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No. 64568-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD PETERS,

Appellant.

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

BRIEF OF APPELLANT

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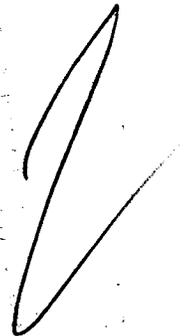


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A. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Peters' right to due process when it lowered the State's burden of proof by instructing the jury that it could convict Mr. Peters of first-degree manslaughter if it found he disregarded a substantial risk that a wrongful act may occur.

2. Mr. Peters was denied his constitutional right to the effective assistance of counsel.

3. The trial court violated Mr. Peters' right to due process by admitting evidence of his gun collection and prior acts involving guns other than the one at issue in this case.

4. The trial court violated ER 404(b), ER 403, and ER 402 by admitting evidence of his gun collection and prior acts involving guns other than the one at issue in this case.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under case law and WPIC 10.03, to prove first-degree manslaughter, the State must show beyond a reasonable doubt that the defendant knew of and disregarded a substantial risk that a death may occur, not just that any wrongful act may occur. The State proposed a jury instruction consistent with this rule, but the court incorrectly responded, "the WPIC does not require a

substantial risk of death, and neither does the law.” The court therefore instructed the jury that it could convict Mr. Peters of first-degree manslaughter if he knew of and disregarded a substantial risk that a wrongful act may occur. Did the trial court’s lowering of the State’s burden of proof violate Mr. Peters’ right to due process, requiring reversal?

2. A defendant is denied his constitutional right to the effective assistance of counsel if his attorney’s performance is deficient and it is reasonably probable that the outcome of the trial would have been different but for the deficient performance. Here, defense counsel agreed to a jury instruction that lowered the State’s burden of proof for first-degree manslaughter, even though the WPIC and its Comment as well as relevant case law revealed the correct instruction, the State originally proposed the correct instruction, and the court told the attorneys to research the issue. The jury convicted Mr. Peters of first-degree manslaughter rather than acquitting him or finding him guilty of second-degree manslaughter, even though evidence was presented that the discharge of the gun was an accident or the result of negligence rather than recklessness. Must Mr. Peters’ conviction be reversed

and his case remanded for a new trial because he was denied the effective assistance of counsel?

3. A trial court violates a defendant's right to due process if it admits evidence of gun ownership and use that is unrelated to the crime in question. Over Mr. Peters' repeated objections, the trial court admitted evidence that there were guns lying all over his house, that he had previously asked his young son to retrieve a gun for him, that he had previously pulled a gun out from under his couch to show a neighbor, and that a gun different from the one at issue in this case had accidentally fired, but not hurt anyone, at a "pumpkin shoot" a couple of weeks before the incident at issue. Did the admission of this evidence violate Mr. Peters' right to due process?

4. Under the rules of evidence, irrelevant evidence is inadmissible, relevant evidence should be excluded if it is substantially more prejudicial than probative, and evidence of prior acts may not be admitted to prove action in conformity therewith. The State sought to admit evidence of Mr. Peters' gun collection and gun-related activities because "the showing of a pattern tells the jury this is not an isolated event." Did the trial court violate the rules of evidence by admitting these acts?

C. STATEMENT OF THE CASE

1. The Accident. Richard Peters is a 43-year-old father and husband who worked at Boeing for 20 years following service in the Navy. CP 163; Ex. 57 at 1, 13-14. He and his wife, Krissy, settled in Marysville where they raised children Gino (age 8), Stormy (age 6), and Qwintin (age 3). CP 163. Like many families in their neighborhood, Richard and Krissy collected guns and engaged in target practice and other activities with friends. Ex. 57 at 2, 13, 20-21; 2 RP 301. Mr. Peters taught the children about guns and how to handle them safely. Ex. 57 at 4.

On November 16, 2008, Mr. Peters spent the day with his children playing basketball, riding bicycles, and watching the Wizard of Oz on television. Ex. 57 at 3, 33. That evening, he decided to clean one of his guns. He asked his daughter, Stormy, to go upstairs and get his Colt .45 handgun for him. Ex. 57 at 3. After Stormy returned and handed the gun to Mr. Peters, he “took the magazine out and it went off. It just ... it shot.” Ex. 57 at 3. A bullet went through Stormy’s head and she died from the injury. 4 RP 267.

While medical professionals attended to Stormy, Mr. Peters described the accident to police officers. Ex. 57 at 1-34. Although

he was crying and in a state of shock, he explained what had happened and requested updates on Stormy's status. Ex. 57 at 32-33. He told the officers he had had several drinks throughout the day, but did not feel too impaired to handle guns because he had regularly handled guns while drinking. 6 RP 898; Ex. 57 at 22-23. The officers took Mr. Peters to the hospital for a blood test, which revealed he had a blood-alcohol level of 0.11 grams per 100 milliliters. 3 RP 703; 5 RP 728, 766.

2. Charges and Pretrial Motions. Mr. Peters was charged with first-degree manslaughter for the death of Stormy. CP 167. The State later amended the information to add a charge of second-degree felony murder predicated on assault, on the theory that Mr. Peters was pointing the gun at Stormy to scare her when it accidentally fired. CP 158; 11/23/09 RP 53. Mr. Peters was eventually acquitted of the murder charge. CP 33.

Before trial, Mr. Peters moved to exclude "reference to all guns (other than gun involved in shooting), ammunition, holsters, gun manuals and magazines removed from Peters' home" on the basis that the evidence was not relevant and was substantially more prejudicial than probative. CP 93; 1 RP 169, 174. Mr. Peters' attorney explained:

[N]one of these guns were involved in the incident. The gun involved in the incident is the Colt. The State still can make its argument that Mr. Peters was reckless in allowing his daughter to go get that gun from the bed stand in the master bedroom and bring it down to him. They still have the argument that he was reckless by not making sure there was not a round chambered. The rest of these guns are simply – it is highly prejudicial. And they are not relevant to what the State has to prove in this case.

1 RP 174-75.

The prosecutor explained that he wanted to introduce evidence that there were “guns all over the place accessible to children ... because of how Mr. Peters handled guns, he was constantly sloppy with guns, that this is not an isolated act...” 1 RP 175. The court admitted the evidence of all of the guns Mr. Peters owned on the basis that it was relevant “to the issue of recklessness” which the State was required to prove for first-degree manslaughter, and was more probative than prejudicial. 1 RP 178.

Mr. Peters also moved to exclude evidence that a weapon accidentally discharged during a “pumpkin shoot” a few weeks prior to the accident. CP 93. The weapon that had accidentally fired during the pumpkin shoot was not the gun that accidentally discharged on November 16, 2008. CP 94. Furthermore, somebody else handed it to Mr. Peters after loading it, and did not

tell Mr. Peters it was loaded. Mr. Peters pointed the weapon at the ground so no one was in danger and no one was hurt. Accordingly, the evidence was not relevant, was cumulative, and was more prejudicial than probative. 1 RP 208. The State responded, “[Defense counsel’s] suggestion that the showing of a pattern is prejudicial, that that is unfair, I think the showing of a pattern tells the jury this is not an isolated event.” 1 RP 210. The court admitted the evidence on the basis that it was relevant to show recklessness and was more probative than prejudicial. 1 RP 211-12.

Mr. Peters further moved to exclude neighbor Jes Smith’s testimony that he once observed Mr. Peters asking Gino to retrieve a gun from his car for him. CP 96; 1 RP 179-80. Mr. Peters pointed out that Gino was not involved in the accidental discharge that killed Stormy, that he is older than Stormy, and that therefore the fact that Mr. Peters asked him to retrieve a gun was not relevant and was more prejudicial than probative. CP 96; 1 RP 181. The court ruled the evidence was relevant and admissible. 1 RP 182.

Finally, Mr. Peters moved to exclude Jes Smith’s testimony that Mr. Peters once pulled a loaded gun out from under a couch

and handed it to him. 1 RP 184-86, 199-202. As with the other evidence of guns that were not used the night of November 16, Mr. Peters argued that this evidence was not relevant and was highly prejudicial. 1 RP 201-02. The court nevertheless admitted the evidence. 1 RP 202.

3. Trial. At trial, the State played a recording of a law enforcement interview with Mr. Peters, during which Mr. Peters told the detective that after Stormy handed the gun to him, he “took the magazine out and it went off. It just ... it shot.” Ex. 57 at 3. Several responding officers also testified about the condition in which they found Stormy that night. 3 RP 449, 476.

Because of the pretrial rulings discussed above, much of the trial was taken up by testimony regarding Mr. Peters’ general gun ownership and use, not just what happened on the night in question or with the gun in question. The jury heard the tape of Mr. Peters describing his other guns and gun-related activities. For example, the jury heard the following:

MR. PETERS: I collect guns and I go out shooting every now and then with a bunch of buddies.

DETECTIVE: Okay. What kind of guns do you have?

MR. PETERS: Ohh. A lot.

DETECTIVE: Do you? What's a lot?

MR. PETERS: An AR-15, AK-47, three 12 gauges, three 45's, a 7 mm, and the list goes on.

Ex. 57 at 2. He also mentioned that Krissy owned a 9mm handgun, and that he had bought the children "a little .22 pistol." Ex. 57 at 7, 13.

Several law enforcement officers also testified about other guns in the home. Detective Vanderweyst, for example, stated that there was a shotgun, ammunition, and gun cleaning equipment in the garage, a loaded semiautomatic handgun in the living room, and several shotguns, rifles, and handguns in a gun safe in the family room. 4 RP 639-46.

Also over Mr. Peters' objection, the jury heard about the pumpkin shoot:

MR. PETERS: Well I kinda got my butt chewed last time because I was showing a friend how to use one of my shotguns and, thank God, it was pointed down-range cuz he chambered a round and didn't tell me about it.

DETECTIVE: Oh, did it, did it ... did you ...?

MR. PETERS: Ah, I discharged it. Yes.

Ex. 57 at 22. The State called George Wilson, who worked with Mr. Peters at Boeing, to provide additional testimony about the pumpkin

shoot. 4 RP 552. He explained that it was a tradition for them to “get together and shoot pumpkins” shortly after Halloween. 4 RP 554. He said during the 2008 event Mr. Peters’ gun appeared to go off by accident. 4 RP 558.

[Mr. Peters] was manipulating what I believed to be a Fox 12 shotgun. And he and another person were there manipulating it. They seemed to be having some problems. ...

It was pointed down range and it was pointed into the back stop properly. So at that point all I was doing was watching. And then at some point the gun went off. And there was a surprised look at several people.

4 RP 557-58.

Also over Mr. Peters’ objection, neighbor Jes Smith testified about prior acts. Mr. Smith testified that once when he was at Mr. Peters’ house, Mr. Peters wanted to show Mr. Smith a new gun he had bought. 3 RP 432. According to Mr. Smith, Mr. Peters “reached down beside him underneath some newspapers and magazines [and] pulled out a .45 and handed it kind of over towards” Mr. Smith. 3 RP 432. Mr. Smith said, “I was kind of nervous because I didn’t know if it was loaded and it was coming towards me. The barrel was not really pointed at me, but in my direction.” 3 RP 432.

Mr. Smith testified that Mr. Peters then sent Gino out to the truck to get another gun to show Mr. Smith. 3 RP 432, 436-37. Mr. Smith went on to make a general statement that there were “other times” he had seen loaded weapons in the Peters home, including one instance in which there was a “rifle that had a large magazine that was loaded leaning against the wall.” 3 RP 435-36. Mr. Smith also said he had seen Mr. Peters handling guns while drinking. 3 RP 441. Mr. Smith testified that because of these incidents, he did not allow his daughter to go to Mr. Peters’ house. 3 RP 437, 442.

4. Jury Instructions and Verdict. Following the testimony, the parties and the court discussed jury instructions. With respect to the first-degree manslaughter charge, an instruction defining “reckless” was required. Consistent with WPIC 10.03 and its comments, the State proposed the following instruction on recklessness:

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.

Supp. CP ____ (Sub No. 70). The court asked, “Counsel, everybody in agreement that it ought to be defined as substantial risk that

death may occur?" 6 RP 981. Mr. Peters' attorney responded, "Is that the WPIC? I think it is." 6 RP 981.

But the court disagreed with the proposed instruction. The court said, "The WPIC says a substantial risk that a wrongful act may occur. ... the WPIC does not require a substantial risk of death, and neither does the law." 6 RP 981.

The prosecutor stated, "Thank you. Let me review that and propose." 6 RP 981. The defense attorney stated, "I like this one," but it is not clear from the record whether "this one" referred to the instruction with the word "death" or the instruction with the words "wrongful act." 6 RP 981.

The court and parties moved on to discuss other instructions, then returned to the definition of "reckless":

THE COURT: [Instruction] 11 would be manslaughter 1 elements. [Instruction] 12 would be reckless. Mr. Stern, you were going to perhaps propose some different language other than death?

PROSECUTOR: Exactly.

THE COURT: You know what that might be?

PROSECUTOR: Whatever Mr. Fine advises. I will try to figure that out. I think there is --

THE COURT: Ms. Halverson, you are going to make a note. You obviously [are] going to want to look at it when it gets here. I will tell you that the WPIC itself

says a person is reckless or acts recklessly when he or she knows of and disregards substantial risk that a wrongful act may occur. And then it has a place to fill in –

DEFENSE ATTORNEY: What's the number?

THE COURT: 10.03. And after wrongful act it has a place, fill in more particular description of act, if applicable. So pursuant to the WPIC, wrongful act appears to be fine. In fact, appears to be the suggested language, unless you want to get –

DEFENSE ATTORNEY: That's fine.

THE COURT: -- more specific.

PROSECUTOR: We don't want to do that.

THE COURT: So you are fine with wrongful act?

DEFENSE ATTORNEY: I am.

THE COURT: Why don't you take out death and put in wrongful act?

6 RP 997-98.

The court gave the jury the following instruction:

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.

CP 50 (Instruction 12). The court also gave an instruction on the lesser-included offense of second-degree manslaughter. CP 51-

52.

During closing argument, the prosecutor emphasized the testimony regarding the pumpkin shoot and Jes Smith's descriptions of prior incidents regarding different guns. 11/23/09 RP 21-22, 35-36.

The jury acquitted Mr. Peters of second-degree murder, but convicted him of first-degree manslaughter with a firearm. CP 31-33. The court sentenced him to 162 months' confinement based on an offender score of zero. CP 23. Mr. Peters appeals. CP 7-19.

D. ARGUMENT

1. JURY INSTRUCTION 12 LOWERED THE STATE'S BURDEN OF PROOF, REQUIRING REVERSAL OF THE FIRST-DEGREE MANSLAUGHTER CONVICTION.

a. To prove first-degree manslaughter, the State must show the defendant knew of and disregarded a substantial risk that *death* may occur, not a substantial risk that *any wrongful act* may occur.

The first-degree manslaughter statute provides, "A person is guilty of manslaughter in the first degree when [h]e recklessly causes the death of another person." RCW 9A.32.060(1)(a). In the context of first-degree manslaughter, "reckless" or "recklessly" means the defendant "knows of and disregards a substantial risk that a death may occur and his disregard of such substantial risk is a gross

deviation from conduct that a reasonable person would exercise in the same situation.” WPIC 10.03 and Comment.

In other words, “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). This is in contrast to lesser crimes, in which the State need only prove the defendant disregarded a substantial risk that some other “wrongful act” may occur. RCW 9A.08.010(1)(c). For example, to prove second-degree felony murder by assault, the State is “required to prove only that” the defendant “disregarded a substantial risk that substantial bodily harm may occur.” Gamble, 154 Wn.2d at 467-68. “As such, first degree manslaughter requires proof of an element that does not exist in the second degree felony murder charge.” Id. at 468.

In sum, to convict a defendant of first-degree manslaughter, the State must prove that the defendant disregarded a substantial risk that death would occur, not a substantial risk that some lesser wrongful act would occur. Instructing the jury that it need only find the latter improperly lowers the State’s burden of proof. Gamble, 154 Wn.2d at 468; WPIC 10.03 and Comment.

b. The trial court improperly lowered the State's burden of proof by replacing the agreed proposed instruction requiring proof of disregard of substantial risk of death with one requiring only proof of disregard of substantial risk of any wrongful act. The Washington Pattern Jury Instruction for recklessness includes a blank for the "wrongful act" whose substantial risk the defendant is alleged to have disregarded. WPIC 10.03. Consistent with Gamble, the Comment to the WPIC specifically sets forth the appropriate instruction for first-degree manslaughter:

For 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 Supreme Court has held in a manslaughter case that the definition of recklessness requires proof of disregarding a substantial risk that a death, rather than simply a wrongful act, may occur. ... Accordingly, **for a manslaughter case, the instruction above should be drafted using the word "death" rather than "wrongful act."**

Comment to WPIC 10.03 (emphasis added).

Following the above guidelines and case law, the instruction the State proposed, and with which Mr. Peters agreed, used the word "death" instead of the broader phrase "wrongful act:"

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.

Supp. CP ____ (Sub No. 70). But the trial court sua sponte admonished the parties that “[t]he WPIC says a substantial risk that a wrongful act may occur. ... the WPIC does not require a substantial risk of death, and neither does the law.” 6 RP 981.

As explained above, the trial court was wrong. Gamble, 154 Wn.2d at 467-68; WPIC 10.03. But the parties eventually acquiesced, and the court gave the following instruction:

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.

CP 50 (Instruction 12). By rejecting the proposed (correct) instruction and instead giving the jury the above (incorrect) instruction, the trial court lowered the State’s burden of proof. Gamble, 154 Wn.2d at 468.

c. Reversal is required. A jury instruction that lowers the State’s burden of proof violates due process and therefore is an error of constitutional magnitude that may be raised for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Constitutional errors require reversal unless the State

proves, beyond a reasonable doubt, that the error did not contribute to the verdict obtained. State v. Mills, 154 Wn.2d 1, 15 n.7, 109 P.3d 415 (2005) (citing Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

The State cannot prove beyond a reasonable doubt that this error did not prejudice Mr. Peters. It takes much, much less to create a substantial risk of any “wrongful act” than it does to create a substantial risk of death. The jury concluded that Mr. Peters disregarded a substantial risk of a wrongful act by drinking and attempting to clean his gun while Stormy was in the room, but it may not have concluded beyond a reasonable doubt that he knew this behavior would create a substantial risk of death. Indeed, the jury acquitted Mr. Peters of felony murder, indicating that it rejected the State’s theory that Mr. Peters was pointing the gun at Stormy.

A “wrongful act” could be any bodily injury, no matter how minor, as well as any damage to property, as well as any number of other nonhomicidal acts. The erroneous jury instruction substantially lowered the State’s burden of proof, prejudicing Mr. Peters. The conviction should be reversed and the case remanded for a new trial. Mills, 154 Wn.2d at 15.

2. MR. PETERS WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY AGREED TO ALLOW THE COURT TO AMEND THE “RECKLESS” INSTRUCTION TO LOWER THE STATE’S BURDEN OF PROOF.

a. Mr. Peters had a constitutional right to effective assistance of counsel. A person accused of a crime has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI;¹ Const. art. I, § 22;² United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)).

¹ The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”

² Article I, § 22 of the Washington Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel”

An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms") (quoting Strickland, 466 U.S. at 688). While an attorney's decisions are treated with deference, his or her

actions must be reasonable under all the circumstances. Wiggins, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. Strickland, 466 U.S. at 694; Hendrickson, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. Thomas, 109 Wn.2d at 226.

b. Defense counsel's performance was deficient because she failed to research the relevant law and agreed to a jury instruction that lowered the State's burden of proof. "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." Kyllo, 166 Wn.2d at 862. Here, as in Kyllo, defense counsel's failure to research the relevant law resulted in a jury instruction that lowered the State's burden of proof. As in Kyllo, this performance was deficient.

Indeed, counsel's performance here was even worse than that of the trial attorney in Kyllo, because in that case counsel was

following the relevant WPIC. Kyllo, 166 Wn.2d at 865. The Supreme Court nevertheless held that the lawyer's performance was deficient because "there were several cases that should have indicated to counsel that the pattern instruction was flawed." Id. at 866. There is no legitimate strategic or tactical reason for allowing an instruction that incorrectly states the law and lowers the State's burden of proof. Id. at 869 (citing State v. Woods, 138 Wn. App. 191, 201-02, 156 P.3d 309 (2007); State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004)).

Here, in contrast to Kyllo, the WPIC was consistent with the relevant case law. WPIC 10.03 and Comment; Gamble, 154 Wn.2d at 467-68. Thus, if the attorney's performance was deficient in Kyllo despite the fact that the instruction given was consistent with the WPIC, then counsel's performance here was certainly deficient. Furthermore, the State's original proposed instruction was correct, and the court alerted the parties that they should research the issue. There is no legitimate strategic or tactical basis for trial counsel's failure to research the relevant law and instead agree to amend the instruction to lower the State's burden of proof.

c. Defense counsel's deficient performance prejudiced Mr. Peters, because it is reasonably probable that if properly instructed the jury would have acquitted Mr. Peters or convicted him of the lesser offense. As to prejudice, it is reasonably probable that the outcome would have been different but for the deficient performance. Accordingly, Mr. Peters' conviction should be reversed and his case remanded for a new trial.

As discussed above, it takes much less to create a substantial risk of any "wrongful act" than it does to create a substantial risk of death. The jury concluded that Mr. Peters disregarded a substantial risk of a wrongful act by drinking and attempting to clean his gun while Stormy was in the room, but it may not have concluded beyond a reasonable doubt that he knew this behavior would create a substantial risk of death. Indeed, the jury acquitted Mr. Peters of felony murder, indicating that it rejected the State's theory that Mr. Peters was pointing the gun at Stormy.

A "wrongful act" could be any bodily injury, no matter how minor, as well as any damage to property, as well as any number of other nonhomicidal acts. If the jury had been properly instructed, it is reasonably probable that it would have either acquitted Mr. Peters or found him guilty of the lesser offense of second-degree

manslaughter. Mr. Peters' conviction should be reversed, and his case remanded for a new trial at which the jury will be properly instructed.

3. THE TRIAL COURT VIOLATED THE DUE PROCESS CLAUSE AND THE RULES OF EVIDENCE BY ADMITTING EVIDENCE THAT MR. PETERS OWNED AND USED MANY GUNS THAT WERE NOT INVOLVED IN THE ACCIDENT IN QUESTION.

Over Mr. Peters' repeated objections, the trial court admitted a great deal of testimony regarding Mr. Peters' general gun ownership and use, not just what happened on the night in question or with the gun in question. Because gun ownership is a constitutional right, the admission of this evidence violated Mr. Peters' right to due process. Furthermore, contrary to the trial court's rulings, the evidence was not relevant to show knowledge of risk because it did not involve the gun that killed Stormy, and nobody had ever been killed or even harmed with the other guns.

Furthermore, even if it were relevant, it would be substantially more prejudicial than probative, in violation of ER 403. Finally, the State used the evidence for the impermissible purpose of proving action in conformity therewith – arguing that because Mr. Peters was reckless with other guns on other occasions he must

have been reckless on this occasion. The use of the evidence to show a propensity for recklessness violated ER 404(b).

For each of these independent reasons, the trial court erred in admitting the evidence. The evidence was highly prejudicial, requiring reversal of the conviction and remand for a new trial.

a. The federal and state constitutions and the rules of evidence restrict the admission of evidence of gun ownership and use in criminal trials. The impermissible use of constitutionally protected behavior constitutes a violation of due process. U.S. Const. amend XIV; State v. Kendrick, 47 Wn. App. 620, 626, 736 P.2d 1079 (1987). Gun ownership is protected by both the federal and state constitutions. U.S. Const. amend. II; Const. art. I, § 24; District of Columbia v. Heller, ___ U.S. ___, 128 S.Ct. 2783, 2821, 171 L.Ed.2d 637 (2008) (holding statutes banning handgun possession in the home violated Second Amendment); State v. Sieyes, 168 Wn.2d 276, 225 P.3d 995 (2010) (both Second Amendment and article I, section 24 protect the rights of individuals in Washington to bear arms). Thus, defendants are “entitled under our constitution to possess weapons, without incurring the risk that the State would subsequently use the mere fact of possession against him in a criminal trial unrelated to their use.” State v. Rupe,

101 Wn.2d 664, 707, 683 P.2d 571 (1984) (reversing death sentence where trial court had admitted evidence of defendant's gun collection, even though the defendant had committed his murders with a gun).

In addition to these constitutional limitations, the Rules of Evidence restrict the admission of evidence of gun ownership and use in criminal trials. First, evidence which is not relevant is not admissible. ER 402. Second, even relevant evidence may be excluded if it is substantially more prejudicial than probative, confuses the issues, or misleads the jury. ER 403. Finally, evidence of other acts "is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). The "forbidden inference" of propensity to act in conformity with prior acts "is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact finder to the merits of the current case in judging a person's guilt or innocence." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1998).

If the State offers evidence of other acts, the court must "closely scrutinize" it to determine if (1) it is relevant and necessary to prove an essential ingredient of the crime charged and (2) its

probative value outweighs its potential for prejudice. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). “When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.” State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). Evidence of prior acts should be excluded if “its effect would be to generate heat instead of diffusing light, or ... where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” State v. Smith, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting State v. Goebel, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). In doubtful cases, “the scale should be tipped in favor of the defendant and exclusion of the evidence.” Id. at 776.

b. Over Mr. Peters’ objections, the trial court admitted evidence of his extensive gun collection and of prior acts involving guns other than the one at issue in this case. The trial court in this case admitted a great deal of testimony regarding Mr. Peters’ general gun ownership and use, over Mr. Peters’ objections. The jury heard that Mr. Peters’ owned “an AR-15, AK-47, three 12 gauges, three 45’s, a 7 mm, and the list goes on.” Ex. 57 at 2. They also heard that Krissy owned a 9mm handgun, and that Mr. Peters had bought the children “a little .22 pistol.” Ex. 57 at 7, 13.

Detective Vanderweyst testified that there was a shotgun, ammunition, and gun cleaning equipment in Mr. Peters' garage, a loaded semiautomatic handgun in the living room, and several shotguns, rifles, and handguns in a gun safe in the family room. 4 RP 639-46.

The jury also heard both Mr. Peters (in a recorded interview) and George Wilson testify that Mr. Peters accidentally discharged a loaded shotgun at a pumpkin shoot. Ex. 57 at 22; 4 RP 554-58.

Neighbor Jes Smith testified about multiple prior acts. Mr. Smith testified that once when he was at Mr. Peters' house, Mr. Peters "reached down beside him underneath some newspapers and magazines [and] pulled out a .45 and handed it kind of over towards" Mr. Smith. 3 RP 432. Mr. Smith testified that Mr. Peters then sent Gino out to the truck to get another gun to show Mr. Smith. 3 RP 432, 436-37.

Mr. Smith went on to make a general statement that there were "other times" he had seen loaded weapons in the Peters home, including one instance in which there was a "rifle that had a large magazine that was loaded leaning against the wall." 3 RP 435-36. Mr. Smith also said he had seen Mr. Peters handling guns while drinking. 3 RP 441. Mr. Smith testified that because of these

incidents, he did not allow his daughter to go to Mr. Peters' house.
3 RP 437, 442.

c. The trial court's admission of evidence of Mr. Peters' gun ownership and use violated due process, ER 404(b), ER 403, and ER 402. The admission of the above evidence was unconstitutional and contrary to the Rules of Evidence.

In Rupe, the Supreme Court reversed the defendant's death sentence because he was denied due process of law by the admission of evidence of his gun collection. Rupe, 101 Wn.2d at 669. This was so even though the defendant used one of his guns in the commission of the crimes. Id. The trial court had admitted evidence of other guns not used in the crime, including a semiautomatic rifle, a 12-gauge shotgun, a .22 caliber rifle, and a pistol. Id. at 703.

In reversing, the Supreme Court emphasized, "The State can take no action which will unnecessarily 'chill' or penalize the assertion of a constitutional right and the state may not draw adverse inferences from the exercise of a constitutional right." Id. at 705. Furthermore, "the challenged evidence directly implicates defendant's right to bear arms." Id. at 706 (citing Const. art. I, § 24). "Defendant was thus entitled under our constitution to possess

weapons, without incurring the risk that the State would subsequently use the mere fact of possession against him in a criminal trial unrelated to their use.” Id. at 707.

This Court similarly held it was error of a constitutional magnitude to admit evidence of a defendant’s gun ownership in State v. Hancock, 46 Wn. App. 672, 731 P.2d 1133 (1987). The State had argued the evidence was relevant to show the victim’s fear of the defendant and failure to report abuse. Id. at 680-81. This Court disagreed, stating, “the evidence of Hancock’s gun ownership appears to be gratuitous and irrelevant.” Id. at 681. “Moreover, the challenged evidence implicates Hancock’s right to bear arms.” Id. Accordingly, the admission of the evidence of gun ownership violated due process. Id. at 681-82.

Similarly here, the denial of the motion to exclude the evidence violated Mr. Peters’ right to due process. Here, as in Rupe, the trial court admitted evidence of Mr. Peters’ entire gun collection, even though only one gun caused the victim’s death. The other acts discussed involved different guns from the one that accidentally discharged on November 16, as well as different people and circumstances.

In addition to violating the Constitution, the admission of the other gun evidence in this case also violated the Rules of Evidence. The other guns and acts were not relevant, were highly prejudicial, and were used for the improper purpose of proving action in conformity therewith.

This Court's decision in Freeburg is instructive. State v. Freeburg, 105 Wn. App. 492, 20 P.3d 984 (2001). That case involved a defendant who shot and killed another man, and was finally tracked down and arrested a little over two years later. Freeburg, 105 Wn. App. at 495-96. The trial court admitted evidence that the defendant was carrying a gun when he was apprehended, on the basis that the evidence was relevant to show flight and consciousness of guilt. Id. at 496-98. This Court reversed, holding the evidence was not relevant for that purpose, in part because the gun used in the shooting was not the same as the gun found on the defendant. Id. at 500. Furthermore, the prejudicial effect of the evidence outweighed its probative value, and the evidence was inadmissible under ER 404(b). Id. at 501.

In Mr. Peters' case, the trial court ruled that the evidence of the gun collection, pumpkin shoot, and interactions with Jes Smith were relevant to show Mr. Peters knew of the substantial risk of

death created by asking Stormy to bring him his .45 handgun and then preparing it for cleaning. But that is incorrect. First, evidence that Mr. Peters has other guns says nothing about knowledge of the risk of the gun that fired on November 16. Second, none of these other guns ever came close to causing death. In fact, the one that accidentally fired at the pumpkin shoot caused no harm at all. Neither the gun that Mr. Peters showed Jes Smith nor the one he had Gino retrieve from his truck accidentally fired. Thus, the evidence of the gun collection and of prior acts involving other guns was not relevant to show Mr. Peters knew of the substantial risk of death caused by cleaning his Colt .45 handgun with his daughter in the room.

Furthermore, even if the evidence were relevant, which it was not, it was substantially more prejudicial than probative. Jurors react emotionally to evidence of extensive gun ownership and use. "Many individuals view guns with great abhorrence and fear." Rupe, 101 Wn.2d at 708. "Evidence of weapons is highly prejudicial, and courts have uniformly condemned evidence of dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged." Freeburg, 105 Wn. App. at 501 (citations omitted). The admission

of other gun evidence in this case was therefore improper under ER 403.

Additionally, the admission of the evidence of other guns and acts involving the other guns violated ER 404(b) because it was introduced for the improper purpose of showing action in conformity therewith. The prosecutor acknowledged that he wanted to introduce evidence that there were “guns all over the place accessible to children ... because of how Mr. Peters handled guns, he was constantly sloppy with guns, that this is not an isolated act...” 1 RP 175 (emphasis added). Similarly, when discussing the pumpkin shoot, he said, “[Defense counsel’s] suggestion that the showing of a pattern is prejudicial, that that is unfair, I think the showing of pattern tells the jury this is not an isolated event.” 1 RP 210 (emphasis added). In other words, as the prosecutor fully conceded, he wanted the evidence of the other guns and acts involving them admitted to show that Mr. Peters has a propensity for being reckless with guns.

These other guns and incidents could not have shown knowledge of a substantial risk of death, because having “guns all over” the house had never even caused an injury previously, let alone a death. And the pumpkin shoot incident did not involve the

same gun, did not result in harm to anyone, and was not an event that children attended. The only reason the State offered these incidents was so the jury would draw an adverse inference from Mr. Peters' exercise of his constitutional rights and conclude he had a propensity for recklessness. This violated both ER 404(b) and due process.

d. Reversal is required. Constitutional errors require reversal unless the State proves beyond a reasonable doubt that the outcome would have been the same but for the violation. Chapman, 386 U.S. at 24; Hancock, 46 Wn. App. at 682. Evidentiary errors require reversal if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Thomas, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983). Under either standard reversal is required in this case.

Absent the evidence of Mr. Peters' extensive gun collection, the pumpkin shoot, and the incidents with Jes Smith, it is reasonably probable that the jury would have either acquitted Mr. Peters or convicted him of the lesser included offense of second-degree manslaughter. Certainly, the State cannot show beyond a reasonable doubt that the jury would have convicted Mr. Peters of

first-degree manslaughter absent the improper evidence.

Testimony about Mr. Peters' gun collection and gun-related activities took up much of the trial, and the prosecutor emphasized the possession of other guns and prior acts involving them in his closing argument. 11/23/09 RP 21-22, 35.

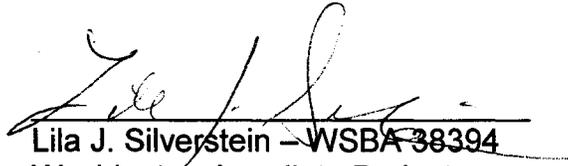
Evidence of weapons is "highly prejudicial" Freeburg, 105 Wn. App. at 501, and jurors likely regarded the evidence of Mr. Peters' other guns and gun-related activities as evidence that he had a propensity to behave recklessly with guns. See id. at 502. As in Freeburg, "[g]iven the powerful nature of the evidence, its lack of relevance, and the absence of a limiting instruction, [this Court] cannot characterize its admission as harmless." Id. Mr. Peters' conviction must be reversed and his case remanded for a new trial at which evidence of his other guns and gun-related activities will be excluded.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Peters' conviction and remand his case for a new trial.

DATED this 10th day of June, 2010.

Respectfully submitted,



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Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 64568-4-I
)	
)	
RICHARD PETERS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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