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FILED
March 21, 2016
Court of Appeals E
Division I
State of Washington

Court No. 73952-2-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent,

vs.

BIJAN KHORRAMI, Defendant/Appellant.

APPELLANT'S BRIEF

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A. INTRODUCTION

Bijan Khorrami, a local florist and business leader in the Belltown community of Seattle, was convicted of one count of third-degree assault in the King County Superior Court stemming from an incident on August 27, 2014, wherein his vehicle made contact with a Parking Enforcement Officer while she attempted to apply a parking boot. Mr. Khorrami maintains that he could not have known she was near his car at the time he engaged the engine, and that he did not act with criminal negligence. He asks This Court to reverse his conviction for the reasons enumerated below.

B. ASSIGNMENTS OF ERROR

1. Appellant assigns error to the jury instructions, which relieved the State of its burden of proof on an essential element of the offence.
2. Appellant assigns error to the Court's response to the jury's request for clarification as to what constituted the "wrongful act" Mr. Khorrami was alleged to have disregarded.
3. Appellant assigns error to the jury's verdict where the evidence is insufficient as a matter of law to prove his guilt beyond a reasonable doubt.

Issues Pertaining To Assignments Of Error:

1. Did the jury instructions relieve the State of its burden of proof because they did not sufficiently define the "wrongful act" of which Mr. Khorrami should have been aware?

2. Should the trial court have clarified the ambiguity identified by the jury in its question to the court, posed during deliberations, as to what risk a reasonable person in Mr. Khorrami's position would have avoided?
3. Should Mr. Khorrami's conviction be reversed where the State did not prove beyond a reasonable doubt that he acted with criminal negligence no reasonable person in his position would have had reason to believe that anyone was crouching underneath the passenger wheel well of his vehicle when he engaged the engine?

C. STATEMENT OF THE CASE

The jury erroneously convicted Mr. Khorrami based on incorrect jury instructions which relieved the State of its burden to prove every essential element. Further, the admitted evidence is insufficient as a matter of law to support his conviction for assault in the third degree.

The Seattle Police Department employs civilians as Parking Enforcement Officers (hereinafter "PEO") to patrol the city and enforce parking laws. These individuals are not commissioned officers, do not have arrest powers, and do not carry weapons. RP at 4-5.¹ Some members work in pairs operating small vans that have cameras attached. These cameras scan license plates and alert if they detect one that is "boot eligible." *Id.* A vehicle with four or more unpaid parking tickets, as designated by the Alliance One collection company, is boot eligible. RP at 5.

The boots are u-shaped, weigh approximately 16 pounds, and are generally placed on curb-side tires to avoid having to block traffic. Applying a boot usually takes 3-4 seconds and requires the operator to squat down and reach into the wheel well. RP at 14, 35-37, 55.

Once a boot had been applied, it can only be removed by the owner obtaining a code from Alliance One after payment, which is inputted into the boot's keypad to release it, or by PEO's upon the direction of Alliance One.

Bijan Khorrami, a local florist and business leader in the Belltown District since 2002, has had a lot of experience with parking boots. As a floral delivery driver for his business, he often incurs parking citations. From a business perspective, it is cheaper and more efficient to allow the tickets to build up to a degree that a parking boot is applied, because he can then dispense with payment of all outstanding tickets at one time. RP at 133-134, 149-151. He also understood that it would be impossible to move a vehicle with an attached boot without substantially damaging it. RP at 146.

Mr. Khorrami was preparing to leave his shop to make daily deliveries on the afternoon of August 27, 2014, when he was informed by a store employee that his son's car had been booted just outside the store. RP at 135. He found his son, Neema Khorrami,² arguing with Seattle Police Department Parking Enforcement Officer Nolan (hereinafter "PEO"), who was handing him the paperwork for boot removal; the boot was already in place. Id. at 136. Neema

¹ "RP" refers to the Verbatim Report of Proceedings filed on or about February 16, 2016.

worked with his father only periodically and was using his girlfriend's vehicle on that particular day to help with deliveries. When he discovered the boot, he became very agitated and concerned that he would not be able to return the car. RP at 135.

Mr. Khorrami never saw PEO Calderon, and spoke only to his son at that time, calmly explaining that it was a fixable problem and a phone call would remedy the issue. RP at 136. Keen to get deliveries underway, Mr. Khorrami then began heading back into the shop to call and get the boot removed, when he saw PEO Nolan standing alone some distance down the block, near his own vehicle. RP at 136-137.

Mr. Khorrami's car³ was parked approximately 2-4 car lengths⁴ south of Neema's. RP at 137. The parking enforcement van had stopped in the area in between, next to another parked vehicle. RP at 54-55, 106. As he stood in front of his flower shop, Mr. Khorrami had only a partial view of his car, as there was a sandwich-board sign on the sidewalk and a small tree. RP at 107-108, 137, 153.

As Mr. Khorrami began to approach her, PEO Nolan informed him that his car was booted as well, and held a pad of paperwork she was filling out with

² For ease of reference, Neema will be referred to by his first name hereinafter.

³ A white Lexus SUV. RP at 10.

⁴ RP at 22.

his vehicle information.⁵ RP at 138. Mr. Khorrami disputed this, telling her that his vehicle was properly parked at that time, and that he had recently paid his previous outstanding tickets and that her records were incorrect. RP at 140.⁶

During his encounter with PEO Nolan, Mr. Khorrami did not see PEO Calderon and did not know she was in the process of booting his car. RP at 139, 152, 156. PEO Calderon accessed the curbside by walking to the *rear* of the Lexus, not around the front hood area. RP at 37. She elected to place the boot on the front curbside tire, as opposed to the rear curbside tire, because the back tire was too close to the curb. RP at 38. She later admitted on cross-examination that the rear tire was in fact farther away from the curb than the front tire. RP at 59.

Mr. Khorrami became increasingly concerned about his deliveries and the flowers in his car. He felt that the quickest way to resolve the problem would be to go straight to City Hall to address the ticket mistake. RP at 141, 146. As Mr. Khorrami approached his car, PEO Nolan attempted to block his way, but he pushed past her and got into the driver's seat. RP at 141. She continued to yell at him not to move his car, but did not mention PEO Calderon, who happened to be in the process of applying the boot to his front passenger side tire. Id. at 141-142.

⁵ PEO Nolan testified that she informed Bijan that "his vehicle had been booted," (RP at 109) while Mr. Khorrami testified that she informed him "you are boot eligible and we are going to boot your car." RP at 139, 141.

⁶ The defense introduced evidence that Mr. Khorrami's car had been booted and released on August 15, 2014, twelve days prior to this incident, RP at 140, 160, and that he believed any outstanding tickets incurred in May and June of that year had been satisfied. RP at 165.

After she was already down on the ground behind the tire⁷ and reaching into the wheel well⁸ Calderon heard “someone running by” and a lot of commotion, along with someone yelling “don’t boot my car” or “don’t move my car.” RP at 38. PEO Nolan testified Mr. Khorrami said “do not boot my car; you cannot boot my car.” RP at 89.

PEO Calderon’s position was such that she was kneeling down below the hood-line of the SUV and close enough to the undercarriage that she was not visible from the side mirrors. RP at 97. Mr. Khorrami checked all of his mirrors⁹ and then engaged the engine, removed the parking brake, and put the car into the reverse gear. RP at 142-143. This caused a slight shift in the car’s momentum and it rocked backward, but he never took his foot off the brake, and the vehicle never moved from its parked position. RP at 108, 143.

Immediately thereafter Mr. Khorrami heard yelling and saw PEO Calderon’s hand hit the hood area of his car. RP at 69. This was the first moment he became aware of her presence in any manner. RP at 143. He immediately turned off his car and got out, inquiring if she was okay. RP at 144. PEO Calderon’s arm had become stuck under the wheel when the car rocked

⁷ RP at 97.

⁸ Her head was positioned approximately underneath the frame holding the side-view mirror. RP at 62.

⁹ Mr. Khorrami testified that in his experiences the boots have always been applied to the REAR passenger side tire, and he used his mirror to confirm there was no boot attached before engaging the engine. RP at 142.

backwards, but was immediately released once the car was returned to the “park” position. RP at 41.

Officer Dowsing (RP at 16-33) arrived on scene within minutes and observed PEO Calderon at the scene. RP at 21. He described her demeanor as generally controlled with occasional facial grimaces. RP at 26. He did not conduct any type of medical examination of PEO Calderon.

Officer Jason Bender (RP 114-121) also responded to the scene. He reported that Mr. Khorrami was calm and respectful, and defended his actions because he had not known PEO Calderon was present when he started the car. PEO Calderon admitted that she herself never saw Mr. Khorrami at any time prior to her hand being stuck. “The only time I saw Mr. Khorrami was after the incident that happened.” RP at 9. Likewise, PEO Nolan confirmed that she had been unable to see Calderon from her position on the driver’s side of the Lexus during the boot application. RP at 91.

Calderon was transported to Harborview Medical Center for an examination and injury assessment, including x-rays of her shoulder, elbow, wrist, forearm and hand. RP at 72. The conclusion of the medical staff immediately following these procedures was that they did not discover any fracture or soft tissue injury. RP at 72. Following her discharge, she participated in physical therapy but ultimately discovered she had a cyst, which was corrected by surgery. RP at 73.¹⁰

¹⁰ The State offered no medical evidence that the cyst resulted from the accident.

Nonetheless, Mr. Khorrami was charged with one count of felony assault in the third degree,¹¹ and the case went to trial on July 22-24, 2015. Prior to trial, the court confirmed “and we’re just going on bodily harm, right? Not threat or not fear? There’s nothing, it’s just whatever bodily level of bodily harm?” RP 2. The State agreed. *Id.* Thus, the prosecutor acknowledged his burden to prove that Mr. Khorrami failed to be aware of a risk that *bodily harm to PEO Calderon* would occur.

Conversation related to proposed jury instructions was minimal, although the court and parties agreed that this area of law can be confusing. SRP at 5-6.¹² The State proposed its “standard packet,” which included the following definition of criminal negligence:¹³

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk **that a wrongful act may occur**, and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.¹⁴

When criminal negligence as to a particular result or fact is required to establish an element of a crime, the element is also established if a person acts intentionally, knowingly, or recklessly as to that result or fact. (emphasis added)

¹¹ RCW 9A.36.031 states, in relevant part: (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree (d) with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.

¹² “SRP” refers to the Supplemental Report of Proceedings filed concurrently herewith.

¹³ This was found in Jury Instruction Number 8.

Jury Instruction number 6, the “to-convict” instruction, read as follows:

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about August 27, 2014, the defendant caused bodily harm to Arlene C. Calderon;
- (2) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm;
- (3) That the defendant acted with criminal negligence; and
- (4) That this act occurred in the State of Washington.

The term “wrongful act” was not defined in the jury instructions, and the court did not give the WPIC instruction defining “assault.”¹⁵ There were no objections or exceptions by either party to the instructions adopted by the court and ultimately provided to the jury. SRP at 5-6, RP at 165-171.

At the conclusion of the State’s case-in-chief, the defense raised a halftime motion to dismiss, arguing that the State failed to produce evidence establishing what a reasonable standard of care would have been for an individual in Mr. Khorrami’s position. RP at 122. The State argued that the jury must determine the definition of “reasonable person standard,” and the government need not prove it with evidence. *Id.* at 122-123. The trial court denied the motion, concluding it was within the jury’s province to judge whether Mr. Khorrami acted criminally or negligently.¹⁶ RP at 125.

¹⁴ WPIC 10.04 is attached hereto as Exhibit D.

¹⁵ WPIC 35.05

¹⁶ This ruling is not one of Mr. Khorrami’s assignments of error.

In closing argument, the State acknowledged that the case turned on the criminal negligence prong. RP at 174. The prosecutor expressed the State's theory of the case as "Mr. Khorrami knew or should have known...that driving the car would have presented a risk to Ms. Calderon." Id.

During deliberations the jurors posed the following question to the court:¹⁷

Jury instruction No. 8 defines criminal negligence as failing 'to be aware of 'a substantial risk...' No. 6 says 'each of the following elements of the crime must be proved.' Our question: Is the awareness of 'substantial risk' in #8 specific to the crime – being the injury to PEO Calderon, or is it awareness of a substantial risk in general? (emphasis in the original)

The court's response:¹⁸

"No additional information will be provided. Please rely on all your instructions, the evidence admitted in the case and argument of counsel."

After deliberating for several hours, the jury returned a guilty verdict. The following day, the court received an email from one of the jurors, Richard Kosterman, in which he advised the court that the jury had employed an improper legal standard based on its confusion as to the nature of the risk Mr. Khorrami was alleged to have disregarded. He wrote:

There was confusion in the jury about whether this element [failure to be aware of substantial risk] referred to awareness of risk in a general sense, or whether it referred to awareness of risk specifically to Officer Calderon. It was difficult to discern a clear answer from the jury instructions and the court would not clarify this point for us. Subsequent research has led me to believe that

¹⁷ See Exhibit B attached hereto.

¹⁸ Exhibit B; RP at 191.

we should have judged this based on whether or not Mr. Khorrami was aware of Officer Calderon on the passenger side of his vehicle. Had I had a better understanding of this during deliberations, there is a substantial likelihood that I would have reached a different verdict.¹⁹

Thereafter, Mr. Khorrami brought a motion for new trial, which was denied.²⁰ He timely appealed the verdict and the trial court granted his motion to stay execution of his sentence pending a final determination on the merits of his appeal. Mr. Khorrami respectfully urges This Court to reverse.

D. SUMMARY OF ARGUMENT

The jury instructions relieved the State of its burden to prove every element of the offense because they failed to properly define criminal negligence and allowed the jury to convict based on disregard of a general risk only, instead of the specific risk punishable by the crime of assault in the third degree. The court's failure to properly instruct the jury in this regard, compounded by its failure to clarify the jury's question, was a manifest error of constitutional magnitude. Moreover, the evidence was insufficient as a matter of law to support the conviction where no reasonable person in Mr. Khorrami's position would have known PEO Calderon's arm was inside the wheel-well of the vehicle at the time the engine was engaged.

¹⁹ See Exhibit C attached hereto.

²⁰ The court's specific ruling in that regard is not challenged herein because trial counsel did not argue that the jury instructions were improper in his motion for a new trial. Rather, the motion was primarily repetitive of the halftime motion based on the lack of evidence as to the "reasonable person standard."

E. ARGUMENT AND AUTHORITY

1. Standard Of Review

Jury instructions that relieve the State of its burden of proof are constitutionally infirm and violate due process guaranteed by the Sixth Amendment to the United States Constitution, and article 1, section 22, of the Washington State Constitution. State vs. Chino, 117 Wash. App. 531, 72 P.3d 256 (2003); State vs. Hassan, 184 Wash. App. 140, 336 P.3d 99 (2014); State vs. Mills, 154 Wash.2d 1, 109 P.3d 415 (2005)

Jury instructions may be challenged for the first time on appeal because they involve issues of constitutional magnitude as articulated in RAP 2.3(a)(3). See State vs. Ritchie, 365 P.3d 770 (2015); State vs. Peters, 163 Wash. App. 836, 847, 261 P.3d 199 (2011).

Errors of law in jury instructions are reviewed *de novo*. State vs. Levy, 156 Wash.2d 709, 132 P.3d 1076 (2006). “We review challenged jury instructions *de novo*, examining the effect of a particular phrase in an instruction by considering the instructions as a whole and reading the challenged portions in the context of all the instructions given.” State vs. Harris, 164 Wash. App. 377, 382, 263 P.3d 199 (2011), *citing* State vs. Pirtle, 127 Wash.2d 628, 904 P.2d 245 (1995).

“We consider the sufficiency issue by viewing the evidence in the State's favor to determine whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State vs. Holmes, 106 Wash. App. 775, 781, 24 P.3d 1118, 1122 (2001) *citing* State vs. Joy, 121 Wash.2d 333, 338, 851 P.2d 654 (1993).

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2. The Court Improperly Instructed The Jury That It Could Convict Mr. Khorrami With Only Evidence That He Disregarded The Risk Of A Generic “Wrongful Act” When The Charged Crime Requires Proof That He Disregarded The Specific Risk Of Bodily Harm To The Victim.

It is reversible error to instruct jury in a manner that relieves State of burden to prove every element of the offense beyond a reasonable doubt. State vs. Pirtle, 127 Wash.2d 628, 904 P.2d 245 (1995); State vs. Brown, 147 Wash.2d 330, 58 P.3d 889 (2002).

Jury instructions defining a *mens rea* must consider the specific risk contemplated by the criminal statute instead of merely a generalized “wrongful act.” “In instructing a jury, a trial court should use the statute's language ‘where the law governing the case is expressed in the statute.’” State vs. Hardwick, 74 Wash.2d 828, 830, 447 P.2d 80 (1968).

Both Divisions I and II of the Court of Appeals, have previously reached similar a conclusion. First, in State vs. Peters, 163 Wash. App. 836, 261 P.3d 1999 (2011), This Court overturned a first degree manslaughter conviction after concluding that the “wrongful act” language insufficiently described the risk Mr. Peters should have been aware of. Mr. Peters was initially charged with second degree felony murder after he shot his daughter with a handgun in their home. At trial, the jury was also instructed on the lesser-included offenses of first-degree and second-degree manslaughter. Ultimately, Mr. Peters was acquitted of the murder charge, but found guilty of first-degree manslaughter.

On appeal he raised, for the first time the question, of whether the jury was properly instructed as to the criminal negligence and/or prongs of the

manslaughter offenses.²¹ Citing the Supreme Court's decision in State vs. Gamble, 154 Wash.2d 457, 114 P.3d 646 (2005), the appellate court concluded that the term "wrongful act" improperly conveyed a lesser standard of proof to the jury.

In Gamble, which involved a manslaughter charge, the court recognized that the reckless *mens rea* must be as to the specific result, and not merely a generic risk of harm. As the Court explained, "recklessly causing a death and recklessly causing [a wrongful act] are not synonymous." State vs. Peters, 163 Wash. App. 848, *citing Gamble*, 154 Wash.2d at 468 n.8. *See Also State vs. Henderson*, 180 Wash. App. 138, 149, 321 P.3d 298, 303 review granted, 180 Wash. 2d 1022, 328 P.3d 903 (2014) and aff'd, 182 Wash. 2d 734, 344 P.3d 1207 (2015) ["...applying Gamble's reasoning, it is logical to assume that criminal negligence for manslaughter would require the State to prove that a defendant failed to be aware of a substantial risk that a *homicide* (rather than 'a wrongful act') may occur."]

The Peters court similarly reasoned that the State was actually required to prove that Mr. Peters disregarded a substantial risk that **death** would occur; thus, the instruction requiring only evidence of risk of **a wrongful act** allowed the jury to convict under a lesser standard. State vs. Peters at 850. Importantly, the Court

²¹ There, the trial court suggested "wrongful act" was sufficient, and both sides concurred, with neither the State nor the defense objecting. State vs. Peters at 843-844, FN 6.

reached this result even though the “to convict” instruction properly identified the reckless *mens rea* and the **actual result**, the death of the victim.

Likewise, in State vs. Harris, 164 Wash. App. 377, 263 P.3d 1276 (2011), the court reversed a conviction for first degree assault of a child after finding that the jury instructions did not adequately define the specific act for which Mr. Harris was accused of recklessly disregarding. This was so, even though the elements instruction used the appropriate “great bodily harm” language.

Mr. Harris had been a primary caregiver for an infant, who was diagnosed with symptoms of “shaken baby syndrome,” which resulted in permanent debilitating injuries. Mr. Harris admitted to being frustrated with the child, but no one ever saw him handle the infant inappropriately. One witness noted some abnormalities in the baby’s behavior immediately following Mr. Harris’ care of him, but the child was not immediately taken for medical treatment.

The State asked the jury to find that Mr. Harris intentionally inflicted an assault on the child, and “recklessly inflicted great bodily harm.” State vs. Harris at 384. The definitional instruction for recklessness stated, in relevant part:

A person is reckless or acts recklessly when he or she knows of an disregards a substantial risk that a **wrongful act** may occur and this disregard is a gross deviation from the conduct that a reasonable person would exercise in the same situation. Id. (emphasis added)

Thus, Harris involved the exact “wrongful act” language at issue in Mr. Khorrami’s case. Also, like in this case, the term “wrongful act” was not defined anywhere in the jury instructions.

On appeal, Mr. Harris contended that the jury instructions allowed the jury to convict even if it did not find that he disregarded the specific risk that “great

bodily harm” would occur, and instead allowed them to convict based only on a disregard of the risk that a generic “wrongful act” would occur. This, he argued, relieved the State from its burden of proving the specific conduct that made him culpable of the offense.

The appellate court agreed, again relying on the distinction announced in State vs. Gamble, 154 Wash.2d 457, 114 P.3d 646 (2005), that the specific outcome must be contained in the jury instruction defining recklessness in a manslaughter charge. Harris adopted the distinction for assault cases as well, noting:

Although the Gamble court’s discussion of the ‘wrongful act’ required for assault was in the context of determining whether first degree manslaughter is a lesser included offense of second degree felony murder, the court’s reasoning indicates that the ‘wrongful act’ required for a finding of recklessness depends on the specific crime charged. The Gamble court did not endorse use of the phrase ‘wrongful act’ in place of a specific wrongful act contemplated by the charging statute.

Importantly, the Harris court also recognized that the WPIC²² actually *directs* courts to insert language identifying the “particular result” that was supposedly disregarded. State vs. Harris at 385. Moreover, although the instruction’s language was drawn directly from the statutory definition, it “[did] not adequately convey the mental state required to convict.” Id. at 384. Thus, the court concluded that the instruction containing the “wrongful act” only language misstated the crime. Id.

The Harris decision is significant not only because it reinforced the Gamble holding, but because it actually *extended* Gamble to non-homicide cases.

Thus, since Gamble was decided, at least two appellate courts have chosen to expand, rather than narrow its reasoning.

In an analogous context, the Supreme Court reversed a second-degree assault conviction because the jury instructions there did not adequately define the criminal act which the defendant was said to have intended. In State vs. Byrd, 125 Wash. 2d 707, 715-16, 887 P.2d 396, 400-01 (1995), Mr. Byrd displayed a gun during a confrontation with another man. There was conflicting testimony as to whether Mr. Byrd pointed the gun at the victim or merely waived it in the air, and the jury was asked to decide if he had intentionally assaulted the man by creating a fear of harm.

The challenged instruction in Byrd related to the definition of intent, and read: “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime”. State vs. Byrd at 714. The Supreme Court found this instruction fatally deficient because the jury could have been confused as to whether Mr. Byrd’s intent was to display the weapon or whether it was to create apprehension/fear of injury. As the Court explained:

It is not enough to instruct a jury that an assault requires an intentional unlawful act because, given the circumstances, Byrd's act of drawing the gun could be found to be an unlawful intentional act. Even where an act is done unlawfully and the result is reasonable apprehension in another, it still is not sufficient to convict because the act must be accompanied by an actual intent to cause that apprehension. This is the required element about which the jury was never told. State vs. Byrd, 125 Wash. 2d 707, 715-16, 887 P.2d 396, 400-01 (1995).

²² Washington Pattern Jury Instructions (there WPIC 10.03; here WPIC 10.04)

Thus, like the “wrongful act” generality involved here, “unlawful act” did not adequately specify the requisite harm the State was required to prove beyond a reasonable doubt.

In another context, the Court ruled that for accomplice liability to attach, the State must prove that the defendant knew the principal intended to commit *the specific crime charged* and not merely *a crime*. State vs. Cronin, 142 Wash.2d 568, 14 P.3d 752 (2000). Thus, instructions that permitted a jury to convict on the theory that knowledge that *any* crime would be committed relieved the State of its burden on every essential element. *See Also* State vs. Roberts, 142 Wash.2d 471, 14 P.3d 713 (2000); State vs. Brown, 147 Wash.2d 330, 338, 58 P.3d 889, 894 (2002) (“It is a misstatement of the law to instruct a jury that a person is an accomplice if he or she acts with knowledge that his or her actions will promote *any* crime.”) (emphasis in original).

In a departure from the above cases, in State vs. Johnson, 180 Wash.2d 295, 325 P.3d 135 (2014), the Court concluded that the omission of a specific description of conduct was not necessarily fatal where the elements instruction included the correct legal standard.²³ The fallacy of this circular reasoning was exposed in a strong dissent authored by Justice Gordon-McCloud, in which she illustrated the dangers of using the overbroad “wrongful act” language. State vs. Johnson at 308-311.

²³ Johnson involved the definition of “recklessness” in a second-degree assault case coupled with charges of felony harassment and unlawful imprisonment stemming from a period of domestic violence.

To follow her example here, inserting the charge-specific language in the to-convict instruction would have clarified the State’s burden. Such an instruction would have read “...that on or about August 27, 2014, the defendant [failed to be aware of a substantial risk that Arlene Calderon would incur bodily harm, and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation].”

Conversely, using the generic “wrongful act” language exacerbated the definitional overbreadth, reading “...that on or about August 27, 2014, the defendant [failed to be aware of a substantial risk that a wrongful act would occur, and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation].”

Seen in this light, it is clear that Mr. Khorrami’s jury was asked only to consider whether he should have been aware of a risk that *any* wrongful act would occur, as opposed to whether he should have been aware of a risk that *bodily injury to the victim* would occur. This relieved the State of its burden of proof.

The majority in Johnson suggested that including specificity in reckless definitions would cause confusion where multiple offenses were charged, but here there was only one criminal allegation.²⁴ Moreover, this case is distinguishable

²⁴ Procedurally, Johnson is also distinguishable because the issue arose there as an “ineffective assistance of counsel claim.”

from Johnson because there *is* substantial evidence in the record that the instructions *were* fatally inadequate and did mislead the jurors.²⁵

Confusion amongst the jury members was evident both in the question posed to the court during deliberations, but also in the juror's comments following trial.²⁶ Indeed, Mr. Kosterman felt strongly enough that he was compelled to contact the trial court to express his regret that the jury did not apply the appropriate standard. As he explained, "had I had a better understanding of this during deliberations, there is a substantial likelihood that I would have reached a different verdict... I do not feel good about the outcome."²⁷

A challenged jury instruction is evaluated in the context of the instructions as a whole, given the charged offense and the evidence admitted at trial. State vs. Pirtle, 127 Wash.2d 628, 904 P.2d 245 (1995). Here, Mr. Khorrami was only "criminally negligent" if the evidence proved a reasonable person would have been aware of *the risk of bodily injury*. Thus, the jury could not evaluate whether he grossly deviated from reasonable care unless it understood exactly *what risk* was involved.

²⁵ Johnson also approved of adding charge-specific language "in some cases." State vs. Johnson, 180 Wash.2d at 307.

²⁶ Although the jurors' thought process generally inheres in the verdict and may not be an independent basis to overturn the verdict, it is nonetheless additional evidence that the jury instructions did not accurately reflect the law. See *E.g.* State vs. Byrd, 72 Wash. App. 774, 868 P.2d 158 (1994), which considered jury inquiries in assessing the adequacy of instructions.

²⁷ See Exhibit C attached hereto.

Would a reasonable person in Mr. Khorrami's situation have been aware of a substantial risk that something bad could happen if he started the car after being told not to? The jury concluded yes. Would a reasonable person in his situation have been aware of a substantial risk of bodily harm to PEO Calderon? The jury was not allowed to decide this question due to the erroneous instructions, however the evidence does not support such a conclusion where: 1) Mr. Khorrami never saw her at the scene at all prior to the injury; 2) she never saw Mr. Khorrami prior to the injury; 3) PEO Nolan did not see PEO Calderon from her position alongside Mr. Khorrami.

“Jury Instructions are constitutionally inadequate if they permit a jury to return a guilty verdict as charged even if the jury believes and accepts the defense theory of the case.” State vs. Byrd, 125 Wash.2d 707, 887 P.2d 396 (1995).

Here, the defense theory was that no one in Mr. Khorrami's position would have foreseen bodily harm to PEO Calderon where she was unseen until after it occurred. Jury Instruction Number 8, however allowed the jury to convict him even if it accepted his position because it could nonetheless have concluded that a reasonable person would have foreseen a risk that *some* harm might occur (maybe even to another person such as Officer Nolan, who was standing next to the vehicle). Thus, the instruction suggests that the *actual harm* that occurred need not even be related to the *risk of harm* that was disregarded.

The jury's question makes it abundantly clear that it considered a “general risk” instead of, and/or in addition to, the risk specific to the crime (i.e. the injury). Mr. Kosterman's comments likewise vividly illustrate this error.

Therefore, unlike in State vs. Johnson, 180 Wash.2d 295, the jury instructions here did not accurately define the crime, and did in fact relieve the State of its burden to prove every element beyond a reasonable doubt.

3. The Trial Court Erred In Failing To Properly Respond To The Jury's Question Posed During Deliberations.

The instructional error outlined above was compounded by the trial court's failure to give the requisite clarification in response to the jury's question.

Criminal Rule for Superior Court 6.15(f)(1) contemplates the authority of the court to supplement jury instructions when necessitated by questions during deliberations. CR 6.15(f)(1) states, in part, "any additional instructions on any point of law shall be given in writing." *See Also* State vs. Becklin, 163 Wash. 2d 519, 529, 182 P.3d 944, 948 (2008), *citing* State vs. Brown, 132 Wash.2d 529, 612, 940 P.2d 546 (1997); State vs. Ng, 110 Wash.2d 32, 42–43, 750 P.2d 632 (1988) ["This portion of the rule necessarily assumes that additional instructions on the law *can* be given during deliberation. Whether to give further instructions in response to a request from a deliberating jury is within the discretion of the trial court."]

Thus, here the trial court could have instructed the jury that the disregard was *of the specific risk of bodily harm* to PEO Calderon, and not merely a general risk.

In contrast to cases such as State vs. Ransom, 56 Wash. App. 712, 785 P.2d 469 (1990) and State vs. Jasper, 158 Wash. App. 518, 245 P.3d 228 (2012), here the jury inquiry related directly to a central issue in the case, and did not

require the introduction of additional instructions that went beyond the matters argued by the parties during trial. Washington law discourages courts from supplementing instructions as to elements or legal theories posed by jurors that were not relied upon by the parties. Here, however, the jury question was a direct reflection of the overbreadth of the criminal negligence instruction, the only truly contested issue.

Both sides argued at length as to the what a reasonable person in Mr. Khorrami's position would have known, and whether his conduct amounted to criminal negligence. Additionally, far from introducing collateral unanticipated matters, the jury question directly referenced the interplay between the "to-convict" and the criminal negligence instructions, asking for clarification as to their interpretation. Thus, it was both proper and necessary to have given clarification.

Like in State vs. Davenport, 100 Wash.2d 757, 675 P.3d 1213 (1984), the trial court's answer was inappropriate. In Davenport, the jury inquired about accomplice liability based on an erroneous statement made by the prosecutor in closing argument. The court's response, almost identical to that in Mr. Khorrami's case, was "rely on the law given in the Court's instructions to the jury." This, the Supreme Court concluded, did not clarify the jury's confusion appropriately, nor cure the prejudice from the prosecutor's misstatement of the law.

While the juror confusion here arose from the instructions themselves, and not an improper argument, the court's response was nonetheless inadequate to

address the underlying problem created by misleading instructions. Inexplicably, the court concluded that there was “[no] answer that would be the right answer.” RP at 191. Given the substantial case law discussed above, the trial court’s approach was simply incorrect.

4. The Instructional Error Was Not Harmless Beyond A Reasonable Doubt.

Even an erroneous jury instruction may be forgiven if the State can establish, beyond a reasonable doubt, that the jury’s verdict would have been the same without the misstatement. State vs. Thomas, 150 Wash.2d 821, 83 P.3d 970 (2004); State vs. Brown, 174 Wash.2d 330, 58 P.3d 889 (2002).

However, “where jury instructions are inconsistent or contradictory on a given material point, their use is prejudicial because it is impossible to know what effect they may have on the verdict.” Hall vs. Corporation of Catholic Archbishop, 80 Wash.2d 797, 804, 498 P.2d 844 (1972).

Further, “Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.” State vs. Hayward, 152 Wash. App. 632, 646, 217 P.3d 354, 362 (2009), *citing* State vs. Guloy, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985).

The State cannot meet such a burden here because the record established much more than even a mere likelihood that the error affected the verdict. The jury’s question clearly reflects the confusion and misunderstanding that prevailed during deliberations. Moreover, the only material dispute involved in this case

was the negligence prong of the crime. Thus, rather than being harmless, the error here was contextually significant.

5. Due Process Requires Proof Beyond A Reasonable Doubt Of Each And Every Element Of The Crime.

The State did not prove beyond a reasonable doubt that a reasonable person in Mr. Khorrami's position would have avoided the bodily injury to PEO Calderon, and his conviction for assault in the third degree must be reversed.

If a reviewing court finds insufficient evidence to prove an element of a crime, reversal is required. State vs. Smith, 155 Wash. 2d 496, 505, 120 P.3d 559, 563 (2005) *citing* State vs. Hickman, 135 Wash.2d 97, 103, 954 P.2d 900 (1998).

When reviewing a challenge to the sufficiency of the evidence, we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' Jackson vs. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The purpose of this standard of review is to ensure that the trial court fact finder 'rationally appl[ied]' the constitutional standard required by the due process clause of the Fourteenth Amendment, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt. Jackson, 443 U.S. at 317-18, 99 S.Ct. 2781; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In other words, the Jackson standard is designed to ensure that the defendant's due process right in the trial court was properly observed. State vs. Phuong, 174 Wash. App. 494, 501-02, 299 P.3d 37, 41 (2013).

Even taking all of the evidence in the light most favorable to the State here, a clear reason to doubt still exists; in fact, if *all* the State's witnesses are believed, to the exclusion of any contradictory evidence, the following facts are nonetheless inescapable:

- 1) PEO Nolan informed Mr. Khorrami only that his car *was going to be* booted, not that the process was underway;

- 2) PEO Calderon did not herself see, or have any contact with, Mr. Khorrami prior to the injury;
- 3) PEO Nolan could not see Calderon from her position with Mr. Khorrami on the driver's side;
- 4) PEO Nolan did not inform Mr. Khorrami there was another officer on scene or involved.

These facts alone present significant doubt that anyone in Mr. Khorrami's position would have known of a substantial risk *of bodily harm to Calderon*.

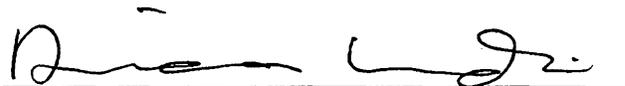
Thus, no rational trier of fact could have concluded the evidence established every element of the offense beyond a reasonable doubt. As discussed above, the jury instructions misled the jury into misapplying the legal standard for guilt, which resulted in the erroneous verdict. Had the jurors properly understood the specific nature of the risk at issue, they would have been compelled to reach a not-guilty finding, as would any rational jury.

F. CONCLUSION

Mr. Khorrami requests this Honorable Court reverse his erroneous conviction.

DATED this 18th day of March, 2016.

Respectfully Submitted,



DIANA LUNDIN
Attorney for Appellant
WSBA#: 26394

EXHIBIT A

FILED
KING COUNTY, WASHINGTON
JUL 24 2015
SUPERIOR COURT CLERK
BY NICHOLAS REYNOLDS
DEPUTY

IN THE KING COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

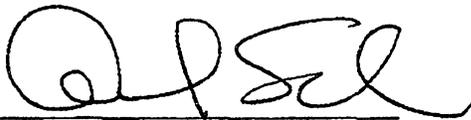
BIJAN KHORRAMI,

Defendant.

NO. 14-1-05458-7 SEA

COURT'S INSTRUCTIONS
TO THE JURY

Dated the 23rd day of July, 2015.



The Hon. Carol A. Schapira
Judge

No. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value

of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

No. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

No. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

No. 4

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

No. 5

A person commits the crime of assault in the third degree when he or she with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.

No. 6

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 27, 2014, the defendant caused bodily harm to Arlene C.

Calderon;

(2) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm;

(3) That the defendant acted with criminal negligence; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 7

Bodily harm means physical pain or injury, illness, or an impairment of physical condition.

No. 8

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

When criminal negligence as to a particular result or fact is required to establish an element of a crime, the element is also established if a person acts intentionally, knowingly, or recklessly as to that result or fact.

NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

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 this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

No. 10

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and the verdict form for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision. The presiding juror must sign the verdict form and notify the bailiff. The bailiff will bring you into court to declare your verdict.

7/23/15
Paul Sel

EXHIBIT B

FILED
KING COUNTY, WASHINGTON
JUL 24 2015
SUPERIOR COURT CLERK
BY NICHOLAS REYNOLDS
DEPUTY

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

State of Washington Plaintiff/Petitioner
vs.

No. 14-1-05458-7 SEA

INQUIRY FROM THE JURY
AND COURT'S RESPONSE
(JYN)

Bijan Kharrami Defendant/Respondent

Jury Instruction
JURY INQUIRY:

A No. 8 defines criminal negligence as failing "to be aware of a substantial risk..." No. 6 says "each of the following elements of the crime must be proved."

Our question: Is the awareness of "substantial risk" in #8 specific to the crime -- being the injury to PED Calderon -- or is it awareness of substantial risk in general?


FOREMAN

7-24-15 12:35
DATE AND TIME

DATE AND TIME RECEIVED: 12:45 PM

****DO NOT DESTROY- LEAVE IN JURY ROOM****

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

No additional information will be provided. Please rely on all your instructions, the evidence admitted in the case, and argument of counsel.

Carl Sel

JUDGE *Schapus*

DATE AND TIME RETURNED TO JURY: 1:40

*****DO NOT DESTROY- LEAVE IN JURY ROOM*****

EXHIBIT C

Diego J. Vargas

From: Court, Schapira <Schapira.Court@kingcounty.gov>
Sent: Wednesday, July 29, 2015 3:49 PM
To: Marchesano, Joseph; Diego J. Vargas
Subject: RE: Juror follow-up

The Court received the email from one of our jurors, Richard Kosterman. See below for your reference.

Ted

From: R Kosterman [<mailto:rkosterman@outlook.com>]
Sent: Wednesday, July 29, 2015 3:24 PM
To: Court, Schapira
Subject: Juror follow-up

State vs. Khorrami
No. 14-1-05458-7 SEA

Dear Judge Schapira:

I was a juror in the case referenced above. With due deference, I wanted to follow up with you because I feel it is important to share a few thoughts that provide context to the verdict, from my perspective.

First, I want to say the this first-time experience as a juror was fascinating, and I was impressed with the dignity of all parties involved and the thoughtfulness and seriousness of my fellow jurors. But I also found it to be an upsetting experience, which I was not expecting. It was upsetting because there was some gray area in fitting the evidence to the precise definition of the criminal charge, and the correct conclusion given my narrow duty as a juror was extremely difficult to come by.

With respect to the elements of the crime, I thought (as did some other jurors) that Officer Calderon exaggerated the bodily harm that she received, although I did not ultimately have reasonable doubt that she experienced some degree of physical pain. I also felt -- with regard to criminal negligence -- that Mr. Khorrami's behavior did not grossly deviate from a reasonable standard of care right up the point that he turned the ignition to start his vehicle, and this "deviation" was immediately corrected when he quickly turned his vehicle off.

Perhaps my biggest quandary was whether or not Mr. Khorrami failed to be aware of substantial risk. There was some confusion in the jury about whether this element referred to awareness of risk in a general sense, or whether it referred to awareness of risk specifically to Officer Calderon. It was difficult to discern a clear answer from the jury instructions, and the court would not clarify this point for us. Subsequent research has led me to believe that we should have judged this based on whether or not Mr. Khorrami was aware of Officer Calderon on the passenger side of his vehicle. Had I had a better understanding of this during deliberations, there is a substantial likelihood that I would have reached a different verdict.

The bottom line is that this case was not at all black-and-white at the time, and is perhaps less so with further legal understanding. I did my utmost to follow the jury instructions to the letter and to neither conform to my

fellow jurors nor to thoughtlessly adhere to a rigid stance of opposition, and I feel good about my execution of this duty. But I do not feel good about the outcome. I have great difficulty with the charge of third-degree felony assault and do not believe it serves the cause of justice. This is clearly your role, and not mine, in making this judgment, and I impart these thoughts to you with all due respect for your expertise and experience. But I did not want this to be left unsaid and perhaps taken into consideration.

Thank you for your attention to this letter.

Sincerely,

Richard Kosterman

EXHIBIT D

WestlawNext **Washington Criminal Jury Instructions**[Home Table of Contents](#)**WPIC10.04Criminal Negligence—Definition**

Washington Practice Series TM
 Washington Pattern Jury Instructions--Criminal
 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.04 (3d Ed)

Washington Practice Series TM
 Washington Pattern Jury Instructions--Criminal
 Database Updated December 2014
 Washington State Supreme Court Committee on Jury Instructions
 Part III. Principles of Liability
 WPIC CHAPTER 10. General Requirements of Culpability

WPIC 10.04 Criminal Negligence—Definition

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that [a wrongful act] [(fill in more particular description of act, if applicable)] may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

[When criminal negligence [as to a particular [result] [fact]] is required to establish an element of a crime, the element is also established if a person acts [intentionally] [or] [knowingly] [or] [recklessly] [as to that [result] [fact]].]

NOTE ON USE

Use bracketed material as applicable. For a discussion of the bracketed alternatives relating to a wrongful act, see the Comment below.

If the bracketed second paragraph is used, use WPIC 10.01 (Intent—Intentionally—Definition), WPIC 10.02 (Knowledge—Knowingly—Definition), and WPIC 10.03 (Recklessness—Definition), as applicable, with this instruction.

With regard to the bracketed language in the instruction's final sentence, see the discussion of the *Goble* case in the Comment to WPIC 10.02 (Knowledge—Definition).

COMMENT

RCW 9A.08.010(1)(d); RCW 9A.08.010(2).

The Supreme Court has held that when intent is an element of the crime charged, the defendant is entitled to have the jury instructed with the statutory definition of "intent," WPIC 10.01. See *State v. Allen*, 101 Wn.2d 355, 678 P.2d 798 (1984). In the same opinion, the court suggests in dictum that whenever criminal negligence is an element of the crime charged, the defendant is entitled to an instruction defining criminal negligence, such as WPIC 10.04.

The breach of a statutory duty is admissible, but not conclusive, on the issue of criminal negligence. *State v. Lopez*, 93 Wn.App. 619, 970 P.2d 765 (1999).

Because criminal negligence is based on an objective "reasonable person" standard, a person may be criminally negligent despite voluntary intoxication, *State v. Coates*, 107 Wn.2d 882, 892, 735 P.2d 64 (1987), and despite an impairment in mental capacity, *State v. Warden*, 80 Wn.App. 448, 456, 909 P.2d 941 (1996), affirmed 133 Wn.2d 559, 947 P.2d 708 (1996).

For manslaughter, the definition of criminal negligence is likely more particularized than is the general statutory definition. The statutory definition is phrased in terms of failing to be aware of a substantial risk that a *wrongful act* may occur, whereas in the manslaughter context, the Supreme Court has implied that criminal negligence involves a substantial risk that a *death* may occur. In *State v. Gamble*, 154 Wn.2d 457, 467–68, 114 P.3d 646 (2005), the Supreme Court analyzed the related definition of recklessness, holding that recklessness in a manslaughter case requires proof of a substantial risk that a death, rather than simply a wrongful act, may occur. By a similar rationale, criminal negligence in the manslaughter context would require proof of a substantial risk that a death may occur. Accordingly, for a manslaughter case, this instruction above should be drafted using the word "death" rather than "wrongful act." The *Gamble* court gave no indication as to whether more particularized standards would also apply to offenses other than manslaughter. Accordingly, the first paragraph of this instruction above is drafted in a manner that allows practitioners to more fully consider how *Gamble* applies to other offenses.

In *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014), the Supreme Court declined to extend the rule to a prosecution for

assault in the second degree, finding that the WPIC 10.03 “generic” definition of recklessness is sufficient when charge-specific language for recklessness is included in the “to convict” instruction. However, careful consideration should be given to drafting a particularized definition of recklessness (or negligence) depending on the charge that contains such mental element.

Assuming that this analysis applies in the negligence context, the bracket after “a wrongful act” should be filled in with language specifying the nature of the risk the defendant is alleged to have disregarded. See the appropriate elements instructions for particular offenses for the committee’s recommended language.

With regard to the relationship between recklessness and higher culpability requirements, see the discussion of *Goble* in the Comment to WPIC 10.02 (Knowledge—Knowingly—Definition). For a general discussion of the hierarchy of mental states set forth in RCW 9A.08.010, see WPIC 10.00 (Introduction).

[Current as of June 2014.]

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