

No. 35543-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON

30

V.

MARTIN K. WARREN

---

BRIEF OF APPELLANT

---

Thomas E. Weaver  
WSBA #22488  
Attorney for Appellant

The Law Office of Thomas E. Weaver  
P.O. Box 1056  
Bremerton, WA 98337  
(360) 792-9345

PM 5/11/07

ORIGINAL

## TABLE OF CONTENTS

A. Assignments of Error.....	1
B. Statement of Facts.....	2
C. Argument.....	16
1. Mr. Warren’s counsel was ineffective for failing to request lesser-included offense instructions of second degree murder and manslaughter.....	16
2. The trial court erred by not including the element of knowledge in the jury instruction defining unlawful possession of a firearm.....	24
3. The terms of the Order of Protection prohibiting contact with Russell Warren or “the residence” are vague and unenforceable.....	26
D. Conclusion.....	30

## TABLE OF AUTHORITIES

### Cases

<u>Cox v. Louisiana</u> , 379 U.S. 559, 85 S. Ct. 476, 484, 13 L. Ed. 2d 487 (1965).....	28
<u>In re Grisby</u> , 121 Wn.2d 419, 430, 853 P.2d 901 (1993) .....	29
<u>In re the Discipline of Clayton Longacre</u> , 155 Wn.2d 723, 122 P.3d 710 (2005).....	22
<u>In re Thomas</u> , 766 So. 2d 975 (Ala.2000) .....	21
<u>Lutton v. Smith</u> , 8 Wn. App. 822, 824, 509 P.2d 58 (1973).....	29
<u>Raley v. Ohio</u> , 360 U.S. 423, 79 S. Ct. 1257, 1266-67, 3 L. Ed. 2d 1344 (1959).....	28
<u>State v. Anderson</u> , 141 Wn.2d 357, 361, 5 P.3d 1247 (2000) .....	24
<u>State v. Berlin</u> , 133 Wn.2d 541, 947 P.2d 700 (1997).....	17
<u>State v. Bowerman</u> , 115 Wn.2d 794, 802 P.2d 116 (1990) .....	17, 18
<u>State v. Bradshaw</u> , 152 Wn.2d 528, 98 P.3d 1190, certiorari denied, 544 U.S. 922, 125 S. Ct. 1662, 161 L. Ed. 2d 480 (2004).....	25
<u>State v. Curran</u> , 116 Wn.2d 174, 804 P.2d 558 (1991).....	18
<u>State v. Davis</u> , 121 Wn.2d 1, 846 P.2d 527 (1993) .....	18
<u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000) .....	19
<u>State v. Jones</u> , 95 Wn.2d 616, 628 P.2d 472 (1981).....	20
<u>State v. Lucky</u> , 128 Wn.2d 727, 912 P.2d 483 (1996) .....	18
<u>State v. Miller</u> , 156 Wn.2d 23; 123 P.3d 827 (2005).....	26
<u>State v. Spiers</u> , 119 Wn. App. 85, 79 P.3d 30 (2003).....	25
<u>State v. Ward</u> , 148 Wn.2d 803, 64 P.3d 640 (2003).....	28
<u>State v. Warden</u> , 133 Wn.2d 559, 947 P.2d 708 (1997).....	17
<u>State v. Williams</u> , 158 Wn.2d 904, 148 P.3d 993 (2006) .....	25
<u>State v. Workman</u> , 90 Wn.2d 443, 584 P.2d 382 (1978).....	17
<u>Strickland v. Washington</u> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	16
<u>United States v. Pennsylvania Indus. Chem. Corp.</u> , 411 U.S. 655, 93 S. Ct. 1804, 1816, 36 L. Ed. 2d 567 (1973).....	28

A. Assignments of Error

Assignments of Error

1. Mr. Warren's counsel was ineffective for failing to request lesser-included offense instructions of second degree murder and manslaughter.
2. The trial court erred by not including the element of knowledge in the jury instruction defining unlawful possession of a firearm.
3. The terms of the Order of Protection prohibiting contact with Russell Warren or "the residence" are vague and unenforceable.

Issues Pertaining to Assignments of Error

1. Was Mr. Warren's counsel ineffective for failing to request lesser-included offense instructions of second degree murder and manslaughter when: (a) The defense was diminished capacity and Mr. Warren admitted the fatal shooting; and (b) Mr. Warren's counsel repeatedly prepared the jury for the possibility that the shooting was overcharged?
2. Did the trial court err by not including the element of knowledge in the jury instruction defining unlawful possession of a firearm?
3. Were the terms of the Order of Protection prohibiting contact with Russell Warren or "the residence" vague and unenforceable such that the aggravating factor should be stricken?

## B. Statement of Facts

Martin Warren shot and killed his father, Russell Warren, on October 11, 2004. Although Mr. Warren testified that he could not remember shooting his father, this fact was never in serious dispute. RP, 1052. The only issue was whether the killing was negligent, reckless, intentional, or premeditated. The State argued that the death was the result of Mr. Warren's premeditated intent. Mr. Warren was represented by attorney Clayton Longacre. Mr. Longacre presented substantial evidence that the death was the result of a methamphetamine induced delusional state which rendered him incapable of forming the requisite intent. RP, 927. After presenting this evidence, however, Mr. Longacre inexplicably failed to offer any lesser-included offenses. This incredibly prejudicial decision cannot be attributed to a tactical decision and fell far below an objective reasonableness standard for attorneys.

The issue of what degree of offense Mr. Warren should be convicted of was an early and frequent topic of discussion, both in front of and outside the presence of the jury. Prior to starting general voire dire, Mr. Longacre asked whether it was permissible to inquire about the jury's feelings about lesser-included offenses. He explained, "One of the issues

that I want to talk to the jury about is the gradations of the charge of murder. There's premeditated [,] murder two, manslaughter, diminished, whatever the things might be." RP, 337. The court allowed inquiry into these matters with the caveat that he not get "too technical." RP, 337.

During voir dire, Mr. Longacre questioned juror number 40 about her profession. Juror number 40 is a deputy prosecuting attorney in King County. RP, 49. She has worked there for fifteen years. RP, 343. Mr. Longacre inquired whether other jurors would defer to her judgment, and she stated she did not know because she has never been on a jury before. RP, 345. Mr. Longacre specifically used her expertise to springboard the concept of lesser-included offenses. He asked, "The court may give instructions in terms of different gradations of murder. It's not all cut and dry. Okay? Number 40, in your charging decisions, you have to decide different gradations of murder I presume?" RP, 365. Juror number 40 confirmed that she makes those type of decisions "even at the start" of the case. RP, 365. Mr. Longacre then asked the group, "Is there anybody that feels that if a person – if there's more than one possibility for the murder charge, different gradations, that if they find there's murder, that it is just going to stay right with the top one and leave it there?" RP, 365. Juror number 40 was again instrumental in her answers to emphasize that the

jury should look at lesser-included offenses to the extent permitted by the jury instructions. RP, 366.

Later in *voire dire*, Mr. Longacre inquired whether it would be “malpractice” for him to leave a deputy prosecutor on the jury. RP, 374. Juror number 40 provided a long thoughtful answer that included the following comment, “And one of the other things I think that’s a benefit to having someone like me for a defendant is that I have well-developed ideas about how the instructions and facts and testimony interact.” RP, 375. Juror number 40 was not preempted by either side and served on the jury as juror number 8. CP, 81.

The next time lesser-included offenses were mentioned was at the conclusion of Mr. Longacre’s opening statement, where he said, “You will hear stories of [Mr. Warren’s] family that will shock you, and it will be up to you at the end to figure out what to label it. Premeditated first degree murder? Second degree murder? Manslaughter? Diminished capacity? You will hear arguments by the lawyers, and forgive us if you think that we are trying to force you to think one way or the other, because in the end you will take the judge’s instructions, the evidence you receive, and figure it out for yourselves. Thank you.” RP, 407-08.

During the defense case-in-chief, Mr. Warren sought to introduce both expert and lay testimony of his mental state at the time of the offense.

Mr. Longacre explained that this evidence was admissible “not only for diminished capacity, but also to attack the state’s claim of premeditation and first degree intent.” RP, 866. Later, Mr. Longacre said, “The crux of my case begins and ends not only with diminished capacity, but also because of the emotional history, baggage in this case, that there is no premeditation and no first degree murder.” RP, 867-68. In arguing whether the defense should be allowed to present expert psychiatric testimony, Mr. Longacre said, “But as far as the issue of premeditation, whether there was a simple emotional blow-up, if you don’t reach diminished capacity, family history is still relevant and still comes in under that basis. If the state were charging second degree murder and manslaughter, they might have an argument, but as long as they are charging premeditation, then those thought processes going to Mr. Warren’s state of mind come in in terms of being able to argue against premeditation.” RP, 869. The trial court considered the various arguments and admitted both expert and limited lay testimony relevant to Mr. Warren’s ability to premeditate on the day of the shooting. RP, 874.

Mr. Longacre never proposed any lesser-included offense jury instructions. CP, 95. Instead, he adopted the State’s proposed instructions, with only minor variation. RP, 1055. Ironically, just a short time after indicating that he was adopting the State’s proposed instructions, he

continued to discuss the evidence in terms of lesser-included offenses. He sought to introduce impeachment evidence that he said was “material evidence related to the shooting, whether we get to premeditation, whether this was an emotional shooting such as manslaughter, second degree shooting. All of those come into play here.” RP, 1094. The only jury instruction that was not agreed was the “to convict” instruction defining unlawful possession of a firearm, which omitted the element of knowledge. RP, 1175. The Court instructed the jury on the agreed jury instructions.

#### Substantive Evidence

Martin Warren lived with his girlfriend Kathy Moore, his son Zak, his brother Ivan, and his parents Russell and Dorothy Warren, on a three acre piece of property on Komichan Lane in Seabeck, Washington<sup>1</sup>. RP, 601. Seabeck is a small, rural community on the outskirts of Kitsap County. Russell and Dorothy lived in the main house, which was a mobile home. RP, 762. Martin and Ms. Moore lived in a motor home on the back side of the property. RP, 762. In order to reach the motor home, it was necessary to drive down the driveway past the mobile home. RP, 762.

---

<sup>1</sup> For ease of analysis, first names are used in this portion of the brief. No disrespect is intended. Dorothy Warren is also referred to in the record as Dortha.

Martin's motor home was located about 200 feet away from the main residence. RP, 909.

Martin has a longtime addiction to methamphetamine and other controlled substances. From the time he was an infant, his father would blow marijuana into his face to help him sleep. RP, 1008. Russell was a methamphetamine manufacturer, which he allowed Martin to use. RP, 897. Russell was the one who showed him how to inject drugs with needles. RP, 898. Martin was a regular user of methamphetamine by the time he was in his teens. RP, 897. Martin also experimented with marijuana, alcohol and cocaine, but methamphetamine was the primary drug. RP, 897.

During the period leading up to October of 2004, Martin was a daily methamphetamine user. For two years prior to the shooting he was using "very high doses" on a daily basis. RP, 911. He was using two to three grams per day. RP, 1042.

Ms. Moore described a typical day. RP, 765. She would get up in the morning and immediately use methamphetamine intravenously. RP, 765. She would repeat this throughout the day every three hours, typically using about a quarter gram per day. RP, 765. Martin would typically give her the injections. RP, 767. Ms. Moore testified that as long as she slept every night, she did not have trouble with hallucinations. RP,

769. But if she was sleep deprived, the methamphetamine would cause her to start having conversations with people that were not there. RP, 769.

Everyone agreed that Russell was not a nice person and did not do anything for anybody else. RP, 647-48. Dorothy admitted that her life is “a lot better without him” because he was not a good man. RP, 720. Russell would regularly threaten to kill Martin, Dorothy, and other family members. RP, 908. When Martin was ten years old, Russell raped Martin’s older sister, causing her to estrange herself from the family. RP, 900. Russell taught Martin how to manufacture and sell drugs on the street. RP, 899. On one occasion when Martin was fifteen or sixteen years old, a drug deal went sour and Russell shot and killed a man while Martin watched. RP, 900. In 1999, Martin’s younger brother Brian, with whom he was very close, was killed in a drunk driving accident. RP, 906. Martin blamed his father for the accident and death because Brian and Russell had had a fist fight prior to the car accident. RP, 906.

According to Ivan, during the period leading up to October 11, 2004, Martin never carried a firearm on his person. RP, 603. Ivan testified that “around that time period” he had seen a 9-millimeter and a .380 in Martin’s “living establishments.” There was also a firearm in the F-150 pickup. RP, 784. In the weeks leading up to the shooting, Martin had said

several times that he was going to kill himself in front of Russell because he was tired of being wrong all the time. RP, 706.

On October 11, 2004, Ms. Moore came into the main house to ask about using the Ford Ranger, because Martin's F-150 pickup needed new brakes. RP, 610. Martin owned the F-150 pickup, although it was registered in Ivan's name. RP, 604. Russell refused to give Martin permission and Ms. Moore and Russell had a brief argument. RP, 611. Dorothy heard Russell say, "No. You lied to me last time you borrowed it and you can't drive it anymore." RP, 699. Ms. Moore left the house and reported to Martin what Russell had said. RP, 612. According to Ivan, Martin got very upset and called his father an "asshole." RP, 613. Ms. Moore testified that he "just exploded" and became enraged immediately. RP, 778. Martin then went into the house and started "bitching" at his father, saying, "Well, the restraining order is back on." RP, 613. Dorothy heard Martin say, "All you do is lay around and you won't help anybody." RP, 701. He then exclaimed, "I hate you," to which Russell responded, "I know." RP, 701.

Ms. Moore and Martin returned to the motor home. RP, 780. Martin was pacing back and forth, acting very angry. RP, 781. Martin testified that he had been awake and high for four consecutive days at this point. RP, 1048. Martin was making statements, "I should just kill him.

He has made people miserable long enough. I should just fucking shoot him.” RP, 781. Ms. Moore was trying to calm him down, saying, “That’s really not what you want to do. What’s going to happen to your family? What’s going to happen to us?” RP, 782. Martin responded, “I don’t fucking care.” RP, 782. Martin walked to the F-150 pickup and retrieved a firearm. RP, 784. Ms. Moore offered to cook Martin some food and Martin refused. RP, 786. Instead, Martin walked to the house. RP, 787. Dorothy gathered up the dogs and went outside. RP, 705. He said, “You are dead,” and fired the firearm. RP, 617. Ivan heard three shots. RP, 618. Dorothy heard four. RP, 708. Ms. Moore heard five. RP, 787.

Dorothy went to the sliding glass door where she could see Martin, took him by the hand, and led him to his pickup. RP, 709. She told him to leave. RP, 709. Ivan went into his bedroom and retrieved his own pistol. RP, 618. After retrieving his pistol, Ivan went outside in time to see Martin getting into his truck. RP, 620. Ivan intended to shoot Martin, but initially restrained himself because Dorothy was between himself and Martin. RP, 621. Moments later, Ivan shot at Martin. RP, 624. Martin pointed his firearm at Ivan. RP, 626. Ivan fired a second shot. RP, 626. Martin then left in the F-25 pickup. RP, 626. Dorothy called 911 and told Cencom that Martin had left in a white pickup. RP, 715. Ivan also called 911. RP, 627. Dorothy told Ivan, “You’re dad is dead,” and went outside.

RP, 716. She was joined by Ms. Moore and the two of them talked until the police arrived. RP, 716.

The initial 911 call was received by Kitsap County dispatchers at 12:38 p.m. RP, 537. Deputy Lee Watson was the first to arrive at 12:51 p.m. When he arrived, he did not initially see anyone. RP, 538. He had Cencom call into the house and ask the occupants to come outside. RP, 539. Dorothy came outside the house. RP, 540. She was extremely upset and speaking unintelligibly. RP, 540. Eventually, she calmed down enough to say that her husband had been shot. RP, 542. When asked by whom, she said, “Ma-ma-ma-Martin.” RP, 542. Deputy Watson told Dorothy to sit down at the fence and calm down while he investigated the house. RP, 543.

Deputy Watson decided to enter the residence. RP, 542. Before entering the fenced in area, however, he asked Dorothy to put the dogs away so he would not get bit. RP, 542. Dorothy said she had already put the dogs away. RP, 542.

Deputy Watson entered the residence and found Ivan standing over his father, trying to remove blood from his father’s mouth with a turkey baster. RP, 544. Ivan was upset, frantic. RP, 544. Deputy Watson felt for a pulse but could not find one. RP, 544. Russell had four wounds, one to

the right side of his head, two to the chest, and one to his hand. RP, 465-66.

In response to questions, Ivan identified himself and said the deceased was his father, Russell. RP, 555. He said that Martin had shot his father because, "He wouldn't let the girlfriend use the truck." RP, 555. He said the weapon was "the .380." RP, 555. Ivan indicated by pointing that he was down the hall at the time of the shooting. RP, 556. He said Martin just came right in the house and started shooting. RP, 556. At that point, Deputy Watson persuaded Ivan to come out of the house so he could console his mother. RP, 556. About that time, an aid car arrived and confirmed that Russell was deceased. RP, 557-58, 575. All of Ivan's statements to Deputy Watson were admitted as excited utterances over objection by the defense. RP, 549-50.

Deputy Watson then rejoined Dorothy Warren, who was with Ivan and Katherine Moore. RP, 558. Ms. Moore was trying to console Dorothy. RP, 553. In response to questions, Dorothy stated that Martin came into the house with a gun. RP, 559. Dorothy left out the door and was holding onto the dogs when she heard four shots. RP, 559. The court admitted these statements as excited utterances over the defense objection. RP 554.

Deputy Carl Argyle was responding to the site of the shooting when he was passed by the F-150 pickup. RP, 526. The truck was not speeding or being driven erratically. RP, 531. Deputy Argyle turned around and was in the process of catching up with the pickup when he passed Deputy James Kent, also in a patrol car. RP, 519, 526. Deputy Kent turned around and followed the pickup and Deputy Argyle. RP, 521. Deputy Argyle did not have his emergency lights on, but the pickup pulled over of its own accord. RP, 526. Martin was the driver and only occupant. RP, 522. He was arrested without incident. RP, 521. Deputy Argyle read Miranda warnings. RP, 528. Martin's pants were wet, as if he had wet himself or spilled something in his lap. RP, 530. Five days later, on October 16, 2004, Deputy Michael Grant recovered the firearm several miles away and along the route Martin and Deputy Argyle had been traveling. RP, 582.

At the time of the shooting, there was an Order for Protection in effect. RP, 838, exhibit 10. The residence listed on the Order for Protection is 2851 NW Komichan Lane in Seabeck. Ex. 10. The restraining order prohibited Martin from contacting Russell or coming within 50 feet of the "residence." It also states, "The respondent's contact with Dortha M. Warren is unrestricted except as prohibited by the restraints concerning Russell Warren herein." Ex. 10. Page 3 of the Order

for Protection says, “Violation of this order is a gross misdemeanor unless one of the following conditions apply: Any assault that is a violation of this order and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a Class C felony.” Ex. 10.

It is clear from the record that the restraining order was ignored from the beginning. According to Dorothy, the day it was signed by the judge, Russell told Martin that the order was only a tool so Martin would do what he was told. RP, 702. Russell told Martin that the order did not mean anything and he could get it dropped at any time. RP, 702. Russell had threatened Dorothy that if she did not back him on the restraining order he would “take care of [her].” RP, 722. Martin and Ms. Moore regularly used the main house for showering. RP, 763.

Martin stipulated that on October 11, 2004, he was free on bond or personal recognizance pending trial on a serious offense. RP, 838.

The defense called psychiatrist Dr. John Melson as an expert witness. RP, 889. Dr. Melson referred Mr. Warren to Dr. Muscatel, a psychologist, to do some neuropsychological testing as a supplement to Dr. Melson’s evaluation. RP, 894. Dr. Melson opined that the shooting Martin witnessed when he was a teen would have been “amongst the most traumatic of many traumas in Martin’s life.” RP, 900. Brian’s death

caused him to lose “one of the few dependable, close, reliable relationships that he had experienced in his life.” RP, 906-07.

Dr. Melson made five diagnoses. The first was attention deficit hyperactivity disorder. RP, 917. He also diagnosed post-traumatic stress disorder (PTSD). RP, 920. The PTSD is related to a third diagnosis called dissociative disorder. RP, 922. A person who dissociates is “more like an automaton, more robotic.” RP, 923. The next diagnosis is amphetamine dependence. RP, 925. Dr. Melson opined that Martin’s methamphetamine had reached acute and chronic levels, which produces a “hyperalert, overstimulated brain where there starts to be disconnects between the ability to think and reason about one’s actions and the consequences of one’s actions.” RP, 911. People who use to this level are often irritable, suspicious, and overly reactive to their sensory system. RP, 912. The final diagnosis is amphetamine intoxication, delirium. RP, 926. This is a transient state, usually only lasting for a short time, depending on the substance and the other problems present. RP, 927.

Given Martin’s diagnoses, “any suggestion that he was going to be subjected to his father’s anger or attack would greatly increase his vigilance, his suspiciousness, and his sort of fight or flight reactivity.” RP, 921. Although a person with Martin’s history is able to function on a certain level, including driving a car or firing a gun, those activities are not

“integrated between their conscious awareness and what they are doing and the actual behaviors that they are engaged in.” RP, 924. In sum, given all the diagnoses, Dr. Melson concluded that Martin “would not be capable of forming the intent to commit a crime on October 11.” RP, 927. He reached this conclusion to a reasonable medical certainty. RP, 930. The State’s expert, Dr. Sarah Leisenring, disagreed with this conclusion. RP, 1118.

### C. Argument

#### **1. Mr. Warren’s counsel was ineffective for failing to request lesser-included offense instructions of second degree murder and manslaughter.**

Mr. Warren did not receive effective assistance of counsel when his attorney failed to request lesser-included offense instructions of second-degree murder and first and second degree manslaughter. The Sixth Amendment guarantees the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), has been oft repeated. First, Mr. Warren must show that his counsel’s performance fell below an objective reasonableness standard in light of all the circumstances. Second, he must show that he was prejudiced by his counsel’s mistake.

Mr. Warren begins his analysis with the prejudice prong. Mr. Longacre did not request any lesser-included offense instructions. Mr. Warren was prejudiced by this omission if he was entitled to have the jury so instructed.

Washington uses a two part-test to determine whether a lesser-included offense jury instruction is warranted. State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978). First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed. Second degree murder is a lesser included offense of first degree murder. State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990). First and second degree manslaughter are both lesser-included offenses of first and second degree murder. State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997); State v. Warden, 133 Wn.2d 559, 947 P.2d 708 (1997). The legal prong of the Workman test is easily satisfied.

The factual prong of the Workman test is also satisfied in Mr. Warren's case, as demonstrated by the Berlin and Warden cases. In Berlin the Court held that the defendant's evidence of drinking entitled him to the lesser-included offense instruction. The Court said, "[A]mple evidence was offered of Berlin's drinking to the point of potentially impairing his ability to form the requisite intent to kill." Berlin at 552. In Warden, the

defendant presented expert testimony of diminished capacity. The defense expert “testified about the physical and psychological abuse Warden suffered at the hands of her son. His theory was Warden suffered from posttraumatic shock disorder, which resulted in dissociative episodes. He stated it was his opinion that Warden lacked the mental capacity to form the intent to kill.” Warden at 564. Based upon this testimony, the trial court erred by denying the lesser-included offense instruction. The expert testimony offered by the defense in Warden is remarkably similar to the testimony offered by Mr. Warren at trial. Had his attorney requested a lesser-included offense instruction, he was entitled to one. Mr. Warren was prejudiced by the failure to request a lesser-included offense instruction.

There is some older case law where the Washington Supreme Court showed a certain hostility towards lesser included offenses. This hostility manifested itself both when the Court was analyzing the legal prong of Workman and when the Court was analyzing the factual prong. See, e.g. State v. Lucky, 128 Wn.2d 727, 912 P.2d 483 (1996) (legal prong), State v. Curran, 116 Wn.2d 174, 804 P.2d 558 (1991) (same), State v. Davis, 121 Wn.2d 1, 846 P.2d 527 (1993) (same), State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990) (factual prong). But these cases have all been explicitly or implicitly overruled by the Berlin

and Warden cases. In fact, the Warden case, which reached the opposite conclusion of Bowerman based upon materially identical facts, fails to even mention the earlier case. The Supreme Court has also acknowledged that lesser-included offenses may be part of a strategy of inconsistent defense theories. State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000).

The modern trend in Washington jurisprudence is to error on the side of giving lesser-included offenses. Mr. Warren was legally and factually entitled to lesser-included offense instructions and was prejudiced by their absence.

Having established that Mr. Warren was entitled to lesser-included offense instructions, the next issue is whether Mr. Longacre failed to act reasonably when he failed to request them. Stated another way, can Mr. Longacre's decision to not request lesser-included offense instructions be attributed to trial tactics? On the one hand, it is possible to attribute an all-or-nothing strategy to Mr. Longacre's actions and say that Mr. Longacre's performance was not defective. But under the facts of this case, this Court should find that Mr. Longacre's performance was defective. While case law is clear that a defendant is not entitled to a successful strategy from his attorney, he is entitled to have his attorney employ a strategy that employs the minimal skills expected of an attorney considering the charge. In this

case, the charge was aggravated murder, the most serious criminal offense in Washington. Mr. Warren admitted to doing the shooting that killed his father. The defense of diminished capacity. The failure of Mr. Longacre to request a lesser-included offense put the jury in the position of either acquitting entirely an admitted killer or of convicting him of Washington's most serious offense.

Washington courts have long held that in cases where diminished capacity or intoxication is the defense, an all-or-nothing approach is an unrealistic choice for juries. In State v. Jones, 95 Wn.2d 616, 628 P.2d 472 (1981), the Court said the following:

There were, then, two possible ways the jury could have decided that appellant lacked the intent necessary for a conviction of second degree murder. They could have found either that he was so intoxicated as to be unable to form the intent to kill or, alternatively, that he acted in self-defense, but recklessly or negligently used more force than was necessary to repel the attack. We think it plain the evidence was sufficient for the court to give the intoxication instruction. Without the manslaughter instruction, however, the jury was required either to find appellant guilty of second degree murder or to acquit him altogether. The refusal to give the manslaughter instruction prevented appellant from presenting his theory that the killing was unintentional by reason of his intoxication. This refusal was reversible error.

Jones at 622-23 (citations omitted).

It is an untenable decision to ask a jury to set free entirely a man who has admittedly killed his father on the ground that his

lifelong drug addiction so impaired his ability to reason that he did not know what he was doing. While the law recognizes that diminished capacity is a complete defense, a jury is unlikely on that basis to acquit a person entirely on a serious charge such as first degree murder. Instead, they are much more likely to consider favorably a lesser offense, such as second-degree murder or manslaughter.

The Alabama Supreme Court reached the conclusion that failure to request a lesser-included of manslaughter when the defense is voluntary intoxication is unreasonable in the case of In re Thomas, 766 So. 2d 975 (Ala.2000). There, the Court said:

Trial defense counsel's failure to request an instruction submitting manslaughter and failure to preserve error in this regard cannot be considered a strategic decision. He requested and obtained an instruction on voluntary intoxication to the effect that voluntary intoxication could negate an element of specific intent. The logical sequel would have been an instruction on manslaughter as a lesser included offense. Such an instruction, predicated on voluntary intoxication, would have been entirely consistent with the defense of mental incompetence and the strategy of simply saving the defendant's life rather than seeking total exoneration.

Thomas at 979.<sup>2</sup>

---

<sup>2</sup> The Court later concluded that the defendant was not prejudiced by the failure to ask for a lesser offense of manslaughter. Although trial counsel did not request a manslaughter instruction, he did request a lesser-included offense of non-capital murder. The jury rejected this lesser-included. Given that the jury was unwilling to convict of non-capital murder, the

One cannot help but speculate that Mr. Longacre has a tendency to place too much confidence on his ability to persuade juries. This is exactly what happened in the case of In re the Discipline of Clayton Longacre, 155 Wn.2d 723, 122 P.3d 710 (2005). In Longacre, the Washington Supreme Court suspended Mr. Longacre for sixty days, starting on November 10, 2005. This was one year after Mr. Warren's arrest. The suspension caused a delay in Mr. Warren's trial while the parties waited out the suspension. The suspension was the result of Mr. Longacre failing to advise his client of a five year plea bargain offer in a drive-by shooting case. Instead, the case went to trial and the jury convicted of all counts, leaving the client facing 51 years in prison.

At Mr. Longacre's disciplinary hearing, he bragged about his trial successes. See Longacre at 724 (Justice Matsen, dissenting) ("I had the highest win rate for some reason in the public defender's office up there as well as in this whole region;" "So I gained a reputation before I got out of law school of doing exceptional trial work;" "Because in the jail, these people think I'm a miracle-maker sometimes when they hear about the different people that I've won acquittals on.")

---

Alabama Supreme Court concluded that the "likelihood is nil" that the jury would have convicted of manslaughter. Thomas at 980.

Additionally, there was evidence at the disciplinary hearing that Mr. Longacre's desire to advocate aggressively on behalf of his client's sometimes clouds his judgment. As Justice Madsen observed, "[I]t can be easily inferred from his testimony before the hearings officer and in his briefs to the Board that Longacre believed the plea offers were so outrageous and unfair that they could not be viewed as serious offers. This does not excuse him from his duty to inform his client of the plea offers, but it does show that he was motivated by the desire to get the best deal for his client and not from selfish or dishonest considerations." Longacre at 725 (Justice Matsen, dissenting).

But even assuming arguendo that Mr. Longacre's decision to not request a lesser-included offense instruction was a legitimate tactical decision, there still remains the manner in which he approached the issue in front of the jury. Repeatedly, during voir dire and in his opening statement, Mr. Longacre talked about the concept of lesser-included offenses. His voir dire is peppered with comments that prepared the jury for the possibility of considering a lesser charge. He was particularly effective in using a King County deputy prosecuting attorney from the jury pool to discuss these issues, even to the point of leaving the prosecutor on the jury. More importantly, his

opening statement told the jury that they would be “to figure out what to label” the shooting. He suggested the possibilities of premeditated first degree murder, second degree murder, manslaughter, and diminished capacity. Given his clearly expressed intent to argue a lesser-included offense to the jury, his decision to not request such instructions cannot be attributed to trial tactics. This Court should reverse Mr. Warren’s conviction and remand for new trial with lesser-included offense instructions.

**2. The trial court erred by not including the element of knowledge in the jury instruction defining unlawful possession of a firearm.**

Knowledge that the defendant is in possession of a firearm is a requisite element of the offenses of unlawful possession of a firearm. State v. Anderson, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000). The trial court did not include this element in the jury instructions, however. CP, 162. This was error and violated Mr. Warren’s Sixth Amendment right to have the jury pass on all the elements of the offense.

Mr. Longacre timely objected to the erroneous instruction. RP, 1175. But he erroneously believed that the Anderson decision had recently been overruled. RP, 1175. It is possible Mr. Longacre was

thinking of State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190, certiorari denied, 544 U.S. 922, 125 S. Ct. 1662, 161 L. Ed. 2d 480 (2004), which held that knowledge is not a requisite element for possession of controlled substance. Regardless, Anderson is still the law of this State. If anything, the Anderson ruling has been recently strengthened. State v. Williams, 158 Wn.2d 904, 148 P.3d 993 (2006). The trial court erred by not instructing on knowledge.

The omission of the knowledge element was not harmless. The harmless error analysis is complicated by the fact that Mr. Warren had never been convicted of a felony offense prior to October 11, 2004. Firearm possession was made illegal by the fact that he was free on bond or personal recognizance pending trial on a serious offense at the time of the shooting, a fact to which he stipulated. RP, 838. In State v. Spiers, 119 Wn. App. 85, 79 P.3d 30 (2003), the Court of Appeals held that RCW 9.41.040 is overbroad insofar as it prohibits gun ownership by people who are pending trial but have never been convicted of a crime. Instead, the Court held, "The prohibition against possession and control of a firearm is sufficient to protect public safety and welfare." Spiers at 94. Although there was evidence that Mr. Warren owned firearms in the months prior to October 11, 2004, the only evidence heard by the jury of Mr. Warren actually possessing or controlling a firearm is immediately prior to and

during the shooting. Additionally, the State heard lengthy testimony from Dr. Melson that Mr. Warren's mental state at that time was such that he could not form an intent to commit a crime. It cannot be said that the omission of the knowledge element from the jury instruction was harmless beyond a reasonable doubt.

**3. The terms of the Order of Protection prohibiting contact with Russell Warren or "the residence" are vague and unenforceable.**

RCW 10.95.020 (13) elevates premeditated murder to aggravated murder when "[a]t the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order." This statutory provision has apparently not previously been interpreted by the appellate courts.

It is error for a court to admit an invalid or vague no contact order into evidence. State v. Miller, 156 Wn.2d 23; 123 P.3d 827 (2005). The Order for Protection in this case contains several vague and arguably contradictory provisions.

The first ambiguity is that the Order for Protection prohibits Mr. Warren from coming within 50 feet of "residence." The residence listed

on the Order for Protection is 2851 NW Komichan Lane in Seabeck. The ambiguity arises from the fact that all of the key witnesses at Mr. Warren's trial, including Martin Warren, lived at 2851 NW Komichan Lane in Seabeck. Ms. Moore described driving past the mobile home on the property (presumably less than 50 feet away) in order to get to the motor home, which was located 200 feet away from the mobile home.

The second ambiguity was that the Order for Protection permitted "unrestricted contact with Dortha M. Warren except as prohibited by the restraints concerning Russell Warren." Dorothy Warren lived in the motor home with Russell and Ivan. It is impossible to permit "unrestricted contact" with her while simultaneously prohibiting contact with Russell. There was evidence at trial that the only running water on the property was in the motor home and Mr. Warren and Ms. Moore relied on the motor home's bathroom for showing. In fact, Ms. Moore showered in the motor home the same morning as the shooting. Taking these two ambiguities together, a person of reasonable intelligence would not understand what contact is prohibited.

The third ambiguity is that the Order for Protection says, "Violation of this order is a gross misdemeanor unless one of the following conditions apply: Any assault that is a violation of this order and that does not amount to assault in the first or second degree under RCW

9A.36.011 or 9A.36.021 is a Class C felony.” The purpose of the warning is “to explain that all assaults committed in violation of a no-contact order will be penalized as felonies.” State v. Ward, 148 Wn.2d 803, 64 P.3d 640 (2003). A person reading this provision would understand that an assaultive behavior violation of the order could result in a conviction for a Class C felony. But it is impossible to learn from this warning that a murder in violation of the order will result in aggravated murder.

Government agents may not tell people that particular behavior is lawful, and then punish them for that same behavior. United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 93 S. Ct. 1804, 1816, 36 L. Ed. 2d 567 (1973) (overturning conviction of corporation for violation of environmental statute because it was not allowed to prove that it reasonably relied on current, published regulations promulgated by the Army Corps of Engineers which indicated that its conduct was lawful); Cox v. Louisiana, 379 U.S. 559, 85 S. Ct. 476, 484, 13 L. Ed. 2d 487 (1965) (overturning conviction of demonstrator for violating statute prohibiting picketing "near" a courthouse where "the highest police officials of the city, in the presence of the Sheriff and Mayor" informed demonstrators that they could gather in precise spot where they were arrested); Raley v. Ohio, 360 U.S. 423, 79 S. Ct. 1257, 1266-67, 3 L. Ed. 2d 1344 (1959) (overturning contempt convictions based on failure to

answer legislative committee's questions where chairman of committee expressly informed defendants that they could invoke privilege against self-incrimination; noting, inter alia, that sustaining conviction would "sanction the most indefensible sort of entrapment by the State"). To do so violates the federal due process clause. Cox v. Louisiana.

Judges are held to a higher standard. Although judges are not required to advise a person of the legal consequences of a particular act, when a judge does advise a person, the advice must be accurate. Lutton v. Smith, 8 Wn. App. 822, 824, 509 P.2d 58 (1973).

In Mr. Warren's case, while the Order for Protection does not state that it is permitted to engage in assaultive behavior in violation of the order, it does specify the remedies. Under the warning set out in the Order for Protection, the State would be limited to charging a Class C felony. (Presumably, first and second degree assault would be prohibited by double jeopardy principles, but to the extent they would not be, those charges could also be charged.)

Any fact that elevates a sentence to life without the possibility of parole "is *always* a significant one." In re Grisby, 121 Wn.2d 419, 430, 853 P.2d 901 (1993) (emphasis in original). The alleged violation of the Order for Protection was the only fact that elevated Mr. Warren's sentence to life without parole. Any ambiguities in the Order should be read in

favor of Mr. Warren under the rule of lenity. The Court should strike the aggravating factor.

D. Conclusion

This Court should strike the aggravating factor. The convictions for aggravated murder and unlawful possession of a firearm should be reversed and remanded for a new trial with appropriate jury instructions.

DATED this 10<sup>th</sup> day of May, 2007.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

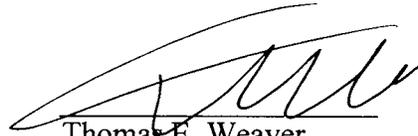
Thomas E. Weaver, WSBA #22488  
Attorney for Defendant



1 APPELLANT to the Kitsap County Prosecutor's Office, 614 Division St., MS-35, Port Orchard,  
2 WA 98366.

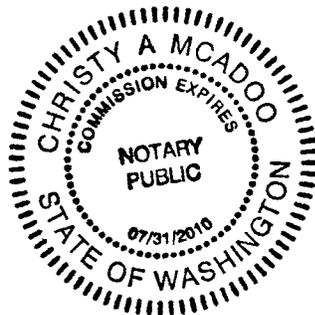
3 On May 11, 2007, I sent a copy, postage prepaid, of the MOTION FOR EXTENSION  
4 OF TIME FOR THE FILING OF THE BRIEF OF APPELLANT, and the BRIEF OF  
5 APPELLANT to Mr. Martin Warren, DOC #899907, Washington State Penitentiary, 1313 N.  
6 13<sup>th</sup> Ave., Walla Walla, WA 99362.

7 Dated this 11<sup>th</sup> day of May, 2007.

8  
9 

10 Thomas E. Weaver  
11 WSBA# 22488

12 SUBSCRIBED AND SWORN to before me this 11<sup>th</sup> day of May, 2007.





Christy McAdoo  
NOTARY PUBLIC in and for  
the State of Washington.  
My commission expires: 7/31/2010