

04508-4

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No. 64568-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD PETERS,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. JURY INSTRUCTION 12 LOWERED THE STATE'S BURDEN OF PROOF, REQUIRING REVERSAL OF THE FIRST-DEGREE MANSLAUGHTER CONVICTION.

In his opening brief, Mr. Peters argued that his conviction for first-degree manslaughter must be reversed because the trial court gave the wrong definition of "reckless" in its instructions to the jury.

The proper instruction for manslaughter cases provides:

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

WPIC 10.03 and Comment; State v. Gamble, 154 Wn.2d 457, 467, 114 P.3d 646 (2005). The State proposed the above instruction and Mr. Peters agreed with it, but the trial court instead instructed the jury:

A person is reckless or acts recklessly when he 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.

CP 50. In refusing to instruct the jury that it must find Mr. Peters disregarded a substantial risk of death, the court improperly

lowered the State's burden of proof. Gamble, 154 Wn.2d at 468; WPIC 10.03 and Comment.

In response, the State first argues, “[t]he instruction given is set out in WPIC 10.03.” Br. of Resp’t at 31. On the contrary, WPIC 10.03 makes clear that the defendant’s disregard of a substantial risk of death is required to support a manslaughter conviction, and the disregard of a substantial risk of some other “wrongful act” is insufficient:

WPIC 10.03 Recklessness—Definition

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.

...

NOTE ON USE

Use bracketed material as applicable. For a discussion of the first paragraph's bracketed alternatives relating to a wrongful act, see the Comment below.

...

COMMENT

...

For manslaughter, the definition of recklessness is more particularized than is the general statutory requirement of a substantial risk that a wrongful act may occur. The Supreme Court has held in a manslaughter case that the definition of recklessness requires proof of disregarding a substantial risk that a death, rather than simply a wrongful act, may occur. State v. Gamble, 154 Wn.2d 457, 467–68, 114 P.3d 646 (2005) (in the context of analyzing whether first

degree manslaughter is a lesser included offense of second degree felony murder with assault as the predicate felony). Accordingly, **for a manslaughter case, the instruction above should be drafted using the word “death” rather than “wrongful act.”** ...

WPIC 10.03 (emphasis added).

The State then argues that the language the trial court used was approved in State v. Smith, 31 Wn. App. 226, 229, 640 P.2d 25 (1982). Br. of Resp't at 31. But Smith is almost three decades old, and simply followed the WPIC that existed at that time. The WPIC has been amended since Gamble, and the Comment characterizes Smith as a “pre-Gamble prosecution” limited to its facts. Comment to WPIC 10.03. Furthermore, the defendant in Smith did not argue that the instruction should have required a finding that he disregarded a substantial risk of death. Rather, he argued that the “reckless” and “negligent” instructions were confusing because they were so similar. Smith, 31 Wn. App. at 229. Mr. Peters, on the other hand, argues that the “reckless” instruction given was improper because it did not require a finding that he disregarded a substantial risk of death. Under the current WPIC and current caselaw, Mr. Peters is correct. WPIC 10.03; Gamble, 154 Wn.2d at 467.

The State then claims that the current WPIC is in “conflict” with the statute, and that the language of the statute must be used instead. Br. of Resp’t at 32-34. The State is wrong, because there is no conflict between the WPIC and the statute. The statute provides the generic definition of “reckless” for all crimes. RCW 9A.08.010(1)(c). Homicide is simply the specific “wrongful act” whose substantial risk is disregarded in a manslaughter case. WPIC 10.03 and Comment; Gamble, 154 Wn.2d at 467.

Plenty of statutes have corresponding WPIC’s with brackets that must be filled in with language specific to the crime at issue rather than generic statutory language. For example, the statutory definition of “mental incapacity” describes a “condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse.” RCW 9A.44.010(4) (emphasis added). But the WPIC quite properly includes two options in brackets: “sexual intercourse” or “contact.” WPIC 45.05. “Contact” must be used where the crime at issue is indecent liberties, because that is the specific act that occurs in that circumstance. WPIC 45.05 Note on Use.

Finally, the State argues that decisions issued by Divisions Two and Three of this Court undercut the Supreme Court’s

statement in Gamble that the State must prove the defendant knew of and disregarded a substantial risk that a homicide would occur. Br. of Resp't at 35-36. But as the State acknowledges, the issue Mr. Peters raises was not before the court in any of the cited cases. In Hunter, Division Two reversed a murder conviction for failure to provide instructions on the lesser-included offenses of first- and second-degree manslaughter. State v. Hunter, 152 Wn. App. 30, 47, 216 P.3d 421 (2009). In describing the procedural history of the case, the court quoted the instructions the defendant had proposed, but whether that language was proper was not before the court. Id. at 45-46.

Similarly in Grier, Division Two reversed a murder conviction because of ineffective assistance of counsel where the defense attorney withdrew his request to instruct the jury on the lesser-included manslaughter offenses. State v. Grier, 150 Wn. App. 619, 208 P.3d 1221 (2009). The State is correct that the court in that case cited the generic definition for recklessness, but the definition was immaterial to the outcome of that case. Id. at 637.

Finally, neither Williams nor Hayward even involved the crime of manslaughter, let alone the jury instruction for recklessness. Br. of Resp't at 35-36 (citing State v. Williams, 156

Wn. App. 482, 234 P.3d 1174 (2010); State v. Hayward, 152 Wn. App. 632, 645, 217 P.3d 354 (2009)). In Williams, the court held convictions for assault and rape violated double jeopardy. Williams, 156 Wn. App. at 495. In describing the facts of the case, the Court noted that the trial court had defined recklessness as “an act that disregards a substantial risk that a wrongful act may occur.” Id. at 494. The Court of Appeals did not comment on the propriety of this instruction, and in any event, this instruction was given for an assault charge, not a manslaughter charge. Id.

Hayward was an assault case in which the State was required to prove the defendant intentionally assaulted the victim and recklessly inflicted substantial bodily harm. Hayward, 152 Wn. App. at 643. The Court held that the final sentence of the jury instruction defining “reckless” – “Recklessness also is established if a person acts intentionally” – created an impermissible mandatory presumption. Id. at 643-45. The other portions of the “reckless” instruction were not at issue. Furthermore, the Court cited with approval the 2008 amendments to WPIC 10.03, and held that the 2008 language should have been used instead of the previous version. Id. at 645. Similarly here, the 2008 amendments to WPIC

10.03 should have been used, but the trial court instead insisted on using the old instruction.

In contrast to the cases the State cites, the definition of the reckless element for first-degree manslaughter was squarely before the Court in Gamble. There, the issue was whether first-degree manslaughter is a lesser included offense of second-degree felony murder predicated on assault. Gamble, 154 Wn.2d at 462. In order to answer the question, the Court had to determine the elements of both crimes. Id. at 463. The Court concluded that manslaughter is not a lesser-included offense of felony murder because the definition of “reckless” for manslaughter is different from the definition of “reckless” for assault. Id. at 467-68.

[T]o prove manslaughter the State must show [the defendant] knew of and disregarded a substantial risk that a homicide may occur. On the contrary, to achieve a felony murder conviction here, the State was required to prove only that Gamble acted intentionally and disregarded a substantial risk that substantial bodily harm may occur. Significantly, the risk contemplated per the assault statute is of “substantial bodily harm,” not a homicide as required by the manslaughter statute. As such, first degree manslaughter requires proof of an element that does not exist in the second degree felony murder charge.

Id. (citing RCW 9A.08.010(1)(c)). The 2008 amendments to WPIC 10.03 properly incorporated Gamble, and the parties in this case

properly proposed an instruction consistent with the WPIC and Gamble. The trial court erred in rejecting the jointly proposed instruction and instead providing a definition of reckless that described a mere “wrongful act” rather than death.

The State’s contention that the error was harmless beyond a reasonable doubt is without merit. Br. of Resp’t at 36-38. If the instruction had been correct, the jury may well have convicted Mr. Peters of second-degree manslaughter rather than first-degree manslaughter. The instruction given, however, required the jury to convict if it found Mr. Peters disregarded a substantial risk of injury or some other wrongful act rather than a substantial risk of death. The State cannot prove beyond a reasonable doubt that the jury would have convicted Mr. Peters of first-degree manslaughter had it been required to find he knew of and ignored a substantial risk of homicide.

The State misrepresents the record when stating that Mr. Peters “knew the pistol was loaded.” Br. of Resp’t at 37. Mr. Peters knew the pistol had a magazine in it, and he removed the magazine. Ex. 57 at 5, 7-8. But he did not know there was a round in the chamber. Ex. 57 at 5, 7-8.

Nor was any evidence presented that Mr. Peters knew the pistol was pointed at Stormy when he was removing the magazine in preparation for cleaning the gun. Indeed, the jury rejected the State's theory that Mr. Peters intentionally pointed the gun at his daughter. Rather, as Mr. Peters told the detective, "I took the magazine out and it went off. It just, it shot." Ex. 57 at 3.

Finally, the State exacerbated the error by repeatedly arguing to the jury that it only had to find Mr. Peters disregarded a risk "that something bad could happen." 11/23/09 RP 21. Given the evidence presented and the State's argument to the jury, the State cannot prove beyond a reasonable doubt that a properly instructed jury would have convicted Mr. Peters of first-degree manslaughter rather than second-degree manslaughter. The conviction should be reversed, and the case remanded for a new trial.

2. MR. PETERS WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY AGREED TO ALLOW THE COURT TO AMEND THE "RECKLESS" INSTRUCTION TO LOWER THE STATE'S BURDEN OF PROOF.

As argued in Mr. Peters' opening brief, Mr. Peters was denied the effective assistance of counsel when his attorney agreed to the court's modification of the instruction on

recklessness. “Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Defense counsel failed to research the relevant law and was unaware of Gamble and the 2008 amendments to WPIC 10.03. As in Kylo, defense counsel’s failure to research the relevant law resulted in a jury instruction that lowered the State’s burden of proof. As in Kylo, this performance was deficient. Id. at 869 (There is no legitimate strategic or tactical reason for allowing an instruction that incorrectly states the law and lowers the State’s burden of proof).

The State posits it is possible that trial counsel did research the relevant law, and simply rejected WPIC 10.03’s “suggestion” that the definition of reckless “may” use the word “death” or “homicide” in lieu of “wrongful act.” Br. of Resp’t at 39. The State is wrong. The Comment to WPIC 10.03 states that the instruction “should be drafted using the word ‘death’ rather than ‘wrongful act,’” not that it “may” be drafted that way. It further states that “the definition of recklessness requires proof of disregarding a substantial risk that a death, rather than simply a wrongful act, may occur.” Comment to WPIC 10.03. The State’s theory that this is a

mere “suggestion” that counsel researched and rejected is disingenuous.

Counsel’s deficient performance prejudiced Mr. Peters, because had the correct instruction been given, it is reasonably probable that the jury would have convicted Mr. Peters of the lesser offense of second-degree manslaughter. The State cites the wrong prejudice standard when stating that “the burden is showing that had the objection been made, the court would have given a different instruction.” Br. of Resp’t at 40. The question is whether “there is a reasonable probability that [Mr. Peters’] trial would have turned out differently had counsel requested, and had the trial court given” the proper instructions. Grier, 150 Wn. App. at 645. As explained in the preceding section, the answer is yes. Accordingly, Mr. Peters’ conviction should be reversed, and the case remanded for a new trial.

3. THE TRIAL COURT VIOLATED THE DUE PROCESS CLAUSE AND THE RULES OF EVIDENCE BY ADMITTING EVIDENCE THAT MR. PETERS OWNED AND USED MANY GUNS THAT WERE NOT INVOLVED IN THE ACCIDENT IN QUESTION.

Over Mr. Peters’ repeated objections, the trial court admitted a great deal of testimony regarding Mr. Peters’ general gun

ownership and use, not just what happened on the night in question or with the gun in question. Because gun ownership is a constitutional right, the admission of this evidence violated Mr. Peters' right to due process. Furthermore, contrary to the trial court's rulings, the evidence was not relevant to show knowledge of risk because it did not involve the gun that killed Stormy, and nobody had ever been killed or even harmed with the other guns.

Furthermore, even if it were relevant, it would be substantially more prejudicial than probative, in violation of ER 403. Finally, the State used the evidence for the impermissible purpose of proving action in conformity therewith – arguing that because Mr. Peters was reckless with other guns on other occasions he must have been reckless on this occasion. The use of the evidence to show a propensity for recklessness violated ER 404 (b).

For each of these independent reasons, the trial court erred in admitting the evidence. The evidence was highly prejudicial, requiring reversal of the conviction and remand for a new trial. See Brief of Appellant at 24-35; State v. Rupe, 101 Wn.2d 664,

707, 683 P.2d 571 (1984); State v. Freeburg, 105 Wn. App. 492, 495-96, 20 P.3d 984 (2001); ER 402, 403, 404(b).¹

The State attempts to argue that this issue was not preserved, yet in the next sentence acknowledges that Mr. Peters moved to exclude “all reference to all guns (other than gun involved in shooting), ammunition, holsters, gun manuals and magazines removed from Peters’ home.” Br. of Resp’t at 20 (citing CP 93). Mr. Peters reiterated at the hearing on the motion that “the only gun relevant in this case is the gun that was used in the shooting. The rest of the guns are not relevant to the case and ... there is potential prejudice in admitting the fact that he has a lot of guns.” 1 RP 169. The issues were clearly preserved.

The State contends that “evidence that [Mr. Peters] owned several guns, had a gun safe, and had trigger locks for those guns was relevant to show that he was very familiar with firearms, and knew that those guns posed a risk.” Br. of Resp’t at 20. But the question is not whether Mr. Peters knew that guns pose a risk. Everybody knows that guns pose a risk. The question was whether Mr. Peters knew that preparing his .45 for cleaning while his

¹ The State is correct that the Supreme Court rejected this Court’s ruling that the admission of the defendant’s gun ownership was error in State v. Hancock, 109 Wn.2d 760, 784 P.2d 611 (1988). Mr. Peters made a mistake in failing to check the subsequent proceedings in that case.

children were in the room would create a substantial risk of death.

The fact that he owned other guns has no bearing on this question.

The State then brushes aside its ER 404(b) violation by stating:

[Mr. Peters'] leaving unsecured, loaded firearms lying around his house when children were present and playing, and having his young children, without supervision, fetch loaded firearms that were stored out of the sight of any adult, showed [his] state of mind in disregarding the risks he knew loaded firearms posed.

Br. of Resp't at 21. This paragraph is simply a covert repetition of what the State improperly argued in the trial court: "because of how Mr. Peters handled guns, he was constantly sloppy with guns, ... this is not an isolated act." 1 RP 175. "[T]he showing of pattern tells the jury this is not an isolated event." 1 RP 210. In other words, the State argues the fact that Mr. Peters had guns lying around shows a propensity for recklessness. This is forbidden under ER 404(b).

As explained in Mr. Peters' opening brief, the other guns and incidents could not have shown knowledge of a substantial risk of death, because having "guns all over" the house had never even caused an injury previously, let alone a death. And the pumpkin shoot incident did not involve the same gun, did not result in harm

to anyone, and was not an event that children attended. The only reason the State offered these incidents was so the jury would draw an adverse inference from Mr. Peters' exercise of his constitutional rights and conclude he had a propensity for recklessness. This violated both ER 404 (b) and due process.²

Finally, the admission of other guns and incidents was substantially more prejudicial than probative, in violation of ER 403. This Court has recognized that “[e]vidence of weapons is highly prejudicial,” Freeburg, 105 Wn. App. at 501, and our supreme court has found, “[m]any individuals view guns with great abhorrence and fear.” Rupe, 101 Wn.2d at 708. Yet the State claims the evidence of guns lying all over Mr. Peters' house “was not likely to stimulate an emotional response.” Br. of Resp't at 27. The State does not explain why the general principles espoused in Rupe and Freeburg would not apply to this case. The prejudicial effect of this evidence cannot reasonably be disputed, as testimony about Mr. Peters' gun collection took up much of the trial, and the prosecutor emphasized

² The State wrongly asserts that Mr. Peters “did not object on the grounds it was offered to show propensity.” Br. of Resp't at 28. To the contrary, Mr. Peters stated, “The defense requests that all of this testimony be excluded as it is highly prejudicial and not relevant to the current charges. **It should also be excluded pursuant to ER 404(b).** CP 96 (emphasis added).”

the possession of other guns and the prior acts involving them in his closing argument. 11/23/09 RP 21-22, 35.

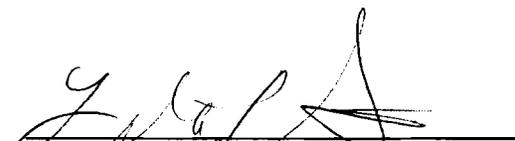
In sum, the admission of extensive evidence regarding Mr. Peters' gun collection and prior incidents involving guns was improper and prejudicial. For this reason, too, this Court should reverse Mr. Peters' conviction and remand for a new trial.

B. CONCLUSION

For the reasons above and in the opening brief, this Court should reverse Mr. Peters' conviction and remand his case for a new trial.

DATED this 12th day of November, 2010.

Respectfully submitted,


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DIVISION ONE**

STATE OF WASHINGTON,)

Respondent,)

NO. 64568-4-I

RICHARD PETERS,)

Appellant.)

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