

68030-7

68030-7

NO. 68030-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FELIX SITTHIVONG,

Appellant.

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COURT OF APPEALS
DIVISION ONE
NOV 09 2017

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEAN REITSCHEL

BRIEF OF RESPONDENT

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COURT OF APPEALS
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A. ISSUES PRESENTED

1. Whether the trial court properly refused to give an instruction on the lesser included offense of manslaughter as to Count 5, the charge of first degree murder by extreme indifference, when the court properly concluded that there was not affirmative evidence that Sitthivong committed manslaughter in the first degree to the exclusion of first degree murder by extreme indifference in the killing of Steve Sok.

2. Whether Sitthivong has failed to establish that his trial counsel was ineffective in not requesting an instruction on a lesser self defense standard as to Count 2, first degree assault, when the self defense standard provided to the jury was correct and even if the lower standard applied, there is no chance that the jury would have concluded that Sitthivong met that lower standard in this case.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Felix Sitthivong, was convicted by a jury of murder in the first degree of Steve Sok, attempted murder in the second degree of Landon Nguyen, attempted murder in the second degree of Yousouf Ahmach, and assault in the first degree of Phillip

Thomas, all with firearm enhancements. CP 20-23; 126-33. Sitthivong waived his right to a jury trial as to a charge of unlawful possession of a firearm in the second degree; the court, the Honorable Jean Reitschel, found him guilty of that charge after a concurrent, partially bifurcated bench trial. CP 138, 176-78; 3RP 12-13; 11RP 160-61; 15RP 2-4.¹ The court rejected Sitthivong's request to impose an exceptional sentence downward and imposed a standard range sentence.² CP 155-64; 16RP 18.

2. SUBSTANTIVE FACTS.

On June 6, 2010, Sitthivong fired eight shots down a busy sidewalk in downtown Seattle, killing one man, Steve Sok, and critically injuring another, Phillip Thomas. His shots did not hit the two men that he was targeting as they ran away down that sidewalk, Landon Nguyen³ and Yousouf Ahmach. The charges in this case all relate to that single volley of shots and these four

¹ The Report of Proceedings is in sixteen volumes, referred to in this brief as in the Appellant's Brief, 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.

² The jury also convicted Sitthivong of murder in the second degree of Steve Sok. CP 20-23, 124. That conviction was vacated solely on double jeopardy grounds. 16RP 3-6.

³ Three unrelated individuals in this case share the last name Nguyen; two unrelated individuals share the last name Thomas. All of these persons will be referred to by their full names throughout the brief, to avoid confusion.

victims. The jury rejected Sitthivong's claim that he was acting in self defense.

a. The Crimes

On the night of June 5, 2010, Steve Sok went to Club Aura in the Pioneer Square neighborhood in Seattle, to celebrate a friend's birthday. 11RP 10 -11. At Club Aura, he met more friends, a group comprised of Phillip Nguyen, Landon Nguyen, and Yousouf Ahmach. 5RP 186-88. About 1:30 a.m. on June 6th, both groups of Sok's friends went to V-Bar, a bar in the Belltown neighborhood, some 15 blocks away. 5RP 190-92; 11RP 15-17, 110.

About 30 minutes after Sok arrived at V-Bar, he went outside with Phillip Nguyen to smoke a cigarette. 5RP 193-94. As they were out in front of the bar, Phillip was facing Sok and heard a series of gunshots. 5RP 196-97. Phillip reacted by the third or fourth shot, ducking into the entryway of the bar. 5RP 197, 208-09. When he got there, he turned around and saw that Sok was on the ground, at the same spot where they had been smoking. 5RP 198. No one was standing over Sok during the flurry of shots and Phillip never saw anyone holding a gun, although he did look toward the

parking lot from which the shots were coming, and he thought he saw a muzzle flash. 5RP 198-200, 210.

Sok died of a gunshot wound to the head. 8RP 220. The bullet entered the right side of his head, just below his eyebrow. 8RP 207-08. The bullet went diagonally through Sok's head, through his brain, including his brain stem. 8RP 211-12. The bullet was recovered from the back of his head. 8RP 212-13. Because the bullet passed through his brain stem, Sok would have literally died before he hit the sidewalk. 8RP 220. The condition of the bullet and features of the wound suggested the bullet may have struck something else before striking Sok. 8RP 209-11, 221-24.

Before the shooting, Landon Nguyen and Ahmach had left V-Bar together, walking away from the bar for a smoke. 5RP 93-94, 142-43. As the two walked toward the parking lot, they encountered Sitthivong, who was near the corner. 5RP 119, 178, 183. Sitthivong spoke to the two men. Sitthivong's companions testified that he asked the two if they knew a man named "Sonny" or "Sundy" and when the men responded that they did, Sitthivong's gun came out. 7RP 54, 194-95; 8RP 195. Nam Nguyen recalled that after one of the men said that "Sundy" was one of his good friends, Sitthivong responded, "Fuck Sundy." 8RP 123-24.

Landon Nguyen saw Sitthivong pull up his shirt and saw the handle of a gun – Landon turned and ran. 5 RP 101, 104. Ahmach heard someone yell “gun” and also turned and ran. 5RP 101, 156. Sitthivong’s companions confirmed that when Sitthivong pulled out the gun, the two men he was talking to turned and ran the opposite way. 7RP 55, 194-95; 8RP 125.

Sitthivong pulled the gun from his waistband, and tried to fire it. 8RP 127-28. When the gun did not fire, he pulled back the slide to load a bullet into the chamber and fired toward the running men. 8RP 127-28; 9RP 175-79; 10RP 56. He fired eight rapid shots down the sidewalk.⁴ Ex. 5; 9RP 83, 131-32. Sitthivong then turned and ran. 6RP 184; 12RP 75.

A cell phone recording by an apartment manager who was monitoring activity outside V-Bar from above includes nine seconds of silence before eight rapid-fire, evenly spaced gun shots. Ex. 5; 5RP 42-43, 45-46. Part way through the gunshots, the camera is directed toward the street outside V-Bar and two men are seen running through the picture. Ex. 5. The running men are Landon Nguyen and Ahmach. 5RP 110-11, 121. This event occurred at

⁴ A crime scene detective described the location of eight shell casings at the corner where Sitthivong stood and described all bullet defects observed at the scene as showing shots coming from that direction. Ex. 67-69; 10RP 137-70; 178-79.

about 2:45 a.m. 5RP 43. There were no other shots in the area that night. 5RP 47-48.

Seattle Police Officer Nicholas Evans was working an off-duty job a block from the shooting. 6RP 156-58. He was standing in the street and heard a rapid series of shots. 6RP 161-62. He saw a man at the corner by the V-Bar parking lot who was shooting a semi-automatic handgun; Evans saw the muzzle flashes. 6RP 163-66. The area was well-lit and Evans noticed about ten to fifteen other people in the area. 6RP 164-66.

One of the shots Sitthivong fired struck Phillip Thomas, who happened to be walking along the sidewalk with his girlfriend. 9RP 162. Phillip Thomas was struck in the abdomen and immediately dropped to the ground. 9RP 162-63. His injury was life-threatening, and required immediate surgery, but he survived. 7RP 140-44, 156; 9RP 181-83. The bullet remains lodged in a bone in his pelvis. 7RP 153-55.

b. Sitthivong And His Companions

Sitthivong began the evening of June 5, 2010, with his friend Jason Lee and Lee's girlfriend, Kayla. 12RP 42-44. The three went to Belltown and joined other friends: Kenrique Thomas, Nam

Nguyen, Ron Battles, and Jarvis Wesson. 12RP 43. The group went to three or four bars in Belltown that night. 6RP 218; 7RP 165; 8RP 85.

At about 1:30 a.m. on June 6th, Lee left to drive Kayla home, and Sitthivong got into Kenrique Thomas' Cadillac with Kenrique Thomas, Nam Nguyen, Battles and Wesson. 12RP 53-54. They decided to go to V-Bar and Kenrique Thomas drove there via Second Avenue, past the front of the bar, pulling into the parking lot at the corner. Ex. 17; 7RP 37, 41, 81, 89-94; 12RP 55, 57.

Everyone was drinking that night. 6RP 213. Sitthivong testified that as they drove by V-Bar, he saw some people that he recognized. 12RP 55. Nam Nguyen recalled that Sitthivong said that he recognized people outside V-Bar as people Sitthivong had issues with in the past. 8RP 155.

In the Cadillac, the men argued about a handgun that Battles had in the car, a 9mm semi-automatic pistol. 7RP 41-45, 192; 8RP 112-14; 10RP 48-51. Sitthivong eventually took the gun. 8RP 114; 10RP 50-51; 12RP 61. Sitthivong seemed angry and others in the car told him not to do anything stupid. 10RP 50-51. Sitthivong put the gun in his waistband and got out of the car, then immediately

went to the corner of the buildings on Second Avenue and looked up the sidewalk toward V-Bar. 7RP 47; 8RP 116-17; 10RP 50-54.

Sitthivong's companions all also got out of the car and moved up behind him.⁵ 7RP 50, 57, 192, 196-97; 8RP 116, 119. After his verbal confrontation with Landon Nguyen and Ahmach, his companions saw Sitthivong pull the gun out. 7RP 54-55, 195; 8RP 124. When Kenrique Thomas saw the gun, he turned and ran back to his car. 7RP 55. Battles saw the two men turn and run, then saw that Sitthivong had the gun out and saw him try to fire it. 7RP 195-196. Battles ran as Sitthivong tried to cock the gun. 7RP 253-54. Nam Nguyen saw Sitthivong try to fire the gun, then cock it and fire five shots before Nguyen turned and ran back to the car. 8RP 125-29.

Kenrique drove the group to the home of Lee's girlfriend. 7RP 61. Sitthivong was "amped up," saying things like "that's how we get down." 7RP 61. He told the others in the car not to say anything about the shooting. 8RP 132. The group later went to Battles' home, and eventually to the Muckleshoot Casino. 7RP 65-69; 8RP 133-35; 12 RP 76, 165. Nam Nguyen fled with Sitthivong

⁵ Wesson testified that he returned to the car before the shooting began because he felt ill. 10RP 55-56.

to California, where Siththivong was soon arrested. 8RP 137-39; 10RP 9, 15; 12 RP 78.

c. Sitthivong's Defense

Sitthivong testified that he had had a confrontation at a different bar in Belltown, just before they drove to V-Bar. 12RP 48, 55. He said that everyone in his own group was present when he and Jason had a confrontation with a group that included Sok, Landon Nguyen, Ahmach, and possibly Phillip Nguyen. 12RP 93-96. Siththivong testified that someone in the group said that if he did not shut up, they were going to "fuck him up and kill him." 12RP 50. No weapons were mentioned or displayed. 12RP 101. He did not take it too seriously at the time. 12RP 50.

However, Siththivong's companions testified that a confrontation very similar to that had occurred much earlier in the evening, at the first bar they visited. 6RP 218-25; 7RP 27-32, 166-71; 8RP 90-95; 10RP 32-39. They all testified that they had not seen the two men that Siththivong confronted at the corner at any point earlier in the evening. 7RP 51, 189-91; 8RP 119; 10RP 55. One member of the group described a second confrontation that Siththivong had later on with a group of black men. 7RP 174-76.

The others did not see any other confrontation that night. 7RP 32; 8RP 100; 10RP 88-90.

Sok's companions were not involved in and did not see any confrontations that evening, before the shooting. 5RP 91, 139; 11RP 13-15, 45. They were celebrating and drinking only at the Club Aura in Pioneer Square before they went to V-Bar. 5RP 90-93, 137-38; 11RP 10-13, 15, 41-46.

Sitthivong testified that he was not familiar with guns. 12RP 143-45. He said that he armed himself that night because he was afraid, having just seen Sok and the others involved in the recent confrontation outside V-Bar. 12RP 55-56, 60-61. He said that he got out looking for Sok, went to the corner and saw Sok and Landon Nguyen walking toward him. 12RP 63. Sitthivong claimed that the two gave him a hard time verbally. 12RP 64. He said that when his own companions came up behind him, the other two men started walking back toward V-Bar. 12RP 65-67.

Sitthivong claimed that he then looked down and when he looked up the two men had pulled out guns. 12RP 69. The men were 30 or 40 yards away, closer to V-Bar, and did not say anything. 12RP 70-72. Then one of the men went into an alcove and Sitthivong said he then pulled out his gun and started shooting

at the man still on the sidewalk pointing a gun. 12RP 72-74.

Sitthivong testified that he wasn't trying to hit anybody but did shoot toward the area where he saw the gun. 12RP 151-52. He said that he was not a marksman and did not have the skill to hit anyone at that distance, that he was not really aiming and had his eyes closed during part of the time that he was shooting. 12RP 152-53.

Kenrique Thomas saw the two men approach and talk to Sitthivong. 7RP 46, 50-54. Thomas testified that the two men were not aggressive and did not display any kind of weapon before Sitthivong pulled his gun out and started to fire (when Thomas turned and ran). 7RP 50-55.

Nam Nguyen saw Sitthivong exchange words with the two men after Sitthivong said "Fuck Sundy." 8RP 124. Nguyen said the two men looked like they wanted to fight but displayed no weapon before Sitthivong pulled out his gun and the two turned and ran. 8RP 125-26, 130. Then Sitthivong started shooting. 8RP 125-26. Nguyen saw the entire interaction. 8RP 133. There were about thirty people on the sidewalk in the area. 8RP 127.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY AS TO THE LESSER OFFENSE OF MANSLAUGHTER FOR COUNT 5, FIRST DEGREE MURDER BY EXTREME INDIFFERENCE.

Sitthivong claims that the trial court erred in refusing to instruct the jury on the lesser included offense of manslaughter in the first degree as to Count 5, murder in the first degree by extreme indifference, requiring reversal of that conviction. This argument should be rejected. The trial court did not abuse its discretion in concluding that there was not affirmative evidence that Sitthivong committed manslaughter in the first degree to the exclusion of first degree murder by extreme indifference in the killing of Steve Sok. Thus, the instruction was properly rejected. In the unusual circumstances of this case, even if it was error to refuse the instruction, it was harmless error when the jury rejected the defense theory that would be presented in that instruction, by finding Sitthivong guilty of intentional murder and rejecting manslaughter as to the same victim.

A court must give an instruction on a lesser offense if all of the elements of that lesser offense are necessarily included in the charged crime and the evidence supports an inference that the

lesser offense was committed to the exclusion of the charged offense. State v. Gamble, 168 Wn.2d 161, 181, 225 P.2d 973 (2010) (citing State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). As the State agreed in the trial court, the legal prong of the Workman test is satisfied in this instance because the elements of first degree manslaughter are necessarily included in the elements of first degree murder by extreme indifference. State v. Pastrana, 94 Wn. App. 463, 470-71, 972 P.2d 557 (1999); 12RP 188.

A person is guilty of first degree murder by extreme indifference when, "Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person." RCW 9A.32.030(1)(b).

A person is guilty of first degree manslaughter when he or she "recklessly causes the death of another person." RCW 9A.32.060(1)(a). A person acts recklessly "when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c).

The issue presented is whether there was substantial evidence at trial that affirmatively established that Sitthivong was guilty of first degree manslaughter but not guilty of first degree murder by extreme indifference. In order to satisfy the factual component of the Workman test, “there must be substantial evidence that affirmatively indicated that manslaughter was committed to the exclusion of first ... degree murder.” State v. Perez-Cervantes, 141 Wn.2d 468, 480-82, 6 P.3d 1160 (2000). It is not enough that the jury might disbelieve the State’s evidence; some evidence must be presented that affirmatively establishes the defendant’s theory on the lesser offense. Id.

Sitthivong’s assertion that a defendant has a right to instruction on a lesser if there is “even the slightest evidence”⁶ that only the lesser was committed is incorrect. Sitthivong cites as authority for that proposition State v. Parker, a 1984 Supreme Court case in which that phrase appears within a larger quotation from a 1900 case. App. Br. at 17 (citing 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))). Later in the opinion, the court refers to

⁶ App. Br. at 17.

the existence of “substantial evidence” presented relating to the lesser. Parker, 102 Wn.2d at 165.

The Supreme Court more recently has explicitly stated that “when substantial evidence in the record supports a rational inference that the defendant committed only the lesser included ... offense to the exclusion of the greater” the factual component of the Workman test is satisfied. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000); accord Perez-Cervantes, 141 Wn.2d at 480-82. The court noted that it is error to submit any issue to the jury when there is not substantial evidence concerning it.

Fernandez-Medina, 141 Wn.2d at 455. It explained that there is a higher burden when a lesser offense instruction is requested: the evidence must raise an inference that only the lesser included offense was committed, to the exclusion of the charged offense. Id. In determining if the evidence at trial was sufficient to justify the instruction, the appellate court will view the supporting evidence in the light most favorable to the party that requested the instruction. Id. at 455-56. The lesser offense instruction should be given if the

evidence “would permit a jury to rationally find the defendant guilty of the lesser and acquit him or her of the greater.” Id. at 456 (quoting State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)).

The trial court in the case at bar accepted the State’s argument that the facts in this case are “well beyond normal recklessness” that would constitute only manslaughter. 12RP 190-95. The court concluded that as to Count 5, “based on the number of people at the location, the number of shots, the timing of the shots, the location of the individuals who were involved,” the lesser included offense instruction was not justified. 12RP 195. The court relied on Pastrana, supra, a case holding a manslaughter instruction is not warranted as to a charge of murder by extreme indifference if there is not evidence that affirmatively establishes that the defendant acted recklessly but did not act with the aggravated recklessness that would constitute murder by extreme indifference. 13RP 12.

The standard of review applied to the trial court’s ruling, which is based on a conclusion that the factual prong of Workman was not satisfied, is review for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 777, 966 P.2d 883 (1998); State v.

LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366 (2010). As the Supreme Court has observed, it is the trial judge who has heard all of the testimony, observed the demeanor of the witnesses, and reviewed all the evidence, and who is in the best position to hear and weigh the evidence to determine if it supported the instruction requested. Walker, 136 Wn.2d at 777. The trial court properly concluded that the evidence did not support the defense theory in support of the lesser offense of manslaughter as to Count 5.

The defense theory in support of the lesser offense instruction is that the defendant could be found to have used excessive force in self defense. 12RP 190-95. That theory was recognized in State v. Schaffer, 135 Wn.2d 355, 957 P.2d 214 (1998). If a person reasonably believes that he or she is in imminent danger and needs to act in self-defense, but recklessly or negligently uses more force than necessary to repel the attack, the person may be found guilty of manslaughter. Id. at 358. If that person is charged with premeditated murder, a manslaughter instruction is warranted. Id. Based on that theory, the trial court in this case did give a lesser offense instruction of manslaughter as to Count 1, the charge of premeditated murder. CP 90-93; 12RP 190.

The trial court correctly concluded that the analysis of lesser offense instructions differs when the charged crime is first degree murder by extreme indifference. Two courts of appeal have concluded that when a defendant caused a death by recklessly firing a gun in a public area and was charged with murder by extreme indifference, a manslaughter lesser offense instruction was not warranted. State v. Pastrana, 94 Wn. App. 463, 470-72, 972 P.2d 557 (1999) (defendant fired one shot from a moving vehicle, at another car, while driving on a crowded freeway); State v. Pettus, 89 Wn. App. 688, 951 P.2d 284 (1998) (defendant fired multiple shots from a moving car, at another car, in a residential area at mid-day). Both courts concluded that there was not evidence that affirmatively established that the defendant acted recklessly but did not act with the aggravated recklessness that would constitute murder by extreme indifference. Pastrana, 94 Wn. App. at 471-72; Pettus, 89 Wn. App. at 700-01. The court in Pettus observed that the defendant's testimony that he was a poor shot supported the conclusion that his conduct was much more than mere reckless conduct. Pettus, 89 Wn. App. at 700.

In the case at bar, Sitthivong shot a 9mm handgun eight times down a sidewalk with many people present. Ex. 5; 9RP 83,

131-32; 8RP 127. Although it was very late at night, the area he shot toward was outside a bar that was still open (serving food), and the evidence was uncontested that many people uninvolved in the confrontation were in the area and on the sidewalk. Ex. 5; 5RP 141; 8RP 127.

Sitthivong testified that he paid no attention to whether people were standing and walking in the area into which he shot. 12RP 70-71, 143. One of the shots killed a man (Sok) having a cigarette outside the bar; another struck a man (Phillip Thomas) who was walking along the sidewalk with his girlfriend, causing him life-threatening injuries. 5RP 196-98; 8RP 220; 9RP 162, 181-83.

Sitthivong testified that he was not familiar with guns and that he was not really looking where he was shooting. 12RP 144, 151-53. He said that he did not aim and that he closed his eyes part of the time that he was shooting. 12RP 153. There was no evidence to support a rational conclusion that if Sitthivong had a right to act in self defense but used excessive force in doing so, his conduct was simply reckless and was not with extreme indifference to human life. If the shooting was not justified by self defense because the force was excessive, the force used demonstrated extreme indifference to human life, not simply recklessness.

Even if the trial court erred in refusing the lesser offense instruction on Count 5, the error was harmless. Error in refusing an instruction on a lesser offense is harmless if the court did instruct on an intermediate lesser offense and the jury convicted the defendant on the charged crime, rejecting the intermediate lesser. State v. Guilliot, 106 Wn. App. 355, 368-69, 22 P.3d 1266 (2001).

Any error was demonstrably harmless in this case, because the jury rejected a first degree manslaughter lesser offense as to Count 1, which related to the same victim, and returned a verdict of intentional murder on that count. CP 89-93, 124. The jury was instructed that if the killing of Sok was the result of a reckless act (not an intentional act), Sitthivong was guilty of manslaughter. CP 93. The jury necessarily rejected the theory that the defendant acted recklessly in using deadly force in self defense when it rejected the lesser offense of manslaughter on Count 1.

**2. SITTHIVONG HAS NOT ESTABLISHED
INEFFECTIVE ASSISTANCE OF COUNSEL AS TO
COUNT 2, ASSAULT IN THE FIRST DEGREE.**

Sitthivong contends that a different self defense instruction should have been requested by defense counsel as to the first degree assault charge, and that defense counsel's agreement to

the same self defense standard for all five counts constituted ineffective assistance of counsel. This argument should be rejected. Sitthivong has not established either deficient performance of counsel or resulting prejudice to the defendant, each of which is required to establish ineffective assistance.

Sitthivong contends that as to the charge of first degree assault, his attorney should have requested the self defense instruction that reflects the lawful use of force standard in RCW 9A.16.020. That statute provides that the use of force upon another is permitted when “used by a party about to be injured ... in preventing or attempting to prevent an offense against his or her person ..., in case the force is not more than is necessary.” RCW 9A.16.020(3); WPIC 17.02.

The trial court gave the jury the self defense instructions proposed by Sitthivong.⁷ Compare CP 94, 95, 97, 98 (court's instructions) with CP 41, 42, 46-48, 53-55, 60-62, 65 (defense proposed instructions). Defense counsel agreed that the jury should be instructed as to the same self defense instruction for all counts. 12RP 195-96; 13RP 18. That instruction was WPIC

⁷ The court did decline to repeat the self defense instructions for each crime, instead consolidating the instructions.

16.02, which sets out the justifiable homicide standard established in RCW 9A.16.050:

It is a defense to the charges in Counts One through Five that the homicide was justifiable as defined in this instruction.

Homicide is justifiable when committed in the lawful defense of the slayer when:

(1) the slayer reasonably believed that the person slain or others whom the defendant reasonably believed were acting in concert with the person slain intended to commit a felony or to inflict death or great personal injury;

(2) the slayer reasonably believed that there was imminent danger of such harm being accomplished; and

(3) the slayer employed such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him, at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the homicide was not justifiable. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 94. As to the first degree assault against Thomas, Sitthivong argued that the assault charge was based on transferred intent to kill Sok or Phillip Nguyen, so the self defense standard applicable to that act also applied to the assault. 12RP 195-96. The State agreed. 12RP 196.

To establish ineffective assistance of counsel, Sitthivong must show both that defense counsel's representation was

deficient, *i.e.*, that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

In judging the performance of trial counsel, courts must begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Id. at 689-90. Legitimate trial strategy cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The defendant "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged

conduct by counsel." Hutchinson, 147 Wn.2d at 206 (quoting State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

The instruction given was the correct standard of self defense under the circumstances of this case. There was no evidence to support the giving of WPIC 17.02.⁸ Phillip Thomas, the victim of the assault, was not targeted by Sitthivong. The intent relating to the assault was based on Sitthivong's intent relating to Landon Nguyen and Ahmach, the two men he confronted at the corner. As defense counsel argued in the trial court, Sitthivong's state of mind regarding self defense also transferred to the assault charge and the justifiable homicide standard applied.

As to the prejudice prong of his ineffective assistance claim, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109

⁸ Sitthivong inaccurately claims that the State agreed that Sitthivong was entitled to WPIC 17.02 on the assault charge. App. Br. at 21. At the cited location in the record, the State conceded that the justifiable homicide self defense standard would apply to the assault charge as well as the premeditated murder and attempted murder charges. 12RP 195-96. The State later specifically stated that the lower self defense standard for assault would not be appropriate because the assault charge in this case is based on transferred intent for attempted murder. 13RP 18.

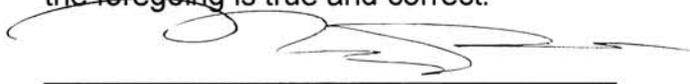
Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. ___, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011). Speculation that a different result might have occurred is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006). Without a showing of prejudice, Sitthivong's ineffectiveness claim fails, even if the representation was deficient. See In re Pers. Restraint of Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992).

Sitthivong's claim on appeal is that he was prejudiced because the jury could have concluded that Sitthivong was confronted by two men pointing guns at him but that it was not reasonable for him to believe he was about to sustain great personal injury or death. App. Br. at 21. Sitthivong has not established a substantial probability that a juror would reach such a strained conclusion. Even if a juror did reach that conclusion, a different outcome would have resulted only if the juror also concluded that when Sitthivong responded by firing eight shots down the sidewalk, he was using no more force than was necessary to defend himself from that threat of at most minor injury.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief Of Respondent, in STATE V. FELIX SITTHIVONG, Cause No. 68030-7-I, in the Court of Appeals, Division I, 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.



Name
Done in Seattle, Washington

11-09-12

Date

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I