71304-3

71304-3

NO. 71304-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

DENNIS WATTERS, JR.

Appellant.

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

The Honorable Michael T. Downes, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The court erred in failing to instruct the jury on a legally and factually available lesser included offense.

2. In the alternative, defense counsel was ineffective for failing to request the lesser included offense instruction.

3. The court erred by conditionally vacating the appellant's first degree manslaughter conviction, which was charged as an alternative to a first degree murder charge.

Issues Pertaining to Assignments of Error

1. Where the appellant was charged with first degree murder by extreme indifference, did the trial court err when it failed to instruct the jury on the lesser included offense of first degree manslaughter, which was both legally and factually warranted?

2. Was defense counsel ineffective for failing to alert the court to a change in the law affecting the ability of the lesser included offense?

3. Did the court err by conditionally vacating the appellant's first degree manslaughter conviction, which was charged as an alternative to first degree murder?

B. STATEMENT OF THE CASE[1]

1. Charges, verdicts, and sentences

The State charged Dennis Watters, Jr. with first degree murder by extreme indifference[2] (count 1) and, in the alternative, second degree intentional murder[3] (count 2) for shooting Ryan Mumm at Blue Stilly Park in Snohomish County. CP 192. The State also charged Watters with two counts of first degree assault (counts 3 and 4) based on allegations he followed and shot at the car in which Mumm and another man, Ethan Mathers, were riding. The State alleged firearm enhancements as to each count. CP 192-93.

Watters sought and received a "justifiable homicide" instruction as to counts 1 and 2. CP 74. Per agreement of the parties, the court also instructed the jury on lesser included offenses of first and second degree manslaughter as to count 2. CP 71-73. However, the court stated that, as

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[1] This brief refers to the verbatim reports as follows: 1RP – 10/4/13; 2RP – 10/7/13; 3RP – 10/8/13; 4RP – 10/9/13 (morning); 5RP – 10/9/13 (afternoon); 6RP – 10/10/13; 7RP – 10/14/13; 8RP – 10/16/13; 9RP – 10/17/13; 10RP – 10/18/13; 11RP – 10/21/13; 12RP – 10/22/13; 13RP – 10/23/13; 14RP – 10/24/13; 15RP – 10/25/13; 16RP – 10/28, 10/29, 10/30/2013; and 17RP – 12/16/13.

[2] RCW 9A.32.030(1)(b).

[3] RCW 9A.32.050(1)(a).

a matter of law, a lesser manslaughter instruction was not available as to count 1. 2RP 16-17.

A jury found Watters guilty of the lesser included offense of first degree manslaughter as to count 2 but otherwise convicted him as charged. CP 41-53.

The court sentenced Watters to consecutive standard range sentences totaling 520 months plus 180 months of firearm enhancements. CP 20; see RCW 9.94A.589(1)(b) (calling for consecutive sentences for "two or more serious violent offenses arising from separate and distinct criminal conduct"). The court also entered an order dismissing count 2 "subject to reinstatement" if count 1 were reversed on appeal. CP 28.

Watters timely appeals. CP 5-16.

2. Trial testimony

Ethan Mathers was 21 years old on July 14, 2012. 10RP 11. He spent the day with 20-year-old Mumm, a longtime friend. 8RP 23; 10RP 14, 75. Mumm had moved away from Snohomish County but was staying with the Christensen family in Lakewood for a few weeks. 10RP 14; 11RP 179. Most of the family was camping over the weekend, but 19-year-old Randy Christensen, a friend of Mumm and Mathers, remained in town. 11RP 181; 15RP 107. The family owned a number of guns which they stored in a locked gun safe. 11RP 179.

That afternoon, Mathers, who was driving a red BMW sedan, picked up Mumm at the Christensen home and drove to the Safeway in Arlington. 10RP 15; 10RP 144-45. Both Mathers and Mumm were heavy drug users and had already used Xanax and heroin that day. 10RP 16, 75-76, 81, 110.

At Safeway, three people in a Volkswagen Jetta offered to sell Mathers a small amount of marijuana. 10RP 16-17. Mathers recognized one of the three as Zachary Smoots. 10RP 16. Mathers took the marijuana but drove off without paying. 10RP 17. Smoots gave chase but Mathers lost Smoots's Jetta in the parking lot. 10RP 17. According to Smoots, he tried to hang onto the window of the BMW but was punched in the face and had to let go. 11RP 30, 70.

Mathers testified that after leaving Safeway he, Mumm, and another friend drove to Blue Stilly Park in unincorporated Snohomish County near Arlington and smoked the marijuana. 10RP 17. Later, after Mathers and Mumm had dropped off the friend in Arlington, the Jetta pulled into traffic behind Mathers's BMW and blocked them in on a dead end road. 10RP 18.

According to Mathers, three men, including Smoots, and a woman, armed with weapons including brass knuckles and a pipe, approached Mathers and Mumm. 10RP 19. Mathers punched Smoots and got in his

car to escape. But the driver's window of the BMW had been shattered in the fray, so Mathers removed it and threw it at Smoots's Jetta. 10RP 20. As Mathers was wrestling with the window, the woman, later identified as Brittany Glass, approached Mathers and began kicking his car. 10RP 20-21, 94; 11RP 71. Mathers warned Brittany to back off. When she did not, he kicked her and then sped off with Mumm. 10RP 20.

Smoots acknowledged the two groups fought and provided additional details. Mathers punched Smoots, who was briefly knocked unconscious. 11RP 32, 38, 73. When Smoots regained consciousness, Mathers was fighting with Bo Schemenauer, part of Smoots's group. 11RP 38. According to Smoots, the fight ended when Mathers and Mumm threw broken glass at Smoots's car and drove away. 10RP 38-39.

After the fight, Mathers became upset that the fight had been unfair. He was also angry that his car had been damaged. 10RP 22, 96. After obtaining Smoots's phone number through mutual acquaintances, 10RP 103, 145, he called and threatened to render Smoots paraplegic and damage his car. Mathers urged Smoots to meet him at Blue Stilly Park to settle the score. 11RP 39, 75.

Smoots was fearful. 11RP 75-76. He told Mathers he and Bo did not want to fight and, at Bo's father's suggestion, offered to pay for the

damage to Mathers's car window. 11RP 48, 76; 15RP 59, 78, 94. Mathers, however, insisted on fighting. 11RP 40, 48.

Smoots did not contact anyone but thought Brittany contacted her father, James Glass, about Mathers's threats. 11RP 40. Bo contacted his father, Ron Schemenauer. 11RP 41, 76. Both men later participated in the row at the park.

Meanwhile, Mathers and Mumm returned to the Christensens' home to collect weapons, including a gun, and to use drugs. 10RP 25-26, 10RP 85-86; 11RP 183; 15RP 110. At trial, Mathers claimed he was unaware Mumm had obtained a gun because he was busy stealing a computer monitor he planned to sell to support his drug habit. 10RP 25, 27, 99. Other witnesses belied this claim. Randy Christensen testified he urged Mumm and Mathers not to take his father's new 9-mm pistol and suggested they borrow a BB gun instead. Nonetheless, Mathers obtained the gun safe key from Randy's brother's room and got into the safe. 15RP 120, 123, 134; see also 13RP 13-15 (additional testimony).

Before leaving the house, Mumm told Randy he wanted to finish what was started and "beat some ass." 15RP 132.

Mathers and Mumm rendezvoused with friends Josh Hogan, Ryland Ford, and Matt Stein at a smoke shop near the intersection of Highway 530 and 27th Avenue Northeast, which was the single access

road to the park. 10RP 27. Mumm rode with Mathers, while Hogan and the others drove in Hogan's black Pontiac Bonneville. 10RP 31-32. At the park, Mathers parked his car facing the exit and waited for Smoots's group to arrive. 10RP 32. Mathers grew impatient and was about to leave when a man standing nearby said, "hold on a second." 10RP 33; 12RP 87.

According to Smoots, a group of about 10 people in various cars met at the Arlington Safeway and then went to the park to look for Mumm and Mathers, who had not yet arrived. 11RP 43; 12RP 16-17. Some of the group then remained at the park, while others went to wait at a nearby Tesoro gas station on Highway 530. 11RP 46-47; 12RP 17, 59, 63, 85. The latter group, which included Smoots, Bo, Bo's father Ron, James Glass, and Watters, returned to the park after receiving a message that Mathers's BMW had arrived. 11RP 46-47; 12RP 25, 59, 139. Smoots rode with Bo and Ron in their Honda. 11RP 50, 80-81.

Mathers testified the Honda sedan drove into the park and struck the front bumper of the BMW. 10RP 33; 13RP 18. At the same time, Watters's blue Ford Ranger pulled in at an angle and stopped with his passenger side window facing Mathers's front passenger window. 10RP 33, 37; see also 13RP 18 (Josh Hogan testimony), 13RP 144 (Kristofer Struhs testimony).

According to Mathers, as the Honda was approaching the BMW, Mumm got out and fired a shot into the air.[4] 10RP 34-35. Mumm reentered the BMW and was placing the gun on the floorboard when a gunshot from the Ranger struck him in the temple. 10RP 34, 36, 58. Mumm never regained consciousness. 10RP 38, 42. The driver of the Ranger fired a total of two or three times. 10RP 36-37. Mathers did not get a good look at the driver because he was preoccupied with trying to steer, shift, and keep the unconscious Mumm from falling across the gearshift. 10RP 38.

Mathers initially told police he did not see the shooter or the gun, although he had changed his story by the time of trial and claimed the man "looked him in the face." 10RP 36, 125-27. Other witnesses described a confusing scenario surrounding the gunshots. Hogan, the driver of the Bonneville, believed someone in the Honda was shooting. 13RP 38-39. Kristofer Struhs, who was at the park but was unaffiliated with either group, testified that besides Mumm, the only person with a gun was the driver of a Ford Expedition. 13RP 161. Cameron Haskett, part of Smoots's group, saw shots coming from both the BMW and the Ranger as

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[4] Contrary to the testimony of multiple witnesses, Mathers denied that Mumm pointed the gun at the occupants of the Honda or other affiliated vehicles. 10RP 112.

he drove away. 13RP 19-20. Ron Schemenauer, the Honda driver, believed Mumm was firing out of the BMW. 5RP 71.

Mathers testified he put the BMW in reverse and then squeezed past the Ranger and Honda. 10RP 36; 13RP 25. But Mathers was having trouble driving, and Hogan's Bonneville passed him on 27th. 10RP 38-39. Mathers yelled that Mumm had been shot, and passenger Ryland Ford called 9-1-1. 13RP 26-27; 14RP 25-26.

As Mathers approached the stop sign at the corner of 27th and Highway 530, he noticed the blue Ranger was gaining on him. The Ranger followed as Mathers turned right onto Highway 530. 10RP 40. As Mathers turned into the lot of an Arco gas station, he felt gunshots strike the BMW, and he saw a gun pointed out the window of the Ranger as it drove by. 10RP 41.

After stopping in the lot, Mathers ran into the attached "AMPM" convenience store and asked the clerk to call 9-1-1. 10RP 43. After that, Mathers checked Mumm's pockets and the car for drugs. 10RP 115. He threw some marijuana in a nearby garbage can and a pen he had used to snort drugs on the ground. 10RP 43-44, 52-53. He then wrapped Mumm's gun in his t-shirt and threw it into the bushes behind the convenience store. 10RP 43.

Hogan's Bonneville pulled into the lot after Mathers. 13RP 28. Mathers and the group in the Bonneville agreed not to tell police about Mumm's gun. 10RP 57; 13RP 32, 35 (Josh Hogan's testimony). But an Arco security video obtained by police showed Mathers appearing to conceal items around the lot. 8RP 55-56, 87-88. Mathers eventually admitted that he threw the gun behind the building, where police later found it under a blackberry bush. 8RP 58-59; 9RP 42, 44, 50; 11RP 152, 164. At trial, Mathers acknowledged he was "in a haze" during the incident from the drugs he used that day. 10RP 86.

Mumm had a weak pulse but was still breathing after police arrived at the lot. 8RP 105-09. He died early the next morning. 8RP 24.

After the incident, Mathers's BMW had bullet holes in the front passenger side pillar, the metal under the driver's door, the rear passenger side window, and the rear driver's side door. 10RP 51; 11RP 92-93; 13RP 66-79. State ballistics expert Kathy Geil also discovered a bullet lodged between the rim and tire of the rear wheel on driver's side. 13RP 85. Geil opined that Watters's 9-mm pistol fired the bullet in the wheel. 14RP 116. She also opined that a bullet collected from Mumm's skull came from Watters's gun. 11RP 123; 14RP 69-77. The bullet was flattened consistent with having struck the BMW pillar. 14RP 124-25.

Police found a single shell casing at the park near some pieces of broken mirror. 11RP 99-100. Geil opined it was ejected from the Christensen gun. 14RP 115.

Smoots gave a different account of the events at the park. He and the Schemenauers drove toward the BMW and rammed it, pushing the BMW back five or ten feet. 11RP 49-50; 13RP 144. Mumm, armed with a gun, got out of the BMW, approached the driver's side of the Honda, cocked the gun, and pointed it at the occupants. 11RP 50; 13RP 149-50 (Struhs's testimony). According to another witness, the look on Mumm's face was frightening. 12RP 122.

Meanwhile, the other vehicles from the Tesoro arrived at the park. 11RP 51, 54; 13RP 149-50 (Struhs testimony). Mumm stepped back from the Honda, fired a few shots into the air, then pointed the gun downward. 11RP 51, 83. Smoots heard but did not see additional shots. 11RP 51, 52, 55. After the Honda backed up, the red BMW sped out of the park. 11RP 52, 56. As it did so, James Glass fired a shot at it. 11RP 52.

Smoots recalled seeing a blue Ford Ranger in the park, but did not recall its location. 11RP 52, 78-79. The Honda was the last car out of the park and Smoots did not see which way the BMW went on Highway 530. 11RP 56-57.

Watters's friend James Glass was on his way to a bonfire in Granite Falls when he received a tearful call from his daughter Brittany. 12RP 7, 55. Brittany told her father that her friends had sold marijuana to some men, who drove away without paying, and she was assaulted during a later confrontation with the men.[5] 12RP 12. Brittany also said Mathers had threatened to cripple Smoots. As a result, Glass feared that Mathers and Mumm had guns. 12RP 14.

Glass, who was driving a green Ford Expedition, had his revolver with him when he got the call because he planned to target-shoot at the bonfire. 12RP 13, 48. Glass called his friend Watters because he knew Watters had a concealed weapons permit and usually carried a gun. 12RP 15, 59. Watters, however, said he did not want to get involved. Glass was therefore surprised when Watters arrived at the Tesoro. 12RP 15-16, 56, 60. Watters was the last to arrive before the convoy left for the park. 12RP 115.

Glass arrived at the park behind the Honda and Watters's Ranger. 12RP 26-27. Two other vehicles from the Tesoro, driven by Cameron Haskett and Brandon Wiede, arrived after Glass. 12RP 27, 140; 15RP 15 (Haskett testimony). Glass saw Mumm point a gun inside the Honda, then

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[5] Chelsea Albriktsen and boyfriend Cameron Haskett observed injuries to Brittany's face and torso. 12RP 101.

turn and point the gun at Watters's truck, which was parked close to the BMW. 12RP 28, 53-54, 70. Glass ducked behind his partly opened door and heard, but did not see, additional shots. 12RP 28, 31-32.

Afterward, Glass looked up and saw the BMW leaving the park at a high rate of speed. He pulled his gun from his center console and shot toward the car, planning to disable it. But he changed his mind at the last second and fired at the ground. 12RP 32-35. After the shooting stopped, all the vehicles attempted to leave the park at once. 12RP 35, 90.

On the way out of the park, Watters was initially behind Glass but passed him and pulled in behind the BMW. 12RP 38-39. On Highway 530, the BMW braked as it turned into the Arco lot. Watters's truck appeared to collide with the rear bumper of the BMW. 12RP 40. Glass and other witnesses then heard two to four gunshots. 12RP 41, 65; 14RP 139, 144, 145, 153. Another witness saw someone shooting from a blue truck. 14RP 153. Glass hid his revolver after the incident and tried to conceal his and Watters's involvement. 12RP 45-47, 68, 92.

Police arrested Watters four days after the incident and impounded the Ford Ranger. 12RP 171, 187. Policed discovered two bullet holes in the window frame of the passenger door. 12RP 188-89. Carly Denui, a state crime lab employee, testified the metal appeared to be pushed

outward, and she therefore opined that a bullet had passed from the interior to the exterior of the truck. 13RP 93-94.

The passenger side mirror was also damaged. 13RP 93-94. Geil examined the mirror after police removed it from the Ranger and submitted to the crime lab. Geil believed a bullet passed from the glass side to plastic side, or from the back to the front of the truck, provided that mirror was in its normal position at the time. 14RP 104.

Watters consented to a recorded interview with detectives. 12RP 172. A redacted version was played for the jury at trial. Ex. 199; 13RP 118. On July 14, Glass called Watters and said Brittany had been beaten up by some heroin addicts. Glass wanted to stand up to the men and needed backup. Glass did not mention there would be guns involved, but Watters was still reluctant to participate. Nonetheless, he drove to the Tesoro after Watters persuaded him help was needed and then drove to the park with the convoy. As Watters reached the park, the BMW drove toward him. The passenger pointed a gun at him through the windshield of the BMW, then reached out of the car and fired two rounds into the air. Ex. 199.

The BMW backed up, then drove past Watters's Ranger with the passenger side facing Watters's passenger side. He saw the BMW passenger fire at him as the BMW passed the Ranger. At that point,

Watters pulled out his gun and shot three rounds at the BMW passenger. Ex. 199.

Watters believed the BMW passenger was continuing to shoot at others as the car drove off, so he accelerated to catch the car and pulled behind it at the intersection of 27th and Highway 530. He denied shooting at the car on Highway 530. But, believing the occupants still posed a danger, Watters rammed the BMW with his truck and attempted to run it off the road. Ex. 199.

Watters admitted he should have called 9-1-1 after the incident but explained he was not thinking straight due to a surplus of adrenaline. Watters acknowledged it was possible he shot his own mirror but maintained the BMW passenger, Mumm, shot at him first. Ex. 199.

C. ARGUMENT

1. TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FIRST DEGREE MANSLAUGHTER AS TO COUNT ONE.

The right to a lesser included instruction derives from statute. RCW 10.61.006 states, "[T]he defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information." The remedy

for failure to give a lesser included instruction, when one is warranted, is reversal. State v. Ginn, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005).

A defendant is entitled to an instruction of a lesser included offense if the two prongs of the State v. Workman test are satisfied. 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Under the legal prong, each element of the lesser offense must be a necessary element of the charged offense. State v. Berlin, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997) (citing Workman, 90 Wn.2d at 447-48). Under the factual prong, the evidence presented in the case must support an inference that only the lesser offense was committed to the exclusion of the charged offense. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

When analyzing the factual prong, this Court reviews the evidence in the light most favorable to the party seeking the instruction. Id. at 455-56. "If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given." Berlin, 133 Wn.2d at 551 (citing Beck v. Alabama, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)).

Here, the two crimes are first degree murder by extreme indifference and first degree manslaughter. First degree murder by extreme indifference requires proof that the defendant "(1) acted 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. Yarbrough, 151 Wn. App. 66, 82, 210 P.3d 1029 (2009); RCW 9A.32.030(1)(b); CP 69 (Instruction 12, to-convict on count 1). First degree murder by extreme indifference requires a very high degree of risk, which "elevates the level of recklessness to an extreme level, thus 'manifesting an extreme indifference to human life.'" State v. Dunbar, 117 Wn.2d 587, 594, 817 P.2d 1360 (1991) (quoting RCW 9A.32.030(1)(b)).

First degree manslaughter requires proof that the defendant recklessly caused the death of another. RCW 9A.32.060(1)(a). A person "acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c).

Two Court of Appeals opinions applied the factual prong of the Workman test to reject arguments that a first degree manslaughter instruction was warranted where an accused was charged with first degree murder with extreme indifference. State v. Pastrana, 94 Wn. App. 463, 468, 972 P.2d 557 (1999); State v. Pettus, 89 Wn. App. 688, 951 P.2d 284 (1998). Here, the trial court considered both cases in the context Watters's

pretrial Knapstad[6] motion to dismiss the first degree murder charge. CP 276-363 (defense motion to dismiss and reply); Supp. CP ___ (sub no. 53, State's Response to Defense Motion to Dismiss); 1RP 43-49 (argument on motion and ruling denying motion to dismiss). It thus appears likely the court relied on them in proclaiming that manslaughter was unavailable as a lesser offense for first degree murder by extreme indifference. 2RP 16-17.

In the first case, Pettus, the defendant was convicted of first degree murder by extreme indifference after driving alongside the car of his victim and firing at it in a residential neighborhood following a drug transaction that went badly. 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 . . . rear window." Id. at 692.

The trial court concluded, based on Pettus's use of a .357 magnum gun, the time of day, the fact that the incident occurred in a residential neighborhood, and Pettus's admitted inability to control the gun from a moving vehicle, did not support an inference that Pettus's conduct

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[6] State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986) (trial court may dismiss criminal charges pretrial based on insufficiency of the evidence).

presented a substantial risk of some wrongful act instead of a "grave risk of death." Id. at 700.

In Pastrana, the defendant was also charged with first degree murder by extreme indifference. 94 Wn. App. at 468. The evidence at trial showed Pastrana was driving on the freeway when another car cut in front of him. At that point, Pastrana obtained a gun from behind the seat, rolled down the passenger window and fired one shot out the window in front of the passenger's face. The passenger asked Pastrana what he was thinking. Pastrana replied that he was aiming for a tire. The passenger commented "it's kind of hard to be aiming at anything when you are going down the freeway that fast." Id. at 469.

Relying on Pettus, the Court stated, "'[t]he factual prong [of Workman] is not satisfied because the evidence showed much more than mere reckless conduct -- a disregard of a substantial risk of causing a wrongful act.'" 94 Wn. App. at 471 (quoting Pettus, 89 Wn. App. at 700). Based on Pettus, therefore, the court was not required to instruct the jury on the lesser crime of manslaughter. Pastrana, 94 Wn. App. at 471-72.

Six years after Pettus and Pastrana, however, the Supreme Court decided State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005). There, the Court altered the State's burden to prove manslaughter, requiring the State to show that the defendant knew of and disregarded a substantial risk that

a homicide may occur, as opposed to a substantial risk that a wrongful act may occur. Id. at 467-68.

In State v. Henderson, ___ Wn. App. ___, 321 P.3d 298, review granted, ___ Wn.2d. ___ (2014), Division Two of this Court acknowledged that, following Gamble, the analyses in Pettus and Pastrana are no longer good law in determining whether a first degree manslaughter instruction is warranted under the factual prong of the Workman test.[7]

Pettus and Pastrana stand for the fact that that shooting guns in a high-risk manner cannot constitute a substantial disregard of some wrongful act. But following Gamble this is not the standard for manslaughter. Henderson, 321 P.3d at 302 (citing Pettus, 89 Wn. App. at 700; Pastrana, 94 Wn. App. at 471). In Henderson, the Court held that where evidence showed defendant shot from the street toward a house hosting a large party, a rational jury could have nonetheless convicted Henderson of first degree manslaughter, while acquitting him on first degree murder by extreme indifference. Henderson, 321 P.3d at 299, 302.

Here the court erred in finding a first degree manslaughter instruction was unavailable. Watters satisfies the legal prong because each element of the lesser offense must be a necessary element of the

[7] The State conceded that the legal prong of Workman was satisfied. Henderson, 321 P.3d at 302.

charged offense. Berlin, 133 Wn.2d at 545-46. To prove first degree manslaughter, the State must prove he (1) acted recklessly (2) causing the death of another. RCW 9A.32.060(1)(a). Both of these are included in the charged offense. RCW 9A.32.030(1)(b)); Dunbar, 117 Wn.2d at 594; see Berlin, 133 Wn.2d at 551 ("states of mind of recklessness and criminal negligence are necessary elements of the greater crime of second degree murder," which required intentional act, and thus first and second degree manslaughter are lesser included offenses of that crime).

Under the factual prong, a lesser included offense instruction is required where the jury could rationally convict the defendant of the lesser offense, while at the same time acquitting on the charged offense. Id. Viewing the evidence in the light most favorable to Watters, a rational jury could find Watters shot at the BMW but did so with a disregard for a substantial risk of homicide, rather than acting with extreme indifference that created a grave risk of death. Watters's acts were considerably less risky than those of defendants in Pettus (firing from a moving vehicle toward a moving vehicle in a residential neighborhood following drug transaction), Pastrana (firing from a moving vehicle at a moving vehicle on a freeway), or Henderson (shooting into a crowded house party).

According to Watters, he fired his gun with the purpose of defending himself and others from the risk Mumm posed. He fired at the

passenger side of the BMW, where Mumm was seated, as it drove past slowly. Ex. 199. Even according to Mathers, arguably the witness most favorable to the State, Mumm had just fired a gun in a crowded park and both cars were stationary when the Watters's shots were fired. 10RP 34-36, 58.

Under the facts pertinent to the homicide, which involve conduct significantly less risky than any of the three cases discussed above, a rational jury could convict of first Watters of first degree manslaughter, while acquitting him on first degree murder with extreme indifference. Thus, the trial court applied the incorrect legal standard from Pettus and Pastrana in stating no lesser was available. 2RP 16-17. Based on this error, the remedy is reversal and remand for a new trial. Ginn, 128 Wn. App. at 878.

2. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ALERT THE COURT TO THE AVAILABILITY OF THE INSTRUCTION ON THE LESSER OFFENSE OF MANSLAUGHTER

Every accused person is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective when

(1) the attorney's performance is deficient and (2) the deficiency prejudices the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. To be effective, counsel has must be informed of the relevant law. State v. Kyllo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009). Co-counsel in this case performed deficiently when they failed to object to the court's ruling that a lesser degree instruction was unavailable as to count 1, and failed to be aware that Pettus and Pastrana were no longer good law as to that point of law.

Under Gamble and its progeny, State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011), both decided well before trial, to convict a defendant of first degree manslaughter the State must "prove beyond a reasonable doubt that the defendant knew of and disregarded a substantial risk that death may occur." Id. at 848 (citing Gamble, 154 Wn.2d at 467-68).

This Court held in Peters that a jury instruction defining recklessness to mean that the accused knew of and disregarded "a substantial risk that a wrongful act may occur," rather than "a substantial risk that death may occur," was contrary to Gamble. This instruction impermissibly relieved the State of its burden of proving each of the elements of the crime. Peters, 163 Wn. App. at 849-50. In summary, Gamble and Peters should have alerted counsel that Pettus and Pastrana were no longer good law on this point.

Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. The presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The failure to be aware of relevant case law cannot be characterized as a legitimate tactic designed to aid Watters. Moreover, the failure to alert the court to the availability of such an instruction cannot be characterized as a legitimate all or nothing approach. Watters raised a self-defense claim as to counts 1 and 2. But counsel sought manslaughter instructions, at least as to count 2. CP 71-73 (defense proposed instructions including first and second degree manslaughter); 16RP 3-61 (conference regarding jury instructions); 16RP 61-68 (formal exceptions). Pursuing an all-or-nothing approach on count 1 but not count 2, a charge based on the same homicide, would not be reasonable under any standard. Accordingly, there can be no legitimate argument that counsel was reasonably pursuing an all-or-nothing defense claim on count 1.

Having established deficient performance, a defendant may demonstrate prejudice by showing a reasonable probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. "A reasonable probability is a probability sufficient to

undermine confidence in the outcome." Id. (quoting Strickland, 466 U.S. at 694). Watters "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

To establish ineffective assistance for failure to request a jury instruction, Watters must demonstrate he was entitled to such an instruction. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). As discussed under the first argument section of this brief, Watters was entitled to a first degree manslaughter instruction. See Henderson, 321 P.3d at 299, 302 (jury instruction on lesser included offense was warranted under more extreme facts). But by failing to alert the court to the availability of the lesser instruction, counsel permitted the court to rule, apparently based on Pettus and Pastrana, that no instructions on a lesser crime were available. 2RP 16-17. As stated in the context of the deficiency prong, the failure to point out the applicable law to the court was not strategic. Counsel was clearly not comfortable with an all-or-nothing approach and requested instructions on first and second degree manslaughter on the alternative second degree murder count. CP 126-29. On this record, had co-counsel been aware of the pertinent legal authority, they would have requested a similar instruction on alternatively-charged count 1. And had the court understood the invalidity of Pettus and Pastrana, the court was likely to have

given the manslaughter instructions as to count 1 just as it did on count 2. CP 71-73.

Moreover, had the jury been instructed on the lesser offense, there is a reasonable likelihood it would have convicted Watters on the lesser. Perhaps most significantly, the jury convicted Watters of first degree manslaughter when given the opportunity. CP 49 (first degree manslaughter verdict on count 2). The jury also submitted questions about the precise meaning of "extreme indifference" as well as "grave risk of death" but was simply told to refer to the instructions.[8] CP 53-54; 16RP 174. Finally, conviction on the greater crime is insufficient to demonstrate the absence of prejudice. See Keeble v. United States, 412 U.S 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973) ("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.").

[8] A single published case, Pettus, discusses a definitional instruction for "extreme indifference to human life." Id. at 696 (defining "extreme indifference to human life" as "indifference to life in general, rather than to any one specific individual" which can be shown by proof of intentional conduct "that puts more than one person at risk of death" or "that creates a risk of death without being specific as to the identity or position of the person" put at risk). No such instruction is contained in the pattern instructions.

In summary, this Court should reverse count 1 because counsel's performance was deficient, and there was a reasonable probability the deficiency affected the verdict. Thomas, 109 Wn.2d at 225-26.

3. THE COURT OF APPEALS ERRED BY CONDITIONALLY VACATING COUNT 2, THE FIRST DEGREE MANSLAUGHTER CONVICTION.

Issues of double jeopardy are questions of law reviewed de novo. State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). The double jeopardy clauses of the federal and state constitutions prohibit the imposition of multiple punishments for the same criminal conduct. State v. Turner, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). Where a jury finds a defendant guilty of multiple counts for the same conduct, the trial court does not violate double jeopardy protections if it enters a judgment and sentence referring to only the greater charge. Id. at 462. The court "'should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense." Id. at 463 (quoting State v. Trujillo, 112 Wn. App. 390, 411, 49 P.3d 935 (2002)).

But a trial court violates double jeopardy by conditionally vacating the conviction for the lesser offense with the direction that the conviction remains valid. Turner, 169 Wn.2d at 464. More specifically, "[d]ouble jeopardy prohibits courts from explicitly holding vacated lesser

convictions alive for reinstatement should the more serious conviction for the same criminal conduct fail on appeal — by means of the judgment, orders, or otherwise." Id. at 465. A judgment and sentence must not include any reference to the vacated sentence either on its face or by reference to an appended order. Id. at 464.

While the judgment and sentence does not reference count 2 and is therefore valid, State v. Howard, ___ Wn. App., ___ P.3d ___, 2014 WL 2864397 at *3 (June 24, 2014), the court entered a sentencing order separate from the judgment and sentence. The order holds the vacated lesser conviction open for reinstatement if the greater offense is overturned on appeal. CP 28. This order violates double jeopardy and must be vacated. Howard, 2014 WL 2864397 at *3-4.

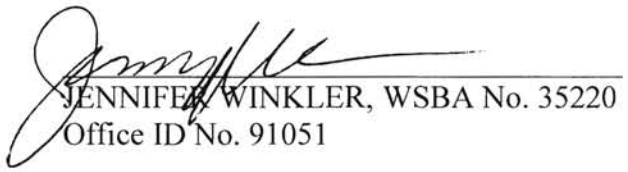
D. CONCLUSION

The court erred when it failed to instruct the jury on the lesser included offense of first degree manslaughter as to count 1. For similar reasons, defense counsel was ineffective for failing to alert the court to the invalidity of the law the court appeared to rely on in declining to instruct the jury on the lesser offense. In any event, the prohibition on double jeopardy requires that the order conditionally vacating count 2 be vacated.

DATED this 16TH day of July, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 71304-3-I
	)	
DENNIS WATTERS,	)	
	)	
Appellant.	)	

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 16TH DAY OF JULY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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COURT OF APPEALS
STATE OF WASHINGTON
2014 JUL 16 PM 4:41

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF JULY 2014.

X Patrick Mayovsky