NO. 90154-6

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER,

v.

MARSELE KENITH HENDERSON, RESPONDENT

Court of Appeals Cause No. 42603-0-II
Appeal from the Superior Court of Pierce County
The Honorable John A. McCarthy

No. 08-1-05882-6

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Petitioner, State of Washington, respondent below, asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION.

Petitioner, State of Washington, seeks review of the published opinion, filed on March 19, 2014, in ***State v. Marsele Kenith Henderson***, COA 42603-0-II (attached as Appendix A), in which the Court of Appeals reversed defendant's conviction for first degree murder and remanded for a new trial. The Court of Appeals held that the trial court had abused its discretion when it declined to instruct the jury on first degree manslaughter[1] as a lesser included crime of first degree murder by extreme indifference[2]. The court reversed because it determined that this Court's ruling in ***State v. Gamble***, 154 Wn.2d 457, 114 P.3d 646 (2005), changed the State's burden to prove manslaughter, and thereby brought manslaughter closer to first degree murder with extreme indifference.

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[1] 9A.32.060(1)(a) A person is guilty of manslaughter in the first degree when he or she recklessly causes the death of another person.
[2] 9A.32.030(1)(b) A person is guilty of murder in the first degree where, 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.

Appendix A at 8. The court held that, because Gamble changed the definition of reckless with regard to manslaughter, the factual prong of the ***Workman***[3] test was satisfied. Appendix A at 9. The court's ruling has the effect of overruling its earlier opinions of ***State v. Pettus***, 89 Wn. App. 688, 951 P.2d 284, *rev. denied*, 136 Wn.2d 1010, 966 P.2d 904 (1998), and ***State v. Pastrana***, 94 Wn. App. 463, 972 P.2d 557, *rev. denied*, 138 Wn.2d 1007, 984 P.2d 1035 (1999).

C. ISSUES PRESENTED FOR REVIEW.

1. Is the Court of Appeals ruling in this case in conflict with this Court's decision in ***State v. Dunbar*** where it removes any factual distinction between first degree murder by extreme indifference and first degree manslaughter?

2. Is there a split between Division I and Division II of the Court of Appeals where the divisions have reached opposite conclusions based on substantially similar facts?

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[3] ***State v. Workman***, 90 Wn.2d 443, 584 P.2d 382 (1978). To establish that an offense is a lesser included offense, first, each of the elements of the lesser offense must be a necessary element of the offense charged (the legal prong); second, the evidence in the case must support an inference that the lesser crime was committed (the factual prong). ***Workman***, 90 Wn.2d at 447-48.

3. Should the trial court's refusal to provide an instruction on first degree manslaughter as a lesser included offense of first degree murder by extreme indifference be upheld where the evidence did not satisfy the factual prong of the ***Workman*** test?

4. Did the trial court properly exercise its discretion when it admitted evidence of defendant's gang affiliation where such evidence was relevant to show motive and was not unduly prejudicial?

D. STATEMENT OF THE CASE.

A jury convicted MARSELE KENITH HENDERSON, hereinafter "defendant," of one count of first degree murder by extreme indifference. Appendix A. The charge arose from defendant's attempt to retaliate against a rival gang for the shooting death of one of defendant's fellow gang members earlier in the evening. Appendix A. During the shooting, defendant stood in the street front of a house where a crowded[4] party was being held and yelled "this is Hilltop," and "what's up cuz," before he fired six shots from a semi automatic weapon into the crowd of people in the front of the house. RP 233, 237-38, 636, 686, 856, 938, 1024. One

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[4] It was unclear how many people were at the party at the time of the shooting, but one of the party-goers estimated that there were 130-200 people present approximately 30 minutes prior to the shooting, and were located in both the front and back yards of the property. RP 187, 193-97. There were still approximately 30 people present by the time law enforcement arrived. RP 133.

man died as a result of being struck with bullet that went through his torso. RP 544.

Defendant asked the court to instruct the jury on first and second degree manslaughter as lesser included crimes to first degree murder by extreme indifference. RP 1032. The trial court reviewed two Division II cases, ***State v. Pettus***, 89 Wn. App. 688, 951 P.2d 284, *rev. denied* 136 Wn.2d 1010, 966 P.2d 904 (1998); ***State v. Pastrana***, 94 Wn. App. 463, 972 P.2d 557, *rev. denied*, 138 Wn.2d 1007, 984 P.2d 1035 (1999), and ultimately concluded that defendant was not entitled to the instructions because the facts of the case did not satisfy the factual prong in ***Workman***. RP 1125-28, 1191.

On March 19, 2014, Division II of the Court of Appeals reversed defendant's conviction, holding that, under the facts of this case, first degree manslaughter was a lesser included offense to first degree murder by extreme indifference. Appendix A. The court also held that the trial court did not abuse its discretion when it declined to give the second degree manslaughter instruction. Appendix A. Because the case was remanded for a new trial, Division II did not reach the issue regarding gang affiliation evidence. Appendix A.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE COURT OF APPEALS DECISION IN THIS CASE IS IN CONFLICT WITH ***STATE V. DUNBAR*** BECAUSE IT ELIMINATES ANY FACTUAL DISTINCTION BETWEEN FIRST DEGREE MURDER BY EXTREME INDIFFERENCE AND FIRST DEGREE MANSLAUGHTER.

Here, the Court of Appeals reversed defendant's conviction because it concluded that this Court's ruling in ***State v. Gamble***, 154 Wn.2d 457, 114 P.3d 646 (2005), "changed the State's burden to prove manslaughter, requiring the State to show that the defendant knew of and disregarded a substantial risk that a homicide may occur, as opposed to merely a substantial risk that a wrongful act may occur." Appendix A at 8. Yet ***Gamble*** did not change the definition of recklessness, but merely discussed what "wrongful act" was required to prove manslaughter versus assault. ***Gamble***, 154 Wn.2d at 467. The ***Gamble*** Court held that, because the "wrongful act" in each crime was different, the crimes were legally distinct. ***Gamble***, 154 Wn.2d at 463-64. Thus first degree manslaughter is not a lesser included crime to felony murder where the predicate felony is assault because the legal prong of ***Workman*** is not met. ***Gamble***, 154 Wn.2d at 469.

In this case, the wrongful act being homicide goes to the reason why first degree murder by extreme indifference and first degree manslaughter contain the same elements and thus satisfy the legal prong of

the ***Workman*** test. It does not automatically follow that the crimes are both homicides in that they are factually identical. The Court of Appeals decision below removes any factual distinction between first degree murder by extreme indifference and first degree manslaughter, essentially because both crimes involve unintentional homicides through reckless behavior and overlooks the fact that first degree murder by extreme indifference requires more than ordinary recklessness.

In ***State v. Dunbar***, 117 Wn.2d 587, 594, 817 P.2d 1360 (1991), this Court discussed the difference between first degree murder by extreme indifference and first degree manslaughter. The State sought to charge Dunbar with attempted first degree murder by extreme indifference. This Court held that, because the crime did not contain an intent element, a person could not be charged with attempted murder by extreme indifference. The State argued that by removing any element of intent, the crime was indistinguishable from first degree manslaughter. This Court disagreed and held that first degree murder under RCW 9A.32.030(1)(b) was not synonymous with first degree manslaughter because of the different levels of risk involved:

> RCW 9A.32.060(1)(a) provides a person is guilty of first degree manslaughter when "[h]e recklessly causes the death of another person." However, first degree murder by creation of a grave risk of death requires more than ordinary recklessness. As the Wisconsin Supreme Court has stated:

> The "depraved mind" standard is distinct from, and is not a species of, recklessness or negligence. "To constitute a depraved mind, more than a high degree of negligence or recklessness must exist...."
>
> (Citation omitted.) ***Randolph v. State***, 83 Wis.2d 630, 639-40, 266 N.W.2d 334 (1978) (quoting ***State v. Weso***, 60 Wis.2d 404, 411, 210 N.W.2d 442 (1973)). LaFave and Scott distinguish manslaughter and murder by creation of a grave risk of death by the presence of a "very high degree of risk" in the murder context as opposed to a mere "unreasonable risk" in the manslaughter setting. *W. LaFave & A. Scott*, § 7.4(a) at 618. The presence of the greater degree of risk elevates the level of recklessness to an extreme level, thus "manifesting an extreme indifference to human life." Although the boundary is not exact, we interpret RCW 9A.32.030(1)(b) to require an aggravated or extreme form of recklessness which sets the crime apart from first degree manslaughter. *W. LaFave & A. Scott*, § 7.4(a) at 618.

Dunbar, 117 Wn.2d at 594. Hence, the ***Dunbar*** decision shows that, when differentiating between murder by extreme indifference and manslaughter, it is not the risk of *death* that is the difference between the crimes, but the *amount* of risk involved.

This Court has not directly opined on the question of whether first degree manslaughter is a lesser included offense of first degree murder by extreme indifference, but two cases from Division II were on point. In both of these cases, the defendant was charged with first degree murder by extreme indifference. In both ***Pettus*** and ***Pastrana***, Division II held in cases that the factual prong of the ***Workman*** test was not satisfied; therefore neither defendant was entitled to a lesser included instruction on

first degree manslaughter. ***Pastrana***, 94 Wn. App. at 471–72; ***Pettus***, 89 Wn. App. at 700.

In ***Pettus***, the defendant was convicted of first degree murder by extreme indifference after driving alongside the car of his victim and firing at it. 89 Wn. App. at 691–92. "The first shot hit the [victim's car] in front of the rear tire. The second shot hit [the victim] in the left arm and penetrated his chest. Two other shots passed nearby or through the windshield and exited through the plastic rear window." ***Pettus***, 89 Wn. App. at 692. The court concluded that:

> [t]he evidence of the force of a .357 magnum, the time of day, the residential neighborhood, and Pettus's admitted inability to control the deadly weapon, particularly from a moving vehicle, does not support an inference that Pettus's conduct presented a substantial risk of some wrongful act instead of a "grave risk of death."

Pettus, 89 Wn. App. at 700.

In ***Pastrana***, the defendant was driving on the interstate when another car cut in front of him. 94 Wn. App. at 469.

> Pastrana retrieved a gun from behind the seat[,] ... rolled down the passenger window and fired one shot out the window, directly in front of [the passenger's] face.
> ....
> After he fired the gun, [the passenger] asked Pastrana what he was thinking. Pastrana replied that he was aiming for a tire. [The passenger] mentioned that "it's kind of hard to be aiming at anything when you are going down the freeway that fast."

Pastrana, 94 Wn. App. at 469. The court then held that "indiscriminately shooting a gun from a moving vehicle is precisely the type of conduct proscribed by RCW 9A.32.030(1)(b)." ***Pastrana***, 94 Wn. App. at 471.

The Court of Appeals decision below abrogates its holdings in ***Pettus*** and ***Pastrana*** based on the ***Pettus*** finding that the facts in that case did not support an inference that the defendant's conduct presented a substantial risk of some wrongful act instead of a grave risk of death. Appendix A at 7-8. The court reasoned that, because ***Gamble*** defined the "wrongful act" in manslaughter to be a homicide, a substantial risk of death and a grave risk of death are factually similar. Yet a grave risk of death is not synonymous with a substantial risk of death. The court incorrectly focused on the risk of *death* rather than the *amount* of risk involved. This ruling removes the factual distinction between ordinary recklessness and the creation of a very high degree of risk as associated with first degree murder by extreme indifference. Hence, the Court of Appeals ruling in this case is in conflict with ***Dunbar***.

As the Court of Appeals decision in this case was in conflict with Supreme Court decisions, the Court should grant review under RAP 13.4(b)(1).

2. THE COURT OF APPEALS DECISION IN THIS CASE SHOWS THAT THERE IS A SPLIT IN INTERPRETATION OF WHETHER FIRST DEGREE MANSLAUGHTER IS A LESSER INCLUDED OFFENSE OF FIRST DEGREE MURDER BY EXTREME INDIFFERENCE BETWEEN DIVISIONS I AND II.

Clarification of this issue is necessary because there is a conflict between the divisions. In 2013, Division I of the Court of Appeals issued an unpublished opinion in ***State v. Sitthivong***[5], 68030-7-I. There, relying on both ***Pettus*** and ***Pastrana***, Division I held that the defendant was not entitled to a lesser included instruction because the crimes did not meet the factual prong of ***Workman***. Division I did not discuss ***Gamble*** at any point in its opinion, nor did it call into question the validity of either ***Pettus*** or ***Pastrana***. Moreover, the facts in the present case and in ***Sitthivong*** are nearly identical, as Sitthivong's crime involved his firing eight shots down a crowded street, killing one person and injuring another. As ***Sitthivong*** is an unpublished case, there is no split in authority between the divisions of the Court of Appeals; however, the fact that Division I and II reached entirely different conclusions based on substantially identical fact patterns shows that there is a conflict between the divisions.

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[5] ***State v. Sitthivong***, 175 Wn. App. 1021 (2013 WL 3091054), *rev. denied*, 179 Wn.2d 1002, 315 P.3d 531 (2013).

3. IF THIS COURT DOES GRANT REVIEW, IT SHOULD ALSO CONSIDER THE ISSUE OF WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED EVIDENCE OF DEFENDANT'S GANG AFFILIATION.

On direct appeal, defendant also alleged that the trial court abused its discretion when it admitted evidence of his gang affiliations. Because the Court of Appeals reversed defendant's conviction and remanded for a new trial based on instructional error, it declined to reach the issue of the admission of gang evidence. If this Court accepts review but does not address this issue, the case would be remanded to Division II to decide the question and would then, again, be subject to discretionary review by this Court. If review is granted, the State respectfully requests this Court to also address the gang evidence issue in order to secure finality of judgment in a timely manner and in the interest of judicial economy.

F. CONCLUSION.

The Court of Appeals ruling on this case is in conflict with existing Supreme Court decisions, and two divisions of the Court of Appeals have reached opposite conclusions based on substantially similar facts. The

State respectfully requests this Court to accept review, vacate the Court of Appeals' decision reversing defendant's conviction, and reinstate the jury's finding of guilt and the trial court's sentence.

DATED: April 17, 2014.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-18-14
Date Signature

PIERCE COUNTY PROSECUTOR

April 18, 2014 - 9:22 AM

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARSELE KENITH HENDERSON, Appellant.	No. 42603-0-II PUBLISHED OPINION

WORSWICK, C.J. — Marsele Kenith Henderson appeals his conviction for first degree murder with extreme indifference to human life while armed with a firearm. Henderson argues that the trial court erred by refusing to instruct the jury on the lesser included offenses of first degree manslaughter and second degree manslaughter. We reverse and remand for a new trial because Henderson was entitled to a lesser included instruction for first degree manslaughter.

FACTS

A. *The Shootings*

Philip Johnson and Henderson were Hilltop Crip gang members and close friends. Johnson told Henderson that he was going to a party at the Boys' and Girls' Club (BGC). Henderson told Johnson not to attend the BGC party because it was too close to the 96th Street

Murderville Folk gang's territory. Johnson went to the BGC party despite Henderson's warning. Johnson was shot at the BGC party and later died.

Henderson, Lewis Davis, and D'Orman McClarron immediately went to the BGC party to check on Johnson. After Henderson, Davis, and McClarron learned that Johnson had been taken to the hospital, they went to the hospital.

On the same night, there was another house party on South Yakima Street in Tacoma. The Yakima Street party took place in a house with a front yard that bordered a street. Attendees had spilled out from the house and formed a large crowd in the front yard. Many people associated with the 96th Street Murderville Folk gang were present. Victor Schwenke worked as security for the party.

Henderson and McClarron left the hospital and went to the Yakima Street party. While Henderson and McClarron were in the street that ran in front of the house, shots were fired from that street, through the front yard, and toward the house. Schwenke was shot and killed.

The State charged Henderson with first degree murder with an extreme indifference to human life while armed with a firearm, alleging that Henderson shot Schwenke when shooting into the Yakima Street party.[1]

The State argued at trial that Henderson was a Hilltop Crip and that he shot indiscriminately into the Yakima Street party with the motive of retaliating against the 96th Street Murderville Folk gang for the shooting of Johnson (a fellow Hilltop Crip). Henderson argued at trial that McClarron, also a Hilltop Crip, was the shooter.

[1] RCW 9A.32.030(1)(b). The State also charged Henderson with one count of second degree unlawful possession of a firearm under RCW 9.41.040(2)(a)(i). This charge is not relevant to this appeal.

B. *Lesser Included Jury Instructions*

Henderson asked the trial court for lesser included jury instructions for first degree manslaughter and second degree manslaughter. At two points during trial, the trial court denied Henderson's requests to give the lesser included instructions.

First, during the defense case, Henderson asked the trial court for lesser included instructions for first degree manslaughter and second degree manslaughter. The trial court declined, citing *State v. Pettus*, 89 Wn. App. 688, 951 P.2d 284 (1998), and *State v. Pastrana*, 94 Wn. App. 463, 972 P.2d 557 (1999). The trial court ruled preliminarily that "depending upon the rest of the case, and it appears to me that, based on both the *Pettus* and *Pastrana* case, that you are not going to get a lesser of Manslaughter 1 and Manslaughter 2 instruction." 10 Report of Proceedings (RP) at 1128.

Second, after the close of evidence, Henderson took exception to the trial court's refusal to instruct the jury on these two lesser manslaughter offenses. The trial court finalized its preliminary decision, stating that "[b]ased on our discussions the other day, I don't think lesser-includeds of Manslaughter First or Second Degree apply based on applying the *Workman*[2] test and the facts of this case." 11-13 RP at 1191.

The jury found Henderson guilty of first degree murder with extreme indifference. Henderson appeals.

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

ANALYSIS

MANSLAUGHTER INSTRUCTIONS

Henderson argues that the trial court erred when it denied his request for lesser included jury instructions for first degree manslaughter and second degree manslaughter. We hold that the trial court erred in refusing to give the jury the lesser included instruction for first degree manslaughter but that it did not err in refusing to give the jury the lesser included instruction for second degree manslaughter.

A. *The Workman Test*

The right to a lesser included instruction is statutory. RCW 10.61.006 states, "[T]he defendant may be found guilty of an offense the commission of which is necessarily included within that with which he or she is charged in the indictment or information." The remedy for failure to give a lesser included instruction when one is warranted is reversal. *State v. Ginn*, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005). A defendant is entitled to an instruction of a lesser included offense if the two prongs of the *State v. Workman* test are met. 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

First, under the *Workman* test's legal prong, each element of the lesser offense must be a necessary element of the charged offense. *State v. Berlin*, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997) (citing *Workman*, 90 Wn.2d at 447-48). Here, the State concedes that the *Workman* test's legal prong was satisfied.

Second, under the factual prong, the evidence presented in the case must support an inference that only the lesser offense was committed to the exclusion of the charged offense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). When analyzing the

factual prong, we view the evidence that purports to support a requested instruction in the light most favorable to the party who requested the instruction at trial. *Fernandez-Medina*, 141 Wn.2d at 455-56.

We review a trial court's determination of the factual prong of the *Workman* test for an abuse of discretion. *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). A trial court's decision is based on untenable reasons if it is based on an incorrect legal standard. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

To determine whether the factual prong is satisfied, we determine whether the facts affirmatively established guilt of the lesser offense, to the exclusion of the greater offense. *State v. Perez-Cervantes*, 141 Wn.2d 468, 481, 6 P.3d 1160 (2000); *Berlin*, 133 Wn.2d at 551. "If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given." *Berlin*, 133 Wn.2d at 551. The factual test requires that the evidence raise a possible inference that the defendant committed the lesser offense, but did not commit the charged offense. *Fernandez-Medina*, 141 Wn.2d at 455.

B. *First Degree Murder By Extreme Indifference Versus Manslaughter*

To properly analyze the question here, it is necessary to examine the similarities and differences among first degree murder by extreme indifference, first degree manslaughter, and second degree manslaughter. First degree murder by extreme indifference requires proof that the defendant "(1) acted 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." *State v. Yarbrough*, 151 Wn. App. 66, 82, 210 P.3d 1029 (2009); RCW 9A.32.030(1)(b). First degree murder requires a very high degree of risk, which "elevates the level of recklessness to an extreme level, thus 'manifesting an extreme indifference to human life.'" *State v. Dunbar*, 117 Wn.2d 587, 594, 817 P.2d 1360 (1991) (quoting RCW 9A.32.030(1)(b)).

First degree manslaughter requires proof that the defendant *recklessly* caused the death of another. 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).

Second degree manslaughter requires proof that the defendant, *with criminal negligence*, caused the death of another person. RCW 9A.32.070(1). A person "acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(d).

C. *The Pettus and Pastrana Cases*

Two Court of Appeals opinions have applied the factual prong of the *Workman* test to uphold a trial court's denial of a lesser included instruction for first degree manslaughter to a defendant accused of first degree murder with extreme indifference. These cases are *Pettus* and *Pastrana*. These are the two cases the State argued to the trial court here.

In *Pettus*, the defendant was convicted of first degree murder by extreme indifference after driving alongside the car of his victim and firing at it. 89 Wn. App. at 691-92. "The first shot hit [the victim's car] in front of the rear tire. The second shot hit [the victim] in the left arm and penetrated his chest. Two other shots passed nearby or through the windshield and exited through the plastic rear window." *Pettus*, 89 Wn. App. at 692. The trial court concluded,

> The evidence of the force of a .357 magnum, the time of day, the residential neighborhood, and Pettus's admitted inability to control the deadly weapon, particularly from a moving vehicle, does not support an inference that Pettus's conduct presented a substantial risk of *some wrongful act* instead of a "grave risk of death."

Pettus, 89 Wn. App. at 700 (emphasis added).

In *Pastrana*, the defendant was driving on the interstate when another car cut in front of him:

> Pastrana retrieved a gun from behind the seat[,] . . . rolled down the passenger window and fired one shot out the window, directly in front of [the passenger's] face.
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> . . . .
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> After he fired the gun, [the passenger] asked Pastrana what he was thinking. Pastrana replied that he was aiming for a tire. [The passenger] mentioned that "it's kind of hard to be aiming at anything when you are going down the freeway that fast."

94 Wn. App. at 469. In *Pastrana*, this court quoted *Pettus* to state that "'[t]he factual prong is not satisfied because the evidence showed much more than mere reckless conduct—a disregard of a substantial risk of causing *a wrongful act*.'" 94 Wn. App. at 471 (emphasis added) (quoting *Pettus*, 89 Wn. App. at 700). This court in *Pastrana* used the quote from *Pettus* to justify holding that manslaughter was not a required lesser included instruction for first degree murder with extreme indifference under the *Workman* test's factual prong. 94 Wn. App. at 471-72.

Six years after *Pettus* and *Pastrana*, our Supreme Court decided *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005). In *Gamble*, our Supreme Court changed the State's burden to prove manslaughter, requiring the State to show that the defendant knew of and disregarded a substantial risk that a *homicide* may occur, as opposed to merely a substantial risk that *a wrongful act* may occur. 154 Wn.2d at 467-68. The attorneys here did not bring *Gamble* to the trial court's attention.

D. *Henderson's Case*

Because the State conceded that the *Workman* test's legal prong was satisfied, the only question before us is whether the *Workman* test's factual prong was satisfied for (1) first degree manslaughter or (2) second degree manslaughter.

1. *First Degree Manslaughter*

Henderson argues that *Gamble*'s narrowing of first degree manslaughter's recklessness element—requiring that the defendant disregard a substantial risk of *homicide*, rather than just a substantial risk of *a wrongful act*—brings manslaughter closer to first degree murder with extreme indifference such as to give Henderson a right to a first degree manslaughter instruction under the *Workman* test's factual prong. The State argues that in spite of *Gamble*, we should continue to follow *Pettus* and *Pastrana* and hold that Henderson has no right to a first degree manslaughter instruction. We agree with Henderson.

The analyses in *Pettus* and *Pastrana* are no longer helpful to a trial court ruling on whether the factual prong of the *Workman* test has been met for a first degree manslaughter jury instruction. This is because *Pettus* and *Pastrana* explicitly justified their holdings on the grounds that shooting guns in a high-risk manner cannot constitute a substantial disregard of

some wrongful act, which is no longer the standard following *Gamble*. *Pettus*, 89 Wn. App. at 700; *Pastrana*, 94 Wn. App. at 471. *Pettus* and *Pastrana* do not stand for the proposition that such acts cannot constitute a reckless disregard of *homicide* which is the definition of recklessness following *Gamble*.

With *Gamble*'s definition of recklessness in mind, we now turn to Henderson's case. A lesser included instruction is required where the jury could rationally convict the defendant of the lesser offense, while at the same time acquitting on the charged offense. *Berlin*, 133 Wn.2d at 551. Viewing the evidence in the light most favorable to Henderson, we hold that a rational jury could find that Henderson shot into a crowd but that he did so with a disregard for a substantial risk of homicide, rather than an extreme indifference that caused a grave risk of death. A rational jury could convict Henderson of first degree manslaughter, while acquitting him on first degree murder with extreme indifference. Thus, the trial court applied the incorrect legal standard from *Pettus* and *Pastrana*. Based on this error, we reverse and remand for a new trial. *Ginn*, 128 Wn. App. at 878.

2. *Second Degree Manslaughter*[3]

Henderson argues that *Gamble*'s narrowing of first degree manslaughter's recklessness element required the trial court to give Henderson a second degree manslaughter instruction. We disagree.

Gamble and *State v. Peters* both state that first degree manslaughter's recklessness element requires demonstrating that the defendant committed an act with a substantial disregard

[3] We address this issue as it is likely to recur on retrial. *See State v. Pierce*, 169 Wn. App. 533, 538, 280 P.3d 1158, *review denied*, 175 Wn.2d 1025 (2012).

for the risk of a homicide. 154 Wn.2d at 467-68; 163 Wn. App. 836, 837-38, 261 P.3d 199 (2011). However, the cases do not address whether second degree manslaughter's criminal negligence element requires demonstrating that the defendant failed to be aware of a substantial risk that a *homicide* (rather than "a wrongful act") may occur. *See Gamble*, 154 Wn.2d at 467-68; *Peters*, 163 Wn. App. at 837-38. But by applying *Gamble*'s reasoning, it is logical to assume that criminal negligence for manslaughter would require the State to prove that a defendant failed to be aware of a substantial risk that a *homicide* (rather than "a wrongful act") may occur. We assume without deciding that the mens rea of criminal negligence requires the failure to be aware of a substantial risk that a *homicide* may occur, because it does not change the result.

A lesser included instruction is required where the jury could rationally convict the defendant of the lesser offense, while at the same time acquitting on the charged offense. *Berlin*, 133 Wn.2d at 551. When one shoots randomly into a crowd, it is obvious that homicide is a possible risk. Thus, no rational jury could possibly conclude that Henderson shot a gun into a crowd while failing to be aware that a homicide could occur. Rather, a rational jury that finds that Henderson shot a gun into a crowd must necessarily find that he displayed, at the very least, a conscious disregard of a substantial risk of homicide. Thus, a rational jury could not find on these facts that Henderson committed only second degree manslaughter by shooting randomly into a crowd. For this reason, the trial court did not abuse its discretion in refusing to give the lesser included instruction for second degree manslaughter.[4]

[4] Henderson also argues that the trial court erred by admitting gang evidence at trial without conducting an ER 404(b) analysis. While it is the best practice to engage in such an ER 404(b) analysis, including a balancing of the evidence's probative value against its potential to cause undue prejudice, we do not consider this issue. Because we reverse Henderson's conviction and remand for a new trial, this evidentiary issue is now moot.

We reverse and remand for a new trial.

Worswick, C.J.

We concur:

Johanson, J.

Bjorgen, J.