Supreme Court No. 102544-1
(COA No. 83803-2-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CODY SHIELDS,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Cody Shields asks this Court to accept review of the Court of Appeals' decision terminating review. RAP 13.3, RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Shields seeks review of the Court of Appeals decision dated October 9, 2023.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court deprived Mr. Shields of a fair trial by improperly instructing the jury on irrelevant culpability elements.

2. Whether the government committed misconduct by diminishing its burden of proof through the improper use of the instructions on higher degrees of culpability.

3. Whether the government's failure to give notice on all the elements of the offense it intended to prove requires reversal.

4. Whether allowing the jury to know about the mother's guilty plea deprived Mr. Shields of his right to a fair trial.

D. STATEMENT OF THE CASE

Cody Shields and Brittany Daniels cared for their three-month-old son, Lucian, in their home. *Id*. at 512.[1] Mr. Shields found Lucian not breathing and tried to revive him with CPR. 6/30/21 RP 224. With no working phone, Mr. Shields used Facebook to alert Ms. Daniels, exhorting her to call 911. 7/1/21 RP 409. He told her, "He is gone. My baby is gone." *Id*.

[1] With non-sequential transcripts, the hearing date is included in the references to the transcripts.

Lucian had failed to thrive. He had gained very little weight and had fallen to the bottom four percent regarding his weight. 6/30/21 RP 306. Lucian had seen three doctors or nurse practitioners since birth. 6/30/21 RP 228, 302 (Dr. Julie Cheek), 348 (Nurse Practitioner Jennifer Elliott); 7/8/21 RP 917 (Nurse Practitioner Berke Altan). They had not noticed signs of abuse and had not told Lucian's parents they were not feeding him properly. 6/30/21 RP 311, 353; 7/8/21 RP 919.

Lucian was also cared for by his grandparents. His grandmother stated Lucian was cared for "like any other baby." 6/30/21 RP 895. She did not see anything medically wrong with him. *Id.* at 897. Lucian's grandfather made similar observations. He also described Lucian as "completely normal." 7/8/21 RP 944. A family friend of the Shields family made similar observations. *Id.* at 939.

But Lucian had trouble eating. His mother could not breastfeed him, so they turned to formula. 7/6/21 RP 526. Lucian had difficulty digesting milk-based formula, so his parents used soy-based formula. *Id.* at 518. While feeding him with a bottle, the parents alternated between holding him while feeding him and propping a bottle in his crib so that Lucian could self-feed. *Id.* at 533-34. Ms. Daniels' mother used the same methods to feed her children. 7/8/21 RP 898. Lucian's mother stated they fed Lucian about every four hours. 7/6/21 RP 624.

Lucian's parents were poor. 7/6/21 RP 518. They had a two-bedroom apartment. 6/30/21 RP 220-21. Ms. Daniels lived in one room with her two-year-old son. 7/6/21 RP 508. Mr. Shields shared the other room with Lucian. *Id.* At the time of Lucian's death, his mother worked as a bell ringer for the Salvation Army. *Id.* at

522. Mr. Shields had plans to go to Alaska for six months as a commercial fisherman. 6/30/21 RP 221.

And while Lucian's parents struggled with basic economic needs, they believed they could care for their son most of the time. 7/6/21 RP 535. The grandparents also chipped in to make sure they had food. 7/1/21 RP 425. "There was always formula on the way. It was just getting, going and getting it, finding the gas to get it, being able to just go retrieve it from wherever it was." 7/6/21 RP 519.

Like all parents, Mr. Shields and Ms. Daniels could get frustrated with Lucian. In their Facebook conversations, they struggled to keep him happy, sometimes arguing. 7/6/21 RP 577-78, 590. These messages indicated they were aware of his problems and worked to solve them. *Id.* at 590. At times, they used expletives in their private messages. *Id.* at 583.

Still, they continued to have trouble feeding him and keeping him calm. *Id.* at 599, 602.

On the day of Lucian's death, Ms. Daniels believed she fed him at around four-thirty and seven in the morning. 7/6/21 RP 565-66. She left for work around nine-forty-five. *Id.* at 567. Mr. Shields had insomnia all night and fell asleep on the couch. *Id.* at 626, 586. By the time Mr. Shields woke up, Lucian had perished. *Id.* at 570-71. Mr. Shields tried to revive him. *Id.* He had no phone but messaged Ms. Daniels, who called 911 and came home. *Id.*

Mr. Shields was distraught, weeping hysterically. 7/6/21 RP 571. The parents tried to be composed in front of other people, including the police. *Id.* at 573. They cooperated with the police, making statements when Lucian died and later. 6/30/21 RP 217, 233.

The medical examiner conducted a post-mortem examination. 7/6/21 RP 655. He described his examination as a puzzle, where sometimes pieces would be missing. 7/6/21 RP 654, 7/7/21 RP 721.The doctor nevertheless concluded Lucian died of malnourishment and dehydration and that his death was a homicide. 7/7/21 RP 738.

Mr. Shields asked medical examiner Dr. Daniel Day, from Eugene, Oregon, to provide a second opinion. 7/7/21 RP 798. Dr. Day agreed Lucian was malnourished but could not conclude that this was the cause of his death. *Id.* at 815. Evidence Lucian had not died of dehydration or starvation included the baby's full diaper, nose secretions, and sweat found on his pillow. 6/29/21 RP 76. Had he been asked to provide the post-autopsy conclusion, he would have defined the

death as Sudden Unexplained Death in Infancy Undetermined. 7/7/21 RP 841.

The government charged Mr. Shields with second-degree manslaughter. CP 5-6. The government alleged his act was criminally negligent. *Id.* No other culpability standards were alleged in the information.

The government charged Ms. Daniels with the same offense. CP 11-12. She pleaded guilty. *Id.* Before trial, Mr. Shields asked the court to exclude references to Ms. Daniels' guilty plea. *Id.* The court denied this request, allowing the government to ask her whether she resolved her case. 6/29/21 RP 21-22. Over objection, the court also instructed the jury not to consider this evidence in rendering their verdict. *Id.*

Without notice, the government asked the court to instruct the jury that criminal negligence is also proved when the government demonstrates the accused

acted intentionally, knowingly, or recklessly. 7/8/21 RP 980. Mr. Shields objected to these new elements. 7/28/21 RP 981. His most significant concern was that the government would use these greater culpability instructions to diminish its proof of criminal negligence. *Id.*

In closing arguments, the government argued the jury could find Mr. Shields committed second-degree manslaughter by finding he had greater culpability, relying on these new elements. 7/12/21 RP 1024. On this reasoning, the government then argued it could prove criminal negligence "all day." *Id.* at 1026.

The jury found Mr. Shields guilty. 7/14/21 RP 1114. The court imprisoned him for 24 months. 3/10/22 RP 1264. The Court of Appeals affirmed Mr. Shields' conviction. App. 1.

E. ARGUMENT

1. Instructing the jury on irrelevant mens rea standards deprived Mr. Shields of his right to a fair trial.

Due process requires that jury instructions be clear and do not confuse the jury. *State v. Weaver*, 198 Wn.2d 459, 465–66, 496 P.3d 1183 (2021) (citing *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009)); U.S. Const. amend. VI; Const. art. I, § 22). When the trial court instructed the jury on irrelevant instructions, it deprived Mr. Shields of his right to due process. *State v. Imokawa*, 194 Wn.2d 391, 396, 450 P.3d 159 (2019) (quoting *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)). The Court of Appeals decision affirming this error requires review because it conflicts with decisions of this Court, is a significant question of constitutional law, and is an issue that this Court should resolve. RAP 13.4(b).

When read as a whole, the constitution demands that jury instructions correctly tell the jury the applicable law, not be misleading, and allow the parties to present their case theories. *Weaver*, 198 Wn.2d at 465–66 (citing *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009)). When instructions are ambiguous, "the reviewing court cannot conclude that the jury followed the constitutional rather than the unconstitutional interpretation." *State v. McLoyd*, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997).

"The standard for clarity in a jury instruction is higher than for a statute; while we have been able to resolve ambiguous wording of [statutes] via statutory construction, a jury lacks such interpretive tools and thus requires a manifestly clear instruction." *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996)

Instructions must be manifestly apparent to the average juror. *Id.* at 900.

The only relevant mens rea element in this case was criminal negligence. CP 5-6. Including irrelevant instructions on intent, knowledge, and recklessness prevented Mr. Shields from receiving a fair trial and created confusion. *Rickert v. Geppert*, 64 Wn.2d 350, 356, 391 P.2d 964 (1964).

Second-degree manslaughter requires the government to prove criminal negligence. RCW 9A.32.070. Criminal negligence occurs when a person fails to be aware of a substantial risk that a wrongful act may occur, and their failure to be aware of the substantial risk constitutes a gross deviation from the standard of care a reasonable person would exercise in the same situation. RCW 9A.08.010.

The government asked the court to instruct the jury on the other culpability definitions. 7/8/21 RP 980. Mr. Shields objected. *Id.* at 981. The court determined it was proper to provide the jury with the unnecessary mens rea definitions. *Id.* at 982-83.

The court's decision to define the irrelevant levels of culpability prevented Mr. Shields from receiving a fair trial, as they were incorrect statements of the law and confused the jurors. *Weaver*, 198 Wn.2d at 465–66. While the higher levels of culpability can establish criminal negligence, they are not elements of second-degree manslaughter. RCW 9A.32.070. And here, the instructions only required the government to prove criminal negligence. CP 57.

The government could not articulate a legal basis for why the mens rea elements were necessary. The government reasoned that "some jurors might think

that [Mr. Shields] did something more than just negligence." 7/28/21 RP 980. But Mr. Shields was not charged with a more serious crime. Jurors often think a person accused of a crime may have done something else illegal. But this is not a reason to instruct them on offenses not charged. Instead, providing unnecessary instructions confuses the jury, making them think there is more to the case than was presented. *Weaver*, 198 Wn.2d at 465–66. This danger is eliminated when instructions are limited to the offense's elements. *Id.*

Mr. Shields objected. 7/28/21 RP 981. He told the court that the instructional error would cause the jury to think Mr. Shields could have been charged with a more serious crime. *Id.* This improper instruction would "make [the jury] feel like he is not getting away with this." *Id.*

Mr. Shields was right. The government decided to charge Mr. Shields with second-degree manslaughter, which is all it could prove. CP 5-6. Indeed, the evidence demonstrated Mr. Shields was an unsophisticated parent living in extreme poverty and doing the best he could. Mr. Shields and the child's mother were feeding their son. The only question was whether they acted negligently in feeding Lucian. 7/6/21 RP 526. The parents had taken their son to the doctor, who had not noted problems. 6/30/21 RP 302, 348; 7/8/21 RP 917. Lucian visited with other family members regularly. RP 6/30/21 RP 895; 7/8/21 RP 944. No one expressed concern. 6/30/21 RP 311, 353, 895; 7/8/21 RP 919, 944. The dispute was whether the parent's feeding of Lucian was sufficient to keep him alive or whether his death resulted from another factor. No evidence supported Mr. Shields had committed a greater offense.

The court provided the irrelevant culpability instructions. 7/28/21 RP 982. To justify its decision, the court believed the commentary on WPIC 10.04 allowed it to offer the other culpability levels. *Id.* (citing WPIC 10.02). But WPIC 10.02 commentary does not discuss criminal negligence. It was unreasonable to rely on this commentary to allow the irrelevant culpability instructions.

Nor should this Court be persuaded that RCW 9A.08.010 provides that proof of a greater degree of culpability can establish criminal negligence. Jury instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Corn*, 95 Wn. App. 41, 52–53, 975 P.2d 520 (1999). Giving irrelevant jury instructions does not assist the jury in deciding whether the government proved its case. Instead, they operate to confuse the jury about what it

needs to find to be proven to have found Mr. Shields guilty beyond a reasonable doubt. *Id.*

The Court of Appeals found no error in this instruction, but this Court should not be persuaded. Instead, this Court should accept review because the trial court committed error and because this error cannot be found harmless beyond a reasonable doubt. *Brown*, 147 Wn.2d at 341 (citing *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

This case was heavily disputed. The medical examiner admitted he did not have all the pieces of his "puzzle." 7/7/21 RP 771. Mr. Shield's medical examiner saw the problems in the government's case. *Id.* at 841. He agreed Lucian was malnourished but described this condition as a failure to thrive. *Id.* at 817.

Likewise, the testimony from others did not demonstrate clarity. Certainly, Lucian's death was not intentional. The grandparents cared for Lucian and did not alert authorities. 6/30/21 RP 895; 7/8/21 RP 944. Three doctors examined the baby without reporting malnourishment. 6/30/21 RP 302, 348; 7/8/21 RP 917. The messages between the parents demonstrated they cared for their child. 7/6/21 RP 590. In Mr. Shield's last message to Lucian's mother, his distraught was evident. 7/1/21 RP 409. The death was not intended.

But when the jury was instructed on the more serious levels of culpability, the lower degree became easier to prove. Indeed, the government focused on this in closing, stating it could prove negligence "all day." 7/12/21 RP 1024. Had the jury not been informed the prosecutor also believed he was guilty of the higher

degrees of culpability, they would have been less inclined to find Mr. Shields criminally negligent.

The Court of Appeals was critical of the failure to cite to caselaw on why jurors should only be instructed on the elements of an offense. App. 7. But this Court and the Court of Appeals decisions are rich in why instructions must be manifestly apparent to an average juror. *State v. Ackerman*, 11 Wn. App. 2d 304, 312-13, 453 P.3d 749 (2019); *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). This Court has been clear that a conviction must be reversed where the instructions confuse the jurors. This Court should accept review of this issue, which meets the requirements of RAP 13.4(b).

2. The government's use of the mens rea instructions to diminish its burden constituted misconduct.

In a footnote, the Court of Appeals determined it would not review the misconduct issue despite the objections below and its independent status from the instructional error. App. 8, fn. 6. Regardless of whether this Court accepts review of the instructional error, it should review the misconduct. RAP 13.4(b). While this error intertwines with the trial court's error, it is independent from that error and otherwise meets the standards for review.

A prosecutor commits misconduct by misstating or trivializing the government's burden of proof. *State v. Allen*, 182 Wn.2d 364, 373-74, 341 P.3d 268 (2015). The government shifted the burden of proving criminal negligence beyond a reasonable doubt when it argued it only needed to prove the reduced level of culpability,

which it could do "all day." *State v. Lindsay,* 180 Wn.2d 423, 434, 326 P.3d 125 (2014).

"Arguments by the prosecution that shift or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct." *Lindsay*, 180 Wn.2d at 434. A prosecutor's arguments are improper if they discuss the reasonable doubt standard in a way that "trivialize[s] and ultimately fail[s] to convey the gravity of the State's burden and the jury's role in assessing the State's case." *State v. Johnson*, 158 Wn. App. 677, 684, 243 P.3d 936 (2010) (quoting *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010)).

As Mr. Shields predicted, the government used the court's instructions to shift and reduce its burden of proof. 7/12/21 RP 1026. After addressing criminal

negligence, the government improperly shifted to other levels of culpability. *Lindsay*, 180 Wn.2d at 434.

The government told the jury that "there are some reasons why we might think that the defendant did this intentionally." 7/12/21 RP 1027. Then, the prosecutor argued the conduct could have been committed with knowledge, arguing the jury could "believe that [Mr. Shields] knew the result of his acts or lack of action happened then he acted knowingly." 7/12/21 RP 1027. The prosecutor further argued that Mr. Shields' conduct met the definition of recklessness. 7/12/21 RP 1028.

After arguing there was evidence that Mr. Shields acted with more culpable mental states, the prosecutor stated, "He was knowing and all in all the mens rea intent element of criminal negligence is clearly, clearly presented." 7/12/21 RP 11028. And all

the prosecution needed to do prove was the lowest culpability level. *Id.* at 1026.

This Court can look to *Allen* for guidance. 182 Wn.2d at 369. In *Allen*, the prosecutor misstated the law of accomplice liability. Like the misconduct in *Allen*, this argument was subtle yet critical. *Id.* at 374. Arguing the government could prove a higher level of culpability showed that there was no question it had proved criminal negligence. 7/12/21 RP 1024. Like *Allen*, the statement was improper. *Id.* at 375.

A prosecutor may not "convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant" because the defendant has the "right to be tried solely on the basis of the evidence presented to the jury." *United States v. Young*, 470 U.S. 1, 18, 105 S. Ct. 1038, 1048, 84 L. Ed. 2d 1 (1985). Following the law

is difficult for jurors in hard cases, which is why courts must be highly diligent in preventing misconduct. Here, the government took advantage of the emotional state of the jurors. They could reconcile their decision to find Mr. Shields guilty of second-degree manslaughter, even if the evidence did not support the charge. This error, unaddressed by the Court of Appeals, requires review.

3. The government failed to give notice it intended to prove greater culpability than necessary to prove manslaughter.

The Court of Appeals determined that the failure of the government to give notice it intended to argue additional elements did not require reversal. App. 8. Mr. Shields argued this process was improper at trial, and it remains so now. Review should be granted because this issue involves a significant question of

constitutional law and an issue that this Court should resolve. RAP 13.4(b).

Individuals have the constitutional right to know what charges have been brought against them. U.S. Const. amend. VI; Const. art. I, § 22. An information is "a plain, concise and definite written statement of the essential facts constituting the offense charged," and it provides the defendant with notice of the charges. CrR 2.1(a)(1). Every essential element of the crime must be set forth in the information. *State v. Pry*, 194 Wn.2d 745, 751, 452 P.3d 536 (2019).

A crime's essential elements are the facts that must be proved "to establish the very illegality" of the defendant's conduct. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). "[E]very fact necessary to constitute the crime with which [the defendant] is

charged" is an essential element. ***In re Winship***, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L. Ed. 2d 368 (1970).

Here, the government provided Mr. Shields with notice it intended to prove criminal negligence. CP 5-6. The information did not state the government intended to prove greater intent elements. *Id.* Mr. Shields prepared a defense based on the government's information.

At trial, the government went beyond the elements in the information. At the jury instructions conference, the government argued it intended to show Mr. Shields had greater culpability than necessary to prove second-degree manslaughter. 7/8/21 RP 980. Mr. Shields objected, arguing this gave the government an unfair advantage. *Id.* at 981. The court overruled the objection.

In closing, the government argued Mr. Shields may have acted intentionally, with knowledge, or recklessly. *Id.* at 982-83. No notice had ever been given to Mr. Shields of this argument. Mr. Shields was unprepared to argue against these new allegations. The evidence he presented at trial focused on criminal negligence, including using a medical expert, a nurse practitioner, and Mr. Shields' father. 7/7/21 RP 798; 7/8/21 RP 930, 940.

If the government had given Mr. Shields notice it intended to argue higher levels of culpability, his defense would have been different. Had the government restricted its argument to criminal liability, failing to provide notice of the higher degrees of culpability would not have been a problem. While there may be circumstances where this is permissible, such as when second-degree manslaughter is a lesser

included of a greater offense, it is always improper when the government fails to give notice of an element it intends to prove at trial. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). And here, the government failed to notify Mr. Shields of its intent to prove these essential elements. This Court should take review.

4. The court's error in allowing the jury to know Ms. Daniels pleaded guilty deprived Mr. Shields of his right to a fair trial.

"A defendant is entitled to have the question of his guilt determined upon the evidence against him, not on whether a co-defendant or government witness has been convicted of the same charge." *United States v. Ofray–Campos*, 534 F.3d 1, 22-23 (1st Cir.2008) (internal citations omitted); U.S. Const. amend. VI; Const. art. I, § 21.

The Court of Appeals found no error and, if there was error, that it was harmless. This Court should accept review of the in allowing the jury to learn Ms. Daniels resolved her case. 6/29/21 RP 21-22. This error unfairly prejudiced Mr. Shields and, in this highly emotional case, deprived Mr. Shields of his right to a fair trial. This Court should accept the Court of Appeals decision to the contrary for review, as it satisfies the requirements of RAP 13.4(b).

Prior convictions are generally inadmissible because of their highly prejudicial effect. *State v. Hardy*, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997). The potential for prejudice is present where evidence of a co-conspirator's conviction is admitted for substantive purposes. *See United States v. Blevins*, 960 F.2d 1252, 1260–62 (4th Cir.1992). This error may cause the jury to abdicate its duty and "regard the issue of the

remaining defendant's guilt as settled and the trial as a mere formality." *United States v. Griffin*, 778 F.2d 707, 711 (11th Cir.1985). "There is no need to advise the jury or its prospective members that someone not in court, not on trial, and not to be tried, has pleaded guilty. The prejudice to the remaining parties who are charged with complicity in the acts of the self-confessed guilty participant is obvious." *States v. Hansen*, 544 F.2d 778, 780 (5th Cir.1977).

Mr. Shields moved to exclude references to Ms. Daniels' guilty plea because of its prejudicial effect. 6/29/21 RP 19. Instead, the court held it would be "inappropriate for this witness -- the witness not to be able to talk about her resolving her case." 6/29/21 RP 21.

Ms. Daniel's resolution was one of the first questions asked by the prosecutor. 7/6/21 RP 502. Mr.

Shields objected. *Id.* at 502, 540. The court again overruled the objection. *Id.*

First, this Court should review whether Ms. Daniels' decision to resolve her case was relevant to Mr. Shield's case, which it did not. ER 401. Here, where Ms. Daniels was not being impeached as a cooperating witness, it had no bearing on her credibility. ER 609(a)(1).

Recognizing the lack of relevance, the court instructed the jury that it was not relevant. CP 55. Examining the court's decision to admit this evidence and then instructing the jury to disregard it is problematic.

Moreover, this mistake was enormously prejudicial to Mr. Shields. The trial court recognized its emotional troubles with this case. 6/28/21 RP 9. The jurors would have had the same feelings and, unlike

the judge, would have lacked the training to put aside their emotions. The prejudicial effect of informing the jury that Ms. Daniels resolved her case outweighed any probative value of this fact.

This Court can look at a similar analysis in *State v. Johnson*, 152 Wn. App. 924, 930, 219 P.3d 958 (2009). *Johnson* involves the court's error in allowing an out-of-court statement from the defendant's wife that was entirely collateral. *Id.* at 933. It shed "no light" on the witness's credibility or the evidence before the jury and was highly prejudicial because it came from the defendant's wife. *Id.*

It would have been impossible to separate culpability between the parents. Mr. Shields co-parented with Ms. Daniels. 7/6/21 RP 512. They shared a home. *Id.* And by example, Ms. Daniels' family argued at sentencing that Mr. Shields should go to

prison, arguing that it was only fair that the parents receive similar punishment. 3/10/2022 RP 1242-43. Surely, the jury reached the same conclusion in this highly emotional case.

"When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583 (2010) (*citing State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995)). Knowing that Ms. Daniels decided to resolve her case had to have impacted the jury's decision on Mr. Shields' guilt, regardless of the court's attempt to mitigate its effect. The court's limiting instruction showed this evidence was irrelevant and thus served only to inflame the jury. The jury should never have learned about Ms. Daniels' decision to resolve her case. This Court should review this error.

F. CONCLUSION

Based on the above, Mr. Shields asks this Court to grant review. RAP 13.4(b).

This petition is 4,428 words long and complies with RAP 18.7.

DATED this 8th day of November 2023.

Respectfully submitted,

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. CODY JAMES SHIELDS, Appellant, BRITTANY SHANE DANIELS, Defendant.	No. 83803-2-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — Cody James Shields appeals his jury conviction for second degree manslaughter of his infant son. Shields argues that the trial court erred by instructing the jury that the State can prove criminal negligence by establishing a person acted intentionally, knowingly, or recklessly, that the State's charging document was deficient, and that the court erred by allowing irrelevant testimony. We affirm.

FACTS

On August 25, 2015, Lucian was born to 23-year-old Shields and 21-year-old Brittany Shane Daniels. At the time, Daniels and Shields shared a home with B.D., Daniels' 2-year-old child from a prior relationship. Shields and Daniels used separate bedrooms, and B.D. slept with Daniels in her room while Lucian slept in Shields' room. Shields mostly slept on the couch in the living room. He

had trouble sleeping and often stayed up at night playing video games and watching television. He would then sleep for several hours during the day while Daniels was at work.

Daniels breastfed Lucian for the first month of his life but then had to move to bottle feeding. She and Shields had trouble feeding Lucian, who often cried for long periods and took "upwards of 45 minutes to just finish five to six ounces of formula." Lucian would sometimes go unfed for up to eight hours and had infrequent bowel movements every few days. Shields ignored Lucian's cries and often drowned them out by wearing headphones while playing video games.

In late October 2015, Daniels had two major surgeries, and Shields became Lucian's primary caregiver. Shields grew frustrated with Lucian and often left the child alone in his bedroom with a bottle propped on a rolled-up blanket. Shields knew that the bottle would fall from Lucian's mouth if he moved but left the infant unsupervised with a bottle for hours.[1] In the weeks before Lucian's death, Shields and Daniels exchanged several Facebook messages in which Shields expressed his anger and frustration toward Lucian. Shields described Lucian as "being a dick," that he was "annoying" and needed to "[s]hut the fuck up," and that Shields did not "give a fuck" if he killed Lucian.

On December 7, 2015, Shields stayed up "the entire night" playing video games and watching television. Daniels fed Lucian in the bathroom at about 4:30 a.m. on December 8, unaware that Shields was still awake in the living

[1] At least one of the bottles that Shields and Daniels regularly used to feed Lucian had "a gaping hole" in the nipple.

room. She then went back to bed. Shields claims he fed Lucian in his bedroom at about 7:00 a.m. by propping a bottle in front of him with a blanket. Shields then returned to the living room and fell asleep on the couch. Daniels got up at about 9:30 a.m. and quickly left for work because she was "running late." She saw Shields asleep on the couch when she left.

Shields woke up at 2:00 p.m. but did not check on Lucian. Instead, he "found [B.D.] playing in his bedroom" and the two watched cartoons in the living room for another three hours. Shields finally checked on Lucian at 5:00 p.m. and found him dead in his bassinette. Shields started CPR[2] and contacted Daniels by Facebook message instead of calling 911 because he had no working phone. Daniels then called 911 and police responded to the home.

Whatcom County Medical Examiner Dr. Gary Goldfogel conducted Lucian's autopsy on December 9, 2015 and issued an autopsy report on January 20, 2016. He concluded that Lucian died of chronic malnutrition and dehydration. On February 22, 2016, the State charged Shields and Daniels with second degree manslaughter.

In December 2019, Daniels pleaded guilty as charged and started serving her sentence the next month. Before his trial, Shields moved to exclude evidence of Daniels' guilty plea, arguing that it was irrelevant under ER 402. The State argued that it was "permitted to inquire of the co-defendant witness as to the plea agreement she entered into because her decision to plead guilty to the

[2] Cardiopulmonary resuscitation.

related charge is relevant to her credibility." The court denied Shields' motion, ruling that "it would be inappropriate for this witness . . . not to be able to talk about her resolving her case." The court also ruled Daniels should not use "the word 'guilty' " during her testimony, but she could say she "resolved her case."

Shields' jury trial began in June 2021. The State admitted several of the Facebook messages between Shields and Daniels to show that Shields neglected Lucian's care. The State also called Dr. Goldfogel, who testified about his January 2016 autopsy report.

Dr. Goldfogel testified that he has conducted "thousands" of autopsies in his 33 years as medical examiner, including "[h]undreds" of infants, and this "was a very memorable autopsy for him" because it was "quite abnormal." He noted that Lucian weighed 8.6 pounds at birth and 9.45 pounds at death. Lucian should have been over 15 pounds but gained only 1 pound over the course of his three-month life, showing he was "a starved child." Dr. Goldfogel testified that Lucian also was "not growing" in length and dehydrated. His "entire [gastrointestinal] tract [was] empty," which was "highly unusual." Dr. Goldfogel found Lucian was otherwise "physically, anatomically normal" with no signs of blunt force trauma, disease, or infection, supporting the conclusion that Lucian's cause of death was "specifically [chronic] malnutrition and dehydration, neglect of ordinary care of [an] infant," and that "the manner of death [was] homicide."

At the close of trial, the court instructed the jury that to find Shields guilty of second degree manslaughter, the State must prove:

> (1) That between the dates of August 25, 2015 and December 8, 2015, the defendant engaged in conduct of criminal negligence; [and]
> (2) That [Lucian Shields] DOB: 8/25/2015, died as a result of defendant's negligent acts.

The State asked the court to also instruct the jury that "[w]hen criminal negligence as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally, knowingly or recklessly as to that result." And it requested that the court include instructions on the definitions of the mental states "intentional," "knowing," and "reckless." Shields objected to the instructions, arguing that they were "confusing to the jury as to what is the mens rea when we are telling them a negligent act but then we start throwing in other mens rea." The court gave the State's proposed instructions.

On July 14, 2021, the jury convicted Shields as charged. The court sentenced him to 24 months in custody followed by 18 months of community supervision.

Shields appeals.

ANALYSIS

Shields argues that the trial court erred by instructing the jury that the State can prove criminal negligence by establishing a person acted intentionally, knowingly, or recklessly, that the State's charging document was deficient, and that the trial court erred by allowing irrelevant testimony.

Jury Instructions

Shields argues that the court erred by instructing the jury that criminal negligence is established when a person acts intentionally, knowingly, or recklessly, "none of which were elements of the charged offense." We disagree.

We review the adequacy of jury instructions de novo. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Jury instructions are sufficient "if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law."[3] State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). We also review issues of statutory interpretation de novo, looking to a statute's plain language and meaning as an expression of legislative intent. State v. Velasquez, 176 Wn.2d 333, 336, 292 P.3d 92 (2013). We discern a statute's plain meaning from the text of the provision, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013).

RCW 9A.08.010(1) establishes and defines a hierarchy of culpable mental states, ranging from "intent" and "knowledge" to "recklessness" and "criminal negligence." Proof of a higher mental state is necessarily proof of a lower mental state.[4] State v. Acosta, 101 Wn.2d 612, 618, 683 P.2d 1069 (1984), abrogated on other grounds by State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989);

[3] Shields argues only that the instructions are an incorrect statement of the law. So, we do not address the first two factors.

[4] This principle holds true so long as the mental states are evaluated with respect to the same fact. See State v. Goble, 131 Wn. App. 194, 202-03, 126 P.3d 821 (2005).

RCW 9A.08.010(2). As a result, when a statute provides that the State must establish "criminal negligence" as an element of an offense, "such element also is established if a person acts intentionally, knowingly, or recklessly." RCW 9A.08.010(2).

The State charged Shields with second degree manslaughter in violation of RCW 9A.32.070. The court instructed the jury that to convict Shields of second degree manslaughter, the State must prove that Shields "engaged in conduct of criminal negligence," and that Lucian "died as a result of [Shields'] negligent acts." See RCW 9A.32.070(1). At the State's request, the court also instructed the jury:

> When criminal negligence as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally, knowingly or recklessly as to that result.

And the court defined each of the culpable mental states of intentional, knowing, and reckless.

Shields argues that providing "all the definitions of culpability was not a correct statement of the law." He suggests the instructions were appropriate only if the State also charged Shields with an offense for which he must form a higher culpable mental state; "[f]or example, where the government has alleged a higher degree of homicide." But Shields cites no authority in support of his argument. So, we presume that " 'after diligent research,' " he found none. See State v. Arredondo, 188 Wn.2d 244, 262, 394 P.3d 348 (2017)[5] (quoting State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978)); see also RAP 10.3(a)(6).

[5] Internal quotation marks omitted.

In any event, Shields' argument conflicts with the plain language of the statute. RCW 9A.08.010(2) is titled "Substitutes for Criminal Negligence" and provides that the element of criminal negligence "also is established" if a person acts intentionally, knowingly, or recklessly. The statute does not limit the concept to those cases in which the State also charges the defendant with a more serious crime.

Shields fails to show the court committed instructional error.[6]

Charging Document

Shields argues that the trial court "deprived [him] of a fair trial by instructing the jury on elements of culpability not contained in the information or required to prove the charged offense." We disagree.

A criminal defendant has a constitutional right to notice of the alleged crime the State intends to prove. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. The State provides notice through the information. State v. Kosewicz, 174 Wn.2d 683, 691, 278 P.3d 184 (2012). The State must include all essential elements of an alleged crime in the information to apprise the defendant sufficiently of the charges against him so that he may prepare a defense. Id. (citing State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991)). But "[t]he State need not include definitions of elements in the information." State v. Johnson, 180 Wn.2d 295, 302, 325 P.3d 135 (2014).

[6] Shields also argues that the prosecutor committed misconduct in closing argument by arguing that Shields' conduct satisfied a higher culpable mental state. But a prosecutor's statement does not amount to misconduct when it is an accurate statement of the law and accords with the jury instructions. See State v. Anderson, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009).

When, as here, a defendant challenges the sufficiency of an information for the first time on appeal, we apply the liberal construction rule. State v. Brown, 169 Wn.2d 195, 197, 234 P.3d 212 (2010) (citing Kjorsvik, 117 Wn.2d at 102). Under that rule, we determine (1) whether the essential elements of the crime appear in any form or can be found by any fair construction in the information and, if so, (2) whether language in the document actually prejudiced the defendant. Id. at 197-98. In applying the liberal construction rule, we construe the charging document liberally in favor of validity. Id. at 197.

Here, the State provided Shields with notice of each essential element of second degree manslaughter in the information. The charging document reads:

> That on or about . . . August 25, 2015 to December 8, 2015, the said defendants, CODY JAMES SHIELDS, and BRITTANY SHANE DANIELS, and each of them, then and there being in said county and state, with criminal negligence, did cause the death of another person, to-wit: Lucian Shields, in violation of RCW 9A.32.070, which violation is a class B felony.

Shields argues the information is deficient because it does not explain that the State planned to show that he acted with intent, knowledge, or recklessness. But these higher culpable mental states are not elements of second degree manslaughter. See RCW 9A.32.070. Instead, they are states of mind that also establish "criminal negligence"—an element of manslaughter. RCW 9A.32.070(1); RCW 9A.08.010. And the State was not required to define what amounts to criminal negligence in its charging document. Johnson, 180 Wn.2d at 302.

The information was not deficient.

Irrelevant Testimony

Shields argues that the trial court erred by "permitting the jury to learn that Ms. Daniels resolved her charges relating to the death of their son." Shields claims the testimony was irrelevant and prejudicial. While we agree the testimony specific to Daniels' case may not have been relevant, any error in allowing the testimony was harmless.

Trial courts determine whether evidence is relevant and admissible, and we review the court's rulings for abuse of discretion. State v. Brockob, 159 Wn.2d 311, 348, 150 P.3d 59 (2006). Evidence is "relevant" if it tends "to make the existence of any fact . . . of consequence to the determination of the action more . . . or less probable." ER 401. The threshold to admit relevant evidence is very low. State v. Briejer, 172 Wn. App. 209, 225, 289 P.3d 698 (2012). Even minimally relevant evidence is admissible. Id.

A defendant may impeach a witness on cross-examination by referencing any agreements or promises made by the State in exchange for the witness' testimony. State v. Ish, 170 Wn.2d 189, 198, 241 P.3d 389 (2010). Evidence of plea agreements allows the jury to be privy to any possible bias a witness may have in testifying against a defendant. State v. Farnsworth, 185 Wn.2d 768, 781-82, 374 P.3d 1152 (2016); State v. Jessup, 31 Wn. App. 304, 316, 641 P.2d 1185 (1982). The right of cross-examination guarantees the defendant an opportunity to show specific reasons why a witness testifying under a plea bargain might be biased in a particular case. State v. Portnoy, 43 Wn. App. 455, 461, 718 P.2d 805 (1986). And the State may elicit testimony about a witness'

plea agreement in its case-in-chief to " 'pull the sting' of the defense's cross-examination." State v. Bourgeois, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997).

The State argues it properly elicited testimony from Daniels about the resolution of her criminal case to "pull the sting" from the inevitable cross-examination challenging her credibility. But nothing in the record suggests that Daniels agreed to testify in return for a favorable plea agreement. Indeed, she pleaded guilty as charged and began her prison sentence in January 2020, over a year before Shields' trial. So, the danger of bias central to a witness testifying in exchange for leniency is not present here, and there was no "sting" for the State to pull from cross-examination.

Even so, any error in permitting Daniels' testimony was harmless. Evidentiary error is grounds for reversal only if it results in prejudice. Bourgeois, 133 Wn.2d at 403. An error is prejudicial if within reasonable probabilities, had the error not occurred, the trial's outcome would have been materially affected. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). Here, the trial court told the jury that in its determination of Shields' guilt, it should disregard Daniels' statement about resolving her case. The court instructed the jury that "[y]ou have heard evidence that Brittany Daniels has resolved her involvement in the matter. That evidence shall not be considered when rendering a verdict." We presume that juries follow the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

In sum, the trial court did not err by instructing the jury that proving intentional, knowing, or reckless conduct satisfies the criminal negligence mental

state, the State's charging document was not deficient, and Shields suffered no prejudice from the trial court allowing Daniels' testimony. We affirm his conviction.

Brunner, J.

WE CONCUR:

Díaz, J.

Bilk, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83803-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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