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Court of Appeals
Division I
State of Washington

No. 73064-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

KAREEM HARRIS,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In the absence of sufficient evidence of each element of the offense, Kareem Harris's conviction for first degree murder violates the Due Process Clause of the Fourteenth Amendment.

2. The trial court deprived Mr. Harris of his right to a jury trial in violation of the Sixth Amendment and Article I, section 22 when the court failed to properly instruct the jury on the causation element of first degree murder.

3. The trial court deprived Mr. Harris of due process in violation of the Fourteenth Amendment when the court failed to properly instruct the jury on the causation element of first degree murder.

4. Because it misstates the requirements of causation and lowers the State's burden of proof on that element, the trial court erred in providing Instruction 18 to the jury.

5. Mr. Harris was denied the effective assistance of counsel in violation of the Sixth Amendment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Due Process Clause of the Fourteenth Amendment requires the State to prove each element of an offense beyond a reasonable doubt. Proof of proximate cause in a criminal case is more exacting than in a tort case and requires proof that the defendant's act

directly caused the injury. In the absence of proof of such a direct connection between his acts and the victim's death 14 months later does Mr. Harris's conviction for first degree murder deprive him of due process?

2. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a reasonable doubt and that a jury find each element. This in turn, requires a trial court to instruct the jury on each element of the offense. To establish an act proximately caused another's death, tort law requires a plaintiff prove the defendant's act contributed 50% or more to the likelihood of death. Proof of proximate cause in a criminal case requires a more direct connection between the act and injury. Where Instruction 18 permitted the jury to convict Mr. Harris of murder by simply finding his act contributed to another's death, did the instruction relieve the State of its burden of proof?

3. The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel. This requires defense counsel's acts to be objectively reasonable such that they do not result in prejudice to the client. Where defense counsel agreed to instruct the jury in a manner which substantially lowered the State's burden of

proof on an essential element of the offense, was defense counsel's performance unreasonable and prejudicial to Mr. Harris?

C. STATEMENT OF THE CASE

Wilbur Gant was shot several times in his car as he left home for work in the early morning of October 28, 2009. 9/10/14 RP 43. Mr. Gant identified Mr. Harris as the person who shot him. 9/10/14 P 90.

Mr. Gant was taken to Harborview Medical Center where he underwent surgery. The surgeon, Dr. John Cuschieri, noted bullets had damaged the valve between Mr. Gant's stomach and small intestine as well as the valve between the small and large intestines. 9/24/14 RP 77-78. Additionally, Mr. Gant suffered injury to his gall bladder and liver and a collapsed lung. *Id.*

Because the initial surgery was only intended stop any internal bleeding or contamination, Mr. Gant underwent another surgery the following day to repair the damage to his internal organs. 9/24/14 74, 91-92

On release, Dr. Cuschieri expected Mr. Gant to meet his physical therapy goals in two to three months' time. 9/24/14 RP 113. At that time, Mr. Gant reported to the doctor he smoked up to two packs of cigarettes each day and consumed two beers. *Id.* at 112-13. At

a later follow-up appointment with Mr. Gant, Dr. Cuschieri did not note any concerns with Mr. Gant's recovery. *Id.* 116.

Margaret Gant explained that after his return home from the hospital, her husband, Mr. Gant continued to smoke more than a pack of cigarettes a day. 9/25/14 RP 80. Ms. Gant explained Mr. Gant continued drinking up to the day he died, usually two beers while she was home. 9/25/14 RP 72. Ms. Gant allowed she was not home "24/7" and at times came home to find her husband drunk. 9/25/14 RP 72-73. Ms. Gant described instances where Mr. Gant snuck alcohol and other occasions where she had to physically take alcohol from his hands to get him to stop drinking. 9/25/14 RP 80. All of this was occurring while Mr. Gant was on medication. 9/25/14 RP 72.

In fact, Mr. Gant's level of alcohol use while on a medications, much of which he had not previously reported, caused at least one his doctors to refuse to renew certain prescription due to their potential for negative interaction with excessive alcohol use. This occurred after Mr. Gant arrived at an appointment smelling of alcohol. 9/30/14 RP 22

Dr. Dennis Rochier, Mr. Gant's regular physician, met with him several times in the months following the shooting. Dr. Rochier noted his concern when Mr. Gant developed bronchitis in June 2010 because the prior collapsed lung increased the chances that bronchitis could

evolve into pneumonia. 9/25/14 RP 109. At that time, and despite smoking more than a pack a day, Mr. Gant told Dr. Rochier he was not smoking. After the bronchitis resolved, Dr. Rochier found Mr. Gant physically capable to return to work at a manufacturing plant and observed he walked with a steady gait with or without a cane. *Id.* 113-14, 147-48.

Dr. Lynne Taylor, a neurologist, examined Mr. Gant in the Spring of 2010 and saw nothing indicating he was not healing well 9/30/14 RP 75. Similarly, Dr. Amy Stepan, who performed outpatient surgery on Mr. Gant in February 2010, did not see any indication of problems from the Harborview surgeries. 10/2/14 RP 57-58.

Mr. Gant developed bronchitis again in December of 2010. 9/25/14 RP 125.

In January 2011, Mr. Gant began coughing blood and was taken by ambulance to St. Francis Medical Center. 9/25/14 RP 78. He checked in shortly after 6:00 p.m. but did not receive any treatment until about 9:00 p.m. that night. *Id.* at 64. Mr. Gant was found to have pneumonia and was found to have food particles in in his airway, suggesting he may have aspirated on vomit. *Id.* at 68. A blood screen revealed *E. Coli* in his blood. *Id.* The blood screen also revealed that at the time he arrived at the hospital Mr. Gant's blood alcohol level was

.02. *Id.* at 72. The following morning Mr. Gant had two instances of cardiac arrest. *Id.* 78. He died that afternoon. *Id.*

An autopsy performed by Dr. Timothy Williams of the King County Medical Examiner's Office concluded Mr. Gant died of bacterial pneumonia caused by *E. Coli* in his lung.

Dr. Williams observed a large amount of internal scarring around the lungs and within the abdomen which prevented the lungs and internal organs from moving freely as they normally would.

10/2/14 132-34. Dr. Williams theorized this scarring may have made it more likely for Mr. Gant to contract and less able to combat pneumonia by potentially limiting his ability to cough and thus clear his lungs. *Id.* at 134-35.

Dr. Williams' theorized two possible means by which *E. Coli* came to be found in Mr. Gant's lung. First, the surgical repairs to Mr. Gant's stomach and intestine may have made it more likely for food to move through his digestive tract thus making him more likely to vomit and thus more likely to aspirate. 10/2/14 RP 149-51, 169. Dr. Williams provided "another possibility" was that inflammation around the intestines may have permitted the *E. Coli* to enter the bloodstream and thereby enter the lungs. *Id.* at 170. Dr. Williams could not say with and degree of certainty that either actually occurred. 10/2/14 RP 173. Dr.

Richard Haruff, the chief medical examiner, testified that his office could not say with any certainty how the gunshot caused the pneumonia, and they could say no more than that it was a contributing factor. 10/14/14 RP 25. Nonetheless, Dr. Williams opined the cause of death was pneumonia and remote gunshot. *Id.* 168

Dr. Carl Wigren noted the absence of any reflux complaints in Mr. Gant's medical history indicating the surgical repairs did not cause an increase in vomiting. 10/7/14 RP 31, 79. Further, Dr. Wigren noted the Harborview surgery notes indicate the presence of heavy internal scarring due to prior surgeries. *Id.* at 107-08. Further, Dr. Wigren noted the absence any suggestion in the medical records regarding surgical complications of the sort which would have permitted *E. Coli* to enter the blood stream. *Id.* at 153. Dr. Wigren concluded the pneumonia could not be attributed to the gunshot wounds inflict 14 months earlier. *Id.* at 31, 64-65, 79.

A jury convicted Mr. Harris of first degree murder. CP 63.

D. ARGUMENT

1. Because the State did not prove Mr. Harris's actions caused Mr. Gant's death there is insufficient evidence to support his conviction of first degree murder.

a. *Due process requires the State prove each element of the offense beyond a reasonable doubt.*

In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Here the State did not prove Mr. Harris caused Mr. Gant's death.

b. *Proximate cause is narrower in a criminal case than in a tort case and requires a direct link between the act and the injury.*

Proof of first degree murder requires the State prove the defendant caused the death of another. RCW 9.32.030. Proof of causation in the criminal setting, as in the civil setting, requires proof

that the defendant's act was both the cause in fact ("but for" causation) and legal cause (proximate cause) of the injury. *State v. Rivas*, 126 Wn.2d 443, 456, 896 P.2d 587 (1995). With respect to factual causation, the criminal and tort law "are exactly alike." *State v. Dennison*, 115 Wn.2d 609, 624 n.15, 801 P.2d 193 (1990) (citations omitted). However, proximate cause or "'legal cause' in criminal cases differs from, and is narrower than, legal cause in tort cases in Washington." *State v. Bauer*, 180 Wn.2d 929, 940, 329 P.3d 67 (2014).

The Court in *Bauer* noted "in criminal law, . . . it is not normally enough merely to prove that [the] accused occasioned the harm; he must have 'caused' it in the strict sense." *Id.* at 936-37 (quoting H.L.A. Hart & Tony Honore, *Causation in the Law*, 350-51 (2d ed.1985)). This is because the purpose of criminal law and resulting punishment is far different from and more severe than tort law. *Bauer*, 180 Wn.2d at 936-37.

Bauer specifically cited to and relied upon a number of cases from other jurisdictions requiring a more direct connection between the criminal act and the injury than is required by tort law. *Id.* at 937-38. A sampling of these holdings requires proof of: "some more direct causal connection between act and result" *United States v. Schmidt*, 626 F.2d 616, 618 n. 3 (8th Cir.1980); the "defendants' actions must be a

sufficiently direct cause of the ensuing death,” *People v. Kibbe*, 35 N.Y.2d 407, 413, 321 N.E.2d 773, 362 N.Y.S.2d 848 (1974); “a more direct causal connection” *People v. Scott*, 29 Mich.App. 549, 558, 185 N.W.2d 576 (1971).

Starting from the proposition, required by *Bauer*, that proof of proximate cause in criminal case requires proof of a more direct connection between the act and injury than required in tort cases; it is useful to establish the floor set by the requirements of proof of proximate cause in tort cases.

In a wrongful death case, proximate cause that an act has caused an injury has been equated with proof that the injury more likely than not caused the death. *Herskovits v. Grp. Health Co-op. of Puget Sound*, 99 Wn.2d 609, 623, 664 P.2d 474 (1983) (Pearson, J. concurring)¹; *Estate of Dormaier ex rel. Dormaier v. Columbia Basin Anesthesia, P.L.L.C.*, 177 Wn. App. 828, 850, 313 P.3d 431 (2013). In *Herskovits*, the Court recognized the tort of lost chance as distinct from the tort of wrongful death – the lost chance being a diminution of less than 50% in the chance of survival. In his concurring opinion, Justice Pearson explained:

¹ While there was no majority opinion in *Herskovits*, the majority opinion in *Mohr v. Grantham*, 172 Wn.2d 844, 262 P.3d 490 (2011) adopted Justice Pearson analysis.

If the injury is determined to be the death of Mr. Herskovits, then under the established principles of proximate cause plaintiff has failed to make a prima facie case. [Plaintiff's medical expert] was unable to state that probably, or more likely than not, Mr. Herskovits' death was caused by defendant's negligence,

99 Wn.2d at 623. "As a matter of law, a greater than 50 percent reduction in the decedent's chance of survival is the same as proximate cause of the decedent's death under traditional tort principles." *Estate of Dormaier*, 177 Wn. App. at 850 (citing *Herskovits*, 99 Wn.2d at 631 (Pearson, J., concurring)). Thus, to be the proximate cause of death an act must have created a more than 50% diminution in the chance of survival.

This is consistent with the requirement that to establish proximate cause medical testimony must the defendant's act more likely than not caused the injury rather than "might have", "could have", or "possibly did". *Orcutt v. Spokane County*, 58 Wn.2d 846, 853, 364 P.2d 1102 (1961). It is from that requirement the corresponding requirement that medical opinion testimony be offered a degree of "reasonable medical certainty" arises. *In re the Detention of Twining*, 77 Wn. App. 882, 891, 894 P.2d 1331 (1995), *abrogated in part*, *In re the Detention of Pouncy*, 168 Wn.2d 382, 229 P.3d 678

(2010).² As *Herskovits* recognized, medical testimony that cannot say an act more likely not resulted in death may establish proximate causation of a different injury, *i.e.*, lost chance, but it cannot establish the proximate cause of death.

Similarly, where medical testimony cannot rule out an innocent explanation as opposed to a criminal cause for death, the State has not presented even *prima facie* evidence of the *corpus delicti* of the crime of murder. *State v. Aten*, 130 Wn.2d 640, 659, 927 P.2d 210 (1996).

The *corpus delicti* of homicide consists of two elements the State must prove at trial: (1) the fact of death and (2) a causal connection between the death and a criminal act. *Id.* at 655. The *corpus delicti* rule is of course a threshold rule for admitting a defendant's confession to a crime. The rule is rooted in the notion that a confession should not constitute the sole proof of the crime. Instead, the State must have independent minimal proof of the body of the crime. If the inability to establish the cause of death to any degree of medical certainty is insufficient to establish *prima facie* evidence of causation it must as a matter of law be insufficient to establish causation beyond a reasonable doubt.

² *Pouncy* overruled the conclusion in *Twinging* that a court need not provide a jury instruction defining of the term "personality disorder." *Pouncy* did not disturb the holding that expert opinion be offered to a degree of reasonable medical certainty.

Under the above principles, the more direct link required by *Bauer*, requires no less than proof the act contributed a more than 50% likelihood of death. Indeed, it must require even more as that is only the threshold for civil liability. Whatever, the higher threshold is, it is clear the State's proof would not even approach the threshold. Based upon the State's proof, Mr. Harris could not even be found liable for the wrongful death of Mr. Gant as the evidence would not establish his act was the proximate cause of death. Too, the State's proof would have been insufficient to establish the even *prima facie* evidence of the *corpus delicti* of the crime.

c. The State did not prove causation beyond a reasonable doubt.

The State's theory was that because Mr. Harris's act led to internal injuries and scarring which in turn may have left Mr. Gant more susceptible to this episode of pneumonia and less able to combat the illness Mr. Harris's act was the proximate cause of death. First, the State's evidence did not even establish that this chain of events actually occurred. Second, even if that chain of events did occur, it does not establish the direct link *Bauer* requires for prove proximate causation in criminal cases. The State did not even prove the shooting was even more than 50% likely to be responsible for the death. The State argued to the jury Mr. Harris's act diminished Mr. Gant's chances to survive

even if it did not directly cause death. 10/15/14 RP 35. As in the tort context, that may establish proximate cause of another injury but as a matter of law it does not establish proximate cause of death. *Herskovits*, 99 Wn.2d at 623. An examination of the State's medical testimony reveals it fell far short of proving and indeed never attempted to prove that the shooting was the direct cause of death.

Dr. Williams stated it was not possible to medically determine how Mr. Gant contracted pneumonia. 10/2/14 RP 173. Instead, Dr. Williams did not more than testify to possible causes. *Id.* at 170.

Dr. Haruff explained that to classify the a death as "homicide," *i.e.*, death by other than natural means, his office "need only show that the injury contributed to the death." 10/14/14 RP 23. Within that framework he opined that the gunshot wound was likely "the most important contributing factor" to Mr. Gant's death. *Id.* First, his task as medical examiner in classifying the manner or cause of death is far different then establishing proximate cause. By his office's standards, the manner of death may only be classified as natural if is solely due to natural causes. 10/14/14 RP 34. In contrast, if any injuries caused by another person contribute in any fashion to the death it is a "homicide." *Id.* Thus, his task, and ultimately his opinion, is limited solely to the question of whether the injuries contributed to death without regard to

how much they contributed. To say that one of many contributing factors was the most significant factor is not the same as saying that factor created more than a 50% diminution in the chance of survival.

By the medical examiner's standard, a preexisting condition may be listed as a cause of death so long as it "created changes in the body such that death could be reasonably a consequence." 10/20/14 RP 20. That is not even "but for" causation, it is certainly not the "more likely than not" standard required for proof of proximate causation in a tort case. In fact, when asked whether he could say with a degree of medical certainty that aspiration was the cause of the pneumonia, Dr. Haruff candidly stated he could not. 10/14/14 RP 25. Echoing Dr. Williams's admission, Dr. Haruff stated "There's no direct evidence that would link the pneumonia to an aspiration event. It cannot be excluded." *Id.*

With respect to the two mechanisms, theorized by Dr. Williams, that could have led to introduction of bacteria into Mr. Gant's lungs, Dr. Haruff admitted "I can't prove either." 10/14/14 RP 29. He explained further that the autopsy could not determine what the "direct cause" of the pneumonia was and instead simply identifies reasonable possibilities. *Id.* If the experts could not say with medical certainty this last link in the chain, aspiration, actually caused the pneumonia which

led to death, they certainly could not say with medical certainty an earlier link in that theoretical chain of events, aspiration occurred due to abdominal injuries resulting from the shooting, caused Mr. Gant's death. And, in fact, Dr. Haruff did not say that.

The testimony never established that a criminal act as opposed to a natural occurrence, a long-term heavy smoker contracting pneumonia in the middle of winter, was the actual cause of death. The medical testimony did not establish any direct connection between the shooting and Mr. Gant's death. Indeed, medical examiners' task was never to do so. The State did not prove a direct link between the shooting and Mr. Gant's death 14 months later. Therefore, the State did not prove Mr. Harris caused Mr. Gant's death.

d. *This Court should reverse Mr. Harris's conviction.*

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment's Double Jeopardy Clause bars retrial on a charge such as this where the State fails to prove an element. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). Because the State did not prove Mr. Harris caused Mr.

Gant's death the State failed to prove first degree murder and the Court must reverse and dismiss that conviction.

Where a conviction is reversed for insufficient evidence remand for resentencing on a lesser included offense is permitted so long as the trial court specifically instructed the jury on the lesser included offense. *In re Heidari*, 174 Wn.2d 288, 293, 274 P.3d 366 (2012) (quoting *Green*, 94 Wn.2d at 234).

Here, the jury was instructed on numerous lesser offense. The matter could be remanded to the trial court to determine whether to sentence Mr. Harris on one of those lesser. However, the court could not enter a conviction on second degree murder as charge similarly lacks proof of causation.

2. Instruction 18 relieved the State of its burden of proving each element of the offense beyond a reasonable doubt.

a. *Jury instructions must inform the jury that the State bears the burden of proving each element beyond a reasonable doubt.*

The Sixth and Fourteenth Amendments require the State prove each element to a jury beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). Instructions must convey to the jury that the State must prove each element beyond a reasonable doubt. *State v. Schulze*, 116 Wn.2d 154,

167–68, 804 P.2d 566 (1991). An instruction which relieves the State of that burden of proof violates this constitutional protection. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011).

b. *Instruction 18 relieved the State of its burden of proving proximate causation.*

Instruction 18 told the jury

To constitute murder, there must be a causal connection between the criminal conduct of a defendant and the death of a human being such that the defendant’s act was a proximate cause of the resulting death.

The term “proximate cause” means a cause which, in a direct sequence, unbroken by any new independent cause, produces the death, and without which the death would not have happened.

There may be more than one proximate cause of a death.

CP 45

This instruction mirrors WPIC 25.02 and purports to define “proximate cause.” However, as made clear in the foregoing discussion, that language is incomplete only defines cause in fact. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985); *Dennison*, 115 Wn.2d at 624. More recently, *Bauer* made clear criminal proximate causation requires a more direct connection between the act and harm than is required in tort cases. 180 Wn.2d at 937-38.

Proof in a tort case that an act proximately caused another's death requires proof that the act decreased the person's chance of survival by more than 50%. *Herskovits*, 99 Wn.2d at 631. Instruction 18 did not even approach that standard. Instead, Instruction 18 permits a finding of negligence alone, without proximate cause, to be the basis of a murder conviction.

The jury was allowed to convict Mr. Harris so long as it found but for the shooting Mr. Gant would not have died, no matter how minimal an effect the shooting actually had on Mr. Gant's death 14 months later. In fact, the medical examiners' testimony was just that; that the manner of death was homicide so long as the shooting contributed to the death in any degree. Pointing to the misstatement of law in Instruction 18, the prosecutor emphasized for the jury "[t]he jury instructions don't even require the gunshot wound to be the most significant or the primary, just a contributing cause." 10/15/14 RP 38. Thus, the prosecutor urged the jury to convict so long as it found Mr. Harris's act contributed to Mr. Gant's death in any degree. That is contrary to *Bauer's* holding that it is not "enough merely to prove that [the] accused occasioned the harm; he must have 'caused' it in the strict sense." *Id.* at 936-37. "But for" or factual causation is not enough to prove causation in a criminal case. That is all Instruction 18 required.

In addition, the instruction permitted the jury to find Mr. Harris caused Mr. Gant's death even if the shooting ultimately contributed less than 50% to his death. In fact, the State never sought to prove it did and argued any contribution was enough. The State argued to the jury Mr. Harris's act diminished Mr. Gant's chances to survive even if it did not directly cause death. 10/15/14 RP 35. That evidence would not even support a finding of liability even in a wrongful death action. *Herskovits*, 99 Wn.2d at 631; *Estate of Dormaier*, 177 Wn. App. at 850. That evidence certainly cannot suffice in a criminal matter where the causation requirement is greater.

Thus while proximate cause is required to establish murder, Instruction 18 fails to define the term. Even more damaging, the instruction does so while purporting to define the term, thus affirmatively telling the jury the term means less than it does.

c. This Court must reverse Mr. Harris's murder conviction.

The Supreme Court has applied a harmless-error test to erroneous jury instructions. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). However, the Court held "an instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." *Brown*, 147 Wn.2d at 339. In

other instances, an instructional error which affects a constitutional right requires reversal unless the State can prove the error was harmless beyond a reasonable doubt. *State v. Mills*, 154 Wn.2d 1, 15 n.7, 109 P.3d 415 (2005) (citing *Neder*, 527 U.S. at 1; *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967)). The State cannot meet that burden in this case.

As discussed, the State seized upon the opportunity presented by Instruction 18 to only offer and rely on evidence establishing less than a direct connection between the shooting and Mr. Gant's death. The State did not offer any evidence that established that direct connection. The error was not harmless.

3. Mr. Harris was denied his right to the effective assistance of counsel.

a. Defense counsel's performance must be objectively reasonable so as not to prejudice the defendant.

The Sixth Amendment guarantees the right to the effective assistance of counsel in a criminal proceeding. *See Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the ‘ample opportunity to

meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S. Ct. 236, 87 L. Ed. 2d 268 (1942)). The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. A person is denied the effective assistance of counsel where the record demonstrates "counsel's performance was deficient" and that deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

b. Counsel's performance was deficient.

Neither party appears to have filed proposed jury instructions. However, comments on the record suggest the instructions given by the court were the product of an agreement between the State and defense counsel. 10/9/14 RP 2. To the extent that is the case, defense counsel's agreement to Instruction 18 relieving the State of its burden of proof was objectively unreasonable.

Generally, legitimate trial strategy is not deficient performance. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). However,

simply terming an act tactical or strategic is not enough. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000).

As made clear above, WPIC 25.02, on which Instruction 18 is patterned, is an incomplete definition of the required causation. *Hartley*, 103 Wn.2d at 778; *Dennison*, 115 Wn.2d at 624. The instruction diminishes the State’s burden to proving only that Mr. Harris’s act was a link in a chain of events the ended with Mr. Gant’s death. That is insufficient to establish his act was the proximate cause of Mr. Gant’s death. *Bauer*, decided several months prior to the start of trial, made clear that even an instruction fully defining proximate cause as it would apply in a tort would necessarily have been inadequate to address the more stringent requirement of proximate cause in a criminal case.

Instruction 18 permitted the jury to convict Mr. Harris of murder even where the State did not prove Mr. Harris’s act led directly to Mr. Gant’s death. To the extent defense counsel agreed to this instruction and corresponding lowering of the State’s burden of proving, that agreement was wholly unreasonable.

c. Counsel's deficient performance prejudiced Mr. Harris.

Counsel's deficient performance requires a new trial where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *In re the Personal Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694). As discussed previously, Instruction 18 framed both the State's proof and argument. The State's experts never undertook to determine the direct cause of Mr. Gant's death, instead only identifying contributory factors admitting they could no more. 10/2/14 RP 173; 10/14/14 RP 29. The prosecutor, in turn, argued to the jury they could convict so long as the shooting contributed in any fashion to Mr. Gant's. 10/15/14 RP 35. Finally, the jury convicted Mr. Harris based upon this insufficient evidence. None of this could have occurred with a proper instruction on criminal proximate cause. Instruction 18 led directly to Mr. Harris's conviction. Counsel's performance prejudiced Mr. Harris.

Mr. Harris is entitled to a new trial.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Harris's conviction of first degree murder.

Respectfully submitted this 15th day of January, 2016.

s/ Gregory C. Link
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Washington Appellate Project
Attorney for Appellant

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

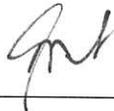
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 73064-9-I
)	
KAREEM HARRIS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF JANUARY, 2016, 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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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF JANUARY, 2016.

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