IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WILLIAM J. HOCKETT, Appellant.	No. 39894-0-II UNPUBLISHED OPINION

Van Deren, J. — William J. Hockett appeals his second degree murder conviction. He argues that his trial counsel provided ineffective assistance by failing to move for a mistrial after the State informed the jury that the death penalty would not be at issue, and he did not object to the trial court's curative instruction. We affirm.

FACTS

On March 7, 2001, John Ernst discovered Dorothy Hockett's[1] body in a ditch on the side of an unpaved road. He called 911. Dorothy suffered two gunshot wounds and several blunt force injuries. The police began a homicide investigation, which led to Hockett's arrest on March 10, 2001.

On March 14, 2001, the State charged Hockett with second degree murder. The trial court found Hockett incompetent to stand trial in June 2001, and he underwent several competency restoration periods thereafter. He was ultimately determined to be competent to stand trial in May 2009, and trial followed in September. During the jury selection process, the following exchange took place:

> Juror No. 14: I had a question about—this is a murder trial—I don't—I'm

[1] To avoid confusion we refer to Dorothy Hockett hereinafter only by her first name.

> not sure about Washington law, but does the jury decide the—decide death (inaudible) is that (inaudible) of this trial?
>
> [State]: That won't be something that is in play in this trial.
>
> Juror No. 14: Okay.
>
> [State]: It's not something that you're going to be asked to decide.
>
> Juror No. 14: Oh.
>
> The Court: If I could have counsel approach?
>
> Sidebar.
>
> [State]: The only, I guess—I didn't mean this to belabor this point. You're fact deciders. You're going to be judges. You're not gonna wear black robes like Judge Sheldon, but you are, in a very real way, going to be judges of what the facts of the case are and to decide and tell us what facts are supported by the evidence.

Report of Proceedings (RP) at 293-94.

When proceedings reconvened the next day, the court raised concerns about the potential constitutional issue the State's answer to juror 14's question raised. The Court gave counsel the opportunity to respond to the concerns.

The State acknowledged error, but argued that it was not prejudicial. The State requested a cautionary instruction advising the jury not to consider the potential punishment in its deliberations. Defense counsel asked for a mistrial, arguing that a curative instruction might be inadequate.

The court found that defense counsel should have objected when the juror asked the question, but determined that the error was not serious enough to have deprived Hockett of a fair trial. The court met with counsel in chambers to construct a curative instruction. As a result of that discussion, it included the following instruction in the opening instructions given to the jury:

> You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. Please remember that you are now officers of the Court and you must take this responsibility seriously to hear and decide this case with attention and care. As officers of the Court, you must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout the trial, you should be impartial and you should not permit either

sympathy nor prejudice to influence you.

RP at 308. Defense counsel did not object. At the close of the first day of trial, the State made a record of the chambers discussion, stating,

> Your Honor met with counsel and looked over a jury [i]nstruction. And I believe, Your Honor, the issue was—and please correct me if I'm wrong—we have in brackets you may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.
>
> Your Honor decided that that should be probably omitted because it would draw attention to it, and only leave the preceding sentence in as you have nothing whatever to do with any punishment that may be imposed in case of a violation of law. And then Your Honor is going to include some further language as well.
>
> That's the record I have to make, Your Honor.

RP at 430.

The court asked whether defense counsel would like to make any further record, and he responded, "No, Ma'am. I think we resolved the issue. I guess ultimately that's for another day though." RP at 430.

The jury found Hockett guilty of second degree murder on October 7, 2009.

ANALYSIS

To establish ineffective assistance of counsel, a defendant must prove deficient performance and resulting prejudice. *State v. Townsend*, 142 Wn.2d 838, 843, 15 P.3d 145 (2001). To prove deficient performance, "a defendant must 'demonstrate that counsel's representation fell below an objective standard of reasonableness under professional norms.'" *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008) (quoting *Townsend*, 142 Wn.2d at 843-44). In order to show prejudice, the defendant must prove that there is a "reasonable probability" that the outcome would have been different, but for counsel's deficient performance. *Hicks*, 163 Wn.2d at 486 (internal quotation marks omitted) (quoting *State v. Cienfuegosi*, 144 Wn.2d 222,

226, 25 P.3d 1011 (2001)).

When the court informs the jury that the death penalty is not involved in a case, defense counsel's failure to object constitutes deficient performance. *Townsend*, 142 Wn.2d at 847. Here, counsel's failure to object when the juror asked the question resulted in the State's improper answer. That was deficient performance. The trial court sought to remedy the problem with a curative instruction. Hockett contends that the instruction was inadequate, and counsel's conduct was again deficient because he did not object to the instruction and did not move for a mistrial on the basis of its inadequacy.

The second argument clearly fails. Counsel asked for a mistrial, rather than a curative instruction. The court denied that request, and there was no reason to suppose that it would change its mind 15 minutes later, after having formulated an instruction that it believed was sufficient to cure the error.

The answer is the same with regard to the failure to object to the curative instruction. The record indicates that the court discussed the instruction with counsel in chambers, the prosecutor asked for language informing the jury that they must not consider the punishment that would follow conviction, and the court rejected that request because it did not want to add emphasis to the improper information the State gave the jury. A further objection by defense counsel would have received the same response.

Moreover, the court's approach was not necessarily erroneous. Hockett argues that the jurors may have been less diligent in examining the evidence because they knew that the death penalty was not involved. However, the curative instruction reminded them of the seriousness of their task and the need to be careful. The court reminded them of this in the first closing

instruction, and it included the admonition that they could "not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful." RP at 858-59; That appears to be the language that Hockett argues should have been included in the curative instruction. He does not explain why it would have been more effective there.

Finally, Hockett cannot show prejudice. Our Supreme Court has twice found that informing the jury about punishment was harmless in light of the amount of evidentiary support for the verdict. *See Hicks*, 163 Wn.2d at 488-89; *Townsend*, 142 Wn.2d at 848-49. That is true in this case. Dorothy had been shot twice, both bullets exiting her body. Two witnesses near her residence had heard gunshots the night she died. There were blood spatters on Dorothy's back patio, and police found two spent bullets near the greenhouse doorway. The bullets were from Hockett's gun. When Dorothy's body was found, there was a portion of a hearing aid in her ear. Police found the missing piece in the breezeway at the back of her house. The night of the murder, a neighbor saw Hockett reposition Dorothy's white pickup truck so that it was backed into the driveway. A short time later, he heard the truck leave. It returned one hour to one hour and one half later, an amount of time consistent with a round trip to the site where the body was found.

It is true, as Hockett argues, that this evidence was all circumstantial, but that does not diminish its weight. *See State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). The evidence was overwhelming. There is no question that the verdict would have been the same had the State never answered the juror's question.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Johanson, J.