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No. 90154-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MARSELE HENDERSON,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

LILA J. SILVERSTEIN
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
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ORIGINAL

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A. INTRODUCTION

It is for the jury to weigh evidence and “separate the wheat from the chaff.” A criminal defendant is entitled to have the jury fully instructed on the defense theory of the case. A court must grant a request to instruct the jury on a lesser-included offense if, viewing the evidence in the light most favorable to the party requesting the instruction, a rational juror could find the defendant committed only the lesser offense. The Court of Appeals properly held that in this case in which the State charged first-degree murder by extreme indifference, Mr. Henderson is entitled to have the jury instructed on the lesser-included offense of first-degree manslaughter.

The State commits two major errors in its analysis: (1) it applies the wrong definition of the mens rea for manslaughter; and (2) it characterizes the evidence in the light most favorable to the State. The mens rea is knowingly disregarding a substantial risk of death - not a mere unreasonable risk and not a risk of any wrongful act. Moreover, multiple witnesses testified that, contrary to the State’s brief, the area into which shots were fired was not crowded at all. It is for the jury to decide whether this crime was murder or manslaughter. This Court should affirm.

B. ISSUE

In this prosecution for first-degree murder by extreme indifference, did the Court of Appeals properly hold that Mr. Henderson was entitled to an instruction on the lesser-included offense of first-degree manslaughter because, viewing the evidence in the light most favorable to Mr. Henderson, a rational jury could find the State proved recklessness but not aggravated recklessness?

C. STATEMENT OF THE CASE

1. The State charges Mr. Henderson with first-degree murder by extreme indifference

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 toward the front yard of a house during a party, and that Mr. Schwenke died as a

result. *State v. Henderson*, 180 Wn. App. 138, 141-42, 321 P.3d 298 (2014), *review granted*, 180 Wn.2d 1022, 328 P.3d 903 (2014). 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 at the front fence and yard from the street. *Id.* at 142; RP 199, 231, 1016.

The State presented a great deal of conflicting evidence at trial. The witnesses had varying vantage points, degrees of attention, and levels of intoxication. RP 808, 828, 876, 886-87, 1016. Several people testified that the shooter looked like Mr. McClarron. RP 233, 306, 351, 466, 831, 1159. Others testified that he looked like Mr. Henderson. RP 802, 838, 856, 938.

There were also extreme discrepancies among witnesses regarding the number of people at the party and the number of people present on the front lawn where the shots were fired. While one witness said there were "100-something" people at the party and another said that attendance reached 75, two others testified that there were about 50 attendees, another said there were 25 or 30, and yet another testified there were "20 at the most." RP 756, 773, 807, 828, 846, 991. Although one of the hosts said that there were 130-200

people at the party, that same witness and others testified that there were only two or three people in the front yard (one of which was the decedent) at the time of the shooting; most people were in the house, the backyard, and the garage. RP 232-34, 339, 341, 345, 735, 774, 805, 996-97, 1011.¹

2. The State agrees that Mr. Henderson is entitled to an instruction on the lesser-included offense of manslaughter.

Mr. Henderson asked the court to instruct the jury on the lesser-included offense of manslaughter in the first degree.² 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). For purposes of the manslaughter statute, “reckless” means the defendant “knew of and

¹ Some State’s witnesses testified to events that the prosecutor and defense stipulated could not have occurred. For example, the State stipulated that Andre Parker was in jail for all of November, 2008, yet Kerry Edwards testified that Parker was at a house with Mr. Henderson the night of the shooting. RP 567, 1136. The State, in violation of the Rules of Professional Conduct, states in its Statement of the Case that Parker was at this meeting. State’s Brief at 3. Presumably, the State quoted this misstatement in order to use the inflammatory phrase “big homey.” This Court should not tolerate such misrepresentations.

² He also requested an instruction on manslaughter in the second degree. The trial court denied the request and the Court of Appeals affirmed as to that issue. Mr. Henderson raised that issue in his Answer, but this Court did not grant review of the issue raised in the Answer.

disregarded a substantial risk that a homicide may occur.” *State v. Gamble*, 154 Wn.2d 457, 467, 114 P.3d 646 (2005).

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

[PROSECUTOR]: 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, [defense counsel] 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.

[PROSECUTOR]: 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.

3. The State changes its mind based on old Court of Appeals cases, and the trial court refuses to instruct the jury on the lesser-included offense.

A few days later, the State reversed course. The deputy prosecutor said, “the State’s had a significant change in its position.” RP 1125. He admitted 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 State did not acknowledge that the reasoning of these old cases hinged on an outdated definition of “reckless:” that the defendant disregarded a substantial risk of **some wrongful act** instead of a substantial risk of **death**. *Pettus*, 89 Wn. App. at 700; *Pastrana*, 94 Wn. App. at 471.

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

4. The Court of Appeals holds Mr. Henderson is entitled to the instruction based on more recent caselaw from this Court.

On appeal, Mr. Henderson argued, inter alia, that the trial court erred in following *Pettus* and *Pastrana*, because these cases had been

abrogated by subsequent opinions of this Court and the Court of Appeals. See Supplemental Brief of Appellant (filed 8/29/13) (citing *Gamble*, 154 Wn.2d at 467; *State v. Peters*, 163 Wn. App. 836, 261 P.3d 199 (2011)).³ Mr. Henderson pointed out that under current caselaw, the State was correct initially when it agreed that the instructions for manslaughter should have been given.

The Court of Appeals agreed with Mr. Henderson that the trial court should have instructed the jury on first-degree manslaughter. In so holding, the court followed this Court's decision in *Gamble*, and rejected the State's claim that the abrogated Court of Appeals cases should control over this Court's current caselaw:

The analyses in *Pettus* and *Pastrana* are no longer helpful to a trial court ruling on whether the factual prong of the *Workman* test has been met for a first degree manslaughter jury instruction. This is because *Pettus* and *Pastrana* explicitly justified their holdings on the grounds that shooting guns in a high-risk manner cannot constitute a substantial disregard of *some wrongful act*, which is no longer the standard following *Gamble*. *Pettus*, 89 Wash.App. at 700, 951 P.2d 284; *Pastrana*, 94 Wash.App. at 471, 972 P.2d 557. *Pettus* and *Pastrana* do not stand for the proposition that such acts cannot constitute a

³ Mr. Henderson filed a supplemental brief in the Court of Appeals after undersigned counsel was appointed. For reasons unknown to current counsel, the Court of Appeals removed prior counsel from this case (and other cases) after initial briefing was filed. As the State notes, it objected to counsel filing a brief despite the fact that Mr. Henderson has a constitutional right to the effective assistance of appellate counsel.

reckless disregard of *homicide* which is the definition of recklessness following *Gamble*.

Henderson, 180 Wn. App. at 147-48.

D. ARGUMENT

The Court of Appeals properly held that Mr. Henderson is entitled to an instruction on the lesser-included offense of manslaughter in the first-degree.

As the Court of Appeals recognized, the prosecutor was correct in initially conceding that Mr. Henderson was entitled to an instruction on first-degree manslaughter. The trial court denied the instruction on the basis that a rational jury could not find Mr. Henderson merely disregarded a substantial risk of some wrongful act. But that is not the test. The question is whether a rational jury, viewing the evidence in the light most favorable to Mr. Henderson, could find he knowingly disregarded a substantial risk of death. The Court of Appeals applied the correct standard, and this Court should affirm.

1. The question must be evaluated using the correct definition of manslaughter and viewing the evidence in the light most favorable to Mr. Henderson.

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.

The State has always conceded that the first prong (“legal prong”) of the above test is satisfied, because each of the elements of

manslaughter is a necessary element of murder by extreme indifference. A person is guilty of first-degree murder if, “[u]nder circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person.” RCW 9A.32.030(b). This Court has described the mens rea for the crime as “an aggravated or extreme form of recklessness.” *State v. Dunbar*, 117 Wn.2d 587, 594, 817 P.2d 1360 (1991).

A person is guilty of manslaughter in the first degree if he recklessly causes the death of another. RCW 9A.32.060(1)(a). For purposes of the manslaughter statute, “reckless” means the defendant “knew of and disregarded a substantial risk that a homicide may occur.” *Gamble*, 154 Wn.2d at 467. Thus, a comparison of the elements demonstrates that manslaughter is legally a lesser-included offense of first-degree murder by extreme indifference.

The State also initially conceded that the second prong (“factual prong”) was satisfied, because a rational jury could find that Mr. Henderson knowingly disregarded a substantial risk of death but not a grave risk of death. RP 1063-65. This analysis was correct.

The State later withdrew its agreement based on an inaccurate understanding of the mens rea for manslaughter. It urged the trial court to follow the out-of-date cases of *Pettus* and *Pastrana*, where the Court of Appeals held that defendants were not entitled to manslaughter instructions in prosecutions for first-degree murder by extreme indifference. *Pastrana*, 94 Wn. App. at 470-71; *Pettus*, 89 Wn. App. at 700-01. The *Pettus* and *Pastrana* cases 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. The Court of Appeals 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). The Court of Appeals followed the analysis of *Pettus* in *Pastrana*. *Pastrana*, 94 Wn. App. at 471.

But as the Court of Appeals in this case recognized, this Court’s more recent caselaw makes clear that the definition of recklessness relied on in *Pettus* and *Pastrana* is wrong. In *Gamble*, this Court emphasized that “to prove manslaughter the State must show [the defendant] knew of and disregarded a substantial risk that a **homicide** may occur.” *Gamble*, 154 Wn.2d at 467 (emphasis in original). This Court recently reaffirmed *Gamble*’s holding that the definition of “reckless” is charge-specific, and does not have the meaning relied on in *Pettus* and *Pastrana*. *State v. Johnson*, 180 Wn.2d 295, 298, 325 P.3d 135 (2014).⁴ The Washington Pattern Instructions were updated to reflect this clarification following *Gamble*. WPIC 10.03 (2008) and comment. Mr. Henderson presented the correct definition to the trial court, and the State initially agreed to the instruction on the lesser-

⁴ The Court held that only the to-convict instruction is required to have the charge-specific language, and including such language in the definitional instruction is optional. *Johnson*, 180 Wn.2d at 307. *See also id.* at 308-09 (Gordon McCloud, J., dissenting) (recognizing that majority acknowledged that *Gamble* is still good law).

included offense based on this correct definition. RP 1063-65. The State's current refusal to acknowledge that *Pettus* and *Pastrana* relied on the wrong definition of the required mens rea is perplexing.

The State alternatively relies on yet another incorrect definition of "reckless," stating, "[Mr. Henderson's] conduct did not merely create an unreasonable risk of death, but created a very high risk of death." State's Supplemental Brief in the Court of Appeals, at 8. First-degree manslaughter does not mean disregarding a mere "unreasonable" risk of death; it means disregarding a **substantial** risk of death. RCW 9A.08.010(1)(c); *Gamble*, 154 Wn.2d at 467. Thus, even if the State is correct that Mr. Henderson disregarded "a very high risk of death," that means he is guilty of manslaughter, because "substantial" means "very high." See <http://www.merriam-webster.com/dictionary/substantial> ("substantial" means "large in amount, size, or number"); *State v. Parr*, 93 Wn.2d 95, 97, 606 P.2d 263 (1980) ("substantial risk" means "the forbidden result is likely to happen"); *State v. Hartley*, 194 Ohio App.3d 486, 494, 957 N.E.2d 44 (Ohio Ct. App. 2011) ("A substantial risk involves a 'strong possibility..."); *State v. Smith*, 241 S.W.3d 442, 445 (Mo.App. W.D. 2007) ("A substantial risk is an actual or practically certain risk.").

The State not only relies on the wrong definition of the crime, but also neglects to view the evidence in the light most favorable to Mr. Henderson – despite its recitation of the black letter law requiring it to do so. In another case decided after *Pettus* and *Pastrana*, this Court emphasized that in determining whether an instruction on the lesser-included offense should be given, “the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.” *Fernandez-Medina*, 141 Wn.2d at 455-56. In performing the analysis, a court may not take “a limited view of the evidence,” but “must consider all of the evidence that is presented at trial.” *Id.* at 456.

The Court of Appeals applied the correct standards to this case. As explained further below, the court properly held that, viewing the evidence in the light most favorable to Mr. Henderson, a rational jury could find that he knowingly disregarded a substantial risk of death but not a grave risk of death, and therefore he was entitled to an instruction on manslaughter.

2. Mr. Henderson is entitled to the instruction because a rational jury could find he knowingly disregarded a substantial risk of death but not a grave risk of death.

Not only did the Court of Appeals apply the correct legal standard, it also accurately evaluated the record. In urging this Court to find that no rational trier of fact could find that Mr. Henderson committed manslaughter rather than first-degree murder, the State ignores the evidence about how many people were in the front yard. The prosecutor claims shots were fired “into an extremely crowded area.” State’s Supplemental Brief in the Court of Appeals, at 8. In so stating, the prosecutor is improperly characterizing the evidence in the light most favorable to the State. The prosecutor correctly notes that one witness – party host Joshua Adams – testified that there were 130-200 people at the party. But two other witnesses said there were only about 50 people at the party, one said there were 25 or 30, and another said there were “20 at the most.” RP 756, 773, 807, 828. Thus, viewing the evidence in the light most favorable to Mr. Henderson, there were 20-50 people at the party, not 130-200.

But more importantly, even assuming that Mr. Adams’s questionable estimate is plausible, he also testified that only a couple of security guards (one of whom was Victor Schwenke) were in the front

yard, where the shots were fired, at the time the shots were fired. RP 232-34. And although a different person testified that “the whole party had migrated outside the gates, so it was kind of like jam-packed out there,” RP 736, another witness and party host, Jose Martinez, said there were only three security guards in the front yard at the time shots were fired. RP 339, 341, 345. When asked whether anyone else was in the front yard, he said, “No.” RP 343.

The shell casings that allegedly came from the perpetrator’s gun were found in the front yard, and there was “no ballistic evidence” in the house, where most of the partygoers had been. RP 624-26, 686, 702.

This evidence is significant in determining whether a rational jury could find Mr. Henderson knowingly disregarded a substantial risk of death and therefore committed manslaughter, but did not exhibit the extreme indifference to human life required to commit first-degree murder. The prototypical examples of the more serious crime are detonating bombs in crowded areas or firing a high-powered rifle at a freeway during rush hour. Indeed, these were the examples given by the legislature when enacting the murder by extreme indifference statute. *See Dunbar*, 117 Wn.2d at 593 (referencing legislative

testimony regarding bombing example as well as “Bellevue sniper,” who opened fire with a high-powered rifle on a busy freeway in 1973).

Thus, for instance, if the Boston Marathon bombing had occurred in this state and the suspect were charged with first-degree murder by extreme indifference, it would likely be appropriate to deny the suspect’s request for an instruction on manslaughter. All evidence in that case shows that the perpetrator detonated the bomb on the course at a time when the course was densely populated, and designed the bomb to ensure widespread casualties. Accordingly, although the culprit may not have had premeditated intent to kill a particular person, his extreme indifference to human life generally warrants a conviction for first-degree murder, and no rational jury could find he committed only manslaughter.

This case stands in contrast to such examples. Indeed, this case rests on the boundary between the recklessness required for a manslaughter conviction and the aggravated recklessness required for a first-degree murder conviction. *See Dunbar*, 117 Wn.2d at 594. Thus, it is for the **jury** to determine which crime was committed. Viewing the evidence in the light most favorable to the State, a rational jury could find Mr. Henderson committed first-degree murder if it thought

the person who said it was “jam-packed” outside most accurately perceived and remembered the events. But viewing the evidence in the light most favorable to Mr. Henderson, a rational jury could find that the two party hosts most accurately perceived and remembered the events, and that because only 2-3 people were standing in the front yard at the time of the incident, Mr. Henderson was guilty of manslaughter but not murder. The jury must be given the opportunity to make this determination, as it is the jury’s job to weigh the evidence and “separate the wheat from the chaff.” *Fernandez-Medina*, 141 Wn.2d at 460-61.

It is particularly important to allow the jury to play its role in a case like this one, because otherwise the State could unilaterally leapfrog second-degree murder and impose punishment for first-degree murder in all reckless homicide cases. Normally, in order to secure a second-degree murder conviction, the State must prove a mens rea of intent to kill. RCW 9A.32.050(1)(a). And if it wishes to secure a first-degree murder conviction, it must prove the even more culpable mental state of premeditated intent to kill. RCW 9A.32.030(1)(a). If the State can demonstrate only recklessness, a manslaughter conviction is appropriate. RCW 9A.32.060. First-degree murder must be reserved

for the most serious cases with the most culpable mental states – premeditated intent or an extreme level of recklessness beyond disregarding a substantial risk of death. *Cf. Gamble*, 154 Wn.2d at 470-71 (Madsen, J., concurring) (lamenting the unavailability of a manslaughter instruction in felony murder cases, where people with less culpable mental states will be punished similarly to those with more culpable mental states). Instructing the jury on lesser-included offenses ensures that punishment is tied to the level of culpability involved in the crime.

In sum, “[a] defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case.” *Fernandez-Medina*, 141 Wn.2d at 461. The Court of Appeals properly held that Mr. Henderson is entitled to have the jury instructed on the lesser-included offense of first-degree manslaughter. This Court should affirm.

E. CONCLUSION

For the reasons set forth above, Mr. Henderson respectfully requests that this Court affirm the Court of Appeals.

DATED this 27th day of August, 2014.

Respectfully submitted,

/s Lila J. Silverstein
Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Appellant,)	
)	NO. 90154-6
v.)	
)	
MARSELE HENDERSON,)	
)	
Respondent.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF AUGUST, 2014, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF RESPONDENT** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF AUGUST, 2014.



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To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Supplemental Brief of Respondent

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