

NO. 50216-0-II

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

In re the Personal Restraint of

AARON GUSTER CLOUD,

Petitioner.

REGARDING THE JUDGMENT AND SENTENCE ENTERED BY
THE SUPERIOR COURT OF KITSAP COUNTY
Superior Court No. 13-1-00824-4

BRIEF OF RESPONDENT

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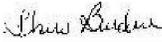
SERVICE	<p>Jeffrey E. Ellis Law Offices of Alsept and Ellis 621 S.W. Morrison St., Ste. 1025 Portland, OR 97205 Email: JeffreyErwinEllis@gmail.com</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED June 13, 2017, Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us</p>
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether trial counsel was ineffective for failing to offer a copy of a Department of Corrections warrant for the arrest of Cloud as rebuttal to the state's consciousness of guilt from flight argument?
 - a. Whether appellate counsel was ineffective for failing to raise this issue on direct appeal?
2. Whether trial counsel was ineffective for failing to argue that a different suspect fired at the victim where the alleged other suspect was merely present?
3. Whether the inference of recklessness instruction given was improper when that inference was not the sole and sufficient proof of *mens rea*?
 - a. Whether appellate counsel was ineffective for failing to raise this issue on direct appeal.
4. Whether trial counsel was ineffective for failing to object to the given recklessness instruction and for failing to propose alternative instructions?
 - a. Whether appellate counsel was ineffective for failing to raise this issue on direct appeal?

II. RESPONSE

The State respectfully moves this court for an order dismissing the petition with prejudice because it lacks merit.

III. STATEMENT OF THE CASE

A. Procedure

On August 9, 2013, an original information was filed charging Cloud with drive-by shooting and first degree unlawful possession of a firearm. CP 1.¹ On October 9, 2013, a first amended information was filed adding a count of first degree assault with an armed with a firearm special allegation. CP 34. The matter proceeded to trial on the three counts.

At trial, Cloud stipulated to the existence of a prior serious offense as predicate for the unlawful possession of firearm charge. CP 76.

The state moved in limine, *inter alia*, to exclude the defendant's self-serving hearsay and to exclude any reference to other suspect evidence. CP 38. At that point in the proceeding, those two motions were granted without defense objection. IRP 10 (self-serving hearsay); IRP 11 (other suspect evidence). However, both these issues were revisited on motion of the defense near the end of the trial.

The self-serving hearsay issue re-arose during cross examination of state's witness Bremerton Police Detective Grey. VIIRP 524-25. As

¹ Reference herein to "CP" and "RP" are to the clerk's papers and report of proceedings

noted by Cloud, the trial had included extensive testimony about Cloud's flight from the car and police efforts to capture him. Detective Grey had been the person who presented Cloud for booking at the jail. VIIRP 524. Cloud was being booked for the present charges and defense counsel added "But also because there was a Department of Corrections warrant outstanding for his arrest, wasn't there." Id. The state objected, the trial court sustained, the jury went out, and argument outside the jury's presence ensued. Id. at 425.

After argument, the trial court continued its ruling sustaining the objection. VIIRP 527. The judge ruled that allowing evidence of the existence of the DOC warrant as the reason Cloud ran away, without any other information, would be speculative; in particular because the jury would not even know if Cloud was aware of the warrant. Id.²

Thus, testimony from Detective Grey regarding the existence of the warrant was foreclosed. But the defense pulled another arrow from its quiver on this issue: the defense offered the testimony of one of the arresting officers that when arrested Cloud had remarked "Okay guys. It's just a DOC warrant. It's only a warrant." After fairly extensive argument, the trial court ruled that the statement was not hearsay, or was subject to a

from the direct appeal.

² The record does not indicate that the defense offered a copy of the warrant itself. No copy of that warrant is in the appellate record or the superior court's file.

hearsay exception, as it went to Cloud's state of mind and not to the truth of the matter asserted. VIIRP 552. Thus the officer testified before the jury that upon arrest Cloud said "Gee guys, it's just a DOC warrant. All I have is a warrant." VIIRP 558.

With regard to the drive-by shooting count, the trial court instructed the jury on the general definition of recklessness. CP 103 (instruction 10). On that count, the trial court instructed the jury on the statutory permissive presumption of recklessness from the unlawful discharge of a firearm from a motor vehicle. CP 106 (instruction 13).

The jury returned convictions on all charges and gave an affirmative answer on the armed with a firearm special verdict. CP 124-25. Cloud received a standard range sentence. CP 232. He timely appealed his convictions. CP 245.

The Court of Appeals, Division II, affirmed the convictions by unpublished opinion. (No. 45579-0-II) 189 Wn. App. 1048 (2015) *review denied* 185 Wn.2d 1010 (2016). The appellate court rejected claims that the evidence was insufficient on the first degree assault charge, that the trial court erred in excluding evidence of the existence of a DOC warrant, that the trial court erred in excluding argument that another passenger in the car did the shooting, that his trial counsel was ineffective, that the prosecutor committed misconduct in various ways, that impeachment evidence was improperly allowed, and that the recklessness instruction

given lessened the state's burden of proof. *Id.*

Regarding the existence of the DOC warrant, Cloud argued on appeal that exclusion of evidence of the existence of the warrant violated his due process right to a fair trial. Brief of Appellant at 27. In that argument, Cloud neither assails nor addresses the trial court's reasons for excluding the evidence from Detective Grey about the existence of the warrant. Rather, he argues that the evidence was relevant by its exculpatory nature.

In his direct appeal, Cloud raised no issue regarding the recklessness jury instructions used in the trial.

B. Facts

In his petition, Cloud submits a recitation of the factual statement from the direct appeal decision. The state would do the same. Cloud's factual statement is sufficient for review of this petition.

IV. AUTHORITY FOR PETITIONER'S RESTRAINT

The authority for the restraint of Aaron Guster Cloud lies within the judgment and sentence entered by the Superior Court of the State of Washington for Kitsap County, on November 4, 2013, in cause number 13-1-00824-4, upon Cloud's conviction of drive-by shooting, unlawful possession of a firearm in the first degree, and assault in the first degree.

V. ARGUMENT

A. CLOUD MUST RAISE NEW CLAIMS AND OVERCOME A HIGH BURDEN FOR COLLATERAL RELIEF INCLUDING PROOF OF ERROR AND PROOF OF ACTUAL AND SUBSTANTIAL PREJUDICE.

1. PERSONAL RESTRAINT PROCEDURE

First, Cloud correctly asserts that the present petition is timely. The Washington Supreme Court denied review by order dated March 30, 2016. This court issued mandate on April 14, 2016. The present petition is dated April 13, 2017, one day shy of the one year time-limit. RCW 10.73.090 (1).

But timely or not “collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders.” *In re Hagler*, 97 Wn.2d 818, 824, 650 P.3d 1103 (1982). Cloud must prove error by a preponderance of the evidence. *In re Crow*, 187 Wn. App. 414, 420-21, 349 P.3d 902 (2015). Then, if he is able to show error, he must also prove prejudice. *Crow*, 187 Wn. App. at 421. Constitutional error must have resulted in actual and substantial prejudice. *In re Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). “Actual and substantial prejudice, which ‘must be determined in light of the totality of circumstances,’ exists if the error ‘so infected petitioner’s entire trial that the resulting conviction violates

due process.” *Crow*, 187 Wn. App. at 421 (quoting *In re Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985)).

If the error is nonconstitutional, the petitioner must meet a stricter standard and demonstrate that the error resulted in a fundamental defect which inherently resulted in a complete miscarriage of justice. *In re Schreiber*, 189 Wn. App. 110, 113, 357 P.3d 668 (2015). This standard requires more than a “mere showing of prejudice.” *In re Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004).

These showings must be supported by particular facts that, if proven, would entitle him to relief and these factual allegations must be based on more than speculation and conjecture. RAP 16.7(a) (2); *In re Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992). Conclusory allegations are insufficient. *Cook*, 114 Wn.2d at 813-14. The petition should be denied absent a prima facie showing of either actual and substantial prejudice or a fundamental defect. *In re Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013). If this showing is made, but the record is insufficient, a reference hearing may be ordered. 177 Wn.2d at 18.

An appellate court may not reconsider a claim that was rejected on its merits on direct appeal unless the petitioner shows that such reconsideration will serve the ends of justice. *In re Jefferies*, 114 Wn.2d

485, 487, 789 P.2d 731 (1990). “Simply revising a previously rejected legal argument... neither creates a ‘new’ claim nor constitutes good cause to reconsider the original claim.” 114 Wn.2d at 488. Thus, a “petitioner may not create a different ground [for relief] merely by alleging different facts, asserting different legal theories, or couching his argument in different language.” *In re Lord*, 123 Wn.2d 296, 329, 868 P.2d 835 (1994) (quoting *Campbell v. Blodgett*, 982 F.2d 1321 (9th Cir. 1992) rehearing denied, amended and superseded, 997 F.2d 512 (9th Cir. 1993); accord *In re Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999) (“Personal restraint petitioner must raise new points of fact and law that were not or could not have been raised in the principle action.”)).

2. INEFFECTIVE ASSISTANCE STANDARDS

To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *Strickland v.*

Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Cloud must “overcome a strong presumption that counsel’s performance was reasonable.” *State v. Breitung*, 173 Wn.2d 393, 398, 267 P.3d 1012 (2011). Such claims are addressed as follows:

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine

whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances."

In re Nichols, 151 Wn. App. 262, 272-73, 211 P.3d 462 (2009) (internal citation omitted). Further, Cloud "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct of counsel." *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003).

Regarding appellate counsel, a criminal defendant has a right to effective assistance of counsel on his first appeal of right. *In re Pers. Restraint of Dalluge*, 152 Wn.2d 772, 787, 100 P.3d 279 (2004), citing *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). The proper standard for addressing a claim of ineffective appellate counsel is under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Smith v. Robbins*, 528 U.S. 259, 284, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). To prevail on a claim of ineffective assistance of appellate counsel, the petitioner must demonstrate the merit of any legal issue appellate counsel raised inadequately or failed to raise and also show how he or she was prejudiced. *In re Pers. Restraint of Netherton*, 177

Wn.2d 798, 801, 306 P.3d 918 (2013); *see also Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 That is, it must be shown that but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. But failure to raise all possible non-frivolous issues on appeal is not ineffective assistance, and the exercise of independent judgment in deciding what issues may lead to success is the heart of the appellate attorney's role. *Dalluge*, 152 Wn.2d at 787; *see also Smith, supra*, 528 U.S. at 288 *citing Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (“appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim but rather may select from among them in order to maximize the likelihood of success on appeal.”).

A. NEITHER TRIAL COUNSEL NOR APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE DOC WARRANT.

1. TRIAL COUNSEL

In his first claim, Cloud argues that his trial counsel was ineffective for failing to gain admission of a Department of Corrections (DOC) warrant that may have provided a separate reason for Cloud’s flight from the police. Cloud further claims that appellate counsel was ineffective for not raising on direct appeal the issue of trial counsel’s

ineffectiveness. Cloud is correct that the document was never offered by the defense. But the claim is without merit because the trial court's ruling excluding evidence of the existence of the DOC warrant when it was first offered was not erroneous, because trial counsel persisted and was able to introduce other evidence that served the same purpose, and because under these circumstances the exclusion of the warrant did not cause substantial prejudice to Cloud's defense.

First, Cloud styles the issue as ineffective assistance for trial counsel's failure "to Offer a DOC Warrant" essentially arguing that defense counsel was deficient for not getting that document into evidence. Pet. at 5. However, the record is clear that defense counsel never offered the actual warrant and the record is clear that trial counsel never intended to so offer.

The issues raised by trial counsel were intended to get the fact of the existence of the warrant before the jury, not the warrant itself. The first attempt to advise the jury of the existence of the warrant failed but by persistence trial counsel got the information before the jury through a different witness. Any evidence of the existence of the warrant served trial counsel's strategic purpose—to show another reason for Cloud's flight. In this, then, the defense ultimately succeeded and appropriate arguments were made in closing. Thus substantial prejudice on this issue

is unlikely because Cloud got the existence of the warrant before the jury and was able to argue from that existence. Moreover, the record shows that Cloud's "it's just a DOC warrant" statement was not subject to a limiting instruction at trial. VIIRP 558.

Further, merely seeking information about the existence of the warrant can easily be seen as a tactical decision. In most cases, defense counsel is at pains to avoid letting the jury know that a particular defendant has other criminal cases from which a warrant might issue. In fact, this warrant would be inadmissible had the state offered it.

Under the circumstances of this case, defense counsel was forced to walk a fine line between getting his rebuttal to the state's flight evidence and at the same time advising the jury that Cloud had other criminal cases. Just as Cloud argues that having the warrant would have "bolstered" (Pet. at 9) his alternative to consciousness of guilt argument, so too would the warrant have served to underline Cloud's prior criminality. The mere existence of the thing gave Cloud his argument. Admission of the warrant itself would have allowed the jury to read things like "State of Washington, Plaintiff v. Aaron Cloud, Defendant." Further, that warrant may have recited other bad acts that constituted the reason for the warrant (e.g., failure to appear for supervision or other failures to abide the sentencing court's orders).

Second, here, Cloud advances no theory under the rules of evidence for either the admissibility of the warrant itself or for the admissibility of the fact of the existence of the warrant when the defense first offered that evidence. “Although the accused enjoys the right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence.” *State v. Farnworth*, ___ Wn. App. ___, ___ P.3d ___, No. 33673-5-II, (June 1, 2017), *citing State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). The trial court ruled that admission of the information that the warrant existed would allow for speculation. VIIRP 527. “An accused does not have a right to offer incompetent, privileged, or otherwise inadmissible evidence under standard rules of evidence.” *Farnworth*, ___ Wn. App. at 20, *citing Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). In short, too many unanswered questions would be left if that hearsay document was admitted. This correct ruling, within the trial court’s discretion, militates against a showing of either deficient performance or prejudice. Counsel is not deficient where he properly offered the evidence but it was excluded by an equally proper evidentiary ruling. Defense counsel was actually quite effective in getting the warrant evidence in from the second witness.

Nor is prejudice manifest under these circumstances. As noted the

purpose of the evidence was to allow a rebuttal to the state's flight evidence. As also noted, that purpose was served by the correct admission of Cloud's statement about the warrant when he was arrested. Moreover, Cloud here asserts various cases that taken collectively he argues stand for the proposition that consciousness of guilt from flight is not that probative. Thus Cloud's argument collapses into an inquiry as to whether or not his argument would have been better ("bolstered") with the actual warrant or not. Since he got the evidence that allowed the argument, he cannot claim that counsel completely failed in his attempt to mitigate the flight evidence.

2. APPELLATE COUNSEL

For his part, appellate counsel recognized that an issue attended the trial court's exclusion of trial counsel's first offer regarding the existence of the warrant. This claim is somewhat confusing in that Cloud argues that appellate counsel was ineffective for failing to "Challenge the Instruction on Due Process Grounds." Pet. at 10. The state does not believe that there was any instruction to the jury on this point. In fact, there was no consciousness of guilt instruction given. But it is clear that appellate counsel also recognized that the trial court's evidentiary ruling was not an abuse of discretion. Neither on direct appeal nor in the present petition does Cloud persuasively argue that this evidentiary ruling was

erroneous. In fact, on direct appeal Cloud, as he must, conceded that the evidence of his flight from the police was relevant and admissible. Brief of Appellant at 30. However, appellate counsel did recognize that Cloud still had an argument from due process.

This situation is in line with the exercise of independent judgment by appellate counsel. Essentially, Cloud castigates both trial and appellate counsel for not getting the warrant in or for not arguing that it should have been gotten in but advances no clear theory on how that was to be done. But simply arguing that trial counsel should have offered the warrant itself says nothing as to whether under the circumstances of this case that offer would have been successful. Appellate counsel found an issue but had no argument that the trial court committed error in the application of the evidence rules. Cloud still has no such argument.

Thus Cloud fails to prove that either trial or appellate counsel were deficient on this issue. In light of the substantial evidence of his guilt, his alternative argument as to flight would not have undermined the other substantial evidence of his guilt.

Since Cloud cannot successfully challenge the trial court's discretion in excluding the first defense offer regarding the warrant, he essentially covers no new ground in this claim in this context. Cloud here asserts the same due process claim that appellate counsel asserted; the

difference is that in the present proceeding he dresses the same issue in different clothing by asserting ineffective assistance instead of Cloud's due process right to present a defense. The same questions obtain: did trial counsel attempt to admit the evidence in question? The answer is yes. Next, did the trial court err in excluding the first offer? The answer is no. These questions and their answers are the key to the issue whether brought on direct appeal or by personal restraint petition. And, these questions are at the heart of the issue whether Cloud calls the issue due process or ineffective assistance. The argument here should be rejected as duplicative of the same issue argued on the merits in Cloud's direct appeal.

B. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE THAT ANOTHER PASSENGER IN THE CAR WAS THE SHOOTER BECAUSE SUCH ARGUMENT WAS NOT ADEQUATELY SUPPORTED BY THE EVIDENCE.

Cloud next claims that defense counsel was ineffective for not arguing to the jury that another passenger in the car fired at the victim. This claim is without merit because the defense could not meet the admissibility requirements for such an argument. The trial court properly ruled that the appropriate foundation had not been laid.

The trial court's ruling excluding evidence is reviewed for abuse of discretion. *State v. Young*, 192 Wn. App. 850, 854, 369 P.3d 205, *review denied*, 185 Wn.2d 1042 (2016). An abuse of discretion occurs when a decision is manifestly unreasonable or based on untenable grounds. *Young*, 192 Wn. App. at 854. A criminal defendant has a right to present a defense. *State v. Starbuck*, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015), *review denied*, 185 Wn.2d 1008 (2016). But the right to present a defense does not allow the introduction of otherwise irrelevant evidence. *See State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996). The abuse of discretion standard remains even when the defendant raises a constitutional fair trial issue. *State v. Franklin*, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014). But if an abuse of discretion impacts a constitutional right, it is presumed prejudicial unless the state can show that abuse was harmless beyond a reasonable doubt. 180 Wn.2d at 377 n. 2.

With regard to other suspect evidence, “[t]he standard for relevance of other suspect evidence is whether there is evidence tending to connect someone other than the defendant to the crime.” *Franklin*, 180 Wn.2d at 381. This is our Supreme Court’s most recent take on the rule from *State v. Downs*, 168 Wash. 664, 13 P.2d 1 91932). “The *Downs* test in essence has not changed: some combination of facts or circumstances

must point to a nonspeculative link between the other suspect and the charged crime.” 180 Wn.2d at 381. In ruling on the admissibility of other suspect evidence, the trial court is not to weigh the strength of the state’s case. 180 Wn.2d at 381. Rather, the focus is on the relevance and probative value of the other suspect evidence itself. *Id.* Other suspect evidence that merely raises a suspicion is inadmissible. *Franklin*. 180 Wn.2d at 380. Thus mere opportunity is not enough. 180 Wn.2d at 384 (Owens, J. dissenting).

At the close of the evidence, the defense raised the question of arguing other suspect because of the difficulty that some witnesses had with identification of Cloud as the shooter. VIIIIRP 581. The defense believed that “there is evidence to show there are potentially more suspects to this case than just Mr. Cloud.” VIIIIRP 583. When challenged by the trial court as to foundation to exclaim that someone other than Cloud was the shooter, defense counsel argued that other suspect or not, the evidence in the case allowed a reasonable doubt argument. VIIIIRP 583. The trial court noted that the proposed other suspect, Branden Egeler, was in the car, was described by one witness as having a shaved head like Cloud, and was present at the scene. VIIIIRP 584. The trial court precluded Cloud from arguing that Egeler must have been the shooter but allowed Cloud to argue that problems with identity may raise a

reasonable doubt. VIIIIRP 585-86.

Thus the issue is cast: does the fact that the potential other suspect was merely present and was identified by one witness as having a shaved head (while another witness said short hair) suffice as a foundation to allow argument that that other suspect did the shooting? On this record the answer is no. Evidence was presented that Cloud possessed the gun; no evidence was produced that Egeler had a gun. Evidence was presented that Cloud lifted the gun and pointed out the window of the car; no evidence refers to any such activity by Egeler. Evidence was presented that the shot came from the passenger side of the car and that Cloud was in the passenger seat. Evidence was presented that Egeler was seated in the back seat behind the driver. Evidence was presented that the gun was found very near to where Cloud fell as he fled; Egeler never fled the car. In sum, no evidence ever did more than place Egeler at the scene. The record really does not tell us much or anything as to how Egeler was behaving during the incident. Thus any assertion that he, Egeler, was the shooter would be pure speculation.

Again on this issue, defense counsel raised the proper issue. And, again, the trial court properly ruled with reference to the evidence before it. There was no deficient performance regarding other suspect evidence.

C. THE PERMISSIVE INFERENCE INSTRUCTION REGARDING RECKLESSNESS WAS PROPER AND APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE THAT IT WAS NOT PROPER.

Cloud next claims that jury instruction 13 (CP 58), which allows an inference of recklessness from the two facts of discharging a weapon from a car, violates due process and lowers the state's burden of proof. Additionally, Cloud claims that appellate counsel was ineffective for failing to raise this claim on direct appeal. This claim is without merit because instruction 13 is a proper statement of the law and because the facts of the case supported the giving of it.

Instruction 13 is taken verbatim from WPIC 35.30.01. Washington Pattern Jury Instructions-criminal, 11 Washington Practice Series (4th Ed.). Moreover, the WPIC is taken verbatim from the drive-by shooting statute. RCW 9A.36.045 (2). This Court has upheld this legislatively created permissive inference. *State v. Washington*, 64 Wn. App. 118, 822 P.2d 1245 (1992) *review denied sub nomine State v. Ferguson*, 119 Wn.2d 1003 (1992). There, the inference was attacked as unconstitutionally vague because of the use of the word "unlawful" in the phrase "unlawfully discharges." 64 Wn. App. at 121. The vagueness argument was rejected. 64 Wn. App. at 124. Next, an argument that the instruction forecloses an accidental discharge defense was rejected primarily on a factual analysis

of that case. *Id.* at 126.

The *Washington* Court then addressed the issue raised by Cloud herein that instruction 13 constitutes an impermissible inference. Specifically, the Court addressed the argument that “there is no rational connection between the inferred fact of recklessness and the proven fact of unlawful discharge.” 64 Wn. App. at 126 (internal quotation omitted). The Court noted that “[s]uch an inference is constitutional only when it is “rationally related” to the proven facts from which it is drawn.” *Id.* The Court concluded, in a factually driven analysis, that “under the instruction at issue here, the jury may infer that the discharge, if unlawful, is reckless behavior.” 64 Wn. App. at 127-28. The instruction allowed the jury to find “only that his unlawful behavior satisfied the legal requirement for recklessness.” *Id.* The *Washington* Court thus easily parried the impermissible inference argument not even addressing whether or not that inference lowered the state’s burden.

No other reported case found deals with the recklessness permissive inference instruction from RCW 9A.36.045 (2) as applied in the drive-by shooting context. But authority is provided on the issue of permissive inferences by cases considering the propriety of the permissive inference of intent to commit a crime that flows from the act of unlawfully entering or remaining in a burglary prosecution under RCW 9A.52.040.

State v. Brunson, 128 Wn.2d 98, 905 P.2d 346 (1995). There, it was first determined that the burglary inference was a permissive inference as opposed to a mandatory presumption. This distinction is important because “[m]andatory presumptions create problems of constitutional scope because of their potential for circumventing the State's burden to prove all elements beyond a reasonable doubt.” 128 Wn.2d at 105, *citing Sandstrom v. Montana*, 442 U.S. 510, 523-24, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979). The burglary inference is permissive because it allows the jury to infer the element or reject that inference, because the instruction is “clearly discretionary” since the jury is free to accept or reject the inference, and because, in that case, the instruction did not solely prove the element to the exclusion of other evidence on the point. 128 Wn.2d at 106-07.

Next, the Supreme Court considered the strength of the inference; that is, whether the inference need be true beyond a reasonable doubt or more likely than not. *Id.* Here, the Supreme Court followed the United States Supreme Court, which held that a permissive inference passes constitutional challenge if “there is a ‘rational connection’ between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is ‘more likely than not to flow from’ the former.” 128 Wn.2d at 107 *quoting Ulster County Court v. Allen*, 442 U.S. 140, 166, 99 S.Ct.

2213, 60 L.Ed.2d 777 (1979). Thus our Supreme Court held that “[w]hen an inference is only part of the prosecution's proof supporting an element of the crime, due process requires the presumed fact to flow ‘more likely than not’ from proof of the basic fact.” *Id.* (alteration in original) (citation omitted).

The *Brunson* Court continued and addressed the issue of an inference reducing the prosecutions burden of proof. The significance of the phrase “when an inference is only part of the prosecution’s proof supporting an element” here becomes clear. Following *Ulster*, our Supreme Court held that “[w]hen an inference is the “sole and sufficient” proof of an element, however, the Supreme Court in *Ulster* suggested the reasonable doubt standard would apply.” 128 Wn.2d at 107 *citing Ulster County, supra*, 442 U.S. at 167. This because “[t]he state may not circumvent its burden of persuasion through exclusive use of a permissive inference.” *Id.* This rule requires factual analysis of the particular case. Having done that and found that the inference was not the sole and sufficient proof in that case, the Court announced its constitutional decision: “Because it was not the sole and sufficient proof of intent in these consolidated cases, the inference is constitutional if intent to commit a crime more likely than not flows from unlawful entry.” 128 Wn.2d at 112.

Applying this analysis to the present case raises two questions: (1) was the permissive inference of recklessness the sole and sufficient proof on the *mens rea* element? And, if not, (2) does the inferred fact, recklessness, more likely than not flow from the proven facts of unlawful discharge of a firearm from a motor vehicle. It should suffice to answer the first question by observing that this Court found sufficient evidence to affirm the jury's verdict of guilty on first degree assault. The sufficient proof there includes sufficient evidence that Cloud fired his gun at the victim with intent to inflict great bodily harm. On this point, this Court said:

Based on the evidence presented at trial, a rational trier of fact could have reasonably inferred that Cloud intended to inflict great bodily harm when he shot at Fortuna's truck because Cloud had just had a confrontation with Fortuna at a stop light, Fortuna was driving the truck, and Cloud shot at the truck. Further, a rational trier of fact could reasonably infer that Cloud was aiming at Fortuna because he was the driver of the truck and a bullet of the same caliber gun as the one found was stuck in the driver side door of the truck Fortuna was driving. Thus, because Cloud shot at the driver side of the truck, where he knew Fortuna was sitting, a rational trier of fact could have reasonably inferred that Cloud intended to inflict substantial bodily injury.

State v. Cloud, 189 Wn. App. 1048, §5. Thus, the evidence allowed the jury to reasonably infer Cloud's intent with regard to assault. Moreover, these inferences must include that Cloud fired the gun and the evidence is clear that the gunshot happened while Cloud was in a motor vehicle.

Thus, Cloud's recklessness rather permeated the case and the permissive inference instruction was not the sole and sufficient proof of the recklessness element. It is also notable that the jury was instructed that "[w]hen recklessness is required to establish an element of a crime, the element is also established if the person acts intentionally." CP 103 (instruction number 10). Given the jury's finding on first degree assault it is likely that the jury believed that all of Cloud's actions were intentional. Thus not only were there sufficient facts to prove recklessness other than by permissive inference, there was also a separate legal reason for the jury to find the *mens rea* element of drive-by shooting.

The permissive inference instruction, then, was not the sole and sufficient proof of Cloud's recklessness. Therefore the second question above is properly put, whether or not the fact to be inferred flows more likely than not from the proven facts. Little more than a healthy dose of common sense is necessary to determine that firing a gun from a moving car "disregards a substantial risk that death or serious physical injury to another person may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation." CP 103 (instruction number 10). And, significantly, the "same situation" in this case includes that the gun was discharged and the car was moving on city streets where numerous unnamed citizens live and drive their cars.

And, more particularly, this situation includes a person lobbing a bullet at a person driving a car with whom the shooter had just exchanged angry words. Under the facts of this case, there is a rational connection between the facts proven and the fact inferred from the proven facts. Under the facts of this case, the jury would clearly have found guilt even absent the giving of the inference instruction. There was not error.³

1. APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ARGUE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Since there was no error in the giving of the inference instruction, appellate counsel was not ineffective for failing to say there was error on direct appeal. Appellate counsel is charged with knowing the difference between a proper permissive inference and an unconstitutional mandatory presumption. Appellate counsel is charged with knowledge of this Court's decision in *State v. Washington, supra*. Appellate counsel is held to have knowledge of the decision in *Brunson, Sanstrom, and Ulster County*.

Knowing these things, and knowing that he had no meritorious argument that the instruction constituted an impermissible mandatory presumption, appellate counsel's omission of this non-issue was not deficient performance.

³ The state is not sure what to do with Cloud's attack on consciousness of guilt instruction found in this section of his brief. There was no consciousness of guilt instruction given in this case.

D. THE JURY INSTRUCTIONS ON DRIVE-BY SHOOTING WERE CORRECT AND COUNSEL WAS NOT INEFFECTIVE FOR NOT OBJECTING TO THEM.

Cloud next claims that the recklessness definition instruction when read in conjunction with the drive-by shooting elemental instruction lowered the state's burden of proof and trial counsel was ineffective for failing to object. In the same breath, Cloud asserts that trial counsel should have proposed other, unspecified, instructions in order to cure the defect. This claim is without merit because the instructions given were correct statements of the law, the instructions caused no prejudice to the presentation of Cloud's defense and Cloud did not argue accidental discharge, and for that reason and because the jury having found intentional assault, if error, the instructions are harmless.

First, Cloud asserts a WPIC comment as authority on this issue. Moreover, the particular comment has no case authority supporting it. Cloud is referring to the following:

By the phrasing of this statute, the adverb "recklessly" appears to modify only the discharge of the firearm. Under the statute, a separate element that must also be proven is the substantial risk of death or injury that was actually created by that "wrongful act." Thus, the risk of death or injury should not be incorporated into the definition of recklessness as it might be with differently phrased crimes.

See, Comment to WPIC 10.03. For this crime, recklessness should be defined as including a disregard of “the substantial risk that discharge of a firearm may occur.” Of course, the jury would also be instructed that an intentional or knowing discharge would establish this element.

WPIC 35.31, comment, 11 Washington Practice Series (4th Ed.). The commentator says ‘recklessness should be defined as including a substantial risk that discharge of a firearm may occur.’ Id. And so Cloud argues that sentence. But neither the commentators nor Cloud tells us why such should be the case. Moreover, the commentator’s precatory statement contains no indication that not following that advice would lead to a diminution of the state’s burden of proof.

The state respectfully disagrees with the WPIC commentator and Cloud in light of the facts of this case. RCW 9A.36.045 (1) provides that

A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

The statutory language quite clearly refers to the act of discharging a firearm, not disregard that the gun might be discharged. If the defendant’s gun went off, Cloud’s reading says that that occurrence shows disregard for the possibility that it would go off. Cloud’s reading isolates the phrase “recklessly discharges a firearm” from the rest of the statutory language, which is clearly concerned with the manner in which an actual discharge

occurred.

On the other hand, if a person is playing with a gun in a car and it accidentally discharges while the car is moving, the commentator's sentence makes sense. There, the question would be whether or not the playing with the gun constituted disregard for the likelihood the gun would be discharged. Thus, the suggested language would be appropriate where accident was asserted as a defense. *See State v. Washington*, 64 Wn. App. at 124, n. 2 (if accidental discharge is the defense theory, the defense should assert appropriate instructions). But it makes no sense in a case where there was no evidence or argument or jury instruction regarding accidental discharge. In the present case there is no indication that Cloud asserted accidental discharge as a defense. And, Cloud makes no argument here that the instructions given had impact on his defense theory or in any way foreclosed his arguments to the jury.

At bottom, argument about what the jury did or did not do with the recklessness instructions is academic. The jury found that Cloud intentionally fired at Mr. Fortuna under the first degree assault count. This finding, as the jury was properly instructed, subsumes the recklessness requirement of the drive-by shooting count. Thus the statute is satisfied by the finding that Cloud intentionally discharged a firearm from a motor vehicle. Cloud argues no error in the jury's finding of intent.

Given the intent finding, there is no prejudice to Cloud from the potential error in the recklessness definition instruction. Given the intent finding for precisely the same acts, a rewritten recklessness definition would not have changed the result. This lack of prejudice to Cloud forecloses a finding that the instructions given warrant reversal. It is shown that if counsel was deficient regarding this issue, that deficiency caused no prejudice thus foreclosing a finding of ineffective assistance of counsel.

Appellate counsel would have been aware both that Cloud did not assert accidental discharge as a defense and also that the jury found that Cloud behaved intentionally in doing precisely the same act as alleged in the drive-by shooting count. Knowing this, appellate counsel would be unlikely to assign error to those instructions.

VI. CONCLUSION

For the foregoing reasons, Cloud's petition should be denied.

DATED June 13, 2017.

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