

No. 67757-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FELIPE JOSEPH RAMOS,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAR 29 PM 3:44

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Brian Gain

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT 6

 1. JURY INSTRUCTION 10 LOWERED THE STATE’S BURDEN OF PROOF, REQUIRING REVERSAL OF MR. RAMOS’ FIRST-DEGREE MANSLAUGHTER CONVICTION. 6

 a. To prove first-degree manslaughter, the State must show the defendant knew of and disregarded a substantial risk that *death* may occur, not a substantial risk that *any wrongful act* may occur..... 6

 b. The trial court improperly lowered the State’s burden of proof by instructing the jury in Instruction 10 the State need only prove a disregard of a substantial risk of a wrongful act rather than a substantial risk of death..... 7

 c. Reversal is required..... 10

 2. MR. RAMOS WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY PROPOSED THE “RECKLESS” INSTRUCTION TO LOWER THE STATE’S BURDEN OF PROOF..... 11

 a. Mr. Ramos had a constitutional right to effective assistance of counsel. 11

b. Defense counsel's performance was inexcusably deficient because he failed to research the relevant law and proposed a jury instruction that lowered the State's burden of proof. 14

c. Defense counsel's deficient performance should leave this Court with no confidence whatsoever in the outcome..... 15

E. CONCLUSION..... 16

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend VI 11, 12

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 22 11

FEDERAL CASES

Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942) 13

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 11

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) 11

Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) 14

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 13, 14

United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) 12, 13

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) 14

WASHINGTON CASES

In re the Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002) 5

State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005) 6, 7, 8, 14

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 11, 13

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 10, 14

<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1998)	13
<i>State v. Mills</i> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	10, 11
<i>State v. Peters</i> , 163 Wn.2d 836, 261 P.3d 199 (2011).....	6, 8, 9
<i>State v. Rodriguez</i> , 121 Wn. App. 180, 87 P.3d 1201 (2004).....	14
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	13
<i>State v. Woods</i> , 138 Wn. App. 191, 156 P.3d 309 (2007).....	14
STATUTES	
RCW 9A.08.010	7
RCW 9A.32.060	6
JURY INSTRUCTIONS	
WPIC 10.03.....	passim

A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Ramos' right to due process when it lowered the State's burden of proof by instructing the jury that it could convict Mr. Ramos of first-degree manslaughter if it found he disregarded a substantial risk that a wrongful act may occur.

2. Mr. Ramos was denied his constitutional right to the effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under case law and WPIC 10.03, to prove first-degree manslaughter, the State is required to prove beyond a reasonable doubt that the defendant knew of and disregarded a substantial risk that a *death* may occur, not just that any wrongful act may occur. Here, the trial court instructed the jury that it could convict Mr. Ramos if he knew of and disregarded a substantial risk that a wrongful act may occur. Did the trial court lower the State's burden of proof and violate Mr. Ramos' right to due process, requiring reversal?

2. A defendant is denied his constitutional right to the effective assistance of counsel if his attorney's performance is deficient and it is reasonably probable that the outcome of the trial

would have been different. Here, defense counsel proposed the jury instruction that lowered the State's burden of proof for manslaughter, even though the WPIC and its Comment as well as relevant case law indicated the correct instruction. The jury convicted Mr. Ramos even though evidence showed Mr. Ramos did not know Mr. Medina was intending to kill Mr. Collins when he provided a firearm to him. Must Mr. Ramos' conviction be reversed and his case remanded for a new trial because he was denied the effective assistance of counsel?

C. STATEMENT OF THE CASE

Felipe Ramos was the ex-husband of Maria Ramos. 6/20/2011RP 32-36. In 1997, Ms. Ramos and Mr. Ramos were living together in an apartment in Kent. *Id.* Ms. Ramos was working at the front desk of the Motel 6 on Military Road in Kent, while Mr. Ramos was working for Alaska Airlines. *Id.*

Mr. Ramos had been in the United States Marines for four years and had been stationed at Camp Pendleton in Oceanside, California just prior to moving to the Northwest. 6/20/2011RP 34-37. While in the Marines, Mr. Ramos purchased a .40 caliber Ruger firearm, which he and Ms. Ramos would shoot at a nearby shooting range. *Id.* This firearm was subsequently stolen in

California before the couple moved to Washington. 6/20/2011RP 51. Records at Camp Pendleton showed Mr. Ramos had purchased ammunition for the .40 caliber weapon, as well as 9 mm ammunition. 6/9/2011RP 48-49.

Also living with Mr. and Ms. Ramos in Kent was Ms. Ramos' youngest brother, Mario Medina. Mario had recently moved from California and was able to obtain a job at Motel 6.

On the evening of September 13, 1997, Mr. and Ms. Ramos and Mr. Medina were watching television at a neighbors' apartment. 6/14/2011RP 57. At 9:00 p.m., Ms. Ramos left for work, but she returned approximately one half hour later, crying. 6/14/2011RP 63-64. Mr. Ramos and Mr. Medina spoke to Ms. Ramos for a while, then left together. 6/14/2011RP 65. Mr. Medina stated they were going to talk to Ms. Ramos' supervisor, Joseph Collins. 6/14/2011RP 65.

Christina Pino, who was working the front desk at the Motel 6 on September 13, 1997, saw Mr. Medina and Mr. Ramos arrive in Mr. Ramos' car. 6/6/2011RP 37. Mr. Medina contacted Ms. Pino and wanted to know the location of Mr. Collins. 6/6/2011RP 40. Mr. Medina asked several times and became more aggressive with his questioning. 6/6/2011RP 42. Ms. Pino disclosed that Mr.

Collins was in his apartment at the Motel. 6/6/2011RP 43. As Mr. Medina turned to leave, Ms. Pino saw the impression of a gun under Mr. Medina's shirt. 6/6/2011RP 43.

Shortly thereafter, the two men were seen standing on the balcony outside Collins' apartment. A loud bang was heard followed by someone shouting, "Call 911 - I just shot Joe [Collins] in the fucking head!" 6/16/1998RP 27. Sounds of men fleeing were heard after the bang. *Id.*

Collins was found lying outside his apartment with a fatal gunshot wound to the forehead. 6/9/2011RP 15, 6/14/2011RP28. Stippling on Collins' forehead indicated the fatal shot was fired from six to 18 inches away. 6/14/2011RP 23.

The firearm which killed Collins, was never located. A shell casing found near Collins was identified as coming from a 9 mm weapon. 6/15/2011RP 55. Various gun paraphernalia was discovered by the police in a field adjacent to the motel, including magazines for .40 caliber and 9mm handguns and one half of trigger lock. 6/8/2011RP 104-23.

A fire crew, responding to the 911 call, staged approximately a block away from the Motel 6, awaiting police assurance it was safe to enter. 6/16/2011RP 130-31. The fire crew was approached

by Mr. Ramos and Mr. Medina who asked what was going on.
6/16/2011RP 138. After being told of the shooting, the two left.
6/16/2011RP 138.

Mr. Ramos and Mr. Medina were arrested at their apartment.
6/8/2011RP 6-11. Mr. Medina gave a detailed statement to the
police in which he admitted shooting Collins. 6/16/2011RP 167-73.
However, at trial, Mr. Medina recanted his admission to the police
and claimed Mr. Ramos had killed Mr. Collins. 6/21/2011RP 143,
6/22/2011RP 42-43, 54, 168.

Mr. Medina and Mr. Ramos were charged with second
degree intentional murder. CP 38.¹ The trial court also instructed
the jury on the lesser included offense of first degree manslaughter.
CP 115-18. The jury found Mr. Medina guilty as charged but
acquitted Mr. Ramos of murder. CP 126; 6/27/2011RP 2. Instead,
the jury found Mr. Ramos guilty of first degree manslaughter. CP
127; 6/27/2011RP 2.

¹ Mr. Medina and Mr. Ramos were originally convicted of second degree
felony murder. CP 14-15. Those convictions were reversed pursuant to the
decision in *In re the Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981
(2002).

D. ARGUMENT

1. JURY INSTRUCTION 10 LOWERED THE STATE'S BURDEN OF PROOF, REQUIRING REVERSAL OF MR. RAMOS' FIRST-DEGREE MANSLAUGHTER CONVICTION.

- a. To prove first-degree manslaughter, the State must show the defendant knew of and disregarded a substantial risk that *death* may occur, not a substantial risk that *any wrongful act* may occur. The first-degree manslaughter statute provides, "A person is guilty of manslaughter in the first degree when [h]e recklessly causes the death of another person." RCW 9A.32.060(1)(a). In the context of first-degree manslaughter, "reckless" or "recklessly" means the defendant "knows of and disregards a substantial risk that a death may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." WPIC 10.03 and Comment.

In other words, "to prove manslaughter the State must show [the defendant] knew of and disregarded a substantial risk that a *homicide* may occur." *State v. Gamble*, 154 Wn.2d 457, 467, 114 P.3d 646 (2005) (emphasis in original); *State v. Peters*, 163 Wn.2d 836, 848, 261 P.3d 199 (2011). This is in contrast to lesser crimes,

in which the State need only prove the defendant disregarded a substantial risk that some other “wrongful act” may occur. RCW 9A.08.010(1)(c). For example, to prove second-degree felony murder by assault, the State is “required to prove only that” the defendant “disregarded a substantial risk that *substantial bodily harm* may occur.” *Gamble*, 154 Wn.2d at 467-68 (emphasis added). “As such, first degree manslaughter requires proof of an element that does not exist in the second degree felony murder charge.” *Id.* at 468.

In sum, to convict a defendant of first-degree manslaughter, the State must prove that the defendant disregarded a substantial risk that death would occur, not a substantial risk that some lesser wrongful act would occur. Instructing the jury that it need only find the latter improperly lowers the State’s burden of proof. *Gamble*, 154 Wn.2d at 468; WPIC 10.03 and Comment.

b. The trial court improperly lowered the State’s burden of proof by instructing the jury in Instruction 10 the State need only prove a disregard of a substantial risk of a wrongful act rather than a substantial risk of death. The Washington Pattern Jury Instruction for recklessness includes a blank for the “wrongful act,” the substantial risk of which the defendant is alleged to have

disregarded. WPIC 10.03. Consistent with the decision in *Gamble*, the Comment to the WPIC specifically sets forth the appropriate instruction for first-degree manslaughter:

For manslaughter, the definition of recklessness is more particularized than is the general statutory requirement of a substantial risk that a wrongful act may occur. The Supreme Court has held in a manslaughter case that the definition of recklessness requires proof of disregarding a substantial risk that a death, rather than simply a wrongful act, may occur. ... Accordingly, *for a manslaughter case, the instruction above should be drafted using the word "death" rather than "wrongful act."*

Comment to WPIC 10.03 (emphasis added).

However, the trial court here gave the following instruction:

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 111 (Instruction 10) (emphasis added). By giving the jury the above (incorrect) instruction, the trial court lowered the State's burden of proof. *Gamble*, 154 Wn.2d at 468.

This same issue arose in *Peters, supra*, in which this Court reversed a first degree manslaughter conviction that utilized the incorrect instruction. 163 Wn.App. 847-50. In *Peters*, the defendant was charged with second degree felony murder, and in

the alternative, first degree manslaughter, where he had shot his daughter to death. The State and defense proffered jury instructions on first degree manslaughter that correctly required a substantial risk that death could occur. *Id.* at 843-44. The trial court disagreed with the proposed instruction, and instead utilized the WPIC language that required only that a wrongful act might occur. *Id.* at 844. Neither the State nor the defense objected to the court's decision to use this jury instruction. *Id.* Following the defendant's conviction for first degree manslaughter, this Court reversed based upon the improper instruction:

We hold the jury instruction given in this case that defines reckless to mean Peters knew of and disregarded "a substantial risk that a wrongful act may occur," rather than that "a substantial risk that death may occur" is contrary to *Gamble* and WPIC 10.03. The instruction impermissibly relieved the State of the burden of proving beyond a reasonable doubt that Peters knew of and disregarded a substantial risk that death may occur, and allowed the jury to convict Peters of only a wrongful act.

Peters, 163 Wn.App. at 849-50.

The same instruction utilized in *Peters* was utilized by the trial court here. *Peters* compels the conclusion that Mr. Ramos is entitled to reversal of his conviction.

c. Reversal is required. A jury instruction that lowers the State's burden of proof violates due process and therefore is an error of constitutional magnitude that may be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Constitutional errors require reversal unless the State proves, beyond a reasonable doubt, that the error did not contribute to the verdict obtained. *State v. Mills*, 154 Wn.2d 1, 15 n.7, 109 P.3d 415 (2005), citing *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The State cannot prove beyond a reasonable doubt that this error did not prejudice Mr. Ramos. It takes much, much less to disregard a substantial risk of any "wrongful act" than it does to disregard a substantial risk of death. The jury concluded that Mr. Ramos disregarded a substantial risk of a wrongful act by providing Mr. Medina with a firearm, but it did not conclude beyond a reasonable doubt that disregarded a substantial risk of death, because the evidence failed to show he knew Mr. Medina was intending to kill Mr. Collins as opposed to merely threatening or injuring him. This is aptly demonstrated by the fact the jury acquitted Mr. Ramos of second degree murder, indicating that it

rejected the State's theory that Mr. Ramos knew Mr. Medina intended to kill Mr. Collins.

A "wrongful act" could be any bodily injury, no matter how minor, as well as any damage to property, as well as any number of other non-homicidal acts. The erroneous jury instruction substantially lowered the State's burden of proof, prejudicing Mr. Ramos. The conviction should be reversed and the case remanded for a new trial. *Mills*, 154 Wn.2d at 15.

2. MR. RAMOS WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY PROPOSED THE "RECKLESS" INSTRUCTION TO LOWER THE STATE'S BURDEN OF PROOF.

a. Mr. Ramos had a constitutional right to effective assistance of counsel. A person accused of a crime has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI;² Const. art. I, § 22;³ *United States v. Cronin*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). "The right to

² The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

³ Article I, § 22 of the Washington Constitution provides, in relevant part, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel"

counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. *State v. McFarland*, 127

Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”), quoting *Strickland*, 466 U.S. at 688. While an attorney’s decisions are treated with deference, his or her actions must be reasonable under all the circumstances. *Wiggins*, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel’s inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wn.2d at 78. A reasonable probability “is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the “more likely than not” standard. *Thomas*, 109 Wn.2d at 226.

b. Defense counsel's performance was inexcusably deficient because he failed to research the relevant law and proposed a jury instruction that lowered the State's burden of proof. "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." *Kyllo*, 166 Wn.2d at 862. Here, as in *Kyllo*, defense counsel's failure to research the relevant law resulted in a jury instruction that lowered the State's burden of proof. As in *Kyllo*, this performance was deficient.

Indeed, counsel's performance here was even worse than that of the trial attorney in *Kyllo*, because in that case counsel was following the relevant WPIC. *Kyllo*, 166 Wn.2d at 865. The Supreme Court nevertheless held that the lawyer's performance was deficient because "there were several cases that should have indicated to counsel that the pattern instruction was flawed." *Id.* at 866. There was no legitimate strategic or tactical reason for allowing an instruction that incorrectly states the law and lowers the State's burden of proof. *Id.* at 869, citing *State v. Woods*, 138 Wn. App. 191, 201-02, 156 P.3d 309 (2007); *State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201 (2004).

Here, in contrast to *Kyllo*, the WPIC was consistent with the relevant case law. WPIC 10.03 and Comment; *Gamble*, 154 Wn.2d

at 467-68. Thus, if the attorney's performance was deficient in *Kyllo*, despite the fact that the instruction given was consistent with the WPIC, then counsel's performance here was inexcusably deficient. And, there was certainly no legitimate strategic or tactical basis for trial counsel to propose an incorrect instruction that lowered the State's burden of proof.

c. Defense counsel's deficient performance should leave this Court with no confidence whatsoever in the outcome.

Mr. Ramos' conviction should be reversed and his case remanded for a new trial. As discussed above, it takes much less to disregard a substantial risk of any "wrongful act" than it does to disregard a substantial risk of death. The jury concluded that Mr. Ramos disregarded a substantial risk of a *wrongful act* by assisting Mr. Medina, but it did not have conclude beyond a reasonable doubt that he knew this act would create a substantial risk of *death*. Indeed, the jury acquitted Mr. Ramos of second degree murder, indicating that it rejected the State's theory that Mr. Ramos knew that Mr. Medina was intending to kill Mr. Collins.

A "wrongful act" could be any bodily injury, no matter how minor, as well as any damage to property, or any number of other non-homicidal acts. If the jury had been properly instructed, it is

reasonably probable that it would have acquitted Mr. Ramos. Mr. Ramos' conviction should be reversed, and his case remanded for a new trial at which the jury will be properly instructed.

E. CONCLUSION

For the reasons stated, Mr. Ramos requests this Court reverse his conviction and remand for a new trial.

DATED this 29th day of March 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project - 91052
Attorneys for Appellant

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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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KING COUNTY COURTHOUSE	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] FELIPE RAMOS	(X)	U.S. MAIL
BA: 209027430	()	HAND DELIVERY
KING COUNTY JAIL-KENT	()	_____
620 WEST JAMES		
KENT, WA 98032		

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF MARCH, 2012.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710