68574-1

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NO. 68574-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KENNETH FRANKLIN MILLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARIANE SPEARMAN

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Statutes

Washington State:

A. QUESTION PRESENTED

This Court requested supplemental briefing on the impact of State v. Johnson, ___ Wn. App. ___, 289 P.3d 662 (Dec. 3, 2012).

B. BRIEF ANSWER

To the extent the Court in Johnson found that the jury instruction defining the term "reckless" was erroneous and a violation of due process, the Court was in error. This error has its genesis in an incorrect application of the analysis from State v. Peters,[1] a manslaughter case, applied to an assault of a child case in State v. Harris.[2] The Court in Johnson then incorrectly adopted the analysis from Harris to this case.

Unlike the situation in Peters, where there was a violation of due process because the jury instructions did not properly inform the jury of the elements of the crime, here, the "to convict" instruction, and the instruction defining the crime of second-degree assault, properly instructed the jury on the elements of the crime. There was no due process issue because the instructions did not relieve the State of the burden of proving the elements of the crime. Thus, while a modified "reckless" definition instruction may be preferable, it is not legally required. The instruction given tracked the language of the statute word for word, and was an accurate statement of the law.

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[1] 163 Wn. App. 836, 261 P.3d 199 (2011).
[2] 164 Wn. App. 377, 263 P.3d 1276 (2011).

C. ARGUMENT

The defendant was convicted of second-degree assault for intentionally assaulting Randall Rasar and thereby recklessly inflicting substantial bodily harm. He contends that the instruction given here, defining the term "reckless," impermissibly lowered the State's burden of proof by stating that a person acts recklessly when he disregards "a substantial risk that a wrongful act or result may occur," instead of a substantial risk that "substantial bodily harm" may occur. This argument has no merit. It ignores the fact that the "to convict" instruction, and the instruction defining the crime of second-degree assault, properly define the crime.

1. STATE V. PETERS, THE FIRST CASE.

Peters was convicted of manslaughter in the first degree. On appeal, he claimed that erroneous jury instructions violated his due process rights by lowering the State's burden of proving the crime charged. Peters, 163 Wn. App. at 847. As the Court noted, it is a violation of due process to "instruct the jury in a manner that would relieve the State of the burden of proof." Id. (citing State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)).

A person is guilty of manslaughter in the first degree when "[h]e or she recklessly causes the death of another person." RCW 9A.32.060(1)(a).

In a "to convict" instruction that did not tract the language of the manslaughter statute, the jury was instructed that to find the defendant guilty, it had to find:

> (1) That on or about the 16th day of November, 2008, the defendant engaged in ***reckless conduct***;
>
> (2) That [S.P.] died as a result of defendant's ***reckless acts***; and
>
> (3) That any of these acts occurred in the State of Washington.

Peters, at 845 (emphasis added).

The term "reckless" was defined as follows:

> 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.

Id. (emphasis in original).

The Court held, and the State agrees, that the jury in Peters was not properly instructed on the law. Specifically, no instruction informed the jury that it had to find Peters "recklessly caused the death" of SP. As the Supreme Court has noted, recklessly causing a death and recklessly causing a wrongful act are not synonymous. State v. Gamble, 154 Wn.2d 457, 468 n.8, 114 P.3d 646 (2005).

While the Court ruled that it was the "reckless" definition instruction that relieved the State of the burden of proving Peters knew of and disregarded a substantial risk that "death" may occur, in point of fact, it was

the jury instructions as a whole that relieved the State of that burden—if not solely the "to convict" instruction. See State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997) ("Jury instructions must be read as a whole, and each instruction must be read in the context of all other instructions given"); State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (The "'to convict' jury instruction must contain all the elements of the crime because it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence"). In other words, had the "to convict" instruction been written differently, for example, tracking the language of the statute, the "to convict" instruction would have informed the jury that Peters needed to have recklessly caused the death of the victim. Either way, if the "to convict" instruction had been modified, or the "reckless" definition instruction modified, the State would not have been relieved of its burden of proving an element of the crime.

2. ALONG CAME STATE V. HARRIS, A MISAPPLICATION OF PETERS.

Harris was convicted of assault of a child in the first degree, a crime that requires that the perpetrator "[i]ntentionally assaults the child" and "[r]ecklessly inflicts great bodily harm," to the child. RCW 9A.36.120(1)(b). The jury was instructed that to find Harris guilty, it had to find that:

> (1) That on or about the 25th day of August 2007, the defendant ***intentionally assaulted [TH] and recklessly inflicted great bodily harm***;
>
> (2) That the defendant was eighteen years of age or older and [TH] was under the age of thirteen; and
>
> (3) That the acts occurred in the State of Washington.

Harris, 164 Wn. App. at 384-85 (emphasis added). Just as in Peters, the jury was provided with the standard instruction defining reckless as follows:

> 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.

Id. at 384 (emphasis added).

Harris argued that the trial court should have substituted the term "great bodily harm" for the term "wrong act" in the instruction defining reckless. Division Two agreed, stating "[w]e agree with Division One's analysis [in Peters] and hold that the jury instruction here relieved the State of its burden to prove that Harris acted with disregard that a substantial risk of great bodily harm would result when he shook TH." Harris, at 387. The problem with this conclusion is that the rationale of Peters did not apply to the situation that existed in Harris.

In Peters, the "to convict" instruction for manslaughter, did not inform the jury that they had to find Peters recklessly caused the death of

the victim. Rather, the "to convict" instruction simply used the terms "conduct" and "acts." Peters, at 845. Thus, with neither the "to convict" instruction, nor the "reckless" definition instruction informing the jury what wrongful act or result the defendant had to disregard, the instructions did not properly state the law.

In contrast, in Harris, the "to convict" instruction specifically informed the jury that it had to find that the defendant recklessly inflicted a specific defined level of harm. The jury was required to find that Harris "recklessly inflicted great bodily harm." Harris, at 384. This is what the statute requires. Thus, the basic premise underlying Peters, that there was a violation of due process because the State was relieved of proving an element of the crime, is missing. Without this due process violation, while one could argue that the definition of reckless instruction still should be modified to be more clear, there is no requirement that it be done.

The Court in Harris never discussed whether or not the "to convict" instruction properly stated the law. Nor did the Court address the distinction between the "to convict" instruction in Peters, and the "to convict" instruction in Harris. Because the "to convict" instruction in Harris specifically informed the jury of the wrongful act or result it was required to find, there was no due process violation and the application of Peters was misguided.

3. THE COURT IN STATE V. JOHNSON, IMPROPERLY ADOPTED THE MISGUIDED CONCLUSION IN HARRIS.

Among other charges not relevant here, Johnson was charged with second-degree assault. Under the statute, a person commits second-degree assault when the person "intentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a). The "to convict" instruction provided that to find Johnson guilty, the jury had to find the following:

> (1) That during the time intervening between May 4, 2009 and May 6, 2009, the defendant ***intentionally assaulted*** [j.j.];
>
> (2) That the defendant thereby ***recklessly inflicted substantial bodily harm*** on [J.J.];
>
> (3) That the acts occurred in the State of Washington.

Johnson, 289 P.3d at 670. Just as in Peters and Harris, the jury was given the standard definition of reckless. Id.

The Court adopted the Harris court's application of Peters, and found that the reckless definition instruction given was erroneous. Id. at 671. In doing so, the Court dismissed out of hand the State's argument that the "to convict" instruction properly stated the law, stating only that the "court's holding in Peters was focused on the definition of recklessness, not the 'to convict' instruction itself." Id. at 672. However, as in Harris, focusing solely on the definition instruction, without looking

at the "to convict" instruction, ignores the very premise of the claim, that there is a due process violation that relieved the State of proving an element of the crime.

The definition of reckless given to the jury is word-for-word the definition as supplied by the legislature. On its face, it cannot be said to be erroneous—it is the law. The only way the instruction could be considered erroneous would be in the context of the case it is given. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005) (Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole, properly inform the jury of the applicable law). But just as in Harris, the "to convict" instruction in Johnson correctly stated the law, informing the jury that Johnson had to have "recklessly inflicted substantial bodily harm." The "to convict" instruction did not relieve the State of the burden of proving an element of the crime, and thus the adoption of Harris' application of Peters is erroneous.

4. APPLICATION TO MILLER'S CASE.

By statute "a person is guilty of assault in the second degree if he or she ... [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a). Here, the jury instruction defining the crime tracked the statutory language:

> A person commits the crime of assault in the second degree when he ***intentionally assaults another and thereby recklessly inflicts substantial bodily harm***.

CP 61 (emphasis added). The "to convict" instruction also tracked the statutory language and required that the jury find the following constituent elements:

> (1) That on or about the 6th day of November, 2009, the defendant ***intentionally assaulted*** Randall Rasar;
>
> (2) That the defendant thereby ***recklessly inflicted substantial bodily harm*** on Randall Rasar;
>
> (3) That the defendant was not acting in self-defense;[3] and
>
> (4) That the act occurred in the State of Washington.

CP 62 (emphasis added). Separate instructions defined the terms "assault," "substantial bodily harm," "reckless," "intent," "knowledge," and "lawful force." CP 63-68. The reckless definition was consistent with the statutory language (RCW 9A.08.010(1)(c)) and the instruction given in Peters, Harris, and Johnson. CP 65.

In no uncertain terms, both the "to convict" instruction and the instruction defining the elements of the crime, informed the jury that it was required to find that the defendant "recklessly inflicted substantial bodily harm" on Randall Rasar to find the defendant guilty. CP 61-62. An appellate court will "review the instructions in the same manner as a

[3] The self-defense language was added at the request of the defendant. 4RP 399-400.

reasonable juror." State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994). There are no "magic words" that must be used. State v. Coe, 101 Wn.2d 772, 787, 684 P.2d 668 (1984). As pertinent here, jury instructions are sufficient if they properly inform the jury of the applicable law. Mills, at 7. Two instructions properly informed the jury as to the "elements" of the crime. The reckless definition instruction accurately defined that "term." The failure to provide a modified reckless definition instruction did not relieve the State of proving the properly defined elements of the crime. See State v. Bowerman, 115 Wn.2d 794, 809 P.2d 116 (1990) (instructions are read in a commonsense manner); State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008) (courts will not adopt a strained reading of an instruction).

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 11 day of February, 2013.

Respectfully submitted,

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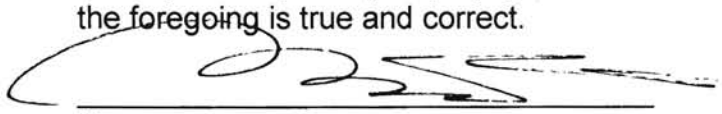
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lenell Nussbaum, the attorney for the appellant, at 2003 Western Ave, Suite 330, Seattle, WA 98121, containing a copy of the Supplemental Brief of Respondent, in STATE V. MILLER, Cause No. 68574-1-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.



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