

NO. 69517-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT DEAN III,

Appellant.

2013 MAY 10 PM 3:13
COURT OF APPEALS DIV I
STATE OF WASHINGTON
D

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Jury instructions must inform the jury that the State bears the burden of proving each essential element of a criminal offense beyond a reasonable doubt. Jury instructions are read in a common-sense manner and are sufficient if they properly inform the jury of the applicable law. Here, the definition of “recklessness” in the jury instructions precisely mirrored the statute, and the “to convict” instruction required the jury to find every element of the crime charged. Was the jury properly instructed?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Robert Dean III was charged with Assault in the Second Degree for cutting Ibrahim Al-Sebah, a grocery store security guard, with a knife. CP 1; 4RP 18, 21-27.¹ The State alleged that Dean “intentionally assaulted” Al-Sebah with a deadly weapon, and that he intentionally assaulted Al-Sebah “and thereby recklessly” inflicted “substantial bodily harm upon” him.” CP 1. A jury found

¹ The Verbatim Report of Proceedings is referenced as follows: 1RP (9/25/12); 2RP (10/4/12); 3RP (10/8/12); 4RP (10/9/12); 5RP (10/10/12); and 6RP (10/19/12).

Dean guilty of Assault in the Second Degree and the trial court sentenced him within the standard range. CP 52-60.

2. SUBSTANTIVE FACTS.

Ibrahim Al-Sebah was working as a Safeway security guard when he confronted Dean for placing store items in his backpack without paying for them; Dean responded by slashing Al-Sebah in the head and wrist with a knife and then running away. 4RP 21-27, 34-37. Al-Sebah's injuries required a total of 19 stitches. 5RP 11-12.

3. FACTS REGARDING THE INSTRUCTIONS AND THE STATUTE.

The jury was instructed that, in order to convict Dean of Assault in the Second Degree, the State had to prove beyond a reasonable doubt:

- (1) That on or about July 21, 2012, the defendant:
 - a. Intentionally assaulted Ibrahim Al-Sebah and thereby recklessly inflicted substantial bodily harm;
 - or
 - b. Assaulted Ibrahim Al-Sebah with a knife; and that such knife constituted a deadly weapon;
- and
- (2) That this act occurred in the State of Washington.

CP 18. In the same instruction, the jury was told that to return a verdict of guilty, they “need not be unanimous as to which of alternatives 1(a) or 1(b) has been proved beyond a reasonable doubt,” as long as each juror “finds that either 1(a) or 1(b) has been proved beyond a reasonable doubt.” CP 18. This instruction was proposed by Dean’s attorney over the State’s objection. 5RP 24.

Substantial bodily injury was defined for the jury as bodily injury that “involves a temporary but substantial disfigurement...”

CP 17. The jury instructions defined “recklessness” as:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

CP 14.

Under the statute, a person commits Assault in the Second Degree when the person “intentionally assaults another and thereby recklessly inflicts substantial bodily harm.”

RCW 9A.36.021(1)(a). The jury was also instructed that a “person commits the crime of assault in the second degree when he intentionally assaults another and thereby recklessly inflicts

substantial bodily harm or assaults another with a deadly weapon.”

CP 11.

C. ARGUMENT

THE JURY INSTRUCTIONS PROPERLY REQUIRED THE STATE TO PROVE DEAN RECKLESSLY INFLICTED SUBSTANTIAL BODILY HARM.

Dean argues that the jury instructions misstated the law by requiring only that he recklessly committed a “wrongful act,” rather than recklessly “inflicted substantial bodily harm.” Dean is incorrect. The jury’s “to convict” instruction specifically required that the State prove Dean “recklessly inflicted substantial bodily harm” before he could be found guilty of assault in the second degree. CP 18.

Jury instructions must inform the jury that the State bears the burden of proving each essential element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Schulze, 116 Wn.2d 154, 167-68, 804 P.2d 566 (1991). It is reversible error to instruct the jury in a manner that would relieve the State of the burden of proof. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Accordingly, Dean may challenge the jury instruction defining recklessness for the first time on appeal. RAP 2.5(a)(3).

Challenged jury instructions are considered as a whole, and the challenged portions are read in context. State v. Atkins, 156 Wn. App. 799, 807, 236 P.3d 897, 901 (2010). The court reviews alleged errors of law in jury instructions de novo. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Jury instructions are read in a common-sense manner and are sufficient if they properly inform the jury of the applicable law. State v. Bowerman, 115 Wn.2d 794, 809 P.2d 116 (1990). An appellate court will “review the instructions in the same manner as a reasonable juror.” State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994). There are no “magic words” that must be used. State v. Coe, 101 Wn.2d 772, 787, 684 P.2d 668 (1984).

Dean argues that the instructions misstated the law because the definition of recklessness referred to a “wrongful act” rather than the specific result of substantial bodily harm. Dean’s argument fails because he focuses on the jury instruction that defines recklessness in general terms. The “to convict” instruction here clearly instructed the jury that, if they are to convict, they must first find that Dean “intentionally assaulted Al-Sebah” and thereby

“recklessly inflicted substantial bodily harm,” an instruction in complete conformity with the statute. CP 18. While recklessness was defined in general terms, the “to convict” instruction for Assault in the Second Degree specifically required that Dean recklessly inflicted substantial bodily harm. CP 18.

Because jury instructions must be evaluated as a whole, these instructions are clear that to convict Dean of Assault in the Second Degree, based on the injury, the jury must have found that he knowingly disregarded a substantial risk that he would inflict the specific result of “substantial bodily harm.” CP 14, 18.

The decision cited by Dean is rooted in a misinterpretation of the Washington Supreme Court case State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005). Dean relies on State v. Harris, 164 Wn. App. 377, 385, 263 P.3d 1276 (2011) to support his contention that the wrongful act itself must be specified in the jury instruction defining recklessness. Brief of Appellant at 5-7. While he does not also cite State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011) and State v. J.C. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2012), both of those cases also support his contention. These cases, however, are rooted in a misinterpretation of the Washington

State Supreme Court's decision in State v. Gamble, and are fundamentally flawed.²

In Gamble, the court held that manslaughter was not a lesser included offense of felony murder because the jury must find a direct connection between recklessness and death for manslaughter, but not for felony murder. 154 Wn.2d at 460. The court noted that in a manslaughter case, the wrongful act recklessly disregarded is "death." Id. at 467-68. The court's decision in Gamble said nothing, however, as to how jury instructions defining "recklessness" must be drafted, whether in a manslaughter case or any other case.

There has been considerable confusion since Gamble as to the scope and import of the decision. In particular, courts and the WPIC³ Committee have debated whether recklessness must always be defined with reference to the risk that is to be avoided. Responding to Gamble, the WPIC Committee provided a recklessness definition with a fill-in-the-blank bracket permitting (but not requiring) a particularized definition. WPIC 10.03. The

² The State has filed a Petition of Review in J.C. Johnson (Supreme Court, No. 88683-1). A decision on review is pending.

³ Washington Pattern Jury Instructions – Criminal.

Committee's uncertainty about Gamble was reflected in its commentary:

The [Gamble] court gave no indication as to whether more particularized standards would also apply to offenses other than manslaughter. The first paragraph of the instruction above is drafted in a manner that allows practitioners to more fully consider how Gamble applies to other offenses. If the instruction's blank line is used, care must be taken to avoid commenting on the evidence.

11 Wash. Practice: WPIC 10.03, Comment. Thus, the pattern instruction committee is unsure whether Gamble requires a change to jury instructions outside of the manslaughter context.

As noted above, the question of how to instruct juries on the definition of recklessness has arisen in two published Court of Appeals decisions. In State v. Peters, the defendant was convicted of manslaughter in the first degree. On appeal, he claimed that the jury instructions violated his due process rights by lowering the State's burden of proof. Peters, 163 Wn. App. at 847. Indeed, the defendant was correct insofar as the "to convict" instruction asked the jury to find only that Peters engaged in "reckless conduct" before convicting him, instead of saying that they had to find Peters "recklessly caused the death" of his victim. Id. A "to convict" instruction must contain all the elements of the crime because it

“serves as a yardstick by which the jury measures the evidence to determine guilt or innocence.” State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). By failing to provide the nexus between recklessness and death, the “to convict” instruction was incorrect.

However, the Peters court misidentified the error. It correctly held that the jury was not properly instructed, but it mistakenly held that the “reckless” definition, rather than the “to convict” instruction, was flawed. The definition of “reckless” correctly used the statutory language. 163 Wn. App. at 845. Had the “to convict” instruction actually tracked the statute, it would have informed the jury that Peters needed to have recklessly caused the death of the victim, and the State would not have been relieved of its burden of proving an element of the crime. Thus, the Peters court erred by requiring a change to the definition of reckless rather than by requiring the “to convict” instruction to establish the appropriate nexus.

A version of this erroneous analysis was imported into a non-manslaughter case in State v. Harris, supra. Harris was charged with assault of a child and the jury was provided the standard instruction defining recklessness, i.e., disregarding the

risk that a “wrongful act” may occur. Unlike in Peters, the “to convict” instruction in Harris used the precise language of the statute and contained the required nexus between recklessness and the harm to be avoided. The instruction required the jury to find that the defendant “recklessly inflicted *great bodily harm*.” Harris, at 384 (emphasis added).

The Harris court apparently failed to realize that it was the “to convict” instruction in Peters that was deficient. Rather, Harris simply followed the holding of Peters, and held that by failing to include “great bodily harm” in the definition of “reckless,” the State was relieved “of its burden to prove that Harris acted” with disregard of the risk that his actions would result in “great bodily harm.” Id. at 387. This was error. The “to convict” instruction in Harris specifically informed the jury that it had to find that the defendant recklessly inflicted a defined level of harm, “great bodily harm.” Id. at 384. Thus, there was no need to insert the phrase “great bodily harm” into the definition of recklessness.

This Court’s decision in Johnson imported the errors in Peters and Harris to the crime charged here, Assault in the Second

Degree under RCW 9A.36.021(1)(a). The basic reasoning underlying the result in Peters – that there was a violation of due process because the State was relieved of proving an element of the crime – is altogether absent in both Harris and Johnson because the link between recklessness and harm was made clear in the “to convict” instructions in those cases. Thus, there is no due process violation and the “reckless” definition may simply repeat the statutory language rather than be tailored to fit each charged crime.

The court’s opinion in Gamble never required a wholesale change in the way mental states are defined in jury instructions. In fact, Gamble never addressed the sufficiency of the jury instructions at all, yet Peters, Harris and Johnson all erroneously extended Gamble’s ruling to apply even in cases where, unlike Gamble, the jury instructions properly required the jury to find all of the elements of the charged crimes. This Court should decline to follow this erroneous precedent here, and should affirm Dean’s conviction.


D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Dean's conviction.

DATED this 10 day of May, 2013.

Respectfully submitted,

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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 Christopher Gibson, the attorney for the appellant, at Nielsen, Broman, & Koch, PLLC, 1908 E. Madison Street, Seattle, WA, 98122, containing a copy of the BREIF OF RESPONDENT, in STATE V. ROBERT DEAN, III, Cause No. 69517-7 -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.

Dated this 10 day of May, 2013

A handwritten signature in black ink, appearing to be "C. Gibson", written over a horizontal line.

Name

Done in Seattle, Washington