

No. 89585-6

NO. 67090-5-1

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

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In re the Personal Restraint of

NOEL E. CALDELLIS,

Petitioner.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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MARK K. ROE  
Prosecuting Attorney

KATHLEEN WEBBER  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

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## **I. SUPPLEMENTAL ARGUMENT**

### **A. THE ORDER SEALING JURY QUESTIONNAIRES ENTERED AFTER THE JURY HAD BEEN SELECTED IS NOT A COURTROOM CLOSURE ENTITLING THE PETITIONER TO A NEW TRIAL.**

The petitioner challenged his conviction on the basis that the trial court entered an order sealing the jury questionnaires used to assist the parties during voir dire. He further asserted that he received ineffective assistance of counsel when his trial attorney did not explain to him that the juror questionnaires were confidential and closed to the public. The Court has requested supplemental briefing on the viability of this issue in light of State v. Beskurt, 176 Wn.2d 441, 293 P.3d 1159 (2013).

In Beskurt the defendant asserted that he was entitled to a new trial on the basis of facts that are virtually identical to those presented here. Prior to trial jurors were provided with a questionnaire that informed them that responses to questions would not be available to the public. The attorneys used the questionnaires to determine who would be questioned individually. The attorneys used the questionnaire to assist in questioning prospective jurors. All questioning occurred in open court. After jury selection was concluded the trial court entered an order sealing those juror questionnaires. Beskurt, 176 Wn.2d at 442-44.

On appeal the defendant argued sealing juror questionnaire constituted a closure under Washington Constitution art. I, §22. He claimed that closure constituted a structural error which entitled him to a new trial. Id. At 445. A unanimous Supreme Court disagreed for various reasons. A majority of the court found no violation under article 1, §22. Four members of the court reasoned that the questionnaire was used by the parties as a screening tool, which the parties and the court used during the course of jury selection. While some jurors were asked to elaborate on their written responses, others were asked no questions about their written responses. “Nothing suggests the questionnaires substituted actual oral voir dire.” Id. At 447. Because the public had the opportunity to observe jury selection no closure implicating the defendant’s public trial rights had been implicated. Id. At 447-48. Two justices concurred, finding there was no evidence in the record showing juror questionnaires were withheld from scrutiny by the defendant, defense counsel, or the public throughout the trial. Id. At 457. The remaining three members of the court held that the defendant failed to preserve the issue for review, reasoning that he had not shown any prejudice necessary under RAP 2.5(a)(3) in order to justify review. Id. At 449-56. The court considered this

issue in a personal restraint petition in light of Beskurt in In re Yates, 177 Wn.2d 1, 29-30, 296 P.3d 872 (2013). There the court found the petitioner had failed to meet his burden of proof because he had presented no evidence that any of the challenges for cause were based on the questionnaires, as opposed to the oral voir dire that was open to the public. Id.

Here the petitioner asserts that the act of having jurors write some answers to some questions before voir dire was in itself a sealing. Petition at 38. But just as in Beskurt the written answers were not the only basis on which jurors were selected. The questionnaires were used initially as a screening tool. Ex. 7. Both the petitioner and his trial counsel admit that the petitioner and his trial team had access to those questionnaires. Petition Appendix B, I. Both counsel used those questionnaires, asking questions from them during the course of jury selection which was completely open to the public. Ex. 11. Although counsel states that he did not ask some questions based on some of the written answers, that is not dispositive. As the Supreme Court observed there was nothing to suggest that “the questionnaires substituted actual oral voir dire.” Beskurt, 176 Wn.2d at 447. Thus the act of having written some answers to some questions did not result in a closure in violation of

the defendant's right to an open courtroom. Id. The petitioner has not demonstrated that any juror excused for cause was based on the questionnaires and not questioning in open court. Just as no closure implicating the defendant's rights in Beskurt or Yates occurred, no such closure occurred here.

The Court also addressed whether a closure implicating the public's right trial under Art. 1, §10 was implicated by the sealing order. Because the information in the questionnaires were presumed private under GR 31(j), and no one had sought to access that information, no issue under Art 1, §10 had been raised. Beskurt, 176 Wn.2d at 448.

Here it is not entirely clear that the petitioner is asserting a claim under Art. 1, §10. In his petition he states that his personal right to an open and public trial was violated by using the confidential questionnaire without first holding a Bone-Club hearing. Petition at 34. To the extent that he does attempt to raise a public trial under Art. 1, §10 the State relies on authorities presented in its response brief which preclude an individual from asserting the public's right. In addition the State relies on the Supreme Court's reasoning that until a request for access to those documents are made by a member of the public, no Art. 1, §10 has been raised.

**B. THE FIRST DEGREE MURDER INSTRUCTION STATED THE ELEMENTS OF THE CRIME. THE PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF BOTH TRIAL AND APPELLATE COUNSEL WITH RESPECT TO ISSUES RAISED REGARDING THE TO CONVICT INSTRUCTION.**

The Court has also requested the parties address case law decided since the original briefing was completed that affects any of the claims raised by the petitioner. The petitioner challenged the to convict instruction on two bases: (1) the instruction did not include language that was included in the standard instruction as it was amended after the petitioner's trial, and (2) the to convict instruction was ambiguous as to whether the petitioner acted with extreme indifference to people in general or to a specific person. He additionally argues that he received ineffective assistance of trial counsel and appellate counsel in connection with these two errors.

With respect the first claim the defendant has filed a statement of additional authorities, citing State v. Harris, 164 Wn App. 377, 263 P.3d 1276 (2011) and State v. Peters, 163 Wn App. 836 (2011). In each of these cases the Court held it was error to define recklessness as "know[ing] and disregard[ing] a substantial risk that a wrongful act may occur..." Harris, 164 Wn. App. at 87-88, Peters, 163 Wn. App. at 837. Error occurred when the charged crime prohibited a specific result such as death or great bodily

harm, but the jury was instructed that the defendant need have only knowledge of a more general wrongful act. Peters, 163 Wn. App. at 850, Harris, 164 Wn. App. at 385.

Neither case supports the conclusion that the jury instructions here were inadequate to inform the jury of the elements of first degree murder by extreme indifference. Jury instructions must inform the jury that the State bears the burden to prove every essential element of the offense beyond a reasonable doubt. In re Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert denied, 518 U.S. 1026 (1996). Challenged instructions are evaluated in the context of the instructions as a whole. Id. In Peters and Harris the instructions did not accurately inform jurors of the essential elements of the charged crimes because there was a difference between knowing a generic “wrongful act” may occur and knowing either a death or great bodily harm could occur.

Here, taken as a whole the jury instructions adequately informed the jury of the essential elements of the crime. The “to convict” instruction was written in the language of the statute. RCW 9A.32.030(1)(b), Ex. 2, no. 4. “Extreme indifference” has been defined by case law as an aggravated form of recklessness. State v. Dunbar, 117 Wn.2d 587, 593, 817 P.2d 1360 (1991). It includes

knowledge and disregard for a grave risk of death to others. State v. Barstad, 93 Wn App. 553, 565, 970 P.2d 324, review denied, 137 Wn.2d 1037 (1999). Instructions number 5 and 8 incorporated these statements. Read together the “to convict” instruction, the definition of extreme indifference, and the definition of recklessness informed the jury that in order to convict the defendant it needed to find the defendant knew of and disregarded a grave degree of risk that death to another person would occur. Unlike Harris and Peters the instructions did not lower the State’s burden of proof by instructing the jury that the “wrongful act” the defendant knew of and disregarded was anything other than a grave risk of death to another.

Harris and Peters do not support a claim that counsel was ineffective for proposing a definition of recklessness that included the generic “wrongful act” language. Ex. 5, no 27. Those cases were decided four years after the petitioner’s trial. Before they were decided the comments to WPIC 10.03 stated it was unclear whether the more particularized resulting act was required for any offense other than manslaughter WPIC 10.03 (comment). Counsel is not deficient for failing to anticipate a decision the Court has yet to make. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049

(1999). For that reason appellate counsel was not deficient for failing to raise the error identified in Harris and Peters on appeal. State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d P.3d 756 (2009) (appellate courts will not review claims where the trial court could not have foreseen the potential error). Further the petitioner was not prejudiced by the jury instructions. The petitioner defended on the basis that he did not commit the crime or that if the shot he fired did cause the victim's death, it was an accident. 19 RP 3112-13; 20 RP 3215, 3242-61. There was no question that the wrongful act at issue here was causing the death of Jay Clements, and not causing some lesser injury.

**C. THE STANDARD FOR REVIEW ON A CLAIM FOR PROSECUTOR MISCONDUCT THAT HAS NOT BEEN OBJECTED TO REMAINS THE RESULTING PREJUDICE STANDARD.**

The petitioner argued the prosecutor committed misconduct in closing by arguing that in addition to the reasons that he did not testify that were suggested by petitioner's trial counsel there was one other reason. Petition at 45-50. He argued that the constitutional harmless error standard of review applied because the error directly violated a constitutional right. Id at 49.

As to claims raised on direct appeal the Supreme Court rejected that argument in State v. Emery, 174 Wn.2d 741, 756-59, 278 P.3d 653 (2012). There the prosecutor argued

“[I]n order for you to find the defendant not guilty, you have to ask yourselves or you’d have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in that blank.

Id. at 750.

The prosecutor then argued that the jury verdict meant to “speak the truth.” He urged jurors to “speak the truth” by finding the defendant’s guilty. Id.

Neither defendant objected to this argument. On appeal the defendants argued the prosecutor’s closing remarks violated their right to the presumption of innocence. Id. at 756. The Court refused apply the constitutional harmless error analysis for three reasons. First the court had previously declined to apply that standard where the prosecutor had made had made similar arguments. Id. at 758. Second the argument did was not a deliberate attempt to inject racial bias into the case. Id. Finally, the Court reasoned that closing argument was not like instructional error. Jurors are instructed to disregard any argument that is not supported by the law and the courts instructions. Those arguments

therefore did not carry the same weight that the court's instructions would. Id. at 759. The court went on to analyze the challenged statements using the test previously articulated when the defendant fails to object; the error was waived unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Id. at 760-61.

Here, for reasons discussed in the State's original response, the trial attorney made a tactical decision to withdraw his objection to the prosecutor's arguments. Appellate counsel was therefore left with deciding whether there was a viable claim that the prosecutor's brief, indirect reference to the petitioner's failure to testify was so prejudicial that no instruction could have cured it. The jury instructions specifically told jurors the defendant was not compelled to testify, and that the fact that he did not testify was not to be used against him to infer guilt. Ex. 2, no. 25. The jurors were further instructed to ignore any argument that was unsupported by the evidence or the law as contained in the courts' instructions. Ex.2, no. 1. Jurors are presumed to follow all of the courts instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Given these facts and authority, appellate counsel made a reasoned decision to not raise a claim of prosecutorial error on the basis of

this one remark made in rebuttal to defense counsel's closing argument.

The issue here is raised in the context of a personal restraint petition. In this context a claim of prosecutorial misconduct resulting in a violation of the petitioner's constitutional rights requires the petitioner to show that he was actually and substantially prejudiced by a violation of those rights. In re Pirtle, 136 Wn.2d 467, 482, 965 P.2d 593 (1998). The Court has decided one personal restraint petition involving prosecutorial misconduct in closing argument since briefing was originally filed in this case. In re Glassmann, 173 Wn.2d 696, 286 P.3d 673 (2012). There the court applied the same waiver test it employed for prosecutor misconduct claims on direct appeal. Id. at 678. Thus in the context of a personal restraint petition the petitioner is still required to show actual prejudice and he must show that no instruction could have cured that prejudice.

Here the argument complained of was a brief, indirect comment on the petitioner's failure to testify made on the heels of defense counsel's lengthy recitation of affirmative reasons that legitimately justified the petitioner's decision to exercise his right to remain silent. It was accompanied by jury instructions that told

jurors to not ascribe any meaning to the defendant's decision not to testify, and the court's instruction to ignore any argument that was not supported by the instructions. Under the circumstances the petitioner has not shown the requisite prejudice, or that any prejudice from the argument was not cured by the court's instructions.

## II. CONCLUSION

For the forging reasons, and the reasons argued in the State's original response the State asks the Court to dismiss the petition.

Respectfully submitted on August 26, 2013.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By: Kathleen Webber  
KATHLEEN WEBBER WSBA #16040  
Deputy Prosecuting Attorney  
Attorney for Respondent