SUPREME COURT NO.

COA NO. 49184-2-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN CHACON,
Petitioner.

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

Thurston County Cause No. 16-1-00266-1

The Honorable Gary Tabor, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner John Chacon, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

John Chacon seeks review of the Court of Appeals unpublished opinion entered on August 29, 2017. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: An accused person has an "unqualified right" to have the jury instructed on an applicable inferior-degree offense when there is evidence permitting the inference that s/he committed only the inferior offense. Did the court err by refusing to give Mr. Chacon's proposed instruction on third degree assault where the jury could have found that he had kicked the officer, but did not cause any injury?

ISSUE 2: An accused person has a due process right to have the jury properly instructed on the presumption of innocence and the state's burden of proof. Did the court err by giving a jury instruction on the burden of proof that failed to inform jurors that Mr. Chacon had no burden of proving the existence of a reasonable doubt?

IV. STATEMENT OF THE CASE

John Chacon is a homeless veteran. RP 610.[1] He regularly uses the facilities at the Olympia Center to bathe and buy coffee. RP 610.

One day, the staff asked Mr. Chacon to leave the Senior Center area, where he was drinking his coffee. RP 67. He was eventually issued a formal trespass warning prohibiting him from returning to the Olympia Center.[2] RP 70-71. The trespass warning, however, did not indicate the length of time for which Mr. Chacon was barred from the center. Ex. 1.

Mr. Chacon went back to the Olympia Center the next day. RP 117. The staff called the police. RP 143.

The police came and arrested Mr. Chacon. RP 204. Mr. Chacon stood and cooperated with being handcuffed. RP 204. But he passively resisted being taken to the police cruiser and the officers dragged him across the floor. RP 207. Once they got to the door, however, Mr. Chacon stood when asked and walked outside with the officers. RP 207-208.

Once they were outside, the officers perceived that Mr. Chacon was making it difficult for them to open the door to the police car. RP 385.

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[1] All citations to the Verbatim Report of Proceedings refer to the chronologically-numbered volumes recounting the events of 6/27/16 through 7/14/16.

[2] Staff said that Mr. Chacon refused to leave when asked and became hostile. RP 94-95.

Officer Jeffrey Davis executed a "knee strike" to Mr. Chacon's leg. RP 386.

The "knee strike" is supposed to be disabling when it hits the soft part of the thigh. CP 387. But Davis's attempt at a "knee strike" had no effect on Mr. Chacon. RP 386.

Mr. Chacon was eventually taken to the ground and then taken to jail. RP 213, 216. Sometime in the process, Davis's knee dislocated and he had to pop his kneecap back into place. RP 394.

The state charged Mr. Chacon with criminal trespass and second degree assault. CP 9.

At trial, Davis said that Mr. Chacon had struck him with his right leg after Davis's attempted "knee strike." RP 389. Davis said that the pain in his knee started when Mr. Chacon struck him. RP 389.

Davis admitted, though, that Mr. Chacon only had about twelve to eighteen inches of space in which to strike him because of their positioning next to the car. RP 389.

There were two other officers helping with the arrest. Neither of them saw Mr. Chacon strike Davis. RP 236, 262. One of those officers was holding one of Mr. Chacon's arms and watching him very carefully. RP 229. The other was watching the interaction closely from nearby. RP 260, 290.

Davis's knee dislocation caused him to miss a few days of work. RP 399. He was put on light duty for weeks after that. RP 399.

The doctor who treated Davis's knee also testified. She admitted that Davis's knee could have been dislocated when he attempted his "knee strike" to Mr. Chacon. RP 441, 447. She also said that it is possible to dislocate a knee by twisting it. RP 451.

Mr. Chacon asked the court to instruct the jury on the inferior-degree offense of third degree assault against a police officer. RP 484-485. He argued that the jury could find that Mr. Chacon had assaulted Davis but that he had not caused substantial bodily harm. RP 485-486.

The court refused to give Mr. Chacon's proposed instruction on third degree assault. RP 488.

The court's instruction to the jury on the state's burden of proof differed from the pattern instruction. CP 30-31. The instruction the jury received did not include the sentence providing that "The defendant has no burden of proving that a reasonable doubt exists." CP 30-31.

During closing argument, the prosecutor told the jury that they were convinced beyond a reasonable doubt if they believe Mr. Chacon "did it." He said that the jury should convict Mr. Chacon even if they did not feel that the state had proved its case:

> And sometimes we'll hear from folks, ["]well, I believe he did it, I really believe he did it, but you didn't prove it to me.["] And I would submit to you I did. If you believe he did it, then I did prove it to you because remember, you came in here in terms of the evidence from this case, you came in here as a blank slate… You don't get to that point if it hasn't been proved to you beyond a reasonable doubt.
>
> RP 514.

The jury convicted Mr. Chacon of both charges. CP 38-39. Mr. Chacon timely appealed. CP 56. He argued, *inter alia*, that the trial court erred by refusing to instruct the jury on the lesser degree offense of third degree assault.

The Court of Appeals affirmed his convictions in an unpublished decision. *See* Opinion.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that the trial court violated Mr. Chacon's "unqualified right" to have the jury instructed on an applicable lesser degree offense by refusing to give his proposed instruction on Third Degree Assault. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4).

Mr. Chacon presented evidence that Davis's knee injury could have resulted from Davis's "knee strike," rather than from Mr. Chacon's alleged kick. RP 441-447.

Indeed, any kick by Mr. Chacon had to have been limited to twelve to eighteen inches of space. RP 389. It was also so slight that neither of the other two officers saw it, even though one of those officers was holding onto Mr. Chacon at the time. RP 229, 236, 262.

Accordingly, a reasonable jury could have concluded that Mr. Chacon had kicked Davis, but that Davis's injury was caused by his "knee strike."

Even so, the trial court refused to give Mr. Chacon's proposed instruction for third degree simple assault against a police officer. RP 488. The court violated Mr. Chacon's "unqualified right" to have the jury instructed on the applicable inferior-degree offense. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984).

An accused person has a statutory right to have the jury instructed on applicable inferior-degree offenses. RCW 10.61.003 states:

> Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

RCW 10.61.010 provides as follows:

> Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of

which the accused is guilty.

These statutes guarantee the "unqualified right" to have the jury decide on the inferior-degree offense if there is "even the slightest evidence" that the accused person may have committed only that offense. *Parker*, 102 Wn.2d at 163-164 (citing *State v. Young*, 22 Wash. 273, 276-277, 60 P. 650 (1900)).

The instruction should be given even if there is contradictory evidence, or if the accused presents other defenses. *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000). The right to an appropriate inferior-degree offense instruction is "absolute;" failure to give such an instruction requires reversal. *Parker*, 102 Wn.2d at 164.

Unlike a lesser-included offense, the elements of an inferior-degree offense are not necessarily included within the charged offense. *See State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997); *See also State v. Tamalini*, 134 Wn.2d 725, 734, 953 P.2d 450 (1998) (delineating the differences between lesser-included and inferior-degree offenses).

Rather, a crime is an inferior-degree offense of another when:

> (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

Peterson, 133 Wn.2d at 891 (*citing State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979) and *State v. Daniels*, 56 Wn. App. 646, 651, 784 P.2d 579 (1990)).

The third element of this test is equivalent to the second (factual) prong of the *Workman* test for lesser-included offenses. *Daniels*, 56 Wn. App. at 651. When considering evidence that the accused committed only the lesser crime, the court must take the evidence in the light most favorable to the party requesting the instruction. *State v. Condon*, 182 Wn.2d 307, 321, 343 P.3d 357 (2015).

Applying the first element of the test to Mr. Chacon's case, the statutory scheme for assault "proscribe[s] but one offense." *See Peterson*, 133 Wn.2d at 885.

As to the second element, Mr. Chacon was charged with second degree Assault. CP 9. Assault is divided into first through fourth degrees. *See* RCW 9A.36.01; RCW 9A.36.021; RCW 9A.36.031; RCW 9A.36.041. Mr. Chacon proposed an instruction for third degree assault, which is an inferior degree to the crime with which he was charged. RP 484-486.

Finally, regarding the third element, there was evidence that Mr. Chacon committed only third degree assault against a police officer.

Third degree assault (as it would have been instructed in Mr. Chacon's case) criminalizes simple assault against a police officer during the course of his/her duties. RCW 9A.36.031(1)(g).

Davis's doctor testified that his knee dislocation could have been caused by his knee strike to Mr. Chacon's leg. RP 441, 447. Indeed, any alleged strike by Mr. Chacon would have to have been very slight, given the limited space in which to withdraw his leg and the fact that the officer who was holding his arm did not even notice it. RP 229, 236, 389.

Taking the evidence in the light most favorable to the defense, the jury could have concluded that Mr. Chacon committed simple assault by hitting Davis with his leg but that he did not cause Davis's injury.

Accordingly, the jury could have inferred that Mr. Chacon committed only third degree assault.

Even so, the Court of Appeals held that Mr. Chacon was not entitled to the inferior degree instruction because Davis's doctor testified only that his knee strike *could have* caused his knee dislocation. Opinion at 8. The Court of Appeals finds dispositive that no witness conclusively testified that the knee strike was, in fact, the cause of the injury. Opinion at 8.

But a jury is permitted to draw rational inferences from the evidence presented. And the reviewing court is required to take the

evidence in the light most favorable to the party requesting the lesser degree instruction. *Condon*, 182 Wn.2d at 321. Taken in the light most favorable to the defense, the jury could reasonably have found that Mr. Chacon kicked Davis but was not the cause of Davis's injury.

Mr. Chacon was entitled to his proposed jury instruction on the inferior-degree offense of third degree assault. *Peterson*, 133 Wn.2d at 891.

The statutory right to instruction on an appropriate inferior-degree offense is "absolute." *Parker*, 102 Wn.2d at 164. When warranted by the evidence and requested by the defendant, failure to give such an instruction requires reversal. *Id.* Washington courts adopted this rule more than a century ago. The court's failure to give Mr. Chacon's proposed inferior-degree instruction requires reversal of his assault conviction. *Parker*, 102 Wn.2d at 164.

This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4). This Court should grant review.

B. The Supreme Court should accept review and hold that the trial court's instructions improperly relieved the state of its burden of proof and undermined the presumption of Mr. Chacon's innocence. This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4). This Court should grant review.

The jury instruction defining reasonable doubt at Mr. Chacon's trial deviated from the pattern instruction. It did not specify that Mr. Chacon had no burden of proving the existence of a reasonable doubt. CP 30-31; *cf.* WPIC 4.01.

Mr. Chacon exercised his right not to testify in his own defense. A fair trial in his case hinged on the jury's proper application of the burden of proof and the presumption of innocence. But the court's instructions permitted the jury to convict if it felt that Mr. Chacon should have testified to raise a reasonable doubt.

The court erred by failing to give the reasonable doubt instruction mandated by the Supreme Court. *See State v. Bennett,* 161 Wn.2d 303, 318, 165 P.3d 1241 (2007).

Due process requires jurors to presume an accused person's innocence. U.S. Const. Amend. XIV. The presumption of innocence is "the bedrock upon which the criminal justice system stands." *Bennett,* 161 Wn.2d at 315.

A court commits reversible error when it instructs the jury in a manner relieving the state of its burden of proving each element beyond a reasonable doubt. *State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011). Although the constitution does not require specific wording, jury instructions "must define reasonable doubt and clearly communicate that the state carries the burden of proof." *Bennett*, 161 Wn.2d at 307 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 280–81, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)).

To that end, the Washington Supreme Court has used its inherent supervisory authority to order lower courts to instruct juries on the burden of proof using WPIC 4.01. That instruction reads as follows:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. *The defendant has no burden of proving that a reasonable doubt exists.*
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

WPIC 4.01 (certain bracketed material omitted; emphasis added); *Bennett*, 161 Wn.2d at 308.

A trial court may not give a reasonable doubt instruction that differs from the WPIC. *State v. Castillo*, 150 Wn. App. 466, 472, 208 P.3d 1201 (2009); *State v. Lundy*, 162 Wn. App. 865, 870-871, 256 P.3d 466 (2011).

The court at Mr. Chacon's trial gave an instruction omitting the sentence reading: "The defendant has no burden of proving that a reasonable doubt exists." CP 30-31. This instruction presents the same error at issue in *Castillo.*[3]

Divisions I and II approach the issue of harmlessness differently. Division I does not evaluate *Bennett* errors for harmlessness. *Castillo*, 150 Wn. App. at 473. Division I has noted that "the [*Bennett*] court neither said nor implied that lower courts were free to ignore the directive if they could find the error of failing to give WPIC 4.01 harmless beyond a reasonable doubt." *Id.*

By contrast, Division II applies the harmless error standard for constitutional error. *Lundy*, 162 Wn. App. at 870-871.

Even under Division II's approach, the error here requires reversal. In *Lundy,* the trial court used a modified instruction, which differed only

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[3] Mr. Chacon did not object to the court's instruction, but he did propose an instruction that included the language clarifying that he had no burden of proving that a reasonable doubt exists. CP 9. This issue is preserved for appeal.

In the alternative, the court's instructional error presents manifest error affecting a constitutional right, which may be raised for the first time on appeal RAP 2.5(a)(3).

slightly from the pattern instruction. *Lundy*, 162 Wn. App. at 870-71. The instruction unequivocally informed jurors "that the defendant has no burden of proving that a reasonable doubt exists." *Id, at* 873. Because the instruction correctly communicated the burden of proof and the reasonable doubt standard, the *Lundy* court found the error harmless beyond a reasonable doubt. *Id., at* 872-873.

Here, the court omitted the sentence reading: "The defendant has no burden of proving that a reasonable doubt exists." CP 30-31. This instruction presents the same error at issue in *Castillo.* It differs significantly from the instruction addressed by the *Lundy* court.

Unlike the instructions in *Bennett* and *Lundy*, the instruction in Mr. Chacon's case provided an incomplete statement regarding the burden of proof. The trial court in this case neglected to tell jurors that Mr. Chacon had no burden. In other words, the instruction did not make the relevant standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). The instruction left open the possibility that Mr. Chacon had the burden of raising a reasonable doubt. The same error persuaded Division I to reverse.[4] *Castillo,* 150 Wn. App. at 473.

[4] The instruction in *Castillo* suffered from other flaws as well.

This error was exacerbated at Mr. Chacon's trial by the fact that the prosecutor told the jury that they should convict if they believed that Mr. Chacon "did it," regardless of whether they felt the state had proved its case. RP 514.

The jury could have taken the prosecutor's argument together with the court's improper instruction to conclude that Mr. Chacon had the burden to raise any potential reasonable doubt.

The trial court erred when it failed to instruct the jury that Mr. Chacon had no burden of proving that a reasonable doubt existed. *Castillo,* 150 Wn. App. at 473. This instructional error requires reversal of Mr. Chacon's convictions. *Id.*

The Court of Appeals agreed that the trial court erred by giving the incomplete instruction on the state's burden of proof. Opinion at 12. Still, the Court affirmed Mr. Chacon's convictions because "Chacon has not shown prejudice." Opinion at 13.

This Court should grant review to resolve the split between Divisions I and II on the issue of whether this error is subject to harmless error analysis. *Lundy,* 162 Wn. App. at 870-71; *Castillo,* 150 Wn. App. at 473.

This significant question of constitutional law is also of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(3) and (4). This Court should grant review.

VI. CONCLUSION

The issues presented in this case are significant under the State and Federal Constitutions. Furthermore, because they could impact a large number of criminal cases, they are of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted September 27, 2017.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

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

John Chacon
c/o Thurston County Jail
2000 Lakeridge Drive SW
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and I sent an electronic copy to

Thurston County Prosecuting Attorney
paoappeals@co.thurston.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 Seattle, Washington on September 27, 2017.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

August 29, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN A. CHACON, Appellant.	No. 49184-2-II UNPUBLISHED OPINION

MELNICK, J. — John Chacon appeals his convictions of assault in the second degree and criminal trespass in the first degree. We conclude that the trial court did not err by declining to give an inferior degree offense instruction, and that the prosecutor did not commit misconduct. We do conclude that the trial court erred in instructing the jury on reasonable doubt, but the error was harmless beyond a reasonable doubt.[1] We affirm.

FACTS

On February 16, 2016, Chacon sat inside the Senior Center, an area in The Olympia Center building reserved for members at least 55 years old and their guests. Chacon had used The Olympia Center's bathroom and shower on previous occasions.

Seeing that Chacon was a young man, the director of the Senior Center informed him that the Senior Center had age restrictions. Chacon stated, "I'll do whatever I want." 1 Report of Proceedings (RP) at 92. The director asked Chacon to leave, but he refused. A security guard

[1] Chacon also requests that we waive appellate costs in this matter. Pursuant to RAP 14.2, we defer this matter to our commissioner in the event that the State files a cost bill and Chacon objects.

asked Chacon for his age. When Chacon stated that he was 35 years old, the security guard informed him that according to the Senior Center policies posted at the entryway, Chacon did not meet the qualifications. Chacon responded, "If you don't get the f**k away from me I'm going to take you outside and beat the f**k out of you." 1 RP at 68.

The director called the Olympia Police Department. When police officers arrived, an Olympia Center employee prepared a formal trespass notice to be issued to Chacon. Chacon walked out of the building. The police officers followed Chacon and asked him to sign the trespass notice. He refused. They advised Chacon that he would be arrested for criminal trespass if he went back inside The Olympia Center. Chacon responded, "I'll see you tomorrow." 2 RP at 253.

The following day, an Olympia Center employee saw Chacon in the building. The employee informed Chacon that he was not supposed to be in the building and that someone might call the police. When Chacon ignored him, another employee called the police.

Police officers arrived and saw Chacon sitting at a table in the Senior Center drinking coffee. They informed Chacon that he was under arrest for trespass and placed him in handcuffs. Two officers, including Officer Jeffrey Davis, escorted Chacon out of the Senior Center. At one point, Chacon became uncooperative and dropped his weight to the floor. Because of his size, the officers could not carry Chacon and were forced to drag him to the front door. Chacon eventually stood and walked to the officers' patrol car.

At the patrol car, Chacon used his body to try to block the rear passenger door from opening. He became more aggressive and uncooperative. The officers repeatedly asked Chacon to move, but he said, "F**k you, I'm not moving." 2 RP at 385. Davis tried to move Chacon by pushing his shoulders, but Chacon resisted.

To overcome Chacon's resistance, Davis delivered a "knee strike"[2] with his right knee to a soft area of Chacon's thigh. 2 RP at 386. The knee strike was ineffective. As Davis continued to attempt to move Chacon, Chacon shifted his weight towards Davis and struck Davis with his leg. He hit Davis in the interior edge of his right knee. Davis later testified, "[Chacon's strike] was similar to the first one I had given to him in a close tight proximity, within 12 to 18 inches of movement." 2 RP at 389.

Davis felt "intense and immediate pain, helplessness" and a "sickening pop." 2 RP at 389. Davis's knee cap moved from its normal position and his leg locked at a 90-degree angle. Davis could not move his leg. He stood on his left leg and held onto the car door for stability. When the other officers noticed Davis let go of Chacon, they took Chacon to the ground.

At some point, Davis felt his knee pop back into place. Able to put a small amount of pressure on his right leg, Davis immediately assisted the other officers. He secured Chacon's legs with his baton and left knee. Davis subsequently asked one of the officers to take his position at Chacon's legs, saying "I can't do this anymore." 2 RP at 268. Davis "looked a little white." 2 RP at 269.

Davis had a red and swollen knee. One officer observed that Davis was "not his normal self" and "unsteady on his feet." 2 RP at 345. A medical examination showed that Davis suffered a dislocated kneecap. He was placed on light duty and underwent physical therapy. He was not cleared for active duty for approximately 14 weeks.

[2] A "knee strike" is a "pain compliance" technique law enforcement officers use to temporarily deaden the targeted muscle and incapacitate the person. 2 RP at 387.

None of the officers saw Chacon kick Davis. Chacon did not complain of any injuries. The State charged Chacon with assault in the second degree and criminal trespass in the first degree.

I. JURY INSTRUCTIONS

At trial, both parties submitted proposed jury instructions. Regarding the assault in the second degree charge, Chacon requested an inferior degree offense instruction of assault in the third or fourth degree. He argued that a jury could find that the injury to the officer did not amount to substantial bodily harm, an element required to establish assault in the second degree but not the inferior degrees.

The trial court denied Chacon's request, ruling that Chacon presented no evidence that Davis suffered anything other than substantial bodily harm. The evidence established that Davis suffered a dislocated kneecap which required him to be off-duty for 14 weeks.

The court instructed the jury on burden of proof and reasonable doubt as follows:

> The defendant has entered a plea of not guilty to the charges. That plea puts in issue every element of the crimes charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Clerk's Papers (CP) at 30-31 (Instr. 3). Chacon did not object to this instruction.[3]

[3] Chacon submitted proposed jury instructions, but the record does not include them. The State's proposed reasonable doubt instruction included the sentence, "The defendant has no burden of proving that a reasonable doubt exists as to these elements." Suppl. CP at 66 (Proposed Instr. 4). The State argues that the trial court's omission of the sentence was an oversight.

II. CLOSING ARGUMENT

During closing arguments, the prosecutor stated:

> And sometimes we'll hear from folks . . . I really believe he did it, but you didn't prove it to me. . . . If you believe he did it, then I did prove it to you because remember . . . you came in here as a blank slate. . . . The only information you got in this case came from the witness stand, came from the exhibits. The only way you can say to yourself when you walk out, I really believe he did it, is if you have been given that information and you have formed that belief based on that information. You don't get to that point if it hasn't been proved to you beyond a reasonable doubt. So please, hold the State to the burden of proof that you are instructed on and not a higher level or a greater level of proof.

3 RP at 514. The prosecutor continued in rebuttal:

> Folks, there is no question [Chacon] knew he was not supposed to be there [at the Senior Center]. And all of that other stuff with the ceramic coffee cup and the poor gal behind the counter who didn't tell him to leave, that is white noise, ladies and gentlemen. Listen, listen, listen, buzz, buzz, buzz, buzz. Don't pay attention to the facts and the legal instructions that you have been given.

3 RP at 576. The prosecutor concluded:

> [T]his idea that [Chacon] didn't know what was happening, all these things just sort of happen and he wasn't involved in them. It's like that commercial, right, with the old gals that are trying to do Facebook. . . . She's like look here, I put you on my wall, and there's one of the ladies that is sitting there going what? But . . . that's not how this works. . . . [A]nd she's like no, it is. . . . [S]he doesn't like what she's saying, she says, "I unfriend you," because that's her understanding of Facebook and that's how she wants it to be. And the entire picture or premise of it is like that's not how this works, that's not how any of this works. And that is the white noise that counsel has asked you to accept.
>
> Here is this version of events that has zero support in evidence, it didn't happen, and [Chacon's] behavior should be excused because, you know, that's just the way it is. It should be that way. That's not how this works, that's not how any of this works.

3 RP at 581-82. Chacon did not object to the above closing arguments.

After deliberations, the jury returned a guilty verdict on both charges. Chacon appeals.

ANALYSIS

I. INFERIOR DEGREE OFFENSE INSTRUCTION

Chacon argues that the trial court violated his "unqualified right" to give an applicable inferior degree offense jury instruction on assault in the third degree against a police officer. Br. of Appellant at 7, 10. We disagree.

RCW 10.61.003 provides that a jury may find a defendant not guilty of the charged offense, but guilty of an offense with an inferior degree. Under this statute, parties have a statutory right to an inferior degree offense instruction. *See State v. Corey*, 181 Wn. App. 272, 277, 280, 325 P.3d 250 (2014) (affirming, over defendant's objection, a conviction based on a lesser degree instruction proposed by the State).

The party requesting an instruction on an inferior degree offense must show: "'(1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.'" *State v. Fernandez–Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997) (quoting *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)).

The third requirement is the factual component of the test. When determining whether the evidence was sufficient to support an inferior degree offense instruction, we view the evidence in the light most favorable to the party that requested the instruction. *Fernandez–Medina*, 141 Wn.2d at 455–56. However, the evidence must affirmatively establish the defendant's theory of the case, not merely allow the jury to disbelieve evidence of guilt. *Fernandez–Medina*, 141 Wn.2d at 456.

An inferior degree offense instruction must be given if the evidence would permit a jury to rationally convict only on the inferior offense and acquit on the greater offense. *Fernandez–Medina*, 141 Wn.2d at 456. As long as the defendant presents sufficient factual evidence to support an inferior degree instruction, it does not matter that the instruction would be inconsistent with other portions of the defendant's case. *Fernandez–Medina*, 141 Wn.2d 459-60. We review de novo the trial court's decision to give an inferior degree offense instruction. *Corey*, 181 Wn. App. at 276.

Here, the parties do not seem to contest that the first two prongs of the inferior degree test are satisfied. Therefore, this case turns on the factual component of the test.

To convict on assault in the second degree, the State had to prove that Chacon assaulted Davis by recklessly inflicting substantial bodily harm. RCW 9A.36.021(1)(a). "'Substantial bodily harm' means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part[.]" RCW 9A.04.110(4)(b). Chacon would be guilty of assault in the third degree if he assaulted under circumstances not amounting to assault in the first or second degree, and assaulted a law enforcement officer who was performing his or her official duties at the time of the assault.[4] RCW 9A.36.031(1)(g).

Chacon argues that the jury could have concluded that he committed assault in the third degree because the evidence established that Davis's knee strike could have caused his knee dislocation, that the distance between Davis and Chacon was limited, and that none of the officers saw Chacon kick Davis.

[4] Chacon only argues the assault against a police officer prong of assault in the third degree.

Chacon's argument is based on speculation and a misinterpretation of the evidence. The testimony from Davis's physician was that it was *possible* to dislocate a kneecap if Davis hit something with the corner of his kneecap rather than straight on. The physician also testified that a person would immediately notice a dislocated kneecap. Davis testified that his knee strike against Chacon was ineffective. But when Chacon struck Davis's knee, the pain was immediate and intense. His knee locked, he could not walk, and he held onto the patrol car door for stability.

The jury heard no evidence that Davis's knee strike to Chacon caused his dislocated knee. Nor did the jury hear evidence that substantial bodily harm from a kick could only occur at a specific distance between two persons. Although the jury heard testimony that a knee strike could possibly dislocate a kneecap, that evidence alone is not enough to entitle Chacon to an inferior degree offense instruction. *See Fernandez–Medina*, 141 Wn.2d at 456. The evidence may have allowed the jury to disbelieve evidence of Chacon's guilt, but it did not affirmatively establish Chacon's theory of the case. *Fernandez–Medina*, 141 Wn.2d at 456. Therefore, the trial court did not err by denying Chacon's request to instruct the jury on assault in the third degree.

II. PROSECUTORIAL MISCONDUCT

Chacon argues that the prosecutor committed misconduct during closing argument. We conclude that although some of the prosecutor's remarks were not proper, Chacon cannot show any resulting prejudice.

An appellant claiming prosecutorial misconduct must demonstrate that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). To establish prejudice, the appellant must then show that the improper comments had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 760.

If the defendant failed to object to the allegedly improper comments at trial, the defendant must also show that the comments were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61. The appellant must show that no curative instruction would have eliminated the prejudicial effect, and the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 761. The focus of this inquiry rests more on whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks. *Emery*, 174 Wn.2d at 762.

A. Burden of Proof

Chacon first argues that the prosecutor improperly mischaracterized and minimized the State's burden of proof.

The State bears the burden of proving its case beyond a reasonable doubt, and the defendant bears no burden. *Emery*, 174 Wn.2d at 760. During closing argument, a prosecutor has wide latitude to argue reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). But a prosecutor's argument misstating, minimizing, or trivializing the law regarding the burden of proof can be improper. *State v. Johnson*, 158 Wn. App. 677, 684-85, 243 P.3d 936 (2010). As are arguments that shift the burden of proof to the defense. *Thorgerson*, 172 Wn.2d at 453.

During closing argument, the prosecutor stated that if the jury believed Chacon "did it," then she proved that Chacon committed the crimes. 3 RP at 514. The prosecutor then stated that the only way the jury could believe Chacon committed the crimes is if it "ha[d] been given that information" and "formed that belief based on that information." 3 RP at 514. She continued, "You don't get to that point if it hasn't been proved to you beyond a reasonable doubt," and told

the jury to "hold the State to the burden of proof that you are instructed on[.]" 3 RP at 514. Chacon did not object.

Nothing in the prosecutor's arguments suggests that she misstated or minimized the State's burden of proof. To the contrary, the prosecutor told the jury to hold the State to its burden of proof as instructed by the court. Therefore, we conclude that the prosecutor did not make any improper argument on this basis.

B. Disparagement

Chacon next argues that the prosecutor committed misconduct by mischaracterizing[5] and disparaging his attorney's defense theory rather than attacking it based on the evidence presented at trial. He argues that the prosecutor improperly compared his attorney to "old gals" in a television commercial who were satirized for their ineptitude with technology. Br. of Appellant at 15.

"It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity." *Thorgerson*, 172 Wn.2d at 451. Disparaging defense counsel, however, is significantly different from disparaging defense counsel's argument. *See Thorgerson*, 172 Wn.2d at 451-52. It is not error for a prosecutor to argue that the evidence does not support the defendant's theory. *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

During rebuttal, the prosecutor stated, "Listen, listen, listen, buzz, buzz, buzz, buzz," arguing that Chacon's attorney was distracting the jury with irrelevant facts and that he was telling the jury to ignore the court's instructions. 3 RP at 576. The prosecutor equated the defense theory as "white noise." 3 RP at 576. Chacon did not object.

[5] Chacon does not argue how the prosecutor's comments mischaracterized his attorney's defense theory. He argues that the prosecutor "dismiss[ed] Mr. Chacon's arguments as an attempt to divert the jury's attention from the real issues." Br. of Appellant at 15. But these comments did not mischaracterize the attorney's defense theory. Chacon's arguments focus on disparagement of his attorney.

These remarks impugned Chacon's attorney's integrity because they implied that he attempted to deceive the jury and steer it away from the court's instructions. Although the prosecutor's remarks were inappropriate, Chacon has not shown that there was a substantial likelihood that the remarks affected the jury's verdict. Additionally, a curative instruction would have eliminated any prejudicial effect.

As to the prosecutor's alleged comparison of Chacon's attorney to "old gals" in a television commercial, Chacon mischaracterizes the prosecutor's argument. 3 RP at 581. During rebuttal, the prosecutor compared Chacon's argument—that "he didn't know what was happening, all these things just sort of happen and he wasn't involved in them,"—to a woman in a television commercial. 3 RP at 581. The woman in the commercial firmly believed that she understood how to use Facebook, even though her understanding was completely wrong. 3 RP at 581.

The prosecutor argued that even though Chacon said that "it didn't happen, and his behavior should be excused because . . . that's just the way it is," he should not be acquitted of the charges because his version of events was unsupported by the evidence. 3 RP at 581. These comments did not disparage Chacon's attorney's role or impugn his integrity.

For the foregoing reasons, we disagree with Chacon's arguments on prosecutorial misconduct.

III. REASONABLE DOUBT JURY INSTRUCTION

Chacon argues that the trial court's jury instruction defining reasonable doubt relieved the State of its burden of proof and undermined Chacon's presumption of innocence. We agree that

the trial court erred by giving a reasonable doubt jury instruction that did not use the exact language of WPIC 4.01,[6] but that the error was harmless.

We review alleged errors of law in jury instructions de novo and consider them in the context of the instructions as a whole. *State v. Fehr*, 185 Wn. App. 505, 514, 341 P.3d 363 (2015). Trial courts have been directed to use only the reasonable doubt pattern instruction contained in WPIC 4.01. *State v. Bennett*, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007). Here, the trial court's jury instruction defining reasonable doubt used almost the exact verbiage of WPIC 4.01, but omitted one sentence from it. The omitted sentence reads, "The defendant has no burden of proving that a reasonable doubt exists." WPIC 4.01. Chacon did not object.[7]

Because the trial court did not instruct per *Bennett*, it committed error; however we conclude that the error was harmless. Erroneous jury instructions are generally subject to a constitutional harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). Error is harmless if we are satisfied beyond a reasonable doubt that the jury verdict would have been the same absent the error. *Brown*, 147 Wn.2d at 341. Even misleading instructions do not require reversal unless the complaining party can show prejudice. *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010).

[6] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 4.01, at, 85 (3d ed. 2008) (WPIC).

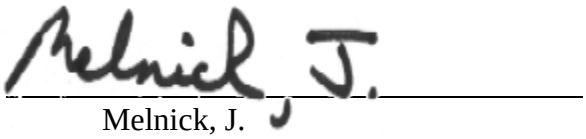
[7] Even though Chacon did not object to the jury instruction, we review it. *State v. O'Hara*, 167 Wn.2d 91, 100-01, 217 P.3d 756 (2009) (jury instructions that fail to define the beyond a reasonable doubt standard constitutes manifest constitutional error); RAP 2.5(a)(3).

In deciding harmless error, we are aware that a split exists among the divisions of this court as to whether a harmless error analysis can be utilized when a trial court gives an erroneous reasonable doubt instruction Division I held that a failure to use WPIC 4.01 constituted reversible error and declined to apply a harmless error analysis. *State v. Castillo*, 150 Wn. App. 466, 472-75, 208 P.3d 1201 (2009). But Division II declined to follow *Castillo.* It reasoned that *Bennett* did not hold that an instruction that modified WPIC 4.01 automatically constituted reversible error. *State v. Lundy*, 162 Wn. App. 865, 872, 256 P.3d 466 (2011). *Lundy* held that the failure to use WPIC 4.01 is not structural error, and that it should be subject to a constitutional harmless error analysis. *Lundy*, 162 Wn. App. at 872. We adhere to our ruling in *Lundy*.

Here, the trial court's instruction accurately described the State's burden of proof by clearly stating that the State must prove each element of the crimes charged beyond a reasonable doubt. It also instructed that the "defendant is presumed innocent," and that the "presumption continues throughout the entire trial unless . . . you find it has been overcome by the evidence beyond a reasonable doubt." CP at 31 (Instr. 3). Chacon has not shown prejudice and we do not find prejudice. Therefore, we conclude that although the jury instruction was erroneous, the error is harmless beyond a reasonable doubt.

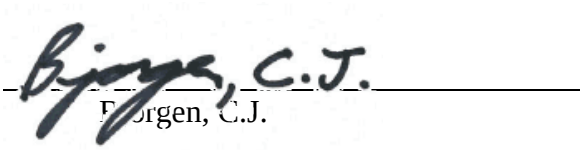
We affirm.

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.

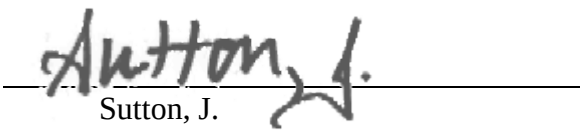


Melnick, J.

We concur:



Bjorgen, C.J.



Sutton, J.

LAW OFFICE OF SKYLAR BRETT

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