

No. 44724-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

TERESA TEA MOODY,

Appellant.

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

The Honorable James J. Dixon, Judge
Cause No. 12-1-01038-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether reversal is required where the defendant is tried with committing an offense by alternate means and the jury instruction defining the mens rea element of one alternative means is erroneous, and where the error made no difference in the outcome of the trial.

2. Whether Moody may raise a challenge to a jury instruction for the first time on appeal where there is no manifest constitutional error.

3. Whether a defense counsel's failure to object to an erroneous jury instruction constitutes ineffective assistance of counsel where the error was harmless.

B. STATEMENT OF THE CASE.

The State accepts Moody's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. The State concedes that Jury Instruction 9, WPIC 10.03, was error. However, under the circumstances of this case, it was harmless error.

Moody was tried for one count of second degree assault. The jury was provided with three instructions relevant to her challenge that Instruction No. 9 misstated the law and relieved the State of its burden of proving all of the elements of the crime beyond a reasonable doubt.

A person commits the crime of assault in the second degree when he or she intentionally assaults

another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon.

Instruction No. 6, CP 83.

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that result.

Instruction No. 9, CP 86.

To convict the defendant of the crime of assault in the second degree, as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about July 31, 2012, the defendant intentionally assaulted Juanqita A. Knox;

(2) That the defendant acted by one or more of the following means or methods:

(a) thereby recklessly inflicted substantial bodily harm on Juanqita A. Knox or

(b) with a deadly weapon; and

(3) That this act occurred in the State of Washington.

Instruction 14, CP 91.

Moody does not challenge Instructions 6 or 14.

A challenged jury instruction is reviewed de novo. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). "An omission or misstatement of the law in a jury instruction that relieves the State

of the burden to prove every element of the crime charged is erroneous.” State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). The Court of Appeals has held that the instruction defining recklessness as given to this jury does not adequately convey the mental state required for conviction of first degree assault, State v. Harris, 164 Wn. App. 377, 384, 263 P.3d 1276 (2011), second degree assault, State v. Johnson, 172 Wn. App. 112, 132, 297 P.3d 710 (2012), and first degree manslaughter, State v. Peters, 163 Wn. App. 836, 850, 261 P.3d 199 (2011), and the Supreme Court has reached the same result in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005). The State concedes that Instruction No. 9 erroneously used the words “wrongful act.” Instead, it should have used the words “substantial bodily harm.”

An erroneous jury instruction that misstates the law is subject to a harmless error analysis. Thomas, 150 Wn.2d at 844. The State disagrees with Moody that this error cannot be harmless.

To determine that an error is harmless, a reviewing court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Peters, 163 Wn. App. at 850. A review of the record of Moody’s case shows that even if

the error had not occurred, no reasonable jury would have reached a different result.

First, the other two jury instructions cited above make it clear that the jury must find Moody disregarded a known and substantial risk that substantial bodily harm would have resulted from her assault. The instructions are read as a whole and the challenged portion is considered in the context of all the instructions given. Pirtle, 127 Wn.2d at 656. In a criminal trial, the jury must be instructed that the State has the burden of proving each essential element of the crime beyond a reasonable doubt. Id. The jury in this case was instructed as to the State's burden. Instruction No. 2, CP 79.

Second, the arguments of the prosecutor directed the jury's attention to the substantial bodily harm element; the prosecutor argued that the victim's injuries constituted substantial bodily harm and resulted from the stabbing with a screwdriver. Defense counsel argued that the stabbing never occurred and that the injury was not substantial bodily harm. There was no confusion about which act and which injury was at issue.

During closing argument, the prosecutor focused on evidence showing the stabbing was intentional, but that the

recklessness applied to the substantial bodily harm. Some examples follow.

This wasn't an accident. The Defendant meant to do what she was doing. It's not as though she were heading over to her car to open her hood with her screwdriver and inadvertently struck Ms. Knox when she was heading over. This was an intentional act. She was intentionally striking—stabbing Ms. Knox in the hand.

RP 368-69.¹

You can find the Defendant guilty of Second Degree Assault if you believe the Defendant assaulted Ms. Knox and recklessly inflicted substantial bodily harm.

RP 371.

On or about July 31st, 2012, the Defendant intentionally assaulted Ms. Knox. She did that by recklessly inflicting substantial bodily harm on Ms. Knox. It was reckless to be hitting her with a screwdriver in the head, stabbing her. That's not the actions of a prudent person or someone who doesn't care or who cares about whether or not someone's going to be hurt. The defendant didn't care.

RP 373-74.

The theory of the defense was that the stabbing never happened, and that the victim was injured by hitting herself in the head with a bunch of keys. RP 390-91, 398. Counsel emphasized the faulty memories of State witnesses. RP 381, 383, 386, 388,

¹ All references to the Verbatim Report of Proceedings are to the three-volume trial transcript.

394, 396. He argued that the testimony of the State witnesses was inconsistent with the physical evidence, RP 388, 393, 397, 399, 406, and inconsistent with each other. RP 382, 384, 385, 387. The defense argument did not even reach the recklessness element because it relied on the theory that the act never occurred at all. It could not have led the jury to believe that the recklessness applied to the stabbing rather than the result of the stabbing.

Although defense counsel did dispute, during closing argument, that the victim's injuries constituted substantial bodily harm, he told the jury it was not the focus of the defense. RP 397. The issue at trial was not the nature of the injuries. The erroneous instruction did not deprive Moody of the opportunity to argue her case, nor did it reduce the State's burden of proof.

The outcome of this trial would have been the same even if the jury instruction defining recklessness had been correct, and therefore the error was harmless.

2. Because the error was harmless, there was no manifest error of constitutional magnitude, and Moody should not be able to bring a challenge to the jury instruction for the first time on appeal.

Moody did not object to Instruction No. 9 at trial, although she did object to the other two instructions set forth in Section 1

above. RP 333. An appellate court may refuse to review a claim of error not raised in the trial court, but a party may raise a “manifest issue affecting a constitutional right” for the first time on appeal. RAP 2.5(a)(3); State v. Schaler, 169 Wn.2d 274, 282, 236 P.3d 858 (2010). An instruction omitting an element of the charged crime can be of constitutional magnitude. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). A manifest error of constitutional magnitude requires a showing of actual prejudice. State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). To demonstrate actual prejudice, there must be a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” Id. at 99 (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)).

Because the error here was harmless, as argued above, Moody cannot demonstrate prejudice, and therefore there is no manifest error. Absent a manifest error of constitutional magnitude, Moody may not raise a challenge to the jury instruction for the first time on appeal.

3. Because the erroneous instruction did not prejudice Moody, she cannot establish ineffective assistance of counsel.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him or her. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

Moody was not prejudiced by counsel's failure to object to Instruction No. 9, and thus cannot establish the second prong of the Strickland test.

D. CONCLUSION.

Although Jury Instruction No. 9 was erroneous, the error was harmless. Because of that, Moody may not raise this issue for the first time on appeal. Similarly, without prejudice, there is no ineffective assistance of counsel. The State respectfully asks this court to affirm Moody's conviction.

Respectfully submitted this 30th day of January, 2014.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on the date below as follows:

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

Dated this 30th day of January, 2014, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

January 30, 2014 - 1:26 PM

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