FILED
Mar 01, 2013
Court of Appeals
Division III
State of Washington

NO. 297101

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

V.

Joel Cameron Condon,

Appellant.

RESPONDENT'S SUPPLEMENTAL BRIEF

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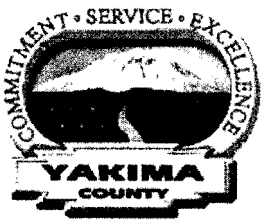

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February 28, 2013

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Division III
State of Washington

Ms. Renee S. Townsley
Clerk/Administrator
Court of Appeals/Division III
500 North Cedar Street
Spokane, WA 99201

RE: Joel Cameron Condon
Appeal Number: 297101

Dear Ms. Townsley:

In response to the court's letter of February 4, 2013, the State submits the following supplementation of its response brief.

The Court has requested supplemental briefing, asking whether, if the Court were to decide that Mr. Condon satisfied both the legal and factual prongs of State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978), the trial court's error in failing to give a lesser-included instruction for the offense of second degree (intentional) murder, was obviated by the jury's verdict of guilty on the charge of first degree (premeditated) murder? The parties were asked to consider the reasoning in State v. Guilliot, 106 Wn. App. 355, 22 P.3d 1266 (2001) and State v. Hansen, 46 Wn. App. 292, 730 P.2d 706 (1986).

The State reiterates the argument contained in its response brief that while there is no dispute that the first, or legal prong, of Workman is met with respect to second degree murder, the factual prong was not met in Mr. Condon's case, i.e., evidence admitted at trial does not support an inference that *only* the lesser included offense was committed.

In Guilliot, the Court of Appeals determined that the trial court's error in denying lesser included instructions for first and second degree manslaughter was harmless, since there was no prejudice to the defendant. This was so, because the jury found the defendant guilty of the primary offense of first degree murder, but rejected the "intermediate offense" of second degree murder: "[i]f the jury believed that Guilliot was less culpable due to an accident or his hypoglycemia, logically it would have returned a verdict on the lesser offense of second degree murder. But the jury rejected this intermediate offense and elected to convict him on the highest offense." Accordingly, since the case was resolved adversely to Guilliott, the error did not require reversal. Id., at 369.

That an error in failing to instruct on a lesser included offense does not require reversal if the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions, was also the basis for the holding in State v. Hansen, 46 Wn. App. 292, 297, 730 P.2d 706 (1986) (citations omitted). The Hansen court cited State v. White, 144 Ariz. 245, 697 P.2d 328 (1985), where the Arizona court held that a finding of guilt on "the highest offense, to the exclusion of the immediately lesser-included offense, second degree murder, the jury necessarily rejected all other less-included offenses" White, 144 Ariz. at 247.

In Hansen, the jury was "not presented with an all or nothing choice", but in fact was instructed on the intermediate offense of second degree kidnapping. The jury convicted the defendant of both first degree rape and first degree kidnapping, rejecting the intermediate offense, and also rejecting Hansen's defense theory that a drug interaction produced a mental disorder which affected his ability to form the requisite intent to commit the crimes charged. Id., at 299.

The Guilliot court also cited State v. Hernandez, 99 Wn. App. 312, 997 P.2d 923 (1999), which would appear to be more on point with respect to the facts present here. In that case, unlike in Guilliot, the defendant did not admit to any acts which would have caused the death of

the victim, and the Court of Appeals affirmed the trial court's refusal to instruct on the lesser included offenses of manslaughter. Hernandez, 99 Wn. App. at 318.

Here, the jury was instructed separately as to the primary offense of first degree (premeditated) murder, and the alternative offense of first degree (felony) murder, which was based upon first degree burglary. **(CP 219, 222)** While not strictly speaking an intermediate, or lesser-included offense, the alternative offense functioned in much the same manner, an alternative which could be considered by the jury, but which was rejected in favor of the primary offense of premeditated murder. **(CP 305)**

It should also be noted that the jury also found Condon guilty of the offense of first degree burglary, and unlawful possession of a firearm. **(CP 306, 307)** That the jury would find those offenses proven beyond a reasonable doubt, particularly the first degree burglary, yet reject a charge of felony murder based upon that very felony, only highlights that any failure in giving the lesser included offense instruction was harmless under the authorities cited. The factual question was necessarily resolved adversely to the defendant under the instructions properly given, and the court did not err.

Sincerely,

/s/ Kevin Eilmes

Kevin Eilmes
Deputy Prosecuting Attorney
WSBA #18364

Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant by filing electronically, by agreement, and pursuant to GR 30(b)(4).

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Dated at Yakima, WA this 28th day of February, 2013

/s/ Kevin G. Eilmes