Supreme Court No. (to be set)
Court of Appeals No. 46589-2-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Angelino Pena
Appellant/Petitioner

Clark County Superior Court Cause No. 13-1-00417-8
The Honorable Judge David Gregerson

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Angelino Pena, the appellant below, asks the court to review the decision of Division II of the Court of Appeals referred to in Section II.

II. COURT OF APPEALS DECISION

Angelino Pena seeks review of the Court of Appeals opinion entered on February 9, 2016. A copy of the opinion is attached.

III. ISSUE PRESENTED FOR REVIEW

> Defense counsel provides ineffective assistance by failing to propose jury instructions necessary to the theory of the defense. Did Mr. Pena's attorney provide ineffective assistance by arguing that Burnett had been shot as a result of Mr. Pena's carelessly playing with a gun while drunk, but failing to propose an instruction drawing the jury's attention to the difference between an intentional assault and an accidental shooting?

IV. STATEMENT OF THE CASE

Neil Hill was high on heroin when he picked Angelino Pena up at a bar and drove him to the EconoLodge hotel in downtown Vancouver. RP 113, 120. Mr. Pena was drunk. RP 124. In the truck on the way to the hotel, he pulled out a gun and started fidgeting with it. RP 115-16. He repeatedly popped a bullet out of the clip and put it back in. RP 116. Hill

said that Mr. Pena threatened to shoot him if he was pulled over by the police.[1] RP 115.

Hill dropped Mr. Pena off at the EconoLodge but did not get out of the truck. RP 117. Mr. Pena went to a room in the hotel to meet some mutual friends. RP 138.

Mr. Pena walked to the room and found three people there: Elena Espinoza, Vincent Burnett, and Levi Blomdahl. RP 139. All three of them had been using heroin. RP 113, 137,147.

Hill became concerned after he dropped Mr. Pena off, based on his behavior in the truck. RP 118. He called Blomdahl to make sure he was alright. RP 118. Blomdahl said everything was fine so Hill relaxed and went home to bed. RP 119.

Mr. Pena was still acting drunk in the hotel room. RP 139. He was showing his gun off. RP 139. He sat down and joined the party. RP 140. He continued to play with his gun. RP 141, 150-51. He popped the clip in and out of the gun. RP 150. He popped bullets in and out of the clip. RP 150. He passed the gun around to other people in the room. RP 141.

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[1] Hill also said that Mr. Pena claimed he was going to shoot Elena Espinoza, a mutual friend who was in the room at the EconoLodge. RP 118.

Eventually, the gun went off. RP 142. Burnett was hit in the head. RP 142. The three un-injured guests fled. RP 144. No one called 911.

Burnett survived his injuries. RP 160. The state charged Mr. Pena with attempted second degree murder and first degree assault. RP 58.

At trial, none of the eyewitnesses testified that they had actually seen Mr. Pena shoot Burnett. RP 142, 161, 274.

Blomdahl testified that he was nodding in and out of heroin-induced sleep when he heard the gunshot. RP 142, 152. The shot woke him up. RP 142. He thought the gun was in Mr. Pena's hand at the time, but he was not one hundred percent sure. RP 153, 155. He said that Burnett and Espinoza had both handled the gun as well. RP 141. He remembered hearing Mr. Pena say that he could not believe what had happened. RP 151.

Burnett's memory was affected by his injuries. RP 160. He did not remember getting shot or who had shot him. RP 161.

Espinoza refused to cooperate altogether. RP 273-276. She claimed that she did not remember anything about that night. RP 274.

Defense counsel's primary theory in closing was that the shooting had been an accident, caused by Mr. Pena's drunk and careless playing with the gun. RP 451-456.

Defense counsel proposed jury instructions on the lesser offense of second degree assault. CP 83. The court gave the instructions. CP 117.

Defense counsel argued in closing that the jury should convict of second-degree assault if it found that Mr. Pena had caused Burnett's injuries by his recklessness but had not intended to shoot him. RP 456.

The jury convicted Mr. Pena of attempted murder and first degree assault. RP 471. Finding that the assault charge carried a higher penalty, the court vacated the attempted murder conviction. RP 490-91.

Mr. Pena timely appealed. CP 130. The Court of Appeals affirmed his conviction in an unpublished decision. Opinion.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

> The Supreme Court should accept review and hold that Mr. Pena's attorney provided ineffective assistance by failing to request an instruction on a lesser included offense that actually corresponded with his theory of the defense. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(3) and (4).

There was significant evidence at trial that Burnett's shooting had been an accident. Everyone in the hotel room was using drugs when Burnett was shot. RP 113, 137, 147. Numerous witnesses for the state testified that Mr. Pena was drunk. RP 124, 139. They also said that he was fidgeting with his gun, taking the clip in and out and popping bullets

in and out. RP 115-16, 141, 150-51. No witness described any real reason why Mr. Pena would intentionally shoot Burnett.

As such, Mr. Pena's theory of defense was that he was intoxicated and carelessly playing with a gun when Burnett was unintentionally shot. RP 451-56.

But Mr. Pena's attorney failed to request an instruction informing the jury of the legal significance of this evidence. CP 67-81, 82-91. Instead, defense counsel proposed instructions on second degree assault. CP 83.

But second degree assault is just another type of intentional assault. RCW 9A.36.021; *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 982, 329 P.3d 78 (2014). The jury was left with no legal hook upon which to hang their hats if they believed Mr. Pena's theory.

Defense counsel's failure to request an instruction for third degree assault – causing bodily harm by means of a weapon with criminal negligence – constituted ineffective assistance of counsel.

A. Defense counsel made an error by proposing instructions for second degree assault, which did not correspond to his theory of the case.

Second degree assault punishes, *inter alia*, "intentionally assault[ing] another and thereby recklessly inflict[ing] substantial bodily harm." RCW 9A.36.021(1)(a). It also includes "assault[ing] another with

a deadly weapon." RCW 9A.36.021(1)(c). The definition of assault requires an intentional act. *Villanueva-Gonzalez*, 180 Wn.2d at 982.

A verdict for second degree assault in Mr. Pena's case would have required the jury to find that he intentionally shot Burnett. Thus the jury instruction for second degree assault was inapplicable to defense counsel's theory that the gun discharged unintentionally as a result of Mr. Pena's negligent actions.

Defense counsel provided ineffective assistance of counsel by proposing the wrong instruction.[2] *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009).

B. Mr. Pena's attorney provided deficient performance by failing to request a lesser included instruction on third degree assault, which was the charge that actually aligned with his theory of the defense.

An accused person has an "unqualified right" to have the jury instructed on applicable lesser-included and lesser-degree offenses. RCW 10.61.010; RCW 10.61.003; *State v. Parker*, 102 Wn.2d 161, 163-164,

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[2] The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. U.S. Const. Amends. VI, XIV; *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Defense counsel provides ineffective assistance by failing to propose a jury instruction necessary to his/her client's defense. *Powell*, 150 Wn. App. at 156. Here, Mr. Pena's attorney provided deficient performance by requesting a lesser included instruction that did not correspond with his theory of the defense, rather than one for third degree assault.

683 P.2d 189 (1984) (citing *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900)).

If the jury found that Mr. Pena had accidentally shot Burnett as a result of his negligent conduct, it could have convicted him of assault in the third degree. RCW 9A.36.031(1)(d).

The Court of Appeals agrees that Mr. Pena would have been entitled to an instruction on third degree assault if his attorney had asked for one. Opinion, p. 5. Still, the court finds that defense counsel's failure to request the correct lesser included instruction was a legitimate trial tactic. Opinion, pp. 5-6. The court determines that Mr. Pena's attorney used an all-or-nothing strategy by creating a circumstance in which the jury was required to acquit unless it found that he had committed intentional assault. Opinion, pp. 5-6.

But the court's analysis is belied by defense counsel's own explanation of his theory of defense in closing argument.

In closing, Mr. Pena's attorney recounted all of the evidence that the shooting had been unintentional. RP 455-456. Then he informed the jury that if they found Mr. Pena had shot Burnett accidentally, they should convict him of second degree assault:

> If you find that Mr. Burnett [sic] must be held to account in your mind for the overall circumstances of what's gone on here, if you… truly believe that he held the gun beyond a reasonable

> doubt, I submit again that neither of those have been proved. But if you were to get there, then you could possibly get to the assault in the second degree based on a reckless conduct.
> RP 456.

But the jury's instructions clearly and accurately provided that second degree assault required intentional assault. CP 113-114.

Mr. Pena's lawyer did not opt for an all-or-nothing approach. He simply requested the wrong lesser included instruction for his theory of the case. This mistake constitutes deficient performance. *Powell*, 150 Wn. App. at 156.

C. Mr. Pena was prejudiced by his attorney's failure to request an instruction on the lesser-included offense corresponding to his trial theory.

Counsel's failure to request a necessary jury instruction prejudices the accused when the jury is left without the information necessary to apply the relevant law to the evidence presented at trial. *Powell*, 150 Wn. App. at 156.[3]

Here, the evidence strongly supported the defense theory that Burnett's injuries were caused because Mr. Pena was negligently fidgeting with his gun while intoxicated. But the jury instructions only permitted the jury to convict Mr. Pena of shooting Burnett intentionally or to acquit

[3] Generally, deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Kyllo*, 166 Wn.2d at 862.

him completely despite his culpable conduct. There is a reasonable probability that defense counsel's failure to propose an instruction on the correct lesser-included offense affected the outcome of Mr. Pena's trial. *Kyllo*, 166 Wn.2d at 862.

Additionally, it is not within the province of an appellate court to find that failure to instruct the jury on an applicable lesser offense did not prejudice the accused. *Parker*, 102 Wn.2d at 164 (*relied on in State v. Condon*, 182 Wn.2d 307, 326, 343 P.3d 357 (2015). When the evidence supports a lesser-included instruction, failure to give one is never harmless. *Id.*

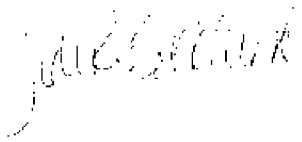
Mr. Pena's attorney provided ineffective assistance of counsel by proposing the wrong lesser offense instruction. The jury was left with no way to apply the defense theory to the law. Mr. Pena's conviction must be reversed.

VI. CONCLUSION

The issue here is significant under the State Constitution. Furthermore, because it could impact a large number of criminal cases, it is of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted March 9, 2016.

BACKLUND AND MISTRY



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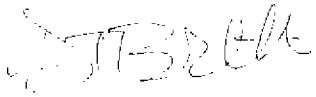

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Angelino Pena, DOC #828071
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1313 North 13th Avenue
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and I sent an electronic copy to

Clark County Prosecuting Attorney
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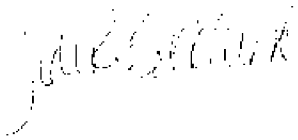
through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 9, 2016.



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APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

February 9, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANGELINO LUCIANO PENA, Appellant.	No. 46589-2-II UNPUBLISHED OPINION

MAXA, J. – Angelino Pena appeals his conviction of first degree assault based on the shooting of one of his acquaintances, and also appeals the legal financial obligations (LFOs) imposed as part of his sentence.[1]

We hold that (1) defense counsel's failure to request an inferior degree offense jury instruction on third degree assault did not constitute ineffective assistance of counsel, (2) the trial court did not err in allowing an investigating officer to testify that he was assigned to a regional gang unit, (3) the record does not support Pena's allegations that the prosecutor made statements that constitute misconduct, and (4) Pena waived his claim that the sentencing court erred in imposing LFOs without an individualized assessment of his ability to pay because he did not object in the trial court. Accordingly, we affirm Pena's conviction for first degree assault and the imposition of LFOs.

[1] Pena also was convicted of attempted second degree murder. The trial court vacated the attempted second degree murder conviction because that conviction and the first degree assault conviction arose from the same criminal conduct and first degree assault carried a higher penalty.

FACTS

On January 26, 2013, Neil Hill, Vincent Burnett, Levi Blomdahl, and Elena Espinoza were using heroin in a hotel room in Vancouver. At 2:00 AM, Espinoza asked Hill to pick up Pena and bring him back to the hotel.

During the drive, Pena pulled out a gun and told Hill that he would shoot him in the stomach if Hill got pulled over by the police. Hill described Pena as intoxicated. While in the car, Pena played with the gun, repeatedly ejecting bullets from the ammunition clip and putting them back in. Hill feared for his life. When he arrived at the hotel, Pena knocked on the door with the butt of his gun, entered carrying the gun, acted belligerently, and appeared intoxicated. Pena continued to play with the gun and pop bullets in and out of the clip. He also passed the gun around to others in the room.

Blomdahl observed that Pena and Burnett were having a disagreement about Pena's brother. Later, Blomdahl was nodding in and out of sleep when he heard a gun fire. He opened his eyes and saw that Burnett had fallen over and was lying on the floor bleeding. He then saw Pena stand up and appear to put the gun in his pocket or waistband.

Burnett suffered permanent impairment because of his injuries. He could not remember who shot him, but he did remember that Pena was at the hotel room, that Pena had a gun, and that the two of them had both good and bad conversations that night about family.

The State charged Pena with second degree attempted murder and first degree assault, each with a firearm enhancement. At trial, Detective Erick Zimmerman, an investigating officer, testified that at the time of his investigation of the shooting he was assigned to the Safe Streets

Task Force and that the task force was a regional gang unit. The trial court overruled Pena's objection to this testimony.

At Pena's request, the trial court gave an instruction on second degree assault. Pena did not propose an inferior degree offense instruction on third degree assault. The jury found Pena guilty of attempted second degree murder and first degree assault.

The trial court vacated the attempted second degree murder conviction because it merged with the assault, and imposed a standard range sentence. The trial court also imposed discretionary LFOs.

Pena appeals his first degree assault conviction and the imposition of LFOs.

ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Pena argues that defense counsel's failure to propose an inferior degree offense instruction on third degree assault deprived him of his right to effective assistance of counsel.[2] We disagree.

1. Legal Principles

To prevail on an ineffective assistance of counsel claim, the defendant must show both that (1) defense counsel's representation was deficient, and (2) the deficient representation prejudiced him. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). To demonstrate

[2] Pena also argues that he was entitled to a lesser included instruction for third degree assault on the attempted murder charge. But this court has held that third degree assault is not a lesser included offense of attempted second degree murder. *State v. Boswell*, 185 Wn. App. 321, 340 P.3d 971 (2014), *review denied*, 183 Wn.2d 1005 (2015). Therefore, we address only whether defense counsel was ineffective for failing to request an inferior degree offense instruction to first degree assault.

deficient performance, the defendant must show that, based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). And the law affords trial counsel wide latitude in the choice of tactics. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 736, 16 P.3d 1 (2001).

There is a strong presumption that defense counsel's performance was reasonable. *Grier*, 171 Wn.2d at 33. To rebut this presumption, a defendant must demonstrate that there is no conceivable legitimate tactic explaining defense counsel's performance. *Id.*

2. Inferior Degree Offense Instruction

RCW 10.61.003 provides that a jury may find a defendant not guilty of the charged offense but guilty of an offense with an inferior degree. Under this statute, both parties have a statutory right to an inferior degree offense instruction. *State v. Corey*, 181 Wn. App. 272, 276, 325 P.3d 250, *review denied*, 181 Wn.2d 1008 (2014). The party requesting an instruction on an inferior degree offense must show:

> "(1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense."

State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)).

The difference between first degree assault and third degree assault is the required mens rea. First degree assault requires the State to prove that the defendant "with intent to inflict great

bodily harm: assaults another with a firearm." RCW 9A.36.011(1)(a). Third degree assault requires the State to prove that the defendant "[w]ith criminal negligence, cause[d] bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." RCW 9A.36.031(1)(d).

Here, there is no question that third degree assault is an inferior degree offense to first degree assault. And there is evidence that Pena committed only third degree assault, which involves negligent conduct rather than the intentional conduct required for first degree assault. Therefore, Pena was entitled to a third degree assault instruction if he had requested one.

3. Defense Counsel Strategy

Pena argues that defense counsel was deficient in failing to request a third degree assault instruction because the primary defense theory was that the shooting was not intentional. Pena claims that without a third degree assault instruction, the jury's only alternative was to convict him of first degree assault if the jury determined that he negligently shot Burnett.

However, defense counsel's arguments were not so narrow. Defense counsel argued to the jury that (1) the State failed to prove that he was present; (2) if he was present, the State failed to prove that he possessed the gun; (3) if he did possess the gun, the State failed to prove that he fired it; (4) if he did fire the gun, the State failed to prove that the shooting was intentional. A third degree assault instruction was irrelevant for the first three arguments.

Further, by foregoing a third degree assault instruction, defense counsel set up an "all or nothing" scenario. Without a third degree assault instruction, the jury would have had to acquit Pena if it found that he did not intentionally injure Burnett – i.e., if the jury found that Pena's conduct was accidental, negligent, or reckless. In other words, defense counsel may have made a

tactical decision to create doubt that Pena acted intentionally and therefore leave only the possibility of an acquittal. An all or nothing strategy can be a legitimate tactic with regard to lesser included offense or inferior degree offense instructions, and does not amount to ineffective assistance of counsel. *See State v. Breitung*, 173 Wn.2d 393, 398-400, 267 P.3d 1012 (2011); *Grier*, 171 Wn.2d at 43.

We presume that defense counsel made a legitimate tactical decision not to request a third degree assault instruction in order to set up an all or nothing scenario. Accordingly, we hold that Pena's ineffective assistance of counsel claim fails.

B. GANG TASK FORCE EVIDENCE

Pena argues that the trial court erred in allowing Detective Zimmerman to testify that he was assigned to a gang task force because that evidence was irrelevant and unfairly prejudicial. We disagree.

We review a trial court's rulings on evidentiary matters for an abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010). A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds or reasons. *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012). A decision is based on untenable reasons if it is based on an incorrect standard or if the facts do not meet the requirements of the correct standard. *Id.*

Detective Zimmerman testified that he was assigned to the Safe Streets Task Force at the time of his investigation and that the task force was a regional gang unit. The State elicited this testimony when establishing Zimmerman's training and experience. Zimmerman did not testify that there was any suspicion of Pena's involvement with gang activity. In fact, Pena successfully

argued that any references to gang culture were irrelevant and the trial court excluded any such evidence.

We hold that the trial court did not abuse its discretion in allowing testimony about Zimmerman's experience and training as a police officer, which included a brief reference to his assignment to the gang task force.

C. ALLEGED PROSECUTORIAL MISCONDUCT

Pena asserts in a statement of additional grounds (SAG) that the prosecutor engaged in misconduct. We disagree.

First, Pena claims that the prosecutor stated during opening statement and closing argument that this case did not involve a situation where Pena called the police and said the shooting was an accident; instead, Pena claimed he was not there. Pena argues that these statements constituted misconduct. However, he does not cite to the record to support this claim. In fact, the State's opening statement is not part of the record and these statements do not appear in the record of the State's closing argument.

Second, Pena claims that the prosecutor unfairly expressed his personal opinion when he stated that "it's obvious [that] it does not take much to make Mr. Pena angry [and] want to shoot people." SAG at 2. But this statement also is not in the record.

There is no evidence in the record that the prosecutor made the statements that Pena claims constitute misconduct. Therefore, Pena's prosecutorial misconduct arguments fail.

D. IMPOSITION OF LFOS

The trial court did not make an on the record assessment of Pena's present and future ability to pay before imposing discretionary LFOs. However, Pena did not object to the

imposition of LFOs in the trial court. We repeatedly have held that a defendant cannot raise this issue on appeal unless he preserved the error below, especially after this court issued its decision in *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013), *remanded*, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). *See State v. Lyle*, 188 Wn. App. 848, 852, 355 P.3d 327 (2015). Therefore, we hold that Pena has waived this issue on appeal.

We affirm Pena's conviction and the imposition of LFOs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, J.

We concur:

WORSWICK, J.

JOHANSON, C.J.

BACKLUND & MISTRY

March 09, 2016 - 11:16 AM

Transmittal Letter

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