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Supreme Court No. 88854-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington
Petitioner,
vs.

JOEL CONDON

Appellant/Respondent

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

**RESPONDENT'S SECOND
SUPPLEMENTAL BRIEF**

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ARGUMENT

THE TRIAL JUDGE SHOULD HAVE INSTRUCTED THE JURY ON SECOND-DEGREE INTENTIONAL MURDER AS A LESSER-INCLUDED OR INFERIOR-DEGREE OFFENSE OF AGGRAVATED PREMEDITATED FIRST-DEGREE MURDER.

A. Mr. Condon had the “unqualified” statutory right to instructions on second-degree murder.

The trial court infringed Mr. Condon’s “unqualified” statutory right to instructions on second-degree murder. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984). This is so whether the second-degree murder is characterized as a ‘lesser-included’ offense or an ‘inferior-degree’ offense. RCW 10.61.003; RCW 10.61.006.

The two categories are not mutually exclusive. An inferior-degree offense may qualify as a lesser-included offense, and a lesser-included offense may also be an inferior-degree offense.¹

In this case, second-degree intentional murder is both an inferior degree offense and a lesser-included offense of aggravated first-degree (premeditated) murder. As the Court of Appeals found, when the evidence is taken in Mr.

¹ Thus, for example, second-degree assault is an inferior degree offense of first-degree assault. *State v. Peterson*, 133 Wn.2d 885, 892, 948 P.2d 381 (1997). Some means of committing second-degree assault may also qualify as lesser-included offenses of first-degree assault. Compare RCW 9A.36.011(1)(c) (“with intent to inflict great bodily harm... [a]ssaults another and inflicts great bodily harm”), with RCW 9A.36.021(1)(a) (“[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm”). Other means of committing second-degree assault will never qualify as lesser-included offenses. Compare RCW 9A.36.011 generally, with RCW 9A.36.021(1)(b) (“[i]ntentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child”).

Condon's favor, there is at least "some" evidence suggesting that he acted with intent but without premeditation. *See* Respondent's Supplemental Brief, pp. 9-10; Court of Appeals Opinion, pp. 13-14.

Now, in its second supplemental brief, the state argues for the first time that Mr. Condon's charges should be analyzed exclusively as an inferior-degree offense, without considering that it is also a lesser-included offense. Petitioner's Second Supplemental Brief, pp. 1, 3-9. According to Petitioner, "this case involves an inferior-degree offense under RCW 10.61.003." Petitioner's Second Supplemental Brief, p. 4.²

Respondent cites no authority suggesting that an inferior-degree offense may not also be analyzed as a lesser-included offense. Petitioner's Second Supplemental Brief, pp. 1, 3-9. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007). Furthermore, even if Petitioner were correct, Mr. Condon would be entitled to instructions on second-degree intentional murder.

An inferior degree offense instruction "is properly administered when '(1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense;

² Hidden in this argument is the erroneous assumption that the tests differ in some way material to Mr. Condon's case.

and (3) there is evidence that the defendant committed only the inferior offense.”
State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting
Peterson, 133 Wn.2d 885 at 891 (internal citations omitted)). This test differs from
the *Workman*³ test “only with respect to the legal component.” *Fernandez-Medina*,
141 Wn.2d at 455.

Here, Petitioner concedes—as it must—that the legal prong is satisfied.
Petitioner’s Second Supplemental Brief, p. 7. Petitioner erroneously claims “there
is no evidence to support the inference that only second-degree murder was
committed to the exclusion of first-degree murder.” Petitioner’s Second
Supplemental Brief, p. 8. Petitioner’s error is based on two separate mistakes.

1. Mr. Condon was not required to show he committed second-degree intentional murder to the exclusion of felony murder, because aggravated premeditated first-degree murder and first-degree felony murder are different offenses; they are neither alternate means of committing one offense, nor greater and lesser charges.

Petitioner’s argument is premised on the erroneous assumption that intentional murder must be analyzed as an inferior-degree offense of first-degree *felony* murder. *See* Petitioner’s Second Supplemental Brief, p. 8. This is incorrect.

Aggravated premeditated murder and first-degree felony murder are not a single offense: “They are, rather, two different offenses.” *Matter of Pers. Restraint of Lord*, 123 Wn.2d 296, 304, 868 P.2d 835 (1994) (Lord I) *decision clarified sub*

³ *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

nom. In re Pers. Restraint Petition of Lord, 123 Wn.2d 737, 870 P.2d 964 (1994) (Lord II). They “are not different means of committing the same offense, nor are they greater and lesser offenses.” *Id.*

The separate rule urged for inferior degree offenses cannot apply here. The triad of charges at issue in Mr. Condon’s case does not comprise a greater offense and an inferior degree offense. The statutes at issue do not “proscribe but one offense,” as required for analysis of an inferior degree offense. *Fernandez-Medina*, 141 Wn.2d at 454. Aggravated premeditated murder and first-degree felony murder are “different offenses.” *Lord I*, 123 Wn.2d at 304. Petitioner’s attempt to bring first-degree felony murder into the mix fails the first step of the analysis.

Fernandez-Medina, 141 Wn.2d at 454.

Because they are two different offenses, aggravated premeditated murder and first-degree felony murder will necessarily encompass different lesser/inferior offenses. An accused person should have the right to instruction on a lesser charge without showing that s/he committed the lesser charge to the exclusion of *all* alternative charges filed. *See State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).

The state has provided no authority holding that an inferior degree offense must meet *Workman’s* factual prong for every alternative crime charged. This lack of authority is consistent with *Berlin* and its progeny. *Berlin* rejected the *Lucky*

rule,⁴ which Petitioner now seeks to revive when different crimes are charged in the alternative.

Here, the trial court should have instructed on second-degree murder. The record contains “affirmative evidence suggesting that Mr. Condon acted intentionally, but impulsively,” permitting a rational jury to find him guilty of second-degree murder but acquit him of aggravated first-degree murder. Court of Appeals Opinion, pp. 13-14. He should not be required to also prove that he committed intentional murder to the exclusion of the “different offense” of first-degree felony murder. *Lord I*, 123 Wn.2d at 304.

The Court of Appeals decision reversing Mr. Condon’s conviction must be affirmed, and the case remanded for a new trial.

2. The record contains affirmative evidence establishing intentional murder to the exclusion of aggravated premeditated murder.

Petitioner’s second mistake involves the state’s interpretation of the record. Petitioner’s Second Supplemental Brief, p. 8. Petitioner erroneously contends that Mr. Condon “did not present a defense theory” in support of second-degree murder. Petitioner’s Second Supplemental Brief, p. 8. The error stems from Petitioner’s myopic focus on Mr. Condon’s argument that “he was not there.” Petitioner’s Second Supplemental Brief, p. 8.

⁴ *State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996).

Mr. Condon had the right to present inconsistent or even contradictory arguments to the jury. *Fernandez-Medina*, 141 Wn.2d at 455-462. In making the decision on a requested instruction, the trial judge “must consider all of the evidence that is presented at trial...” *Id.*, at 456. In this case, the record contains eyewitness testimony and forensic evidence suggesting that Mr. Condon acted intentionally but impulsively when he shot and killed Ramirez. Court of Appeals Opinion, pp. 13-14; Respondent’s Supplemental Brief, pp. 9-10.

The instruction should have been given. *Id.* Mr. Condon’s conviction for aggravated premeditated murder must be reversed, and the case remanded for a new trial. *Id.*

B. Petitioner’s argument does not impact Mr. Condon’s constitutional right to instruction on a lesser included or inferior degree offense.

Petitioner’s argument addresses only the statutory right to instruction on a lesser or inferior degree offense. Petitioner’s Second Supplemental Brief, pp. 4-9. It does not address Mr. Condon’s constitutional right to such instruction. *See* Respondent’s Supplemental Brief, pp. 13-18. Nor is there any reason to suppose the constitutional claim would rest on whether the characterization of the lesser charge as a lesser-included offense or as an inferior-degree offense. Even if Petitioner’s statutory argument prevails, Mr. Condon’s conviction must be reversed

for violation of his constitutional right to instruction on a lesser-included or inferior-degree offense. Respondent's Supplemental Brief, pp. 13-18.⁵

CONCLUSION

Whether charged in the alternative or in separate counts, aggravated premeditated first-degree murder and first-degree felony murder are different offenses. They are not greater and lesser crimes; nor are they alternative means of committing the same crime. A lesser-included or inferior-degree offense of one of these two crimes need not also be a lesser-included or inferior-degree offense of the other.

Mr. Condon asked the court to instruct jurors on second-degree intentional murder as a lesser-included or inferior-degree offense of aggravated premeditated murder. He was therefore required to present some evidence that he committed intentional murder to the exclusion of premeditated murder. He was not also required to show that he committed intentional murder to the exclusion of felony murder.

⁵ In its Statement of Additional Authority, Petitioner asserted that due process challenges to criminal procedures are governed by the *Medina* test and not the *Mathews* test. Statement of Additional Authorities, p. 1 (citing *State v. Hurst*, 173 Wn.2d 597, 269 P.3d 1023 (2012)). Like the other Washington cases addressing the appropriate framework for due process challenges to criminal proceedings, the *Hurst* court did not have the benefit of briefing addressing the federalism concerns underlying the *Medina* rationale for adopting a less intrusive test. See Respondent's Supplemental Brief, pp. 13-18. Nor did the *Hurst* court have before it a *Gunwall* analysis. Mr. Condon's briefing provides the necessary argument to support application of the *Mathews* balancing test to Washington criminal procedural due process claims.

The Supreme Court should affirm the Court of Appeals decision reversing Mr. Condon's conviction for aggravated premeditated first-degree murder. The case must be remanded for a new trial. On retrial, Mr. Condon is entitled to instructions on second-degree intentional murder if some evidence shows that he committed that crime to the exclusion of premeditated murder.

Respectfully submitted on December 9, 2013.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of the Second Supplemental Brief, postage pre-paid, to:

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With the permission of the recipient(s), I emailed an electronic version of this brief to:

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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 December 9, 2013.



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Attached is the Respondent's Second Supplemental Brief.

Thank you.

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