

NO. 35359-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RUSSELL EUGENE PEARSON,

Appellant.

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STATE OF WASHINGTON  
COURT OF APPEALS  
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BY [Signature]

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

The Honorable Frederick W. Fleming, Judge

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SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Trial counsel's failure to propose instructions on the lesser included offenses of first and second degree manslaughter constitutes ineffective assistance of counsel.

Issue pertaining to supplemental assignment of error

Appellant was charged with second degree intentional murder and second degree felony murder predicated on burglary. Although the evidence supported instructions on the lesser included offenses of first and second degree manslaughter, counsel failed to propose such instructions. Did counsel's error deny appellant effective representation?

B. SUPPLEMENTAL ARGUMENT

DEFENSE COUNSEL'S FAILURE TO REQUEST INSTRUCTIONS ON THE LESSER INCLUDED OFFENSES OF FIRST AND SECOND DEGREE MANSLAUGHTER DENIED PEARSON HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

A defendant is entitled to a lesser included offense instruction if the proposed instruction meets the legal and factual "prongs" of the Workman test. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The legal prong is met where each of the elements of the lesser offense are included within the elements of the greater offense, while the factual prong is met where the evidence supports an inference that only the

lesser offense was committed. Id. Here, Pearson was charged with second degree murder based on intent. Because first and second degree manslaughter satisfy both prongs of the Workman test, he was entitled to have the jury instructed on those offenses.

The elements of first degree manslaughter are causing the death of another and recklessness. RCW 9A.32.060(1)(a). The elements of second degree manslaughter are causing the death of another and criminal negligence. RCW 9A.32.070. The mental elements of recklessness and criminal negligence are lesser included mental states of intent. RCW 9A.08.010(2); State v. Jones, 95 Wn.2d 616, 621, 628 P.2d 472 (1981). Therefore, both degrees of manslaughter are necessarily proved whenever second degree intentional murder is proved, and first and second degree manslaughter meet the legal prong of the Workman test.

When considering the factual prong of the Workman test, courts must view the evidence in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); State v. Ward, 125 Wn. App. 243, 248, 104 P.3d 670 (2004). It was undisputed in this case that Klum was killed by a shotgun Davis was carrying. The jury found that the killing was not intentional, however. CP 245. There was evidence that Davis pulled out the shotgun when Klum appeared in the hallway with a gun in his belt. 4RP 139, 148,

199. Davis and Klum argued over who would put down his weapon, and the argument culminated in Klum being shot. 4RP 150. Pearson looked shocked when the shotgun came out, like he did not know the shotgun was supposed to be there, and he acted like he wanted to get out of there. 4RP 207; 4RP 429. Moreover, the state's firearm expert and the medical examiner both testified that Klum's injuries could have resulted from a struggle over the gun in which the gun was discharged inadvertently. 4RP 266; 7RP 620, 625. This evidence, viewed in the light most favorable to the defense, would support an argument that the shooting was negligent or reckless, and Pearson was therefore entitled to lesser included offense instructions.

Defense counsel's failure to request these instructions constituted ineffective assistance of counsel and denied Pearson a fair trial. The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantee a criminal defendant effective assistance of counsel. A defendant is denied this right when his attorney's performance is deficient and that deficiency prejudices the defense. Ward, 125 Wn. App. at 247 (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Trial counsel in this case took an unreasonable risk in failing to seek lesser included offense instructions. Without instructions on the lesser included offenses, the jury was left with the options of convicting Pearson of second degree murder or acquittal. The jury clearly did not believe Pearson intended to kill Klum. Although the guilty verdict on the felony murder charge would suggest the jury found Pearson was in the apartment unlawfully, that element of the predicate offense to felony murder was sharply disputed. See 9RP 828-33. The jury could have found, based on the evidence, that that while Pearson was lawfully in the apartment by way of an implied invitation, he acted negligently or recklessly in going there with Davis, who was armed with a shotgun. Under these circumstances with the instructions given, the jury would have to acquit. But since it believed Pearson's negligent or reckless conduct was responsible for Klum's death, it was not likely to do that. Instead, the jury would resolve its doubts in favor of conviction. See Ward, 125 Wn. App. at 250 ("Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.")

Counsel's decision not to request lesser included offense instructions exposed Pearson to the substantial risk the jury would convict on the only available option. While this "all or nothing" approach may be

theoretically supportable, “a defendant is entitled to a lesser offense instruction . . . precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory.” Ward, 125 Wn. App. at 250 (quoting Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d. 844 (1973)); see also State v. Pittman, 134 Wn. App. 376, 388, \_\_\_ P.3d \_\_\_ (2006)(counsel ineffective for failing to request lesser included offense instruction where element of charged offense in doubt but defendant clearly guilty of something).

Moreover, the penalties on the lesser offenses were significantly lower than on the charged offense. See Ward, 125 Wn. App. at 249 (counsel ineffective in not proposing lesser included offense instruction where penalty on lesser offense significantly lower than charged offense). Pearson’s standard range on the murder conviction was 165 to 265 months, plus 60 months for the firearm enhancement, for a total range of 225 to 325 months. CP 272. By contrast, if convicted of first degree manslaughter, Pearson would have faced 171 to 207 months (111 to 147 plus the firearm enhancement), and for second degree manslaughter the penalty was 101 to 114 months (41 to 54 months, plus the enhancement). RCW 9.94A.510.

Under the circumstances, counsel's all or nothing strategy fell below an objective standard of reasonableness. There is a reasonable probability this deficient performance prejudiced the defense.

The state's evidence of unlawful entry or remaining was weak, and its witnesses were significantly impeached. As discussed in the Brief of Appellant, evidence improperly excluded by the trial court would have further weakened the state's burglary theory and exposed the bias of a key state witness. See Br. of App. § C.2 at 19-32. It is reasonably likely that, given the chance, the jury would have convicted Pearson of first or second degree manslaughter instead of second degree felony murder. Thus, counsel's failure to request lesser included offense instructions constitutes ineffective assistance of counsel.

C. CONCLUSION

For the reasons set forth above and in the opening brief, this Court should reverse Pearson's conviction and remand for a new, fair trial.

DATED this 31<sup>st</sup> day of May, 2007.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Motion to File Supplemental Brief and Supplemental Brief of Appellant in *State v. Russell Eugene Pearson*, Cause No. 35359-8-II, directed to:

Kathleen Proctor  
Pierce County Prosecutor's Office  
Room 946  
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Tacoma, WA 98402-2102

Russell Eugene Pearson, DOC# 810747  
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Washington State Reformatory  
P.O. Box 777  
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski  
Done in Port Orchard, WA  
May 31, 2007

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