No. 46589-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Angelino Pena,

Appellant.

Clark County Superior Court Cause No. 13-1-00417-8

The Honorable Judge David Gregerson

Appellant's Opening Brief

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2. Mr. Pena's attorney provided ineffective assistance by proposing the wrong lesser offense jury instruction.
3. Mr. Pena was prejudiced by his attorney's deficient performance.
4. Third degree assault was available as a lesser offense to both attempted murder and first degree assault.
5. Defense counsel should have proposed an instruction for third degree assault, the offense corresponding to his theory of the defense.

> **ISSUE 1:** Defense counsel provides ineffective assistance by failing to propose jury instructions necessary to his/her theory of the defense. Here, Mr. Pena's attorney argued that Burnett had been shot as a result of Mr. Pena's carelessly playing with a gun while drunk, but failed to propose an instruction drawing the jury's attention to the difference between an intentional assault and an accidental shooting. Did ineffective assistance of counsel deny Mr. Pena his Sixth and Fourteenth Amendment rights?

6. The court erred by admitting evidence that Mr. Pena was investigated and arrested by a "safe streets" gang task force, over his objection.
7. The court erred by allowing reference to the gang task force in violation of ER 401 and 402.
8. The court violated ER 403 by allowing reference to the gang task force, which had no probative value and a high danger of unfair prejudice.
9. Mr. Pena was prejudiced by the erroneous admission of evidence regarding the gang task force.

> **ISSUE 2:** A trial court must exclude evidence that is irrelevant or when the danger of unfair prejudice outweighs any probative value. Here, the court overruled Mr. Pena's objections and admitted evidence that he was investigated and arrested by a multi-agency "safe streets" gang task force even absent evidence that he belonged to a gang. Did the court abuse its discretion by admitting the evidence?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Neil Hill was high on heroin when he picked Angelino Pena up at a bar and drove him to the EconoLodge hotel in downtown Vancouver. RP 113, 120. It was around two a.m. RP 114.

Mr. Pena was drunk. RP 124. In the truck on the way to the hotel, he pulled out a gun and started fidgeting with it. RP 115-16. He repeatedly popped a bullet out of the clip and put it back in. RP 116. Hill said that Mr. Pena threatened to shoot him if he was pulled over by the police.[1] RP 115.

Hill dropped Mr. Pena off at the EconoLodge but did not get out of the truck. RP 117. Mr. Pena went to a room in the hotel to meet some mutual friends. RP 138.

Mr. Pena walked to the room and found three people there: Elena Espinoza, Vincent Burnett, and Levi Blomdahl. RP 139. All three of them had been using heroin. RP 113, 137,147.

Hill became concerned after he dropped Mr. Pena off, based on his behavior in the truck. RP 118. Blomdahl was Hill's best friend, so he called him to make sure he was alright. RP 118. Blomdahl said everything was fine so Hill relaxed and went home to bed. RP 119.

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[1] Hill also said that Mr. Pena claimed he was going to shoot Elena Espinoza, a mutual friend who was in the room at the EconoLodge. RP 118.

Mr. Pena was still acting drunk in the hotel room. RP 139. He was showing his gun off. RP 139. He sat down and joined the party. RP 140.

Mr. Pena continued to play with his gun. RP 141, 150-51. He popped the clip in and out of the gun. RP 150. He popped bullets in and out of the clip. RP 150. He passed the gun around to other people in the room. RP 141.

Eventually, the gun went off. RP 142. Burnett was hit in the head. RP 142. The three un-injured guests fled. RP 144. No one called 911.

Burnett survived his injuries. RP 160. The state charged Mr. Pena with attempted second degree murder and first degree assault. RP 58.

At trial, none of the eyewitnesses testified that they had actually seen Mr. Pena shoot Burnett. RP 142, 161, 274.

Blomdahl testified that he was nodding in an out of heroin-induced sleep when he heard the gunshot. RP 142, 152. The shot woke him up. RP 142. He thought the gun was in Mr. Pena's hand at the time, but he was not one hundred percent sure. RP 153, 155. He said that Burnett and Espinoza had both handled the gun as well. RP 141. He remembered hearing Mr. Pena say that he could not believe what had happened. RP 151.

Burnett's memory was affected by his injuries. RP 160. He did not remember getting shot or who had shot him. RP 161.

Espinoza refused to cooperate altogether. RP 273-76. She claimed that she did not remember anything about that night. RP 274.

No witness testified that Mr. Pena or anyone else in the EconoLodge room was part of a gang. *See* RP *generally*. Still, the lead detective in the case testified, over Mr. Pena's objection, that he was assigned to the case as part of his work on a regional "safe streets" gang task force.[2] RP 347.

Mr. Pena exercised his right not to testify at trial. RP 367.

Defense counsel's primary theory in closing was that the shooting had been an accident, caused by Mr. Pena's drunk and careless playing with the gun. RP 451-56.

Defense counsel proposed jury instructions on the lesser offense of second degree assault. CP 83. The court gave the instructions. CP 117. Defense counsel argued in closing that the jury should convict of second-degree assault if it found that Mr. Pena had caused Burnett's injuries by his recklessness but had not intended to shoot him. RP 456.

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[2] Other officers testified that Mr. Pena was arrested at his home by a SWAT team. RP 186, 361 364. They told the jury that he was placed in an armored vehicle with ballistic protection. RP 186, 359.

The jury convicted Mr. Pena of attempted murder and first degree assault. RP 471. Finding that the assault charge carried a higher penalty, the court vacated the attempted murder conviction. RP 490-91. This timely appeal follows. CP 130.

ARGUMENT

I. MR. PENA'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO REQUEST AN INSTRUCTION ON A LESSER INCLUDED OFFENSE THAT ACTUALLY CORRESPONDED WITH HIS THEORY OF THE DEFENSE.

Everyone in the hotel room was using drugs when Mr. Burnett was shot. RP 113, 137,147. Numerous witnesses for the state testified that Mr. Pena was drunk. RP 124, 139. They also said that he was fidgeting with his gun, taking the clip in and out and popping bullets in and out. RP 115-16, 141, 150-51. No witness described any real reason why Mr. Pena would intentionally shoot Burnett. *See* RP *generally*. Accordingly, Mr. Pena's primary theory of defense was that he was intoxicated and carelessly playing with a gun when Burnett was unintentionally shot. RP 451-56.

Still, Mr. Pena's attorney failed to request an instruction informing the jury of the legal significance of this evidence. CP 67-81, 82-91. Instead, defense counsel proposed instructions on second degree assault. CP 83. But second degree assault is just another type of intentional

assault. RCW 9A.36.021; *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 982, 329 P.3d 78 (2014).

The jury was left with no legal hook upon which to hang their hats if they believed Mr. Pena's theory. Defense counsel's failure to request an instruction for third degree assault – causing bodily harm by means of a weapon with criminal negligence – constituted ineffective assistance of counsel.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel provides ineffective assistance by failing to propose a jury instruction necessary to his/her client's defense. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009). Here, Mr. Pena's attorney provided deficient performance by requesting a lesser included instruction that did not correspond with his theory of the defense, rather than one for third degree assault.[3]

[3] Defense counsel does not provide ineffective assistance by making a tactical decision to pursue an "all or nothing" strategy, wholly foregoing a lesser included instruction. *See e.g. State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). But Mr. Pena's attorney did not

A. Defense counsel made an error by proposing instructions for second degree assault, which did not correspond to his theory of the case.

Mr. Pena's attorney proposed a jury instruction for the lesser degree offense of second degree assault. CP 83. But that offense was not consistent with his theory of defense – that Burnett was unintentionally shot as a result of Mr. Pena's carelessness. Assault in the second degree is simply another form of intentional assault, applicable only if Mr. Pena shot Burnett on purpose. Defense counsel made a mistake by proposing the wrong instruction.

Second degree assault punishes, *inter alia*, "intentionally assault[ing] another and thereby recklessly inflict[ing] substantial bodily harm." RCW 9A.36.021(1)(a). It also includes "assault[ing] another with a deadly weapon." RCW 9A.36.021(1)(c). The definition of assault requires an intentional act.[4] *Villanueva-Gonzalez*, 180 Wn2d at 982.

A verdict for second degree assault in Mr. Pena's case would have required the jury to find that he intentionally shot Burnett. As such, the jury instruction for second degree assault was inapplicable to defense

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choose an "all or nothing" approach. He decided to request a lesser included instruction but proposed the wrong one. CP 83. *Grier* is inapposite.

[4] The only relevant difference between second and first degree assault in Mr. Pena's case is that first degree assault also required a finding that Mr. Pena either intended to cause great bodily harm or intentionally used force likely to produce such harm. RCW 9A.36.011.

counsel's theory – that the gun discharged unintentionally as a result of Mr. Pena's negligent actions.

The jury was left with no instruction permitting it to find that Mr. Pena was culpable for Burnett's injuries but had not shot him on purpose. Defense counsel's failure to propose the correct instruction constituted ineffective assistance. *Powell*, 150 Wn. App. at 156.

B. A competent attorney would have requested a jury instruction for third degree assault in Mr. Pena's case.

An accused person has an "unqualified right" to have the jury instructed on applicable lesser-included and lesser-degree offenses. RCW 10.61.010; RCW 10.61.003; *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984) (citing *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900)).

Here, third degree assault was available as an inferior-degree or lesser-included offense of both first degree assault and attempted murder. Mr. Pena's attorney should have requested a jury instruction on third degree assault.

1. Third degree assault was available in Mr. Pena's case as an inferior degree offense of the first degree assault charge.

A jury may always convict of an inferior degree of the charged crime. RCW 10.61.010. Accordingly, third degree assault was available as a lesser offense to Mr. Pena's first degree assault charge.

Generally, appellate courts will not find error for failure to instruct on a lesser offense if the jury was instructed on and passed up the opportunity to convict for an intermediate offense. *State v. Guilliot*, 106 Wn. App. 355, 369, 22 P.3d 1266 (2001). The *Guillot* court found that the erroneous failure to instruct on manslaughter in a first degree murder case was harmless because the jury rejected the intermediate offense of second degree murder. *Id.* The court reasoned that "the factual question posed by the omitted manslaughter instructions was necessarily resolved adversely to Guilliot." *Id.*

The reasoning of *Guillot* does not apply to Mr. Pena's case. Here, the "factual question posed" by the omitted instruction was whether Mr. Pena shot Burnett, but did so unintentionally as a result of criminal negligence. The jury was never given the opportunity to resolve that question. Accordingly, the fact that the jury did not convict Mr. Pena of second degree assault is inapposite. Defense counsel was ineffective because he did not take the steps necessary to put the relevant factual question before the jury at all.

2. Third degree assault was available in Mr. Pena's case as a lesser-included offense of the attempted murder charge.

Under the two-prong *Workman* test, an instruction on a lesser-included offense is warranted if (1) the elements of the lesser offense are necessary for conviction of the greater offense (legal prong) and (2) the evidence supports an inference that only the lesser offense was committed (factual prong). *State v. Condon*, No. 88854-0, 2015 WL 114156 at *4, --- Wn.2d ---, --- P.3d --- (Wash. Jan. 8, 2015) (*citing State v. Workman,* 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978)). When applying the *Workman* test, the court must view the evidence in the light most favorable to the party requesting the instruction. *Id.* at *6.

The *Workman* legal prong looks to the elements of an offense as it was actually charged and prosecuted in a specific case, rather than a mechanical analysis of the statutory elements. *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).

As charged in Mr. Pena's case, third degree assault was available as a lesser-included offense of attempted murder under both prongs of the *Workman* test.

Third degree assault includes, *inter alia*, "with criminal negligence, caus[ing] bodily harm to another person by means of a

weapon or other instrument or thing likely to produce bodily harm." RCW 9A.36.031(1)(d).

Negligence is necessarily a lesser-included degree of culpability of intent. RCW 9A.08.010(2). It follows that a person who intentionally attempts to murder by shooting someone with a gun necessarily commits the crime of third degree assault.

Under the factual prong, the evidence supported the conclusion that Mr. Pena committed only third degree assault. *Condon*, 2015 WL 114156 at *4, --- Wn.2d ---. All of the state's eyewitnesses were on heroin when the gun went off. RP 113, 137,147. Most of them also testified that Mr. Pena was very drunk. RP 124, 139. Mr. Pena did not appear to have any reason to shoot Burnett intentionally. Instead, he was playing with his gun: passing it around and popping bullets in and out. RP 141, 150-51. The jury could have believed that Mr. Pena was criminally responsible for Burnett's injuries but that he did not shoot him on purpose.

Third-degree assault was available as a lesser included of attempted murder under both prongs of the *Workman* test. *Id.* Mr. Pena's attorney provided ineffective assistance by failing to request a jury instruction on that offense.

3. This court should reexamine its decision in *Boswell.*

The Court of Appeals has held that assault can never be a lesser offense of attempted murder. *State v. Boswell*, --- Wn. App. ---, 340 P.3d 971 (Dec. 30, 2014). But *Boswell* relied exclusively on the Supreme Court's decision in *Harris*, which has been abrogated by subsequent cases. *Id.* (relying on *State v. Harris*, 121 Wn.2d 317, 849 P.2d 1216 (1993)).

Harris predates the Supreme Court's decision in *Berlin*, in which the Supreme Court recognized that the analysis had strayed too far from its original underpinnings. *Berlin*, 133 Wn.2d at 547. When *Harris* was decided, the legal prong allowed instruction on an included offense only when the lesser was always committed when a person committed the greater offense. The *Harris* court termed this the "statutory approach." *Harris*, 121 Wn.2d at 323-24.

The *Berlin* court later rejected that approach as an erroneous deviation from *Workman*. *Berlin*, 133 Wn.2d at 547. The *Berlin* court repudiated the improper focus on "the elements of the pertinent charges as they appeared in the context of the broad statutory perspective, and not in the more narrow perspective of the offense *as prosecuted*." *Id.* at 548 (emphasis added). The court noted that:

> Only when the lesser included offense analysis is applied to the offenses *as charged and prosecuted*, rather than to the offenses as they broadly appear in statute, can both the requirements of constitutional notice and the ability to argue a theory of the case be met.

Id. (emphasis added). Contrary to the analysis in *Harris*, it is no longer relevant whether one might hypothetically commit attempted murder without committing an assault.

Under *Harris,* an attempt will never have a lesser-included offense, since the substantial step that constitutes an attempt can be almost any action, unrelated to the elements of any lesser offense. *Berlin* eliminated the *Harris* court's reasoning, and it is no longer the law. Instead, the legal prong requires a court to determine only whether the assault is an included offense of attempted murder "as prosecuted" in the case at hand. *Berlin*, 133 Wn.2d at 548.

Harris is no longer controlling precedent. *Boswell* was wrongly decided, is currently under reconsideration, and should not be followed in this case.

C. Mr. Pena was prejudiced by his attorney's failure to request an instruction on the lesser-included offense corresponding to his trial theory.

Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Kyllo*, 166 Wn.2d at 862. Specifically, failure to request a necessary jury instruction is prejudicial when the jury is left without the information

necessary to apply the relevant law to the evidence presented at trial. *Powell*, 150 Wn. App. at 156.

Here, the evidence strongly supported the defense theory that Burnett's injuries were caused because Mr. Pena was negligently fidgeting with his gun while intoxicated. It is likely that the jury believed that Mr. Pena should be held criminally liable, even if he had not intended to shoot Burnett. But the jury instructions only permitted the jury to convict Mr. Pena of shooting Burnett intentionally or to acquit him completely despite his culpable conduct. There is a reasonable probability that defense counsel's failure to propose an instruction on the correct lesser-included offense affected the outcome of Mr. Pena's trial. *Kyllo*, 166 Wn.2d at 862.

Additionally, it is not within the province of an appellate court to find that failure to instruct the jury on an applicable lesser offense did not prejudice the accused. *Parker*, 102 Wn.2d at 164 (*relied on in Condon,* --- Wn.2d at ---, 2015 WL 114156, at *9). When the evidence supports a lesser-included instruction, failure to give one is never harmless. *Id.*

Mr. Pena's attorney provided ineffective assistance of counsel by proposing the wrong lesser offense instruction. The jury was left with no way to apply the defense theory to the law. Mr. Pena's conviction must be reversed.

II. THE COURT ERRED BY ADMITTING IRRELEVANT, HIGHLY PREJUDICIAL EVIDENCE THAT MR. PENA WAS INVESTIGATED AND ARRESTED BY A MULTI-AGENCY "SAFE STREETS" GANG TASK FORCE.

There was no evidence admitted at trial that Mr. Pena – or anyone else in the hotel room -- was affiliated with a gang. *See* RP *generally*. Still, the court permitted the lead detective in the case to testify, over Mr. Pena's objection, that he was part of a "safe streets" task force that specializes in gangs. RP 347.

The evidence was irrelevant and more prejudicial than probative because it encouraged the jury to speculate that Mr. Pena was in a gang or that the shooting was somehow gang-involved. The evidence was particularly prejudicial because the state was unable to present any direct evidence giving Mr. Pena a reason to shoot Burnett. The court erred by overruling Mr. Pena's objection. ER 401, 402, 403.

Evidence is not relevant unless it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Irrelevant evidence is not admissible. ER 402. Evidence of an accused's gang affiliation is not admissible unless there is a connection between gang membership and the crime. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009).

Here, there was no evidence linking the facts of the crime with any gang affiliation. *See* RP *generally*. There was no evidence that Mr. Pena was a member of a gang or that the shooting was gang-motivated. *See* RP *generally*. The fact that the incident as investigated by a multi-agency gang task force did not have any tendency to make any element of the offense more or less probable. The evidence was inadmissible because it was not relevant. ER 401, 402.

Evidence must be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Gang evidence is prejudicial because it encourages the jury to infer that the accused is a "bad person." *Scott*, 151 Wn. App. at 529.

The lead detective was permitted to testify that a gang task force investigated and arrested Mr. Pena. The danger of unfair prejudice far outweighed any probative value of that evidence. ER 403. As outlined above, the evidence was not relevant to any element of any charge.

The evidence improperly encouraged the jury to infer that Mr. Pena was a gang member. As a result, the jury could have believed that the shooting was motivated by gang rivalry even absent direct evidence to that effect. The involvement of a gang task force in Mr. Pena's case was inadmissible under ER 403.

Evidentiary error requires reversal if there is a reasonable probability that it materially affected the outcome of the trial. *State v. Briejer*, 172 Wn. App. 209, 228, 289 P.3d 698 (2012).

Here, the state also presented evidence that Mr. Pena was arrested by a SWAT team and transported to the police station in an armored vehicle. RP 186, 361 364.. The detective testified that the armored vehicle had ballistics protection. RP 186, 359. Combined with the testimony regarding the gang task force, the evidence portrayed Mr. Pena as far more dangerous than the average arrestee.

Additionally, no witness testified to any real reason why Mr. Pena would shoot Burnett on purpose. The gang evidence invited the jury to speculate that the offense could have been gang-related, which would have filled that gap in the state's evidence of intent. The erroneous admission of the evidence regarding the "safe streets" gang task force prejudiced Mr. Pena's defense.

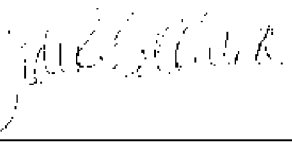
The court abused its discretion by admitting evidence that Mr. Pena was investigated and arrested by a "safe streets" gang task force absent any evidence that he was actually in a gang. ER 401, 402, 403. Mr. Pena's conviction must be reversed.

CONCLUSION

Mr. Pena received ineffective assistance of counsel because his attorney proposed the wrong lesser-included instruction. The court abused its discretion by admitting irrelevant, highly prejudicial gang evidence. Mr. Pena's conviction must be reversed.

Respectfully submitted on February 24, 2015,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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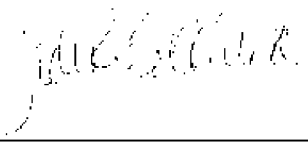
prosecutor@clark.wa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 24, 2015.



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