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 Reply Brief

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MR. PENA'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO REQUEST AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE CORRESPONDING TO HIS THEORY OF THE DEFENSE.

A. Mr. Pena's attorney did not make a tactical decision to pursue and "all-or-nothing" strategy. He chose to propose a lesser-included instruction but offered the wrong one.

Defense counsel in Mr. Pena's case requested (and received) a jury instruction on the lesser offense of second degree assault. CP 83, 117.

In closing, Mr. Pena's attorney argued that the state had not proved that Mr. Pena shot Burnett. RP 444-452. But he also argued, in the alternative, that the evidence demonstrated at most an accidental shooting. He pointed out that Burnett was only shot once even though Mr. Pena had the opportunity to "finish the job" if he had shot him intentionally. RP 455-456. He argued that the evidence was "consistent with an accidental, dopey, reckless shooting." RP 454. He said that if the jury believed Mr. Pena had shot the gun, the most they could find was that he had done so accidentally. RP 456.

But the lesser offense that Mr. Pena's attorney had proposed – second degree assault – did not include accidental shooting. *See* RCW 9A.36.021; *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 982, 329 P.3d 78 (2014). Defense counsel's proposed instruction did not align with his theory.

Even so, the state argues that counsel's performance was not deficient because the decision to forego a lesser-included instruction can be a legitimate trial strategy. Brief of Respondent, pp. 9-13 (*citing to State v. Hassan*, 151 Wn. App. 209, 211 P.3d 441 (2009); *State v. Grier,* 171 Wn.2d 17, 246 P.3d 1260 (2011); *State v. Breitung*, 173 Wn.2d 393, 267 P.3d 1012 (2011).

But each of the cases upon which Respondent relies deals with a situation in which the defense chose not to propose a lesser-included instruction at all. *See Hassan*, 151 Wn. App. at 214; *Grier*, 171 Wn.2d at 26-27; *Breitung*, 173 Wn.2d at 397. That authority is inapposite to Mr. Pena's case.

The state also points out all of the places in which Mr. Pena's attorney argued for acquittal. Brief of Respondent, pp. 9-13. Respondent completely ignores the fact that the defense also argued that, if the jury found that Mr. Pena pulled the trigger, they should find that the shooting was accidental. *See e.g.* RP 454-456. Defense counsel did not pursue an all-or-nothing trial strategy. Respondent's arguments are misplaced.

B. Mr. Pena's attorney proposed an instruction for the wrong lesser-included offense.

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 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 proposed the wrong instruction.

The state does not contest that third degree assault was available as a lesser-included offense in Mr. Pena's case. Brief of Respondent, pp. 8-17. Respondent's lack of argument on that issue can be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Instead, Respondent argues that Mr. Pena's attorney did not err by requesting an instruction for second degree assault because of "the weapon used and the severity of the injuries." Brief of Respondent, pp. 12-13. The state's argument is wrong for two reasons.

First, the state appears to be arguing that the jury was more like to convict Mr. Pena of assault two than of assault three because of general outrage about the extent of Burnett's injuries. As such, Respondent conflates the prejudice analysis with that of whether an instruction on third degree assault would have been appropriate in the first place. Indeed, as noted below, appellate courts do not weigh the strength or severity of the evidence when deciding whether a lesser-included instruction is appropriate even during the prejudice analysis. *See State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984). The state's argument that assault 2

was more appropriate than assault 3 simply because of the seriousness of the offense is incorrect.

The jury was also unaware of any sentencing differences between the two offenses and was instructed not to consider sentencing in determining guilt. CP 34.

Second, regardless of the severity of Burnett's injuries, second degree assault was not legally relevant to Mr. Pena's case. Second degree assault would have required an intentional shooting, just like first degree assault. RCW 9A.36.021. The charge did not permit the jury to address the real issue that should have been raised by a lesser-included instruction in this case: whether the shooting was accidental. Defense counsel proposed the wrong lesser-included instruction.

C. Mr. Pena was prejudiced by his attorney's failure to request an instruction on third degree assault: the lesser-included offense that correlated to his trial theory.

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. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009).

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 State v.*

Condon, 182 Wn.2d 307, 326, 343 P.3d 357 (2015)). When the evidence supports a lesser-included instruction, failure to give one is never harmless. *Id.*

It is likely that the jury believed that Mr. Pena should be held criminally liable, even if he had not intended to shoot Burnett.

The evidence supported the defense theory that Burnett's injuries were caused because Mr. Pena was negligently fidgeting with his gun while intoxicated. But the 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. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Still, the state argues that Mr. Pena was not prejudiced by his attorney's failure to propose the proper lesser-included instruction because the jury passed up the opportunity to convict him on the "intermediate offense" of second degree assault. Brief of Respondent, pp. 14-17 (*relying on State v. Guillot*, 106 Wn. App. 355, 368-69, 22 P.3d 1266 (2001); *State v. Hansen*, 46 Wn. App. 292, 296-98, 730 P.2d 706 (1986)).

But the reasoning of the cases cited by the state does not apply in Mr. Pena's situation. In both *Guillot* and *Hansen*, the jury answered the factual question posed by the omitted instruction by rejecting the intermediate offense. *See Guilliot*, 106 Wn. App. at 369; *Hansen* 46 Wn. App. at 298.

In Mr. Pena's case, however, the actual 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. Respondent cannot overcome the presumption of prejudice stemming from that failure. *Parker*, 102 Wn.2d at 164.

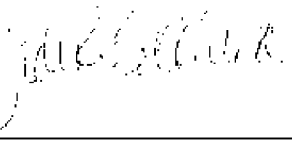
Mr. Pena's attorney provided ineffective assistance of counsel by proposing the wrong lesser offense instruction. The jury was left with no way to apply the defense theory to the law. Mr. Pena's conviction must be reversed.

CONCLUSION

Mr. Pena's conviction must be reversed for the reasons set forth above and in his Opening Brief.

Respectfully submitted on June 10, 2015,

BACKLUND AND MISTRY



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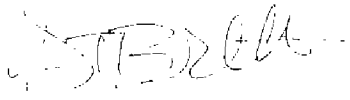

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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

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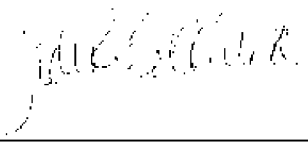

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