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NO. 68030-7-I

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

REC'D
AUG 08 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

FELIX SITTHIVONG,

Appellant.

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

The Honorable Jan Rietschel, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to instruct the jury on first degree manslaughter as a lesser included offense of first degree murder by extreme indifference to human life.

2. Defense counsel's failure to seek appropriate self-defense instructions to a charge of first degree assault deprived Appellant of his constitutional right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. First degree manslaughter is, as a matter of law, a lesser included offense of first degree murder by extreme indifference. Did the trial court err in refusing to give a first degree manslaughter instruction where there was a factual basis for the jury to conclude Appellant only committed the lesser offense?

2. Did trial counsel deprive the appellant of effective representation by failing to request appropriate self-defense instructions for the first degree assault charge and instead agreeing to use the more onerous justifiable homicide standard?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged appellant Felix Sitthivong with premeditated first degree murder, first degree murder by extreme indifference, two counts of attempted first degree murder, first degree assault and unlawful possession of a firearm. But for the possession charge, each crime included a firearm sentencing enhancement allegation. CP 20-23; RCW 9A.28.020; RCW 9A.32.030(1)(a) & (b); RCW 9A.36.011(1)(a); RCW 9.41.040(2)(a)(i); RCW 9.94A.533(3). The charges arose out of a shooting incident outside a bar in the Belltown neighborhood of Seattle during the early morning hours of Sunday, June 6, 2010. CP 2-8.

A jury convicted Sitthivong of first degree murder by extreme indifference, second degree intentional murder, two counts of second degree attempted murder and first degree assault. CP 124, 126, 128, 130, 132. The jury also found Sitthivong was armed with a firearm when he committed the offenses. CP 125, 127, 129, 131, 133. Sitthivong was found guilty of the firearm possession by stipulated bench trial. CP 176-78; 15RP.

The trial court vacated the second degree murder conviction on double jeopardy grounds and then imposed a sentence of more than 65 years. CP 155-64; 16RP 6, 18-19.¹ Sitthivong appeals. CP 165-74.

2. Substantive Facts

On the evening of Saturday, June 5, 2010, Sitthivong rode with his friend Jason Lee and Lee's girlfriend to the Belltown neighborhood of Seattle. 12RP 42-43. When they got there they met up with several other friends, including Kenrique Thomas (Kenrique), Ron Battles, Jarvis Wesson and Nam Nguyen (Nam), who were celebrating Kenrique's 21st birthday. 6RP 207-09, 214; 12RP 44.

While at a bar called "Ohana", Lee and Sitthivong got into a heated encounter with a group of people passing by the bar. Kenrique, Battles, and Nam believed the people were Samoans based on their size. 6RP 219-20, 222; 7RP 103, 166-68, 170, 229; 8RP 90-93; 10RP 32-34. Wesson said "They were just Asians." 10RP 35. Sitthivong, however, did not attempt to identify their race or nationality at trial, but instead recalled they

¹ There are sixteen volume of verbatim report of proceedings referenced as follows: 1RP - 10/5/11; 2RP 10/6/11; 3RP - 10/10/11; 4RP - 10/13/11; 5RP - 10/17/11; 6RP - 10/18/11; 7RP - 10/19/11; 8RP - 10/20/11; 9RP - 10/24/11; 10RP - 10/25/11; 11RP - 10/26/11; 12RP - 10/31/11; 13RP - 11/1/11; 14RP - 11/3/11; 15RP - 11/16/11; and 16RP - 12/2/11.

were the same group encountered later that night, which included Steve Sok and Landon Nguyen (Landon). 12RP 49.

Heated words were exchanged, but there was no physical contact. 7RP 100-03, 171; 10RP 32-35; 12RP 48-49. Sitthivong recalled at one point Sok told him "to shut the fuck up or they're going to fuck me up and kill me." 12RP 50. Battles recalled a similar threat to kill, and Nam recalled threats of some sort being made. 7RP 169, 228; 8RP 92-93, 168. Sitthivong said he did not take the threats seriously at the time, assuming they were merely the result of Sok being drunk and rowdy. 12RP 50.

Later that night, after Lee and his girlfriend went home, Sitthivong, Nam, Battles, Wesson and Kenrique went to eat at the V-Bar, an establishment in Belltown that would stay open after 2 a.m. to serve food. 7RP 33-34; 12RP 52. Everyone rode to the V-Bar in Kenrique's car. 7RP 37-40; 8RP 103, 108-09; 10RP 43, 45.

Sitthivong recalled they drove past the V-Bar twice before parking, and each time Sitthivong saw Sok's group. 12RP 55, 110. They were walking from the parking lot near the V-Bar towards the V-Bar. 12RP 55, 57. Sitthivong made eye contact with them each time they drove by and he got the impression they recognized him. 12RP 56. Kenrique eventually parked in the lot near the V-Bar. 12RP 57, 60.

Given Sok's earlier threat to kill, Sitthivong became concerned he might be in danger, so before heading to the V-Bar he armed himself with a pistol Battles was carrying that night. 7RP 179-81; 12RP 60-61. After he got the pistol Sitthivong walked over to the edge of the parking lot and peered down the sidewalk towards the V-Bar. 12RP 61-62, 113. He saw Sok and Landon walking towards him on the sidewalk, and a third person in the street. 12RP 63, 113. Sitthivong was concerned the third person might be trying to come at him from behind. 12RP 70. Sok and Landon walked up to Sitthivong and started being "verbally aggressive", asking "what's up, where's your friend now?", and called him a "little bitch." 12RP 64, 114-15. At that point Sitthivong sensed someone approaching him from behind and when he turned and looked he was relieved to see it was Kenrique and his other companions. 12RP 66.

When Sitthivong looked back at Sok and Landon, he noted they were "agitated" by the appearance of Kenrique and the others. 12RP 66. Sitthivong said Sok and Landon first backed away and then turning and walking towards the V-Bar. 12RP 67. When they were at least 90 feet away, however, they both turned around, pointed guns at Sitthivong, and one of them ducked into a doorway out of sight. 12RP 69-70, 72, 135. Fearing for his life, Sitthivong pulled out Battles' gun and started firing

towards Sok and Landon and then ran and got into Kenrique's car and handed the gun back to Battles. 12RP 72, 75-76, 132. His companions had all gotten back in the car as well, and they drove away from the area immediately and went to Lee's house. 12RP 161.

Sitthivong explained he shot only to protect himself and not to kill or harm anyone. 12RP 151. Sitthivong did not recall how many shots he fired, and admitted he was unsure whether Sok, Landon or anyone else fired at him, although he suspected they had. 12RP 74-75, 141, 146, 153.

Sitthivong did not learn anyone had been hurt until he saw a news broadcast that stated someone had died at the hands of a single gunman. 12RP 77. Fearing the police had concluded the victims were unarmed, as well as possible retaliation by Sok's group, Sitthivong fled to California, where he was eventually arrested. 12RP 77-78, 166-67.

Sok died from a gunshot wound to the head, which a forensic pathologist opined may have been caused by a ricocheting bullet. 8RP 205, 211, 220. Phillip Thomas (Thomas), who happened to be walking by the V-Bar with his girlfriend at the time of the incident, was shot in the abdomen but survived. 7RP 21, 141; 9RP 162.

According to Thomas, three or four drunk Asian-looking men came out of the V-Bar before the shooting and two of them were walking

towards a man who was standing at the corner south of the establishment. 9RP 163, 165. Thomas witnessed an exchange of words between the man on the corner and these two men. 9RP 175. Then, as the two men started walking back towards the V-Bar, Thomas felt a pain in his side and realized he had been shot. 9RP 175-79.

Although Thomas recalled seeing muzzle flashes coming from the man on the corner, he testified there was a shooter only a couple of feet from the V-Bar entrance. He told police this shooter had come out of the V-Bar. 9RP 186, 197. Thomas described the shooter as tall and skinny with short hair in the back. 9RP 198, 201. Thomas did not recall the other person who was hurt being armed. 9RP 202.

In contrast to Thomas's description of the shooter, Sitthivong is five feet eight inches tall, weighs 165 pound, has close shaved hair on his head, and a light mustache. Ex. 81.

Sok's companion, Landon, testified that he, Sok, Yousouf Ahmach, Phillip Nguyen (Phillip) and Jim Pin had been out drinking before ending up at the V-Bar sometime after midnight. 5RP 88-89, 91-92. Landon admitted that he drank "[a] lot" of alcohol that evening, and that by the time he and his companions were at the V-Bar he was "[r]eally drunk." 5RP 93. Landon could not recall he or his friends getting into any

confrontations and could not remember whether Sok or Ahmach threatened anyone that night. 5RP 91, 115, 129-30. Landon did claim, however, that it was he and Ahmach, not Sok, who approached a man outside the V-Bar who eventually pulled a gun out and started shooting at them. 5RP 93-95, 101, 115. Landon said that when the shooting started he ran for a couple of blocks before being tackled by police. 5RP 102. Landon claimed neither he nor any of his companions were carrying weapons that evening. 5RP 105.

Ahmach also drank so much and got so drunk that he eventually vomited outside the restaurant, yet continued to drink afterwards. 144-45, 163, 166-67. Like Landon, Ahmach could not recall a confrontation before coming to the V-Bar. 5RP 139. Ahmach claimed he was unarmed that evening, and was not aware of any of his companions carrying weapons. 5RP 153, 163-65.

At some point after throwing up, Ahmach and Landon went outside to smoke and walked up the block a ways. 5RP 143. At some point, he heard someone, possibly Landon, say "gun", which prompted him to run back into the V-Bar. 5RP 146-47. Ahmach heard at least five shots fired. 5RP 147. He did not know what prompted the shooting. 5RP 150.

Phillip also did not recall any confrontations earlier that night. 5RP 192, 194, 211. He and Sok were outside the V-Bar smoking when he heard several shots fired. 5RP 194, 197, 207. After about the third or fourth shot, Phillips took cover. 5RP 197, 209. Sok was on the ground where they had been smoking. 5RP 198. Sok was bleeding from his head and Phillip knew he was dead. 5RP 200.

Several nearby police officers heard the gunshots. 5RP 6-9; 6RP 8-9, 45-46. Officer Kraus went to see if anyone was hurt while officers Zieger and Kallis went after people fleeing from the scene. 5RP 9-11. Kraus testified he found Sok just outside the entrance to the V-Bar and Thomas, on the sidewalk 10 to 15 feet to the south. 5RP 12-13, 20, 28-29. Kraus recalled seeing 10 to 20 people running from the area. 5RP 13.

Meanwhile, Zieger and Kallis pursued and tackled Landon. Although Landon was not armed when caught, both Kallis and Zieger admitted they lost sight of him at times during the chase, during which time he could have sloughed a weapon. 6RP 21, 34, 51, 54, 68. They also admitted they never thoroughly searched the path Landon ran. 6RP 40, 64. Landon told the officers the shooter was a bald Asian man. 6RP 25, 40, 55, 68.

Officers Myers and Evans were also nearby when the shooting occurred. 6RP 75-77, 157. Myers saw a man, later identified as Brandon Valdez, running from Evans and another officer in the area at the time. 6RP 84, 87. Valdez was eventually caught and found to be unarmed. 6RP 89-92.

Evans saw the shooter when the shots rang out. 6RP 161-62. He described him as a dark-skinned male wearing a white t-shirt, blue jeans and a stocking cap. 6RP 164, 184. He pursued the shooter, who ran east immediately after he stopped firing, but lost sight of him before helping with Valdez's capture. 6RP 165, 167-69, 184, 187. Valdez testified he and a friend ran after hearing the shots. 8RP 60. Valdez saw the shooter from about half a block away, described him as probably a man of color, about six feet tall, wearing a white shirt. 8RP 67-69; Ex. 81.

Kenrique, Nam, Wesson and Battles recalled that Sitthivong spoke with two other men on the street near the V-Bar. They did not recognize the men from earlier that evening, although Kenrique and Battles admitted one of them looked like Sok. 7RP 50-51, 117, 190; 8RP 45, 48, 118-19; 10RP 54-55. None of them could confirm whether either of the two men displayed weapons before the shooting started. 7RP 52, 123, 195; 8RP 125.

C. ARGUMENTS

1. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FIRST DEGREE MANSLAUGHTER REQUIRES REVERSAL OF SITTHIVONG'S CONVICTION FOR FIRST DEGREE MURDER BY EXTREME INDIFFERENCE.

A criminal defendant is entitled to have the jury fully instructed on his theory of the case where the instructions are supported by the evidence.

State v. Fernandez-Medina, 141 Wn.2d 448, 453, 461, 6 P. 3d 1150 (2000). RCW 10.61.006 provides:

In all other cases [besides inferior degree 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.

When determining whether a lesser included offense instruction is appropriate, Washington courts apply the following test:

Under the Washington rule, a defendant is entitled to an instruction on a lesser-included offense if two conditions are met. 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.

State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), (citations omitted).

This rule serves several purposes. First, it ensures the defendant receives constitutionally adequate notice of all possible charges. State v.

Berlin, 133 Wn.2d 541, 545, 947 P.2d 700 (1997). Second, it allows the defendant to present his theories of the case to the jury. 133 Wn.2d at 545, 548. Third, it affords the jury the benefit of a third option, in addition to conviction or acquittal on the charged offense. By doing so, "it accord[s] the defendant the full benefit of the reasonable-doubt standard." Beck v. Alabama, 447 U.S. 625, 633-34, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). The Beck Court noted the potential unfairness that arises "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction." 447 U.S. at 634 (italics in original).

With respect to the first degree premeditated murder charged in Count One, Sitthivong's jurors also received lesser included offense instructions for second degree intentional murder and first degree manslaughter. As a matter of law, first degree manslaughter is a lesser included offense of second degree intentional murder because the lesser state of mind of recklessness is a necessary element of the greater crime. State v. Berlin, 133 Wn.2d 541, 551, 947 P.2d 700 (1997). A person is guilty of second degree intentional murder when "[w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person." RCW 9A.32.050(1)(a). A person is guilty of first

degree manslaughter when she "recklessly causes the death of another person." RCW 9A.32.060(1)(a).²

In agreeing to the defense request for the lesser first degree manslaughter instruction, the trial court noted:

Given that there is testimony that [Sitthivong] was not trying to hit them, not aiming at the individuals, that he pointed and shot, he was shooting in the direction of that person, I think he is entitled to Manslaughter I. I don't believe that testimony factually entitles him to Manslaughter II. So I will allow the Manslaughter I but not the Manslaughter II as to [Count One.]

12RP 190.

First degree manslaughter is also, as a matter of law, a lesser included offense of first degree murder by extreme indifference to human life:

First-degree manslaughter requires proof that the defendant (1) recklessly (2) caused the death of another. RCW 9A.32.060(1)(a). First-degree murder by extreme indifference to human life requires proof that the defendant acted (1) with extreme indifference, an aggravated form of recklessness, which (2) created a grave risk of death to others, and (3) caused the death of a person. RCW 9A.32.030(1)(b); State v. Dunbar, 117 Wn.2d 587, 593-94, 817 P.2d 1360 (1991). "Because the elements of first degree manslaughter are necessarily included in first degree murder by extreme indifference, the legal prong of the

² For purposes of first degree manslaughter, a person acts recklessly when he "knows of and disregards a substantial risk that a wrongful act may occur and the disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c).

Workman test is satisfied.” [State v. Pettus, 89 Wn. App. 688, 700, 951 P.2d 284, review denied, 136 Wn.2d 1010, 966 P.2d 904 (1998)]. Thus, the only remaining issue is whether . . . the factual prong of the Workman test [is satisfied].

State v. Pastrana, 94 Wn. App. 463, 470-71, 972 P.2d 557, review denied, 138 Wn.2d 1007, 984 P.2d 1035 (1999).

In Pastrana and Pettus, the reviewing courts concluded the facts did not warrant the lesser included instruction. In each of those cases, the defendant fired a gun from moving car into another car. Pastrana, 94 Wn. App. at 469; Pettus, 89 Wn. App. at 692.

Pettus, who admitted he had poor aim and was unfamiliar with the gun he had, fired at least four shots from a .357 caliber while hanging out the car window. He was traveling through a residential area near a school playground in the middle of the day. 89 Wn. App. at 700. The Court held the evidence did not support an inference that Pettus' conduct caused a substantial risk of "some wrongful act instead of a 'grave risk of death.'" 89 Wn. App. at 700-01.

Pastrana is similar. Pastrana was chasing another vehicle, traveling on a major freeway ramp, in heavy traffic, after dark, when he fired at the vehicle. The court found Pastrana disregarded the grave risk inherent in shooting a gun at a moving car on a crowded freeway. This conduct was

found to be more than mere recklessness; Pastrana instead "manifested an extreme indifference to human life and created a grave risk of death - conduct which fits only the first-degree murder statute, not manslaughter." 94 Wn. App. at 471.

In Sitthivong's case, defense counsel repeatedly requested a lesser included first degree manslaughter instruction as to Count Five. CP 70-73; 12RP 190, 193, 195; 13RP 8. Despite a previous finding that Sitthivong's conduct could be deemed merely reckless for purposes of Count One, the court refused, reasoning:

On this particular count, based upon the number of people at the location, the number of shots, the timing of shots, the location of the individuals who were involved, I am not going to allow the lesser as to Count V.

12RP 195. This was error.

As defense counsel pointed out at trial, unlike Pastrana and Pettus, Sitthivong claimed self-defense. CP 70-73; 12RP 190-91. A defendant is entitled to manslaughter instructions if he reasonably believes he is in imminent danger and needs to act in self-defense, but recklessly or negligently used more force than was necessary to repel the attack. State v. Schaffer, 135 Wn.2d 355, 358, 957 P.2d 214 (1998).

Schaffer is instructive. Schaffer and victim Magee initially had words at a nightclub. Upon leaving, Schaffer approached Magee, who

shook his fist, swore at Schaffer, and threatened to kill him. 135 Wn.2d at 357. When Magee moved his arm toward his back, Schaffer thought he was reaching for a gun. In response, Schaffer drew his own gun and shot Magee five times, including twice in the back. 135 Wn.2d at 357-58.

The State charged Schaffer with first degree premeditated murder. Schaffer requested manslaughter lesser included offense instructions, which the trial court refused. This was found to be reversible error. Schaffer's upbringing supported a reasonable fear of imminent harm, while Schaffer's response supported the claim that he "recklessly or negligently used excessive force to repel the danger he perceived." 135 Wn.2d at 358.

As did Schaffer, Sithivong shot in response to his reasonable fear of being shot. Defense counsel correctly identified the similarity to Schaffer when he noted the jury could conclude Sithivong was entitled to act in self defense because he reasonably feared harm, but that his response was a reckless overreaction under the circumstances that did not rise to the level of extreme indifference to human life.³ CP 72; 12RP 190-

³ The degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997).

91, 193-95. In other words, just as for Count One, the facts supported the lesser included offense instruction because jurors could conclude Sitthivong's conduct was merely reckless rather than extremely indifferent to human life.

Whereas in Pastrana and Pettus there was no arguably rational basis for the shootings, here self-defense was a justifiable reason. But the trial court, despite finding a basis for the jury to find recklessness as to Count One, refused to allow the jury to consider whether the same conduct could be deemed reckless for Count Five.

Defendants have an unqualified right to have jurors consider a lesser offense if there is "even the slightest evidence" that only the lesser was committed. State v. Parker, 102 Wn.2d 161, 163 64, 683 P.2d 189 (1984) (quoting State v. Young, 22 Wn. 273, 276 77, 60 P. 650 (1900)). Reversal is required when a defendant is entitled to instruction on a lesser charge and the trial court fails to give it. Parker, 102 Wn.2d at 163-64 (where defendant has right to lesser included offense instruction, it is not within appellate court's province to hold defendant was not prejudiced by court's failure to submit lesser included offense to jury); Fernandez-Medina, 141 Wn.2d 462 (failing to give appropriate lesser degree instruction is reversible error). Sitthivong was denied that right with

regard to Count Five and therefore his conviction for first degree murder by extreme indifference to human life must be reversed along with the corresponding sentencing enhancement.

2. COUNSEL'S FAILURE TO DEMAND THE JURY BE PROPERLY INSTRUCTED ON SELF DEFENSE AS IT PERTAINED TO THE FIRST DEGREE ASSAULT CHARGE DEPRIVED SITTHIVONG OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The general statute regarding defense of self and others provides that the "use, attempt, or offer to use force upon or toward the person of another" is permitted when "used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person." RCW 9A.16.020. In contrast, under RCW 9A.16.050, homicide is "justifiable" when committed either:

- (1) In the lawful defense of the slayer . . . or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
- (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence

WPIC 16.02 requires that the slayer "reasonably believed the person slain intended to commit a felony or to inflict death or great personal injury[.]" 11 Washington Practice: Washington Pattern Jury

Instructions: Criminal 16.02, at 234-35 (3rd ed. 2008). WPIC 17.02, in contrast, requires only that the person "reasonably believes that he is about to be injured" or that he is "lawfully aiding a person who he reasonably believes is about to be injured." 11 WPIC 17.02, at 253. A defendant claiming justifiable homicide must therefore make a greater showing to establish he acted with a reasonable belief of impending harm.

When deciding which of these instructions to apply, "the important issue is the defendant's mental state in committing the crime, not whether the victim in fact died." State v. Cowen, 87 Wn. App. 45, 53, 939 P.2d 1249 (1997) (applying WPIC 16.02 to attempted murder); see also State v. Bolar, 118 Wn. App. 490, 502, 504, 78 P.3d 1012 (2003) (the mens rea for felony murder is based solely on the mens rea for the predicate offense), review denied, 151 Wn.2d 1027 (2004). Thus, in a case such as this one, where self defense is asserted against both homicide and non-homicide offenses, the jury should have received WPIC 16.02 for the homicide charges, and WPIC 17.02 for the assault charge. 12RP 195-98.

Sitthivong's counsel, however, agreed to have the jury instructed on self defense for all charges using only the higher standard required for homicide. 13RP 18. As such, to acquit Sitthivong of the first degree assault based on self defense, the jury would have to find Sitthivong

reasonably believed there was imminent danger he was about to be killed or subjected to "great personal injury"⁴ rather than just mere injury. CP 94 (Instruction 17); WPIC 16.02; WPIC 17.02. Because there was no legitimate tactical basis for agreeing to a more onerous self defense standard for the assault charge, Sitthivong was denied his constitutional right to effective assistance of counsel.

Defense counsel is ineffective when (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

Counsel is ineffective based on failure to request a jury instruction where the party (1) was entitled to the instruction, (2) counsel's performance was deficient in failing to request the instruction, and that (3) the failure to request the instruction prejudiced the accused. State v.

⁴ "Great personal injury" was defined for the jury as

an injury that the slayer reasonably believed, in light of all the facts and circumstances known at the time, would produce severe pain and suffering if it were inflicted upon either the slayer or another person.

CP 96 (Instruction 19).

Kruger, 116 Wn. App. 685, 690-95, 67 P.3d 1147 (2003). Sitthivong satisfies these criteria.

First, Sitthivong was entitled to WPIC 17.02 as to the assault charges. This was never disputed. 12RP 196.

Second, defense counsel was deficient in failing to request the non-homicide self-defense instruction. There is no legitimate tactical reason to take on a heavier burden than necessary to make a self-defense claim. Such a "tactic" could only reduce the likelihood of the jury rejecting self-defense.

Finally, Sitthivong was prejudiced by counsel's deficient performance. There was evidence supporting a reasonable inference that Sitthivong may have reasonably believed he was about to be injured by Sok and Landon, but that it was not reasonable to believe he was about to sustain great personal injury or death because no shots were actually fired at him. Reversal is therefore required.

D. CONCLUSION

For the reasons stated, this Court should reverse Siththivong's first degree murder and assault convictions and the associated firearm enhancements, and remand for resentencing within the standard range.

DATED this 8th day of August 2012

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 68030-7-1
)	
FELIX SITTHIVONG,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF AUGUST 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR BY EMAIL.

[X] FELIX SITTHIVONG
DOC NO. 354579
WASHINGTON STATE PENITENTIARY
1313 13TH AVENUE
WALLA WALLA, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF AUGUST 2012.

x *Patrick Mayovsky*

2012 AUG -8 PM 4: 14
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STATE OF WASHINGTON