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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOEL CONDON,

Respondent.

Filed
MAR 19 2014
Clerk of Supreme Court

APPEAL FROM THE SUPERIOR COURT OF YAKIMA COUNTY

THE HONORABLE DAVID A. ELOFSON

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

TABLE OF CONTENTS

Page

A. ISSUE PRESENTED 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 3

D. CONCLUSION 9

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Berlin, 133 Wn.2d 541,
947 P.2d 700 (1997) 1, 3, 4, 5, 7, 8

State v. Condon, 174 Wn. App. 1041,
2013 WL 1628247 (2013) 2, 3

State v. Fernandez-Medina, 141 Wn.2d 448,
6 P.3d 1150 (2000) 7, 8

State v. Fowler, 114 Wn.2d 59,
785 P.2d 808 (1990) 5

State v. Lucky, 128 Wn.2d 727,
912 P.2d 483 (1996) 5

State v. Schaffer, 135 Wn.2d 355,
957 P.2d 214 (1998) 1, 3, 4, 6, 7, 8

State v. Workman, 90 Wn.2d 443,
584 P.2d 382 (1978) 1, 2, 4, 5, 7, 8

Statutes

Washington State:

RCW 10.61.003 ..... 4, 7

RCW 10.61.006 ..... 4, 7

A. ISSUE PRESENTED

1. Whether this Court's decisions in State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997) and State v. Schaffer, 135 Wn.2d 355, 957 P.2d 214 (1998), which pertain to the legal prong of the Workman[1] test for necessarily-included offenses dictate the outcome of this case, where the issue relates to the factual prong of the test for inferior-degree offenses.

B. STATEMENT OF THE CASE

The State charged Condon with one count of first-degree murder under two alternatives: aggravated premeditated murder and felony murder with a first-degree burglary predicate. CP 302-03. The State also charged Condon with one count of first-degree burglary and one count of second-degree unlawful possession of a firearm. CP 302-03.

Condon requested a jury instruction on second-degree intentional murder as a "lesser-included offense of the first-degree premeditated murder." RP 1050-51, 1053. The trial court declined to instruct the jury on second-degree murder for two reasons: first, because there was no evidence that raised an inference that *only* second-degree murder was

[1] State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978).

committed,[2] and second, because second-degree murder was not a lesser-included offense of both the principal charge of premeditated murder and the alternative charge of felony murder.[3] RP 1083-86. The court treated the felony murder alternative as a lesser-included offense of premeditated murder, however, instructing the jury to consider the felony murder charge only if it found Condon not guilty of first-degree premeditated murder or was unable to reach a verdict on that offense. CP 220. There was no objection to this procedure.

The jury found Condon guilty of first-degree premeditated murder, first-degree burglary, and second-degree unlawful possession of a firearm. CP 305-07. The jury also found the aggravating circumstance that Condon had committed the murder in the course of, in furtherance of, or in immediate flight from the crime of first-degree burglary, and that he committed the murder and burglary while armed with a firearm. CP 308-10. As instructed, the jury did not render a verdict on the

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[2] Regarding the factual prong of the Workman test for instructing the jury on lesser offenses, the trial court explained, "But ... the factual prong requires that there be ... facts that raise an inference that only second degree murder was committed. And I don't see that as being – surviving the facts in this case." RP 1084-86.

[3] As the Court of Appeals noted, the trial court's reasoning with respect to whether second-degree murder must be a lesser-included offense of both versions of first degree murder was erroneous. State v. Condon, 174 Wn. App. 1041, 2013 WL 1628247, *5 n.1 (2013). The State offers the correct analysis below.

alternative offense of felony murder. The trial court sentenced Condon to life without possibility of release. CP 321.

The Court of Appeals, Division Three, reversed Condon's conviction for aggravated premeditated murder, concluding that the trial court should have instructed the jury on the lesser-degree offense of murder in the second degree and that the failure to do so was not harmless. State v. Condon, 174 Wn. App. 1041, 2013 WL 1628247 at *1, *5-*8 (2013). This Court granted review on that issue, as well as two of the issues raised in Condon's cross-petition.

C. ARGUMENT

In its Supplemental Brief to this Court, the State has argued that the trial court properly refused to instruct the jury on second-degree murder because there was no factual basis for an inference that only that crime was committed, to the exclusion of first-degree murder. Supplemental Brief of Petitioner at 7-14. At oral argument, Condon's counsel argued that there was sufficient factual support with respect to premeditated murder and cited Berlin and Schaffer for the proposition that whether a lesser offense instruction should be given must be independently analyzed with respect to each charged offense. Some members of this Court also suggested that Berlin and Schaffer are

pertinent to the analysis. But Berlin and Schaffer address whether manslaughter is a necessarily-included offense of murder under RCW 10.61.006, whereas this case involves an inferior-degree offense under RCW 10.61.003. Because neither Berlin nor Schaffer addresses the particular question presented here, they do not control the outcome.

In Berlin, the issue was whether jury instructions for manslaughter should be given under RCW 10.61.006[4] when the defendant is charged with both felony murder and intentional or premeditated murder. 133 Wn.2d at 543. The Court explained that it uses the two-part Workman test to determine whether an offense is necessarily included within the charged offense:

> First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed. ... We refer to the first prong of the test as the "legal prong" and the second prong as the "factual prong." This has been ... and will continue to be the test for lesser included offenses.

133 Wn.2d at 545-46 (internal citation omitted). The Court further explained the factual prong by stating:

> It is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes the defendant's

[4] RCW 10.61.006 provides: "In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information."

> theory on the lesser included offense before an instruction will be given.

133 Wn.2d at 546 (quoting State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)). The Court expressly overruled State v. Lucky, 128 Wn.2d 727, 912 P.2d 483 (1996), which held that the Workman rule had been replaced by one that precluded lesser-included offense instructions whenever there are alternative means of committing the greater crime unless the alternative means overlap. Berlin, 133 Wn.2d at 546-47 (quoting Lucky, 128 Wn.2d at 735). The Berlin Court clarified that an offense is "necessarily included" under the legal prong of the Workman test when the elements of the lesser are necessary elements of the offense *charged*, even if the lesser offense's elements would not be necessarily included in the greater offense if committed by alternative means. 133 Wn.2d at 547-48 (emphasis in original).

The Berlin Court went on to determine whether first- and second-degree manslaughter are necessarily-included offenses of second-degree felony murder and second-degree intentional murder. Focusing on the legal prong of the Workman test, the Court held that manslaughter is not necessarily included in the offense of felony murder, but satisfies the test with respect to second-degree intentional murder. 133 Wn.2d at 550-51.

Accordingly, manslaughter instructions "should be given to a jury when the facts support such an instruction." Id. at 551.

Similarly, in Schaffer, the defendant was charged with premeditated murder and second-degree felony murder. 135 Wn.2d at 357. The trial court gave Schaffer's proposed self-defense instruction, but refused to instruct the jury on manslaughter. Id. The jury rejected the premeditated murder charge, but found Schaffer guilty of felony murder. Id. The issue on appeal was whether the trial court should have instructed the jury on manslaughter as a lesser-included offense of premeditated murder. Id. The State conceded that Schaffer was entitled to an instruction on the lesser crime if sufficient evidence supported it. Id. at 358. The Court held that the evidence that Schaffer believed that he was in imminent danger but used more force than necessary to repel the attack was sufficient to raise the inference that Schaffer committed only manslaughter, so the jury should have been instructed on that offense. Id. Since Schaffer had been acquitted of premeditated murder, he could not be retried on the offense for which manslaughter was included. Id. Without meaningful analysis or citation to authority, the Court concluded that, "if the State elects to retry him on the felony murder charge, and he again presents evidence supporting an instruction on manslaughter, the jury should be instructed on that offense as well." Id. at 358-59.

It makes sense that Berlin and Schaffer analyzed the alternative charges separately when evaluating the legal prong of the Workman test. The elements of the alternative greater offenses were different, so each offense must be evaluated by itself to determine whether manslaughter is *necessarily included* under RCW 10.61.006. But in this case, Workman's legal prong is not at issue. The question here is whether the jury should have been instructed that second-degree intentional murder is an *inferior-degree offense* of first-degree murder under RCW 10.61.003.[5] In the context of inferior-degree offenses, the legal prong of Workman is automatically satisfied. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Only the factual prong remains, and that test is the same for both necessarily-included offenses and inferior-degree offenses: "Specifically, ... the evidence must raise an inference that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense." Id.

In Berlin, there was "ample evidence" that Berlin had been drinking to the point of impairing his ability to form intent to kill, which supported his defense that the fatal shooting was accidental. Id. at 551-52. In Schaffer, there was sufficient evidence to permit the jury to find that

[5] RCW 10.61.003 provides: "Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense."

Schaffer believed himself in imminent danger, but recklessly or negligently used excessive force to defend himself. 135 Wn.2d at 358. Thus, in both cases, the evidence "affirmatively established" the defense theory that only manslaughter was committed, satisfying Workman's factual prong and justifying an instruction on the lesser-included offense of manslaughter. 133 Wn.2d at 552; 135 Wn.2d at 358.

Here, there is no evidence to support the inference that only second-degree murder was committed to the exclusion of first-degree murder. It is undisputed that the murder was committed in the course of a first-degree burglary, which is the definition of first-degree felony murder as charged in this case.[6] Further, unlike Berlin and Schaffer, Condon did not present a defense theory with which the inferior-degree offense was consistent. He did not argue that the State failed to prove premeditation. He argued that he was not there. Since there is no evidence that affirmatively supports a defense theory consistent with second-degree murder, and no evidence from which the jury could infer that only that crime occurred, Condon was not entitled to an instruction on that inferior-degree offense. Fernandez-Medina, 141 Wn.2d at 455. Nothing in Berlin or Schaffer is to the contrary, and neither case is undermined or overruled

[6] Indeed, Mr. Condon's counsel conceded at oral argument that the jury could not rationally find Condon not guilty of first-degree felony murder.

by holding that the trial court properly refused to instruct the jury on second-degree intentional murder in this case.

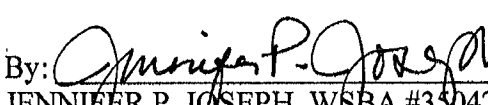
D. CONCLUSION

For the reasons expressed above and in the State's Supplemental Brief of Petitioner, the State respectfully urges this Court to reverse the Court of Appeals' decision that Condon was entitled to an instruction on second-degree murder and that he was prejudiced by the trial court's refusal to instruct the jury on that offense. This Court should affirm the Court of Appeals' decision that sufficient evidence of premeditation supports his conviction for first-degree murder, and affirm Condon's conviction for aggravated first-degree murder.

DATED this 5th day of March, 2014.

Respectfully submitted,

JAMES HAGARTY
Yakima County Prosecuting Attorney

By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the respondent, Manek Mistry and Jodi Backlund (backlundmistry@gmail.com), containing a copy of the Second Supplemental Brief of Petitioner, in STATE V.JOEL CONDON, Cause No. 88854-0, in the Supreme Court, for the State of Washington.

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

L Brame
Name

3/5/14
Date

Done in Seattle, Washington