100409-5

No. 82543-7-I

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

SHANE LYNN, Petitioner

APPEAL FROM THE SUPERIOR COURT
OF MASON COUNTY

THE HONORABLE JUDGE DANIEL L. GOODELL

PETITION FOR REVIEW

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253-445-7920

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I. IDENTITY OF PETITIONER

Petitioner Shane Lynn, the petitioner here and appellant below, asks the Court to review the unpublished Court of Appeals decision terminating review entered October 25, 2021, pursuant to RAP 13.3(a)(2)(b) and RAP 13.4(b). A copy of the decision is attached as an appendix.

II. ISSUES PRESENTED FOR REVIEW

1. A trial judge may not order an accused person shackled during court hearings without an individualized inquiry into the necessity of restraints. Despite this long established constitutional doctrine, and with acknowledgement of the requirement of an individualized inquiry the trial judge here ordered Mr. Lynn to be shackled based on the deputy's belief the courtroom was difficult to secure.

In its decision, the Court of Appeals acknowledged that Mr. Lynn's constitutional rights had been violated. Despite this Court's admonition in *State v. Jackson,* 1855

Wn.2d 841, 467 P.3d 97 (2020), that even where a defendant has prior convictions of violence, and was accused of a serious violent offense, an individualized inquiry was necessary to uphold due process. And despite this Court's direction that an individualized inquiry was necessary before *every* court appearance, the Court of Appeals found harmless error.

Should this Court grant review because the trial court granted shackling without an individualized inquiry which is contrary to established law?

2. It is long established that opinion statements about the intent of a defendant are improper. Should this Court accept review where officers gave testimonial opinions divining Mr. Lynn's intent and upon which the trial court relied ?

3. The evidence does not a finding of specific intent and use of a weapon or force or means likely to produce great bodily harm. Should this Court grant review where

the evidence does not support the finding of specific intent to inflict great bodily harm, nor does it support the finding that Mr. Lynn assaulted the officers by a force or means likely to produce great bodily harm?

III. STATEMENT OF THE CASE

Shane Lynn was charged by amended information with assault in the first degree, assault in the second degree, possession of a stolen motor vehicle, and attempting to elude a police vehicle. CP 7-9. The matter proceeded to a bench trial.

DEFENDANT SHACKLED

On the first day of trial, the court administrator from the jail wanted to know if Mr. Lynn could be brought to court in restraints. RP 34. Defense counsel objected, arguing that Mr. Lynn could not be restrained in the courtroom without a finding he presented a danger to himself or to others during the proceeding RP 35. The State's attorney disagreed saying:

Frankly, it's my default position that he be in restraints. There's no jury, and Your Honor can certainly parse that out, you know. You know, Your Honor knows he's in custody, so it's not something that's going to taint him or prejudice him in any way. And I think that if the jail believes that he needs to be in restraints, they are the ones that are holding him and they are the ones that are responsible for his safety, and they're you know, the safety of others that he might possibly assault. So, the State would ask that the jail's request be honored and be he in restraints in the courtroom. RP 35.

DEPUTY VASQUEZ: He is a state prisoner, Your Honor. He is under a sentence from a previous felony that he has committed, so we don't believe that it was going to be - it's going to cause any interference with any kind of trial that he's gonna be in at this time. There's no jury. My understanding is

a bench trial, and the current judicial officer has already seen him in restraints when he was brought up to court in a previous hearing, so I would like for him to stay in restraints, Your Honor.[1]

RP 37.

The court acknowledged the concerns of the jail, and also acknowledged:

the law is clear that there has to be a finding of the court that given something unique about this individual defendant that places. A risk to the courtroom for him to be not in restraints; however, the court is also aware that we are in a courtroom that is very difficult to be secure. And so, based upon the limitations that have here in this courtroom

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[1] The record does not contain discussion or observation of previous shackling of Mr. Lynn. Assuming the deputy's statement was accurate, there was no discussion before Mr. Lynn was shackled during the previous hearings.

the court is going to require that the defendant remain in ankle restraints but no the arm restraints. RP 37-38. Mr. Lynn remained in leg restraints throughout the proceedings.

FACTS

Shane Lynn drove a truck on June 29, 2018. RP 57-58. He dropped his passenger off at a friend's home. RP 42. Responding to a call made by an unnamed reporting party, Officer Smith followed the truck driven by Mr. Lynn into the driveway of Mr. Lynn's friend's home. P 90-93. He saw the drive rev up the truck, drive through a carport, and onto another road. RP 93. He announced over the radio what he witnessed. RP 94.

Deputy LaFrance heard the dispatch and waited for the truck to go by her. RP 66. She saw it speeding and followed about 50 feet behind it. RP 69. The truck sped and swerved as the drive threw a couple of paint cans out the window and two small cannisters. RP 69. The

cannisters bounced and spun off the road. RP 70. She said they “exploded” in the sense there was a pressure release, but they were not “fireballs.” RP 81-83. The cannisters did not come near her car, but the potential frightened her. RP 84.

In response to a defense question as to whether she specifically thought “that thing is going to come up, come through my windshield and physically impact me?” She reported thinking, ‘This guy is trying anything possible to get away and *he’s doing anything possible to hurt myself,* Deputy Anderson, *so he can get away.”* RP 84. Defense counsel did not object.

As the chase continued, the truck drive shot a flare gun out the window. RP 85. One shot went directly into the woods and the second shot landed on the road about 10 feet in front of the pursuing patrol car. RP 71-72. LaFrance testified she saw the speeding truck turn a

corner, and when she rounded it, she saw it had flipped. The driver was not in the vehicle. RP 72.

Deputy Anderson also pursued the truck. RP 115-116. He saw the 6–8-inch cannisters go out the window and a “puff of smoke” when they hit the pavement. RP 107.

On direct examination, explaining why the deputies did not immediately approach the flipped truck, Deputy Anderson testified “the person driving that same vehicle that we were just pursuing was actively trying to harm us as we were pursuing it.” RP 112. In response to defense counsel asking, “Did it appear that the defendant was specifically aiming for windshields, or was he just chucking stuff out the side of the vehicle?” the deputy answered, “I believe that he’s aiming for the person in law enforcement in any way, Sir.” RP 118.

The court found Mr. Lynn not guilty of assault second degree, but guilty on all other counts. RP 146-

152; CP 18-21. The courts written findings merely recited the elements of the statutes and included no factual evidence from the testimony. Rather, the court incorporated its oral findings into the written findings. CP 18-19.

In its oral findings, the court stated:

> In addition, the defendant fired two rounds from the flare gun *at* Sergeant LaFrance and threw out two metal twelve to fourteen-inch propane tanks in the path of Sergeant LaFrance…

RP 147-48.(italics added).

> …the Court concludes beyond a reasonable doubt that the propane tanks thrown in the path of Sergeant LaFrance's patrol car, considering all the circumstances presented, were used by a force and means that was likely to produce great bodily harm or death to Sergeant LaFrance.

RP 148

When the Court considers the act of firing two rounds with the flare gun *directly at* Sergeant LaFrance, the Court is persuaded that the defendant was focusing on harming Sergeant LaFrance. While the flare gun was not a deadly weapon, the defendant followed the shootings with the throwing of propane tanks, which turned into projectiles and became deadly weapons in the fashion that they were used. There is a likelihood the defendant intended to inflict great bodily harm when he threw the first propane tank, with the results being obvious as the propane tank ruptured, and Sergeant LaFrance drove through the cloud of gasses.

When this was followed by the defendant throwing the second propane tank in the path of Sergeant LaFrance, against all - again, all occurring at the speeds of seventy to eighty miles an hour, the Court

> concludes that the State has met its burden of proving beyond a reasonable doubt that the defendant did intend to inflict great bodily harm when he threw the second propane tank *at* Sergeant LaFrance's patrol car.

RP 149. (italics added).

The written conclusions of law recited only the elements of the statutes. CP 20-21.

In its opinion, the Court of Appeals reasoned the judge in a bench trial does not consider inadmissible evidence in rendering a verdict. (Slip Op. at 7). Despite the testimony that the flare gun went into the woods and far in front of the patrol vehicle, the trial court found that Mr. Lynn shot *directly* at the deputy. The finding was based on the deputy's statement that Mr. Lynn was trying to harm them and get away. The Court of Appeals held: "Here there is no evidence indicating that the judge considered this opinion testimony." The Court

distinguished testimony about Mr. Lynn's intent to cause harm from where Mr. Lynn allegedly aimed the flare gun. (Slip Op. at 7-8).

IV. ARGUMENT

A. Compelling And Individualized Circumstances Must Be Found To Justify The Use Of Restraints On An Accused In The Courtroom.

Shackling an accused is constitutional error and inherently prejudicial unless a trial court has conducted an individualized assessment of the need for shackling, and compelling circumstances justify the use of shackles. *State v. Hartzog,* 96 Wn.2d 383, 401, 635 P.2d 694 (1981). The circumstances permitting shackling must be extraordinary. *State v. Finch,* 137 Wn.2d 792, 842, 975 P.2d 967 (1999); *See also Illinois v. Allen,*397 U.S. 33, 98 S.Ct. 1057, 25 L.Ed.2 353 (1970); *Deck v. Missouri,* 544 U.S. 622, 632, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005)(defendant robbed and killed an elderly couple and

was shackled. Court held the security of the courtroom was one factor to consider, but given the prejudicial effect, due process required the court to take account of the circumstances of each particular case.)

This prohibition against shackling of a defendant in the courtroom supports the presumption of innocence. Article I, § 22 provides "In criminal prosecutions the accused shall have the right to appear and defend in person." It has long been recognized that a person who appears in shackles will "necessarily conceive a prejudice against the accused believing the judge has deemed the person 'dangerous…and not one to be trusted.'" *State v. Williams,* Wash. 47, 50-51, 50 P.580 (1897).

Established case law prohibits the trial court from chaining, cuffing, or physically restraining every detained person brought into court, without an individualized inquiry into the necessity of such restraint. The court may not shackle every defendant in deference to the jailer's

preference. *State v. Hartzog,*96 Wn.2d at 400-401; *State v. Jaquez,* 105 Wn.App. 699, 709, 20 P.3d 135 (2001); *State v. Jackson,* 195 Wn.2d 841, 467 P.3d 97 (2020).

To properly exercise its discretion to impose restraints on an accused, the court must balance the need for a secure courtroom with the presumption of innocence, the defendant's ability to assist counsel, the right to testify on one's own behalf, and the dignity of the judicial process. *State v. Walker,*185 Wn.App. 790,798, 344 P.3d 227 (2015)(internal citation omitted). Washington Courts have long recognized that jailers are in no position to weigh and balance the factors the trial judge must consider. *Id.*

Here, the trial court acknowledged the requirement to consider individualized factors and then simply deferred to the jailer's recommendation. There was no individualized inquiry.

In its opinion, the Court of Appeals acknowledged the need for the individualized inquiry into the use of restraints and agreed it was an abuse of discretion. *Slip Op.* at 3-5. It also acknowledged that under *State v. Jackson,* it is a "practical impossibility for a defendant to prove whether a judge was unconsciously prejudiced by the restraints at any point during the case." *Slip Op.* at 3.

Similar to the Court of Appeals decision in *Jackson,* the Court here wrongly held the error was harmless beyond a reasonable doubt based on a footnote from the *Jackson* opinion which provides:

> We acknowledge that there may be a case where the State can prove that under the *Hutchinson/Hartzog* individualized shackling factors that the defendant would have been required to wear restraints. Such a showing may satisfy the State's burden to prove the error was harmless beyond a reasonable doubt. However, the State does not argue here that Jackson would have been shackled under an individualized inquiry, and *there is no evidence to so suggest.*

State v. Jackson, 195 Wn.2d at 856 FN.4.(Italics added).

The Court of Appeals in *Jackson* held the shackling violated the defendant's constitutional rights but found it harmless error. This Court reversed, reiterating "at all stages of the proceedings, the court *shall make an individualized inquiry* into whether shackles or restraints are necessary…" *Id.* at 845.

Jackson was accused of violent crimes and had a history of violent crimes. *Id.* at 845. Yet, this Court held there was no evidence to suggest that Jackson would have been shackled under an individualized inquiry.

The backfilling of reasons by the State for why an accused should be shackled should be set aside. The requirement is for the trial court to conduct an individualized inquiry: both to preserve the dignity of the courtroom and the presumption of innocence of the defendant.

The decision by the Court of Appeals in this case contradicts established rulings by this Court and the

United States Supreme Court. If the Court allows the State, as the Court of Appeal has done here, to fill in reasons for restraint when the case is on appeal, every defendant accused of criminal conduct which might have harmed another or has any criminal history may be restrained without individualized inquiry. Review should be accepted to correct trial courts from failing to conduct the requisite individualized inquiry.

B. The Improper Opinion Testimony Constituted Harmful Error Requiring Reversal.

Factual questions are to be decided by the trier of fact. U.S. Const. amend. VI; Wash. Const. art.1, §§ 21, 22; *State v. Montgomery,* 163 Wn.2d 577, 590, 183 P.3d 267 (2008). Witnesses who opine on a defendant's guilt or innocence, either directly or by inferential statement, violate the defendant's constitutional right to an independent determination of the facts. *State v. Madison,* 53 Wn.App. 754, 760, 770 P.2d 662 (1989); *State v.*

Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). An opinion on the intent of an accused is impermissible opinion testimony. *State v. Montgomery,* 163 Wn.2d at 592.

Because opinions by police officers carry an "aura of special reliability and trustworthiness", such statements may impermissibly influence the fact finder, denying the defendant a fair and impartial trial. *State v. Demery,* 144 Wn.2d 753, 759,763, 30 P.3d 1278 (2001).

Here, the officers opined on Mr. Lynn's intent three times, testifying he was aiming for them, actively trying to harm them, and doing anything possible to hurt them.

In its opinion, the Court of Appeals held that because defense counsel invited one error, and failed to object to the others, he failed to meet his burden to show a manifest constitutional error. *Slip Op.* at 7. This is error.

In *Montgomery,* this Court held that opinions that went directly to the intent of the accused or expressions

of personal belief about guilt were improper. *Montgomery,* 173 Wn.2d at 594-95. In *Farr-Lenzini,* 93 Wn.App. 453, 970 P.2d 313 (1999), the Court held that officer observations of the actions of the driver did not allow an opinion that the driver was "attempting to get away" and "refusing to stop." *Id.* at 458.

A defendant's state of mind lays outside of an officer's law enforcement experience as either an expert or lay witness. *Id.* at 461. In both *Montgomery* and *Farr-Lenzini,* reviewing Courts have held that officer statements about what the accused was thinking or intending is a comment on guilt, because they address a critical element of the crime. *Id.* at 465; *Montgomery,* 163 Wn.2d at 592.

The trial court was clear that it considered the two flare gun rounds to have been fired "directly" at Sargeant LaFrance. The actual testimony was that one shot was fired into the woods and the other shot was far in front of

her vehicle. The record does not support the finding that the shot was aimed directly at LaFrance. In conjunction with the cannisters having been thrown out the window, LaFrance opined “He’s doing anything possible to hurt myself…so he can get away.” That is an opinion: that Mr. Lynn intended to hurt the deputies. It was error for the Court of Appeals to reason that “intent to cause harm was distinct from evidence about where he was aiming.” It is a distinction without a difference: where the flare gun was aimed and where the cannisters landed were the significant factors.

This Court should grant review of the highly prejudicial opinion testimony. Based on the facts, it would have been impossible for deputies to conclude Mr. Lynn intended to hurt them. He threw several items out of the window of the truck and fired a flare gun once out of the back of the truck into the woods and another into the road that fell far short of the pursuing patrol car. It was more

than plausible that Mr. Lynn pitched things into the road to slow down the patrol cars and to allow himself time to escape. The opinion testimony as to his particular intent is reversible error. *State v. Quaale,* 182 Wn.2d 191, 199, 340 P.3d 213 (2014).

Because at least one statement was not objected to, Mr. Lynn must show the error resulted in practical and identifiable consequences in his trial. *State v. A.M.,* 194 Wn.2d 33, 39, 448 P.3d 35 (2019). A constitutional error is harmless only if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict given. *Neder v. United States,*527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

Under the "contribution test" if there is a reasonable probability the outcome would have been different had the error not occurred, then the error is not harmless. *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). The "overwhelming evidence test" analysis provides the error

is harmless if it can be said beyond a reasonable doubt that the untainted evidence necessarily leads to a finding of guilt.

Without the deputies' improper opinions as to intent, the court would have been hard pressed to conclude the flare gun was fired at the officer or that the cannisters were aimed at them. At no time were the officers actually endangered by debris hitting the patrol car. The improper testimony incorrectly divined Mr. Lynn's state of mind as to intent. And it is evident the trial court relied on that opinion testimony by the phrasing it used in making its oral findings on intent. RP 148-149.

This Court should accept review because the improper opinion testimony had a practical and identifiable effect on the court's findings.

C. The Evidence Is Insufficient To Sustain A Conviction For Assault In The First Degree.

1) The State Did Not Prove The Element Of Intent.

RCW 9A.08.010(1)(a) defines intent as when an individual acts with an objective or purpose to accomplish a result constituting a crime. The mens rea for first-degree assault is the specific intent to inflict great bodily harm. RCW 9A.36.011(1). Generally, because first-degree assault requires proof of the specific intent to inflict great bodily harm it usually involves use of a firearm or other deadly weapon such as a knife. Without a weapon, the evidence must show beyond a reasonable doubt the actual force or means used was likely to produce great bodily harm. *State v. Pierre,* 108 Wn.App. 378, 383, 31 P.3d 1207 (2001).

Great bodily harm is statutorily defined as bodily injury which creates a *probability of death*, or which causes significant serious permanent disfigurement, or

which causes a significant permanent loss or impairment of any bodily part or organ. RCW 9A.04.110(c).(Italics added).

The issue here is not whether Deputy LaFrance had apprehension she would be seriously injured: the issue is whether Mr. Lynn specifically intended to create the *probability* of death, or serious and permanent damage. This Court has long held that specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act. *State v. Louther,* 22 Wn.2d 497, 502, 156 P.2d 672 (1945); *State v. Wilson,* 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

The act of throwing the cannisters into the road and firing the flare gun away from the patrol car, cannot substantiate a finding of specific intent to create the probability of death or serious disfigurement. Mr. Lynn

was doing what it looked like he was doing: trying to get away from the pursuing patrol cars.

Specific intent may be inferred from the evidence, but it must be proved as an independent fact. The evidence here is patently equivocal: an attempt to escape versus intent to create the probability of death or serious disfigurement. The trial court stated "There is a *likelihood* the defendant *intended* to inflict great bodily harm" when he threw the cannisters. The "likelihood" of intent is not a finding beyond a reasonable doubt.

The evidence cannot sustain a conviction for first degree assault because the element of intent is not met.

2) The Discarded Items Do Not Meet The Standard of Instrumentality For First Degree Assault.

As noted above, first degree assault requires a firearm, a deadly weapon, or the evidence must show beyond a reasonable doubt the actual force or means used was likely to produce great bodily harm.

In *State v. Marohl,* 170 Wn.2d 691, 246 P.3d 177 (2010), the question was whether a floor was an instrument or thing likely to produce bodily harm under the third-degree assault statute. *Id.* at 699. This Court reasoned that the instrument or thing must be similar to a weapon, an instrument of offense or defense. *Id.* at 700. In reversing the conviction, the Court found that where a defendant caused the victim to hit the floor and made no effort to proactively use the floor to hurt him, he had not used the floor like a weapon. *Id.*

Here, none of the items Mr. Lynn jettisoned caused any damage to the patrol cars or the deputies. They were not explosives and landed in the road, spun off to the side. The Court of Appeals found the cannisters could have gone through the deputy's windshield, and thus, functioned as deadly weapons. (*Slip Op*. at 9-10). The deputy testified the cannisters did not come near her car.

RP 84. The evidence is insufficient to sustain the conviction.

V. CONCLUSION

Based on the foregoing facts and authorities, Mr. Lynn respectfully asks this Court to accept review of his petition and to include review of his Statement of Additional Grounds.

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Submitted this 24th day of November 2021.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SHANE AMMEL LYNN, Appellant.	No. 82543-7-I DIVISION ONE UNPUBLISHED OPINION

SMITH, J. — Shane Lynn fled from police in a stolen vehicle and endangered the officers pursuing him by shooting a flare gun and throwing metal canisters behind him. Lynn was convicted of possession of a stolen vehicle, attempting to elude a pursuing police vehicle, and first degree assault. He appeals, contending that the court violated his constitutional rights by ordering him to wear ankle restraints during trial. Lynn also challenges the court's admission of police testimony opining that he intended to harm them, contends that there was insufficient evidence to support that element of the crime, and claims that the court erred by imposing interest on nonrestitution legal financial obligations. In a statement of additional grounds for review (SAG), Lynn also contends that there was insufficient evidence that he used a "deadly weapon" and that he received ineffective assistance of counsel. We agree that the court erred by imposing restraints, but conclude that this error was harmless beyond a reasonable doubt. We affirm but remand to strike the interest provision.

FACTS

On June 28, 2018, Shane Lynn was sitting in a stolen pick-up truck outside someone else's home. A patrol vehicle approached, flashing its overhead lights. Lynn sped away, first crashing into a carport and then a fence before continuing on. He was pursued by two Mason County Sheriff officers in two separate cars, Sergeant Kelly LaFrance and Deputy Nathan Anderson. Sergeant LaFrance and Deputy Anderson followed Lynn at a distance of about 50 feet, going 70 to 80 miles per hour. While they pursued him, Lynn was swerving through lanes of traffic and threw at least one paint can and two metal 12 to 14 inch propane canisters behind him at Sergeant LaFrance. The propane canisters hit the ground, bounced, and exploded in a burst of smoke that Sergeant LaFrance and Deputy Anderson had to drive through. As the chase continued, Lynn also fired two rounds from a flare gun at Sergeant LaFrance.

The State charged Lynn with second degree assault, possession of a stolen motor vehicle, attempting to elude a police vehicle, and unlawful possession of a firearm. Lynn waived his right to a jury trial. The State then amended the information to drop the firearm charge and add a first degree assault charge, and the case proceeded to a bench trial.

At the onset of trial, the jail where Lynn was being held requested that Lynn remain in restraints, on the grounds that Lynn was serving a sentence from a previous felony, that the court had already seen Lynn in restraints, and that it was a bench trial. The court ordered the jail to remove Lynn's arm restraints but not his ankle restraints to ensure courtroom security.

ANALYSIS

Shackling at Trial

Lynn first contends that the court violated his constitutional rights by ordering him to be shackled and restrained at trial. We agree but conclude that the error is harmless beyond a reasonable doubt.

The right to a fair trial requires that a criminal defendant may "'appear at trial free from all bonds or shackles except in extraordinary circumstances.'" State v. Jackson, 195 Wn.2d 841, 852, 467 P.3d 97 (2020) (quoting State v. Finch, 137 Wn.2d 792, 842, 975 P.2d 967 (1999)). "Restraints are viewed with disfavor because they may abridge important constitutional rights, including the presumption of innocence, privilege of testifying in one's own behalf, and right to consult with counsel during trial." State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981). This right extends to bench trials, in part because even though a judge may be aware the defendant is incarcerated, there is a "practical impossibility for a defendant to prove whether a . . . judge was unconsciously prejudiced by the restraints at any point during the case." Jackson, 195 Wn.2d at 856.

However, "the right to be free from restraint is not absolute, and trial court judges are vested with the discretion to determine measures that implicate courtroom security, including whether to restrain a defendant in some capacity in order to prevent injury." Jackson, 195 Wn.2d at 852. This "discretion must be founded upon a factual basis set forth in the record. A broad general policy of imposing physical restraints upon prison inmates charged with new offenses

because they may be 'potentially dangerous' is a failure to exercise discretion." Hartzog, 96 Wn.2d at 400. Thus, an "individualized inquiry" into the use of restraints is required. Jackson, 195 Wn.2d at 854. The court should consider:

> [T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

State v. Hutchinson, 135 Wn.2d 863, 887-88, 959 P.2d 1061 (1998) (quoting Hartzog, 96 Wn.2d at 400), abrogated on other grounds by Jackson, 195 Wn.2d at 467.

Because the trial court has "broad discretion to provide for order and security in the courtroom," we review its decision for abuse of discretion. State v. Hartzog, 96 Wn.2d 383, 401, 635 P.2d 694 (1981). If the court did abuse its discretion, "the State bears the burden to prove beyond a reasonable doubt that the constitutional violation was harmless." Jackson, 195 Wn.2d at 856. A showing that the court would have required restraints if it had applied the factors "may satisfy the State's burden." Jackson, 195 Wn.2d at 856 n.4.

Here, the trial court abused its discretion by requiring Lynn to wear ankle restraints at trial. The court acknowledged that it needed to make a specific finding that "this individual defendant . . . places a risk to the courtroom," but then ordered Lynn to remain in ankle restraints purely on the basis of its perfunctory finding that "we are in a courtroom that is very difficult to be secure." The court

failed to ground its decision in "a factual basis set forth in the record." Hartzog, 96 Wn.2d at 400. It did not reference anything about Lynn that might pose a risk in the courtroom and did not explain whether there was anything specific about the courtroom that was difficult to secure. Restraining defendants on the basis that courtrooms in general are difficult to secure clearly thwarts the requirement that defendants appear without restraints "except in extraordinary circumstances." Jackson, 195 Wn.2d at 852. The court here "'effectively deferred'" its decision to the jail policy, which is a failure of the court to exercise the required discretion. Jackson, 195 Wn.2d at 854 (quoting State v. Lundstrom, 6 Wn.2d.388, 391, 429 P.3d 388 (2018).

However, we hold that the State has met its burden to establish that this error was harmless beyond a reasonable doubt. The court did order Lynn's arm restraints to be removed so as to not hamper his "ability to best deal with this matter, be able to converse with his attorney, [or] be able to write." Because the restraints would be less conspicuous, and the trial was before a judge (who knew Lynn was incarcerated) instead of a jury, the possibility for unfair prejudice was minimized. Most importantly, an individualized inquiry would justify restraining Lynn. Lynn was on trial for first degree assault against a law enforcement officer and attempting to elude a pursuing police vehicle with an enhancement for endangering third parties. Lynn also had substantial prior criminal history, multiple pending cases in Washington, including a charge of first degree theft, and two warrants for his arrest from other jurisdictions. Given this evidence, the court would have been justified in restraining Lynn on the grounds that there was

a risk he might try to escape and could pose a danger to individuals in the court room if he did so. Accordingly, although the court failed to protect Lynn's constitutional rights when it acquiesced to the jail's request, the error in this particular case was harmless.

Opinion Testimony

Lynn next contends that the court erred by admitting opinion testimony as to Lynn's intent to do substantial bodily harm. We conclude that Lynn invited some of this testimony, failed to object to any of it, and has failed to meet his burden to show manifest constitutional error.

The doctrine of invited error "prohibits a party from setting up an error at trial and then complaining of it on appeal." State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). Furthermore, an appellant loses the right to raise a claim of error that they did not object to below, but may regain that right if it is a "manifest error affecting a constitutional right." RAP 2.5(a). "To meet RAP 2.5(a) and raise an error for the first time on appeal, an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). "'Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.'" State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Here, the first piece of testimony that Lynn challenges is from his counsel's cross-examination of Deputy Anderson. Counsel asked, "[d]id it appear that the defendant was specifically aiming for windshields, or was he just chucking stuff out the side of the vehicle?" Deputy Anderson responded, "I believe that he's aiming for the person in law enforcement in any way, Sir." Any error here was invited. Counsel asked the officer to opine as to where Lynn was aiming, and the officer responded. Therefore, Lynn is barred from raising this issue on appeal. Pam, 101 Wn.2d at 511.

The other testimony challenged by Lynn was not invited. First, Deputy Anderson testified during the prosecutor's direct examination that "[t]he person driving that same vehicle that we were just pursuing was actively trying to harm us as we were pursuing it." Second, when defense counsel asked Sergeant LaFrance if she thought the propane tank would come through her windshield, she answered, "I was thinking oh, my God, this guy is . . . doing anything possible to hurt myself [and] Deputy Anderson, so he can get away." Though Lynn did not invite the witnesses to testify about their beliefs regarding his intent, he did not object to the testimony either so the burden is on him to show that its admission was a manifest error affecting a constitutional right.

Lynn cannot meet this burden. "[I]n the absence of evidence to the contrary, we presume the judge in a bench trial does not consider inadmissible evidence in rendering a verdict." State v. Read, 147 Wn.2d 238, 242, 53 P.3d 26 (2002). Here, there is no evidence indicating that the judge considered this opinion testimony. Its findings regarding whether Lynn intended to inflict great

bodily harm focus on the results of throwing the first and then the second propane tank and do not mention the officers' belief that Lynn was trying to harm them. Lynn contends that the court relied on the opinion testimony because it found that he shot the flare gun "directly at Sergeant LaFrance" and threw the propane tank "at Sergeant LaFrance's patrol car." However, the issue here is testimony about Lynn's intent to cause harm, which is distinct from evidence about where Lynn was aiming.[1]

We therefore hold that Lynn failed to meet his burden to show manifest constitutional error and may not challenge this testimony on appeal.

Sufficiency of the Evidence

Through counsel and in his SAG, Lynn contends that there was insufficient evidence to support the court's finding that he intended to inflict great bodily harm. In his SAG, Lynn also contends that there was insufficient evidence that the propane tank was a deadly weapon. We disagree.

The crime of first degree assault requires proof that the defendant, (1) with intent to inflict great bodily harm, (2) assaulted (3) another (4) with a firearm or any deadly weapon. RCW 9A.36.011. "Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements proved beyond a reasonable doubt." State v. Pierre, 108 Wn. App. 378, 383, 31 P.3d 1207 (2001). We "defer to the trier of fact on issues of conflicting testimony, credibility

[1] As noted, even if the testimony about where Lynn was aiming was inadmissible, Lynn invited that testimony.

of witnesses, and the persuasiveness of the evidence." State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000).

1. Intent

Lynn claims that the State failed to prove that he intended to inflict great bodily harm. To establish intent to inflict great bodily harm, "[i]t is not sufficient merely to prove the defendant intended to act in a way likely to bring about the specific result." State v. Mancilla, 197 Wn. App. 631, 647, 391 P.3d 507 (2017). However, while specific intent may not be presumed, "it can be inferred as a logical probability from all the facts and circumstances." State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). "In satisfying its burden of proving intent, the State is entitled to rely on circumstantial evidence." Mancilla, 197 Wn. App. at 649.

Here, the testimony at trial established that as police followed Lynn at a distance of about 50 feet, going 70 to 80 miles per hour, Lynn shot a flare gun, threw paint cans and two dense propane tanks at them. The propane tanks ruptured when they were thrown out of the window, went "spinning all over the place" and bounced in such a way that they could have gone through Sergeant LaFrance's patrol car window. Furthermore, at the speed the cars were going, it appeared that the projectiles would have shattered the windshield of the patrol car and could easily have resulted in a wreck. In making its findings on intent, the court considered the effect of Lynn throwing the first propane tank, "with the results being obvious as the propane tank ruptured and Sergeant LaFrance drove through the cloud of gasses." It then determined that based on this, when

Lynn threw the second tank, again at speeds of 70 to 80 miles per hour, there was no reasonable doubt that Lynn intended to inflict great bodily harm. This finding is supported by sufficient evidence because a reasonable fact finder could reach this conclusion. Lynn continued to throw several different projectiles behind him at high speeds and they ruptured, bounced, and almost hit the police cars, which would have caused substantial bodily harm. Thus, his intent "can be inferred as a logical probability from all the facts and circumstances." Wilson, 125 Wn.2d at 217.

In his SAG, Lynn disagrees and notes that the court misstated some of the facts in its findings. The court stated that Lynn's firing of the flare gun directly at Sergeant LaFrance was evidence that Lynn was trying to harm her, and that this was followed by the first propane tank, which established a likelihood that Lynn intended to inflict great bodily harm, and that by the second propane tank there was no reasonable doubt of this intent. However, the record shows that Lynn threw the paint can and propane tanks first, and then shot the flare gun afterward. This misstatement on the court's part does not change our analysis. Viewed in the light most favorable to the State, the evidence is still sufficient to support the court's finding, given the effects of the first propane tank followed by the second one. Furthermore, the court did not mention the paint can in its finding on this issue, which is additional circumstantial evidence of Lynn's intent.

2. Deadly Weapon

In his SAG, Lynn also contends that there was insufficient evidence to establish that the propane tanks were "deadly weapons."

A deadly weapon includes any "weapon, device, instrument, article, or substance, . . . which, under the circumstances in which it is used . . . is readily capable of causing death or substantial bodily harm." RCW 9A.04.110(6). Here, the court found that Lynn

> threw out two metal twelve- to fourteen-inch propane tanks in the path of Sergeant LaFrance, who was traveling only fifty feet behind him at the rate of seventy to eighty miles per hour.
>
> When the propane tanks hit the road, they ruptured and were propelled by the pressurized contents, testified to almost like rockets, spraying out their contents into the path of patrol cars, with some of the contents covering the windshield of Sergeant LaFrance's patrol car. . . .[T]he Court concludes beyond a reasonable doubt that the propane tanks thrown in the path of Sergeant LaFrance's patrol car, considering all the circumstances presented, were used by a force and means that was likely to produce great bodily harm or death to Sergeant LaFrance.[

Lynn does not challenge any of these findings but instead points to other testimony that the patrol vehicle was likely equipped with a standard safety glass windshield. Even assuming standard safety glass could prevent a propane tank from coming through a windshield at 70 miles per hour, there is still testimony that LaFrance thought the propane tank hitting her car would have caused a wreck that would injure her. Given the speeds of this chase, the finding that the propane tanks were deadly weapons in these circumstances is supported by substantial evidence.

Ineffective Assistance of Counsel

Also in his SAG, Lynn alleges that he received ineffective assistance of counsel. We disagree.

Lynn first states that his attorney failed to conduct a sufficient investigation. However, he does not point to any specific failure or explain how this insufficient investigation prejudiced him. We do not consider an issue in a defendant's SAG "if it does not inform the court of the nature and occurrence of alleged errors." RAP 10.10(c); see also Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

Lynn next contends that the State amended the information to include a charge of first degree assault after Lynn had already agreed to a bench trial, and that his counsel's failure to object to this rendered Lynn's waiver of his jury trial right "unknowing and involuntary." However, the record shows that Lynn's waiver was made with an awareness that the information would be amended.[2] Lynn's claim is therefore unsupported. See, e.g., State v. Trebilcock, 184 Wn. App. 619, 632, 341 P.3d 1004 (2014) ("The record here amply demonstrates that [the defendant] wanted to waive a jury for all purposes, including determining the aggravating factors alleged, even though her waiver occurred before the information was amended to add the aggravating factors.").

Interest on Legal Financial Obligations

Lynn claims, and the State concedes, that the court erred by imposing interest on his legal financial obligations. We agree.

[2] Prior to Lynn agreeing to waive his jury right, Lynn's counsel informed the court, "in speaking with my client, what we've agreed to do on that is waive jury trial and set this one for a bench trial. And Your Honor, I believe the State is going to be amending the Information in that case to allege - to amend the assault two upward to an assault one."

"As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." RCW 10.82.090. Here, Lynn was convicted in 2019. Nonetheless, the court imposed mandatory nonrestitution legal financial obligations and provided that those obligations "shall bear interest from the date of the judgment until payment in full." This was error and the provision should be stricken. State v. Spaulding, 15 Wn. App. 2d 526, 537, 476 P.3d 205 (2020).

We affirm but remand to strike the interest provision of the judgment and sentence.

WE CONCUR:

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on November 24, 2021, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Petition for Review to the following: Mason County Prosecuting Attorney at timw@co.mason.wa.us and to Shane Lynn/DOC#310933, Airway Heights Corrections Center, PO Box 2049, Airway Heights, WA 99001.

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MARIE TROMBLEY

November 24, 2021 - 2:21 PM

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