

70134-7

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No. 70134-7

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD D. PETERS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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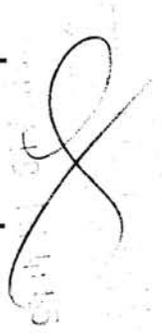


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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion and unreasonably burdened Mr. Peters's state and federal constitutional right to bear arms by admitting evidence of firearms and ammunition he owned that were unrelated to the case.

2. The trial court abused its discretion by admitting evidence of Mr. Peters's prior unrelated acts that did not fall under any exception to ER 404(b).

B. STATEMENT OF THE CASE

Richard Peters worked as an electrician at Boeing and lived in Marysville with his wife and three children. 3/11/13RP 631-33. He loved his children more than anything, spent as much time with them as he could, and never did anything deliberately to harm them. 3/11/13RP 632-35. To an outside observer, it was obvious that Mr. Peters loved his children and he appeared to be a good father. 3/06/13RP 247.

On November 16, 2008, a Sunday, Mr. Peters spent the day at home playing outside with his children and watching television with them inside. 3/11/13RP 645-53. In the early evening, at around 6 or 7, his mother telephoned and asked if he had a handgun he could give her with a "slide" mechanism that would be easy for her to pull.

3/11/13RP 654. When Mr. Peters got off the phone, he unlocked his gun safe and retrieved his Para Ordnance .45 pistol to check the slide mechanism to see if it would be appropriate for his mother to use.

3/11/13RP 655-57. Mr. Peters often carried the Para Ordnance with him outside the home for personal protection. 3/11/13RP 640. When he was home, he kept the gun in the safe, which had an electronic keypad lock that the children could not access. 3/11/13RP 640.

After checking the Para Ordnance, Mr. Peters removed the magazine and placed it on the couch. 3/11/13RP 657. He then asked his six-year-old daughter Stormy to retrieve his Colt .45 pistol from his nightstand upstairs so that he could check the slide mechanism of that gun. 3/11/13RP 657. Mr. Peters kept the Colt for personal protection inside the home. 3/11/13RP 642. He never kept a bullet in the chamber of the gun. 3/11/13RP 629, 643. He had no reason to believe the gun would be unsafe for Stormy to handle. 3/11/13RP 629. He had taught his children how to handle guns safely and wanted them to be familiar with guns and respect them. 3/11/13RP 644.

Stormy came downstairs with the Colt and handed it to Mr. Peters. 3/11/13RP 658-59. He took the gun from her and removed the magazine without looking at the gun. 3/11/13RP 658-59. He had no

reason to think there was a bullet in the chamber; the magazine looked full when he took it out. 3/11/13RP 660. Nonetheless, suddenly the gun fired. 3/11/13RP 660-61. Mr. Peters must have unintentionally placed his finger on the trigger. 3/11/13RP 660-61, 676. The gun had a “hair” trigger that was especially easy to pull. Exhibit 57 at 3, 10. A bullet hit Stormy straight in the forehead as she stood next to Mr. Peters. 3/11/13RP 660-61. She fell to the floor. 3/11/13RP 661.

Mr. Peters started screaming and his wife hurried into the room. 3/11/13RP 661. She called 911. 3/11/13RP 662. Mr. Peters was in shock and disbelief. 3/11/13RP 661-62. He grabbed the Colt, put the magazine in it, chambered a round, and put the gun to his head. He did not know why he did not pull the trigger. 3/11/13RP 662.

Medics arrived and took Stormy to the hospital in an ambulance. 3/05/13RP 132. She died later that night. 3/06/13RP 269, 320.

When medics and police arrived at the house, they noted that Mr. Peters was crying and very distraught. 3/05/13RP 87. He said that the shooting was an accident and he did not know the gun was loaded. 3/05/13RP 88. Mr. Peters was so upset that he repeatedly threatened to shoot himself and burn down the house. 3/05/13RP 87; 3/08/13RP 545, 549-50; 3/11/13RP 663.

Medics and police at the scene also noted that Mr. Peters appeared to be intoxicated. 3/05/13RP 85. He acknowledged having several vodka and Coke drinks throughout the day. 3/11/13RP 649, 652. When his blood was drawn at 2:50 a.m. the next morning, his blood-alcohol level was determined to be .11. 3/06/13RP 287-88, 298. Mr. Peters acknowledged to police that he felt under the influence of alcohol. 3/08/13RP 526-27. But he did not feel too intoxicated to handle a gun. 3/11/13RP 663. He appeared to be sober when police formally interviewed him at 10 p.m. that night. 3/08/13RP 497, 515.

Mr. Peters was very cooperative with the police. 3/08/13RP 546. He repeatedly said that the shooting was unintentional and that he had no reason to believe the gun was loaded after he had removed the magazine. Exhibit 57.

The State charged Mr. Peters with one count of second degree felony murder based on second degree assault. CP 348. In the alternative, the State charged him with one count of first degree manslaughter. CP 348-49.

Following a trial, the jury found Mr. Peters not guilty of felony murder but guilty of first degree manslaughter. CP 304, 312.

Mr. Peters appealed and this Court reversed the conviction based on instructional error.¹ CP 295. On remand, the State re-charged Mr. Peters with first degree manslaughter. CP 292.

Prior to trial, defense counsel moved to exclude evidence that Mr. Peters owned several guns in addition to the Colt .45 and the Para Ordnance, as well as evidence of unrelated ammunition found in the house. 2/26/13RP 75-79, 105; 3/04/13RP 10-11; 3/06/13RP 306; CP 86, 89. The court denied the motion. 2/26/13RP 85-86, 106-07; 3/04/13RP 12-13; 3/06/13RP 307. The court reasoned that the evidence was relevant and admissible to show “recklessness on behalf of [Mr. Peters] in his use of guns and his overall propensity to not maintain a safe environment within the home.” 2/26/13RP 85, 106-07.

Thus, the jury heard evidence that, when police executed a search warrant at the house, they seized a total of 16 guns. 3/05/13RP 174-76; 3/08/13RP 481. Inside the gun safe, police found several handguns, four assault rifles, and a shotgun. 3/05/13RP 183; 3/08/13RP 481. A neighbor testified that Mr. Peters owned at least one

¹ The Court held that the trial court had erroneously instructed the jury that in order to convict Mr. Peters of first degree manslaughter, the State need prove only that he knew of and disregarded “a substantial risk that a wrongful act may occur” rather than “a substantial risk that death may occur.” CP 295 (citing State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005)); CP 338 (jury instruction).

AK-47 assault rifle. 3/05/13RP 41. None of the guns in the safe were loaded or had a bullet in the chamber. 3/05/13RP 209.

The jury also heard testimony that Mr. Peters owned a large quantity of ammunition. The gun safe contained ammunition including rifle and pistol magazines. 3/05/13RP 183. In addition, in the garage, police found 12 full boxes of .45 caliber pistol ammunition and a bag of fired shell casings for various caliber guns. 3/08/13RP 441-42.

Prior to trial, defense counsel also moved to exclude, under ER 404(b), evidence of specific prior incidents in which Mr. Peters was alleged to have handled a firearm in a careless manner. CP 86-91; 2/26/13RP 89. The court denied the motion, reasoning that whether Mr. Peters had been careless with guns in the past was relevant and admissible to show whether he was reckless on the present occasion. 2/19/13RP 40, 67-70; 2/26/13RP 91, 96-97.

Thus, the jury heard testimony from Mr. Peters's neighbor, John Smith, about Mr. Peters's handling of guns on prior occasions unrelated to the present incident. 3/05/13RP 35-36. Mr. Smith testified that one day, a few years earlier, he went to Mr. Peters's house and Mr. Peters showed him some of his guns. 3/05/13RP 38, 70. When Mr. Peters handed him a pistol, it was briefly pointed at Mr. Smith. 3/05/13RP 40.

Also, Mr. Smith saw an AK-47 assault rifle leaning against the wall that had a magazine in it. 3/05/13RP 41-43. Mr. Smith thought this was unsafe and told Mr. Peters so. 3/05/13RP 43, 51.

On another occasion, Mr. Smith went to Mr. Peters's house and Mr. Peters handed him a handgun from under a pile of papers on the couch. 3/05/13RP 44-45. The gun had a magazine in it, which Mr. Smith thought was unsafe. 3/05/13RP 46. That day, Mr. Smith also observed Mr. Peters ask his son, who was eight or nine years old, to retrieve a gun from the truck. 3/05/13RP 49. When the son brought the gun inside, it was not loaded. 3/05/13RP 50. Mr. Smith also saw Mr. Peters handle his guns while drinking on three prior occasions. 3/05/13RP 48-49. He never saw Mr. Peters handle a gun that had a bullet in the chamber, however. 3/05/13RP 74.

The jury also heard testimony from George Wilson about a "pumpkin shoot" that occurred about two weeks before the charged incident. 3/06/13RP 238. A group of people got together that day to shoot pumpkins that farmers had left over from Halloween. 3/06/13RP 237. Mr. Wilson observed Mr. Peters and another man holding a shotgun that they were trying to manipulate. 3/06/13RP 239, 250. They were trying to clear or chamber a shell when the shotgun

accidentally discharged. 3/06/13RP 240, 250. The gun discharged in a safe direction downrange while the range was “hot,” meaning that people were allowed to shoot and no one was downrange. 3/06/13RP 235, 239. No one was endangered by the accidental discharge. 3/06/13RP 258. There was no evidence that Mr. Peters was drinking during the “pumpkin shoot” incident. He was not asked to leave the shoot after the gun accidentally discharged. 3/06/13RP 247, 258.

Mr. Peters testified consistently with his statement to police. 3/11/13RP 629-78. He had no reason to think the handgun was loaded after he had removed the magazine. 3/11/13RP 629-30, 660, 677-78.

The jury found Mr. Peters not guilty of first degree manslaughter but guilty of the lesser-included offense of second degree manslaughter. CP 31-32.

C. ARGUMENT

1. **The trial court abused its discretion and unreasonably burdened Mr. Peters’s constitutional right to bear arms by admitting evidence of firearms and ammunition he owned that were unrelated to the charged incident**

Both the state and federal constitutions guarantee the right of an individual citizen to keep operable firearms in the home. Article 1, section 24 of the Washington Constitution provides that “[t]he right of the

individual citizen to bear arms in defense of himself, or the state, shall not be impaired.” The right to possess firearms in one’s home is part of the right of an “individual citizen to bear arms in defense of himself.” State v. Rupe, 101 Wn.2d 664, 706, 683 P.2d 571 (1984).

The federal constitution provides a similar guarantee. The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” This provision “confer[s] an individual right to keep and bear arms” for the “core lawful purpose of self-defense.”² District of Columbia v. Heller, 554 U.S. 570, 595, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). Although the constitutional right to bear arms is subject to reasonable regulation by the State, it “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” Id. at 635. Thus, in Heller, the Court struck down as unconstitutional a District of Columbia law that prohibited individuals from possessing handguns in the home and required lawfully owned firearms to be kept

² The Second Amendment right is “fully applicable to the States.” McDonald v. City of Chicago, __ U.S. __, 130 S. Ct. 3020, 3026, 177 L. Ed. 2d 894 (2010).

unloaded and disassembled or otherwise inoperable and thus unavailable for immediate self-defense. Id.

Not only may the State not enact laws that unreasonably limit an individual's constitutional right to possess firearms in the home, the State may also not unduly burden the lawful exercise of that right. To protect the integrity of the constitutional right to bear arms, the State may take no action that unnecessarily "chills" or penalizes the exercise of the right, nor may the State draw adverse inferences from the exercise of that right. Rupe, 101 Wn.2d at 705. These principles restrict the admissibility of evidence relating to the constitutional exercise of the right to bear arms. Id. at 706. It is a violation of constitutional due process to admit evidence in a criminal case that permits the jury to draw adverse inferences from the defendant's lawful exercise of the right to bear arms. Id.

In Rupe, the defendant received a death sentence for shooting and killing two bank tellers during the course of a robbery. Id. at 670. At the sentencing proceeding, the trial court admitted evidence that Rupe possessed several firearms unrelated to the charged offense. Id. at 703. The court also admitted evidence that, although the firearms were legal, they were not suitable for hunting or sport. Id. Holding

that this evidence unduly burdened Rupe's lawful exercise of his constitutional right to bear arms, the Washington Supreme Court reversed the death sentence. *Id.* at 707-08. The court explained that Rupe was "entitled under our constitution to possess weapons, without incurring the risk that the State would subsequently use the mere fact of possession against him in a criminal trial unrelated to their use." *Id.*

Aside from the constitutional implications, Washington courts have long recognized that evidence of dangerous weapons that have nothing to do with the charged crime is highly inflammatory and carries great potential to sway the jury's opinion unfairly against a defendant. *E.g., State v. Robinson*, 24 Wn.2d 909, 915, 167 P.2d 986 (1946) (admission of unrelated weapon evidence was "highly inflammable" and "could only result in prejudicing the jury against the appellant"); *State v. Freeburg*, 105 Wn. App. 492, 501, 20 P.3d 984 (2001) ("Evidence of weapons is highly prejudicial, and courts have uniformly condemned . . . evidence of . . . dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged.") (internal quotation marks and citation omitted).

Evidence of unrelated *firearms*, in particular, is highly prejudicial. Many individuals on a jury might view guns with "great

abhorrence and fear,” and many others might conclude the defendant is a dangerous individual simply because he owned guns. Rupe, 101 Wn.2d at 708. Yet the Washington Supreme Court has “take[n] judicial notice of the overwhelming evidence that many nonviolent individuals own and enjoy using a wide variety of guns.” Id.

Due to the inflammatory nature of such evidence and its great potential to unfairly prejudice the jury, it is a long-standing rule in Washington that “weapons that are unrelated to the case are not admissible.” State v. Jeffries, 105 Wn.2d 398, 412, 717 P.2d 722 (1986); see also Rupe, 101 Wn.2d at 708; Robinson, 24 Wn.2d at 915 (reversible error to admit evidence of unrelated weapons); State v. Lloyd, 138 Wash. 8, 16-17, 244 P. 130 (1926) (error to admit evidence of pistol unconnected to the crime); Freeburg, 105 Wn. App. at 501.

Here, the trial court abused its discretion and unreasonably burdened Mr. Peters’s lawful exercise of his constitutional right to possess operable firearms in his home by admitting inflammatory evidence of unrelated firearms and ammunition that he owned. The trial court admitted, over objection, evidence that Mr. Peters owned 14 guns that were unrelated to the charged crime. 3/05/13RP 174-76; 3/08/13RP 481. The court also admitted evidence that Mr. Peters

owned multiple gun magazines as well as 12 full boxes of .45 caliber handgun ammunition. 3/08/13RP 441-42. Four of the guns admitted were assault rifles, including at least one AK-47. 3/05/13RP 41, 183; 3/08/13RP 481. It is likely that at least some of the jurors viewed those weapons with “with great abhorrence and fear” and concluded that Mr. Peters must be dangerous simply because he possessed them. Rupe, 101 Wn.2d at 708.

Mr. Peters had a constitutionally protected right to keep those weapons in his home and to maintain them in an operable state, available for immediate self-defense. Heller, 554 U.S. at 635. Most of the firearms and ammunition admitted at trial were not used in the shooting and were therefore unrelated to the charged crime. The only purpose of the evidence was to permit the jury to draw adverse inferences about Mr. Peters’s general dangerousness. The evidence therefore unreasonably burdened his constitutional right to bear arms and was inadmissible. Rupe, 101 Wn.2d at 708.

Because the evidence was highly inflammatory and unduly prejudicial, reversal of the conviction is required. Id.; Robinson, 24 Wn.2d at 915; Lloyd, 138 at 16-17; Freeburg, 105 Wn. App. at 501.

2. **The trial court abused its discretion in admitting evidence of Mr. Peters's prior unrelated acts involving firearms, because the evidence did not tend to show that he knew, or should have known, of a substantial risk that death could occur**

Evidence of a defendant's other crimes, wrongs or acts is categorically excluded if the only relevance of the evidence is "to prove the character of a person in order to show action in conformity therewith." ER 404(b). The purpose of ER 404(b) is "to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (internal quotation marks and citation omitted). Evidence of a defendant's other bad acts is admissible only if it "is logically relevant to prove an essential element of the crime charged, rather than to show the defendant had a propensity to act in a certain manner." State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

A court's ER 404(b) ruling is reviewed for abuse of discretion. In close cases, the balance must be tipped in favor of the defendant. Id.

To prove the charged crime in this case, the State was required to prove that Mr. Peters engaged in reckless conduct and that Stormy died as a result. CP 40; RCW 9A.32.060(1)(a). To prove the element

of recklessness, the State was required to prove Mr. Peters knew of and disregarded “a substantial risk that death may occur,” and that this disregard was “a gross deviation from conduct that a reasonable person would exercise in the same situation.” CP 41; RCW 9A.08.010(c).

Thus, to prove the recklessness element, the State was required to prove that Mr. Peters was aware of and disregarded the risk that death—and not some lesser harm—could occur. Id.; State v. Gamble, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005).

The evidence of Mr. Peters’s prior unrelated acts involving firearms was not admissible because it was not logically relevant to prove the element of recklessness. The evidence did not show that Mr. Peters was aware of and disregarded the risk that death could occur when he asked his daughter to retrieve his handgun from his nightstand.

The evidence of the prior unrelated acts consisted of Mr. Smith’s, the neighbor’s, observations of Mr. Peters’s treatment of his firearms, and the testimony regarding the “pumpkin shoot.” Mr. Smith testified that, on one occasion, Mr. Peters handed him a handgun and briefly pointed it at him. 3/05/13RP 40. That same day, Mr. Smith saw an assault rifle at the house that had a magazine in it. 3/05/13RP 41-43. On another occasion, Mr. Peters handed Mr. Smith a handgun that had

a magazine in it. 3/05/13RP 44-46. He also asked his son that day to retrieve a gun from the truck; when the boy brought the gun in the house, it was unloaded. 3/05/13RP 50. Finally, on three separate occasions, Mr. Smith observed Mr. Peters handle his guns while drinking. 3/05/13RP 48-49. But he never saw Mr. Peters handle a gun that had a bullet in the chamber. 3/05/13RP 74.

These prior acts by Mr. Peters were inadmissible under ER 404(b) because they were not logically relevant to show that he was reckless on the current occasion. The evidence did not show that on any of those prior occasions, Mr. Peters was aware of and disregarded a substantial risk that death—or any kind of harm—could occur. None of the prior incidents resulted in any harm.

Similarly, the evidence of the pumpkin shoot incident did not tend to show recklessness. Mr. Wilson testified that a shotgun accidentally discharged while Mr. Peters and another man were handling the gun. 3/06/13RP 240, 250. But the gun fired downrange—in the direction it was supposed to fire—while others were shooting and no one was standing downrange. 3/06/13RP 235, 239. No one was endangered by the accidental discharge. 3/06/13RP 258. The evidence

did not tend to show that Mr. Peters was aware of any particular risk caused by his handling of the firearm.

The evidence of the prior unrelated incidents was also not relevant or admissible to prove the lesser-included offense of second degree manslaughter. To prove second degree manslaughter, the State was required to prove that Mr. Peters caused Stormy's death through his negligent acts. RCW 9A.32.070(1); CP 43. To prove negligence, the State was required to prove that Mr. Peters "fail[ed] to be aware of a substantial risk that death may occur and this failure constitute[d] a gross deviation from the standard of care that a reasonable person would exercise in the same situation." CP 44; RCW 9A.08.010(d).

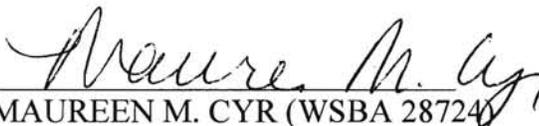
The evidence of the prior incidents did not tend to prove that Mr. Peters should have been aware that his actions on the present occasion created a substantial risk of death. The evidence did not tend to show that he should have known the Colt .45 had a bullet in the chamber or that it would accidentally discharge after he removed the magazine from it. In fact, he had reason to believe the handgun did *not* have a bullet in the chamber because that is how he usually stored the gun. Because the evidence of the prior unrelated acts was not relevant to prove an element of the crime, it was inadmissible under ER 404(b).

The erroneous admission of evidence in violation of ER 404(b) requires reversal if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). Here, it is likely that the evidence of Mr. Peters's prior handling of his firearms influenced the jury's finding that he was negligent on the present occasion. Therefore, the conviction must be reversed.

D. CONCLUSION

The trial court abused its discretion and unreasonably burdened Mr. Peters's constitutional right to bear arms by admitting evidence of unrelated firearms and ammunition, and by admitting evidence of unrelated prior acts of Mr. Peters. Because the erroneous admission of the evidence was not harmless, the conviction must be reversed.

Respectfully submitted this 19th day of November, 2013.


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

STATE OF WASHINGTON,)	
)	
Respondent/Cross-appellant,)	NO. 70134-7-I
)	
)	
RICHARD PETERS,)	
)	
Appellant-Cross-respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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