantiago</u> , 149 Wn.2d 402, 68 P.3d 1065 (2003).....	26, 29, 30
<u>State v. Dyson</u> , 90 Wn. App. 433, 952 P.2d 1097 (1997).....	16, 17
<u>State v. Estorga</u> , 60 Wn. App. 298, 803 P.2d 813 (1991).....	25
<u>State v. Garbaccio</u> , 151 Wn. App. 716, 214 P.3d 168 2009 .....	17
<u>State v. Garcia</u> , 57 Wn. App. 927, 791 P.2d 244, <u>rev. denied</u> , 115 Wn.2d 1010 (1990).....	13
<u>State v. Garrett</u> , 124 Wn.2d 504, 881 P.2d 185 (1994).....	14
<u>State v. Graves</u> , 97 Wn. App. 55, 982 P.2d 627 (1999).....	16
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	15
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	15
<u>State v. Hobson</u> , 61 Wn. App. 330, 810 P.2d 70 (1991).....	23
<u>State v. Janes</u> , 121 Wn.2d 220, 850 P.2d 495 (1993).....	16, 17
<u>State v. Jenkins</u> , 53 Wn. App. 228, 766 P.2d 499, <u>rev. denied</u> , 112 Wn.2d 1016 (1989).....	24, 26
<u>State v. Johnson</u> , 92 Wn.2d 671, 600 P.2d 1249 (1979).....	15
<u>State v. Johnson</u> , 143 Wn. App. 1, 177 P.3d 1127 (2007).....	16

<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991).....	14
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	13, 14
<u>State v. McNeal</u> , 145 Wn.2d 352, 37 P.3d 280 (2002).....	14
<u>State v. Medina</u> , 112 Wn. App. 40, 48 P.3d 1005 (2002).....	22
<u>State v. Mohamed</u> , 132 Wn. App. 58, 130 P.3d 401 (2006).....	25, 26
<u>State v. Neal</u> , 144 Wn.2d 600, 30 P.3d 1244 (2001).....	28
<u>State v. Rainey</u> , 107 Wn. App. 129, 28 P.3d 10 (2001).....	12, 14
<u>State v. Roebuck</u> , 75 Wn.2d 67, 448 P.2d 934 (1968).....	24
<u>State v. Slider</u> , 38 Wn. App. 689, 688 P.2d 538 (1984), <u>rev. denied</u> , 103 Wn.2d 1013 (1985).....	24
<u>State v. Solomon</u> , 5 Wn. App. 412, 487 P.2d 643, <u>rev. denied</u> , 80 Wn.2d 1001(1971).....	24, 25
<u>State v. Theroff</u> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	16, 17
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	12, 15
<u>State v. White</u> , 80 Wn. App. 406, 907 P.2d 310 (1995).....	12
<u>State v. White</u> , 81 Wn.2d 223, 500 P.3d 1242 (1972).....	13, 15

<u>State v. Wilson</u> , 29 Wn. App. 895, 626 P.2d 998, <u>rev. denied</u> , 96 Wn.2d 1022 (1981).....	20, 21
<u>State v. Yates</u> , 64 Wn. App. 345, 824 P.2d 519 (1992).....	17

Constitutional Provisions

Federal:

U.S. Const. amend. VI .....	1, 13, 22-25, 27, 31
U.S. Const. amend. XIV .....	23

Rules and Regulations

Washington State:

ER 804 .....	2- 5, 11, 26, 28-32
--------------	---------------------

Other Authorities

WPIC 2.13.....	19
WPIC 17.02.....	3

**A. ISSUES PRESENTED**

1. Trial counsel's assistance is ineffective when the representation is deficient and the defendant is prejudiced as a result. Legitimate trial tactics are, by definition, not ineffective. The superior court found that Moore's attorney in the 2007 decision to assert self-defense rather than self-defense and defense of property was "patent ineffective assistance of counsel." In concluding that this strategic decision was "patent ineffective assistance of counsel" did the superior court fail to properly apply the Strickland standard?

2. Under the Confrontation Clause of the Sixth Amendment a criminal defendant is guaranteed an opportunity to conduct cross-examination. Following the defendant's conviction on this charge, the case was reversed and remanded for a new trial. Before the State could retry the case, the State's primary witness died. Over Moore's objection the State admitted the former trial testimony of the unavailable witness. In concluding that the admission of the former testimony violated the Confrontation Clause did the superior court fail to properly apply the Strickland standard?

3. Under ER 804(b)(1) the former testimony of an unavailable witness is admissible at a subsequent proceeding if the party against whom it is offered had both an opportunity and similar motive to develop the testimony. Here, the State offered the former trial testimony of an unavailable witness. In concluding that Moore's counsel in the first trial lacked a similar motive to develop cross-examination did the superior court fail to properly apply the Strickland standard?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

On April 12, 2007, the State of Washington charged the respondent, Donald C. Moore (hereinafter "Moore") with one count of assault in the fourth degree. Clerk's Papers (CP), 1. Trial commenced on July 12, 2007. CP, Docket 4. The jury found Moore guilty of assault in the fourth degree. CP, Docket 6. Moore appealed. CP, Docket 9.

On appeal, Moore claimed that he was denied effective assistance of counsel. See Appendix A. The superior court reversed Moore's conviction based upon his attorney's failure to request a "no duty to retreat" jury instruction. See Appendix A. For

this reason alone, the superior court reversed Moore's conviction for ineffective assistance of counsel and remanded for a new trial. Appendix A; CP, Docket 12.

Before the case could be retried, the State learned that its primary witness, Mark Storer, had died in a plane crash. CP, Docket 16. Pursuant to ER 804(b)(1) the State moved to admit Mr. Storer's former testimony in the second trial. 2RP 56.<sup>1</sup>

Moore objected to the admission of Mr. Storer's former trial testimony and argued that the use of Mr. Storer's former testimony violated the Confrontation Clause and ER 804(b)(1). 2RP 49-61. Specifically, Moore argued that his attorney in the 2007 trial was an "ineffective attorney" by failing to raise a "defense of property" defense. 2RP 53.<sup>2</sup> Moore argued that the admission of the former testimony violated his right to Confrontation because his lawyer in the 2007 trial had been "ineffective" by failing to properly cross-examine Mr. Storer regarding defense of property. See 2RP 59.

---

<sup>1</sup> 2RP refers to the retrial held on October 19, 2009- October 20, 2009, in King County District Court.

<sup>2</sup> WPIC 17.02, "Useful Force- Defense of Self and Others," provides that "The [use of] force upon or toward the person of another is lawful when [used] [by a person who reasonably believes that he or she is about to be injured] [by someone lawfully aiding a person who [he] [she] reasonably believes is about to be injured] in preventing or attempting to prevent [an offense against the person [or] [a malicious trespass or other malicious interference real or personal property lawfully in that person's possession and when the force is not more than necessary."

Moore intended to raise both self-defense and defense of property as affirmative defenses in his second trial. 2RP 53.

Over Moore's objection, the trial court admitted Mr. Storer's former testimony and the case proceeded to trial. CP, Docket 21. No new charges were added and no new witnesses testified. See 2RP 89-170. The State played a recording of Mr. Storer's former testimony for the jury. 2RP 133.

The jury found Moore guilty as charged. CP, Docket 24. Moore appealed. CP, Docket 26.

The superior court reversed Moore's conviction holding that the admission of Mr. Storer's former trial testimony violated the Confrontation Clause and failed to satisfy ER 804(b)(1). Appendix B. In reaching its decision the superior court found that Moore was denied effective assistance of counsel in the first trial because his attorney failed to raise, argue, and request a defense of property instruction. Appendix B. Although Moore's attorney had asserted a claim of self-defense, the superior court found that this was not a strategic decision, but that Moore's attorney had provided "patent ineffective assistance of counsel" by failing to also raise defense of property. Appendix B. The superior court further found that the trial court abused its discretion in admitting the testimony

under ER 804(b)(1) because Moore's attorney lacked a "similar motive to develop" cross examination regarding his alternative affirmative defense. Appendix B.

The State filed a timely notice of discretionary review. Appendix C. This Court granted review. Appendix D.

## **2. SUBSTANTIVE FACTS**

### **a. Facts Elicited During The 2007 Trial.**

On the morning of April 9, 2007, Seneca Robben, the manager of the Garden Pointe Apartments in Burien, Washington, placed a call to Airport Towing requesting a tow for an illegally parked vehicle. 1RP 23.<sup>3</sup>

Mark Storer, owner and operator of Airport Towing, responded to the Garden Pointe Apartments. 1RP 23. He arrived wearing a uniform and drove a marked tow truck. 1RP 68; Plaintiff's Ex. 1, 2, 6. Mr. Storer contacted the complex manager and was given the location and description of the vehicle; she described the vehicle as a "blue Chevrolet Corsica beater with some windows broken out." 1RP 23. He began the tow process because the

---

<sup>3</sup> 1RP refers to the jury trial held on July 11, 2007, in King County District Court.

vehicle "matched the description and license number" given to him by the apartment complex manager. 1RP 27.

As Mr. Storer began the towing process a man, later identified as Donald Moore, ran toward him yelling, "don't tow my car." 1RP 24. Mr. Storer had already attached towing equipment to Moore's vehicle when Moore tried to remove the equipment. 1RP 23-24. Mr. Storer explained to Moore that he was required to tow the car. 1RP 24. Moore continued to reach underneath the car removing the towing equipment. 1RP 24. Mr. Storer pushed Moore's hand away and told him not to touch his equipment. 1RP 24. Moore continued in his attempts to remove the equipment.

When Mr. Storer again placed the hook on Moore's car, Moore punched Mr. Storer in the face just below his eye. 1RP 24-25. When Mr. Storer attempted to call 911, Moore slapped Mr. Storer's phone from his hand, climbed into the driver's side of Mr. Storer's tow truck, and attempted to release his vehicle. 1RP 25. Moore then began yelling at a woman standing nearby, urging her to start his car and drive it away from the scene. 1RP 25. Mr. Storer then managed to place a chain around the left side of Moore's vehicle. 1RP 25. As he knelt to put the chain on, Moore kicked Mr. Storer in the chest "with enough force" to lift him from

the ground. 1RP 25. Mr. Storer, in an attempt to keep Moore at the scene, used a control panel at the rear of the tow truck to lift Moore's vehicle. 1RP 25. Enraged, Moore ran back to Storer and punched him eight to ten times more. 1RP 25. Each time Mr. Storer tried to get up, Moore punched him. 1RP 25. Mr. Storer finally got up, staggered away, turned off the control panel, and put the keys in his pocket. 1RP 26. Mr. Storer began searching for his cell phone as he waited for the police and watched as Moore ransacked the interior of his tow truck. 1RP 26.

Ms. Robben had been walking outside when she saw Mr. Storer lying on the pavement attaching a strap to the vehicle. 1RP 36. She saw Moore punch him in the face and ran to her office to call 911. 1RP 36.

When officers arrived at the Garden Pointe Apartments, they found both Moore and Mr. Storer standing about 20 feet apart. 1RP 44. Mr. Storer had scratches and marks on his face while Moore had no visible injuries. 1RP 41, 46.

Moore's testimony differed substantially from that of Mr. Storer. 1RP 59-73. Moore explained that on the morning of April 9, 2007, he was visiting his father-in-law. 1RP 60, 64. From inside the apartment Moore "heard a diesel rig," a sound he

recognized from having worked in "commercial tires." 1RP 60. The sound prompted him to run outside. 1RP 60. Moore claimed that he confronted Storer, showed Mr. Storer his hospital bracelet, and pleaded with him. 1RP 61. Mr. Storer ignored Moore's pleas and said, "I don't give a fuck. I'm taking it anyways." 1RP 61.

Moore claimed that he began to remove the towing equipment when Mr. Storer jumped onto his back and began hitting him first. 1RP 61. Moore somehow knocked Mr. Storer off his back and Mr. Storer stood over him with a "hook." 1RP 61. Moore believed that Mr. Storer would hit him so he struck Mr. Storer first. 1RP 61. A fight ensued and the men continued hitting each other. 1RP 61-62. Moore claimed that he pleaded with Mr. Storer asking, "why are you doing this...?" 1RP 62.

Moore testified that the incident could "all been avoided if Mr. Storer didn't try to steal my car." 1RP 68.

**b. Additional Facts Elicited In The 2009 Retrial.**

In the retrial held in 2009 additional facts were elicited both by the State and Moore's attorney. Seneca Robben testified for a second time. She explained that on the morning of the incident, she

had conducted a morning check of the apartment complex grounds and found an illegally parked vehicle. 2RP 108.

Ms. Robben identified the tow truck driver as Mr. Storer. 2RP 108. When Mr. Storer arrived at the apartment complex, Ms. Robben signed the paperwork authorizing the tow. 2RP 111.

A short time later, Ms. Robben walked outside and found Mr. Storer and Moore "in an altercation," and watched as Moore punched Mr. Storer. 2RP 111. Once Ms. Robben called 911, she returned to the men and saw that Mr. Storer had a "huge knot [on his cheek] and he was bleeding." 2RP 109. There were no marks on Moore. 2RP 109.

During cross-examination, Moore's attorney asked Ms. Robben if anyone had ever explained the parking rules to Mr. Moore. 2RP 123. Ms. Robben explained that she herself had explained the rules to Moore when she had impounded his car on a previous occasion, about two weeks before the assault. 2RP 123. When asked why she had not mentioned this before, Ms. Robben responded, "I wasn't asked." 2RP 123.<sup>4</sup>

---

<sup>4</sup> Ms. Robben's testimony substantially undermined Moore's argument that he took reasonable actions to defend his property from a "malicious trespass" or "malicious interference."

Moore again took the stand. 2RP 134-63. Moore explained that he was defending his vehicle and his person from Mr. Storer, someone he believed was "stealing" his car. 2RP 162. Moore added that he had previously worked as a tow truck driver and knew that the way in which Mr. Storer intended to tow his vehicle would have damaged it. 2RP 136-44.<sup>5</sup>

**C. ARGUMENT**

The superior court found that counsel's failure during the 2007 trial to raise and develop cross-examination relating to a specific affirmative defense "affected cross examination in a fundamental way" and constituted "patent ineffective assistance of counsel." Appendix B. As a result the superior court held that the former testimony of an unavailable witness, admitted in a retrial on the same charge where no new evidence was offered, violated the Confrontation Clause. Appendix B. In other words, in order for a party to admit former testimony, cross-examination must be effective. This court should reverse because the court failed to properly apply the Strickland standard in evaluating counsel's performance in the 2007 trial. And, because superior court's

---

<sup>5</sup> None of this testimony was elicited at trial in 2007. Without Mr. Storer, the State was unable to rebut it.

decision concerning both the Confrontation Clause and ER 804(b)(1) was based upon a misapplication of the Strickland standard, this Court should reverse.

**1. THE SUPERIOR COURT MISAPPLIED THE STRICKLAND STANDARD IN FINDING "PATENT INEFFECTIVE ASSISTANCE OF COUNSEL."**

The superior court's finding of "patent ineffective assistance of counsel" is unsupported by the trial record and such a finding is inconsistent with Strickland. In 2007, Moore's attorney focused the jury's attention on the more credible affirmative defense of self-defense because it was supported by the evidence. Given that the underlying facts involve the respondent, Donald Moore, repeatedly punching a tow truck driver in the face, a defense of property instruction could not have been supported by the evidence. *Infra*. Thus, it cannot be said that Moore was denied effective assistance of counsel when his attorney pursued an affirmative defense that was supported by the evidence.

The superior court found "patent ineffective assistance of counsel" without properly applying the Strickland standard. Moreover, the superior court failed to evaluate whether counsel's performance was deficient or requiring Moore to identify how he

was prejudiced by any deficient performance. Finally, the superior court's findings are insufficient to find that there is a reasonable probability that the outcome would have been different, but for counsel's failure to raise a defense of property claim.

A challenge to effective assistance of counsel is reviewed *de novo*. State v. Rainey, 107 Wn. App. 129, 135, 28 P.3d 10 (2001) (citing State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995)).

Ineffective assistance of counsel occurs only where "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The burden of proving this is placed wholly on the defendant. Id. In order to prove this, and thus prevail on a claim of ineffective assistance of counsel, the defendant must establish both that: 1) trial counsel's performance fell below a minimum objective standard of reasonableness (the "performance prong"); and 2) that but for this substandard performance, there is a reasonable probability that the trial's outcome would have been different (the "prejudice prong"). State v. Thomas, 109 Wn.2d 222, 225-56, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. 668). If the defendant fails to meet his or

her burden with regard to either prong, a reviewing court will find that the defendant was not denied effective assistance of counsel and its inquiry need not go any further. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990).

When reviewing any claim of ineffective assistance of counsel, courts will strongly presume that counsel's representation was effective and competent. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). In engaging in this presumption, the court must make "every effort to eliminate the distorting effects of hindsight." In re Personal Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). In addition appellate courts base their evaluation on the entire trial record, rather than looking simply to the portions identified by the defendant. McFarland, 127 Wn.2d at 335 (citing State v. White, 81 Wn.2d 223, 225, 500 P.3d 1242 (1972)).

To satisfy the first prong, an appellant must show that counsel made error so serious that they were not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Strickland, 466 U.S. at 687. Thus, "scrutiny of counsel's performance is highly deferential and courts will indulge in a strong

presumption of reasonableness. Id. at 226 (emphasis added).

A reviewing court presumes that the defendant was properly represented. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). An attorney's representation is considered deficient only when it falls below an objective standard of reasonableness. Id. Deficient performance is not shown by matters that go to trial strategy or tactics. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The appellant bears the burden of showing that there were no legitimate strategic or tactical reasons behind defense counsel's decision. Rainey, 107 Wn. App. at 135 (citing State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)).

Appellate courts are loathe to second-guess trial counsel's strategic or tactical decisions. As a result, a decision made by trial counsel for legitimate strategic or tactical reasons cannot be ineffective. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) ("If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for the claim that the defendant received ineffective assistance of counsel).

When determining whether counsel's representation was deficient, the court must evaluate counsel's representation against the entire record. State v. White, 81 Wn.2d 223, 225, 500 P.2d

1242 (1972). Trial strategies and techniques may vary among lawyers, and the effectiveness of counsel cannot be measured by the result obtained. State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979) (emphasis added). Moreover, matters that go to trial strategy or tactics do not show deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). However, the fact that counsel's decision is tactical in nature does not insulate it from a claim that the decision is unreasonable. State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011).

To satisfy the second prong, a defendant must show that trial counsel's errors were so serious as to deprive him of a fair trial. Thomas, 109 Wn.2d at 225-26 (citing Strickland, supra). In order to establish prejudice, an appellant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Despite all of this, the superior court found "patent ineffective assistance of counsel" because Moore's attorney in 2007 raised self-defense, but not defense of property. However, a defendant is not entitled to have a jury instruction unless there is sufficient credible evidence to support a theory or defense. State v. Dyson,

90 Wn. App. 433, 952 P.2d 1097 (1997) (citing State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980)). In order to obtain a jury instruction on self-defense or by analogy, on defense of property, there must be some credible evidence tending to establish that the defendant acted in self-defense or acted in defense of property. State v. Graves, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999); State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097 (1997) (emphasis added). The defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that belief was objectively reasonable." Dyson, 90 Wn. App. at 438-39 (emphasis added). This Court has held that where a claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. State v. Johnson, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007).

Evidence of self-defense is viewed "from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). And, although a defendant is entitled to

have the jury instructed on his or her theory of the case, a defendant is not entitled to an instruction that misrepresents the law or for which there is no evidentiary support. State v. Garbaccio, 151 Wn. App. 716, 737, 214 P.3d 168 2009 (internal citations omitted). There must be sufficient evidence to support an affirmative defense instruction. State v. Yates, 64 Wn. App. 345, 351, 824 P.2d 519 (1992). The evidence is sufficient if "the jury could reasonably infer the existence of the facts needed to use it." Yates, 64 Wn. App. at 351 (emphasis added). A defendant is not entitled to have a jury instruction unless there is sufficient evidence to support a theory or defense. State v. Dyson, 90 Wn. App. 433, 952 P.2d 1097 (1997) (citing State v. Theroff, 95 Wn.2d at 389, 622 P.2d 1240 (1980)). In order to receive a jury instruction on self-defense, or by analogy, defense of property, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that belief was objectively reasonable. Dyson, 90 Wn. App. at 438-39.

Moore cannot demonstrate that he was entitled to a defense of property instruction, that counsel's performance was deficient in failing to request it, or that the failure to request the instruction

resulted in prejudice. Thus, Moore's argument that he was denied effective assistance of counsel in this regard must fail.

The superior court found that Moore was denied his right to effective assistance of counsel in 2007 when his attorney pursued only self-defense, but not defense of property. Absent from the superior court's decision was any analysis concerning *why* the decision was deficient or *how* Moore was prejudiced by counsel's decision. In reaching this erroneous conclusion, the superior court refused to engage in a presumption of reasonableness, instead turning the standard on its head finding "patent ineffective assistance of counsel." Appendix B.

This Court has held that any force used in defense of property must be "necessary" to protect "against a malicious trespass or other malicious interference" with any real or personal property lawfully in that person's possession even though the defendant does not reasonably believe he is about to be injured. See State v. Bland, 128 Wn. App. 511, 514, 116 P.3d 428 (2005) (emphasis added).

Here, there was no credible evidence that Moore's use of force was "*necessary*." Moore kicked and repeatedly punched a tow truck driver in order to prevent Mr. Storer from towing his car.

1RP 24-26. Furthermore, there was no credible evidence that Moore used force to protect "against a *malicious* trespass or other *malicious* interference." There was, in fact, no evidence that Mr. Storer, the tow truck driver, acted with malice at all.<sup>6</sup> There was no credible evidence that Mr. Storer was committing a "trespass" or an "interference," when he was expressly invited to the Garden Pointe Apartments by the complex manager, Seneca Robben, to tow Moore's vehicle that was illegally parked at the apartment complex. 1RP 23.

In addition, a review of the entire record (as required in an ineffective assistance claim) reveals that trial counsel had a cohesive theory of the case: self-defense. The defense theory of the case was that Mr. Storer had touched Moore first and that Moore had acted in self-defense. The defense theory was that Moore's actions were justified because Storer touched him first. 1RP 30-31.

This theory of the case and the argument based upon it were consistent throughout the trial. Trial counsel pursued a legitimate trial strategy based on that theory of the case. And, during closing

---

<sup>6</sup> To act maliciously is defined as acting with "an evil intent, wish, or design to vex, annoy, or injure another person." WPIC 2.13. The record is devoid of any evidence that Mr. Storer acted with malice.

argument, trial counsel vigorously argued the defense theory and appropriately reminded the jury of all of the facts that supported it.<sup>7</sup> In light of this theory and strategy, it was a legitimate and reasonable tactical decision to refrain from also attempting to assert that Moore acted in defense of property.

Given that there was no credible evidence presented in the 2007 trial that would support a defense of property claim, Moore's attorney's performance cannot now be characterized as deficient.<sup>8</sup> To the contrary, Moore's attorney made a reasonable strategic decision to raise, argue, and cross-examine the complaining witness regarding Moore's claim of self-defense.

Thus, trial counsel's decision to pursue one strategy over another was not a decision that fell below an objective standard of reasonableness, but rather was a legitimate, and wise, tactical approach. That it did not succeed does not, by definition, make the decision ill-advised. State v. Wilson, 29 Wn. App. 895, 904,

---

<sup>7</sup> Moore's attorney began closing argument as follows: "Ladies and gentlemen. I told you at the beginning, this is a case about self-defense, self-defense." 2RP 3. He continued, "Mr. Moore told you today that he wasn't the aggressor. That he had to act. Storer was the aggressor." 2RP 4. Moore's attorney did not argue defense of property defense, nor did he request jury instructions concerning this affirmative defense.

<sup>8</sup> Moore may argue that because he received a defense of property instruction in the 2009 trial, that he was entitled to it in 2007. However, it appears that in 2009, the State did not take exception to the instruction and it was included in the instructions to the jury without any argument or discussion.

626 P.2d 998, rev. denied, 96 Wn.2d 1022 (1981) ("The competency of counsel is not measured by the result.").

Even if Moore could show deficient performance, which he cannot, Moore has failed to identify any prejudice. Moore's sole argument relating to prejudice was that he was unable to question Mr. Storer regarding "the legality of the tow," presumably as it related to defense of property. 2RP 52.<sup>9</sup>

However, in 2009 Moore's attorney carefully cross-examined the apartment complex manager, Ms. Robben, concerning the legality of the tow. Ms. Robben testified that Moore was parked in a space reserved for "tenants only." She testified that the parking rules of the complex clearly state that a guest pass was required to park where Moore had been parked. The parking rules were conspicuously posted in 12 locations in the parking lot. And, two weeks before the assault, Ms. Robben had called the same towing company to impound Moore's vehicle for illegal parking. At that time, Ms. Robben explained the rules governing parking to Moore. 2RP 111-20.

---

<sup>9</sup> Moore argued that his previous attorney was ineffective because there was "no questioning about whether the cars were parked, how the thing was marked, whether or not the tow operator verified at any point that this was the car he received a call about, who made the call, whether that person had the authority to order a tow or not... I can't develop any of that because this witness is gone." 2RP 52.

Moore's argument concerning prejudice relies upon the incorrect assumption that only Mr. Storer could answer questions concerning the "legality of the tow" when in fact Ms. Robben answered those questions. And, it cannot be ignored that the answers to these questions substantially undermine Moore's claim regarding defense of property. This information undermined any argument that Moore acted reasonably to defend his property against a "*malicious* trespass" or "*malicious* interference." Given that Moore was on notice that his car could be, and would be, towed, his use of physical force was unreasonable, unnecessary, and unlawful.

Given the evidence and testimony presented, the superior court's finding of ineffective assistance of counsel is unsupported by the trial record.

**2. THE FORMER TRIAL TESTIMONY OF AN UNAVAILABLE WITNESS SATISFIES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.**

The question of whether a criminal defendant's Sixth Amendment right to confrontation has been violated is reviewed de novo. State v. Medina, 112 Wn. App. 40, 48, 48 P.3d 1005

(2002). The Confrontation Clause of the Sixth Amendment, made applicable to the State's through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witness against him." The Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. Coy v. Iowa, 487 U.S. 1012, 1016, 108 S. Ct. 2798 (1987). In order to ensure the defendant's ability to test the reliability of testimony, "[t]he Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination. State v. Hobson, 61 Wn. App. 330, 334, 810 P.2d 70 (1991) (internal citations omitted).

The Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the fact finder the reasons for giving scant weight to the witness' testimony." Delaware v. Fensterer, 474 U.S. 15, 21-22, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985).

However, the right to confront witnesses, as guaranteed by the Sixth Amendment and the Washington constitution, is not absolute. State v. Slider, 38 Wn. App. 689, 696, 688 P.2d 538 (1984), rev. denied, 103 Wn.2d 1013 (1985). A traditional and well-settled exception to Confrontation is when “a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant which was subject to cross-examination by that defendant.” Barber v. Page, 390 U.S. 719, 722, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968).

When a witness is unavailable, his or her prior testimony can be admitted at a subsequent trial consistent with the Sixth Amendment if, at the previous hearing, there was adequate opportunity to cross-examine. State v. Solomon, 5 Wn. App. 412, 487 P.2d 643, rev. denied, 80 Wn.2d 1001(1971); State v. Roebuck, 75 Wn.2d 67, 72, 448 P.2d 934 (1968).

This Court has held that although the clause does guarantee an opportunity to conduct cross-examination, it does not guarantee the right to conduct effective cross-examination. State v. Jenkins, 53 Wn. App. 228, 235, 766 P.2d 499, rev. denied, 112 Wn.2d 1016 (1989) (internal citations omitted). And, the United States Supreme Court has long held that “the Confrontation Clause guarantees only

'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" United States v. Owens, 484 U.S. 554, 560, 108 S. Ct. 838 (1988); Kentucky v. Stincer, 482 U.S. 730, 739, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987).

The opportunity to conduct cross-examination satisfies the Sixth Amendment right to Confrontation. Solomon, 5 Wn. App. at 419; State v. Estorga, 60 Wn. App. 298, 803 P.2d 813 (1991). The opportunity to conduct cross-examination can be exercised effectively, or not, and, it may be waived in its entirety. See State v. Benn, 161 Wn.2d 256, 165 P.3d 1232 (2007) (confrontation satisfied where the defendant and his attorney waived cross examination of a State witness who subsequently died before the case could be retried).

Even testimony from a preliminary hearing satisfies the Confrontation Clause, assuming a proper opportunity for cross-examination at the previous hearing. See, e.g., California v. Green, 399 U.S. 149, 165, 90 S. Ct. 1930, 26 L. Ed. 489 (1970); State v. Mohamed, 132 Wn. App. 58, 64, 130 P.3d 401 (2006).

When a party offers the former testimony of an unavailable witness, the Confrontation Clause is satisfied when two conditions

are met. State v. DeSantiago, 149 Wn.2d 402, 410-11, 68 P.3d 1065 (2003). First, the moving party must demonstrate that the declarant is "unavailable" at the time of trial. Id. at 411. Second, the moving party must demonstrate that the statement bears sufficient indicia of reliability. Id. A witness is unavailable if they are "unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity..." ER 804(a)(4).

This Court has held that preliminary hearing testimony satisfies the Confrontation Clause when the testimony is "given under circumstances closely approximate [to] those that surround the typical trial." Mohamed, 132 Wn. App. at 66. Circumstances approximating trial include those where the witness testifies under oath, the defendant is represented by counsel, proceedings conducted before a judicial tribunal where a record can be made, and the defendant given every opportunity to cross examine the witness. Mohamed, 132 Wn. App. 58 (citing Green, 399 U.S. at 165; State v. Jenkins, 53 Wn. App. 228, 235, 766 P.2d 499 (1989)).

This Court has observed "the question is whether that opportunity was adequate to fulfill the purposes of the Confrontation Clause." Id. at 65. The superior court's decision was premised upon

a mistaken conclusion that Moore's counsel in the 2007 trial was ineffective.

In the present case, Moore's opportunity to cross-examine Mr. Storer in 2007 was adequate. At that time, the motive to ask questions surrounding the facts was strong and the opportunity to do so was unlimited. Mr. Storer was subjected to unfettered and properly motivated questioning about the facts underlying the assault. 1RP 22-34. That Moore's attorney chose to pursue one legitimate affirmative defense over another questionable affirmative defense has no bearing on whether the Confrontation Clause was satisfied: Moore's Sixth Amendment right to Confrontation was not violated by the admission of Mr. Storer's testimony in the retrial held in 2009.

The superior court's decision rests upon a misapplication of the Strickland standard and is in conflict with a long line of well-settled precedent discussed *supra*. For this reason, this court should find that the superior court's decision was error.

**3. THE FORMER TESTIMONY OF AN UNAVAILABLE WITNESS SATISFIES ER 804(b)(1).**

The superior court held that the attorney in the 2007 trial lacked a similar motive to develop cross-examination concerning specific facts because the attorney was unaware of the alternative affirmative defense and had thus provided ineffective assistance of counsel. The superior court's decision is unsupported by the trial record and is premised upon a misapplication of the Strickland standard.

The decision to admit evidence is reviewed for an abuse of discretion. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1244 (2001). The superior court erroneously found that the trial court abused its discretion by admitting Mr. Storer's former testimony. See Appendix B.

The former testimony of an unavailable witness is admissible at a subsequent trial under ER 804(b)(1) when a two-part test is satisfied. As a prerequisite to the admissibility of the former testimony, the opposing party must have had both an "opportunity and similar motive to develop the testimony by... cross...

examination." Under ER 804(b)(1) an opportunity to cross examine a witness can be waived. The defendant need not actually engage in cross examination of a witness. State v. Benn, 161 Wn.2d 256, 165 P.3d 1232 (2007).

In the present case, Moore not only had an opportunity to cross examine Mr. Storer, but Moore exercised this opportunity by engaging in cross examination in the first trial. Thus, the former testimony was properly admitted because Moore had an opportunity to cross-examine Mr. Storer.

ER 804(b)(1) requires only that a party have a "similar motive" to develop testimony. A trial court may properly admit former testimony of an unavailable witness in a subsequent trial even when the State offers new evidence and additional criminal charges. State v. DeSantiago, 149 Wn.2d 402, 414, 68 P.3d 1065 (2003). In DeSantiago after the State's first trial resulted in a mistrial, the State moved to admit testimony of unavailable witnesses in the retrial. Id. at 410-11. The State also added a charge of burglary. Id. Over DeSantiago's objection, the trial court

admitted the former testimony of three unavailable witnesses, and Santiago was found guilty as charged. Id. at 409-10.

The Washington State Supreme Court affirmed holding that the trial court properly found that both the Confrontation Clause and ER 804(b)(1) were satisfied. Id. at 415. In DeSantiago, the court observed that whether the defendants had "similar motive" to cross examine depended "upon consideration of new evidence offered at the second trial and a new burglary charge." Id. at 413. Thus, where there is no new evidence and no new charges filed, the "similar motive" requirement is satisfied. "A similar motive" is distinguishable from "an identical motive." See United States v. Salerno, 505 U.S. 317, 326, 112 S. Ct. 2503, 120 L. Ed. 2d 255 (1992).

The superior court found that the trial court's decision to admit this evidence was an abuse of discretion because Moore lacked a "similar motive" to develop the cross-examination of Mr. Storer based on defense counsel's decision to raise an

additional affirmative defense.<sup>10 11</sup> However, the superior court's decision regarding counsel's motive to conduct cross-examination is based upon a misapplication of the Strickland standard.

#### D. CONCLUSION

Moore failed to establish deficient performance, and considering the evidence presented at trial, Moore failed to demonstrate that he suffered prejudice as a result of his attorney's decision to pursue self-defense rather than a defense of property, an affirmative defense that was unsupported by the trial record.

The former testimony of an unavailable witness is admissible at a subsequent proceeding when the defendant has had an opportunity to conduct cross-examination. This admission of this testimony did not violate the Confrontation Clause of the Sixth

---

<sup>10</sup> Moore argued that he lacked a similar motive because he could no longer question Mr. Storer regarding the "legality of the tow." Moore added "there's nothing to establish whether or not the tow was legal. There's no evidence developed. There's no cross-examination, there's no direct examination about the legality of the tow.... There's no evidence as to whether or not this tow operator had any right to tow it." 2RP 52.

<sup>11</sup> The superior court's decision is fundamentally flawed and leads necessarily to absurd results. Moore's decision to pursue a similar affirmative defense is not dispositive as to whether Mr. Storer's testimony should have been admitted in the retrial. If the superior court's decision is correct, then a party's decision to pursue a different tactic or strategy in a subsequent trial may serve as an absolute bar to the admission of the testimony of an unavailable witness under ER 804(b)(1). Thus, a party could intentionally raise new issues or defenses in a subsequent trial in order to bar the admission of former testimony.

Amendment, nor was the evidence admitted in violation of ER 804(b)(1). The superior court's decision to the contrary was based upon an unsupported finding of "patent ineffective assistance of counsel."

For the foregoing reasons, the State respectfully asks this Court to affirm the superior court.

DATED this 11<sup>th</sup> day of July, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
CELIA A. LEE, WSBA #41700  
Deputy Prosecuting Attorney  
Attorneys for Appellant  
Office WSBA #91002

## APPENDIX A

**FILED**

KING COUNTY, WASHINGTON

APR 22 2008 ✓

SUPERIOR COURT CLERK  
JENNIFER L. SCHMANN  
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF KING

STATE OF WASHINGTON  
Appellant,

NO. 07-1-10560-6 SCA

vs.

DECISION ON RALJ APPEAL

DONALD MORSE  
Respondent

CLERK'S ACTION REQUIRED

This appeal came on regularly for oral argument on \_\_\_\_\_ pursuant to RALJ 8.3, before the undersigned Judge of the above entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the court holds the following:

Reasoning Regarding Assignment of Error: Failure by defense counsel to request a "no duty to retreat" instruction was ineffective assistance of counsel because there was no rational tactical reason not to request such an instruction and the giving of such an instruction would have affected the verdict in this matter

IT IS HEREBY ORDERED that the above cause is:

[ ] AFFIRMED; [  ] REVERSED; [ ] MODIFIED;

COSTS

REMANDED to \_\_\_\_\_ Court for further proceedings, in accordance with the above decision and that the Superior Court Clerk is directed to release any bonds to the Lower Court after assessing statutory Clerk's fees and costs.

DATED: 4/22/08

Witt  
JUDGE

\_\_\_\_\_  
Counsel for Appellant

\_\_\_\_\_  
Counsel for Respondent

DECISION ON RALJ APPEAL (DCRA)

10/01

## APPENDIX B

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	No. 10-1-03979-8 SEA
	)	DECISION ON RALJ
Plaintiff/Respondent,	)	(King County District Court Cause
	)	270103850 South Division, Burien
vs.	)	Courthouse)
DONALD C. MOORE,	)	
	)	
Defendant/Appellant.	)	

On June 3, 2011, this appeal came on regularly for oral argument pursuant to RALJ 8.3 before the undersigned Judge of the above entitled court. After reviewing the record on appeal and considering the writing submitted and oral argument of the parties this court reverses the trial court for the following reasons:

1. Under the Sixth Amendment's Confrontation Clause, "[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination. State v. Hobson, 61 Wn. App. 330, 334, 810 P.2d 70, 71 (1991).

In order to satisfy the Confrontation Clause the proponent of the admission of former testimony must meet two conditions. State v. DeSantiago, 149 Wn.2d 402, 410-11, 68 P.3d 1065 (2003). The State must demonstrate that the declarant is "unavailable" at the time of trial and the State must further demonstrate that the prior testimony bears a sufficient indicia of reliability. Id. at 411; Crawford v. Washington, 541 U.S. 36, 57, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Reviewing this case de novo, this Court finds that the defendant's right to confrontation was violated because his attorney in the first trial was ineffective by failing to raise, explore, and request instructions on the affirmative defense of

DECISION ON RALJ

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
PH (206) 296-9000 FAX (206) 296-0955

1 defense of property. The failure by counsel to properly raise this defense affected  
2 cross examination in a fundamental way because this defense was clearly  
3 appropriate in this case. Regardless of the issues ruled upon in the first appeal, it  
4 was patent ineffective assistance of counsel not to argue and seek a defense of  
5 property instruction under the circumstances and facts presented in this case.

6 This court finds that trial counsel for Moore failed to pursue this affirmative  
7 defense because he was unaware of it. This failure was not a strategic decision.  
8 No effective attorney would have failed to raise this affirmative defense. As a  
9 result of this failure by trial counsel, the admission of Mark Storer's former  
10 testimony in the retrial violated the Confrontation Clause.

- 11 2. A trial court's decision to admit evidence is reviewed for an abuse of discretion.  
12 State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Under ER 804 the  
13 former testimony of an unavailable witness is admissible at a subsequent trial  
14 under ER 804(b)(1) when a two part test is satisfied. The opposing party must  
15 have had both an "opportunity and similar motive to develop the testimony by...  
16 cross... examination." ER 804(b)(1).

17 This Court finds that the trial court abused its discretion by admitting the former  
18 testimony of Mark Storer because trial counsel for Moore was ineffective in the  
19 first trial. No effective attorney would have failed to raise this affirmative defense.  
20 Because Moore's attorney failed to raise the affirmative defense of property in the  
21 first trial, Moore lacked a similar motive to cross examine Storer. As a result, this  
22 Court finds that Moore lacked a similar motive to develop testimony during cross  
examination. Thus, the State failed to satisfy the requirements of ER 804(b)(1).

IT IS HEREBY ORDERED that the above cause is REVERSED and REMANDED to  
King County District Court, South Division, Burien Courthouse, for further proceedings in  
accordance with the above decision.

DATED: June 7, 2011

JUDGE: Susan Craighead  
HON. JUDGE SUSAN CRAIGHEAD  
King County Superior Court

Celia A. Lee  
CELIA A. LEE, WSBA #41700

Deputy Prosecuting Attorney  
Attorney for Respondent

approved electronically  
JEANETTE JAMESON, WSBA #24154  
Attorney for Appellant

DECISION ON RALJ

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
PH.(206) 296-9000 FAX (206) 296-0955

## APPENDIX C

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff/Respondent,	)	No. 10-1-03979-8 SEA
	)	
vs.	)	(King County District Court Cause
	)	270103850, South Division, Burien)
DONALD C. MOORE,	)	
	)	NOTICE OF DISCRETIONARY
Defendant/Appellant.	)	REVIEW TO COURT OF APPEALS,
	)	DIVISION I
	)	
	)	

The State of Washington, plaintiff, pursuant to RAP 2.3(d), seeks review by the Court of Appeals of the State of Washington, Division I, of the superior court's Decision on RALJ Appeal entered on June 7, 2011. A copy of this decision is attached.

DATED this 10<sup>th</sup> day of June, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
CELIA A. LEE, WSBA #41700  
Deputy Prosecuting Attorney  
Attorneys for Plaintiff

Counsel for Petitioner: CELIA A. LEE  
King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104

Counsel for DONALD C. MOORE  
JEANNETTE JAMESON, WSBA No. 24154  
Law Office of J.J. Jameson  
16212 Bothell Way SE #F221  
Mill Creek, WA 98012

NOTICE OF DISCRETIONARY REVIEW TO  
COURT OF APPEALS, DIVISION I

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

## APPENDIX D

2012 APR 18 PM 1:39

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

STATE OF WASHINGTON,	)	
	)	No. 67294-1-I
Petitioner,	)	
	)	ORDER GRANTING MOTION
v.	)	FOR DISCRETIONARY REVIEW
	)	
DONALD C. MOORE,	)	
	)	
Respondent.	)	
_____	)	

Petitioner State of Washington moves for discretionary review of a superior court order reversing the conviction in district court of respondent, Donald C. Moore, on one count of fourth degree assault.

The charge arose from a physical conflict between Moore and Mark Storer, a tow truck driver. Moore saw that Storer was about to hook up his car and tow it away from a parking lot. A scuffle ensued. Storer sustained minor injuries. At the first trial, in July 2007, Moore argued self-defense. He was convicted. He appealed to superior court, arguing that his attorney was ineffective for failing to request instructions on defense of property and no duty to retreat. The superior court reversed the conviction because counsel did not request an instruction on no duty to retreat. The superior court's decision did not address the argument about defense of property.

The second trial occurred in 2009. Mark Storer had died for reasons unrelated to this case. Over Moore's objection, the trial court permitted the jury to hear Storer's recorded testimony from the first trial. The no duty to retreat instruction was given. The

trial court allowed Moore to argue defense of property as well as self-defense and gave appropriate instructions.

Again, Moore was convicted. He appealed to superior court, contending that it was error to admit Storer's former testimony. The superior court agreed and reversed his conviction and remanded for a new trial. The court concluded that Storer's former testimony should not have been admitted in the second trial for two reasons. Both reasons were premised on the court's determination that counsel in the first trial was ineffective.

First, the superior court ruled that "it was patent ineffective assistance of counsel not to argue and seek a defense of property instruction under the circumstances and facts presented in this case." The court reasoned that because of counsel's failure, "the admission of Mark Storer's former testimony in the retrial violated the Confrontation Clause."

The finding of "patent ineffective assistance of counsel" raises a significant question of constitutional law. A per se test for ineffective assistance would be inconsistent with the two-prong test of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). It is not clear why, in view of the record as a whole, counsel's omission should be viewed as deficient performance rather than as a legitimate trial strategy. Perhaps even more significantly, it is not clear there is a reasonable probability that the outcome of the second trial would have been different but for counsel's failure to raise defense of property in the first trial. See State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The superior court did not formulate the prejudice prong inquiry in the usual way. Instead, the court apparently

reasoned that but for counsel's failure to raise defense of property in the first trial, the record of Storer's former testimony might have included cross-examination on factual issues pertinent to defense of property. This is certainly true, but the question remains whether the opportunity to cross-examine Storer on this topic would likely have produced a different outcome in the second trial. This particular intersection of the Confrontation Clause with the law of ineffective assistance raises significant legal and practical concerns. We conclude review is warranted pursuant to RAP 2.3(d)(2).

Second, the superior court ruled that Storer's former testimony should not have been admitted in the second trial because it violated an evidentiary rule. The former testimony of an unavailable witness may be admitted only if, in the first proceeding, the opposing party had both the opportunity and a "similar motive" to cross-examine the witness. ER 804(b)(1). Starting again with the premise that counsel for Moore in the first trial was patently ineffective for not raising defense of property as an affirmative defense, the court concluded that Moore "lacked a similar motive to cross examine Storer" in the first trial.

The violation of an evidentiary rule does not raise a constitutional question in itself. The State, however, also relies on RAP 2.3(d)(1) as a basis for obtaining discretionary review ("If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court"). The State contends the court's decision conflicts with State v. DeSantiago, 149 Wn.2d 402, 414, 68 P.3d 1065 (2003). In DeSantiago, the original charge was kidnapping. The first trial ended with a mistrial. On retrial, the State added a charge of burglary. The court held the former testimony of a now unavailable witness about damage to the home was properly admitted. Even

though burglary was a new charge, in each trial the defense theory was that the defendants were not in the home to engage in criminal activity. Therefore, in each trial, defendants had a "similar motive" to cross-examine the witness. Moore responds that a determination by the superior court that the motive was not sufficiently similar should not be a subject for discretionary review because it is fact-specific by nature and must be evaluated on a case-by-case basis.

The superior court reasoned that Moore lacked a "similar motive" to cross-examine Storer in the first trial because his attorney failed to raise defense of property. If this ruling was incorrect, it was because the court incorrectly analyzed the issue of ineffective assistance of counsel, not because the court made a ruling in conflict with DeSantiago's analysis of ER 804(b)(1). Because both of the superior court's grounds for reversal implicate the issue of ineffective assistance of counsel, the entire ruling warrants discretionary review under RAP 2.3(d)(2).

Now, therefore, it is hereby

ORDERED that the motion for discretionary review in the above matter is granted and the clerk is directed to set a schedule for perfecting the appeal.

DATED this 18<sup>th</sup> day of April, 2012.

Reach, C. J.

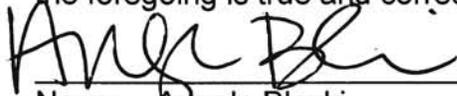
Becker, J.

Appelwick, J.

Certificate of Service by Mail

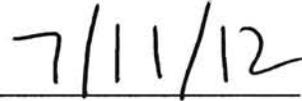
Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jeannette D. Jameson, the attorney for the appellant, at 16212 Bothell Way SE, Suite F221, Mill Creek, Washington 98012-1603, containing a copy of the Brief of Appellant, in STATE V. DONALD C. MOORE, Cause No. 67294-1-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name Angela Blocki

Done in Seattle, Washington



Date

ORIGINAL