71304-3

71304-3

NO. 71304-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DENNIS WATTERS, JR.

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Michael T. Downes, Judge

REPLY BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

A. ISSUES IN REPLY

1. Did the court commit reversible error when it ruled the lesser offense instruction was unavailable as to count 1?

2. Do the cases relied on by the trial court understate the seriousness of the lesser offense, manslaughter, and did the court therefore err in ruling the lesser instruction was unavailable?

3. Does the State's brief ignore the illogical nature of an all-or-nothing strategy, given that the defense sought a lesser included offense instruction on the alternative charge based on the same homicide?

4. Has the State failed to demonstrate that failure to give the lesser instruction was harmless?

B. ARGUMENTS IN REPLY

1. WHERE THE COURT ANNOUNCED, INCORRECTLY, THE UNAVAILABITY OF THE LESSER OFFENSE INSTRUCTION, THE COURT COMMITTED REVERSIBLE ERROR.

The State attempts to reframe Watters's first argument as advocating for a rule that a court should be required to instruct the jury sua sponte on a lesser offense. Brief of Respondent (BOR) at 7-8 (citing State v. Grier, 171 Wn.2d 17, 45, 246 P.3d 1260 (2011)).

That is not what Watters is asking this Court to decide. Watters instead asks this Court to reverse based on the court's refusal to give a legally and factually warranted lesser instruction.

Here, before trial, and after considering the Pettus[1] and Pastrana[2] cases in a slightly different context,[3] the court announced a manslaughter instruction was unavailable as a matter of law as to count 1, but that it was available as to count 2, the alternative charge. 1RP 16-17. This case is not like Grier and does not raise the specter of an attempt to second-guess an attorney's tactical decision whether to seek a lesser offense instruction.

The purpose of requiring an objection before the trial court is to "apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." State v. Moen, 129 Wn.2d 535, 547, 919 P.2d 69 (1996) (citing State v. Wicke, 91 Wn.2d 638, 591 P.2d 452 (1979)). Here, the trial court gave its ruling on the matter that Watters now raises on appeal, a decision which this Court reviews de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

2. THE TRIAL COURT ERRED IN RELYING ON PETTUS AND PASTRANA BECAUSE THOSE CASES UNDERSTATE THE SERIOUSNESS OF MANSLAUGHTER FOLLOWING GAMBLE.

The State also argues that State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005) had no effect on the validity of the Pettus and Pastrana decisions because Gamble dealt with the legal prong of the test under State

---

[1] State v. Pettus, 89 Wn. App. 688, 951 P.2d 284, review denied, 136 Wn.2d 1010 (1998).

[2] State v. Pastrana, 94 Wn. App. 463, 972 P.2d 557, review denied, 138 Wn.2d 1007 (1999).

[3] Brief of Appellant at 18.

v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), whereas those cases dealt with the factual prong. BOR at 19.

The accused is entitled to a lesser offense instruction when (1) each element of the lesser offense is a necessary element of the charged offense (legal prong) and (2) the evidence supports an inference that the defendant committed only the lesser offense (factual prong). Workman, 90 Wn.2d at 447-48.

Common sense dictates that a court's understanding of the legal definition of an offense may affect the court's decision as to whether certain conduct may satisfy the factual prong. In other words, the two prongs do not exist in isolation. The Pettus and Pastrana decisions, which the trial court obviously relied on here, were based on a now discredited underestimation of manslaughter's seriousness. Pastrana, 94 Wn. App. at 471; Pettus, 89 Wn. App. at 700.

As discussed in Watters's opening brief at pages 21-22, in the light most favorable to Watters, there was evidence satisfying Workman's factual prong, that is, that Watters engaged in conduct creating a risk of homicide, as opposed to conduct demonstrating the aggravated form of recklessness "evincing a depraved mind, regardless of human life" that is required to prove first degree murder by extreme indifference. State v. Dunbar, 117 Wn. 2d 587, 592-93, 817 P.2d 1360, 1362 (1991); see also State v. Condon, ___ Wn.2d ___, ___ P.3d ____, 2015 WL 114156, at *8-

9 (Jan. 8, 2015) (where first degree felony and first degree intentional murder were charged in the alternative, lesser was warranted where factual prong was satisfied as to one of the alternatives).

In summary, the Court's analysis of the factual prong in Pettus and Pastrana is undermined by Gamble. The trial court erred in relying on those cases to rule the lesser instruction was unavailable.

3. THE DEFENSE REQUEST FOR A LESSER OFFENSE INSTRUCTION ON COUNT 2 REFUTES THE STATE'S CLAIM OF AN ALL-OR-NOTHING STRATEGY.

As to Watters's ineffectiveness claim, the State argues this Court must presume that defense counsel was pursuing an all-or-nothing strategy as to count 1. BOR at 8-11.

As argued in Watters' opening brief, however, this ignores that defense requested such an instruction on count 2, which was based on the same act. An all-or-nothing tactic on count 1, but not count 2, could still result in a manslaughter conviction. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kyllo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). Any such strategy would be illogical because it would result in a manslaughter conviction and not an acquittal even if Watters was acquitted on count 1.

4. THE FAILURE TO GIVE THE LESSER OFFENSE INSTRUCTION PREJUDICED WATTERS.

The State argues that this Court must infer Watters was not prejudiced because the jury convicted him as charged offense on count 1. BOR at 11-13.

This is not the general rule. Instead, the failure of the trial court to instruct the jury is presumed to be prejudicial unless the error affirmatively appears harmless. State v. Southerland, 109 Wn.2d 389, 390-91, 745 P.2d 33 (1987). Washington courts have found the failure to instruct on a lesser offense is harmless only in those cases in which other verdicts returned by the same jury demonstrate the jury's implicit rejection of the lesser degree offense. For instance, where a jury rejects an intermediate degree offense, it is valid to infer that it would have rejected other, even lesser degree offenses. State v. Guilliot, 106 Wn. App. 355, 22 P.3d 1266 (2001); State v. Hansen, 46 Wn. App. 292, 730 P.2d 706, 737 P.2d 670 (1986).

Otherwise, Washington Courts follow the rule that

> as the law gives the defendant the unqualified right to have the inferior degree passed upon by the jury, it is not within the province of the court to say that the defendant was not prejudiced by the refusal of the court to submit that phase of the case to the jury, or to speculate upon probable results in the absence of such instructions.

State v. Parker, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wash. 273, 276, 60 P. 650 (1900)); see also Condon, 2015 WL 114156 at *9 (reaffirming Parker rule).

Here, the State cannot demonstrate that the failure to give the instruction was harmless. In addition, as argued in Watters's opening brief, the record affirmatively indicates the error was not harmless. Brief of Appellant at 26.

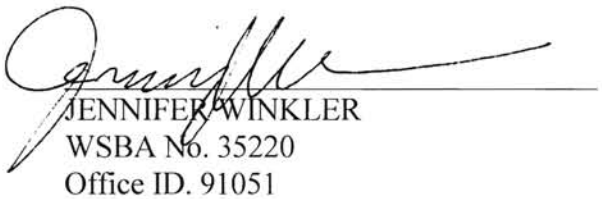
C. CONCLUSION

For the reasons stated above and in Watters's opening brief, this Court should reverse his count 1 conviction.

DATED this 14TH day of January, 2015

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER WINKLER
WSBA No. 35220
Office ID. 91051

Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILA BAKER

JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OF COUNSEL
K. CAROLYN RAMAMURTI

State V. Dennis Watters Jr.

No. 71304-3-I

Certificate of Service

On January 15, 2015, I E-served and or mailed a copy of the reply brief, directed to:

Prosecuting Atty Snohomish County
Via E-mail: Diane.Kremenich@co.snohomish.wa.us

Dennis Watters, Jr., 371201
Washington State Penitentiary
1313 N 13th Ave
Walla Walla, WA 99362

Re Dennis Watters Jr.
Cause No. 71304-3-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.

John Sloane
Office Manager
Nielsen, Broman & Koch

01-15-2014
Date
Done in Seattle, Washington