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COA No. 71449-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN HUBBARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Ken Schubert

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Kevin Hubbard's trial on three charges of attempted first degree murder by shooting, the State's chief witness, James "Jesse" Henderson, testified without swearing to tell the truth in court.

2. The trial court erroneously permitted a police detective, who was not an expert and whose testimony was without foundation, to testify regarding his analysis of cell phone tower location data to track the whereabouts of individuals' cell phones.

3. The trial court erred in denying Mr. Hubbard's request to present evidence of other suspects.

4. The trial court erroneously instructed the jury on accomplice liability, for which the evidence was insufficient to warrant the instruction, or to support guilt.

5. The trial court erred in ruling that the offense of first degree assault categorically could not be a lesser offense of attempted murder, and in refusing Mr. Hubbard's request that the jury be instructed on assault as a lesser crime.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence Rule 603, the Fourteenth Amendment's Due Process clause, and the State Constitution require that witnesses

swear to tell the truth. When the State's chief accusing witness, James "Jesse" Henderson, testified without swearing to tell the truth in court, was this manifest constitutional error under RAP 2.5(a)? Does the error require reversal where Henderson's testimony was essential to the State's case?

2. Detective James Hughey was not an expert on the analysis of cell phone tower records and their supposedly reliable use to locate the positions of cell phones, and therefore the locations and path of travel of the defendant and James Henderson after the shooting. Was the detective erroneously permitted to testify where he was not an expert, and his testimony was without foundation? Where this evidence was used to contradict Mr. Hubbard's account of his conduct on the night of the shooting, and to support the claims of the State's key witness, James Henderson, is reversal required?

3. Mr. Hubbard would have been able to elicit admissible evidence that a third person, known as "Lil Hev," had the opportunity and the motive to commit the offenses. Did the court err and violate Mr. Hubbard's right to present a defense by excluding this evidence?

4. The State's opening statement asserted that the prosecution would prove that Kevin Hubbard was the person in the

grainy security video who appeared to be perpetrating the shooting of the three victims. Then, in closing argument the State contended that Mr. Hubbard could be found guilty, as an accomplice, if the jury believed he was the other person in the video, who runs away when the shooting commences. Where this person did nothing more than be present at the time of the crime, was the jury erroneously instructed on accomplice liability, in the absence of evidence adequate to merit the instruction, and is reversal required where the evidence was insufficient to convict under that theory of guilt?

5. The question whether an offense is legally a lesser-included crime of a greater offense must be assessed based on how the greater offense was charged and purported to be proved. Did the trial court err in ruling that the offense of first degree assault categorically could not be a lesser offense of attempted murder? Where the jury could rationally have concluded that the shooter only intended to cause great bodily harm, should the jury have been instructed on first degree assault on all three counts?

C. STATEMENT OF THE CASE

1. <u>Shooting incident</u>. On January 28, 2012, Seattle Police officers responding to calls to 911 arrived at a parking lot across the

street from the Citrus Lounge, a nightclub in the south Lake Union area. 6RP 673, 679-87, 719. A large crowd, mostly of patrons from the Lounge, was gathered around the area of three apparent gunshot victims lying on the ground in the parking lot of the Fred Hutchinson Cancer Center. 6RP 673, 679, 682-87; 7RP 846, 851. The persons who were shot were three young African-American males -- Zealand Adams, Rommie Bone, and Daniel Wilson; they were transported to Harborview Medical Center where they survived, with serious injuries. 7RP 860-867; 12RP 1473-77; 16RP 1942.

Officers investigating the shooting discovered that several vehicles in the parking lot, including victim Zealand Adams' Dodge Magnum, had bullet holes in them, and numerous shell casings were recovered from the ground. The shell casings indicated that the three injured men had been shot with an assault rifle. In addition, other spent shells showed that one or more of the victims had also been firing handguns. 7RP 798, 801. Some time after the shooting, when emergency personnel had already responded, a man in a white T-shirt was seen searching under the Dodge Magnum, and then throwing a handgun into the bushes. 11RP 1279-78. One of the responding police detectives found two handguns inside that

vehicle, a .40 caliber and a 9mm Desert Eagle. 13RP 1681, 1693.

2. Security videotapes. The crowd from the Citrus Lounge was uncooperative, and police could not determine how the gun battle had started. However, security videotapes from the Citrus Lounge and the nearby Cancer Center were obtained. 9RP 1076, 1099-1100. The videos appeared to show the shooting incident in footage that was grainy and indistinct, and in which the only individuals who could be reliably identified were the shooting victims, who observed and identified themselves on the tapes later in the investigation. 19RP 2386-91.

The Cancer Center videos appear to show two people involved in the lead-up to the assault rifle shooting. Although they could not be identified, they appeared to be males. 19RP 2391-95. The video appeared to show these two individuals exit a white Lexus SUV, and walk northbound on Yale Avenue N. toward the area of the Dodge Magnum. The two persons seem to stop near a retaining wall with bushes on it, adjacent to where the Dodge is parked. After Rommie Bone is seen entering the Dodge, and Wilson and Adams are seen walking up to it, one of the persons appears to be aiming a rifle at the victims and shooting. 19RP 2396-99.

Just as the shooting commences, the other person, who does not have a firearm, walks and then runs southbound out of the area, while the perpetrator remains. Several police officers testified that the location of many of the bullet casings, and the nature of the bullet damage, showed that the shooter was moving as if to aim purposefully at the individuals. 6RP 719, 728-31; 11RP 1323, 1346-53. However, a number of witnesses indicated that the crowd at the scene, and the responding emergency personnel, kicked a lot of the physical evidence around the parking lot before it could be located and mapped. 11RP 1236, 1245. One police officer referred to the medical personnel as the "crime scene destruction team." 16RP 2045.

An additional video from the Cancer Center, from some minutes earlier, appeared to show the two persons arriving at the parking lot, in a white four-door SUV, and then stepping out of that vehicle and walking toward the area of the shooting. The driver appears to retrieve something from the vehicle after he exits it and before walking toward where the shooting occurs. 20RP 2489-90.

3. <u>The Citrus Lounge</u>. Managers and employees of the Citrus Lounge indicated that there had been a large fight in the bar

area of the Lounge in the time prior to the shooting incident outside. 10RP 1195-98. However, the fight apparently involved a group of older men in the bar. 11RP 1268. The Citrus manager confirmed that the fighting involved older gentleman, one of whom was harassing a coat check girl. 13RP 1542-51. A security videotape from the interior of the Citrus Lounge appeared to show some minor physical altercation near the doorway preceding the shootings. It appeared someone was briefly punched. 13RP 1577-78; 20RP 2477. Kevin Hubbard explained to police, when he was interrogated some months later by Seattle police detective Benjamin Hughey, that he had been punched randomly by a Citrus patron after a scuffle had broken out. 23RP 2763-64.

Kevin had arrived at the Citrus with an acquaintance, James "Jesse" Henderson, who he had driven to the Citrus Lounge in a borrowed white four-door Lexus SUV. 23RP 2762-63. After this minor scuffle, Kevin left the Citrus Lounge and drove down to Tacoma, where the mother of his child was giving birth. While at the hospital, Kevin heard about the shooting from her, and from friends who had been at the Citrus. 23RP 2764-65.

During the investigation revealed in the affidavit of probable

cause, Zealand Adams told Detective Hughey that there had been an altercation in the Citrus Lounge's bar area that evening, including punches and a chair being thrown, and afterward he and his two friends were shot by an unknown male with an assault rifle. CP 8. However, Zealand Adams did not testify at trial. It turned out that Adams' DNA was located on a Hi-Point pistol, which was yet another handgun found at the scene of the shooting, and may have been the one seen being tossed away from under the Dodge Magnum. 13RP 1611. Rommie Bone testified he had no idea who fired the rifle. 3RP 321.

Daniel Wilson told the jury that he and his friends went to the Citrus Lounge nightclub after being at Freddie's Casino. At some point he got in trouble with the bouncer. When he, Adams, and Bone walked out to Adams' Dodge Magnum, they were shot, and all he saw was a muzzle flash. 8RP 889, 933-337. Daniel Wilson did not know, and had never met, the defendant Kevin Hubbard. 8RP 952.

Khris Wilson, Daniel's brother, confirmed that Daniel was involved in some commotion at the Citrus Lounge bar, and then was told by the bouncer to leave. 8RP 982, 998-1005.

4. <u>Investigation and trial</u>. Detective Hughey was told by

Khris, who was also a witness to the events, that he had heard on the street that one of the shooters might be a person with the nickname "B-12," who the detective knew from his gang unit work to be Benjamin Palmer. CP 8-9. Zealand Adams did not pick Palmer from a montage he was shown. However, Adams, Daniel Wilson, and Khris Wilson had also heard that a person who went by the name "Lil Hev" was the shooter. CP 9. When shown a photo of this individual, one Daunte Williams, victim Adams thought that he recognized this person as one of the shooters. Daniel Wilson confirmed his belief that this person was at the Citrus Lounge that night. CP 9. However, the court denied Mr. Hubbard's effort to bring in "other suspect" evidence at his trial. CP 138-42; 2RP 230-32.

Later in the investigation, a confidential informant stated that the shooters were James Henderson and Kevin Hubbard, and the police determined that this was the route of investigation they would follow. 13RP 1663-64.

Some months after the shooting, an AK-47 rifle, that had been purchased as part of a federal gun investigation called Operation Used Car, was transferred to the Seattle Police. Forensic analysts determined that it had been the gun used to fire the multiple rifle

bullets in the parking lot. 12RP 1457-58; 13RP 1645-50. Police arrested Joshua Dawson and James "Jesse" Henderson in connection with the rifle. 12RP 1467-71.

Henderson was arrested as part of a federal investigation on April 17, 2012. Detective Hughey arranged to interrogate him regarding the Citrus Lounge incident, and told Henderson that he had been connected to the incident via the rifle. After being told that he was facing 90 years in prison, Henderson stated that he was one of the two persons visible in the security video footage, and asserted that Kevin Hubbard was the other person. 14RP 1822, 1832; 14RP 1817; 21RP 2620-23. According to Henderson's story, and the later trial testimony that secured a misdemeanor conviction for him instead of 90 years, Mr. Hubbard had driven Henderson to Seattle, and there had been fighting just before the shooting, inside the Lounge. 14RP 18-32-33. After the scuffle at the Citrus, Henderson claimed, he and Hubbard drove the Lexus SUV across the street, and Kevin Hubbard allegedly took an assault rifle from the car, which he used to shoot at Wilson, Adams, and Bone. Henderson then claimed that he and Hubbard had driven southbound out of the area after the shooting. 21RP 2636-45.

The prosecution also relied on a recording taken by a confidential informant ("CI") outside a nightclub called BB Magraws, in which Henderson told the CI that the Citrus Lounge shooter was the person inside. Surveillance detectives said that Henderson was referring to Kevin Hubbard. 13RP 1669-73; 14RP 1799-1802; 21RP 2570-77; Supp. CP ___, Sub # 116 (Exhibit list - Exhibit 57). On cross-examination, Henderson said that he never indicated to the CI that he was saying Kevin Hubbard was the shooter. 14RP 1832-33. In fact, Detective Hughey was compelled to reveal that the CI told him that Mr. Henderson told him that he had "pulled out a firearm and shot down three or four people with a whole bunch of bullets." 23RP 2753.

Later, after arresting Kevin Hubbard, Detective Hughey interrogated him. The detective told Kevin that his DNA was on the assault rifle that police had located. 23RP 2771; see State's exhibit 105 (transcript of interrogation). In fact, the forensic DNA analyst would later testify at trial that all she could say was that Mr. Hubbard could not be eliminated from a hypothetical group of 50 percent of the entire population, any of whom could also not be eliminated as having left minor DNA trace evidence on the rifle. 13RP 1580, 1604-

18. Neither Joshua Dawson, nor Henderson nor "Lil Hev" was ever tested to determine if their DNA was on the rifle. 13RP 1637.

Kevin, who said that he did know James Henderson, told Detective Hughey that he must have been around the rifle at some point, but he had nothing to do with the shooting. 23RP 2768, 2771. Kevin readily admitted that while he was in the Citrus Lounge, someone had tried to rip his friend Kennan's gold chain off his neck, and this person tried to punch him. 23RP 2764; Exhibit 105, at p. 19. Kevin thought it was weak that a big guy would try to do that, and determined he should just leave. 23RP 2766; Exhibit 105, at pp. 19-22. He went straight to his Lexus and left for Tacoma alone. 23RP 2767; Exhibit 105, at pp. 21-23.

Detective Hughey challenged Kevin Hubbard with cell tower evidence that he said proved he had Henderson with him in his car when he drove south. 23RP 2771. Kevin stated that Mr. Henderson may have left his phone in Kevin's car. 23RP 2771. This cell tower testimony was also admitted at trial. 20RP 2506; 21RP 2560. However, Hughey had no specialized knowledge about the process of using cell tower signals to determine the location of a cell phone, but, over objection, he was allowed to testify that the locations of

Henderson's and Hubbard's cell phones showed that they traveled southbound from Seattle in the same vehicle. 26RP 1996.

At the close of the case, the trial court agreed with the prosecutor that first degree assault categorically could not be a lesser offense of attempted murder, and declined to instruct the jury on that offense as to the counts. 22RP 2706. Kevin Hubbard was found guilty of three counts of attempted first degree murder, and with attached firearm enhancements, he was sentenced to 913.25 months, or approximately 76 years imprisonment. CP 424.

D. ARGUMENT

1. KEVIN HUBBARD'S CONVICTIONS MUST BE REVERSED WHERE THE STATE'S CHIEF WITNESS, WHO ACCUSED KEVIN OF BEING THE SHOOTER AND RECEIVED A MISDEMEANOR CONVICTION FOR HIS TESTIMONY, WAS NOT SWORN TO TELL THE TRUTH AT TRIAL.

a. <u>The State's chief witness, James Henderson, was not sworn to tell the truth, a constitutional error which may be raised on appeal</u>. The trial court failed to obtain a proper oath to tell the truth in the courtroom from witness James "Jesse" Henderson, and violated Washington's Court Rules and the state and federal constitutions. ER 603; U.S. Const. amend. 14; Wash. Const. art. 1, section 3, section 6. As a matter of court rule, ER 603 requires that

witnesses be sworn by an oath in which the witness promises to testify truthfully:

> **Evidence Rule 603. OATH OR AFFIRMATION**
> Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

ER 603. However, James Henderson was not sworn to tell the truth in the tribunal prior to his testimony. The verbatim report of proceedings of October 22, 2013 states, prior to Henderson's direct examination by the State: "(The witness was not sworn in on the record)". 14RP 1717. This was Mr. Henderson's testimony before the jury. 14RP 1716. Other trial witnesses were properly sworn.[1]

Mr. Hubbard may appeal because the absence of a proper oath obtained by the court under the requirements of ER 603 and constitutional guarantees, was manifest constitutional error under RAP 2.5(a)(3). See U.S. Const. amend. 14 (providing that no state

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[1] The court reporters' practice in this case was to indicate in the transcript when the witness was sworn. Thus the following appears before the testimony of the State's first trial witness, a police officer:

> BRADLEY RICHARDSON: Witness herein, having first been duly sworn on oath, was examined and testified as follows:

6RP 673. The same court reporter for Mr. Henderson's testimony that indicated he was not sworn, reported that the next witness *was* sworn, in the manner above. 15RP 1885 (witness Kelli Anderson).

shall "deprive any person of life, liberty, or property, without due process of law"); Wash. Const. art. 1, section 3 (our state's guarantee of Due Process). Further, the State Constitution specifically provides at Article 1, section 6:

> The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom the oath, or affirmation, may be administered.

Wash. Const. art. 1, section 6. Here, the failure to obtain an oath, given the centrality of James Henderson's testimony, was a violation of the guarantee of the basic fairness of the proceeding under Due Process and the foregoing provisions of Washington's Constitution. This constitutional error became manifest and appealable when the court did not obtain an oath from this witness, but Henderson was allowed to testify nonetheless. RAP 2.5(a)(3); In re M.B., 101 Wn. App. 425, 3 P.3d 780, review denied, 142 Wn.2d 1027 (2000). It also requires reversal of Mr. Hubbard's convictions.

For example, in the case of In re M.B., the Court of Appeals held that the entry of a contempt order against an accused juvenile, on the basis of statements from an unsworn witness, violated the evidence rules and the right to due process of law under the Fourteenth Amendment. Regarding appealability, the Court stated:

"R.T.'s counsel did not object to the unsworn testimony. We nonetheless review this issue under the manifest constitutional error doctrine." The Court therefore reached the issue. In re M.B., 101 Wn. App. at 425 (citing RAP 2.5(a)(3) and State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992) (to be manifest, error must be the type that causes identifiable prejudice)).

Similarly, the Court of Appeals in State v. Avila, 78 Wn. App. 731, 735, 899 P.2d 11 (1995), although not finding manifest error, stated that the failure to administer a proper oath to a child witness violated ER 603, and the Court left open the possibility that testimony in the absence of a proper oath could also be error that is not just constitutional, but also manifest, where the record demonstrates identifiable prejudice as required by State v. Lynn. Avila, 78 Wn. App. at 735.

That standard is met in this case. For comparison, the Avila Court stated that Mr. Avila had not shown the prerequisite demonstrable prejudice, where the record allowed the reviewing court to be confident that the failure to obtain a proper oath from the witness did not affect the outcome. Avila, 78 Wn. App. at 738-39; Lynn, 67 Wn. App. at 345 ("manifest" constitutional error is error that

shows practical and identifiable consequences in the record). Those assurances in Avila included the testimony of a witness who had seen the victim, a child, sitting on the defendant's lap in a room while the defendant watched an R-rated movie and had his hand on the child's thigh, the fact that the child stated to the interview specialist that she had been abused, and the child's "statement at the pretrial hearing that she understood it was important to tell the judge the truth" in the bench trial. Avila, 78 Wn. App. at 738-39.

No similar assurances are present in the record of this case. The security videocamera footage did not allow the persons involved to be identified, except by Henderson's claim that he was one of the persons and Mr. Hubbard was the other. The DNA evidence from the rifle was so slight as to be inconsequential, ruling out no more than 50 percent of the human population. There was no DNA on the bullets, and no fingerprints on the rifle. None of the victims stated the defendant was the person who shot them. Henderson's testimony was pivotal and the absence of an oath renders it a nullity as to credence.

b. Reversal is required. An accusing witness should be shown to be able to promise to tell the truth, to the jury and court, in

the formal setting of the courtroom. Reversal is required for the constitutional error of Mr. Henderson's unsworn testimony. As a constitutional error, it must be proved harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), and even if it were mere evidentiary error, such error requires reversal if, within reasonable probabilities, the outcome was affected. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, James Henderson was the critical accusing witness in the case. He testified that he was one of the two individuals who could be seen in the videos exiting the white Lexus near the Citrus Lounge, and that it was Kevin Hubbard who did the shooting. 14RP 1767-71, 1817. His similar claim to the confidential informant appeared to bolster this accusation, and his assertion that he and Kevin rode together driving south after the shooting appeared to make Kevin look as if he was not telling the truth when he was interrogated by Detective Hughey. 23RP 2770-72. It cannot be said that, had he been required to promise to tell the truth, he would have testified similarly, or at all. Without Henderson's sworn testimony, the outcome would have been different, requiring reversal even

under the lesser standard for evidentiary error. This Court should reverse Mr. Hubbard's convictions.

2. THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING TESTIMONY FROM DETECTIVE HUGHEY REGARDING THE USE OF CELLULAR TELEPHONE TOWER DATA TO LOCATE MR. HUBBARD'S AND MR. HENDERSON'S CELL PHONES, WHICH WAS PROPERLY THE PROVINCE ONLY OF A QUALIFIED EXPERT, AND WAS WITHOUT FOUNDATION.

a. <u>The court allowed the cell phone tracking testimony of Detective Hughey, over objection</u>. Crucial evidentiary claims in the case against Kevin Hubbard came in the form of Detective Hughey's testimony at trial that he used cell phone tower locating technology to determine that Mr. Hubbard had lied to him when he said that he left the Citrus Lounge and drove to Tacoma alone, before knowing of any shooting. This testimony, and accompanying exhibits, also appeared to support James Henderson's account of the time after the shooting for which he accused Kevin, and his assertion that he and Kevin drove to Tacoma together after the incident. 20RP 2506-35; 23RP 2772-84.

(i) Offer of Proof. The State proffered that Detective Hughey would use data regarding a cell phone tower location list, which he had received from Henderson's and Hubbard's cell phone providers,

in order to determine "what cell towers the defendants [sic] were hitting . . . at what time." 26RP 1996. The detective would also offer maps that he had created, depicting his determination, based on this data, of where Henderson and Hubbard were likely to be, given the tower locations. 26RP 1996-97.

(ii) Objections. Mr. Hubbard moved *in limine* to exclude this evidence, making clear his challenge to any such testimony as lacking foundation, and arguing that this was a specialized matter that was properly only the subject of testimony by an expert, which the detective had admitted he was not. 16RP 1997-98; 23RP 1996-97. Counsel had indicated he would waive the need for authentication of the documents sent to the detective by the phone companies, so there would be no requirement to call a custodian of records. 23RP 1997. However, Detective Hughey had expressly informed counsel that he was not an expert in cellular telephone tower location analysis. Mr. Hubbard argued that there was no foundation for the proposed testimony and that Detective Hughey could not offer opinion testimony absent proper qualification as an expert. 23RP 1997-98.

(iii) Ruling. The court ruled that the detective could testify on the matter, because it did not involve expertise, although the court did preclude the detective from saying that the cell tower location analysis definitely proved that the lines drawn on various of the maps in State's exhibits 74, 75, and 76 were a representation of some actual path of travel detected. 23RP 2007-08.[2]

(iv) Jury instruction. At the close of the case, counsel also objected to the instruction stating the jury could accept the opinion testimony of an expert, as it related to the detective and this testimony. 23RP 2834; CP 205 (Instruction no. 6).[3]

b. <u>The evidence was erroneously admitted at trial</u>. As a result of the trial court's ruling, Detective Hughey was allowed to testify about his analysis of the cell phone tower data he received

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[2] Mr. Hubbard made clear that he was objecting to all of the detective's proffered testimony and exhibits, regardless of minor restrictions placed on it. He argued that the detective should not be allowed to proffer any of the maps he had created, which were printed with a purple line that traversed southbound along the Interstate 5 highway. 16RP 2003-07. The State argued that this line was something that automatically appeared on the internet "Google" map program, and could not be removed. 16RP 2007-10; 20RP 2515. The court restricted the State in closing argument from claiming that the line on the maps portrayed a route of travel. 24RP 2879 (closing argument). Mr. Hubbard also asked, solely in the alternative, that the Detective not be permitted to testify to any triangulation analysis to posit the precise location where he assessed the individual using a cell phone was located. 23RP 1999.

[3] The giving of the expert opinion jury instruction bears on the question of harmfulness of the error of allowing Detective Hughey to testify on this topic. <u>See State v. Ehrhardt</u>, 167 Wn. App. 934, 941, 276 P.3d 332 (2012) (regarding assignment of error to the giving of Washington Pattern Instruction 6.51, at 199 (3d ed. 2008) (WPIC) and assignment of error challenging improper testimony).

from various telecommunications companies, which he said showed that the defendant and James Hubbard traveled from Seattle southward, together, after the Citrus Lounge shooting. 20RP 2506-10. The detective asserted that his analysis, using "decipher keys" to locate certain cellular telephone towers, allowed him to electronically determine that certain towers picked up phone signals, allowing him to assess that Henderson's and Hubbard's cell phones were at certain locations at certain times. 20RP 2512-2523. Using an internet, user-created "Google" map, which was shown to the jury, and using a technique called "splicing," the detective believed that these phones had been in the same locations at the same times after the shooting because cellular telephones' signals are picked up by the nearest geographic tower. 20RP 2506-32; see Supp. CP ___, Sub # 116 (Exhibits 72, 73, 74, 75, 76, 91, 92, 93).

Hughey's testimony either relied on his calculations, or relied on obtained calculations, of the reception range of various cell towers, which he also claimed could be used to determine the cell telephone locations at pertinent times. 20RP 2511-12, 2523; 23 RP 2772, 2780-84.

Additionally, during the Detective's testimony about his interrogation of Kevin Hubbard after Kevin's arrest, Hughey testified that he used his locating techniques to determine where Hubbard's phone and Henderson's phone were located, and used this data to confront Mr. Hubbard and pressure him that he was lying about the night in question. 23 RP 2760-84.

The court's ruling allowing this testimony was error. Lay opinion testimony is not permitted on matters as technical as the cell tower signal locating analysis that Detective Hughey described. Under ER 701, permissible lay opinion testimony must be based on rational perceptions that are not based on scientific or specialized knowledge. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). A witness must always have a basis of knowledge to testify about a matter, and the detective's admitted lack of expertise on the topic he was testifying about disqualified him from relating these specialized matters to the jury, including as a matter of foundation.

The trial court does have discretion in ruling on the admissibility of expert testimony, which may be testimony in the form of an opinion. State v. Fagundes, 26 Wn. App. 477, 483, 614 P.2d

198, 625 P.2d 179, review denied, 94 Wn.2d 1014, 1980 WL 153140 (1980). But as a predicate matter, ER 702 permits testimony only by a qualified expert, and only where that person's scientific, technical, or specialized knowledge will assist the trier of fact to understand the evidence. The rule states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. Under the rule, for example, proposed drug recognition expert testimony must satisfy a two-part test to be admissible. The trial court must determine (1) whether the witness qualifies as an expert and (2) whether the expert's testimony would be helpful to the trier of fact. State v. Baity, 140 Wn.2d 1, 18, 991 P.2d 1151 (2000). "A proper foundation for [drug recognition expert] testimony would include a description of the [drug recognition expert]'s training, education, and experience in administering the test, together with a showing that the test was properly administered." Baity, 140 Wn.2d at 18.

Here, there was no foundational testimony showing Detective Hughey to be qualified to testify about the highly technical matter of cellular tower location analysis, and he himself did not have personal knowledge of how the cellular towers obtained phone signals or with what accuracy, if any. Much of the information he related to the jury was without foundation as hearsay, and thus inadmissible under ER 801 and ER 802. This witness had no ability to testify as to if, or why, a cellular telephone's signal would or would not be detected by a particular cell phone tower that was nearer to the phone compared to another cell phone tower, a matter that would involve not just distance, but interference, both geographic and electronic, and the capabilities of each telephone and each tower. Because he was not an expert, it was not permissible for this detective to testify to hearsay as a matter he 'relied on' under any authority of ER 705. See, e.g., In re Detention of Leck, ___ Wn. App. ___, 334 P.3d 1109, 119-20 (2014) (witness who is an *expert* may state hearsay relied upon as basis for expert opinion), review denied, 334P.3d 1109 (2014).

Instead, in this case, the detective merely repeated data of a scientific nature of which he had no foundational personal, or expert

knowledge. His testimony also consisted of conclusory and speculative lay opinions, which were lacking an adequate foundation and should not have been admitted. The technology and science about which he testified were not within the proper scope of any testimony by him.

This sort of cell tower testimony has generally been viewed as requiring a foundation in expert qualifications and as having to pass muster under the evidence rules for expert testimony. Thus in United States v. Harrell, 751 F.3d 1235, 1243, (11th Cir. 2014), the federal Court of Appeals held that a district court abused its discretion when it permitted a police detective to testify as an expert on the interaction between cell phones and cell towers, without requiring the government to comply with requirements for proffering that witness as an expert so that he could state such opinion testimony, under Federal Rule of Evidence 702. See also United States v. Yeley–Davis, 632 F.3d 673, 684 (10th Cir. 2011) (agent's testimony about how cell towers work constitutes expert testimony).

c. Reversal is required. Erroneously admitting testimony is an evidentiary error. Reversal is required where there is a probability the incompetent evidence affected the outcome. State v. Bourgeois,

supra, 133 Wn.2d at 403; State v. Steward, 34 Wn. App. 221, 660 P.2d 278 (1983) (reversing for improper profile testimony by expert). Here, reversal is required. The cellular telephone signal analysis went to the question of Mr. Hubbard's and Mr. Henderson's assertions regarding the time after the shooting occurred at the Citrus Lounge. James Henderson claimed that after the shooting he was asserting Kevin had been responsible for, he and Mr. Hubbard left the Citrus Lounge parking lot area and drove south, both in the white Lexus SUV. 14RP 1773-74. Henderson, who claimed that he and Kevin were compatriots, stated he was dropped off in Skyway. 14RP 1774-75. Mr. Hubbard told Detective Hughey, after he was arrested, that he certainly drove Mr. Henderson up to Seattle that night as a favor, but he later left the Citrus Lounge and drove straight to Tacoma alone; he did not know where James Henderson was at the time he left the Citrus Lounge, and he only heard about the shooting from the mother of his child when he arrived at the hospital. 23RP 2762-70. But Detective Hughey used the cell tower analysis to assert that Kevin was lying. 23RP 2772, 2780-84.

The prosecution well understood the importance of Detective Hughey's testimony to the jury's decision. In closing argument, the

State relied heavily on Hughey's testimony and argued that the jury could "tell from the cell tower records" that the defendant and James Henderson left the Citrus Lounge parking lot area together, just as James Henderson had said when implicating Kevin. 24RP 2902-03. The prosecutor emphasized why all of this technical circumstantial evidence was key to guilt -- Kevin Hubbard had lied to the police during his interrogation when he stated that he had driven to Tacoma alone, as shown by

> [t]he fact that the defendant was clearly untruthful with Detective Hughey about what happened after he left the Citrus Lounge that night. People who are untruthful are usually untruthful because they don't want you to know what really happened.

24RP 2899-2900. Therefore, the State argued, Mr. Henderson was truthful when he said he was dropped off before Tacoma, and Kevin was lying to Detective Hughey when he stated that he left the Citrus Lounge and only heard about a shooting later, after he went straight to the Tacoma hospital. 24RP 2903-05, 2904 ("So what that tells us, generally speaking, they're moving from Seattle and heading south to Renton, which is consistent with what Mr. Henderson told Detective Hughey and what he told you on the stand."). The prosecutor continued with this theme:

> But then he [Mr. Hubbard] says, after he left the Citrus Lounge . . . he left and went straight to Tacoma because his girlfriend was going into labor. That doesn't jive [sic] with the cell phone tower records. And obviously doesn't jibe with what Mr. Henderson says.

24RP 2908. The prosecutor discussed the cell phone tower testimony at length, and rested its comparison between Mr. Henderson and Mr. Hubbard on that technology, stating, "The defendant did not drive to Tacoma by himself. Mr. Henderson was clearly with him. It's contradicted by the cell phone records." 24RP 2910; see 24RP 2899-2900, 2902-06, 2908-11. And of course, as did the detective, the prosecutor also used the cell tower technology to bolster the testimony of James Henderson and the account Henderson gave to police. 24RP 2903-06, 2909-10. This evidence was highly material to guilt and, within reasonable probabilities, it affected the outcome of Kevin's trial on all three counts. Bourgeois, 133 Wn.2d at 403. The convictions should be reversed.

3. MR. HUBBARD WAS WRONGLY DENIED THE RIGHT TO PRESENT EVIDENCE OF OTHER SUSPECTS.

a. Admissible evidence showed motive and opportunity in another suspect. Mr. Hubbard moved *in limine* to be allowed to introduce evidence of other suspects. 2RP 229; CP 138. The

investigation of the case by Seattle police had uncovered that victim Zealand Adams, victim Daniel Wilson, and Wilson's brother Khris Wilson had indicated that a person who went by the name "Lil Hev" was the shooter. CP 9. When shown a photo of this individual, who was one Daunte Williams, Adams thought that he actually recognized this person as the shooter, and Daniel Wilson confirmed his belief that this person was at the Citrus Lounge that night. CP 9; CP 138-142.

However, the trial court denied Mr. Hubbard's effort to bring in "other suspect" evidence at his trial by seeking to elicit this testimony. The court held that under State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), cert. denied, 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993), there was inadequate evidence that Mr. Williams had any intent to commit the offenses. 2RP 230-32.

b. The court erred and reversal is required. The court's ruling disallowing the other suspect evidence to be elicited from all of these witnesses was error. The investigation had indicated that Khris Wilson stated that Mr. Williams was present at the Citrus Lounge and was involved in the fighting there. CP 9; 2RP 230. The defense was also prepared to offer an explanation for why Mr.

Williams was able to provide the police with cell phone numbers that would show he made calls from locations away from the shooting site, which was that his phones had been carried by someone else. 2RP 230-31.

The Due Process Clause of the Fourteenth Amendment guarantees criminal defendants "a meaningful opportunity to present a complete defense." Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). Further, article I, section 22 of the Washington Constitution guarantees criminal defendants a right to present testimony in their defense that is equivalent to the right guaranteed by the United States Constitution. See State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983). Washington regulates the admission of "other suspects" evidence that a defendant seeks to present under these guarantees according to the ER 401 and ER 402 rules of relevance, and ER 403, which precludes confusing or distracting evidence – but other suspect evidence may be introduced if the accused "can establish 'a train of facts or circumstances as tend clearly to point out some one besides the prisoner as the guilty party.' " State v. Hilton, 164 Wn. App. 81, 99, 261 P.3d 683 (2011), review denied, 173 Wn.2d 1037, cert. denied, 133 S.Ct. 349 (2012).

In this case, importantly, Mr. Hubbard was only peripherally involved in a minor side-scuffle at the Citrus Lounge – he therefore had no more apparent or explainable motive for the shootings that was any different than Mr. Williams. The defense offer of proof was that several of the victims placed "Lil Hev" at the scene and even identified him as the assailant. 2RP 229-33. This was equivalent, at least, to the claims of Mr. Henderson against Mr. Hubbard. In addition, the defense offer of proof indicated that the confidential informant, from whom much evidence was produced at trial, had also indicated that "Lil Hev" was the shooter. 2RP 230-31.

Certainly, there was a sufficient nexus between this third party and the crime, State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993), and it tended "clearly to point out someone besides the one charged as the guilty party." State v. Russell, 125 Wn.2d 24, 75, 882 P.2d 747 (1994). The trial court's decision on admissibility of this evidence was an abuse of discretion. Furthermore, it was constitutional error, and was not harmless because it cannot be said beyond a reasonable doubt that this competent evidence, from a range of sources that "Lil Hev" was the shooter would not have

changed the outcome. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

4. THE ACCOMPLICE LIABILITY INSTRUCTION WAS NOT PROPERLY GIVEN TO THE JURY WHERE THE EVIDENCE AT MOST SHOWED THAT THE NON-SHOOTER WAS CULPABLE OF NO MORE THAN MERE PRESENCE AT THE SCENE, REQUIRING REVERSAL EITHER FOR THE INSTRUCTIONAL ERROR OR FOR VIOLATION OF MR. HUBBARD'S RIGHT TO JURY UNANIMITY.

a. The trial court instructed the jury on accomplice liability. During opening statements at Mr. Hubbard's trial, the prosecution announced that it would prove definitively that Mr. Hubbard was the person in the indistinct, unfocussed security videotape who could be seen firing the automatic rifle. 10/9/13RP at 7-9 (arguing, "You can actually see the shooter, Mr. Hubbard[.]"). By the close of trial, however, the prosecutor was asking for an accomplice liability instruction; Mr. Hubbard objected to the trial court giving the jury this instruction, but that objection was overruled. 22RP 2716; 23RP 2836.

b. The accomplice liability instruction was given in error. The Court of Appeals reviews the decision whether to give a particular jury instruction for an abuse of discretion. State v. Chase, 134 Wn. App. 792, 803, 142 P.3d 630 (2006), review denied, 160

Wn.2d 1022 (2007). However, it is always error for a trial court to give an instruction which is not supported by the evidence. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). In Mr. Hubbard's case, there was insufficient evidence of accomplice liability.[4]

A person is guilty as an accomplice to a crime only if he "solicits, commands, encourages . . . or aids" another in committing the crime, [and] does so "[w]ith knowledge that it will promote or facilitate the commission of the crime." RCW 9A.08.020(3)(a)(i)(ii).[5] Here, there was no aid or encouragement by the second person in the video, and if that person was Mr. Hubbard – as the prosecutor

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[4] This is true even considering that the trial court, and the appellate court, properly view the supporting evidence in the light most favorable to the party that requested the instruction. State v. Fernandez–Medina, 141 Wn.2d 448, 455–56, 6 P.3d 1150 (2000).

[5] Washington's accomplice liability statute, RCW 9A.08.020, correctly defines when a person is liable for another's criminal conduct by virtue of being an accomplice, providing as follows:

> **RCW 9A.08.020. Liability for conduct of another--Complicity**
>
> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
>
> (2) A person is legally accountable for the conduct of another person when:. . .
>
> (c) He is an accomplice of such other person in the commission of the crime.
>
> (3) A person is an accomplice of another person in the commission of a crime if:
>
> (a) With knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it[.]

RCW 9A.08.020.

argued in closing as an alternative theory of guilt – he was not an accomplice in law. The prosecutor contended that if the driver of the car that pulled up in the parking lot and then exited was the defendant, as the State had always argued, that person would be guilty as an accomplice, because he appeared to retrieve something from inside the vehicle that the State argued was a rifle, and therefore he would have had to transfer the rifle to the shooter and then driven away with the shooter. 24RP 2922-23. But if Mr. Henderson was the shooter, and the person in the video who was not the shooter was Mr. Hubbard, that individual – according to the State's own case – did nothing but flee the scene and then ride in the Lexus southbound from Seattle.

This is inadequate. To be an accomplice, a person must give encouragement or aid and do so knowing that the same will promote or facilitate the principal's commission of the crime. State v. LaRue, 74 Wn. App. 757, 875 P.2d 701 (1994) (citing State v. Amezola, 49 Wn. App. 78, 89, 741 P.2d 1024 (1987)). This knowledge requirement means that an accomplice must associate himself with the principal's criminal undertaking, participate in it as something he desires to bring about, and seek by his action to make it succeed. In

re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); Amezola, 49 Wn. App. at 89.

For example, in Amezola, the defendant Ramirez could not be convicted as an accomplice to several principals who were manufacturing heroin in a house in South Seattle, where she cooked food and washed dishes for the house's occupants and was merely aware of their activities. State v. Amezola, 49 Wn. App. at 88. The Amezola Court also cited RCW 9A.08.020(3)(a) and State v. Bockman, 37 Wn. App. 474, 491, 682 P.2d 925 (1984), for the rule that an accomplice must have knowledge that her activity will promote or facilitate the commission of the crime, and contrasted this requirement with the rule of Wilson, supra, that physical presence and assent alone are insufficient to establish complicity. The Court of Appeals therefore concluded that the evidence was insufficient to support Ramirez's conviction as an accomplice. State v. Amezola, 49 Wn. App. at 89-90.

Further, in order to be liable as an accomplice, "a defendant must not merely aid in any crime, but must knowingly aid in the commission of the specific crime charged." State v. Brown, 147 Wn.2d 330, 338, 58 P.3d 889 (2002); see also State v. Trout, 125

Wn. App. 403, 410, 105 P.3d 69 (2005) (stating that "it is also clear now that the culpability of an accomplice cannot extend beyond the crimes of which the accomplice actually has knowledge"); State v. Cronin, 142 Wn.2d 568, 578, 14 P.3d 752 (2000); State v. Roberts, 142 Wn.2d 471, 510-13, 14 P.3d 713 (2000).

Here, there is no evidence that this potential abettor had any knowing involvement in the crime of shooting Mr. Bone, Mr. Wilson, and Mr. Adams. 24RP 2911, 2913, 2920-21. The person who the prosecutor stated was an accomplice had nothing to do with the number of shots fired or the aiming of the gun. Detective Hughey, in his analysis of the Fred Hutchinson security videos that captured the shooting, correctly describes that a white Lexus can be seen in the parking lot. 20RP 2487, 2499-2500. After that, two individuals exit the Lexus and walk to an area of rhododendrons or bushes near Zealand Adams' Dodge Magnum. 20RP 2500-01. When the shooter, who appears to be the person who had exited the driver's side of the Lexus earlier, begins shooting, the person who was the passenger, "after the first round's fired, takes two steps, and then runs out of frame." 20RP 2489-90, 2492.

James Henderson also testified and claimed that Mr. Hubbard was the shooter. However, if the State's theory of accomplice liability was that Mr. Hubbard was the accomplice and passenger in the security videos, Mr. Henderson never described any activity that involved knowing complicity in an attempted murder. To an even greater extent than the lack of real motive that could be ascribed to Mr. Hubbard from any activity in the Citrus Lounge, no shadow of a motive was attributed to the person who appeared to be the passenger in the white Lexus. Mr. Henderson stated that an altercation broke out in the Citrus Lounge's bar, but at that time he and Mr. Hubbard and several other friends were not in that area of the Citrus Lounge. 14RP 1745-48. When the friends exited the Lounge the two drove to the other parking lot and nothing was said. 14RP 1755-56. There was no discussion, the two exited toward the bushes, and when the shooting started, Henderson stated that the person in the video -- who he claimed was him -- simply ran away. 14RP 1756, 1762-68, 1791, 1804, 1817; see Exhibit 17.

According to Henderson's account, the principal and the accomplice then drove south after the shooting, not saying more than a word to each other. 14RP 1772-73. This evidence in total did

not warrant an accomplice instruction, and the instructions were improperly given. See also State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993) (mere presence at the scene of the crime, even if the defendant assented to the crime, is not enough to prove accomplice liability).

c. Reversal is required for the instructional error and insufficiency of the evidence. Reversal is required. The evidence of accomplice liability was in fact insufficient to support a verdict of guilty, even viewing the evidence in a light most favorable to the State, and Due Process was violated by the entry of judgment. U.S. Const. amend. 14; Wash. Const. art 1, sec. 3; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 221–22, 616 P.2d 628 (1980).

Further, the erroneous giving of the accomplice liability instruction in Mr. Hubbard's case was not harmless. "Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless." State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001). Under this standard, it cannot be concluded that it affirmatively appears the jury convicted Mr. Hubbard based on principal liability. In closing argument in Mr. Hubbard's trial, the

prosecutor encouraged the jury to find Kevin guilty as an accomplice if it did not believe he was the shooter, but instead was the person who fled the area when the firing commenced. 24RP 2921. The State argued:

> [I]n light of the fact that we know it was either the defendant or Mr. Henderson that did the shooter [sic], there's another legal concept that is included in your jury instructions, and it's called accomplice liability.

24RP 2921. Although accomplice liability does not constitute an "alternative means" of committing a crime, State v. McDonald, 138 Wn.2d 680, 687–88, 981 P.2d 443 (1999), accomplice liability is a theory of guilt requiring a jury to reach different predicate findings than it would if it were determining liability as a principal. RCW 9A.08.020(3) (defining elements of accomplice liability). Thus in the case of State v. Jackson, 137 Wn.2d 712, 727, 976 P.2d 1229 (1999), the Court reversed where the trial court improperly instructed the jury on accomplice liability, because it could not determine whether the jury found the defendant "guilty as a principal or as an accomplice."

For further example, several other Washington cases have recognized that accomplice liability involves meaningfully different findings by a jury. In State v. Ransom, 56 Wn. App. 712, 785 P.2d

469 (1990), a case where the trial court abused its discretion by issuing supplemental jury instructions on accomplice liability after closing arguments, the Court considered whether the supplemental instruction had the effect of providing a new theory of the case, which is improper after argument. Division Two concluded that the trial court erred because accomplice liability "is a distinct theory of criminal culpability" and "[t]he effect was to add a theory that the State had not elected and that defense counsel had no chance to argue." Ransom, 56 Wn. App. at 713–14. See also State v. Carter, 154 Wn.2d 71, 82-83, 109 P.3d 823 (2005) (stating that only when it is clear from the record that the jury must have found the defendant to be an accomplice based on his knowledge of the charged crimes alone, is an erroneous accomplice liability instruction in violation of the "the crime" requirement harmless).

These cases recognize that jury decisions as to guilt may differ based on the evidence and the accomplice liability instruction. Therefore, pursuant to the normal standard of harmlessness in cases of instructional error, the erroneously given accomplice liability instruction in this case requires reversal because nothing about the evidence in the case, the argument of counsel, or the instructions

and verdicts allows it to be said that it affirmatively appears the jury did not rely on accomplice liability. See State v. King, 113 Wn. App. 243, 266, 54 P.3d 1218 (2002) (reversibility of error in accomplice liability instruction is an inquiry "inextricably interwoven" with the facts of the particular case). In this case, the erroneously-given jury instructions allowed the jury to improperly convict the defendant on accomplice liability, and because this Court of Appeals cannot know whether the jury in fact convicted him as a principal or an accomplice, reversal is required. Jackson, 137 Wn.2d at 727. Mr. Hubbard's convictions should be reversed.

5. UNDER DUE PROCESS AND STATE V. WORKMAN'S STATUTORY ANALYSIS, MR. HUBBARD WAS ENTITLED TO HAVE THE JURY INSTRUCTED ON FIRST DEGREE ASSAULT ON ALL THREE COUNTS, WHERE THOSE CRIMES WERE LESSER INCLUDED CRIMES OF ATTEMPTED MURDER, GIVEN HOW THE GREATER CHARGES WERE PROSECUTED.

a. The lesser offense instructions were requested. Mr. Hubbard requested that the trial court instruct the jury on the lesser included offense of first degree assault. 22RP 2702-04; CP 165-66, 171-72, 175-78 (defense proposed instructions). Counsel argued that "when you consider the facts of this case" the crimes committed could, under the legal prong of the lesser included analysis, have

been merely assaults with a firearm and an intent to cause great bodily harm. Additionally, under the factual prong and considering the evidence that Mr. Hubbard was punched but had no reaction or angry response to being a mere part of the melee in the Citrus Lounge, there was simply no motive to kill. 22RP 2705.

The prosecutor responded that first degree assault "is not a legal lesser" of attempted first degree murder and could only be instructed upon if the prosecutor's office had charged those crimes in the information. The prosecutor made clear the State's position that the offense of first degree assault was, categorically, not available under current legal authority. 22RP 2702-04.

The trial court agreed, stating that "[b]y my reading of the law . . . it's not a lesser degree offense." 22RP 2706. Without looking to the attempted murder crimes as charged in the case against Mr. Hubbard, as his counsel had urged, the court stated that as a matter of law there could never be an entitlement to first degree assault instructions in an attempted murder case. 22RP 2705-06.

b. <u>Statutes and Due Process require jury instructions on lesser offenses where those instructions are legally warranted</u>. In Washington, a defendant is entitled to an instruction on a lesser-

included offense where the following two conditions are met: (1) "each of the elements of the lesser offense must be a necessary element of the offense charged," and (2) "the evidence in the case must support an inference that the lesser crime was committed." State v. Workman. 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978).

Generally a criminal defendant may be convicted of those offenses charged in the information, or those offenses which are either lesser included offenses or inferior degrees of the charged offense. Schmuck v. United States, 489 U.S. 705, 717-18, 109 S. Ct. 2091, 103 L. Ed. 2d 734 (1989); State v. Tamalini, 134 Wn.2d 725, 731, 953 P.2d 450 (1998) (citing State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1998)). Washington statutes, RCW 10.61.003 and RCW 10.61.006, codify these rules in the affirmative.

Further, the *failure* to instruct the jury on a lesser offense, where the evidence might allow the jury to convict the defendant of only the lesser offense, violates the Fourteenth Amendment right to Due Process. Beck v. Alabama, 447 U.S. 625, 636-38, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980); U.S. Const. amend. 14.

c. The trial court erroneously denied Mr. Hubbard's request to instruct the jury on the lesser offenses. An instruction

on a lesser offense is warranted, *inter alia*, where each element of the lesser offense must necessarily be proved to establish the greater offense as charged. State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); State v. Workman, supra, 90 Wn.2d at 447-48.

Review is *de novo*. State v. Tamalini, 134 Wn.2d 725, 729, 953 P.2d 450 (1998) ("Because the trial court rejected Tamalini's proposed instruction on the basis that first and second degree manslaughter are not, as a matter of law, lesser included offenses of second degree felony murder, we review the claimed error *de novo*."); State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

Assault in the first degree satisfies the legal prong as a lesser included offense of attempted first degree murder, when one examines the offenses as charged in this case. The State alleged that Mr. Hubbard committed three counts of attempted first degree murder by taking a substantial step towards that crime, in the form of shooting Adams, Bone, and Wilson. CP 216-178 (Instructions nos. 17, 18, 19); RP 858; RCW 9A.32.030(1); RCW 9A.28.020(1). Mr. Hubbard requested lesser instructions on first degree assault, which is defined as follows:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm.

RCW 9A.36.011(1)(a). Mr. Hubbard's proposed instructions properly tracked this statutory definition. CP 165-66, 171-72, 175-78.

As charged in this case, a person who intentionally attempts to kill another by firing a rifle necessarily commits the crime of first degree assault. See RCW 9A.36.011(1)(a). However, the trial court reasoned that first degree assault is categorically not a lesser of attempted murder, relying on case law that attempted murder – the taking of a substantial step toward committing that crime -- can be committed under the attempted murder statutes without assaulting the victims. This is the analysis of State v. Harris, 121 Wn.2d 317, 321, 849 P.2d 1216 (1993). But the reasoning of Harris has been overruled by subsequent decisions of our Supreme Court.

Crucially, the Harris analysis predates the Supreme Court's decision in State v. Berlin, supra, in which the Court recognized that the Workman lesser-included analysis had been misinterpreted in prior decisions. Specifically, Harris was decided during a period in which the Court improperly performed the legal prong aspect of the lesser-included analysis by asking whether the lesser crime was

necessarily, and always, committed whenever a person committed the great offense. See, e.g., State v. Curran, 116 Wn.2d 174, 183, 804 P.2d 558 (1991). State v. Harris termed this the "statutory approach" because it looks solely to the statutes in question. Harris, 121 Wn.2d at 323-24. Harris reasoned that because it was possible under the comparative statutory language to commit attempted murder without necessarily committing an assault, an assault categorically could never be a lesser offense of attempted murder. Harris, 121 Wn.2d at 321.

But in Berlin, the Supreme Court recognized that this hypothetical, statutory analysis was the incorrect mode of asking the Workman lesser-included question. State v. Berlin concluded that the test employed in Harris was an incorrect application of the original Workman case. Berlin, 133 Wn.2d at 547. It is true that the Berlin Court did not cite specifically to Harris, but the decision plainly repudiated the purely statute-based analysis, of which Harris is an example. Thus in Berlin, the Court decided that the Workman test is erroneously applied if a court, when deciding to give a lesser instruction, focuses upon "the elements of the pertinent charged offenses as they appeared in the context of the broad statutory

perspective, and not in the more narrow perspective of the offenses as prosecuted." (Emphasis added.) Berlin, 133 Wn.2d at 547 (discussing State v. Lucky, 128 Wn.2d 727, 735, 912 P.2d 483 (1996)).

Thus, contrary to the analysis in Harris, and the trial court's mirroring reasoning below in Mr. Hubbard's case, it is not relevant whether one might hypothetically commit attempted murder without committing an assault. Instead, the legal prong requires that a court determine simply whether the potential assault is an included offense of attempted murder as charged and prosecuted in the case before it. Berlin, 133 Wn.2d at 548. As noted supra, first degree assault by intentional assault with a firearm is a lesser offense of attempted murder as charged in Mr. Hubbard's three-count case.[6]

Additionally in this case, the requested lesser included offenses were factually supported. The jury's inquiry during deliberations regarding whether Mr. Hubbard's use of alcohol affected his ability to "form an intent" strongly suggests that the jurors

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[6] The correctness of the Berlin version of the Workman analysis is further demonstrated by the Double Jeopardy case of In re the Personal Restraint of Orange, 152 Wn.2d 795, 819-20, 100 P.3d 291 (2004), which rejected a trial court's formulation of the "same elements" test as requiring a court to "compare a generic element in one offense to a specific element in a second offense." (Emphasis added.).

were equivocating on the question of intent to kill. CP 188. In denying the lesser instructions, the trial court did not actually reach the question of the factual prong, because it rejected the requested lesser offense instructions under the legal prong. 22RP 2703 (asking counsel why the court would give lesser offense instructions of assault "when it's not . . . actually an inferior degree of the charged offense."). Thus, this Court should reverse and remand. However, in applying the factual prong, it should be noted that a court must view the supporting evidence in the light most favorable to the party *requesting* the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). Here, the trial court, although rejecting counsel's request based on the preliminary question of the legal prong, seemed to look at the evidence in the case in terms of what alleged facts supported the *greater* charge. 22RP 2702-04. But the lesser offense instruction should be given "[i]f the evidence would permit a jury to rationally find a defendant guilty of the *lesser offense* and acquit him of the greater." (Emphasis added.) State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997) (citing Beck v. Alabama, supra, 447 U.S. at 635); see also Fernandez-Medina, supra, 141 Wn.2d at 456. Viewed in the light most favorable to Mr.

Hubbard, a jury could readily conclude that the shootings – if it concluded he did such acts -- were not an intentional attempt to kill the complainants, but merely an assault with intent to cause the great bodily harm that in fact resulted.

The lesser offenses were factually supported. "A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case." State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Mr. Hubbard was entitled to the requested instructions. Fernandez-Medina, 141 Wn.2d at 461-62. The trial court's failure to instruct the jury on the lesser offenses violated the Fourteenth Amendment. Beck v. Alabama, 447 U.S. at 636-38. This Court should reverse the convictions.

E. CONCLUSION

Based on the foregoing, this Court should reverse Kevin Hubbard's convictions and sentence.

Respectfully submitted this 2 day of December, 2014.

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

STATE OF WASHINGTON, Respondent, v. KEVIN HUBBARD, Appellant.	)))))))))	NO. 71449-0-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF DECEMBER, 2014, 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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[X] KEVIN HUBBARD 334247 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF DECEMBER, 2014.

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