

64568-4

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NO. 64568-4-1

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD D. PETERS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Where the court found the evidence of how defendant handled guns was relevant on the issue of recklessness, and carefully balanced the probative value against any potential for unfair prejudice, did the court abuse its discretion by admitting some of that evidence?

2. Where the court rejected the only grounds urged by defendant to suppress certain evidence, may defendant now argue the evidence was not admissible on different grounds?

3. Does the constitutional right to own firearms require the suppression of any evidence relating to firearms that were not used in the commission of the crime?

4. The jury instruction defining recklessness used the phrase "a wrongful act may occur." The defendant did not object. Was any instructional error harmless beyond a reasonable doubt?

5. Where there was no reasonable probability that the court would have changed the definition of reckless had defendant objected to the instruction given, or that the outcome of the trial would have been different, was defendant's counsel ineffective?

II. STATEMENT OF THE CASE

A. THE FACTS OF THE CRIME.

On the evening of November 16, 2008, defendant and his six year old daughter, S.P.¹, were watching a movie on TV. Defendant was also drinking and handling one of his guns, a Para Ordnance .45 caliber automatic pistol. Defendant had removed the loaded magazine from that gun and placed it on the couch next to him. He put the unloaded gun on the coffee table in front of him. 11/18 RP 595, 671. Defendant then decided he needed another gun, so he told S.P. to "go up and grab my .45 and bring it down." S.P. brought defendant a loaded magazine. Since that was not what defendant wanted, he sent her back up to get the gun. Exhibit 57 3-4, 22-23. When S.P. brought the gun -- a Colt Double Eagle .45 caliber pistol -- to defendant, he thought he took the magazine out, but did not. Exhibit 57 3, 5, 6, 8, 9, 10, 17, 18, 29, 11/18 RP 588-89, 11/20 RP 920, 941. Defendant said that S.P. handed him the gun. Defendant did not notice whether the slide or the hammer was back when S.P. handed him the gun. 11/20 RP 943, Exhibit 57 10, 18, 19. "And then I . . . normally, what I do is I squeeze the trigger but I . . . I don't know how it happened . . . it, it . . . I sclosed

¹ The State will refer to the six year old victim as S.P. No disrespect is intended.

[sic.] the trigger and it went off and there's not supposed to be a bullet in there." Exhibit 57 5.

The bullet struck S.P. in the forehead. The angle was perpendicular to her head. The bullet went through S.P.'s head, through the wall, through the fence, and lodged somewhere on defendant's neighbor's property. 11/18 RP 567-69, 633-34. The bullet killed S.P. 11/18 RP 567.

The State charged defendant with first degree manslaughter. 1 CP 167. Before trial, the State added one count of second degree felony murder with second degree assault as the underlying felony. 1 CP 158.

B. MOTIONS IN LIMINE.

Before trial, defendant moved in limine to suppress, inter alia, evidence of "the guns, ammunition, gun manuals, and magazines removed from [defendants'] house." He also moved to suppress evidence of his unintended discharge of a shotgun during a "Pumpkin Shoot," evidence of him having his eight year old son retrieving a loaded gun from defendant's vehicle, the hearsay statement of his three year old son "daddy went bang" while miming pointing a pistol, and defendant's statements that "his kids are very gun safe and that he always has his kids get his guns for him."

Defendant did not ask the court to suppress his statements to the police about his gun collection. Defendant's only argument for suppression was that the evidence was unfairly prejudicial and not probative. The only authority cited was ER 403.² 1 CP 93-94, 96, 99, 102-03.

Defendant also moved to exclude two of his neighbors "observations in regard to the number of guns in the Peters' home and whether or not they are loaded." Defendant's argument was that the evidence "is highly prejudicial and not relevant to the current charges. It should also be excluded pursuant to ER 404(b)."³ 1 CP 96. That was the only mention of ER 404(b) in defendant's motions in limine.

During the hearing on the motions in limine, defendant offered:

² Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ER 403.

³ Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

[M]y initial motion is going to be that the only gun relevant in this case is the gun that was used in the shooting. The rest of the guns are not relevant to the case and they – there is potential prejudice in admitting the fact that he has a lot of guns.

11/12 RP 169.

The State argued the evidence was relevant “to [defendant’s] knowledge of and need to take care of various weapons.” 11/12 RP 170.

Defendant then offered:

[I]f we could agree, . . . the weapons that are found in the rec room, the living room he is talking about, family room, are relevant because the gun safe was opened. Then I would ask that the other guns found in the house not be admitted except for the gun in question.

11/12 RP 172.

Before getting a ruling, defendant withdrew his suppression motion as to the shotgun that was being cleaned in the garage.

11/12 RP 173. He again argued:

[N]one of these guns were involved in the incident. The gun involved in the incident is the Colt. The State still can make its argument that [defendant] was reckless in allowing his daughter to go get that gun from the bed stand in the master bedroom and bring it down to him. They still have the argument that he was reckless by not making sure there was not a round chambered. The rest of these guns are simply – it is highly prejudicial.

11/12 RP 174-75.

The State argued that “the recklessness is handling of the weapons. Leaving them accessible to kids, not paying any attention, I think is consistent throughout the weapons in the house and how he stored them.” 11/12 RP 175.

After hearing argument, the court ruled:

With regard to the guns in this case, particularly the method of handling the weapon or weapons in the home, seems to me to be directly relevant to the issue of recklessness. The defendant’s disregard of the – of a known risk.

11/12 RP 176-77.

The court cautioned counsel:

It would not be appropriate for anyone to argue, and the Court will not allow anybody to argue or suggest, that because the defendant is a gun owner and because he has multiple weapons in his home, he is somehow or other a bad person or that the ownership of the weapons is bad. He has a constitutional right pursuant to a recent United States Supreme Court case to have guns.

But that doesn’t mean that the State can’t bring into evidence the fact that he has them, where they are and how he handled them. That, again, goes directly to the issue of the defendant’s disregard of this risk that a bad act could occur.

The probative value of this evidence outweighs any prejudicial effect that it might have, and the weapons will be allowed in.

11/12 RP 177-78.

Defendant then withdrew his objection to introduction of evidence of other gun-related items. 11/12 RP 178.

The court again admonished counsel:

Again, I want to reiterate, nobody is going to make any kind of an argument that this is bad or that it's bad to have the guns or whatnot. How the weapons are handled is a completely different situation. That is the crux of the reason that it's admitted, because it's the handling, leaving them accessible to the children, particularly when loaded, that makes it more prejudicial than probative [sic.]⁴

11/12 RP 179.

On the motion to exclude evidence of defendant directing his eight year old son to get him a loaded pistol from his vehicle, defendant argued that his son was older and the exact date of his asking his son to get the gun was unknown. He then asked the court to exclude the evidence. The court ruled that the evidence went both to defendant's knowledge of the risk of having children handle loaded guns, because he said he had taught them how to handle guns, and his disregard of that risk by having them handle the guns without supervision. 11/12 RP 180-82.

The court took under advisement whether to suppress evidence of two other incidents observed by the neighbor. In the

⁴ It is clear from the comments the court intended to rule this evidence was more probative than unfairly prejudicial.

first incident, defendant wanted to show his neighbor a new AR 15 pistol he had acquired. Defendant took the pistol out of a filing cabinet where it was stored and pointed it at the neighbor. The neighbor took the pistol, “dropped the magazine out and racked it.” In the second incident, the same neighbor sat on defendant’s couch in the upstairs living room in defendant’s house. The neighbor “ended up sitting on a weapon that was – from one of the seat cushions.” 11/12 RP 184-85.

The next day, the court ruled that evidence concerning the incident where the neighbor sat on a gun on the couch was relevant, highly probative, and admissible. The court did not allow evidence that defendant took a pistol out of a filing cabinet and pointed it at the neighbor because “the prejudicial effect of this witness outweighs any probative effect it might have.” 11/13 RP 202-04.

In regards to evidence of the “Pumpkin Shoot,” defendant argued that the incident, which took place about 13 days before the shooting at issue, was not relevant because the unintended discharge was not in his home, it was into the ground, and no one was hurt. Defendant then argued the evidence was “highly prejudicial.” 11/13 RP 208.

The court ruled:

This evidence of the defendant having handled a weapon less than two weeks prior to the death of his daughter, in which it's alleged that he was handling a weapon that went off, is directly relevant to his knowledge of a substantial risk. It's hard to conceive of how much more – how other evidence might – could be any more directly relevant to his knowledge. . . . it's a situation that makes it imminently clear that [defendant] knew that in the handling of a gun it could go off even if you didn't intend for it to. So it's highly relevant.

11/13 RP 211. The court then ruled that this probative value “outweighs any prejudicial effect that it might have or does have.”

11/13 RP 212.

C. EVIDENCE AT TRIAL.

Defendant's neighbor testified that on about October 16, 2008, he had taken some gifts to defendant's house to give to his children. “The kids were running around and playing in the house.”

11/17 RP 433. Defendant was sitting on a couch in the upstairs living room when he “reached down beside him and underneath some newspapers and magazines pulled out a .45 and handed it kind of over towards” the neighbor. 11/17 RP 431-32. The pistol had a loaded magazine in it when defendant handed it to his neighbor. 11/17 RP 433.

After showing the neighbor the .45 caliber pistol, defendant told his eight year old son to “go out to the truck and get this .45.” The son went out and brought in the pistol. 11/17 RP 437.

The neighbor testified he had expressed to defendant his concern that children could handle or fire the unsecured, loaded weapons that defendant kept in his house. Defendant told the neighbor that “all the kids had been taught not to touch these weapons.” 11/17 RP 435.

The neighbor also testified that he had seen a loaded rifle and a gun safe in defendant’s house. 11/17 RP 436-40. He did not say how many guns defendant owned, or what other guns he had seen in defendant’s house.

Defendant did not object to any of this testimony.

The neighbor and an officer testified that immediately after the shooting, defendant was intoxicated, inebriated, or drunk. 11/17 RP 443, 471. Defendant admitted he had “Four or five, I don’t know . . . doubles” of vodka, and was “under the influence” and should not drive. 11/20 RP 894, Exhibit 57 23. When defendant’s blood was drawn at about 2:15 AM, some seven hours after the shooting, defendant “sounded sober” but “smelled of

alcohol.” 11/19 RP 737. When tested, defendant’s blood had 0.11 grams of alcohol per 100 milliliters of blood. 11/19 RP 166.

None of the officers saw gun cleaning equipment in the family room. 11/17 RP 481, 11/18 RP 602, 618. They did see gun cleaning equipment in the garage, but it did not appear to have been used recently. 11/18 RP 639-40. That was consistent with defendant’s statements that he was not cleaning guns the night of the shooting, but previously cleaned them in the garage. Exhibit 57 4, 12.⁵

The jury also heard from one of defendant’s former co-workers that he was at the “Pumpkin Shoot” with defendant. The co-worker described how the shoot was organized, the safety measures that were in place, and the safety briefings that were given before the shoot began. 11/18 RP 554-56. The co-worker was acting as a “safety person.” He was behind defendant and another person who were “manipulating what I believed to be a Fox 12 shotgun.” 11/18 RP 557. The co-worker described the shotgun being fired, and the surprised expressions on the faces of

⁵ Defendant asserts he was cleaning or attempting to clean the Colt .45 pistol when he shot his daughter. Brief of Appellant 4, 23, 32. This assertion is directly contradicted by the record and defendant’s own statement to the police.

defendant and the other person manipulating the shotgun. The co-worker said it appeared that the shotgun went off by accident. 11/18 RP 558. This testimony was consistent with defendant's description of the incident when he talked to the police. Exhibit 57, pp. 20-22.

The jury also heard defendant's statement to the police where he said that he did not "know what I did but I hit the trigger . . . I pulled it and it went off." Exhibit 57 8. Defendant described his gun collection. Exhibit 57 2. He said he did not pay attention and did not know if the hammer was back or if the slide was back. Exhibit 57 18, 19. Defendant repeatedly said he removed the magazine from the gun. Exhibit 57 3, 5, 6, 8, 9, 10, 17, 18, 29. He acknowledged he was responsible for his daughter's injury. Exhibit 57 3, 11, 26, 33.

D. INSTRUCTIONS.

On Friday, November 20, when discussing the definition of reckless the State had proposed, the court said "Counsel, everybody in agreement that it ought to be defined as substantial risk that death may occur? . . . But the WPIC does not require a substantial risk of death, and neither does the law." 11/20 RP 981.

After discussing other instructions, the court returned to the definition of reckless. It said, "So pursuant to the WPIC, wrongful act appears to be fine. In fact, appears to be the suggested language, unless you want to get . . . more specific." Defendant responded, "That's fine." The court then inquired, "So are you fine with wrongful act?" Defendant responded, "I am." 11/20 RP 997-98.

On the following Monday, November 23, the court gave the parties a packet of the instructions it intended to give. The court then asked the State and defendant if they had any objections or exceptions to the instructions. There were no objections or exceptions. 11/23 RP 11.

The court instructed the jury:

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.

1 CP 50.

E. CLOSING ARGUMENT.

The State argued that defendant should have been well aware that a gun he didn't think was loaded could still fire, since two weeks before he shot his daughter, defendant had a shotgun

he didn't think was loaded go off. 11/23 RP 21. The State mentioned defendant's ownership of guns only in the context of showing that he was an experienced gun owner. 11/23 RP 22, 27, 32. The State did not argue that "because [defendant] was reckless with other guns on other occasions he must have been reckless on this occasion" as defendant now alleges. Brief of Appellant 24-25.

Defendant's entire argument centered around whether he was guilty of murder. He argued if "you decide that [I] was negligent or maybe even reckless with some of the things [I] did, by having the guns in the house, by having been drinking, find [me] guilty of manslaughter." 11/23 RP 39. Defendant ended his argument by saying, "Rich Peters is responsible for his daughter's death, but Rich Peters is not a murderer." 11/23 RP 46. Defendant did not argue that he did not know there was a substantial risk that death could occur if he pulled the trigger of his pistol while it was pointing at his daughter's head without first checking to ensure there was no round in the chamber.

The State did not mention defendant's ownership of other guns in its rebuttal argument. 11/23 RP 47-53.

F. VERDICT AND SENTENCE.

The jury convicted defendant of first degree manslaughter. It found him not guilty of second degree murder. The court imposed a standard range sentence of 162 months confinement – 102 months for first degree manslaughter and 60 months for the firearm enhancement – followed by 36 months of community custody. 1 CP 22, 23, 12/1 RP 1024.

III. ARGUMENT

A. SUMMARY OF ARGUMENT.

The court carefully considered whether to allow the State to introduce evidence of how defendant handled guns on other occasions and in his house on the night defendant killed his daughter. The court was sensitive to the constitutional right to own guns, and precluded any argument that mere ownership or possession of guns was reckless or unlawful. The court found that defendant's handling of guns was relevant on the issue of recklessness, and the potential for unfair prejudice, for most of the evidence, was outweighed by the probative value. For some of the evidence of defendant's firearm handling, the court determined the potential for unfair prejudice outweighed its probative value. The court used the correct legal standard in evaluating the admissibility

of evidence. Its rulings were reasonable. The court did not abuse its discretion in admitting the evidence of gun handling.

There are no special rules prohibiting introduction of evidence of gun handling or ownership if those facts are relevant to an issue in the trial.

The court instructed the jury using a definition of reckless that mirrors the statute defining a reckless state of mind and specifically approved by the Court of Appeals. Defendant agreed to the use of that instruction. Defendant has not cited any authority holding that instruction lessened the State's burden of proof. The instruction was proper.

Even if the instruction misstated the definition of reckless, any error was harmless beyond a reasonable doubt. The evidence was uncontroverted and overwhelming that defendant knew there was a substantial risk of death if he pointed his .45 caliber pistol at his daughter and pulled the trigger, and that by pulling the trigger of the pistol without checking to ensure it was not loaded, he disregarded that risk. There is no reasonable probability that had the jury been instructed that the State had to prove defendant knew and disregarded a substantial risk that a death may occur, they

would have found defendant not guilty or guilty of only a lesser crime.

Defense counsel was not ineffective for failing to challenge the instruction defining reckless. First, the instruction has never been held to be a misstatement of the law. Second, the court made it clear that it believed the law did not require a different instruction, so there is no reason to believe the court would have changed the definition had defendant objected. Last, as discussed above, there is no reasonable probability that the instruction affected the verdict.

B. STANDARD OR REVIEW.

We will not reverse the trial court's decision to admit evidence where the trial court rejected the specific ground upon which the defendant objected to the evidence and then, on appeal, the defendant argues for reversal based on an evidentiary rule not raised at trial.

State v. Powell, 166 Wn.2d 73, 82-83, 206 P.3d 321 (2009).

"A decision to allow certain evidence will not be reversed on appeal absent a showing abuse of discretion." State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

A court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds. A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Moreover, a court would necessarily abuse its

discretion if it based its ruling on an erroneous view of the law.

State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009) (quotation marks and citations omitted).

“We review jury instructions de novo, within the context of the jury instructions as a whole.” State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. . . . In order to hold the error harmless, we must “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.”

State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), quoting, Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995).

C. THE COURT PROPERLY ADMITTED EVIDENCE OF DEFENDANT'S HANDLING OF GUNS ON OTHER OCCASIONS.

Defendant argues that his gun ownership was used against him in violation of his right to due process and in violation of ER 402, 403, and 404(b). Brief of Appellant 24-25.

The evidence was properly admitted.

1. Evidence Of Defendant's Handling Of Guns Was Relevant On the Issue Of Recklessness.

Defendant assigns error to the court's ruling that evidence of "his gun collection and prior acts involving guns other than the one at issue in this case" was relevant on the issue of recklessness.⁶ Brief of Appellant 1, 32. The evidence was relevant.

The primary evidence of defendant's gun collection came from defendant's confession. Exhibit 57 2. While defendant objected to some of his statements to the police, he did not object to that part of his confession. 1 CP 98, 102-04. Defendant now objects to that evidence, Brief of Appellant 27, but his failure to object below waives any error. State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992).

⁶ "Relevant evidence" means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401.

Even if defendant's motion to exclude "reference to all guns (other than gun involved in shooting), ammunition, holsters, gun manuals and magazines removed from Peters' home" 1 CP 93, was sufficient to preserve the issue, the court ruled the evidence was relevant. "The determination of relevance is within the broad discretion of the trial court, and will not be disturbed absent a manifest abuse of that discretion." In re Personal Restraint Petition of Young, 122 Wn.2d 1, 53, 857 P.2d 989 (1993) (superseded by Statute). "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The court ruled the evidence was relevant on the issue of recklessness. This Court should affirm that ruling

Defendant's position at trial and here is that evidence of any firearm not used in the shooting or any act not directly related to the shooting is not relevant. Brief of Appellant 31, 11/12 RP 169, 174-75. That draws relevance much too narrowly.

The evidence that defendant owned several guns, had a gun safe, and had trigger locks for those guns was relevant to show that he was very familiar with firearms, and knew that those guns posed a risk.

The evidence that defendant told his neighbor and the police that he had trained his children to be “very gun-safe” also shows his consciousness that children and guns pose a risk.

The defendant’s leaving unsecured, loaded firearms lying around his house when children were present and playing, and having his young children, without supervision, fetch loaded firearms that were stored out of the sight of any adult, showed defendant’s state of mind in disregarding the risks he knew loaded firearms posed.

Defendant’s unintentional discharge of a shotgun at the Pumpkin Shoot, after having had a safety briefing and having procedures in place to promote safe handling of firearms showed that defendant was well aware that even firearms he did not know were loaded could be loaded and could fire unintentionally.

As the court below found, evidence of how defendant stored and handled his firearms was relevant on the issue of recklessness.

2. Since The Evidence Of Gun Ownership And Handling Is Relevant, Its Admission Did Not Violate Due Process.

[W]e do not have a per se rule barring the admission of evidence of a defendant’s ownership of firearms. The essential inquiry is one of relevance. Where a defendant’s ownership of a gun is relevant to an issue at stake in the trial, we recognize no special rule that would prevent the evidence from being admitted.

State v. Hancock, 109 Wn.2d 760, 767-68, 748 P.2d 611 (1988).

Here the court determined the evidence of defendant's handling of guns was relevant on the issue of recklessness. As discussed above, this ruling was correct. Accordingly, there was no constitutional violation.

Relying on State v. Rupe, 101 Wn.2d 664, 683 P.2d 571 (1984), State v. Hancock, 46 Wn. App. 672, 731 P.2d 1133 (1987), affirmed on other grounds, 109 Wn.2d 760 (1988), and State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001), defendant argues that, "Because gun ownership is a constitutional right, the admission of this evidence [of gun ownership] violated [defendant's] right to due process." Brief of Appellant 24. Those cases do not support defendant's argument.

In Rupe, the State offered evidence of the defendant's ownership of certain guns during the hearing on whether to impose the death penalty. The State argued that those guns, especially the CAR 15, were only useful for killing people, thus the defendant was a dangerous man who deserved the death penalty. Rupe, 101 Wn.2d at 704. The Supreme Court held that the evidence was not relevant, was prejudicial, and its admission violated the defendant's due process rights. Rupe, 101 Wn.2d at 703, 707, 708.

The evidence was not relevant there because “We see no relation between the fact that someone collects guns and the issue of whether they deserve the death sentence.” Rupe, 101 Wn.2d at 708. The evidence was prejudicial because it was “the crux of the prosecutor’s argument to the jury for defendant’s death.” Id. The evidence violated the defendant’s due process rights because the state “attempted to draw adverse inferences from defendant’s mere possession of these weapons.” Rupe, 101 Wn.2d at 707.

Here, the evidence was not of mere ownership. It was the way defendant regularly handled guns that was the evidence. Defendant’s ownership of the firearms in question was incidental to his handling of them. The court made it clear that mere ownership was not evidence of any crime, and there was no argument based on defendant’s mere ownership of firearms.

In Freeburg, the State offered evidence that when the defendant was arrested in Canada some three years after the murder, he had a gun in his possession as evidence of flight. This Court held “When evidence of flight is admissible, it tends to be only marginally probative as to the ultimate issue of guilt or innocence.” Freeburg, 105 Wn. App. at 987. This Court then ruled “the presence of the gun does not by itself indicate a

consciousness of the serious offense [the defendant] faced.” Freeburg, 105 Wn. App. at 988.⁷ This Court found “there was nothing to connect the handgun found in 1997 to Rodriguez’s death in 1994.” It held:

The State failed to show that the fact Freeburg carried a loaded gun in Canada in 1997 was evidence of consciousness of guilt in the 1994 shooting of Rodriguez, or that its probative value outweighed its harmful effect.

Freeburg, 105 Wn. App. at 989.

Here, there was a direct connection between the evidence of defendant’s gun handling and the crimes with which he was charged. About one month before the shooting, defendant picked up a loaded, unsecured .45 caliber pistol that was sitting on a couch under some magazines and showed it to a neighbor without checking to see that it was not ready to fire. On that same day, defendant had his eight year-old son go out to his truck, without supervision, and get a loaded .45 caliber pistol. The neighbor warned defendant about the risks of leaving unsecured, loaded firearms where they were accessible to children and having children fetch loaded firearms. This was exactly the behavior that

⁷ The Court noted that in fact, the gun did show consciousness of the serious offense the defendant faced, but the

lead to S.P.'s death. Further, the shotgun defendant didn't know was loaded fired unintentionally about two weeks before defendant shot his daughter with a gun he didn't know was loaded. There was a direct link between defendant's possession and handling of firearms and the crime he committed.

In Hancock, the State offered evidence that the defendant owned a gun. It argued that the evidence was relevant to the victim's fear of the defendant and to the victim's failure to promptly report the abuse. Hancock, 46 Wn. App. at 680-81. This Court held that there was "no connection between [the victim's] fear and his father's gun ownership, "thus the evidence of [defendant's] gun ownership appears to be gratuitous and irrelevant." Hancock, 46 Wn. App. at 681. This Court then concluded that the admission of the evidence "was an error of constitutional magnitude." Hancock, 46 Wn. App. at 682. This Court then found the error was harmless beyond a reasonable doubt. Id.

The Supreme Court rejected this Court's ruling that the admission of the defendant's gun ownership was error. It reversed this Court holding:

trial court had suppressed that evidence. Freeburg, 105 Wn. App. at 989.

Since Hancock's ownership of a gun was relevant in the context in which it arose, and does not appear to have been introduced for any impermissible purpose, we find no error with the trial court's admission of this evidence.

Hancock, 109 Wn.2d at 768-69.

Here, in the context in which defendant's handling and ownership of guns arose, it was relevant on the issue of knowledge of a substantial risk, and disregard of that risk. It was not used for an improper purpose. There was no error.

3. The Probative Value Of Evidence Of Defendant's Gun Ownership And Handling Outweighed Its Potential For Unfair Prejudice.

Defendant's next argument is that the evidence was more prejudicial than probative. Brief of Appellant 32-33. "The burden of showing prejudice is on the party seeking to exclude the evidence. Hayes v. Wieber Enterprises, Inc., 105 Wn. App. 611, 618, 20 P.3d 496 (2001). While defendant cites cases and quotes them for the general proposition that evidence of unrelated guns or other deadly weapons may be prejudicial, he offers no analysis of how the evidence here was unfairly prejudicial. "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). Defendant does not carry his burden of

showing how he handled guns on other occasions and how he stored other guns on the night he killed his daughter was likely to “stimulate an emotional response.”

The ability of the danger of unfair prejudice to substantially outweigh the probative force of evidence is ‘quite slim’ where the evidence is undeniably probative of the central issue in the case.

Carson v. Fine, 123 Wn.2d 206, 225, 867 P.2d 610 (1994).

The evidence here was how defendant handled guns, his awareness of the risks in handling guns, the reality that sometimes guns that people think are unloaded are in fact loaded, and his disregard of the risk associated with handling guns. This evidence is “undeniably probative of the central issue in the case.” This evidence was not likely to “stimulate an emotional response.”

An appellate court reviews the trial court’s balancing of the probative value against the prejudicial effect for an abuse of discretion. State v. Stein, 140 Wn. App. 43, 68, 165 P.3d 16 (2007), affirmed on other grounds, 144 Wn.2d 236 (2001). “The trial judge is generally in a better position to weigh the probative value and the unfair prejudice in a case.” Keppelman v. Lutz, 141 Wn. App. 580, 587, 170 P.3d 1189 (2007), affirmed, 167 Wn.2d 1, 217 P.3d 286 (2009).

As the court found, the evidence of defendant's handling guns was prejudicial, but not unfairly so. The court carefully weighed the probative value against the danger of unfair prejudice. The court excluded evidence of a third loaded hand gun that a neighbor said defendant pointed at him. The court found this evidence was unfairly prejudicial. 11/13 RP 203-04. There was no abuse of discretion.

4. The Evidence Was Not Offered To Show Propensity For Recklessness.

Defendant's last argument is that the evidence of his gun ownership and handling "was introduced for the improper purpose of showing action in conformity therewith." Brief of Appellant 33. To show this purpose, defendant quotes arguments the State made to the court concerning the relevance of the evidence. Defendant did not object to the evidence on the grounds it was offered to show propensity. He is precluded from doing so now. Powell, 166 Wn.2d at 82.

Even if the error was preserved, defendant has not shown that the State used the evidence for an improper purpose. The evidence of defendant's ownership and handling of guns was introduced as proof of his knowledge of the danger posed by firearms and his disregard of that danger. It was not introduced to

show his propensity to be reckless. The arguments were made to the court, not the jury, to establish the relevance of the evidence. They did not show the evidence was to be used to show propensity for recklessness.

As to the first argument quoted by defendant, the issue was whether to admit evidence of the Para Ordinance .45 pistol on the table in front of defendant, the open gun safe with loaded guns inside, and the loaded 9 mm pistol that was on the table upstairs in the living room.⁸ These guns were all in the house and in the condition described when the shooting took place. The State argued this evidence showed that “this was not an isolated act that is, as defense will say, just a tragic accident.” 11/12 RP 175.

The State had to prove that defendant ignored the known risk that a firearm would unintentionally discharge. The evidence of the other, easily accessible loaded guns, the availability of protective measures like trigger locks and a gun safe, and the failure to use those measures tended to show defendant disregarded known risks associated with those firearms. That was

⁸ The shotgun in the garage that was partially disassembled was also mentioned. Since defendant withdrew his objection to that shotgun, 11/12 RP 173, it is not addressed.

the State's argument, not that the evidence showed a "propensity for being reckless with guns."

As this Court has observed in holding the potential for unfair prejudice of evidence of other instances of recklessness was outweighed by the probative value:

The evidence did not paint the defendant in any worse light than had already been cast upon him by evidence of the charged crimes, nor did it introduce extraneous and irrelevant considerations about his character.

State v. Daniels, 87 Wn. App. 149, 158, 940 P.2d 690 (1997), review denied, 133 Wn.2d 1031 (1998).

As to the second argument, the issue was introduction of the evidence of the unintended discharge of defendant's shotgun at the Pumpkin Shoot. The State argued that the unintended discharge proved defendant should have been:

aware of the danger and the recklessness of what he is doing when he is holding a gun . . . when he is holding a gun and it accidentally goes off and within two weeks he is pointing a gun at his daughter and it accidentally goes off, that sort of defines recklessness.

11/13 RP 210.

In that context, the State was not arguing defendant had a propensity to be reckless with guns. It was arguing the evidence was relevant to defendant's knowledge and disregard of the risk.

The court carefully looked at the evidence of defendant's gun ownership and handling. It determined most of the evidence was relevant. The court then carefully balanced the probative value of the evidence against its potential for unfair prejudice. The court did not abuse its discretion when it admitted the evidence.

D. THE INSTRUCTION DEFINING RECKLESS WAS A CORRECT STATEMENT OF THE LAW AND DID NOT LESSEN THE STATE'S BURDEN OF PROOF.⁹

The court instructed the jury:

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.

CP 50.

Defendant argues that this definition lowered the State's burden of proof, and a new trial is required. The instruction was proper.

The instruction given is set out in WPIC 10.03. Use of this language has been approved by the Court of Appeals in State v. Smith, 31 Wn. App. 226, 229, 640 P.2d 25 (1982).

⁹ The State is not arguing that defendant's failure to object to this instruction precludes appellate review, since defendant alleges the instruction lowered the State's burden of proof and the failure to object was ineffective assistance of counsel. See State v. Kylo, 166 Wn.2d 856, 861-62, 215 P.3d 177 (2009).

The Supreme Court requires that an instruction use the language of the statute where appropriate. “The court not only may, but should, use the language of the statute in instructing the jury where the law governing the case is expressed in statute.” State v. Hardwick, 74 Wn.2d 828, 830, 447 P.2d 80 (1968).

The definition of reckless is “expressed” in RCW 9A.08.010(c).¹⁰ The instruction used that language. There was no error.

Defendant argues that State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005), requires a different definition of reckless. Brief of Appellant 15-17. Defendant overstates the holding in Gamble.

The Supreme Court was ruling on whether first degree manslaughter is included in second degree felony murder, where second degree assault was the underlying felony. Gamble, 154 Wn.2d at 459-60. It was not ruling on the instructions required to

¹⁰ 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 his or her disregard of such a substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation. RCW 9A.08.010(1)(c).

prove first degree manslaughter. The Supreme Court did observe that:

Looking to the 'wrongful act' caused by a defendant's actions, to prove manslaughter the State must show [the defendant] "[knew] of and disregard[ed] a substantial risk that a [homicide] may occur.'

Gamble, 154 Wn.2d at 467 (emphasis in the original), quoting RCW 9A.08.010(1)(c). It did not rule that instructing the jury using the statutory definition of reckless was incorrect.

Defendant next argues that since WPIC 10.03 was amended in 2008, and the Comment following the instruction suggests "for a manslaughter case, the instruction above should be drafted using the word 'death' rather than 'wrongful act,' the instruction given by the court was improper. Brief of Appellant 16. While defendant's reading of the 2008 amendment is correct, his conclusion is contrary to established case law.

"WPICs are not the law; they are merely persuasive authority. Where a WPIC is in conflict with the applicable statute, the jury instruction must follow the statutory language." State v. Hayward, 152 Wn. App. 632, 645-46, 217 P.3d 354 (2009).

Here, the instruction followed the statute. To the extent the amended WPIC is inconsistent with the statute, the language of the statute prevails.

Further, “Clarification of the standard instruction does not amount to an indictment of earlier versions.” State v. Holzkecht, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 3545929, slip op. 9 (2010). The amendment to WPIC 10.03 does not require a finding that using “wrongful act” in the definition of reckless was error.

The conclusion that Gamble did not require a different definition of reckless is supported by the fact that there have been several reported decisions since Gamble that considered, or at least mentioned, the definition of reckless as it was applied to second degree assault and first degree manslaughter. If Gamble required a different definition of reckless for manslaughter, it likewise required a different definition of reckless for second degree assault.

On the contrary, to achieve a felony murder conviction here, the State was required to prove only that [the defendant] acted intentionally and “disregard[ed] a substantial risk that substantial bodily harm may occur.”

Gamble, 154 Wn.2d at 467-68 (emphasis in the original).

Division II of the Court of Appeals, ruling that lesser included offense instructions should have been given in a murder case, quoted the definition of reckless requested by the defendant. It is substantially the same as the definition of reckless given here. While the propriety of this instruction was not before the Court, it gave no indication that giving this instruction in the defendant's retrial would be error. State v. Hunter, 152 Wn. App. 30, 46 n. 4, 216 P.3d 421 (2009), review denied, 168 Wn.2d 1008 (2010).

Likewise, when ruling that defendant's counsel's failure to request instructions on manslaughter as lesser included offenses to murder constituted ineffective assistance of counsel, the definition of reckless set out in the opinion is a quote from RCW 9A.08.010(1)(c). It did not use the language from Gamble. State v. Grier, 150 Wn. App. 619, 637, 208 P.3d 1221 (2009), review granted, 167 Wn.2d 1017 (2010).

In State v. Williams, 156 Wn. App. 482, 234 P.3d 1174 (2010), this Court ruled that second degree assault with sexual motivation merged with first degree rape. It mentioned the instruction defining reckless. The instruction used the phrase

“wrongful act,” not “substantial bodily harm.” Williams, 234 P.3d at 1179.¹¹ This was not raised as an error.

Division II of the Court of Appeals analyzed the definition of reckless given in a conviction for second degree assault. The definition of reckless was the same as given here. While the Court found the definition allowed the jury to find the defendant recklessly inflicted substantial bodily harm if it found he intentionally assaulted the victim, it did not require that the definition of reckless use the phrase “substantial bodily harm” instead of “wrongful act.” Hayward, 152 Wn. App. at 645.

The definition of reckless given by the court used the language of the statute defining reckless. It was not error.

E. IF THE DEFINITION OF RECKLESS WAS ERROR, IT WAS HARMLESS BEYOND A REASONABLE DOUBT.

Should this Court conclude that, after Gamble, the failure use the word “homicide” or “death” instead of the phrase “wrongful act,” in the definition of reckless used in a prosecution for first degree manslaughter was error, it was harmless beyond a reasonable doubt.

The only error alleged in the instruction was that defendant did not know and disregard the risk that death might occur, only

¹¹ The official reporter has not been paginated.

that a wrongful act might occur. The evidence established that defendant sent his six year-old daughter to get his .45 caliber pistol from his night stand. Defendant knew the pistol was loaded. Exhibit 57 5, 7, 9. When his daughter handed him the pistol, defendant did not unload the gun. 11/18 RP 588-59, 11/20 RP 920, 941. He did not check to ensure there was no round in the chamber. Exhibit 57 9, 18. Defendant did not check to see whether the slide or hammer was back. Exhibit 57 10, 18, 19. Instead, he “squeeze[ed] the trigger . . . I sclosed [sic.] the trigger and it went off[.] . . . I hit the trigger . . . I pulled it and it went off. . . . I just touched it or pulled [the trigger].” Exhibit 57 at 5, 8, 30. The gun was pointed straight at S.P., and killed her. 11/18 RP 567-69.

Defendant did not say that he was not aware the gun was pointed at his daughter, only that he was not aware there was a round in the chamber when he pulled the trigger. Evidence that defendant pulled the trigger of a loaded firearm aimed directly at his daughter was uncontested and overwhelming. The argument that the risk defendant was aware of and disregarded was only of “any bodily injury, no matter how minor, as well as any damage to

property, as well as any number of other nonhomicidal acts,"¹² is specious.

Defendant also argues that the jury, in acquitting him of murder, "rejected the State's theory that [he] was pointing the gun at Stormy." Brief of Appellant 18. The jury was instructed that it had to find defendant intentionally assaulted his daughter to convict him of felony murder. 1 CP 46. The verdict only shows that the jury did not find sufficient evidence of an intentional assault. It does not indicate anything about where the jury thought the gun was pointing. See State v. Goins, 151 Wn.2d 728, 735, 92 P.3d 181 (2004) (jury lenity cannot be ruled out as a potential reason for a not guilty verdict).

Beyond a reasonable doubt, if the jury had been instructed that to convict defendant of first degree manslaughter, it had to find defendant knew of and disregarded a substantial risk that death could occur, the verdict would have been the same.

F. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE DEFINITION OF RECKLESS.

Defendant's counsel agreed that the definition of reckless the court intended to give to the jury was proper. 11/20 RP 998. To show counsel's performance fell below an objective standard of

¹² Brief of Appellant,

reasonableness, defendant argues that “defense counsel’s failure to research the relevant law resulted in a jury instruction that lowered the State’s burden of proof.” Brief of Appellant 21. “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.” McFarland, 127 Wn.2d at 335. There is nothing in the record that supports defendant’s assertion that counsel did not research the law.

Defendant’s real argument is that counsel below did not reach the same conclusion as appellate counsel about the correct definition of reckless. As discussed above, while Gamble and the Comment to WPIC 10.03 might suggest that the definition of reckless may use the word “death” or “homicide” in lieu of “wrongful act,” neither authority states that using “wrongful act” in the definition is error. Since counsel is presumed to provide effective representation, defendant failed to meet his burden of overcoming that presumption. McFarland, 127 Wn.2d at 335.

G. DEFENDANT DID NOT SHOW THE FAILURE TO OBJECT TO THE DEFINITION OF RECKLESS RESULTED IN PREJUDICE.

The second prong of ineffective assistance of counsel defendant must show is that but for counsel’s deficient performance, the outcome would have been different. In the

context of a ruling on instructions, the burden is showing that had the objection been made, the court would have given a different instruction. State v. Keend, 140 Wn. App. 858, 166 P.3d 1268 (2007), review denied, 163 Wn.2d 1041 (2008). Defendant has not made that showing.

Here, the court looked at the proposed instruction requiring defendant to know of and disregard the risk of death. The court stated, “the WPIC does not require a substantial risk of death, and neither does the law.” 11/20 RP 981. Clearly, the court had looked at the 2008 amendment to WPIC 10.03, since it said, “The WPIC says a substantial risk that a wrongful act may occur. . . . And then – or you can put in some other description.” 11/20 RP 981. That option was not part of WPIC 10.03 before the 2008 amendment.

“Judges are presumed to know and apply the law[.]” State v. Cantu, 156 Wn.2d 819, 834, 132 P.3d 425 (2006), Johnson, J. dissenting. As discussed above, there is no authority holding that the definition of reckless set out in the statute is inadequate or incorrect. Given the court’s comments, defendant has not carried his burden of showing a different instruction would have been given had counsel objected.

Defendant argues "If the jury had been properly instructed, it is reasonably probable that it would have either acquitted [him] or found him guilty of the lesser offense of second-degree manslaughter." Brief of Appellant . This is not prejudice required to show ineffective assistance of counsel. Even if that were the correct standard, defendant's argument rests on misstating the evidence and drawing conclusions from the verdicts that are unwarranted. As discussed above, there is no reasonable probability that the verdict would have been different had the jury been instructed as defendant now proposes. He has not shown prejudice.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on October 8, 2010.

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