71304-3

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NO. 71304-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DENNIS WATTERS, JR.,

Appellant.

BRIEF OF RESPONDENT

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1. Is the trial court responsible for sua sponte propose jury instruction for a potential lesser included offense when they are not requested by either party?

2. Has the defendant shown he was denied his constitutional right to effective assistance of counsel because trial counsel did not propose jury instructions for a lesser included offense he was not entitled to and where there were valid tactical reasons for counsel's actions?

3. When the defendant was convicted of a greater and a lesser offense for the same criminal conduct, was it error for the sentencing court to enter a dismissal order separate from the judgment and sentence that conditionally dismisses the lesser offense?

II. STATEMENT OF THE CASE

On July 14, 2012, the defendant shot Ryan Mumm in the head with a 9mm handgun. As a result, Ryan died the next day. He was 20 years old. 10/16/13 RP 24-25.

On July 14, 2012, Ryan Mumm had spent the day with his long-time friend, Ethan Mathers. The two had been friends since the third grade. They had gone to school together, had played

sports together and later began doing drugs together. They were both addicted to heroin. On July 14, 2012, they had both used heroin and Xanax. They drove around the Arlington area for a while and eventually were in the Safeway parking lot. There they were approached by Zack Smoots who offered to sell them a bag of marijuana. Ethan Mathers grabbed the bag of marijuana and left without paying for it. 10/18/13 RP 14-16; 10/21/13 29-30, 68.

This led to a confrontation later in the day when Zack Smoot and his friends found them again. Mr. Smoot chased Mr. Mumm and Mr. Mathers into a dead-end. Everyone got out of their cars. Mr. Smoot and his friends had clubs, pipes and brass knuckles. The police found a baseball bat, tire iron and hammer in Mr. Smoot's vehicle when they served a search warrant on it. The two groups fought for a short time until Mr. Mathers was able to punch Mr. Smoot, causing him to stumble in a daze. This ended the fight, but not before the driver's side window on Mr. Mathers' car had been broken. This made Mr. Mathers angry. He pulled the window out of his car and threw it at Mr. Smoot's car. 10/18/13 RP 18-27; 10/21/13 RP 32-36, 70-73

A female from Mr. Smoot's car, Brittany Glass, had kicked a dent in Mr. Mather's car and was approaching again with a pipe in her hand. Mr. Mathers kicked her back. Mr. Mathers and Mr. Mumm jumped back in their car and drove off. 10/18/13 RP 18-27; 10/21/13 RP 32-36, 70-73

Later that day, Mr. Mathers called Mr. Smoot to challenge him to a fight over the broken window. The fight was to take place at the Blue Stilly Park near Arlington. Mr. Smoot recruited some friends to join him at the fight in the park. He contacted Bobby Boothe; Brittany Glass; Brittany's father, James Glass; Bo Schemenauer; Brock Schemenauer; Bo's father, Ron Schemenauer; Ryan Beamer; Brandon Wiede; Cameron Haskett; Camerson's girlfriend, Chelsea Albriktsen; and Mr. Glass's friend, the defendant. Of these people, James Glass and the defendant were armed with firearms. 10/18/13 RP 18-27; 10/21/13 RP 32-36, 70-73; 10/22/13 RP 16-21; 91.

They all assembled first at the Safeway parking lot and then the Blue Stilly park. Then everyone except Ryan Beamer and Bobby Boothe went to the Tesoro gas station just outside the park to wait. Mr. Beamer and Bobby were to call the others when Mr. Mathers and Mr. Mumm arrived. Mr. Glass testified that he went

there with the intent of beating up Mr. Mathers and Mr. Mumm due to their interactions with his daughter earlier that day. Mr. Glass testified that once they were all assembled, Mr. Smoot called Mr. Mathers to encourage him to meet for the fight. 10/21/13 RP 42-46; 10/22/13 RP 17-18; 84-85.

In preparation for the fight, Mr. Mathers and Mr. Mumm had recruited three friends, Ryland Ford, Josh Hogan and Matt Stein. They armed themselves with a club or rod and a croquet mallet. Mr. Mumm had also obtained a handgun. Mr. Mathers and Mr. Mumm were in Mr. Mathers' car; their friends were in a Bonneville. 10/18/13 RP 28.

When Mr. Mathers and Mr. Mumm arrived at the Blue Stilly, there were already three vehicles there lined up at the end of the access road. There was a male standing nearby. Mr. Mathers pulled his car around to face the entrance to the park and waited. Mr. Mathers became impatient and they were about to leave, when the male who had been standing nearby told them to wait. Almost immediately, two cars came into the park driving side by side. They were a gold Honda and a blue Ford Ranger. The defendant was driving the Ranger. The Honda slammed into Mr. Mather's car backing him up about 5 feet. Mr. Mumm got out of the car, told

them to stop ramming the car, pointed his gun into the air, and fired a shot. The driver of the gold Honda stopped ramming the car. Mr. Mumm got back into the car and was putting the gun down on the floorboards. Mr. Mathers testified that at this point, he was just trying to get away. He backed up to find an opening and was starting to pull forward when the defendant shot Mr. Mumm. 10/16/13 29-38; 10/21/13 RP 50.

The defendant had pulled his Ranger in at an angle alongside Mr. Mather's car so their windows were parallel. The defendant fired his handgun multiple times at Mr. Mather's car; a round struck Mr. Mumm in the head. Mr. Mathers was on the other side of Mr. Mumm in line with the defendant. Mr. Mumm slumped over onto Mr. Mather's. Mr. Mathers testified that he was trying to get out of there; he was trying to shift and trying to hold Mr. Mumm up. He was yelling at him to wake up. 10/16/13 RP 34-38.

According to the testimony and video surveillance footage from nearby businesses, Mr. Mathers and Mr. Mumm were the first out of the park, followed by a Camero. Their friends in the Bonneville soon caught up to them and as they were passing, Mr. Mathers yelled for them to call 9-1-1 that Mr. Mumm had been shot. Mr. Mathers slowed to turn into a nearby AM/PM. At this point the

defendant caught up to him and again began shooting at Mr. Mathers' vehicle, striking the driver's side of the car and the driver's side rear tire before driving off. Mr. Mathers ran into the AM/PM and yelled for them to call 9-1-1 before returning to the car and his friend. Testimony regarding the cellular phone records documented the extensive communication between the participants in the Smoot group prior to the incident including multiple calls back and forth with the defendant. The records also show that none of the parties involved in the defendant's group called 9-1-1 that evening. 10/18/13 RP 142-148.

When the police arrested the defendant they recovered a number of firearms including a 9mm Llama pistol that was identified as the pistol the defendant used during the incident. Washington State Patrol forensic scientist K. Geil testified that she was able to positively match the bullet removed from Mr. Mathers' tire and the bullet removed from Mr. Mumm's skull as having been fired by a Llama pistol belonging to the defendant. The medical examiner testified that Mr. Mumm was shot from right to left, slightly front to back and with a slight downward trajectory of the path of the bullet. The slightly downward path would indicate he was either shot from

above, or his head was cocked to create that angle. 10/24/13 RP 73-75, 116-119.

The state charged the defendant by amended information with court 1: first degree murder by extreme indifference with a firearm allegation; count 2: second degree murder (intentional murder) with a firearm allegation; count 3: first degree assault with a firearm allegation (victim Ethan Mathers); and, count 4: first degree assault with a firearm allegation (victim Ryan Mumm). CP 192-193. The defendant asserted the affirmative defense of self-defense. CP 366. The jury convicted the defendant of count 1: first degree murder; count 2: the lesser offense of manslaughter in the first degree; count 3: first degree assault and count 4 first degree assault and found the firearm enhancement for all 4 offenses. CP 41-51.

III. ARGUMENT

A. THE COURT DID NOT ERR BY NOT SUA SPONTE INSTRUCTING THE JURY ON A LESSER INCLUDED OFFENSE.

The defendant assigns error to the trial court's failure to instruct the jury on the lesser included offense of first degree manslaughter on count 1. Defendant's Brief at 15. Neither party had requested a lesser included instruction for count one. Requiring a trial court providing lesser included instructions sua

sponte in the absence of a request has been rejected by our Supreme Court. "Such a rule would be an unjustified intrusion into the defense prerogative to determine strategy and, accordingly, we reject this requirement." State v. Grier, 171 Wn.2d 17, 45, 246 P.3d 1260, 1274 (2011).

B. THE DEFENDANT HAS NOT SHOWN HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE FAILURE TO REQUEST THE JURY BE INSTRUCTED ON THE LESSER OF MANSLAUGHTER IN THE FIRST DEGREE WITH REGARD TO FIRST DEGREE MURDER BY EXTREME INDIFFERENCE.

1. Even If The Defendant Were Entitled To The Lesser Included Offense Of Manslaughter In The First Degree As Related To Count 1, There Was A Valid Tactical Reason Not To Request The Instruction.

To prevail in a claim of ineffective assistance of counsel, the defendant must demonstrate that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) this deficient performance resulted in actual prejudice. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Both "prongs" must be established to prevail on the claim. Under the latter prong, the defendant must show a reasonable probability that, except for

counsel's unprofessional errors, the results of the proceedings would have been different. Hendrickson, 129 Wn.2d at 78.

Proving ineffective assistance of counsel, under the two-pronged Strickland rule of objectively poor performance and resulting actual prejudice, is not the same as second-guessing the acts or omissions of prior counsel with the luxury of hindsight. Strickland cautions reviewing courts not to succumb to the temptation of second-guessing defense counsel's particular acts or omissions. Strickland, 466 U.S. at 689. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A court may not sustain a claim of ineffective assistance if there was a legitimate tactical reason for the allegedly incompetent act. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). An ineffective assistance claim on direct appeal must be based upon, and cannot go outside, the record before the appellate court. State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome a strong presumption that counsel's performance was reasonable. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260, 1268 (2011). A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. at 689.

In the case at bar, the court instructed the jury on the crimes of count one: first degree murder by extreme indifference; count 2: second degree (intentional) murder; manslaughter first degree as a lesser included offense to court 2; and, manslaughter in the second degree; count 3: assault in the first degree; second degree assault as a lesser included offense of count 3; count 4: assault in the first degree; and, second degree assault as a lesser included offense of count 4. CP 69-73, 81-82, 86-87 (Jury Inst. 12-16, 24, 25, 29, 30). The jury convicted the defendant of count 1: first degree murder; count 2: the lesser offense of manslaughter in the first degree; count 3: first degree assault and count 4 first degree assault and found the firearm enhancement for all 4 offenses. CP 41-51

Under the facts and circumstances of this case as applied to the defendant's theory of the case, it was a very reasonable trial tactic to not request the lesser included offense of manslaughter in the first degree be given as related to count 1. The defendant was claiming self-defense. The testimony suggested the defendant intentionally shot at Mr. Mumm because Mr. Mumm pointed a gun at him. It would be legitimate tactic to present the jury with an "all or nothing" decision with regard to count 1 under the circumstances and provide them with a lesser as applied to the intentional murder. An all or nothing strategy was a legitimate trial strategy because inclusion of the lesser included offense would have weakened the defendant's claim of innocence. State v. Hassan, 151 Wn. App. 209, 221, 211 P.3d 441 (2009).

2. The Defendant Has Not Established That Any Alleged Deficient Performance Resulted In Actual Prejudice.

"In making the determination as to whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." Strickland, 466 U.S. at 694, 104 S.Ct. 2052.¶ 60. The defendant

argues this court should assume that the jury did not hold the State to its burden in the absence of a lesser included offense instruction.

The defendant relies on Keeble v. United States, for the premise that "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Keeble v. United States, 412 U.S. 205, 212–13, 93 S.Ct. 1993, 36 L.Ed.2d 844(1973). Appellant's Brief at 26. Applied to ineffective assistance claims, Keeble skews the Strickland standard. In Strickland, the Court indicated that, "[i]n making the determination as to whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." State v. Grier, 171 Wn.2d 17, 41, 246 P.3d 1260, 1272 (2011).

Furthermore, that argument is misplaced under the facts of this case. The jury in this case was not placed in the position of having to convict the defendant of first degree murder to resolve its doubts, the jury had the ability to find the defendant guilty of "some offense" by the lesser included offenses provided under count 2. The defendant had the ability to take the all or nothing approach to

first degree murder with the safety net of manslaughter first degree being available to the jury should they have had any doubt. Assuring the jury would hold the state to its burden.

If the jury is presumed to have followed the law when it would only have convicted the defendant of first degree murder where the State had proved each of the required elements beyond a reasonable doubt. Since the jury would only have considered the lesser included offense if it had not been able to find the State had proved each of the required elements of first degree murder beyond a reasonable doubt the absence of a manslaughter instruction had no impact on the verdict. Lesser included instructions instructed the jury not to consider the lesser charge if convinced beyond a reasonable doubt that [the defendant] was guilty of the greater. Because the jury returned a guilty verdict, we must presume that the jury found [the defendant] guilty beyond a reasonable doubt of second degree murder. State v. Grier, 171 Wn.2d 17, 41, 246 P.3d 1260, 1272-73 (2011).

3. The Defendant Was Not Entitled To The Lesser Included Offense Of Manslaughter In The First Degree As Related To Count 1: First Degree Murder.

The defendant was not prejudiced by his trial counsel's not requesting a lesser included instruction for count 1 because he was

not entitled to the lesser instruction. The right to instruct the jury on a lesser included offense is a statutory right. State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990); RCW 10.61.003, 10.61.006. Under the test enunciated by the Supreme Court in State v. Workman, a defendant is entitled to a lesser included offense instruction "if two conditions are met." 90 Wn.2d 443, 447, 584 P.2d 382 (1978). First, under the legal prong of the test, each element of the lesser offense must be a necessary element of the charged offense. State v. Sublett, 176 Wn.2d 58, 83, 292 P.3d 715 (2012). Second, under the factual prong, "the evidence must support an inference that the lesser crime was committed." Sublett, 176 Wn.2d at 83. "[T]he factual test includes a requirement that there be a factual showing more particularized than that required for other jury instructions. Specifically, ... the evidence must raise an inference that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense." State v. Fernandez–Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

Here, the legal prong of the Workman test is satisfied. "The elements of first degree manslaughter are necessarily included in first degree murder by extreme indifference ...." State v. Pettus, 89 Wn. App. 688, 700, 951 P.2d 284 (1998).

Under RCW 9A.32.060, first degree manslaughter requires proof that the defendant recklessly caused the death of another. RCW 9A.32.060(1)(a). In contrast under RCW 9A.32.030(1)(b), first degree murder by extreme indifference requires proof that the defendant "acted (1) with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) caused the death of a person." State v. Pastrana, 94 Wn. App. 463, 470, 972 P.2d 557 (1999). There is no dispute here that the firing of shots created a grave risk of death to others and that the shots caused the death of Mr. Mumm. Thus, the question is whether defendant can point to any evidence in this record that shows his acts were merely reckless. See, Pastrana, 94 Wn. App. at 471.

Pastrana and Pettus are instructive. In both of these cases, the defendant was charged with first degree murder by extreme indifference. Pettus, 89 Wn. App at 691; Pastrana, 94 Wn. App. at 467. This court held in both cases that the factual prong of the Workman test was not satisfied; therefore neither defendant was entitled to a lesser included instruction on first degree manslaughter. Pastrana, 94 Wn. App. at 471–72; Pettus, 89 Wn. App. at 700.

In Pettus, the defendant was convicted of first degree murder by extreme indifference after driving alongside the car of his victim and firing at it. 89 Wn. App. at 691–92. "The first shot hit the [victim's car] in front of the rear tire. The second shot hit [the victim] in the left arm and penetrated his chest. Two other shots passed nearby or through the windshield and exited through the plastic rear window." Pettus, 89 Wn. App. at 692. The court concluded that:

> [t]he evidence of the force of a .357 magnum, the time of day, the residential neighborhood, and Pettus's admitted inability to control the deadly weapon, particularly from a moving vehicle, does not support an inference that Pettus's conduct presented a substantial risk of some wrongful act instead of a "grave risk of death."
>
> Pettus, 89 Wn. App. at 700.

In Pastrana, the defendant was driving on the interstate when another car cut in front of him. 94 Wn. App. at 469.

> Pastrana retrieved a gun from behind the seat[,] ... rolled down the passenger window and fired one shot out the window, directly in front of [the passenger's] face.
>
> After he fired the gun, [the passenger] asked Pastrana what he was thinking. Pastrana replied that he was aiming for a tire. [The passenger] mentioned that "it's kind of hard to be aiming at anything when you are going down the freeway that fast."

Pastrana, 94 Wn. App. at 469. "[I]ndiscriminately shooting a gun from a moving vehicle is precisely the type of conduct

proscribed by RCW 9A.32.030(1)(b)." Pastrana, 94 Wn. App. at 471.

As in Pastrana and Pettus, defendant's actions demonstrated not mere recklessness regarding human life but extreme indifference, an aggravated form of recklessness. Defendant shot at the victims from his vehicle in a situation where multiple people were in the area. Mr. Mathers was in direct line of the fire. The defendant's associates were also potential victims. It was a public park during normal hours of operation on a sunny summer evening. He rapidly fired multiple shots indiscriminately in the direction of the victim's vehicle. This conduct, when measured against Pettus and Pastrana, shows the defendant was not entitle to the lesser instruction with regard to this count.

Defendant claims that Pettus and Pastrana have been abrogated by later cases. Specifically, defendant claims that State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005), and State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011), undermine the reasoning behind the earlier cases. Defendant's reading of the more recent cases is incorrect.

In Gamble, the Washington Supreme Court held that manslaughter was not a lesser included offense of second degree

felony murder where second degree assault was the predicate felony. 154 Wn.2d at 460. Washington courts have routinely held that manslaughter fails the legal prong of the Workman test. Gamble, 154 Wn.2d at 463-64. To prove felony murder, the State is required to prove the defendant intentionally assaulted another and recklessly inflicted bodily harm, whereas to prove manslaughter, the State is required to prove that the defendant recklessly caused the death of another person. Gamble, 154 Wn.2d at 467.

In Peters, this Court held that jury instructions which defined recklessness in the context of first degree manslaughter as "Peters knew of and disregarded a substantial risk that a wrongful act may occur," was contrary to the Supreme Court's analysis in Gamble. Peters, 163 Wn. App. at 849-50. The jury instruction should have defined recklessness as Peters knew of and disregarded "a substantial risk that death may occur." Peters, 163 Wn. App. at 850.

To support his position that Gamble and Peters abrogated Pettus and Pastrana, defendant focuses on one statement made in Pettus where that court was focused on the factual prong of Workman: "the evidence showed much more than mere reckless

conduct - a disregard of a substantial risk of causing a wrongful act." Pettus, 89 Wn. App. at 700. Defendant claims that Pettus has been overruled because Gamble and Peters both hold that the elements of manslaughter require the State to prove that the defendants knew of and disregarded a substantial risk that a homicide may occur." See, Gamble, 154 Wn.2d at 467. Yet neither Gamble nor Peters contained any discussion on the matter which was at issue in Pettus and Pastrana: whether manslaughter satisfies the factual prong of Workman so as to be considered a lesser included offense of first degree murder by extreme indifference.

Neither Gamble nor Peters undermine this court's rulings in Pettus and Pastrana. In fact, both Pettus and Pastrana hold that, in the context of first degree murder by extreme indifference, first degree manslaughter does satisfy the legal prong of Workman. Pettus, 89 Wn. App. at 700; Pastana, 94 Wn. App. at 470-71.

As noted above, the facts here do not support a rational inference that defendant committed only manslaughter in the first degree. Defendant did not fire into the air, or at the ground, or even toward an area he believed to be empty. Each of these situations might have supported a finding that defendant acted recklessly

when he knew of and disregarded that a substantial risk of death may occur. Instead, defendant fired several shots into the area of the victims' car. Defendant's conduct did not merely create an unreasonable risk of death, but created a very high degree of risk of death. Thus the evidence does not support a finding that only the lesser offense was committed to the exclusion of the greater offense.

C. THE SENTENCING COURT ERRED BY ENTERING A SEPARATE ORDER CONDITIONALLY VACATING COUNT 2, THE FIRST DEGREE MANSLAUGHTER CONVICTION.

The state concedes the sentencing court erred by entering a separate order dismissing count 2 subject to reinstatement on the same date the judgment and sentence was entered. The defendant does not challenge the validity of the judgment and sentence. Appellant's Brief at 28.

> The courts also attempted to keep the vacated convictions "alive" for purposes of possible reinstatement should the convictions for the greater offenses be reversed. This contravenes double jeopardy as stated forcefully in Womac and clarified herein, and it finds no support in double jeopardy jurisprudence. It remains the law that a lesser conviction previously vacated on double jeopardy grounds may be reinstated if the defendant's conviction for a more serious offense based on the same act is subsequently overturned on appeal.

State v. Turner, 169 Wn.2d 448, 466, 238 P.3d 461, 469 (2010); State v. Womac, 60 Wn.2d 643, 160 P.3d 40 (2007).

> Still, the court entered a sentencing order separate from the judgment and sentence. The order explicitly holds the vacated lesser conviction open for reinstatement if the greater offense is overturned on appeal. This order violates double jeopardy and must be vacated. Incidentally, there was no need for the court to issue an order holding the first degree assault conviction open for reinstatement. The rule remains that "a lesser conviction previously vacated on double jeopardy grounds can be reinstated following the appellate reversal of a defendant's more serious conviction based on the same criminal conduct."

State v. Howard, 182 Wn. App. 91, 100, 328 P.3d 969, 974 (Div 3)(2014).

IV. CONCLUSION

For the reasons stated above, the State respectfully requests this Court to affirm defendant's conviction and remand for entry of a new order vacating count 2, manslaughter in the first degree.

Respectfully submitted on December 19, 2014.

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