

NO. 42603-0-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MARSELE K. HENDERSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy, Presiding Judge

No. 08-1-05882-6

Supplemental Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in refusing to instruct the jury on manslaughter as manslaughter in the first or second degree was not a lesser included offense of first degree murder by extreme indifference?

B. STATEMENT OF THE CASE.

The procedural posture and facts of the case are set forth in the State's Response Brief.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO INSTRUCT THE JURY ON MANSLAUGHTER WHERE THAT CRIME IS NOT A LESSER INCLUDED CRIME TO FIRST DEGREE MURDER BY EXTREME INDIFFERENCE.

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).

An appellate court views the evidence that purports to support a requested instruction in the light most favorable to the party who requested the instruction at trial. *Fernandez–Medina*, 141 Wn.2d at 455–56. This court reviews de novo the legal prong of a request for a jury instruction on a lesser included offense. *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010) (citing *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998)). Where a trial court’s refusal to give instructions is based on the facts of the case, an appellate court reviews this factual determination for abuse of discretion. *LaPlant*, 157 Wn. App. at 687; *State v. Hunter*, 152 Wn. App. 30, 43, 216 P.3d 421 (2009) (citing *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by*, *State v. Berlin*, 133 Wn.2d 541, 547–49, 947 P.2d 700 (1997)). A trial court abuses its discretion if it bases its decision on an erroneous view of the law or applies an improper legal standard. *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005).

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).

Thus, the only question is whether the trial court abused its discretion in deciding that the factual prong was not satisfied. Specifically, did the evidence raise an inference that defendant only committed first degree manslaughter, not first degree murder by extreme indifference?

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. Schwenke. 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. This court then held that "indiscriminately 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.

Here, the court declined to give the lesser included instructions based on the facts of the case. RP 1191. Therefore, the court's ruling is reviewed for an abuse of discretion. The trial court's reliance on *Pettus* and *Pastrana* was not erroneous as both cases are still relevant authority.

As in *Pastrana* and *Pettus*, defendant's actions demonstrated not mere recklessness regarding human life but extreme indifference, an aggravated form of recklessness. Defendant stood in front of a house where he knew there was a crowded¹ party. RP 408, 564. He rapidly fired multiple shots indiscriminately into the crowd. 201, 345, 406-08, 564. This conduct, when measured against *Pettus* and *Pastrana*, shows

¹ 130-200 people were at this party approximately 30 minutes prior to the shooting, located in both the front and back yards of the property. RP 187, 193-97. Approximately 30 people were still at the scene by the time officers arrived. RP 133.

that the trial court was well within its discretion to deny the requested instruction.

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*, Division I of 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

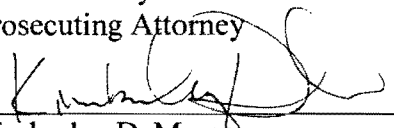
that a substantial risk of death may occur. Instead, defendant rapidly fired several shots into an extremely crowded area. Defendant's conduct did not merely create an unreasonable risk of death, but created a very high degree of risk of death. Thus the evidence does not support a finding that only the lesser offense was committed to the exclusion of the greater offense. Firing a gun indiscriminately into a crowd is exactly the type of conduct proscribed by RCW 9A.32.030(1)(b).

D. CONCLUSION.

The trial court did not abuse its discretion when it found that first degree manslaughter was not a lesser included offense of first degree murder by extreme indifference. For the reasons stated above, and those contained within the State's Response Brief, the State respectfully requests this Court to affirm defendant's conviction.

DATED: October 1, 2013.

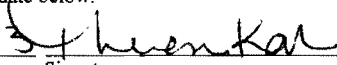
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