NO. 43235-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

MAXIMUS MASON,

Appellant.

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

The Honorable Linda CJ. Lee, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY[1]

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE.

Maximus Mason asserts trial counsel was ineffective for failing to object to the recklessness instruction under State v. Harris[2] and State v. Johnson.[3] Brief of Appellant (BOA) at 12-19.

The trial court in Mason's case defined recklessness as follows:

> 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 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 result.

CP 199 (Instruction 42) (emphasis added).

The pertinent part of the recklessness instruction given in Johnson was identical. 172 Wn. App. 112, ¶ 47. The appellate court held the trial court erred because the instruction "should have used the more specific

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[1] Counsel stands on the Brief of Appellant with respect to arguments 2 and 3 of the brief.

[2] 164 Wn. App. 377, 263 P.3d 1276 (2011).

[3] 172 Wn. App. 112, 297 P.3d 710 (2012), as modified on denial of reconsideration (2013).

statutory language of 'substantial bodily harm', not 'wrongful act'". Id. at ¶ 55; see BOA at 15-16 (addressing Johnson).

The Johnson court followed this Court's reasoning in State v. Harris. Harris was charged with first degree assault of a child, which required the State to prove "the person . . . [i]ntentionally assaults the child and . . . [r]ecklessly inflicts great bodily harm." Harris, 164 Wn. Appat 383 (quoting RCW 9A.36.120(1)(b)(i)). The first paragraph of the instruction defining recklessness was identical to the one used in Mason's case. Harris, 164 Wn. App. at 384.

Harris held the jury needed to find Harris recklessly disregarded the substantial risk that "great bodily harm" would occur as a result of his actions under RCW 9A.36.120(1)(b)(i), not that "a wrongful act" would occur. Harris, 164 Wn. App. at 385. The court concluded the instruction relieved the State of its burden to prove Harris acted with disregard that a substantial risk of great bodily harm would result when he shook the child. Harris, 164 Wn. App. at 387.

The issue in Johnson was whether trial counsel was ineffective for proposing the flawed instruction. 172 Wn. App. 112, at ¶ 43. The court

found counsel was not ineffective because Harris and a case relied on by Harris[4] were not decided until after the trial in Johnson's case. Id., ¶ 61

The same cannot be said for Mason's counsel. Mason's trial commenced more than four months after this Court issued its decision in Harris. See State v. Kyllo, 166 Wn.2d 856, 866, 215 P.3d 177 (2009) (counsel was ineffective for proposing incorrect "act on appearances" self-defense instruction; Supreme Court noted that "at the time of Kyllo's trial there were several cases that should have indicated to counsel that the pattern instruction was flawed.").

It is telling that the State fails to mention Johnson. The State does address Harris and contends Mason's case is "significantly distinguishable" factually. Brief of Respondent (BOR) at 15-18. The State is correct that, unlike in Harris, Mason did not argue he disregarded the risk of causing substantially bodily harm. But this Court must presume that a misstatement of the law in a jury instruction is prejudicial. Harris, 164 Wn. App. at 383 (citing State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)).

The State also contends Mason fails to show the trial court would have sustained a defense objection to the recklessness instruction. BOR at 18. Because Harris applied directly to the instruction in Mason's case, the

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[4] State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011).

trial court would have abused its discretion by failing to sustain an objection. See 1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 596, 146 P.3d 423 (2006) ("By virtue of stare decisis, courts follow rules laid down in previous judicial decisions unless they contravene principles of justice."); State v. Strauss, 119 Wn. 2d 401, 413, 832 P.2d 78 (1992) (trial court may not ignore an appellate court's decision and is bound by the law of the case). Insofar as Harris and Mason's case shared the same narrow legal issue, Harris controls.

The State also maintains that even if counsel performed deficiently by failing to object to the instruction, Mason fails to prove he was prejudiced by counsel's failure. BOR at 18-20. The State points out defense counsel made appropriate objections, had a "strategy and purpose," and made a "coherent closing argument." BOR at 19.

This analysis does not square with the cases that have found counsel ineffective for proposing, or failing to object to, instructions that lessen the State's burden of proof. See, e.g., Kyllo, 166 Wn.2d at 870 (counsel ineffective for proposing instruction that misled jury into concluding self-defense required an apprehension of greater harm than is properly required); State v. Thomas, 109 Wn.2d 222, 228, 743 P.2d 816 (1987) (trial counsel found ineffective for failing to propose instruction that indicated there was subjective component to felony flight); In re

Personal Restraint of Wilson, 169 Wn. App. 379, 391, 279 P.3d 990 (2012) (trial counsel ineffective for proposing pattern accomplice liability instruction, which lowered State's burden of proof by wrongly allowing accomplice to be held strictly liable for any and all crimes the principal committed); State v. Kruger, 116 Wn. App. 685, 694, 67 P.3d 1147 (trial counsel ineffective for failing to request instruction indicating voluntary intoxication could be considered in determining whether defendant acted with requisite mental state), review denied, 150 Wn.2d 1024 (2003).

In none of these cases did the court weigh the good things counsel did against the bad, as the State urges this Court to do. Rather, the test is whether counsel performed deficiently and whether that performance sufficiently undermined confidence in the outcome of the trial. State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). The definition of recklessness given here was contrary to established case law. Counsel performed deficiently by failing to properly research the instruction. The instruction, in turn, lowered the State's burden of proof. There is, therefore, a reasonable probability the assault verdict would have been different but for counsel's error. Mason urges this Court to reject the State's contrary assertions and to reverse the assault conviction.

B. CONCLUSION

For the reasons cited herein and in the Brief of Appellant, this Court should reverse Mason's convictions and remand for a new trial.

DATED this 17 day of April, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON Respondent, v. MAXIMUS MASON, Appellant.	)))))))))	COA NO. 43235-8-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF APRIL 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MAXIMUS MASON
DOC NO. 356713
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF APRIL 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

April 12, 2013 - 2:23 PM

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