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COURT OF APPEALS
DIVISION II

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NO. 37110-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH MILES HUNTER,

Appellant.

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

The Honorable Thomas J. Felnagle, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's refusal to instruct the jury on first and second degree manslaughter denied appellant his right to present a defense.

2. The trial court erred in finding that the device used to demonstrate trigger pull to the jury would accurately convey the concept of trigger pull. CP 120-21 (Finding of Fact 6, Order Regarding Use of Trigger Pull Device at Trial).

3. The trial court erred in finding that use of the trigger pull device by each juror was the best way to give meaning to the concept of trigger pull. CP 121 (Finding of Fact 8).

4. The trial court erred in finding that the probative value of the trigger pull device substantially outweighed the potential to be confusing, misleading or prejudicial and that use of the device was not unduly prejudicial. CP 121 (Finding of Fact 10).

5. Improper admission of demonstrative evidence denied appellant a fair trial.

Issues pertaining to assignments of error

1. Appellant was charged with second degree intentional murder, and he proposed instructions on the lesser included offenses of first and second degree manslaughter. Where appellant testified he

accidentally shot the deceased, and evidence supported an inference that he acted recklessly or negligently, does the court's refusal to give lesser included offense instructions require reversal? (Assignment of Error 1)

2. The state's firearms expert constructed a device which demonstrated the weight associated with pulling the trigger on appellant's gun. The device differed from the gun in several respects, however, all of which affected the perceived effort necessary to pull the trigger. Each juror operated the device after the expert described it. Does the trial court's admission of this significantly inaccurate demonstration require reversal? (Assignments of Error 2-5)

B. STATEMENT OF THE CASE

1. Procedural History

On January 20, 2000, the Pierce County Prosecuting Attorney charged appellant Kenneth Hunter with one count of second degree murder, or in the alternative second degree felony murder based on second degree assault, alleging he was armed with a firearm. CP 1-2. Hunter pleaded guilty to the felony murder alternative, and the state dropped the firearm allegation. CP 3-10, 11-12. Hunter's conviction was reversed following the decisions in Andress¹ and Hinton². CP 31-35, 36-37.

¹ In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

² In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).

On March 2, 2007, the state filed a corrected information charging Hunter with second degree intentional murder, alleging he was armed with a firearm and that this was a domestic violence offense. CP 43-44. The case proceeded to jury trial before the Honorable Thomas J. Felnagle, and the jury returned a guilty verdict and affirmative findings as to the firearm and domestic violence allegations. CP 116-18. The court imposed a standard range sentence with a firearm enhancement, and Hunter filed this timely appeal. CP 137, 143.

2. Substantive Facts

On January 17, 2000, several Tacoma police officers were dispatched to a call regarding a possibly suicidal subject. 5RP³ 106-07, 143. When the police arrived, they were unable to make contact with the subject by telephone and received no response when they knocked on the apartment door. 5RP 109-10. They obtained a key from the apartment manager and unlocked the door. 5RP 110.

Kenneth Hunter was inside the apartment. When the police opened the door, he spoke to them from around a corner, saying he was in the bathroom and had a gun in his mouth. 5RP 112-13. One of the officers spoke to Hunter for six to eight minutes, trying to calm the

³ The Verbatim Report of Proceedings is contained in nine volumes, designated as follows: 1RP—10/29/07; 2RP—10/30/07; 3RP—10/31/07; 4RP—11/1/07; 5RP—11/5/07; 6RP—11/6/07; 7RP—11/7/08; 8RP—11/8/07; 9RP—12/7/07.

situation down. 5RP 114. Hunter sounded very distraught and was crying. 5RP 119, 142. He told the officer that he killed his girlfriend and that it was an accident. 5RP 115, 142. When asked when it happened, Hunter said "a day or two ago." 5RP 137.

Eventually the officer asked Hunter to throw the gun out where he could see it, and Hunter complied. 5RP 116. Hunter then crawled into the hallway, and he was placed in handcuffs. 5RP 118-20. As he was being handcuffed Hunter repeated several times, "My baby's in the bathtub." 5RP 137, 147. He was still obviously distraught. 5RP 151.

Police entered the bathroom and found the body of Ethel Sergeant in the bathtub. 5RP 147. She had a bullet wound through her head and had clearly been dead for some time, and there was a burn on her arm. 5RP 147-48; 6RP 260-61. There was a bullet hole in the shower wall and a hole through the shower curtain and liner. 5RP 192-94. Blood was found on the outside of the shower curtain and on and inside the baseboard heater. 5RP 194; 6RP 288-89. Police found a shirt, three rugs, a bath mat, and a hand towel on top of Sergeant in the bathtub. 5RP 201. The items had bloodstains, tissue, and bone fragments on them. 5RP 202-03. Blood had been wiped off a wall behind the bathtub. 6RP 349.

From the location of the bloodstains in the bathroom, forensics experts believed that Sergeant had been standing in the bathroom at the

time she was shot. 6RP 285. She fell against the baseboard heater, which caused the burn to her arm, and she was moved to the bathtub after she died. 6RP 261, 291.

Police noticed that the rest of the apartment looked well cared for. There did not seem to be any mess, nothing had been disturbed, and there was no sign of a fight. 5RP 124, 149, 157. Police collected some bloodstained clothing from a hamper in the bedroom. 5RP 189-90. There was a bullet casing in the pocket of the jeans that were collected. 5RP 191.

At trial, a forensic scientist from the Washington State Patrol Crime Lab presented a computer reconstruction of the shooting. The witness had entered measurements from the bathroom, including the holes in the shower wall and curtain, Sergeant's height, and the location of the entry and exit wounds, and entered those in a program which determined the trajectory of the bullet. 6RP 282-284, 303-04. From the location of the hole in the wall, the location of the hole in the shower curtain assuming it had been fully closed at the time the bullet went through it, and the entrance and exit wounds on Sergeant assuming she was standing upright at the time of the incident, the witness determined that Hunter was likely standing in the hallway when the gun went off. 6RP 310-13, 326.

He assumed the gun was held at shoulder level for man of Hunter's height.
6RP 314.

Hunter testified that he met Sergeant in 1992, and she became friends with him and his first wife. 7RP 497-98. He ran into her again in 1999, after his divorce, and they began a romantic relationship. 7RP 498-99. They moved in together a short time later, and they were planning to be married in February 2000. 7RP 499, 504.

Hunter remembered very little about the shooting. 7RP 506. He testified that the gun belonged to him. He had bought it in 1995 or 1996 with the idea of taking up competitive shooting. 7RP 496. He was familiar with the gun and how it operated. 7RP 513-14. Hunter normally kept the gun in a briefcase in the spare bedroom, but he remembered taking it into the bathroom that night to show Sergeant. 7RP 519, 522-23. Hunter admitted shooting Sergeant, but he explained that it was an accident. 7RP 510, 519, 27-28.

Hunter remembered being very distraught afterwards, and he recalled contemplating suicide. 7RP 507, 531. He testified that he held Sergeant in his arms, although he did not recall how long he remained on the floor with her. 7RP 533. He did not remember moving Sergeant's body to the bathtub, wiping down the bathroom, or closing the shower curtain. 7RP 506, 536. Hunter testified that he believed he called 911

within an hour of the shooting, although from the condition of the body when the police arrived it was more likely two to three days later. 6RP 250, 267; 7RP 516.

C. ARGUMENT

1. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON FIRST AND SECOND DEGREE MANSLAUGHTER DENIED HUNTER HIS RIGHT TO PRESENT A DEFENSE.

Defense counsel proposed jury instructions on the lesser included offenses of first and second degree manslaughter. CP 72-90. Counsel argued that there was evidence Hunter acted recklessly or negligently in shooting Sergeant, because he accidentally shot her despite his knowledge of how to handle the weapon safely. 8RP 548-49. The jury could also infer from Hunter's distress and contemplation of suicide after the shooting that he did not intend to shoot Sergeant. 8RP 549.

The trial court refused to instruct on the lesser included offenses, however, finding there was no evidence Hunter committed first or second degree manslaughter to the exclusion of second degree murder. 8RP 553. Defense counsel excepted to the court's failure to give his proposed instructions. 8RP 548. The court offered to instruct the jury on excusable homicide, but defense counsel declined, indicating such an instruction would prevent him from arguing the defense theory of the case. 8RP 556.

A criminal defendant is entitled to an instruction on a lesser included offense when each element of the lesser offense is a necessary element of the offense charged (the legal prong), and the evidence supports an inference that the lesser offense was committed (the factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Both prongs of the Workman test are satisfied in this case.

The elements of first degree manslaughter are causing the death of another and recklessness. RCW 9A.32.060(1)(a). The elements of second degree manslaughter are causing the death of another and criminal negligence. RCW 9A.32.070. The mental elements of recklessness and criminal negligence are lesser included mental states of intent. RCW 9A.08.010(2); State v. Jones, 95 Wn.2d 616, 621, 628 P.2d 472 (1981). Therefore, both degrees of manslaughter are necessarily proved whenever second degree intentional murder is proved, and first and second degree manslaughter meet the legal prong of the Workman test. See State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

The factual prong is established when the evidence in the case supports an inference that only the lesser included offense was committed to the exclusion of the greater offense. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Specifically, a lesser included offense instruction should be given "if the evidence would permit a jury to

rationally find a defendant guilty of the lesser offense and acquit him of the greater." *Id.* at 456 (quoting Warden, 133 Wn.2d at 563(citing Beck v. Alabama, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980))). When determining whether the evidence at trial warranted a lesser included offense instruction, the appellate court must view the evidence in the light most favorable to the party requesting the instruction. *Id.* at 455-56.

In Fernandez-Medina, the defendant was charged with attempted first degree murder or first degree assault based on allegations that he placed a gun to the victim's head. Although nobody saw him pull the trigger, the victim and another witness testified that they heard a clicking sound, as if the trigger had been pulled but the gun failed to discharge. Fernandez-Medina, 141 Wn.2d at 451. The defendant denied being present at the time of the incident. He also presented testimony from an expert witness who indicated that the handgun allegedly used could make clicking sounds even when the trigger was not pulled. A state expert confirmed this testimony. *Id.* at 451-52.

The defense requested instructions on second degree assault, but the trial court declined, and the Court of Appeals affirmed. *Id.* at 452. The Supreme Court reversed, holding that expert testimony regarding the gun supported an inference that the defendant did not pull the trigger when

he held the gun to the victim's head. If the requested instruction had been given, the jury reasonably might have inferred that the defendant did not intend great bodily injury but only created an apprehension of harm, thus supporting a conviction of second degree assault rather than first degree assault. Id. at 457.

Here, as in Fernandez-Medina, there was evidence to support instructing the jury on the lesser offenses. Hunter testified that he shot Sergeant, but it was an accident. Because evidence established that Hunter was familiar with the gun, he knew how to handle it safely, and he did not intend to shoot Sergeant, the jury could reasonably infer that he was handling the gun recklessly or negligently when the gun went off. If the jury had been instructed on first and second degree manslaughter, it could have found him guilty of one of those offenses and acquit him of intentional murder. Thus, the evidence supports the inference that only the lesser crimes were committed to the exclusion of the greater offense.

The court below said it found this case similar to State v. Hernandez, 99 Wn. App. 312, 997 P.2d 923 (1999), review denied, 140 Wn.2d 1015 (2000). 8RP 552. In that case, the defendant was charged with second degree murder in the shooting death of his girlfriend, and the trial court denied his request for instructions on first and second degree

manslaughter. Hernandez, 99 Wn. App. at 314. The Court of Appeals affirmed, holding that there was no affirmative evidence the defendant committed the lesser offenses rather than second degree murder. Id. at 320. Although the defendant made several statements about the shooting, he did not describe how the victim was shot, and he did not establish that he touched the gun before it was fired. Id. at 320. His statements contained no admissions that he acted in a manner that caused the victim's death. Because both first and second degree manslaughter require a showing that the defendant caused the victim's death, either recklessly or negligently, the evidence was insufficient to support instructions on those offenses. Id.

Here, unlike in Hernandez, Hunter admitted the conduct which caused Sergeant's death. He testified that he shot Sergeant, but that it was accidental. Hunter's defense did not rely solely on the jury disbelieving the state's evidence. Rather, he presented affirmative evidence from which the jury could convict him of manslaughter and acquit him of murder. He was therefore entitled to instructions on first and second degree manslaughter.

The defense argued below that the evidence supported an inference that Hunter acted recklessly when he accidentally shot Sergeant, pointing out that, with Hunter's knowledge of guns, it was reckless to point the gun

at Sergeant's head. 8RP 552. The trial court seemed to believe that because evidence that Hunter pointed the gun at Sergeant's head did not preclude a finding that he acted intentionally, that evidence did not support an inference that Hunter committed the lesser offense to the exclusion of the greater. 8RP 553-54.

But in determining whether a lesser included offense instruction is appropriate, inferences must be drawn in favor of the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. As discussed above, the jury could infer from Hunter's testimony that he pointed the gun at Sergeant but he shot her accidentally that he was guilty of first or second degree manslaughter. Thus, even though the jury could find Hunter guilty of second degree murder based on evidence that he pointed the gun at Sergeant, because there was also evidence which supported an inference that he was guilty of only the lesser offense, the requested instructions should have been given. See State v. Barker, 103 Wn. App. 893, 900-01, 14 P.3d 863 (2000) (while jury could have found defendant displayed a deadly weapon, evidence that victim did not see firearm and defendant denied having one supported inference that he was not armed with a deadly weapon. Instruction on lesser offense of second degree robbery was appropriate), review denied, 143 Wn.2d 1021 (2001).

The trial court also believed that Hunter's explanation that the shooting was accidental supported only an excusable homicide defense rather than manslaughter. 8RP 554-55. The court was wrong. Excusable homicide is a defense only if the accident which caused the death did not involve negligence, recklessness, or criminal intent. RCW 9A.16.030; State v. Norman, 61 Wn. App. 16, 28, 808 P.2d 1159 (excusable homicide defense not available to one who acts recklessly or with criminal negligence), review denied, 117 Wn.2d 1018 (1991). An accidental killing with recklessness or negligence is manslaughter. RCW 9A.32.060(1)(a); RCW 9A.32.070. Thus, because there was evidence from which the jury could infer Hunter acted recklessly or negligently, the fact that Hunter testified the shooting was accidental did not preclude his theory that he was guilty of only manslaughter.

Moreover, the trial court may not refuse to give a lesser included offense instruction on the basis that the theory supporting the instruction is inconsistent with another theory supported by the evidence. Fernandez-Medina, 141 Wn.2d at 460. This would require the trial court to weigh and evaluate the evidence, a function solely within the province of the jury. Id. at 460-61. When substantial evidence in the record supports a rational inference that the defendant committed only the lesser offense to the exclusion of the greater, the factual prong of the Workman test is

satisfied, regardless of whether that inference is inconsistent with another theory supported by the evidence. Id. at 461 (where evidence supported inference that defendant committed lesser offense, error to refuse instruction on that offense, even though defendant also presented alibi defense). Because the evidence in this case supported an inference that Hunter committed manslaughter, he was entitled to manslaughter instructions, even if the evidence would also support a theory of excusable homicide.

“When the evidence supports an inference that the lesser included offense was committed, the defendant has a right to have the jury consider that lesser included offense.” Warden, 133 Wn.2d at 564. The court’s refusal to give lesser included offense instructions in this case precluded the defense from presenting its theory of the case, and reversal is required.

See Id.

2. THE COURT’S ADMISSION OF SIGNIFICANTLY INACCURATE DEMONSTRATIVE EVIDENCE DENIED HUNTER A FAIR TRIAL.

The state’s firearms expert, Matthew Noedel, testified that in laboratory testing he determined it took seven and a half pounds of pressure to pull the trigger on Hunter’s gun. 7RP 446. Wanting to demonstrate this concept for the jury, Noedel constructed a device which simulated seven and a half pounds of trigger pull. 7RP 362-63. The

device has a grip like a pistol and a ring which can be pulled like a trigger. The ring is attached to a pulley system which lifts the same weights used in the lab to measure trigger pull. 7RP 363-66; CP 123-28. Noedel believed his device was a reasonable representation of what a given amount of trigger pressure feels like, although he acknowledged that there are limits to the design. 7RP 364-65.

The state proposed having Noedel explain and demonstrate the device to the jury and then having each juror operate it. 7RP 360. Defense counsel objected, arguing that the simulation was not sufficiently similar to pulling the trigger on the gun in question because it replicated only weight and not the various other factors which go into perceived trigger pull. 7RP 361.

For example, the ring on the device is more curved than the trigger and thus pulling it would feel different than pulling the trigger. 7RP 375. The width of the ring is significantly smaller than the width of the trigger, which can have a lot to do with perceived trigger pull. 7RP 375. While the gun operates with a lever action, which makes the trigger easier to move, the ring on the device is attached directly to the weight. 7RP 377. This means that as soon as the user begins to pull the ring on the device, the resistance is 7.5 pounds, whereas the trigger starts with zero pressure and increases to 7.5 pounds until the snap of the firing pin. 7RP 389. And

unlike the gun, the device has no trigger break to simulate the snap of the firing pin. 7RP 378. Additionally, the distance from the grip to the ring on the device is about an inch greater than the distance from the grip to the trigger on the gun. 7RP 378. All of these differences would affect the perceived pressure necessary to pull the trigger. 7RP 375-78.

The court operated the device with various weights and also tested the trigger on the actual firearm. 7RP 390. It found that while the device offered a “pretty good representation” of the weight associated with 7.5 pounds of trigger pull, it was not a very accurate representation of what it was like to experience pulling the trigger of this particular weapon. 7RP 393. The court did not believe it would be unfairly prejudicial to demonstrate for the jury only the effort it takes to pull the trigger and not the dynamics of the pull, finding a partial demonstration was better than nothing. 7RP 393-95.

Noedel described the device during his testimony on direct examination, showing how it works and explaining that the device represents what it would feel like weight-wise to pull the trigger on the firearm in evidence. 7RP 447-49. Each juror then operated the device. 7RP 449-50. On cross examination, Noedel explained the differences between the device and the actual gun. 7RP 450-53.

Demonstrative evidence is encouraged only when it accurately illustrates facts sought to be proved. State v. Finch, 137 Wn.2d 792, 816, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). Substantial similarity to the actual events is required. Jenkins v. Snohomish County Pub. Util. Dist. No. 1, 105 Wn.2d 99, 107, 713 P.2d 79 (1986). If the similarity is sufficient to justify admission, any lack of similarity goes to the weight of the evidence. Id. A trial court's determination that the demonstration is sufficiently similar should be reversed where the court abuses its discretion. Id.; see also State v. Stockmyer, 83 Wn. App. 77, 85, 920 P.2d 1201 (1996). As with any piece of evidence that has some probative value, if the evidence is more prejudicial than probative, the court should refuse its admission. Finch, 137 Wn.2d at 816.

In Finch, the court allowed a videotape showing what a person could see from a bedroom window where the defendant was standing at the time he shot a police officer. Lights were tuned on in the yard to replicate conditions that existed the night of the shooting, and officers were positioned in the location of the officer who had been shot. The video did not depict the officers in the yard, although the officers who made the video testified that they could see those officers when the video was shot. Finch, 137 Wn.2d 813-15.

The defense argued in the Supreme Court that the video should not have been admitted because the conditions under which it was made were not substantially similar to the conditions on the night in question. A police car with flashing lights was placed in a different location, and the officer standing in for the officer who was shot was a different height and wearing different clothing. The Supreme Court noted, however, that the officers who made the video testified that the lighting conditions were “pretty much the same” as on the night in question and that the patrol car was far enough away from the scene that it had little impact on the lighting conditions. Further, the officer standing in for the deceased was about the same height, and although he wore different clothing, it was similar in color. Id. at 817-18.

The Court found that the conditions during the videotaping were substantially similar to the night in question. What could be seen from that vantage point was relevant to intent and premeditation, and the video therefore had probative value. Since the video did not show the officers in the yard, that probative value was not outweighed by prejudice to the defendant. Thus, the trial court properly admitted the video. Id. at 818.

Here, unlike in Finch, there were so many significant dissimilarities between Noedel’s trigger pull device and the trigger of the gun that the requirements for accuracy and relevancy were not met. In

Finch, the defense could point to no differences which would mislead the jury as to the scene being depicted in the video. Here, on the other hand, the differences between the curvature and width of the ring on the device and the trigger on the gun, the pulley system on the device and the lever system on the gun, and the distance from grip to ring on the device and grip to trigger on the gun all significantly affected the perceived trigger pull.

The court acknowledged that the device did not adequately represent the dynamics of trigger pull but demonstrated only the weight associated with trigger pull. It was able to draw this distinction only after testing both the device and the actual trigger, however. The jury was not given that opportunity. Contrary to the court's assumption, the admittedly inaccurate demonstration was not better than no demonstration at all, because it had the significant potential for misleading the jury as to the effort necessary to pull the trigger. When inaccuracies in the demonstrative evidence are significant, any probative value is outweighed by the unfair prejudicial effect. Stockmyer, 83 Wn. App. at 85; State v. Newman, 63 Wn. App. 841, 853-54, 822 P.2d 308 (not abuse of discretion to exclude unreliable recording under ER 403), review denied, 119 Wn.2d 1002 (1992)

Hunter's defense was that he shot Sergeant accidentally. The state presented evidence of trigger pull to establish that it took sufficient effort to pull the trigger that the act must have been intentional. It was allowed to make this point using a device which demonstrated only the ultimate weight associated with trigger pull, excluding other factors which would significantly affect the user's perception of the effort necessary to fire the gun.

The state's theory that this was intentional murder rested on inferences drawn from circumstantial evidence. Although Hunter testified that the shooting was accidental, there is a distinct danger that the jury rejected that defense on the basis of this inaccurate and misleading demonstration of trigger pull. Because the error was prejudicial, this Court should reverse and remand.

D. CONCLUSION

The trial court improperly refused instructions on the lesser included offenses of first and second degree manslaughter and improperly admitted significantly inaccurate demonstrative evidence. This Court should reverse Hunter's conviction and remand for a new trial.

DATED this 18th day of August, 2008.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in

State v. Kenneth M. Hunter, Cause No. 37110-3-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
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