

No. 309134

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

FILED
May 30, 2013
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

vs.

IVAN BUSTOS IZAZAGA,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE RUTH REUKAUF, JUDGE

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether Mr. Izazaga was denied effective assistance of counsel in that counsel proposed the incorrect jury instruction defining recklessness?
2. Did sufficient evidence support the jury's verdict finding Mr. Izazaga guilty, as a principal or accomplice, of the offense of first degree manslaughter?
3. Does a "to-convict" instruction, which informs a jury that it has a duty to return a verdict of guilty if it finds all of the elements of an offense have been proven beyond a reasonable doubt, violate a defendant's right to a jury trial?
4. Should the trial court's findings that the defendant had the current or future ability to pay legal financial obligations be stricken as clearly erroneous, where they are not supported in the record?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. While the recklessness definition was not correct for the offense of first degree manslaughter, it was harmless error, and Mr. Izazaga thus cannot demonstrate that he was

prejudiced by the instruction, as the outcome of the trial would not have been different.

2. Sufficient evidence supported the jury's verdict, as Mr. Izazaga and his principal, Mr. Rivera, lay in wait for the car in which they believed an individual with whom they had had an earlier confrontation was an occupant, Mr. Rivera retrieved a firearm from the trunk of his vehicle, and then fired a round into an occupied motor vehicle.
3. The "to-convict" instruction did not deprive Mr. Izazaga of his jury trial right
4. The court's findings that Mr. Izazaga had the present or future ability to pay his legal financial obligations should not be stricken. Mr. Izazaga did not object to the entry of the findings at the time of sentencing, and is precluded from raising the issue for the first time on appeal.

II. STATEMENT OF FACTS

The Respondent does not dispute Izazaga's Statement of the Case, but it is supplemented with the following narrative. RAP 10.3(b)

Officer Mike Costello testified at trial that upon examination of the victim's vehicle, he determined that a single bullet passed all the way

through the driver's side door, and entered the vehicle from the south, or from the direction of the Neighborhood Health Services parking lot. **(4-16-12 RP 81-86)**

Griselda Espino testified at trial that she observed Ivan Izazaga and some companions get into a confrontation with her brother, Hector Espino at Johnny's night club. **(4-16-12 RP 177-78)** The confrontation continued in the Les Schwab parking lot, and her brother attempted to hit Izazaga through an open window as Izazaga was getting into his vehicle. **(4-16-12 RP 182)**

Ms. Espino heard another occupant of Izazaga's vehicle, Hector Ramirez, say "get the gat", before the vehicle sped off. **(4-16-12 RP 182-83)** This incident occurred some five minutes before she heard gunshot come from the direction of the Taco Bell restaurant. **(4-16-12 RP 184)**

Ms. Espino understood the phrase "get the gat" to mean getting a gun. **(4-16-12 RP 193)**

Hector Espino also heard someone scream "get the gat" from the vehicle in which Izazaga was a passenger. **(4-16-12 RP 215)** He had had a prior confrontation with Izazaga at Espino's home. Espino's sister had a red vehicle. **(4-16-12 RP 261-62)**

The victim, Ms. Guerrero, also drove a red vehicle. Her vehicle moved some two to three feet after she had been shot. **(4-16-12 RP 275-76)**

Ms. Guerrero was killed as a result of a single bullet lacerating her aorta. **(4-18-12 RP 322)**

After reaching a deal with prosecutors, Melvin Soto testified that while he shared a cell with Izazaga, the defendant admitted that on the night in question, he was looking to fight a guy, but got the wrong car. **(4-19-12 RP 470-79)**

Mr. Izazaga told Loraine Padilla that something bad had happened, and that “we bought ourselves a ticket to hell.” **(4-18-12 RP 401)**

In surveillance video obtained from Neighborhood Health Services, the driver of Izazaga’s vehicle is seen getting out of the car, retrieving something from the trunk, and then getting back in. Mr. Izazaga gets out, as well, before returning to the vehicle. **(Ex. 41; 4-17-12 RP 281; 302-03)** Other video from Les Schwab and the Holiday Inn show the earlier confrontation in the Les Schwab parking lot, as well as the movement of the respective vehicles during the incident. **(Ex. 43, 46; 4-17-12 RP 290, 304-05; 4-18-12 RP 344)**

In a statement made to Yakima Police detectives, Mr. Izazaga at first claimed that he had left the vicinity before the homicide occurred,

then after being confronted by the detectives, he admitted that he was present. (4-18-12 RP 369-70)

Izazaga claimed that there were only three individuals in the vehicle, then, after the detectives revealed that he had seen a fourth individual in the surveillance videos, he agreed that a fourth person was present. (4-18-12 RP 370)

When asked, Izazaga denied that anyone had gotten out of the car, then stated that Lucio Rivera got out, then returned with a gun. (4-18-12 RP 374-75)¹

III. ARGUMENT

1. The incorrect recklessness definition constituted harmless error, as the outcome of the trial would not have been different. Mr. Izazaga was not prejudiced by any ineffectiveness on the part of this attorney.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of

¹ Under separate cover, the State has designated State's Identification No. 44 for the Court's convenience. While not admitted as an exhibit itself, it was the transcript utilized at trial by both counsel, witnesses and the jury to follow Mr. Izazaga's statement to the police.

the proceeding would have been different. State v McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), *citing* State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In weighing the two prongs found in Strickland, a reviewing court begins with a strong presumption that defense counsel's representation was effective. In fact, the presumption "will only be overcome by a clear showing of incompetence." State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). A claim of ineffective assistance of counsel presents a mixed question of law and fact, reviewed *de novo*. In re Personal Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Because the presumption runs in favor of effective representation, a defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The defendant also bears the burden of showing that, but for counsel's deficient representation, the result of the trial would have been different. Thomas, 109 Wn.2d 225-26.

"We review jury instructions *de novo*, within the context of the jury instructions as a whole." State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence . . . In order to hold the error harmless, we must “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.”

State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), *quoting* Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Jury instructions must inform the jury that the State bears the responsibility of proving each element of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). It is also true that it is reversible error to “instruct the jury in a manner” that would relieve the State of its burden of proof. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995) Accordingly, a challenge to a jury instruction, on the basis that it relieves the State of its burden, may be raised for the first time on appeal. State v. Peters, 163 Wn. App. 836, 847, 261 P.3d 199 (2011),

In his opening brief, Izazaga relies upon the recent decision out of Division I of this Court, Peters, cited above. In that case, the Court held that the trial court erred when, with respect to first degree manslaughter, it defined “reckless” as follows:

A person is reckless or acts recklessly when he 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.

Id., at 845 (emphasis in opinion)

This was instead of the more particularized variation of WPIC 10.03:

A person is reckless or acts recklessly when he *knows of and disregards a substantial risk that death may occur* and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Id.

The Comment to WPIC 10.03 states that “[f]or manslaughter, the definition of recklessness is more particularized than is the general statutory requirement of a substantial risk that a wrongful act may occur.” The pattern instruction was indeed modified in light of the Supreme Court’s decision in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005), where it held that in order to prove manslaughter the State must prove that a defendant knew of, and disregarded a substantial risk that a homicide might occur. Id. At 467-68.

In light of Gamble, the Court of Appeals held that the “wrongful act” instruction impermissibly relieved the State of its burden of proving beyond a reasonable doubt that the defendant in that case knew of and disregarded a substantial risk that a death may occur. Peters, 163 Wn. App. at 849-50.

The State must concede that here, as well, the reckless definitional instruction proposed by the defense, and given by the court, was incorrect since it also referenced a “wrongful act” instead of “death”. The error was clearly harmless beyond a reasonable doubt, however.²

The evidence established that Mr. Izazaga had a confrontation with Mr. Espino, he lay in wait for several minutes with Mr. Rivera after Mr. Rivera retrieved a gun, and Mr. Rivera fired a round into a vehicle erroneously identified by Izazaga, and which they both knew to be occupied. The jury’s verdicts reflect that it was not convinced beyond a reasonable doubt that the killing was premeditated or intentional, but beyond a reasonable doubt, if the jury had been properly instructed that to convict Izazaga, it had to find that he knew of and disregarded a substantial risk that a death would occur, the verdict as to the lesser offense of first degree manslaughter would have been the same.

By the same token, Izazaga has not met *his* burden of demonstrating that but for counsel’s deficient performance, the outcome of the trial would have been different. The second prong of Strickland has not been met.

² That State does not rely upon the invited error doctrine, as Izazaga claims ineffective assistance of counsel. State v. Kyylo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009).

2. Sufficient evidence supported the jury's verdict.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State’s case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

Again, if not intentional, firing a gun at a vehicle known to be occupied is reckless. A reasonable person would know of the substantial risk that by doing so, an occupant of the vehicle, or some other person nearby, could be killed, and is disregarding that risk.

The jury's verdict is supported by sufficient evidence.

3. Izazaga's right to a jury trial was not violated by the "to-convict" instruction.

The right to a trial by jury is and has been a fundamental right afforded to the citizens of Washington:

The effect of the declaration of the Constitution above set out is to provide that the right of trial by jury as it existed in the territory at the time when the Constitution was adopted should be continued unimpaired and inviolate. Whallon v. Bancroft, 4 Minn. 213, 41 N.W. 1020 [3 L.R.A. 510]; Taliaferro v. Lee, 97 Ala. 92, 13 So. 125. This appears to be the rule generally recognized by the authorities.

State ex rel. Mullen v. Doherty, 16 Wash. 382, 384, 47 P. 958, 959 (1897).

See, also, Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 467 P.2d 372 (1970); State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910). Const. art. 1, s. 22; Const. art. 1, s. 21.

The right is also guaranteed under the Sixth Amendment to the U.S. Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. 6.

Izazaga claims that the trial court here impermissibly interfered with his constitutional jury trial rights when it gave this pattern instruction to the jury:

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.

(CP 258; WPIC 28.02)

He is incorrect. In fact, the case on this point is well-settled. Jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. State v. Dana, 73 Wn.2d 533, 536-37, 439 P.2d 403 (1968). The trial court is granted broad discretion in determining the wording and number of jury instructions. Petersen v. State, 100 Wn.2d 421, 440, 671 P.2d 230 (1983). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79

Wn.2d 12, 482 P.2d 775 (1971). A defendant is entitled to an instruction on the defendant's theory of the case if the evidence supports the instruction. State v. Werner, 170 Wn.2d 333, 336, 241 P.3d 410 (2010).

Izazaga argues that the "to-convict" instruction was erroneous because the court informed the jury that it had a duty to convict if it found all of the elements of the crime beyond a reasonable doubt. He cites, and asks this court to reach a different result from, State v. Meggyesy, 90 Wn. App. 693, 696, 958 P.2d 319, *review denied*, 136 Wn.2d 1028, 972 P.2d 465 (1998), *overruled on other grounds by State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005), (applying the six-step analysis set forth in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)). Division I held:

Arthur Heggins and Thomas Meggyesy challenge the giving of standard WPIC "to convict" jury instructions used in their respective trials. Each contends the trial court erred by instructing the jury that if it found that the State had proved beyond a reasonable doubt all elements of the charged crime, then it had "a duty to return a verdict of guilty." We hold that neither the federal nor the state constitution precludes such an instruction. Accordingly, we affirm.

Id.

Meggyesy was followed in State v. Brown, 130 Wn.App. 767, 770-71, 124 P.3d 663 (2005), which also relied upon a similar decision in State v. Bonisisio, 92 Wn. App. 783, 793, 964 P.2d 1222 (1998):

Brown argues that Bonisisio and Meggyesy are distinguishable because in those cases each defendant asked the court to instruct the jury that it “may” convict. Here, Brown argues that the language of the “to convict” instruction affirmatively misleads the jury about its power to acquit. Brown points to the jury’s power to acquit against the evidence, citing to Hartiganv. Territory of Wash., 1 Wash. Terr. 447, 449 (1874). Brown also argues that the court’s use of the word “duty” in the “to convict” instructions conveyed to the jury that they could not acquit if the elements had been established.

...

We find no meaningful difference between Brown’s argument and the issues raised in Bonisisio and Meggyesy.

...

The power of jury nullification is not an applicable law to be applied in a second degree burglary case. We reject Brown’s argument that the court erred in giving the “duty” instruction.

Id.

There is no difference between the issue on appeal raised here, and the decisions in Meggyesy, Bonisisio, and Brown. Izazaga argues that Meggyesy was incorrectly decided, but does not set forth why the facts of this case should compel this court to set aside those decisions and reach a different result. This court should follow Meggyesy as well as Division II’s decision in Brown.

Further, the court in Meggyesy has already applied the six-step analysis set forth in Gunwall and found no independent state constitutional

basis to invalidate the challenged instructions. Meggyesy, 90 Wn. App. at 703-04.

Izazaga did not object to the “to convict” instruction. An instructional error not objected to below may be raised for the first time on appeal only if it is “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An error is manifest if it resulted in actual prejudice. State v. O’Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009).

4. Izazaga is precluded from challenging the court’s findings as to his ability to pay his legal financial obligations for the first time on appeal.

For the first time on appeal, Mr. Izazaga challenges the trial court’s findings as to his ability to pay his legal financial obligations. He argues that since the court had nothing upon which to base those findings, they should be struck as clearly erroneous. A recent case published by Division II of this Court casts some doubt on that argument.

In State v. Blazina, (Slip Opinion, No. 42728-1-II, May 21, 2013), the defendant argued that the record did not support the trial court’s finding that he had the present or future ability to pay his financial obligations, as there was no discussion on the record or documentary evidence to support the finding. He relied upon State v. Bertrand, 165

Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied* 175 Wn.2d 1014 (2012), also cited here, which requires that a trial court first "[take] into account the financial resources of the defendant and the nature of the burden" imposed by the legal financial obligations. In that case, as here, the defendant did not object to the court's findings. Further:

While we addressed the finding of current or future ability to pay in *Bertrand* for the first time on appeal under RAP 2.5(a), that rule does not compel us to do so in every case. We noted that Bertrand had disabilities that might reduce her likely future ability to pay and that she was required to begin paying her financial obligations within 60 days of sentencing Bertrand, 165 Wn. App. at 404. Nothing suggests that Blazina's case is similar. Because he did not object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal.

Blazina, p. 5.

Nothing in this case suggests that Izazaga's situation is so similar to that in Bertrand that he should be allowed to raise this issue for the first time on appeal. The Court should reject the challenge.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the conviction.

Respectfully submitted this 29th day of May, 2013.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail.

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