

70134-7

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NO. 70134-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD D. PETERS,

Appellant.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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I. ISSUES

(1) When the defendant accidentally shot his daughter, there were several other guns present in the same room. Was the defendant's constitutional right to bear arms violated by admission of testimony concerning these gun and crime scene photographs that showed the guns?

(2) The defendant was charged with recklessly shooting his daughter. Evidence showed that he had twice been warned about the danger of pointing guns at people. Evidence also showed that two weeks before the shooting, he had accidentally fired a gun. Did the trial court abuse its discretion in admitting this evidence under ER 404(b)?

(3) If admission of this evidence was erroneous, was the error harmless, where (a) the defendant was acquitted of reckless homicide but convicted of negligent homicide, (b) undisputed evidence showed that the defendant pointed a loaded gun at his daughter and pulled the trigger, and (c) the defendant admitted on cross-examination that his conduct was "careless"?

II. STATEMENT OF THE CASE

On November 16, 2008, the defendant, Richard Peters, shot and killed his six-year-old daughter. The bullet struck her in the

forehead, less than an inch to the left of the midline. The angle of the bullet was almost directly perpendicular to her forehead. 2 RP 321-22.

The defendant told police that he had told his daughter to go upstairs and bring down his gun. She did and gave it to him. "I took it, like popped the magazine out, and I – there shouldn't a been nothing ready, nothing in the chamber but, I don't know what I did but I hit the trigger. I pulled it and it went off." Ex. 57 at 8.

When police arrived, the fatal gun was on the defendant's couch. On a table by the couch, there was an alcoholic drink and another gun. In a gun safe by the couch, there were additional guns. All of these guns were depicted in photographs of the crime scene. 1 RP 109-13.

Police observed that the defendant appeared "quite intoxicated." 1 RP 85. Approximately seven hours after the shooting, his blood alcohol level was .11. This level would have been significantly higher at the time of the shooting. 2 RP 298.

At trial, evidence was admitted of prior incidents in which the defendant had mis-handled guns. Some of these events were described by a neighbor, John Smith. On one occasion, the defendant wanted to show Mr. Smith a particular pistol. He took

the pistol out of a filing cabinet, turned around, and pointed the gun at Mr. Smith. Mr. Smith grabbed the gun from the defendant and determined that it had a full magazine. He told the defendant that his handling of weapons was unsafe. 1 RP 40-41.

On another occasion when Mr. Smith visited, the defendant had an AK-47 leaning against the wall with a loaded magazine. Children were present in the house. Mr. Smith told the defendant that it was unsafe to leave a loaded weapon in a place accessible to children. 1 RP 42-43. Mr. Smith became concerned enough that he directed his daughter not to visit unless he or his wife were present. 1 RP 50.

There was also testimony about a "pumpkin shoot" that occurred about two weeks before the victim was killed. In these events, people get together to shoot at pumpkins that were left over from Halloween. On this occasion, the defendant was holding a shotgun while he and another person manipulated it. The gun went off accidentally. 2 RP 237-41. In cross-examination at trial, the defendant said that he had been unaware that the shotgun was loaded. When asked, if he got his "butt chewed," he answered, "It wasn't really a butt chewing, it was just a discussion." 4 RP 667.

The defendant was initially charged with second degree felony murder. A jury acquitted him on that charge but convicted him of the lesser offense of first degree manslaughter. This court reversed the conviction because of an erroneous jury instruction. CP 294-309. The defendant was then re-tried for first degree manslaughter. The jury acquitted him of that charge but convicted him of the lesser offense of second degree manslaughter. CP 31-232. The defendant now appeals his conviction of that crime.

III. ARGUMENT

A. THERE IS NO SPECIAL RULE BARRING ADMISSION OF EVIDENCE CONCERNING GUN OWNERSHIP, SO LONG AS THAT EVIDENCE IS RELEVANT.

The defendant claims that his constitutional rights were violated by admission of evidence concerning guns in his home. Contrary to his arguments, there is no special rule concerning evidence of gun ownership.

[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 that evidence from being admitted.

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

In the present case, the evidence of the defendant's gun ownership was relevant in at least two ways. First, it was relevant to

prove his awareness of requirements of gun safety. The charge of first degree manslaughter required proof of recklessness. RCW 9A.32.060(1)(a).

A person is reckless ... when he knows of and disregards a substantial risk that a wrongful act can occur and his ... disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)(c). Thus, to prove recklessness, it was necessary for the State to prove that the defendant *knew* the risk involved in his actions.

In the State's case, witnesses testified concerning the standard rules of gun safety. 1 RP 34; 2 RP 235. The defendant's violation of such rules could be sufficient to prove that his actions were unreasonable -- *i.e.*, that he was negligent. That violation was not, however, sufficient to establish that the defendant *knew* of the risk. Had the defendant been a casual or recent gun owner, a jury could question whether he understood the dangers of his actions. Since, however, he was an experienced gun owner who owned numerous guns, a jury could consider it more likely that he was aware of safety rules and the dangers resulting from their violation. Because the defendant's gun ownership was relevant to the issue

of recklessness, admitting evidence of that ownership did not violate any constitutional requirement.

The evidence of gun ownership was also admissible under the “same transaction” doctrine.¹ Under that rule, evidence can be admissible “to complete the story of the crime on trial by proving the immediate context of happenings near in time and place. Each act must be a piece in the mosaic necessarily admitted in order that a complete picture be submitted for the jury.” State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615 (1995) (citations omitted); see State v. Grier, 168 Wn. App. 635, 645-47 ¶¶ 19-21, 278 P.3d 225 (2012).

In the present case, evidence of the other guns was *literally* necessary to give the jury a “complete picture.” Other guns were present in the same room where the shooting occurred. An open gun safe holding guns was by the couch where the defendant had been sitting. Another gun was on the table where he had his drink. 1 RP 109-13. Photographs of the crime scene showed these guns. Had evidence of these guns been suppressed, the jury would not

¹ This has also been referred to as the “res gestae” doctrine. That phrase, however, has multiple meanings. It has been criticized as “not only entirely useless, but even positively harmful.” 6 Wigmore, Evidence § 1767 (Chadbourn rev. 1976); see Haggins v. Warden, 715 F.2d 1050, 1056-57 (6th Cir. 1983), cert. denied, 464 U.S. 1071 (1984).

have been allowed to see what the room looked like at the time of the shooting. Because evidence of the defendant's gun ownership was relevant, admission of that evidence did not violate his constitutional rights.

B. EVIDENCE OF THE DEFENDANT'S PRIOR CARELESSNESS WITH GUNS WAS ADMISSIBLE TO SHOW THAT HE WAS AWARE OF THE POTENTIAL CONSEQUENCES OF SUCH CARELESSNESS.

The defendant also challenges admission of prior instances in which the defendant handled guns in a unsafe manner. He claims that this evidence violated ER 404(b):

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.

As already pointed out, the charge of first degree manslaughter requires proof of recklessness. The statutory definition of recklessness incorporates a type of knowledge. A person is reckless if he "*knows of* and disregards a substantial risk that a wrongful act can occur." RCW 9A.32.060(1)(a). The State could therefore introduce evidence of prior acts to show the defendant's *knowledge* of the dangerousness of his actions. Evidence of prior similar conduct can be admissible to establish a

person's recklessness. State v. Potter, 31 Wn. App. 883, 886, 645 P.2d 60 (1982).

Here, Mr. Smith testified to an occasion when the defendant pointed a loaded gun at him or in his direction. He also described an occasion when the defendant left a loaded assault rifle in a place where it was accessible to his children. On each of these occasions, Mr. Smith told the defendant that his actions were dangerous. 1 RP 38-43. Where a defendant has been specifically warned that his actions are dangerous, a jury can infer that he was aware of that danger.

The other incident was similar. Only a couple of weeks before the defendant killed his daughter, a shotgun accidentally discharged while the defendant was handling it. 2 RP 238-41. At trial, the defendant testified that he had been unaware that the gun was loaded. 4 RP 667. The defendant thus knew, by personal experience, that a carelessly handled gun can be unintentionally fired, even if it seems to be unloaded. This could obviously result in the death of anyone at whom the gun might be pointed. This incident is thus evidence of the defendant's actual knowledge of the risks of pointing an "unloaded" gun at someone while his finger was on or near the trigger.

Since the evidence was relevant to prove recklessness, it was properly admitted.

To admit evidence of other crimes or wrongs under Washington law, the trial court must (1) identify the purpose for which the evidence is sought to be introduced, (2) determine whether the evidence is relevant to prove an element of the crime charged and (3) weigh the probative value of the evidence against its prejudicial effect.

State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). The court's balancing of probative value against prejudicial effect is reviewed for abuse of discretion. Id. at 863.

The court here followed that analysis. It determined that the evidence was relevant to prove recklessness, which is an essential element of the crime of first degree manslaughter. It then determined that the evidence was not "overly prejudicial." 2/26 RP 85-86. The court's decision to admit this evidence was not an abuse of discretion.

C. SINCE THERE WAS OVERWHELMING EVIDENCE OF THE DEFENDANT'S NEGLIGENCE, ANY ERROR IN ADMITTING EVIDENCE WAS HARMLESS.

Finally, even if the trial court erred in admitting some of this evidence, any such error was harmless. The applicable standard depends on the nature of any error. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable

doubt that any reasonable jury would have reached the same result in the absence of the error.” State v. Watt, 160 Wn.2d 626, 635 ¶ 17, 160 P.3d 640 (2007). On the other hand, if the error is not constitutional in nature, the dispositive question is whether “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” State v. Gresham, 173 Wn.2d 405, 433 ¶ 42, 269 P.3d 207 (2012).

Under either standard, the strength of the untainted evidence can be a critical consideration. Constitutional error is harmless if “the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt.” State v. Frost, 160 Wn.2d 765, 782 ¶ 34, 161 P.3d 361 (2007). Non-constitutional error is harmless if improper evidence is “of minor significance in reference to the overall overwhelming evidence as a whole.” State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

As already pointed out, the key disputed issue at trial was whether the defendant acted recklessly. On this issue, the defendant prevailed. The jury acquitted him of first degree manslaughter, which required proof of recklessness. It convicted him of second degree manslaughter, which only requires proof of criminal negligence.

As to negligence, there was no genuine dispute. All the witnesses -- including the defendant himself -- agreed on the basic rules of gun safety: Never point a gun at anything you don't wish to destroy. Always treat a gun as if it is loaded. 1 RP 34; 2 RP 235; 4 RP 665.

It was also undisputed that the defendant violated these rules. He pointed a loaded gun directly at his daughter and pulled the trigger. The gun was obviously loaded, because it fired. It was obviously pointed directly at his daughter, because the bullet hit in the center of her forehead. 2 RP 320-21. He obviously pulled the trigger, because the gun could not be fired in any other way. 2 RP 353; 3 RP 564. On cross-examination, the defendant admitted that his conduct was "careless." He also testified that it was "possibly" reckless. 4 RP 677.

"A person is criminally negligent when he ... fails to be aware of a substantial risk that a wrongful act may occur and his ... failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(d). The defendant's actions -- pointing a gun at someone and pulling the trigger -- created a substantial risk that death would occur. The

defendant's disregard of basic rules of gun safety was a gross deviation from what a reasonable person would do. The evidence thus overwhelmingly established that the defendant was criminally negligent.

The defendant testified that he was unaware that the gun was loaded. He also testified that he did not intentionally pull the trigger. 4 RP 659-60. The jury may have believed these claims, since it acquitted the defendant of acting recklessly. This testimony, however, does not in any way refute negligence. A reasonable person would not assume that the gun was unloaded. A reasonable person would not point a gun at someone he did not intend to kill. A reasonable person would not put his finger on the trigger of a gun that he did not intend to fire. 4 RP 665. If the defendant was not aware of the risk of violating these rules, his lack of awareness was a gross deviation from the standard of care that a reasonable person would exercise. Even under his own testimony, his actions were negligent.

Applying the constitutional harmless error standard, the untainted evidence was so overwhelming that it would necessarily lead to a finding of guilt of second degree manslaughter. Applying the non-constitutional standard, any erroneously-admitted evidence

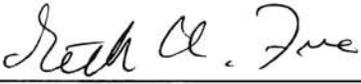
was of minor significance in reference to the overall overwhelming evidence. Any error was therefore harmless under either standard.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on March 18, 2014.

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