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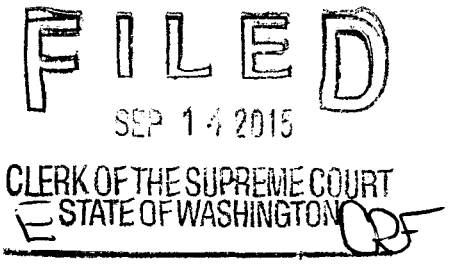

Supreme Court No. (to be set)
Court of Appeals No. 45965-5-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Eric Morrissey
Appellant/Petitioner

Mason County Superior Court Cause No. 13-1-00383-0
The Honorable Judge Amber L. Finlay

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Eric Morrissey, the appellant below, asks the court to review the decision of Division II of the Court of Appeals referred to in Section II.

II. COURT OF APPEALS DECISION

Eric Morrissey seeks review of the Court of Appeals opinion entered on August 4, 2015. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Did the trial court's conflicting definitions of recklessness fail to make the relevant legal standard manifestly clear to the average juror?

ISSUE 2: Did the trial court's instruction equating recklessness with disregard for a risk of substantial bodily harm relieve the state of its burden to prove that Mr. Morrissey disregarded a substantial risk of death?

ISSUE 3: Did the trial court improperly impose $4,750 in defense costs without ascertaining that Mr. Morrissey had the ability to pay?

IV. STATEMENT OF THE CASE

Talon Newman attacked Jacob Rossi in an alley in Shelton. RP 365-69. When Rossi ran, Newman chased after him and punched him

again; he also drew a knife on Rossi's friend, Sean Davis. RP 247, 370-373, 384.

Rossi left Davis, and ran to a house shared by his friends. RP 376-377. He asked his friends to help him find Davis and another friend, to make sure they were ok. RP 377, 658-659. One of these friends was Eric Morrisey. A group checked the alley, and then went to Davis's house. RP 381-382, 660. Accompanied by Davis, the group went in search of the third friend who'd been left behind. RP 384, 660, 662.

Rossi heard someone yell "Hey, fat boy!" RP 670. He turned and saw Newman walking toward him with another man. RP 670. Newman got in Rossi's face and asked if he wanted to fight. When Rossi refused, Newman got in another boy's face, and asked if he wanted to fight. RP 259, 442, 671-672.

Newman then got in Eric Morrissey's face and asked if he wanted to fight. Mr. Morrisey told Newman not to touch him, and not to talk to him or his friends that way. RP 443, 674.

Newman pushed Mr. Morrissey and lifted his arm to punch him. RP 443, 675. Mr. Morrissey head-butted Newman, and the two fought for roughly eleven seconds. RP 443, 675.[1] It ended when Mr. Morrissey's

[1] The length of the fight can be deduced from the time stamp on the state's video exhibit. RP 933; Ex. 59.

friend pulled him off Newman, and the boys all jogged away together.[2] RP 444-445, 677, 933; Ex. 59.

Newman was still conscious. RP 603. He was taken to a hospital, where he died from damage to his spinal cord. RP 133, 154-155. Autopsy results revealed injuries consistent with being punched about five times. RP 168.

The state charged Mr. Morrissey with second-degree felony murder (based on assault) and first degree manslaughter. RP 155-156.

At trial, the court provided the jury with two different definitions of recklessness. One referred to a person's disregard of a risk that "substantial bodily harm may occur." CP 106. The other defined recklessness with reference to the risk that "a death may occur." CP 124.

The court told the jurors to "consider the instructions as a whole," and that "the order of the instructions has no significance as to their relative importance." CP 93. Nothing in the court's instructions limited the jury's consideration of each definition to any particular charge. CP 90-123.

[2] Two witnesses testified that other members of Mr. Morrissey's group punched Newman as well. RP 502-503, 594-95. But Newman's friend -- who was only a few feet away -- testified that the fight was only between Mr. Morrissey and Newman. RP 261. Mr. Morrissey's friends did not have any injuries to their hands. RP 436, 579-582.

The court's "to convict" instruction on manslaughter allowed conviction if the state proved that Mr. Morrissey "engaged in reckless conduct" and that "Newman died as a result of defendant's reckless acts." CP 116.

The jury acquitted Mr. Morrissey of murder but convicted him of manslaughter. CP 30.

Mr. Morrissey moved for a new trial or for arrest of judgment. CP 83-86. He argued that the instructions relieved the state of its burden to prove that he'd disregarded a risk of death, and allowed conviction based on proof that he'd disregarded a risk of substantial bodily harm.[3] CP 83-86; RP 78-79. The court denied the motion. CP 45.

Finding that Newman instigated the fight, the court sentenced Mr. Morrissey an exceptional sentence below his standard range. CP 32. The court did not consider his ability to pay legal financial obligations, but ordered him to pay $4,750 in defense costs. CP 31, 34.

Mr. Morrissey appealed. CP 29. He argued that the court's conflicting instructions relieved the state of its burden to prove recklessness and failed to not make the legal standard manifestly clear.

[3] After trial, a juror had expressed confusion to defense counsel about the showing required for conviction of manslaughter. RP 78.

He also argued that the court improperly imposed legal financial obligations (LFOs) without considering his ability to pay.

The Court of Appeals affirmed. On the instructional issue, the court found "no reason to assume" that jurors were mislead, and concluded that it was "more likely that the jurors matched the correct to-convict instructions with the appropriate recklessness definitions." Opinion, p. 9. The court also concluded that Mr. Morrissey waived his LFO argument. Opinion, p. 12.

V. ARGUMENT: THE SUPREME COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS' DECISION CONFLICTS WITH SUPREME COURT PRECEDENT, AND BECAUSE THIS CASE RAISES SIGNIFICANT QUESTIONS OF CONSTITUTIONAL LAW THAT ARE OF SUBSTANTIAL PUBLIC INTEREST AND SHOULD BE DETERMINED BY THE SUPREME COURT. RAP 13.4 (B)(1), (3), AND (4).

A. The trial court's conflicting instructions relieved the state of its burden to prove recklessness and failed to make the relevant standard manifestly clear to the average juror.

In a criminal trial, due process requires the jury to be instructed in a manner that makes the state's burden manifestly apparent to the average juror.[4] *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Jury

[4] Jury instructions and constitutional issues are both reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012); *Dellen Wood Products, Inc. v. Washington State Dep't of Labor & Indus.*, 179 Wn. App. 601, 626, 319 P.3d 847 (2014) *review denied*, 180 Wn.2d 1023, 328 P.3d 902 (2014).

instructions are erroneous if they permit the jury to apply the wrong legal standard. *Id.* at 865.

Here, the court's instructions were not manifestly clear. They permitted the jury to convict based on the wrong legal standard.

To obtain a manslaughter conviction, the state was required to prove that Mr. Morrissey "recklessly" caused Newman's death, meaning that he knew of and disregarded a substantial risk of death. RCW 9A.32.060(1)(a); *State v. Gamble*, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005). The court's instructions allowed a manslaughter conviction if Mr. Morrissey knew of and disregarded a risk of substantial bodily harm, even if he did not know there was a risk of death.

The court gave two conflicting instructions defining recklessness. CP 106, 124. The manslaughter "to convict" instruction did not tell jurors which definition to apply when determining if Mr. Morrissey "engaged in reckless conduct." CP 116. Nor did the court provide other guidance, except to "consider the instructions as a whole." CP 93. Nothing in the court's instructions limited the jury's consideration of each definition to any particular charge. CP 90-123.

The court's instructions did not make the relevant standard manifestly clear. *Kyllo*, 166 Wn.2d at 864. The ambiguity relieved the

state of its burden to prove that Mr. Morrissey knew of and disregarded a substantial risk of death.

Instructional error is presumed prejudicial unless it affirmatively appears to be harmless. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). The burden is on the state to show harmlessness beyond a reasonable doubt. *State v. W.R., Jr.*, 181 Wn.2d 757, 770, 336 P.3d 1134 (2014).

The instruction here was prejudicial. *Brown,* 147 Wn.2d at 340. The state cannot prove that it was harmless beyond a reasonable doubt. *W.R.*, 181 Wn.2d at 770. It is possible that one or more jurors voted to convict Mr. Morrissey of manslaughter based on evidence that he knew of and disregarded a substantial risk of substantial bodily harm.

Mr. Morrissey engaged in an eleven-second fistfight. RP 443, 675, 933; Ex. 59. He punched Newman five or six times, causing no broken bones. RP 168-69. Newman may have been conscious when Mr. Morrissey left. RP 603.

If jurors believed that Mr. Morrissey knew of and disregarded a risk of substantial bodily harm, they may well have concluded that he "engaged in reckless conduct." CP 116. Under the court's instructions, this would be sufficient to convict, even if the state failed to prove that he knew of and disregarded a substantial risk of death. CP 106, 116.

The Court of Appeals applied the wrong legal standard. Its decision conflicts with *Kyllo* and subsequent Supreme Court cases applying the "manifestly apparent" standard.

First, instead of determining if the instructions were manifestly clear, the court affirmed because it found "no reason to assume" that jurors were misled. Opinion, p. 9. This is inconsistent with the "manifestly apparent" standard set forth in *Kyllo*. An instruction must be manifestly clear, whether or not there is reason to assume jurors were misled. *Kyllo*, 166 Wn.2d at 864.

Second, the Court of Appeals believed that jurors "more likely" reached the correct interpretation, despite the conflict in the trial court's instructions. Opinion, p. 9. This, too, is inconsistent with the "manifestly apparent" standard. *Id.* A likelihood that jurors will correctly interpret conflicting instructions does not mean that the instructions are manifestly apparent to the average juror.

The Supreme Court should accept review. The Court of Appeals decision conflicts with *Kyllo's* admonition that jury instructions be manifestly clear. *Id.* Furthermore, this case raises significant constitutional issues that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(1), (3), and (4).

B. The trial court erred by imposing discretionary legal financial obligations without consideration of Mr. Morrissey's ability to pay.

A sentencing court must make a particularized inquiry into an offender's ability to pay discretionary LFOs. *State v. Blazina*, 182 Wn.2d 827, 841, 344 P.3d 680 (2015). The obligation to conduct the required inquiry rests with the court. *Id.*

The record must reflect the court's individualized inquiry. *Id.* The burden is on the prosecution to show an ability to pay. *State v. Duncan*, 180 Wn. App. 245, 250, 327 P.3d 699 (2014) *review granted,* (Wash. Aug. 5, 2015).

Furthermore, it is only after the court imposes a term of incarceration that an offender can make a meaningful presentation on likely future ability to pay, since the length of incarceration will affect that ability. A defendant's silence or a pre-sentence statement expressing hopes for employment should not be taken as proof of ability to pay. *Cf. Duncan,* 180 Wn. App. at 250 (noting most offenders' motivation "to portray themselves in a more positive light.") Silence or pre-imposition statements cannot substitute for the required individualized inquiry.

Following *Blazina,* the Supreme Court will remand any case in which the record does not reflect an adequate inquiry. *See, e.g., State v. Vansycle*, No. 89766-2, 2015 WL 4660577 (Wash. Aug. 5, 2015).[5]

In addition, the imposition of defense costs without consideration of ability to pay violated Mr. Morrissey's Sixth and Fourteenth Amendment right to counsel. U.S. Const. Amends. VI; XIV. The right to counsel includes the right to a full investigation into the charges against the accused and any experts necessary to do so. *State v. A.N.J.*, 168 Wn.2d 91, 112, 225 P.3d 956 (2010); *see also* CrR 3.1(f); *State v. Kelly*, 102 Wn.2d 188, 200, 685 P.2d 564 (1984) (noting that CrR 3.1(f) "incorporates constitutional requirements by recognizing that funds must be provided where necessary to an adequate defense.").

A court may not impose costs in a manner that impermissibly chills an accused's exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller,* the court must assess the accused person's current or future ability to pay prior to imposing costs. *Id.*

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[5] Similar orders were also entered on August 5th in *State v. Cole*, No. 89977-1; *State v. Joyner*, No. 90305-1; *State v. Mickle*, No. 90650-5; *State v. Norris*, No. 90720-0; *State v. Chenault*, No. 91359-5; *State v. Thomas*, No. 91397-8; *State v. Bolton*, No. 90550-9; *State v. Stoll*, No. 90592-4; *State v. Bradley*, No. 90745-5; *State v. Calvin*, No. 89518-0; and *State v. Turner*, No. 90758-7.

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court's authority to order an offender to pay the costs of prosecution:

> The court *shall not order* a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.[6] *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay

[6] In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed.

them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will end.'" *Id.* (emphasis added). Accordingly, the court found that "the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship." *Id.*

Oregon's recoupment statute did not impermissibly chill the exercise of the right to counsel because "[t]hose who remain indigent or for whom repayment would work 'manifest hardship' are forever exempt from any obligation to repay". *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to require a finding of ability to pay before ordering an offender to reimburse for the cost of counsel. *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) ("A cost judgment may not be constitutionally imposed on a

defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment"); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) ("The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn. Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions"); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) ("In view of *Fuller,* we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute").

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney's fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

Here, the court repeatedly authorized expenditure of public funds for investigative services. Supp. CP 2-6. By granting Mr. Morrissey's requests for funds, the court implicitly found them "necessary to an adequate defense." CrR 3.1(f).

The court did not find that Mr. Morrissey had the present or future ability to pay LFOs. CP 30-39; RP 1009-38. Indeed, the court found Mr. Morrissey indigent at beginning and at the end of the proceedings. CP 27-28; Supp CP 7. Mr. Morrissey's felony conviction and lengthy incarceration will also negatively impact his prospects for employment.

Despite this, the trial court ordered Mr. Morrissey to pay $4750 toward the cost of his defense without conducting any inquiry into his present or future ability to pay. This violated his right to counsel. Under *Fuller,* the court lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Mr. Morrissey to pay $4750 in defense costs must be vacated. *Id.*

The Supreme Court should accept review, vacate the order imposing $4,750 in defense costs, and remand the case for a hearing regarding Mr. Morrissey's ability to pay. The Court of Appeals' decision conflicts with *Blazina* and with *Fuller.* Furthermore, this case raises

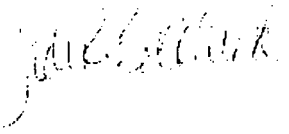
significant constitutional issues that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(1), (3), and (4).

VI. CONCLUSION

The Supreme Court should accept review and either reverse Mr. Morrissey's manslaughter conviction or remand the case for a hearing on his ability to pay discretionary LFOs. The Court of Appeals decision conflicts with *Kyllo, Blazina,* and *Fuller.* RAP 13.4(b)(1). In addition, this case raises significant constitutional issues that are of substantial public interest. These issues should be decided by the Supreme Court. RAP 13.4(b)(3) and (4).

Respectfully submitted September 3, 2015.

BACKLUND AND MISTRY



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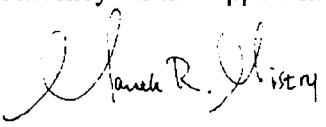

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Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Eric Morrissey, DOC #372706
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

and I sent an electronic copy to

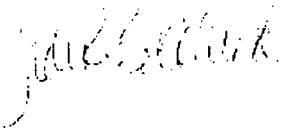
Mason County Prosecuting Attorney
timw@co.mason.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 3, 2015.



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Attorney for the Appellant

APPENDIX:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent and Cross-Appellant, v. ERIC S. MORRISSEY, Appellant and Cross-Respondent.	No. 45965-5-II UNPUBLISHED OPINION

JOHANSON, C.J. — Eric Morrissey appeals his jury trial conviction for first degree manslaughter and argues that (1) the jury instructions impermissibly lowered the State's burden of proof, (2) insufficient evidence supports his conviction, (3) the jury returned inconsistent verdicts, and (4) the trial court unconstitutionally ordered him to pay fees and costs. We hold that (1) the trial court's jury instructions were proper, (2) sufficient evidence supports Morrissey's convictions, (3) the jury's verdicts were not inconsistent, and (4) Morrissey failed to preserve his challenge to the legal financial obligations (LFOs) imposed for our review. Accordingly, we affirm.

FACTS

I. BACKGROUND FACTS

In August 2013, Talon Newman and Michael Hodgson were walking in downtown Shelton when Newman recognized three men in an alley who had assaulted Newman's friend, Jeff Baker,

several months earlier. These three men were later identified as Jacob Rossi, Chris Noor, and Sean Harris.[1] Hodgson testified that Newman ran up to the three men and got into a seconds-long fist fight with Rossi before Rossi ran away. Newman and Hodgson then stopped at a friend's house before going back to Hodgson's apartment.

Rossi testified that Newman was yelling and then ran up to him, started shoving him, and got in his face. Rossi said that Newman punched him a few times, that he attempted to punch Newman back but missed, and that he ran away because he was afraid. After getting separated from his friends, Rossi went to look for Harris and again encountered Newman in the alley. Newman punched him again and Rossi ran to a house where several other friends lived, including Morrissey and Marquis Bullplume.

Rossi's group went to Brandon Lewison's house, where Harris stayed periodically, to look for Harris. They found Harris and decided, with Lewison's and Harris's help, to walk back into town to find their friend Noor. But after walking around for a while and not finding Noor, the group decided to go home.

However, on their way home, the group again encountered Hodgson and Newman. According to Hodgson, Newman approached the group and asked Rossi if he wanted to fight and Rossi declined. Bullplume testified that Newman was aggressive; that he asked Rossi, Harris, and Morrissey if they wanted to fight; that Newman got in Morrissey's face; and that Newman shoved Morrissey and tried to "kind of spit on him." 4 Report of Proceedings (RP) at 674. While Hodgson

[1] Jacob Rossi's legal name is Jacob Curtis. However, both parties more frequently refer to him as "Rossi." Sean Harris also goes by and is referred to by the parties as Sean Davis.

was asking Rossi why Newman wanted to fight him, Hodgson saw Newman fall to the ground and saw Morrissey kneel down or bend over and start punching Newman several times.

Rossi and Bullplume testified that they saw Morrissey head butting Newman once before he fell. Rossi also testified that he saw Morrissey punching Newman a "few" times when he was on the ground. 3 RP at 401. Bullplume pulled Morrissey off Newman and they ran back to Morrissey and Bullplume's house. Newman later died in the hospital from his injuries.

Nichole Gallo, an assistant manager at a nearby restaurant, testified that she thought Newman was "motionless" when he fell to the ground after Morrissey had head butted him. 3 RP at 594. Ira Osman, a passerby who also witnessed the altercation, testified that he saw Morrissey's group "swarm[ ]" around Hodgson and Newman. 3 RP at 504.

Bullplume was Morrissey's only witness at trial. Contrary to what Gallo and Hodgson had said, Bullplume testified that Newman was not unconscious after Morrissey head butted him. He only fell "halfway" and he "caught himself and was about to get back up" before Morrissey started punching him. 4 RP at 676.

II. TRIAL AND OTHER PROCEDURAL FACTS

In January 2014, the State charged Morrissey with second degree felony murder[2]—with second degree assault[3] as the predicate felony—and first degree manslaughter.[4] At trial, the

[2] RCW 9A.32.050(1)(b).

[3] RCW 9A.36.021(1)(a).

[4] RCW 9A.32.060.

witnesses testified consistently with the above facts.[5] The State called several other witnesses, including Dr. Richard Harruff, the King County Chief Medical Examiner, who testified that Newman died from blunt force injury to his brain stem and spinal cord. According to Dr. Harruff, Newman's injuries were consistent with the State's theory: that Newman died when Morrissey got on top of him and punched him several times in the face, causing spinal cord injury when the back of Newman's head banged against the pavement.

The trial court gave two jury instructions defining recklessness without objection:

> A person is reckless or acts recklessly when he or she knows of and *disregards a substantial risk that substantial bodily harm may occur* and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Clerk's Papers (CP) at 106 (emphasis added).

> A person is reckless or acts recklessly when he or she knows of and *disregards a substantial risk that a death may occur* and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

CP at 114 (emphasis added). Although one of these instructions defining recklessness was meant to apply to second degree assault and the other was meant to apply to first degree manslaughter, the trial court did not specifically instruct the jury on which definition goes with which charge. The "to-convict" instruction for first degree manslaughter states,

> To convict the defendant of the crime of manslaughter in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about August 27, 2013, the defendant engaged in reckless conduct;
> (2) That Talon Newman died as a result of defendant's reckless acts; and

[5] The State also presented a surveillance video that does not show any of the actual altercation although it helps to set out the timeline of events.

> (3) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 116.

The jury convicted Morrissey of first degree manslaughter. Morrissey appeals his conviction and the State cross appeals.[6]

ANALYSIS

I. THE JURY INSTRUCTIONS MADE THE APPROPRIATE LEGAL STANDARD MANIFESTLY APPARENT

Morrissey argues that the jury instructions did not make it manifestly apparent to the jury which of two definitions of "recklessness" applied to first degree manslaughter.[7] According to Morrissey, this instructional error allowed the jury to impermissibly convict him based on a finding that Morrissey disregarded a substantial risk of "bodily harm" rather than a substantial risk of "death." We disagree.

A. STANDARD OF REVIEW AND RULES OF LAW

We review jury instructions de novo. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Read as a whole, the court's instructions to the jury "'must make the relevant legal standard manifestly apparent to the average juror.'" *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d

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[6] Because we affirm, we do not reach the State's cross appeal.

[7] Morrissey repeatedly argues that the trial court's instructions must make the relevant legal standard "manifestly clear." Br. of Appellant at 7, 9. The appropriate standard, from *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)), and other cases is "'manifestly apparent.'" *State v. Marquez*, 131 Wn. App. 566, 575, 127 P.3d 786 (2006).

177 (2009) (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). "Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Specifically, the "to-convict" instruction "must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (internal quotation marks omitted) (quoting *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)).

Here, the trial court instructed the jury with two different but legally correct definitions of "recklessness." Jury instruction 22 applied to first degree manslaughter and jury instruction 14 applied to second degree assault, the predicate offense for the felony murder charge. The definitions of "recklessness" were based on 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 10.03, at 209 (3d ed. 2008) (WPIC). Jury instruction 22 read, "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that *a death* may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation." CP at 114 (emphasis added). Jury instruction 14 read, "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that *substantial bodily harm* may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation." CP at 106 (emphasis added).

In addition, the first degree manslaughter "to-convict" instruction read,

> To convict the defendant of the crime of manslaughter in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

> (1) That on or about August 27, 2013, the defendant engaged in reckless conduct;
>
> (2) That Talon *Newman died as a result of defendant's reckless acts*; and
>
> (3) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 116 (emphasis added). The trial court instructed the jury that "[a] person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm." CP at 109.

The State points to the fact that the instructions pertaining to each charge were grouped together. For example, the recklessness instruction referring to "death," which applies to the first degree manslaughter charge, was jury instruction 22, while the manslaughter "to convict" instruction was jury instruction 24. Likewise, the recklessness instruction referring to "substantial bodily harm," which applies to the second degree assault charge, was jury instruction 14, while the second degree assault definition was jury instruction 17, and the felony murder "to convict" instruction was jury instruction 20. Because we find the reasoning in *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014), persuasive, as we discuss below, we need not decide whether grouping the instructions together is alone sufficient to make the legal standard manifestly apparent as the State encourages us to do.

Although we found no case directly on point, our Supreme Court's decision in *Johnson* is persuasive. There, a defendant charged with second degree assault challenged the court's general jury instruction defining recklessness. *Johnson*, 180 Wn.2d at 304-05. The trial court defined "recklessness," stating that a person acts recklessly when "'he or she knows of and disregards a

substantial risk that *a wrongful act* may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.'" *Johnson*, 180 Wn.2d at 305; WPIC 10.03. The trial court also gave a to-convict instruction based on WPIC 35.03, at 456, including a requirement that the jury find that Johnson "'recklessly inflicted substantial bodily harm.'" *Johnson*, 180 Wn.2d at 305 (emphasis omitted). The to-convict instruction in *Johnson* read,

> "To convict the defendant of the crime of assault in the second degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That during the time intervening between May 4, 2009 and May 6, 2009, the defendant intentionally assaulted [J.J.];
> (2) That the defendant thereby *recklessly inflicted substantial bodily harm* on [J.J.]; and
> (3) That the acts occurred in the State of Washington."

180 Wn.2d at 304-05 (alterations in original).

Johnson argued that the recklessness jury instruction was improper because the trial court failed to remove the general words "a wrongful act" and insert the wrongful act associated with second degree assault, "substantial bodily harm," in its place. *Johnson*, 180 Wn.2d at 304-05. He argued that using the general "wrongful act" phrase lowered the State's burden of proof because it permitted the jury to convict him on the basis of any wrongful act. *Johnson*, 180 Wn.2d at 305. Our Supreme Court disagreed and held that instructing the jury using the general "wrongful act" phrase was not error "because we review instructions as a whole, and here, the 'to convict' instruction accurately expressed the essential elements of the crime." *Johnson*, 180 Wn.2d at 308. Specifically, the court held that

> [t]aken in their entirety, the instructions in this case were sufficient. The "to convict" instruction properly laid out the elements of the crime. It identified the wrongful act contemplated by Johnson as "substantial bodily harm." Separately

> providing a generic definition of "reckless" did not relieve the State of its burden of proof. The "to convict" instructions are the primary "yardstick" the jury uses to measure culpability, and here they were accurate.

Johnson, 180 Wn.2d at 306.

Like in *Johnson*, here, the to-convict instruction for first degree manslaughter is proper and contained all essential elements of that offense. The to-convict instruction, as in *Johnson*, was based on the relevant pattern instruction and identified the appropriate "wrongful act": "Talon Newman died." CP at 116. Unlike *Johnson*, the trial court here gave two proper, charge-specific instructions: one defining "recklessness" for first degree manslaughter and a different instruction defining recklessness for second degree assault. These instructions permitted the jury, when reading the jury instructions as a whole, to match the "wrongful act" identified in the to-convict instruction for first degree manslaughter—"Talon Newman died"—with the "wrongful act" of "death" contemplated by jury instruction 22.

There is no reason to assume that the recklessness instructions would mislead the jurors when the to-convict instruction correctly identified the wrongful act at issue. Reading the instructions as a whole, the fact that the trial court identified the specific wrongful act at issue in its instructions defining recklessness makes it more likely that the jurors matched the correct to-convict instructions with the appropriate recklessness definitions.

Morrissey also argues that because the court did not explicitly instruct the jurors regarding which definition of recklessness they should apply to which crime, the appropriate standard was not manifestly apparent. However, he provides no authority for the proposition that the trial court has a duty to specifically make such an instruction. His argument also ignores the requirement

that we read the jury instructions as a whole. *See Johnson*, 180 Wn.2d at 306; *Kyllo*, 166 Wn.2d at 864. This argument is unpersuasive.

We hold that, read as a whole, the trial court's instructions made the relevant legal standard manifestly apparent because the to-convict instruction in this case was proper, contained all the essential elements of the crime at issue, and both the "to-convict" instruction and the "recklessness" instruction specifically identified the "wrongful act" contemplated by a first degree manslaughter charge.

II. SUFFICIENT EVIDENCE SUPPORTS MORRISSEY'S MANSLAUGHTER CONVICTION

Morrissey argues that no reasonable jury could have found that he knew of and disregarded a substantial risk of death from the facts the State presented at trial to support his manslaughter conviction. We disagree.

We review a challenge to the sufficiency of the evidence to determine whether, when "'viewed in the light most favorable to the prosecution, [the evidence] permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.'" *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014) (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). A defendant who claims that insufficient evidence supports his conviction admits the truth of the State's evidence as well as any reasonable inferences that may be drawn from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the trier of fact's determinations regarding witness credibility, conflicts in testimony, and the weight given to the evidence. *Thomas*, 150 Wn.2d at 874-75. When evaluating the sufficiency of the evidence, "circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A person commits first degree manslaughter when he "recklessly causes the death of another person." RCW 9A.32.060(1)(a). A defendant acts "recklessly" when, for the purposes of first degree manslaughter, he "knows of and disregards a substantial risk that [death] may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c); WPIC 10.03.

Here, there is sufficient testimonial evidence from Gallo, Hodgson, and Dr. Harruff to support Morrissey's first degree manslaughter conviction. Gallo saw Newman fall "lifeless" and "motionless" to the ground. 3 RP at 594. After Newman fell, Gallo saw a "gentleman come around to his left side and get on his knees" to continue hitting Newman. 3 RP at 594. Hodgson testified that Newman was "not conscious" when he fell to the ground and identified Morrissey as the person who moved next to Newman's body and kept hitting him. 2 RP at 273.

Dr. Harruff testified that Newman died as a result of damage to his spinal cord caused by "blunt force injury" to the back of his head and neck. 1 RP at 152. He stated further that Newman's head and facial injuries were "consistent with" the State's theory that Morrissey punched Newman on the left side of his face, which caused the right side of the back of Newman's head to strike the pavement, fatally damaging his spinal cord. 1 RP (Jan. 7. 2014) at 178.

Drawing all reasonable inferences in the State's favor, we hold that sufficient evidence exists from which a rational jury could find all the essential elements of first degree manslaughter beyond a reasonable doubt.

III. Inconsistent Jury Verdicts

Morrissey argues that the jury's inconsistent verdicts violated his due process rights. Specifically, he argues that the jury's verdicts are inconsistent because the guilty verdict on first

degree manslaughter required a finding that he disregarded a substantial risk of death; but his acquittal on felony murder with second degree assault as the predicate felony demonstrates that the jury did not find that Morrissey disregarded a substantial risk of bodily harm. We disagree because in *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988), Washington adopted the *United States v. Powell*, 469 U.S. 57, 64-67, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984), rule holding that "[w]here the jury's verdict is supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt, we will not reverse on grounds that the guilty verdict is inconsistent with an acquittal on another count." Because sufficient evidence supports his first degree manslaughter conviction, as discussed above, we hold that Morrissey's acquittal on felony murder does not establish that an inconsistent jury verdict violated his due process rights.

IV. MORRISSEY WAIVED HIS LFO ARGUMENT

Morrissey argues for the first time on appeal that the trial court erred in requiring him to pay certain costs and fees without first considering his present or future ability to pay and that this violates his right to counsel. Citing *Fuller v. Oregon*, 417 U.S. 40, 45-46, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974), Morrissey frames this as a constitutional issue in an attempt to assert a manifest constitutional error that we may address for the first time on appeal. But the constitution does not require findings as to the defendant's ability to pay at the time of sentencing. *State v. Blank*, 131 Wn.2d 230, 239-42, 930 P.2d 1213 (1997). Therefore, under RAP 2.5(a), we decline to address this argument.[8]

[8] Morrissey suggests that this approach also raises equal protection concerns because retained counsel must advise a client in advance of fees and costs, while there is no such obligation for appointed counsel. We decline to address this issue because Morrissey fails to present any relevant argument or citation to legal authority. RAP 10.3(a)(6).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

I concur:

Melnick, J.
MELNICK, J.

BJORGEN, J. (concurring) — For the reasons set out in my dissent in *State v. Lyle*, ___ P.3d ___, No. 46101-3-II, 2015 WL 4156773 (Wash. Ct. App. July 10, 2015), I would reach Eric Morrissey's legal financial obligations' challenge, even though he did not raise it during sentencing. However, the majority in *Lyle*, a published decision, reached a contrary conclusion. *Lyle*, ___ P.3d ___, No. 46101-3-II, 2015 WL 4156773 (Wash. Ct. App. July 10, 2015). Unless *Lyle* is overturned or its bases questioned by subsequent case law, I shall observe its result under principles of stare decisis. Therefore, I concur in this decision with the reservation here expressed.

Bjorgen, J.

BJORGEN, J.

BACKLUND & MISTRY

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