

NO. 67757-8-I
(consolidated)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FELIPE RAMOS & MARIO MEDINA,

Appellants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the doctrine of invited error bars Ramos's claim regarding the jury instruction defining "recklessness" because Ramos proposed the same instruction that was given by the trial court.

2. Whether Ramos has failed to meet his burden of showing ineffective assistance of counsel because there is no reasonable probability that the jury instruction defining "recklessness" had an impact on the outcome of the trial.

3. Whether Medina's claim that the information was improperly amended should be rejected because the trial court properly exercised its discretion to allow the State to amend the information more than a year before the trial began.

4. Whether Medina's claim that he should be given credit for CCAP should be rejected because the relevant statutes and clear evidence of legislative intent demonstrate that Medina should not be given such credit.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendants, Felipe Ramos and Mario Medina, were originally charged with premeditated murder in the first degree for the September 13, 1997 killing of Joseph Collins. CP 1 (Ramos). They were tried to a jury in 1998, and both were convicted of the lesser degree offense of murder in the second degree. The jury answered an interrogatory stating that although the jurors were not unanimous as to the intentional murder alternative means, they were unanimous as to felony murder predicated on second-degree assault. State v. Ramos, 163 Wn.2d 654, 657-58, 184 P.3d 1256 (2008).

While the defendants' appeals were pending, the Washington Supreme Court decided that felony murder predicated on assault was a nonexistent crime. In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981(2002). Subsequently, during what can only be described as a period of substantial uncertainty regarding the implications of Andress, this Court held that the defendants could be retried only for manslaughter due to double jeopardy concerns. State v. Ramos, 124 Wn. App. 334, 341-43, 101 P.3d 872 (2004). Neither party sought further review

at that time, and the State charged the defendants with manslaughter in the first degree on remand in January 2005. CP 38 (Ramos).

Upon remand, the defendants argued to the trial court that the manslaughter charge should be dismissed on grounds of mandatory joinder and double jeopardy. Ramos, 163 Wn.2d at 659. When the trial court denied their motion to dismiss, the defendants sought discretionary review in the Washington Supreme Court, which was granted. Id.

In June 2008, the Washington Supreme Court issued a nearly unanimous¹ decision rejecting the defendants' double jeopardy claim, and holding that jeopardy had never terminated for the crime of intentional second-degree murder. Id. at 659-62. Accordingly, upon remand for the second time, the trial court granted the State's motion to charge both defendants with intentional second-degree murder on April 16, 2010. CP 83-84, 158-64 (Medina); RP (4/16/10) 24-28.

The second trial finally began more than a year later, on May 19, 2011. RP (5/19/11). At the conclusion of the second trial, the jury convicted Medina of second-degree murder as charged,

¹ Justice Sanders dissented.

and convicted Ramos of the lesser included offense of first-degree manslaughter. The jury found that both defendants were armed with a firearm during the commission of the crime. CP 174-75 (Medina); CP 125-27 (Ramos); RP (6/27/11) 2-6.

The trial court sentenced both defendants within the standard range. CP 128-35 (Ramos); CP 185-93 (Medina). Both defendants again appeal. CP 149 (Ramos); CP 193 (Medina).

2. SUBSTANTIVE FACTS

Joseph Collins was the resident manager of Motel 6 on Military Road in south King County. RP (6/6/11) 28-29. Maria Ramos – who is Medina's sister and Ramos's ex-wife – was a front desk clerk. RP (6/6/11) 30. Medina also worked there for a short time. RP (6/21/11) 122.

In the evening on September 13, 1997, Maria Ramos and both defendants had plans to watch a boxing match at the home of Michael and Charmaine McKelpin. RP (6/6/11) 57-58. Although everyone had been drinking while watching the fight, Maria Ramos was scheduled to work that night at 8:00 p.m. She did not leave the McKelpins' until after 9:00 p.m. RP (6/6/11) 58-62. When she arrived at Motel 6, Collins sent her home. RP (6/20/11) 45-46.

Maria Ramos drove back to the McKelpins' apartment and told the defendants what had happened. She was upset. RP (6/14/11) 64-65; RP (6/16/11) 57-58. Michael McKelpin tried to dissuade the defendants from going to Motel 6 to confront Collins, but the defendants ignored his advice and left. RP (6/16/11) 60-61. Before going to the motel, the defendants stopped by the apartment where they lived with Maria and picked up a gun, ammunition, and other supplies. RP (6/8/11) 99-119; Ex. 113. Ramos then drove himself and Medina to Motel 6 in Ramos's Volkswagen Jetta. Ex. 113. Ramos parked the car in the far corner of the parking lot next to a dumpster. RP (6/8/11) 28-31; Ex. 113.

The defendants walked to the motel's laundry room where Medina asked the security guard, Jame Flansburg, if he knew where Collins was. Flansburg told Medina that Collins was upstairs in his room. RP (6/14/11) 113-16. The defendants also walked to the motel office and knocked on the back door. Medina asked the desk clerk, Christina Piño, if she knew where Collins was. RP (6/6/11) 38-40. Piño saw the outline of what appeared to be a gun under Medina's shirt. RP (6/6/11) 42-43. Piño also told Medina that Collins was in his apartment, which was on the second floor of the motel. RP (6/6/11) 43.

A motel guest, Eric Liljestrom, saw the defendants standing together outside the door to Collins's room. RP (6/9/11) 6-7. The defendants' behavior made Liljestrom uneasy, so he turned and walked in the other direction. RP (6/9/11) 7-8. Shortly thereafter, Liljestrom, Piño, and Flansburg all heard a single gunshot. RP (6/6/11) 47; RP (6/9/11) 8; RP (6/14/11) 116. The defendants fled the scene. RP (6/9/11) 18; RP (6/14/98) 116.

Joseph Collins was shot once in the head. The entrance wound was "almost exactly between his eyebrows." RP (6/14/11) 18. Gunpowder burns, called "stippling," on Collins's forehead indicated that he had been shot from a distance of 6 to 18 inches, muzzle to target. RP (6/14/11) 18-23. Jame Flansburg was the first person to come to Collins's aid. It was immediately apparent that there was nothing that could be done, so Flansburg "just held him until he died." RP (6/14/11) 117.

The defendants left many items of evidence in their wake as they fled from the scene of the shooting. Ramos dropped his key to the Volkswagen Jetta on the second-floor walkway a short distance from Collins's body. RP (6/14/11) 118. Accordingly, the Jetta was still in the motel parking lot by the dumpster when the police arrived. RP (6/8/11) 27-31. A single 9 millimeter cartridge casing

was found on the ground directly below where Collins's body lay on the second-floor walkway. RP (6/8/11) 84-85, 91; RP (6/14/11) 118. Although the murder weapon was never found, forensic analysis indicated that the cartridge casing could have been fired from a 9 millimeter Ruger semiautomatic pistol. RP (6/15/11) 59-60. In a grassy field between the motel parking lot and Military Road, the police found gun cleaning supplies, ear plugs, a trigger lock, boxes of ammunition, two empty Ruger magazines, and other gun-related items. RP (6/8/11) 97-119; RP (6/14/11) 142-52.

The box of 9 millimeter ammunition found in the field was consistent with the fired cartridge casing found below the victim's body. RP (6/15/11) 69. Several of the items recovered from the field had labels indicating they had been purchased from the Marine Corps Exchange ("MCX") at Camp Pendleton. RP (6/14/11) 149-52; Ex. 132. Military records showed that Ramos had purchased a 9 millimeter Ruger semiautomatic pistol and a box of 9 millimeter ammunition at the MCX in 1996 when he was stationed at Camp Pendleton while serving in the Marine Corps. Ex. 132.

The defendants were arrested several hours after the shooting at the apartment they shared with Maria Ramos. RP (6/8/11) 8-11. They were interviewed separately by detectives

from the King County Sheriff's Office. RP (6/8/11) 43. Ramos told Detective Earl Tripp that he watched the boxing match at the McKelpins's and then went home. He said he had not been at Motel 6. Tripp asked Ramos where his car key was, and Ramos said he did not know. Tripp told Ramos that the key was found next to the body of Joe Collins. Ramos was "taken aback, wide-eyed." RP (6/8/11) 45-46. After a long pause, Ramos shrugged. RP (6/8/11) 47.

Medina also initially told Detective Sue Peters that he had not been at Motel 6. RP (6/16/11) 171. Peters told Medina that witnesses had seen him at the motel and that there was a videotape. Medina then stated that he had shot Joseph Collins. RP (6/16/11) 171-73. Medina gave a taped statement in which he admitted that he used Ramos's gun to shoot Collins. Ex. 113. When Peters asked Medina if he had intended to kill Collins, Medina initially said that he did. After a long pause, however, Medina said he had "just blanked out." Ex. 113. When Medina testified at trial, he claimed that his confession was false and that Ramos was the shooter. RP (6/21/11) 158; RP (6/22/11) 42.

Additional facts will be discussed further below as necessary for argument.

C. ARGUMENT

1. RAMOS IS BARRED FROM CHALLENGING THE INSTRUCTION DEFINING “RECKLESSNESS” UNDER THE DOCTRINE OF INVITED ERROR.

Ramos first argues that the jury instruction defining “recklessness” was erroneous. More specifically, Ramos argues that under State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005), the standard definition of recklessness set forth in WPIC 10.03 must be redrafted in manslaughter cases to specify that the defendant disregarded a substantial risk that a “death” may occur, rather than simply a “wrongful act.” Brief of Appellant (Ramos), at 6-11. But Ramos is barred from raising this claim under the doctrine of invited error, because he proposed the same instruction that the trial court gave to the jury. Accordingly, this Court should not consider it.

The invited error doctrine dictates that a party may not set up a potential error at trial and then claim that the trial court erred on that basis on appeal. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). Under this doctrine, a claim of trial court error cannot be raised “if the party asserting such error materially contributed thereto.” In re K.R., 128 Wn.2d at 147. The

invited error doctrine prohibits a claim even if that claim impacts a defendant's constitutional rights. City of Seattle v. Patu, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002).

Under the invited error doctrine as it applies in this case, “[a] party may not request an instruction and later complain on appeal that the requested instruction was given.” Henderson, 114 Wn.2d at 870 (quoting State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979)); see also State v. Studd, 137 Wn.2d 533, 546-49, 973 P.2d 1049 (1999). This holds true even if the jury instruction in question is a “to convict” instruction that omits an essential element of the crime. Patu, 147 Wn.2d at 720-21.

In this case, Ramos claims that the trial court's instruction defining “recklessness” was erroneous. CP 111 (Ramos). But Ramos proposed an instruction identical to the one given by the trial court. CP 79 (Ramos).² Accordingly, under well-settled law regarding the invited error doctrine, Ramos is barred from raising this claim and this Court should not consider it.

² Medina also proposed this instruction. CP 127 (Medina).

2. EVEN IF PROPOSING THE STANDARD INSTRUCTION DEFINING "RECKLESSNESS" CONSTITUTES DEFICIENT PERFORMANCE, RAMOS CANNOT DEMONSTRATE PREJUDICE.

Ramos next argues that his trial attorneys were ineffective because they proposed the standard jury instruction defining "recklessness." Brief of Appellant (Ramos), at 11-16. This claim should be rejected. Although the Washington Supreme Court's decision in Gamble appears to require that a manslaughter defendant's recklessness encompass a disregard of a substantial risk that a "death" may occur, rather than a "wrongful act," a different instruction would not have made a difference to the outcome of this case. Therefore, even assuming that Ramos can establish deficient performance, he cannot establish prejudice.

A criminal defendant has the constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 682, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

The defendant bears the burden of establishing ineffective assistance of counsel. Strickland, 466 U.S. at 687. To carry this burden, the defendant must meet both prongs of a stringent two-part test. Specifically, the defendant must show: 1) that counsel's representation was deficient, meaning that it fell below an objective standard of reasonableness considering of all the circumstances (the "performance prong"); and 2) that the defendant was prejudiced, meaning that there is a reasonable probability that the result of the trial would have been different but for counsel's unprofessional errors (the "prejudice prong"). Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. In judging counsel's performance, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This presumption of competence includes the presumption that challenged actions were the result of a reasonable trial strategy. Strickland, 466

U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

In addition to overcoming the strong presumption of competence and showing deficient performance, the defendant must also affirmatively show material prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the trial. Strickland, 466 U.S. at 693. If the standard were so low, virtually any act or omission would meet the test. Strickland, 466 U.S. at 693. Therefore, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. Strickland, 466 U.S. at 694.

In Gamble, the Washington Supreme Court held that felony murder and manslaughter differ because in order "to prove manslaughter the State must show Gamble '[knew] of and disregard[ed] a substantial risk that a [*homicide*] may occur.'" Gamble, 154 Wn.2d at 467 (quoting RCW 9A.08.010(1)(c)) (alterations and emphasis in original). As a result, the WPIC Committee advises that the standard definition of recklessness "should be drafted using the word 'death' rather than 'wrongful act'" in

first-degree manslaughter cases. WPIC 10.03, Comment at 210 (3d ed. 2008). Both Gamble and the comment regarding the WPIC were published before this trial finally took place in 2011. Therefore, it was arguably deficient performance for Ramos's lawyers to propose the standard version of WPIC 10.03 instead of drafting the instruction in accordance with Gamble and the WPIC comment.

But Ramos must still meet Strickland's prejudice prong. To do so, he must show a reasonable probability that but for the manner in which this jury instruction was drafted, the outcome of the trial would have been different. In another context (*i.e.*, applying the constitutional harmless error standard, where the burden is on the State rather than the defendant), both the Washington Supreme Court and the United States Supreme Court have held that instructional errors are harmless if the record shows 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)). Therefore, in this context, Ramos bears the burden of showing a reasonable probability that the jury's verdict would have been different if the Gamble recklessness instruction had been given. He cannot make that showing in this case, because the evidence was

overwhelming that at the very least, Ramos disregarded an obvious risk that Joseph Collins would be killed.

In this case, the evidence proved that both Ramos and Medina had been drinking, and both of them were angry with Joseph Collins for sending Maria home from work and upsetting her. RP (6/14/11) 59; RP (6/16/11) 55; RP (6/20/11) 63. Michael McKelpin tried to talk them out of going to the motel to confront Collins, but to no avail. RP (6/16/11) 60-61. Medina explained to Detective Peters that he and Ramos went back to their apartment before driving to Motel 6. Ex. 113. Ramos changed into dark clothing before they left for the motel. RP (6/21/11) 131-32. Medina claimed in his statement to the detective that he was the one who retrieved the gun from Ramos's closet; however, he said nothing about the extra magazines, ammunition, and other gun-related supplies that they brought with them to the motel. Ex. 113.

The murder weapon, ammunition, and other supplies the defendants brought with them to Motel 6 had been purchased by Ramos at Camp Pendleton when he was stationed there while serving several years in the Marines. Ex. 132. In addition to whatever firearms training Ramos undoubtedly received while he was

in the Marines, Maria testified that they used to go target shooting together as well. RP (6/20/11) 35.

Ramos drove to the motel; Medina did not know how to drive a manual transmission. RP (6/20/11) 44. Ramos parked next to a dumpster in the farthest corner of the parking lot. RP (6/8/11) 30-31; RP (6/21/11) 134; Ex 113. Ramos accompanied Medina as Medina asked Christina Piño and Jame Flansburg where they could find "Joe." RP (6/6/11) 40-43; RP (6/14/11) 113, 116. Piño testified that Medina became aggressive when asking where Collins was, and she could see the outline of what appeared to be a gun in Medina's waistband. RP (6/6/11) 42-43. Ramos and Medina then went upstairs to Collins's apartment together. RP (6/6/11) 44.

Motel guest Eric Liljestrom saw both defendants standing together outside Collins's room. Both defendants looked at Liljestrom nervously and acted suspiciously. Liljestrom "didn't have a good feeling" about the defendants, so he turned and walked in the opposite direction. RP (6/9/11) 6-8.

Medina told Detective Peters that he knocked on Collins's door, asked "What was the problem with my sister[?]", and shot Collins in the "face or the head[.]" Ex. 113. At trial, Medina testified that Ramos shot Collins and that his statement to the detective was

false. RP (6/22/11) 42. In any event, Collins was shot “almost exactly between his eyebrows” from a distance of only 6 to 18 inches, muzzle to target. RP (6/14/11) 18, 22-23. After shooting Collins at point blank range in the head, Ramos and Medina fled together with Ramos in the lead. RP (6/9/11) 8, 18.

Ramos dropped his car keys a short distance from Collins's body. RP (6/8/11) 27-30; RP (6/14/11) 118. Accordingly, Ramos and Medina crawled through a vacant field to get away from the motel. Along the way, one or both of them discarded a trigger lock, gun lubricating oil, earplugs, cotton swabs, an empty 9 millimeter pistol magazine, an empty .40 caliber pistol magazine, a box of 9 millimeter ammunition, a box of .40 caliber ammunition, and other gun-related supplies. RP (6/8/11) 97-119; RP (6/14/11) 142-52. As noted above, all of these items had been purchased by Ramos at Camp Pendleton during his service in the Marines. Ex. 132.

After crawling through the field, Ramos and Medina encountered personnel from the SeaTac Fire Department, who were waiting for the police to give them the “all clear” to enter the scene. RP (6/16/11) 131-32. Ramos walked up to a fire truck and calmly asked Captain Patrick Dahl what was going on. Dahl said that shots had been fired, and Ramos said he lived in the neighborhood and

had heard the shots. Dahl told Ramos to follow him to the scene because the police would want to talk to him. When the fire department began entering the scene, however, Ramos and Medina walked the other way. RP (6/16/11) 138-39. Captain Dahl noted that both Ramos and Medina were wet, and that one of them had leaves on his clothing. RP (6/16/11) 139.

Ramos went back to the McKelpins' apartment and asked repeatedly where Maria and their son were. He also asked, "What should I do?" RP (6/16/11) 67-68, 83, 85. Medina showed up at the McKelpins' as well, and he told Ramos they should go back to their apartment. Ramos told him to "shut up." RP (6/16/11) 85. Ramos and Medina eventually went back to their apartment, where they were later arrested. RP (6/8/11) 8-11.

Ramos told Detective Tripp that he had not gone to Motel 6 that evening, and he claimed he did not know where his car keys were. When Detective Tripp told Ramos the keys were found next to Collins's body, Ramos was "taken aback, wide-eyed." RP (6/8/11) 45-46. After a long pause, he shrugged his shoulders. RP (6/8/11) 47. When Ramos learned that Medina had confessed to shooting Joseph Collins, he became angry. RP (6/8/11) 27.

Given this evidence, Ramos cannot demonstrate that there is a reasonable probability that the jury's verdict would have been different if the instruction defining "recklessness" had used the word "death" instead of "wrongful act." Assuming that the jury concluded that Medina was the shooter – which is certainly likely, given that they found Medina guilty of intentional murder – the evidence overwhelmingly proved that Ramos: 1) was angry with Collins; 2) had been drinking; 3) drove himself and Medina to their apartment; 4) changed his clothes; 5) either retrieved or allowed Medina to retrieve his 9 millimeter pistol; 6) either retrieved or allowed Medina to retrieve all of the other gun-related supplies, including extra ammunition and magazines; 7) drove himself and Medina to the motel; 8) accompanied Medina on the quest to find Collins; 9) stood with Medina outside Collins's room, acting nervously and suspiciously; 10) stood with Medina while Medina shot Collins at point blank range between the eyes; 11) fled with Medina; 12) disposed of evidence; 13) pretended that he and Medina were witnesses rather than suspects when they encountered Captain Dahl; 14) lied to the police about being present at the murder scene; and 15) became angry upon learning that Medina had confessed.

Particularly for someone like Ramos – an experienced gun owner with military training – any reasonable person in these circumstances would have been aware of a substantial risk that Joseph Collins may be killed. Indeed, Ramos received a windfall from the jury, because the evidence overwhelmingly proves that Ramos was at least an accomplice to intentional murder. Accordingly, Ramos cannot meet the prejudice prong of Strickland, and his claim fails.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY ALLOWING THE STATE TO AMEND THE INFORMATION TO CHARGE MEDINA WITH MURDER IN THE SECOND DEGREE MORE THAN A YEAR BEFORE TRIAL.

Medina first argues, as he did at trial, that the State should not have been allowed to amend the information to charge him with murder in the second degree after the Washington Supreme Court issued its decision on discretionary review. Brief of Appellant (Medina), at 9-13. This claim should be rejected. Medina had ample notice of the amendment, which took place more than a year before trial, and Medina cites no relevant authority that supports his position that the State's charging discretion should be curtailed under the unique circumstances present in this case.

The primary purpose of a charging document in any criminal case is to provide the defendant with notice of the charge that “he or she must be prepared to defend against” at trial. State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). Under CrR 2.1(d), an information may be amended in the discretion of the trial court “at any time before verdict or finding if substantial rights of the defendant are not prejudiced.” Because the information provides notice to the defendant for purposes of trial preparation, amendments to the information are liberally allowed prior to trial, whereas the State’s ability to amend the information is far more limited once the trial has begun. State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1987).

In accordance with these principles, when the State moves to amend the information prior to trial (when amendments are liberally allowed), the burden is on the defendant to show “specific prejudice to a substantial right” in order to disallow the amendment. State v. James, 108 Wn.2d 483, 486, 739 P.2d 699 (1987). A lost opportunity to plead guilty to a lesser charge and avoid an amendment to a greater charge does *not* constitute specific prejudice under this rule. James, 108 Wn.2d at 489. Rather, consistent with the primary purpose of the information (*i.e.*, notice

for trial), prejudice in this context means “surprise or an inability to prepare a defense” at trial. Id.

In this case, Medina does not claim that amending the information to charge second-degree intentional murder prejudiced his ability to prepare a defense for trial. Indeed, such a claim would not be well taken, because the information was amended more than a year before the trial finally began. CP 83-84 (Medina); RP (4/16/10) 28; RP (5/19/11). In fact, second-degree murder (under both the intentional murder and felony murder alternative means) was one of the charges submitted to the jury in the first trial in 1998. CP 17 (Medina). Thus, any claim of prejudice to the ability to prepare a defense would strain credulity.

Instead, Medina argues here (as he did in the trial court) that he was prejudiced because he did not plead guilty to first-degree manslaughter in reliance on the mistaken belief that that was the only crime the State could charge in the wake of In re Andress. Brief of Appellant (Medina), at 10-11; CP 20-82 (Medina); RP (4/16/10) 5. But the Washington Supreme Court’s decision in James forecloses this argument; a lost opportunity to plead guilty to a lesser crime does not constitute prejudice. James, 108 Wn.2d at 489-90. Medina’s claim fails on this basis alone.

Nonetheless, Medina argues that he was prejudiced, citing State v. Ziegler, 138 Wn. App. 804, 158 P.3d 647 (2007). Ziegler is not on point. In Ziegler, the State moved to amend the information *during trial*. More specifically, the State amended a single count of child rape to child molestation and charged two additional counts of child rape based on the victims' trial testimony. Although the Ziegler court held that amending the child rape charge to child molestation did *not* result in prejudice, the court also held that adding two counts of child rape in the middle of trial was improper because it was prejudicial to the defendant's ability to prepare a defense. Ziegler, 138 Wn. App. at 811. Although the Ziegler court noted that the defendant's "trial strategy *and plea negotiations* likely would have been different"³ if he had had adequate notice of the amendments, Ziegler is still of no help to Medina because a mid-trial amendment is fundamentally different from an amendment well in advance of trial. Ziegler does not stand for the proposition that a pretrial amendment that potentially impacts plea negotiations (which would include virtually *any* pretrial amendment) constitutes a showing of prejudice under CrR 2.1(d). In fact, controlling authority holds to the contrary. See James, *supra*.

³ See id. (emphasis supplied).

Furthermore, from an equitable standpoint, it would constitute an injustice if the State were precluded from filing a second-degree murder charge in this case.

As the trial court observed, In re Andress left a great deal of uncertainty in its wake for the better part of a decade, and this case is a product of that uncertainty. RP (4/16/10) 24-25. Although this Court initially held in 2004 that Ramos and Medina could be charged only with manslaughter in the wake of Andress due to double jeopardy concerns,⁴ the Washington Supreme Court concluded in 2008 that jeopardy had *not* terminated on second-degree intentional murder under the law regarding alternative means. Ramos, 163 Wn.2d at 659-62. Notably, the Washington Supreme Court's decision resulted from a motion for discretionary review that was filed by the defendants, who were apparently unsatisfied with the initial windfall of being charged only with manslaughter, and who then sought the ultimate windfall of dismissal on double jeopardy grounds. See Ramos, 163 Wn.2d at 659. The fact that they were unsuccessful because the court ultimately rejected their arguments is not a basis to preclude the

⁴ See Ramos, 124 Wn. App. at 338-43.

State from charging the crime that far more accurately described the defendants' conduct based on the available evidence.

As the Washington Supreme Court recently observed, “[t]he charging discretion of prosecuting attorneys is an integral part of the constitutional checks and balances that make up our criminal justice system.” State v. Rice, ___ Wn.2d ___ (No. 85893-4, filed 6/28/2012). Medina has provided no authority that would support curtailing that discretion in this case. Medina received ample notice of the second-degree murder charge and was prepared to defend against it at trial, just as he was prepared to defend against a first-degree murder charge at his first trial in 1998. This Court should reject Medina’s claim, and affirm.

4. THE TRIAL COURT CORRECTLY RULED THAT MEDINA WAS NOT ENTITLED TO CREDIT FOR TIME SPENT ON CCAP PRIOR TO TRIAL.

Finally, Medina argues that he is entitled to credit against his prison sentence for the time he spent in the King County Community Center for Alternative Programs (“CCAP”) prior to trial. Brief of Appellant (Medina), at 13-22. This claim should also be rejected. Although the trial court relied on a statute that was not in effect when Medina killed Joseph Collins in denying Medina’s

request for CCAP credit, the trial court's ruling was still correct and should be affirmed on alternative grounds.

Statutory interpretation is a question of law, which courts review *de novo*. Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. P'ship, 156 Wn.2d 696, 698, 131 P.3d 905 (2006). The reviewing court's primary duty in interpreting a statute is to "discern and implement the intent of the legislature." Id.

When construing a statute, all statutory language must be given effect, with no part of the statute rendered meaningless or superfluous. State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002); State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). Moreover, the meaning of a particular part of a statute is not gleaned from that part alone; the purpose is to ascertain the legislative intent of the statute as a whole. Davis v. Dep't of Licensing, 137 Wn.2d 957, 970-71, 977 P.2d 554 (1999).

There is one rule of statutory construction that "trumps every other rule": the court must not construe the statutory language in a way that results in absurd consequences. Davis, 137 Wn.2d at 971; see also State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987) ("Statutes should be construed to effect their purpose and unlikely, absurd or strained consequences should be avoided").

As a preliminary matter, the trial court relied on the current version of RCW 9.94A.680, which specifically provides that only offenders who are convicted of “nonviolent and nonsex offenses” may receive credit for “time served by the offender in an available county supervised community option” such as CCAP. RP (9/30/11) 15; RCW 9.94A.680(3). If this statute were directly applicable here, its plain language would categorically prohibit giving Medina credit for CCAP against his prison sentence for murder in the second degree. But although RCW 9.94A.680(3) is certainly relevant, because it provides strong evidence of legislative intent with respect to which offenders should receive credit for CCAP (as will be discussed further below), it is not directly applicable because it became effective in 2009. See Laws of 2009, ch. 227 § 1. Nonetheless, the trial court’s ruling should be upheld on alternative grounds as follows.

Under RCW 9.94A.345, courts are directed to apply the sentencing laws that were “in effect when the current offense was committed.” Although this particular statute was not enacted until 2000,⁵ it codifies the principle that legislative enactments generally do not apply retroactively. Accordingly, Medina’s sentence is

⁵ See Laws of 2000, ch. 26.

controlled by the Sentencing Reform Act (“SRA”) as it existed in September 1997, when Medina and Ramos killed Joseph Collins.

The primary difficulty presented in these circumstances is that CCAP did not exist in 1997. Indeed, the first version of the statute that authorized counties to create programs such as CCAP was not enacted until 1999. See Laws of 1999, ch. 197 § 6. However, the 1997 version of the SRA supports the trial court’s ruling in any event.

In 1997, the SRA provided (as it still does today) that offenders should be given credit “for all confinement time served before the sentencing[.]” Former RCW 9.94A.120(16). “Confinement” was defined as “total or partial confinement[.]” Former RCW 9.94A.030(8). “Partial confinement” was then defined as follows:

“Partial confinement” means *confinement* for no more than one year in a *facility or institution* operated or utilized under contract by the state or any other unit of government, or, if home detention or work crew has been ordered by the court, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, and a combination of work crew and home detention as defined in this section.

Former RCW 9.94A.030(26) (emphasis supplied).

What constituted “confinement” in “a facility or institution” for “a substantial portion of each day” for purposes of “partial confinement” was not further defined in the 1997 SRA. However, in the statute that defined a “*term of partial confinement*” when imposed as part of an offender’s sentence, the legislature specified that “[a]n offender sentenced to a term of partial confinement shall be *confined* in the *facility* for *at least eight hours per day*[.]” Former RCW 9.94A.180(1) (emphasis supplied). Given that statutory schemes are to be construed as a whole, this statute evidences a legislative intent in 1997 that “partial confinement” should confine the offender in a facility or institution for a minimum of eight hours.

The King County Code provision that defines CCAP states that CCAP is available only “for offenders convicted of nonviolent and non-sex offenses with sentences of one year or less as provided in RCW 9.94A.680,” and it specifies that CCAP is “an *alternative to confinement* program in which an offender must *participate for a minimum of six hours per day*[.]” KCC 5.12.010 (emphasis supplied). Accordingly, by its very terms, CCAP does not qualify as “partial confinement” under the 1997 SRA for the following reasons: 1) CCAP is specifically designated as an “*alternative to confinement*” rather than “confinement,” whether

partial or otherwise; and 2) it requires the offender to “participate” in the program for a minimum of six hours per day rather than to be “confined” in a “facility or institution” for a minimum of eight hours per day.

In sum, Medina is not entitled to credit for time spent in CCAP prior to sentencing because CCAP does not meet the definition of “partial confinement” under the 1997 SRA. Indeed, Medina should not have been placed in CCAP in the first place; he is categorically ineligible for this “alternative to confinement” program because he was charged with and convicted of second-degree murder – a “serious violent” offense. Former 9.94A.030(31)(a).

Nonetheless, Medina argues that he is entitled to credit for time spent in CCAP, and he cites the 1999 version of the statute that enabled King County to create CCAP. See Brief of Appellant (Medina), at 14 n.4 (quoting former RCW 9.94A.680, enacted by Laws of 1999, ch. 197, § 6). But, as explained above, the current version of this statute – which existed at the time of Medina’s sentencing and is the only apparent evidence of legislative intent regarding offenders who *should* be given credit for CCAP – specifically provides that the court may give credit only “[f]or

offenders convicted of nonviolent and nonsex offenses[.]” RCW 9.94A.380(3) (enacted by Laws of 2009, ch. 227 § 1). Although neither the former version nor the current version of RCW 9.94A.680 applies directly in this case, the current version constitutes strong evidence of legislative intent that violent offenders should not receive credit for CCAP against their prison sentences. Again, Medina should not have been placed in this program in the first place because he was categorically ineligible.

And furthermore, the record shows that Medina was in an even less demanding version of CCAP – “CCAP Basic” – for substantial periods of time. CP 182-85, 189 (Medina). CCAP Basic requires only that the participant call in once a day. CP 182-83 (Medina). No credible argument can be made that Medina is entitled to credit against his prison sentence for making a daily telephone call.

Put bluntly, it would lead to absurd consequences that the legislature plainly did not intend if this Court were to award Medina credit against his prison sentence for a murder conviction based on an “alternative to confinement” program designed for nonviolent offenders facing sentences of one year or less. The relevant

statutes should be interpreted in a manner that avoids these absurd consequences, and Medina's claim should be rejected.

Nonetheless, Medina argues that the rule of lenity, equal protection, and double jeopardy require that he be given credit for CCAP. Brief of Appellant (Medina), at 18-22. These arguments are also without merit.

First, the rule of lenity applies only when statutes are ambiguous, meaning that they are subject to more than one reasonable interpretation and there is no discernible evidence of legislative intent. In re Personal Restraint of Bowman, 109 Wn. App. 869, 875-76, 38 P.3d 1017 (2001), rev. denied, 146 Wn.2d 1001 (2002). As explained above, the statutes in effect in 1997 do not support Medina's argument that CCAP constitutes partial confinement, and the only apparent evidence of legislative intent (*i.e.*, the current version of RCW 9.94A.680(3)) demonstrates that the legislature does not intend that offenders charged with and convicted of murder receive credit for CCAP. Accordingly, the rule of lenity does not apply here.

Second, in support of his equal protection argument, Medina cites State v. Anderson, 132 Wn.2d 203, 937 P.2d 581 (1997), and State v. Swiger, 159 Wn.2d 224, 14 P.3d 372 (2006), neither of

which is on point. In Anderson, the defendant was placed on electronic home detention (“EHD”) while his appeal was pending, and he was denied credit for the time he served on EHD when that appeal proved unsuccessful. The relevant statutes in the SRA specifically awarded credit for pre-conviction home detention, but said nothing regarding post-conviction home detention. The Anderson court held that there was no rational basis to treat pre-conviction and post-conviction EHD differently, and that equal protection required giving the defendant credit for EHD served during the appeal. Anderson, 132 Wn.2d at 206-13.⁶ In Swiger, the situation was identical to Anderson, except insofar as the court required the defendant to be monitored via a global positioning system (“GPS”) rather than EHD pending appeal. Thus, the Swiger court awarded credit for post-conviction GPS monitoring in accordance with Anderson. Swiger, 159 Wn.2d at 227-31.

But in this case, unlike in Anderson and Swiger, the issue is not whether pre-conviction and post-conviction CCAP are the same for equal protection purposes. Rather, the issue is whether CCAP qualifies as “confinement” at all (it does not), and whether the

⁶ The record shows that Medina was also on EHD beginning July 19, 2011. CP 201-06 (Medina). Unlike CCAP, Medina is entitled to credit for EHD in accordance with Anderson.

legislature intends for violent offenders to receive credit for CCAP under any circumstances (it does not).⁷ Medina's equal protection claim is unavailing.

Lastly, Medina cites North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), in sole support of his argument that the failure to give credit for CCAP violates double jeopardy. But the issue in Pearce was whether a defendant who had successfully challenged his conviction on appeal was entitled to credit for the time he had already served *in prison* when he was ultimately convicted a second time. Pearce, 395 U.S. at 716-18.⁸ CCAP is not remotely analogous to prison, and thus, Pearce is not on point.

In sum, the statutes in effect in 1997 should be reasonably interpreted to affirm the trial court's ruling that Medina is not entitled to credit for CCAP against his prison sentence for murder in the second degree. Such an interpretation is consistent with the legislature's clearly-stated intent that only nonviolent and non-sex

⁷ If any equal protection argument were to be made in this case, the issue would be whether the legislature has a rational basis for treating nonviolent and non-sex offenders differently from violent offenders and sex offenders for purposes of eligibility and credit for CCAP. It is self-evident that such a rational basis exists.

⁸ Medina was also clearly entitled to credit for any time spent in prison following his original conviction in 1998.

offenders are eligible for credit for CCAP, and avoids absurd results that the legislature did not intend.

D. CONCLUSION

For the reasons set forth above, this Court should affirm Ramos's conviction for manslaughter in the first degree and Medina's conviction for murder in the second degree.

DATED this 6th day of July, 2012.

Respectfully submitted,

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. FELIPE RAMOS & MARIO MEDINA, Cause No. 67757-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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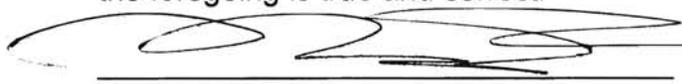
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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. FELIPE RAMOS & MARIO MEDINA, Cause No. 67757-8-I, in the Court of Appeals, Division I, for the State of Washington.

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