

No. 42879-2-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jason Mack,

Appellant.

Cowlitz County Superior Court Cause No. 09-1-00890-3

The Honorable Judge Michael H. Evans

Appellant's Reply Brief

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ARGUMENT

I. MR. MACK WAS ENTITLED TO INSTRUCTIONS ON FIRST-DEGREE MANSLAUGHTER.

A. Respondent applies the wrong standard of review to Mr. Mack's constitutional claim.

Where trial court action infringes a constitutional right, review is de novo. See *State v. Iniguez*, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009). In *Iniguez*, the Supreme Court reviewed de novo a lower court's decision granting a continuance and denying the defendant's motion to sever his case from a codefendant's. *Id.* Ordinarily, the court would have reviewed these issues for an abuse of discretion; however, because the defendant argued a violation of his constitutional right to speedy trial, the court considered the issues de novo. *Id.*

In this case, Mr. Mack argued both a statutory and a constitutional right to instructions on first-degree manslaughter. See Appellant's Opening Brief, pp. 10 n. 3, 14 n. 8. Because he alleges a violation of his Fourteenth Amendment right to due process, review is de novo. *Iniguez*, at 280-281. Since the statutory argument parallels the constitutional argument, the court should review the issue de novo: if reversal is required under a de novo standard, it will not be necessary to examine the issue for an abuse of discretion. Similarly, if the trial court's decision is upheld on

de novo review, it will also be upheld under the abuse-of-discretion standard.

Respondent fails to properly address the standard of review. See Brief of Respondent, pp. 11-17. Without acknowledging Mr. Mack’s constitutional claim, the state asserts that review should be under the abuse-of-discretion standard. Brief of Respondent, pp. 11-13. According to the prosecutor, this more deferential standard applies because “the trial court’s decision was predicated on its assessment of the facts at trial...” Brief of Respondent, p. 15.

The abuse-of-discretion standard would apply if Mr. Mack raised only a statutory argument. The allegation of a due process claim, however, requires the appellate court to review the facts de novo.¹ See, e.g., *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011) (“We review constitutional issues de novo.”)

Because review is de novo, Respondent’s arguments—which rely on the deferential abuse-of-discretion standard—carry less weight than if they had been made under the correct standard. Furthermore, all of the cases cited by the state apply the deferential standard for non-

¹ The Court of Appeals could review the argument under both standards; however, as pointed out above, review for an abuse of discretion is unnecessary, whatever the outcome under the de novo standard.

constitutional issues. See Brief of Respondent, pp. 13-17 (citing *State v. Perez-Cervantes*, 141 Wash.2d 468, 6 P.3d 1160 (2000), *State v. Hernandez*, 99 Wash.App. 312, 997 P.2d 923 (1999), and *State v. Hunter*, 152 Wash.App. 30, 216 P.3d 412 (2009)). None of the cases cited by Respondent involved a Fourteenth Amendment due process claim—or any other constitutional argument—relating to the refusal to give a lesser-included or inferior degree instruction.

Accordingly, neither Respondent’s argument nor the authority cited by Respondent should persuade the court in this case. The court should apply a de novo standard, reverse Mr. Mack’s conviction, and remanded the case with instructions to allow the jury to consider first-degree manslaughter if the case is tried again.

B. The trial court’s refusal to instruct on first-degree manslaughter violated RCW 10.61.006 and Mr. Mack’s Fourteenth Amendment right to due process.

Respondent concedes that first-degree manslaughter is an included offense of first-degree intentional murder under the legal prong of the Workman test. Brief of Respondent, p. 12 (citing *State v. Workman*, 90 Wash.2d 443, 584 P.2d 382 (1978)). Thus the sole issue on review is whether or not there is “even the slightest evidence” that the accused person may have committed only manslaughter. *State v. Parker*, 102

Wash.2d 161, 164, 683 P.2d 189 (1984);² see also Brief of Respondent, p. 12-13. In making this determination, the evidence must be taken in a light most favorable to Mr. Mack as the proponent of the instructions. *State v. Fernandez-Medina*, 141 Wash.2d 448, 456, 6 P.3d 1150 (2000).

The facts in this case, when taken in a light most favorable to Mr. Mack, support an inference that Mr. Mack lacked the intent to kill, even if (as the prosecution contends) he intentionally stabbed Garner. Facts amounting to the “slightest evidence” that Mr. Mack did not intend to kill Garner include the following:

1. The stabbing was prompted by an insult, rather than by some deeper animus. RP 278-279.
2. Very little time elapsed between the insult and the stabbing; thus, the attack was likely borne of an impulsive desire to injure, rather than a plan to murder. RP 278, 426, 901.
3. The scene was chaotic, Garner was wrestling with two others, and Mr. Mack had to reach around one of the combatants to stab Garner; thus he could not see where the knife entered, and may well have intended to inflict a less-serious wound. RP 387, 389, 404, 509-511, 519, 900-901, 911, 913-915, 916.
4. Mr. Mack told Woodward “that guy got hurt or something;” he did not say “that guy got killed,” “I killed that guy,” “I tried to kill that guy,” or anything suggesting he intended to kill Garner. RP 483, 770.

² Contrary to Respondent’s argument, if instructions for an included offense are improperly refused, harmless error analysis does not apply. *State v. Parker*, 102 Wash.2d 161, 164, 683 P.2d 189 (1984).

5. The knife was short (with a blade of only 3-4” at most), and there is no indication that Mr. Mack intended to cut Garner’s pulmonary artery or otherwise inflict a mortal wound. RP 949-959.

These facts, when taken in a light most favorable to Mr. Mack, provide at least “the slightest evidence” that he did not intend to kill Garner.³ He was therefore entitled to instructions on first-degree manslaughter, because the evidence also raises an inference that he stabbed Garner (without intent to kill) and thereby knowingly⁴ or recklessly caused his death. *State v. Berlin*, 133 Wash. 2d 541, 550-51, 947 P.2d 700 (1997).

Respondent makes three significant errors in arguing that Mr. Mack was not entitled to the instructions. First, the state erroneously conflates an intentional act with intent to kill. Brief of Respondent, p. 15. A conviction for second-degree murder requires proof of intent to kill. RCW 9A.32.050. One can commit an intentional act (such as shooting someone in the foot) without intending to kill the target of the act (i.e. the person shot in the foot). Respondent’s primary argument is that Mr. Mack

³ The jury’s verdict also supports Mr. Mack’s position: jurors did not convict Mr. Mack of intentional murder; thus, they did not find that he acted with intent to kill Garner. CP 72.

⁴ See RCW 9A.08.010(2) (“When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly.”)

intentionally stabbed Garner. Brief of Respondent, p. 15 (“The evidence at trial established... that the appellant had intentionally stabbed Mr. Garner...”) But intentionally stabbing someone is not the same as stabbing them with intent to kill. See, e.g., *State v. Turnipseed*, 162 Wash. App. 60, 255 P.3d 843, as amended, review denied, 172 Wash. 2d 1023, 268 P.3d 225 (2011) (intentional shooting results in manslaughter conviction); *State v. Gamble*, 168 Wash. 2d 161, 182, 225 P.3d 973 (2010) (intentional beating results in manslaughter conviction).

Second, the state (apparently) presumes that circumstantial evidence cannot “affirmatively indicate” the need for an included instruction. See Brief of Respondent, p. 13 (quoting Berlin, at 541). But “the law does not distinguish between direct and circumstantial evidence...” CP 54. Thus the requirement of evidence that “‘affirmatively indicates’ the lesser crime was committed to the exclusion of the greater”⁵ need not be satisfied by direct evidence; circumstantial evidence is sufficient. In this case, there is no direct evidence of Mr. Mack’s intent;⁶ however, there is circumstantial evidence, as outlined

⁵ Brief of Respondent, p. 13 (quoting Berlin, at 541).

⁶ Indeed, the prosecution is unable to cite any direct evidence proving intent to kill, relying instead on circumstantial evidence and the presumption that he “intend[ed] the natural consequence of his actions.” Brief of Respondent, pp. 15-16.

above: (1) the stabbing was not motivated by any deep animus (such as might motivate an intentional killing), (2) the short timeframe indicates an impulsive assault rather than a planned murder, (3) the person wielding the knife reached around the combatants and could not see where the knife entered Garner's body, (4) Mr. Mack said that someone had been "hurt;" he did not say Mr. Garner had been killed, and (5) the knife had a short blade. RP 278-279, 387, 389, 404, 509-511, 519, 900-901, 911, 913-915, 916, 949-959.

This circumstantial evidence—when taken in a light most favorable to Mr. Mack—affirmatively suggests that he did not intend to kill him, even though the stabbing involved an intentional act. The circumstantial evidence might not be strong evidence, but it is at least "the slightest evidence." Parker, at 164.

Third, the state erroneously implies that an intentional act producing injury prohibits a verdict of manslaughter. See Brief of Respondent, p. 16 ("[T]here was simply no evidence that would have affirmatively shown the appellant had injured the victim with the knife in a reckless manner.") This is incorrect. RCW 9A.32.060 requires proof that the accused person "recklessly cause[d] the death of another person." RCW 9A.32.060(a). The accused person's act may be intentional—i.e. a

shooting, stabbing, or beating—so long as s/he did not intend to kill. See, e.g., Turnipseed; Gamble.

None of the cases cited by Respondent requires a different outcome.⁷ In *Perez-Cervantes*, the defendant and his cohorts attacked the victim in retaliation for a robbery, beating and kicking him into submission. *Perez-Cervantes*, at 481. After the victim had been subdued, the defendant stabbed him twice. *Id.* The only evidence suggesting a lack of intent to kill was the size of the knife. *Id.* The Supreme Court found this insufficient to require an instruction on manslaughter.⁸ *Id.*, at 481-482.

Here, by contrast, Mr. Mack relies on more than just the size of the knife. When taken in a light most favorable to the defense, the circumstantial evidence showed that he did not intend to kill Garner, as outlined above.⁹ The lack of direct evidence—i.e. testimony or a

⁷ As noted above, none of the cases cited by the state involved a constitutional challenge to the lower court decision; each thus applied the abuse-of-discretion standard applicable to nonconstitutional challenges. *Perez-Cervantes*, *supra*; *Hernandez*, at 319; *Hunter*, at 43.

⁸ Curiously, the court didn't mention the requirement that the evidence be taken in a light most favorable to the defendant. Nor did it refer to the "slightest evidence" test. *Perez-Cervantes*, at 481-482.

⁹ Furthermore, except for the length of the knife-blade, each of the factors relied upon by the *Perez-Cervantes* court is absent here: the attack in this case lacked the deep-seated motive (retaliation for robbery), the advance planning, and the deliberative execution (waiting until the victim had been subdued) which the *Perez-Cervantes* court found significant in that case. Additionally, Mr. Mack made a statement in which he used the word "hurt" rather than "killed;" the defendant in *Perez-Cervantes* apparently made no such statement. RP 483, 770.

statement that he lacked such intent—is irrelevant; the circumstantial evidence provides at least “the slightest evidence” that his intent was not to murder Garner. Accordingly, Perez-Cervantes does not control.

In Hernandez, the evidence disproving murder consisted of the defendant’s statements suggesting that the victim accidentally killed herself: the statements relied on by the defense did “not contain any admissions that [he] acted in a manner that caused [the victim’s] death.” Hernandez, at 320; see also Hunter, at 46-47 (discussing Hernandez). Because the evidence pointed either to murder or a self-inflicted wound, nothing in the record suggested that the defendant recklessly caused the victim’s death, and the proposed manslaughter instructions were not appropriate.

In Hunter, the defendant told police and later testified that he shot his girlfriend by accident. The Hunter court did not indicate or imply that direct testimony of this sort was essential, or that circumstantial evidence could never support a manslaughter instruction. Respondent’s argument seems to be that a manslaughter instruction is not warranted unless direct evidence provides a clear basis for such an instruction; however, the Hunter court announced no such rule.

The circumstantial evidence in Mr. Mack’s case—when taken in a light most favorable to him—provides at least “the slightest evidence” that

he stabbed Garner without intending to kill him. Parker, at 164.

Accordingly, the trial judge should have instructed on the included offense. Berlin, *supra*.

- C. The erroneous failure to instruct on an included offense is not subject to harmless error analysis.

The statutory right to instructions on an included offense is “absolute” and “unqualified.” Parker, at 163-164; RCW 10.61.003; RCW 10.61.010. Where such instructions are warranted, failure to give them requires reversal. Parker, at 163-164. Harmless error analysis does not apply. *Id.* (“This court... has never held that, where there is evidence to support a lesser-included-offense instruction, failure to give such an instruction may be harmless.”) Accordingly, Respondent’s harmless-error argument is contrary to law. Brief of Respondent, p. 17.¹⁰

Furthermore, the state’s bold assertion that the jury “returned a guilty verdict for murder in the second degree” is misleading in this

¹⁰ Even if harmless error analysis could apply, the correct standard would be the stringent standard for constitutional harmless error, because the failure to instruct on manslaughter violated Mr. Mack’s Fourteenth Amendment right to due process. See Appellant’s Opening Brief, pp. 9-15. Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wash.2d 626, 635, 160 P.3d 640 (2007). Constitutional error is harmless only if it is “trivial, or formal, or merely academic, and [is] not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *State v. Koslowski*, 166 Wash. 2d 409, 433, 209 P.3d 479 (2009) (Sanders, J., concurring) (quoting *State v. Britton*, 27 Wash.2d 336, 341, 178 P.2d 341 (1947)); see also *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state cannot meet this standard.

context: the jury was unable to reach a verdict as to intentional murder, and, instead, convicted Mr. Mack of felony murder. CP 3, 72. In other words, the jury could not unanimously agree that Mr. Mack intended to kill Garner. Having failed to reach a verdict on intentional murder, they should have been asked to consider manslaughter as an included offense; it is immaterial that they also convicted him of felony murder. *State v. Schaffer*, 135 Wash.2d 355, 358-359, 957 P.2d 214 (1998).

In *Schaffer*, as in this case, the defendant was charged with both (premeditated) intentional murder and felony murder as alternative charges.¹¹ *Id.*, at 357. As in this case, the defendant was convicted of felony murder and the jury failed to reach a verdict on the intentional murder charge. *Id.*, at 357. The Supreme Court reversed the defendant's felony murder conviction because of the court's failure to give instructions on manslaughter—an offense included within intentional murder but not within felony murder. *Id.*, at 358-359.

The court did not engage in harmless error analysis; nor did it leave the felony murder conviction intact. Instead, it reversed and remanded with instructions to allow the defendant to argue manslaughter

¹¹ The charges in *Schaffer* were premeditated first-degree murder and second-degree felony murder. *Schaffer*, at 357.

to the jury as a “lesser offense,” even though it was not included within felony murder, the only crime for which a retrial was possible. *Id.*

Here, as in *Schaffer*, it is irrelevant that Mr. Mack was convicted of felony murder. His conviction must be reversed, and the case remanded with instructions to allow the jury to consider manslaughter as a “lesser offense.” *Id.*

II. PROSECUTORIAL MISCONDUCT VIOLATED MR. MACK’S CONSTITUTIONAL RIGHTS TO COUNSEL AND TO DUE PROCESS.

A. The prosecutor committed misconduct by arguing that jurors needed to articulate a reason in order to vote “not guilty.”

Prosecutorial misconduct may deprive an accused person of the constitutional right to a fair trial. *In re Glasmann*, ___ Wash.2d ___, ___, 286 P.3d 673 (2012). A prosecutor may not suggest that jurors are required to articulate a reason for doubt before they acquit. *State v. Walker*, 164 Wash. App. 724, 731-32, 265 P.3d 191 (2011). Such arguments are wholly improper. *State v. Johnson*, 158 Wash. App. 677, 685-86, 243 P.3d 936 (2010), review denied, 171 Wash. 2d 1013, 249 P.3d 1029 (2011).

Here, the prosecutor made the following statement during closing argument:

A reasonable doubt is a doubt for which a reason can be given. If in your deliberations you have doubts, *but you can't put them into*

words, you can't articulate them, you can't talk with your fellow jurors about them, other than just maybe I have some kind of doubt but I can't really express it, that's not a reasonable doubt. That's not a doubt that the law requires you be convinced beyond. RP 1053¹² (emphasis added).

The first line of this argument was quoted from the court's instructions and was not improper. However, the remainder of the argument misstated the law and placed an additional burden on Mr. Mack—and upon jurors who were leaning toward acquittal.

Jurors are not required to articulate a reason to vote “not guilty.” Walker, at 731-732. By telling jurors they could not acquit unless they were able to put their doubts into words and articulate them, the prosecutor undermined the presumption of innocence and the burden of proof, in violation of Mr. Mack's Fourteenth Amendment right to due process. *Id.*

Respondent erroneously suggests that this argument “appropriately directed the jury's attention to the definition of reasonable doubt provided by the trial court.” Brief of Respondent, p. 20. This is incorrect; the prosecutor went beyond the instruction and told jurors they were required to put any doubt into words, articulate it, discuss it with fellow jurors, and express it. RP 1053. The law does not require this. The language in the

¹² This passage was erroneously cited as RP 1153 in the Appellant's Opening Brief.

instruction provides one formulation for reasonable doubt; however, it is not the only possible formulation, and the law has never required jurors to be able to articulate a specific doubt in order to acquit. This is identical to the problem addressed in Walker:

The prosecutor... told the jury that before it could find Walker not guilty, it needed a reason. This shifted the burden of proof to Walker. The prosecutor's comments were improper.

Walker, at 732; see also *State v. Anderson*, 153 Wash. App. 417, 431, 220 P.3d 1273 (2009) (“By implying that the jury had to find a reason in order to find Anderson not guilty, the prosecutor made it seem as though the jury had to find Anderson guilty unless it could come up with a reason not to”); *State v. Venegas*, 155 Wash. App. 507, 523-524, 228 P.3d 813, review denied, 170 Wash. 2d 1003, 245 P.3d 226 (2010).

The prosecutor here did not “merely... reiterat[e] an instruction given by the trial court.” Brief of Respondent, p. 20. Instead, he committed misconduct that was flagrant and ill-intentioned, and that violated Mr. Mack’s constitutional right to due process. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

B. The prosecutor infringed Mr. Mack’s constitutional rights to counsel and to due process by disparaging the role of defense counsel and impugning counsel’s integrity.

A prosecutor commits misconduct by disparaging defense counsel’s role or her/his integrity. *State v. Thorgerson*, 172 Wash.2d 438,

451-452, 258 P.3d 43 (2011) (citing *State v. Warren*, 165 Wash.2d 17, 195 P.3d 940 (2008) and *State v. Negrete*, 72 Wash.App. 62, 67, 863 P.2d 137 (1993)). In this case, the state disparaged the defense role and impugned defense counsel's integrity. See Appellant's Opening Brief, pp. 17-19; RP 1086-1089, 1094-1095, 1097. In fact, the prosecuting attorney used his "position of power and prestige to sway the jury"¹³ by scolding defense counsel for Mr. Mack's theory of the case ("For shame. For shame.") RP 1097.

The prosecuting attorney did more than "respond to defense counsel's argument." Brief of Respondent, p. 23. In addition to castigating counsel with the "For shame" comment, the state referred to being "entertain[ed]" (implying that defense counsel's argument was laughable), mentioned that he'd "tried a lot of cases..." (suggesting that jurors should trust him because of his experience), and criticized defense attorneys for refusing to admit a client's guilt, and thereby implying that defense attorneys cannot be trusted ("I have yet to see a Defense Attorney get up and say 'They proved it'"). RP 1086.

Furthermore, defense counsel does not have the "power to 'open the door' to prosecutorial misconduct." *State v. Jones*, 144 Wash.App.

¹³ Glasmann, at ____.

284, 295, 183 P.3d 307 (2008). If the prosecutor believed defense counsel's argument improper in some way, he should have objected, rather than responding with misconduct.

The misconduct here involved emotionally-laden phrases ("For shame") and advised jurors not to trust defense counsel because the defense role is characterized by lying. Such misconduct cannot be said to be harmless beyond a reasonable doubt. *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). In addition, these kinds of emotional appeals to passion and prejudice are per se flagrant and ill intentioned, and cannot be cured by instruction. *Glasmann*, at ____.

The prosecutor disparaged defense counsel and maligned the defense role, thereby violating Mr. Mack's Sixth and Fourteenth Amendment right to counsel and to due process. *Thorgerson*, at 451-452. Mr. Mack's conviction must be reversed and the case remanded for a new trial. *Toth*, supra.

III. THE TRIAL COURT VIOLATED MR. MACK'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION BY RESTRICTING CROSS-EXAMINATION OF LAMSON ON A MATTER RELATING TO BIAS.

Mr. Mack stands on the argument set forth in the Appellant's Opening Brief.

CONCLUSION

Mr. Mack's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on October 30, 2012.

BACKLUND AND MISTRY

A handwritten signature in cursive script that reads "Jodi R. Backlund".

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:
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With the permission of the recipient, I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 30, 2012.

A handwritten signature in cursive script, appearing to read "Jodi R. Backlund".

Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

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