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Feb 25, 2013
Court of Appeals
Division III
State of Washington

No. 29710-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Joel Condon,
Appellant.

Yakima County Superior Court Cause No. 09-1-00544-9
The Honorable Judge David A. Elofson

Appellant's Supplemental Brief

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SUPPLEMENTAL ISSUE

Taken from the court's letter of February 4, 2013:

[W]as the trial court's error in failing to instruct on [second degree intentional murder] obviated by the jury's finding of first degree premeditated murder, where the jury had been instructed and provided verdict forms under which it could reject the charge of first degree premeditated murder in favor of (unpremeditated) first degree felony murder?

SUPPLEMENTAL ARGUMENT

THE COURT’S FAILURE TO INSTRUCT ON SECOND-DEGREE INTENTIONAL MURDER REQUIRES REVERSAL IN THIS CASE.

In general, failure to instruct on an applicable inferior-degree offense requires reversal. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984); RCW 10.61.003; RCW 10.61.010. This is true even if the jury is instructed on alternative charges (such as premeditated first-degree murder and first-degree felony murder). *State v. Schaffer*, 135 Wn.2d 355, 358-359, 957 P.2d 214 (1998); *see also State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). Under such circumstances, the court must instruct on an inferior-degree offense of either alternative, even if the inferior-degree instruction does not apply to both alternatives. *Schaffer*, at 358-359.

The Supreme Court has never found harmless a trial court’s failure to give an applicable inferior degree offense: “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.” *Parker*, at 164. Divisions I and II have applied harmless error analysis to a lower court’s failure to instruct on inferior or lesser offenses, but only under certain limited circumstances not present in this case. *State v. Guilliot*, 106 Wn. App. 355, 22 P.3d 1266 (2001); *State v. Hansen*, 46 Wn. App. 292, 730 P.2d 706 (1986) *aff’d as modified*, 737 P.2d 670 (1987).

In *Hansen*, the defendant was charged with first-degree kidnapping and first-degree rape. He sought instructions on the inferior degree offenses of second-degree rape and second-degree kidnapping, as well as the lesser-included offense of unlawful imprisonment. *Hansen*, at 295-296, 298. The court instructed on second-degree rape and second-degree kidnapping, but refused to instruct on unlawful imprisonment. The defendant was convicted of first-degree rape and first-degree kidnapping. *Hansen*, at 296, 298.

On appeal, the defendant argued that the refusal to instruct on unlawful imprisonment required a new trial. *Id.* Division I concluded that the trial court should have instructed on unlawful imprisonment but found the error harmless. *Id.* Relying on cases from other jurisdictions, the court adopted a new rule, holding that the failure to instruct on unlawful imprisonment was harmless because the jury rejected the “intermediate” offense of second-degree kidnapping. *Id.*, at 297-298.

The court framed its decision thus: “In our view, the jury's verdict on the highest offense was an implicit rejection of all lesser included offenses that could have been based upon Hansen's diminished capacity defense.” *Id.*, at 298. In other words, (1) the jury was properly given the choice of an included offense, (2) it convicted on the charged offense instead of the included offense, and (3) the jury's rejection of the intermediate included offense necessarily amounted to a rejection of any offenses included within that intermediate offense. *Id.*

A similar situation arose in *Guilliot*. There, the defendant was charged with first-degree premeditated murder. The issue at trial was the defendant's mental state at the time of the shooting. The court instructed on the inferior offense of second-degree intentional murder, but refused to instruct on either first-degree manslaughter (which requires proof of recklessness) or second-degree manslaughter (which requires proof of criminal negligence.) *Guilliot*, at 358-359. The defendant was convicted of first-degree premeditated murder.

The Court of Appeals agreed that the trial court should have instructed on manslaughter. *Id.*, at 367-368. However, citing *Hansen*, the court found the error harmless:

If the jury believed that Guilliot was less culpable due to an accident or his hypoglycemia, logically it would have returned a verdict on the lesser offense of second degree murder. But the jury rejected this intermediate offense and elected to convict him on the highest offense. Thus, because the factual question posed by the omitted manslaughter instructions was necessarily resolved adversely to Guilliot by the jury's rejection of second degree murder, this error does not require reversal.

Id., at 369.

The Supreme Court has not adopted the reasoning espoused by the *Hansen* and *Guilliot* courts. Assuming harmless error analysis can be applied in the manner outlined by those two cases, the error in this case was not harmless.

In both *Hansen* and *Guilliot*, the court instructed on an "intermediate" offense between the charged crime and the included offense requested by the defendant. Each jury rejected the intermediate offense and thus necessarily

decided that the defendant's actions were more culpable than required for conviction of the intermediate crime. *Hansen*, at 297-298; *Guilliot*, at 369. This necessarily ruled out any additional offenses involving less culpability than the intermediate offense. As the *Hansen* court put it: "An error in failing to instruct on a lesser included offense does not require reversal if the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." *Hansen*, at 297.

Thus in *Hansen*, the jury's rejection of second-degree kidnapping necessarily meant rejection of unlawful imprisonment. In *Guilliot*, the jury's rejection of second-degree murder necessarily meant rejection of manslaughter.

Here, by contrast, the court did not instruct on any intermediate offense. Nor can it be said that the jury's failure to return a verdict on the alternative charge of first-degree felony murder necessarily meant rejection of second-degree intentional murder.¹ First-degree felony murder is not an intermediate offense between premeditated murder and intentional murder. The jury was not given the opportunity to reject a conviction for intentional murder; thus, the *Hansen/Guilliot* harmless error test does not apply.

The trial court should have instructed on second-degree murder. *Parker*, at 163-164; *Schaffer*, at 358-359. Its failure to do so was not harmless.

¹ The court's instructions and verdict forms relating to the alternative charges were likely erroneous. See CP 220, 236-237. Because the charges were alternatives, the jury should have been instructed to return verdicts on both charges.

Accordingly, his conviction must be reversed and the case remanded for a new trial.

CONCLUSION

Mr. Condon's conviction for aggravated first-degree murder must be reversed and the case remanded with instructions to allow the jury to consider the inferior degree offense of second-degree murder upon retrial.

Respectfully submitted on February 25, 2013.

BACKLUND AND MISTRY

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A handwritten signature in blue ink that reads "Manek R. Mistry". The signature is written in a cursive style with a large initial 'M'.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Supplemental Brief, postage prepaid, to:

Joel Condon, DOC #820953
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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:

Kevin Eilmes
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I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division III, 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 February 25, 2013.

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive style with a large initial "J".

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