90154-6

No. 42603-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARSELE K. HENDERSON,

Appellant.

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

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court erred in denying Mr. Henderson's motion to instruct the jury on the lesser-included offenses of manslaughter in the first and second degree.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A trial court should grant a request to instruct the jury on a lesser-included offense if: (1) each of the elements of the lesser offense is a necessary element of the offense charged; and (2) the evidence in the case supports an inference that the lesser crime was committed. The State charged Mr. Henderson with first-degree murder by extreme indifference, alleging he created a grave risk of death by shooting a gun at a party. The trial court denied Mr. Henderson's motion to instruct the jury on the lesser-included offenses of manslaughter in the first and second degree. The trial court did so based on old cases holding that manslaughter involves disregarding a substantial risk of any wrongful act, as opposed to a grave risk of death. But more recent cases clarify that to prove manslaughter, the State must show the defendant disregarded a substantial risk of **death**, not just any wrongful act. Did the trial court err in denying the motion to instruct the jury on the lesser-included offenses?

C. SUPPLEMENTAL ARGUMENT

The trial court erred in denying Mr. Henderson's motion to instruct the jury on the lesser-included offenses of manslaughter in the first and second degree.

1. The State originally analyzed the issue correctly and agreed that the jury should be instructed on first-degree manslaughter, but it changed its position based on outdated caselaw.

The State did not charge Mr. Henderson with premeditated or intentional murder, but rather with first degree murder by extreme indifference. CP 1. Specifically, the prosecution alleged that Mr. Henderson "did unlawfully and feloniously, under circumstances manifesting an extreme indifference to human life, engage in conduct which created a grave risk of death, thereby causing the death of Victor Schwenke." CP 1.

At trial, evidence was presented showing that either Mr. Henderson or his friend, D'Orman McClarron, fired shots at a party and that Mr. Schwenke died as a result. The State's theory was not that Mr. Schwenke was specifically targeted but that Mr. Henderson was upset about the recent murder of his friend and therefore fired indiscriminately into a crowd.

Mr. Henderson asked the court to instruct the jury on the lesser-included offenses of manslaughter in the first and second degree. CP 80-

89. A person is guilty of manslaughter in the first degree if he recklessly causes the death of another. RCW 9A.32.060(1)(a). A person is guilty of manslaughter in the second degree if he negligently causes the death of another. RCW 9A.32.070(1).

The State initially **agreed** that the jury should be instructed on first-degree manslaughter:

> MR. GREER: Well, legally, both technically are legal lessers. ... And then in analyzing, of course, just logically, if a person comes as in the facts suggested in this case, and anger, you know, goes and the first person not necessarily intending on killing that person even, but, "this is Hilltop," shoot, shoot, shoot, you know, that does two things at the same time. One, it creates, obviously, there is people around, grave risk that someone is going to die, and somebody did in this case. But it's also clearly reckless conduct which, by definition, Mr. Quillian provided the definition, that, "knows [of and disregards] a substantial risk." He filled in, instead of "an act," he filled in the word "death" in this instruction, that a death would occur. And they are very close, obviously. It's hardly a difference.
>
> THE COURT: So it's whether grave risk of death to another is different from substantial risk that a death may occur.
>
> MR. GREER: Right. ... Because you have to look at ... what could the jury find? Is there evidence to support the lesser? And let's say, hypothetically, he is there to scare, "This is Hilltop," boom, boom, boom, scare, and somebody dies, that's obviously reckless."

RP 1063-65.

However, a few days later, the State reversed course. The prosecutor said, "the State's had a significant change in its position." RP 1125. The prosecutor acknowledged that first-degree manslaughter "is a legal lesser" of first-degree murder by extreme indifference, but cited two older cases for the proposition that it did not meet the "factual prong" of the analysis under these circumstances. RP 1125 (citing *State v. Pastrana*, 94 Wn. App. 463, 972 P.2d 557 (1999); *State v. Pettus*, 89 Wn. App. 688, 951 P.2d 284 (1998)). The prosecutor did not recognize that his earlier analysis was correct under current law and that *Pastrana* and *Pettus* had been abrogated by subsequent cases.

The court declined to instruct the jury on the lesser-included offenses, over Mr. Henderson's repeated objections. RP 1127-29, 1191.

2. <u>The trial court erred in relying on the cases the State presented because they have been abrogated by subsequent cases</u>.

The prosecutor was correct in his initial assessment that an instruction on first-degree manslaughter should have been given in this case.

At common law, a jury was permitted to find a defendant guilty of a lesser offense necessarily included in the offense charged. *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997) (citing *Beck v. Alabama,* 447 U.S. 625, 633, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

This rule benefitted defendants and prosecutors alike. *Id.* Washington codified the common-law rule at RCW 10.61.006, which provides, "In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information."

A trial court should grant a request to instruct the jury on a lesser-included offense if: (1) each of the elements of the lesser offense is a necessary element of the offense charged; and (2) the evidence in the case supports an inference that the lesser crime was committed." *Berlin*, 133 Wn.2d at 546 (citing *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978)). A defendant who satisfies this test is entitled to an instruction on the lesser-included offense even if it is inconsistent with an alternative theory of the defense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 459, 6 P.3d 1150 (2000). "When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction." *Id.* at 455-56.

In *Pettus* and *Pastrana*, this Court recognized that first-degree manslaughter satisfies the "legal prong" of the *Workman* test described above, but held that on the facts of those cases it was not a lesser-included offense of first-degree murder by extreme indifference. *Pastrana,* 94 Wn.

App. at 470-71; *Pettus,* 89 Wn. App. at 700-01. In so holding, this Court relied on a definition of "reckless" which is no longer valid.

Pettus was a drive-by shooting case in which the defendant killed a person he thought had "ripped him off" in a drug transaction. *Pettus*, 89 Wn. App. at 691-92. The State charged the defendant with first-degree murder by extreme indifference, and the trial court refused to instruct the jury on manslaughter in the first and second degree. *Id.* at 692-93. This Court affirmed, stating, "the factual prong [of the *Workman* test] is not satisfied because the evidence showed much more than mere reckless conduct – a disregard of a substantial risk of causing **a wrongful act**." *Id.* at 700 (emphasis added). "The evidence of the force of a .357 magnum, the time of day, the residential neighborhood, and Pettus's admitted inability to control the deadly weapon, particularly from a moving vehicle, does not support an inference that Pettus's conduct presented a substantial risk of **some wrongful act** instead of a 'grave risk of death.'" *Id.* (emphasis added). This Court followed the analysis of *Pettus* in *Pastrana. Pastrana*, 94 Wn. App. at 471.

But this Court's more recent cases make clear that the definition of recklessness relied on in *Pettus* and *Pastrana* is wrong. *See State v. Peters*, 163 Wn. App. 836, 261 P.3d 199 (2011). In *Peters*, this Court

reversed a conviction for first-degree manslaughter where the jury had been instructed that:

> 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.

Peters, 163 Wn. App. at 845 (emphasis in original). This Court held the instruction lowered the State's burden of proof and violated due process because in order to convict a defendant of first-degree manslaughter, the State must prove he knew of and disregarded a substantial risk that **death** may occur, not just that some wrongful act may occur. *Id.* at 850-51.

Indeed, the pattern instruction and comment had been updated to clarify this definition. WPIC 10.03 (2008). The clarification followed a Supreme Court case which stated that "to prove manslaughter the State must show [the defendant] knew of and disregarded a substantial risk that a **homicide** may occur." *State v. Gamble*, 154 Wn.2d 457, 467, 114 P.3d 646 (2005) (emphasis in original). It is now settled law that recklessness must be defined in a more particularized fashion for certain crimes than it was in the past, and that mere disregard of a substantial risk of any "wrongful act" is not enough. *See State v. Harris*, 164 Wn. App. 377, 387, 263 P.3d 1276 (2011) (agreeing with the analysis in *Peters*).

Peters and the other authorities cited above undermine the reasoning of *Pettus* and *Pastrana.* Again, those cases relied on the wide disparity between a "grave risk of death" and a "substantial risk of **any wrongful act**." *Pettus*, 89 Wn. App. at 691-92. Analyzed properly, the question for purposes of whether the manslaughter instruction should be given is whether the facts support a jury finding of a "substantial risk of **death**" rather than a "grave risk of death." *Peters,* 163 Wn. App. at 850-51. In other words, the prosecutor's original analysis on this issue was correct. *See* RP 1063-65. As he noted, these definitions "are very close, obviously." RP 1063. Viewed in the light most favorable to the party requesting the instruction, the jury could find that Mr. Henderson created a substantial risk of death but not a grave risk of death. RP 1065. The trial court erred in refusing to instruct the jury on the lesser-included offense of first-degree manslaughter, and the remedy is reversal and remand for a new trial. *Fernandez-Medina*, 141 Wn.2d at 462.

3. <u>The jury should also have been instructed on second-degree manslaughter</u>.

The trial court also relied on *Pettus* and *Pastrana* in denying the instruction on second-degree manslaughter. RP 1128. As explained above, this was error. Just as the definition of "reckless" for purposes of first-degree manslaughter must reference a risk of death rather than a risk

of any wrongful act, the same is true of the definition of "negligence" for purposes of second-degree manslaughter:

> The statutory definition of criminal negligence is written in terms of failing to be aware of a substantial risk that a **wrongful act** may occur. See RCW 9A.08.010(1)(d); WPIC 10.03, Recklessness—Definition. For the crime of manslaughter, however, the Supreme Court's opinion in *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005), suggests the application of a more particularized analysis of criminal negligence. In *Gamble*, the court held that recklessness involves disregarding a substantial risk that a **death** may occur, whereas the usual definition of recklessness involves disregarding a substantial risk that a wrongful act may occur. *State v. Gamble*, 154 Wn.2d at 467–68 (in the context of analyzing whether first degree manslaughter is a lesser included offense of second degree felony murder with assault as the predicate felony). By analogy, criminal negligence for manslaughter would correspondingly involve failure to be aware of a substantial risk that a death may occur. Accordingly, for a manslaughter case, the definition of criminal negligence from WPIC 10.04 should be drafted by filling in that instruction's blank line with "death" rather than by using "wrongful act." For further discussion of *Gamble*, see the Comments to WPIC 10.03 (Recklessness—Definition) and 10.04 (Criminal Negligence—Definition).

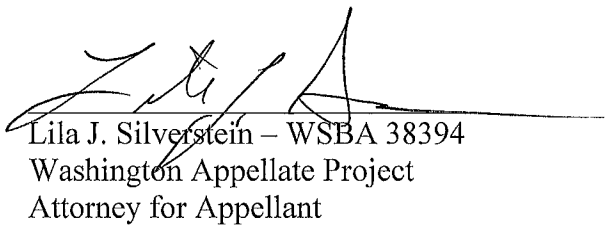
Comment to WPIC 28.06 (emphases in original); *see also* Comment to WPIC 10.04. Accordingly, the trial court erred in denying the motion to instruct the jury on second-degree manslaughter on the basis that manslaughter involves a substantial risk that any wrongful act may occur. RP 1128. This Court should reverse and remand for a new trial. *Fernandez-Medina*, 141 Wn.2d at 462.

D. CONCLUSION

For the reasons set forth above and in the Brief of Appellant, Mr. Henderson asks this Court to reverse and remand for a new trial.

DATED this 29th day of August, 2013.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 42603-0-II
v.	)	
	)	
MARSELE HENDERSON,	)	
	)	
APPELLANT.	)	

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