

No. 45965-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent and Cross-Appellant

V.

ERIC MORRISSEY,
Appellant and Cross-Respondent

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay

No. 13-1-00383-0

BRIEF OF RESPONDENT AND CROSS-APPELLANT

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- 2) Although the defense and the State theories of the case were in disagreement, and although the evidence was in dispute, the jury resolved the conflicting theories and evidence by returning a verdict of guilty for the crime of manslaughter in the first degree. *Under the established standard of review for claims against the sufficiency of the evidence, was the evidence sufficient to sustain the jury’s verdict?*30

- 3) The jury returned a not guilty verdict for the offense of Murder in the second degree and returned a guilty verdict of guilty for the offense of manslaughter in the first degree. Morrissey contends that these verdicts violate his due process rights because, he contends, the verdicts are necessarily inconsistent. *Notwithstanding the acquittal of murder in the second degree, where there is sufficient evidence to support the jury’s verdict of guilty on the charge of manslaughter in the first degree, should the jury’s guilty verdict be sustained?*33

- 4) At sentencing, the trial court ordered Morrissey to pay attorney fees and other costs but did not make a finding that he has the current or future ability to pay these costs. Morrissey did not object in the trial court. *Did the*

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A. STATE'S CROSS-ASSIGNMENTS OF ERROR

- 1) The trial court erred by including the phrase “unless the killing is excusable” in jury instruction No. 21.
- 2) The trial court erred by giving jury instruction No. 25.
- 3) The trial court erred by giving jury instruction No. 26.
- 4) The trial court erred by giving jury instruction No. 27.
- 5) The trial court erred by giving jury instruction No. 28.
- 6) The trial court erred by giving jury instruction No. 29.
- 7) The trial court erred by failing or refusing to give the State’s proposed instruction regarding initial aggressor.

B. ISSUES PERTAINING TO STATE’S ASSIGNMENTS OF ERROR ON CROSS-APPEAL

- 1) **Issue:** Was it error in this case to give an excusable homicide instruction (which requires that defendant act without criminal negligence) for the charge of manslaughter in the first degree even though proof of manslaughter in the first degree as charged in this case specifically required proof that the defendant acted recklessly?
- 2) **Issue:** Morrissey’s excusable homicide defense was premised upon his assertion that Talon Newman’s death was an accident that occurred during Morrissey’s lawful act of self-defense. Because there was no evidence of Morrissey’s actual belief or beliefs, and thus no evidence that he reasonably believed that he was about to be injured or that he in good faith reasonably

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believed that he was in actual danger of injury, did the trial court err by giving lawful use of force, self-defense, excusable homicide, and no duty to retreat instructions in Jury Instructions 21 and 25 through 29?

- 3) **Issue:** Did the trial court err by failing to give the State's proposed initial aggressor instruction?

C. STATE'S COUNTER-STATEMENTS OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- 1) Morrissey was charged with two crimes in this case: murder in the second degree based upon the predicate crime of assault in the second degree; and, manslaughter in the first degree. These two crimes each incorporate a unique definition of the term "reckless" or "recklessness." The trial court instructed the jury in regard to both definitions but did not specifically instruct the jury as to which of the two charges each definition should apply. *When considering the jury instructions as a whole, was the application of each definition to its corresponding crime manifestly apparent to the average juror?*
- 2) Although the defense and the State theories of the case were in disagreement, and although the evidence was in dispute, the jury resolved the conflicting theories and evidence by returning a verdict of guilty for the crime of manslaughter in the first degree. *Under the established standard of review for claims against the sufficiency of the evidence, was the evidence sufficient to sustain the jury's verdict?*
- 3) The jury returned a not guilty verdict for the offense of murder in the second degree and returned a guilty verdict of guilty for the offense of manslaughter in the first degree. Morrissey contends that these verdicts violate his due process rights because, he contends, the verdicts are necessarily

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inconsistent. *Notwithstanding the acquittal of murder in the second degree, where there is sufficient evidence to support the jury's verdict of guilty on the charge of manslaughter in the first degree, should the jury's guilty verdict be sustained?*

- 4) At sentencing, the trial court ordered Morrissey to pay attorney fees and other costs but did not make a finding that he has the current or future ability to pay these costs. Morrissey did not object in the trial court. *Did the trial court lack statutory and constitutional authority to impose these costs because it did not make a finding that Morrissey has the ability to pay these costs, and did the imposition of these costs infringe upon Morrissey's constitutional right to counsel even when he was not denied access to counsel and was not denied any resource needed to obtain a fair trial in this case?*

D. STATEMENT OF FACTS

On the evening of August 27, 2013, Talon Newman and Mike Hodgson were hanging out together, sharing a picture of beer, and playing pool at the Pine Tree, a bar in downtown Shelton, Washington. RP 238-42. After finishing their beer at the Pine Tree, Hodgson and Newman went to another bar and drank another picture of beer. RP 242. After finishing the beer, they left that bar and then went to a gas station and got an 18-pack of beer. RP 244.

Meanwhile, Jacob Rossi was hanging out downtown Shelton with Sean Davis and Chris Noor. RP 357-58. They were hanging around outdoors, at a meeting place known as “the Lead Pipe. RP 360. The meeting place was called the Lead Pipe because there was a pipe sticking out of the ground. RP 360. While at the Lead Pipe, they were passing around a half-gallon of whiskey, drinking straight from the bottle. RP 360. Afterward, they left the Lead Pipe and went to the bars on Cota Street. RP 362. They then left Cota Street and headed to an outdoor meeting place they called “the Water Towers.” RP 365. They were going there so they could finish off the whiskey. RP 365.

While Rossi, Davis, and Noor were headed for the Water Tower, Hodgson and Newman were headed toward Newman’s shop with the beer. RP 244, 365-66. As they walked along, Newman saw Rossi, Davis, and Noor on the street. *Id.* Newman made a comment to Hodgson about those three guys being the guys who had beat up Newman’s friend, “Jeff.” RP 244. Jeff was a friend of Newman’s and had gotten into a fight with Rossi’s buddies a couple of months before. RP 367, 449.

Newman put down the beer and ran over to the three guys. RP 244. Two of the three ran away, but Newman caught up with Rossi and

began fighting with him until he, too, ran away. RP 244, 246-47, 368-69. But after Rossi ran away, Newman caught up with him again and resumed the fight. RP 372. Rossi ran away again and hid in some bushes until it was safe to come out. RP 374-75. Rossi ended up with a black eye from the fight. RP 374.

Newman and Hodgson then resumed the walk to the shop, where they each drank three or four more beers. RP 248. At around 11:00 p.m., they walked back to Hodgson's apartment. RP 250. They stayed in the apartment for about 20 minutes before Newman had to leave. RP 254-55. Apartment rules required that Hodgson escort Newman through the building; so, Hodgson walked out with Newman. RP 255. Besides needing to walk Newman out, Hodgson also wanted to go outside so he could move his truck to a new parking space. RP 255-56. He was too drunk to drive, so he wanted Newman to help him push his truck to a different parking place. RP 255-56.

Meanwhile, Rossi had left the bushes where he had been hiding, and had gone to Eric Morrissey's house. RP 376. When Rossi got to Morrissey's house, Morrissey, Joseph Moe, and Marquis Bullplume were all there. RP 376. Rossi told them that he'd been jumped. RP 377.

Rossi, Morrissey, Moe, and Bullplume all left Morrissey's house together, purportedly to go find Davis, but Rossi would later say that they left to go get "revenge." RP 377, 379, 579. They found Davis at Brandon Lewiston's house. RP 382-84. Davis and Lewiston then joined up with Morrissey, Rossi, Moe and Bullplume, and the group of six then headed downtown. RP 386. The group of six ran or jogged toward Hodgson's apartment. RP 499-504, 588. As they ran toward Hodgson's apartment, they were "whooping and hollering" about beating somebody up and were saying they were going to beat his ass. RP 589, 591.

Meantime, Newman and Hodgson were leaving Hodgson's apartment, and when they got outside, Newman saw the three guys again. RP 255-57. Hodgson had forgotten his truck keys, so he had gone back into the apartment to get his keys. RP 256. When he came back from inside, he saw a group of maybe five guys walking toward them. RP 257-58. Newman and Hodgson walked toward a nearby restaurant, where they were confronted by the group of guys. RP 258. At least four or five guys from the group of six, including Morrissey, swarmed around Hodgson and Newman. RP 503-04. (One or two of the guys were apparently not involved in the swarming. RP 325, 399.)

The group came up to Hodgson and Newman and got face to face with them. RP 259. As soon as the group swarmed around Hodgson and Newman, Morrissey headbutted Newman and knocked him to the ground. RP 400, 503. Newman fell straight back. RP 503, 594. Newman was laid out with his legs on the sidewalk and his head in the parking lot, hanging off the curb. RP 267. Morrissey then kneeled down and hit Newman in the face or head several times. RP 261-62, 281, 305-06, 400, 594. Newman was unconscious, apparently from the headbutt, so he did not fight back or respond as Morrissey repeatedly struck blows to him, hand over shoulder. RP 273-74, 401, 594-95. The group then ran away. RP 403-05, 505-09, 596. As they fled the scene they were excited and were saying to each other things like, “that was so f-ing cool, that was so f-ing cool! We really beat his butt!” RP 596, 604.

As the group, including Morrissey, ran away, Newman was still on the ground. RP 333. He moaned, his eyes fluttered, and he threw up. RP 334-35. Several hours later, Newman died. RP 164. The cause of death was determined to be from the blunt force injuries that he received to his head and neck when he was headbutted and then struck repeatedly in the face or head by Morrissey. RP 157-58, 166-67, 178-79.

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Based on these facts, the State charged Morrissey with one count of murder in the second degree based on the predicate crime of assault in the second degree and one count of manslaughter in the first degree. CP 155-56. These charges were tried to a jury. The jury acquitted Morrissey of the murder in the second degree and returned a guilty verdict on the charge of manslaughter in the first degree. RP 971-72; CP 88-89.

E. ARGUMENT ON CROSS-APPEAL

Standard of Review

Each of the State's assignments of error and issues on cross-appeal are related to the State's contentions that the trial court erred by giving self-defense and excusable homicide instructions and erred by not giving the State's proposed initial aggressor instruction. A trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

- 1) **Issue:** Was it error in this case to give an excusable homicide instruction (which requires that defendant act without criminal negligence) for the charge of manslaughter in the first degree

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even though proof of manslaughter in the first degree as charged in this case specifically required proof that the defendant acted recklessly?

Over the State's objection, the trial court provided the jury with the following instruction regarding the definition of the crime of manslaughter in the first degree:

A person commits the crime of manslaughter in the first degree when he or she recklessly causes the death of another person unless the killing is excusable.

CP 113 (Jury Instruction No. 21). This instruction is derived from WPIC 28.01. In WPIC 28.01, the final phrase, "unless the killing is excusable," is bracketed, and the following note on use is provided: "[u]se bracketed material as applicable if the defense of excusable or justifiable homicide is in issue." At trial, the State voiced objections to the use of this bracketed language. RP 866-67, 869-70, 872-73. The State contends that this instruction was improper because the evidence at trial did not support the defense of excusable homicide.

Based upon the contention that the evidence at trial did not support the defense of excusable homicide, the State also objected to Jury Instruction No. 25. RP 800, 869-70. The State also contends that it was

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improper to instruct the jury in regard to excusable homicide because the offense of manslaughter in the first degree contains recklessness as an element. The trial court's Jury Instruction No. 25 read as follows:

It is a defense to a charge of murder in the second degree and/or manslaughter in the first degree that the homicide was excusable as defined in this instruction.

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

The State has the burden of proving the absence of excuse beyond a reasonable doubt. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 117 (Jury Instruction No. 25). The trial court's Jury Instruction No. 25 is a modified version of WPIC 17.02, which appears in the WPIC volume under the chapter heading "Lawful Force – Charges Other Than Homicide." The modifications in the court's instruction include that the word "force" was replaced with "homicide" and the word "lawful" was replaced with "excusable." Additionally, the second and third paragraphs were omitted entirely, and in their place the trial court inserted the RCW 9A.16.030 statutory definition of excusable homicide.

In this case, the State charged Morrissey with recklessly causing the death of Talon Newman in violation of RCW 9A.32.060(a). CP 156.

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The relevant portion of RCW 9A.32.060 reads as follows: “A person is guilty of manslaughter in the first degree when: (a) He or she recklessly causes the death of another person[.]” Thus, to prove the crime as charged the State was required to prove beyond a reasonable doubt the element of recklessness. *Id.*

The statutory defense of excusable homicide reads as follows:

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

RCW 9A.16.030. Thus, to benefit from the statutory defense of excusable homicide, the actor must act “without criminal negligence.” *Id.* The term “criminal negligence” is defined by RCW 9A.08.010, which at subsection (2) states that:

When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

RCW 9A.08.010(2). It therefore follows that if the actor acted with recklessness then it is also established that actor cannot qualify for the

defense of excusable homicide, which requires that the actor act without criminal negligence.

It is indisputable that as charged in the instant case the State was required to prove beyond a reasonable doubt that Morrissey recklessly caused the death of Talon Newman. CP 156; RCW 9A.32.060(a). Therefore an excusable homicide instruction was unnecessary and potentially confusing to the jury, because “[a]n excusable homicide defense by definition is not available to a defendant who acts recklessly.” *State v. Norman*, 61 Wn. App. 16, 28, 808 P.2d 1159 (1991).

Still more, Morrissey’s proffered defense of excusable homicide was premised upon his assertion that he was acting in self-defense when he assaulted Talon Newman. *See, e.g.*, defendant’s closing arguments at RP 912, 939-40. Under this theory of the case, intending only a fist-fight, Morrissey was acting in self-defense when he fought with Newman, but by accident or misfortune, Newman was killed as result of the purportedly lawful fist-fight. *Id.* But as the State will argue below (in regard to each of the jury instructions to which the State objects in this case), Morrissey was not entitled to the defense of self-defense because there was no evidence that he believed in good faith that he was being attacked, or that

he was about to be injured, or that he was in actual danger of injury. Again, it is not disputed that irrespective of whether Morrissey would be entitled to an excusable homicide instruction, the State would nevertheless be required to prove beyond a reasonable doubt that Morrissey recklessly caused Talon Newman's death. But if Morrissey's act of fighting with Talon Newman was unlawful, then, notwithstanding the State's unrelieved burden of proving that Morrissey acted recklessly, Morrissey is nevertheless not entitled to the statutory defense of excusable homicide. RCW 9A32.060(a); RCW 9A.16.030; *State v. Brightman*, 155 Wn.2d 506, 525 n.13, 122 P.3d 150 (2005).

- 2) **Issue:** Morrissey's excusable homicide defense was premised upon his assertion that Talon Newman's death was an accident that occurred during Morrissey's lawful act of self-defense. Because there was no evidence of Morrissey's actual belief or beliefs, and thus no evidence that he reasonably believed that he was about to be injured or that he in good faith reasonably believed that he was in actual danger of injury, did the trial court err by giving lawful use of force, self-defense, excusable homicide, and no duty to retreat instructions in Jury Instructions 21 and 25 through 29?

As argued in regard to the first issue briefed, above, Morrissey pursued a defense theory that was based upon an assertion that he lawfully

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engaged in a fist-fight with Talon Newman and that by accident or misfortune, Talon Newman was killed as a result of the purportedly lawful fist-fight. *See, e.g.*, RP 912, 939-40. Morrissey contended that the fist-fight was lawful because he was acting in self-defense. *Id.*

In accord with this defense theory, the trial court instructed the jury in regard to the lawful use of force, as follows:

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

CP 118 (Jury Instruction No. 26). The State objected to this instruction at RP 792, 872-73, 869-70. The trial court's Jury Instruction No. 26 appears to be excerpted from WPIC 17.02. The instruction includes only the second and fourth paragraphs of WPIC 17.02, while omitting the first, third, and final paragraphs.

In Jury Instruction No. 27, the trial court instructed the jury as follows:

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It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force.

The law does not impose a duty to retreat. Notwithstanding the requirement that lawful force be “not more than is necessary,” the law does not impose a duty to retreat. Retreat should not be considered by you as a “reasonably effective alternative.”

CP 119. This instruction appears to a merger of two separate WPIC instructions, WPIC 16.08 (which is found in the WPIC section that pertains to *justifiable* homicide) and WPIC 17.05 (which pertains to charges other than homicide). The State objected to this instruction at RP 792, 872-73, 869-70.

The trial court then instructed the jury in Jury Instruction No. 28 as follows:

A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 120 (Jury Instruction No. 28). This instruction mirrors the language of WPIC 17.04. The State objected to this instruction at RP 792, 872-73, 869-70.

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Finally, in Jury Instruction No. 29, the trial court instructed the jury that:

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 121 (Jury Instruction No. 29). This instruction mirrors WPIC 16.05.

The State objected to this instruction at RP 792, 872-73, 869-70.

Jury Instructions numbers 21 and 25 are set forth above under the State's argument in regard to the first issue presented.

A defendant is not entitled to jury instructions that are not supported by the evidence. *State v. Benn*, 120 Wn.2d 631, 654, 845 P.2d 289 (1993). The State contends that Morrissey was not entitled to these instructions because there was no evidence presented to show Morrissey's actual beliefs in regard to each instruction.

For example, Jury Instruction No. 26 required some proof that Morrissey "reasonably believe[d] that he [was] about to be injured...." Arguably there may be evidence from which it may be fairly speculated that others reasonably believed that Morrissey was about to be injured, but there is no evidence from which it may be determined that Morrissey

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believed it too. If he did believe it, then arguably there is at least disputed evidence from which it might fairly be inferred that his belief, if any, was reasonable, but there still is no evidence of what he actually believed on this point.

Jury Instruction No. 26 also requires some proof of the “conditions as they appeared” to Morrissey. But there is no such proof in the record. There is evidence of how the conditions appeared to others and, by extension, there is evidence from which it might be speculated about how the conditions should of appeared or might have appeared to Morrissey, but there is no evidence of how these conditions actually appeared to Morrissey.

Jury Instruction No. 28 requires some evidence that Morrissey “believe[d] in good faith and on reasonable grounds that he [was] in actual danger of injury...” But there is nothing by way of evidence in the record to show that Morrissey, himself, actually, and in good faith, believed that he was in danger of injury. Although the State contends that any such evidence is weak, the evidence that does exist might be sufficient to support an inference that his belief, if there was one, was in good faith, but there is simply no evidence of what Morrissey believed, much less that he

believed in good faith that he was about to be injured. One can speculate that others might have believed it, but there is no evidence that Morrissey believed it.

Likewise, there is no evidence to support a finding in regard to the “circumstances as they reasonably appeared” to Morrissey, as required by Jury Instruction No. 29. There may be evidence from which it may be inferred that if Morrissey perceived the circumstances in the same manner as others who perceived the same circumstances, then his perception may have been reasonable, but nonetheless there is no evidence to support a finding as to what Morrissey perceived or believed or of how the circumstances actually appeared to him, as opposed to others.

A defendant is not entitled to any particular jury instruction unless there is evidence to support the theory or defense defined by the instruction. *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). “To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable.” *State v. Graves*, 97 Wn. App. 55, 62, 982 P.2d 627 (1999) (quoting *State v. Dyson*, 90 Wn. App. 433, 438–39, 952 P.2d 1097 (1997)). “Evidence of self-defense is viewed ‘from the

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standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.”” *Graves*, 97 Wn. App. at 62 (quoting *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). In summary, because each of Jury Instructions Numbers 21 and 25-29 were premised upon a theory or assertion that Morrissey acted in self-defense when fighting with Talon Newman, and because there was no evidence of Morrissey’s own good faith belief in support of the self-defense instructions, Morrissey was not entitled to these instructions, and the trial court erred by giving them.

3) Issue: Did the trial court err by failing to give the State’s proposed initial aggressor instruction?

At trial, the State proposed an initial aggressor instruction that mirrored the language of WPIC 16.04. (Designated by Supplemental Designation of Clerk’s Papers on Dec. 2, 2014). This instruction read as follows:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight,

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then self-defense or defense of another is not available as a defense.

Id. Evidence to support this instruction was in dispute, but there was nevertheless evidence at trial to support the State's contention that Morrissey was the initial aggressor. There was evidence to support the State's contention that Morrissey joined up with five other guys who then went searching for Newman, that they ran or jogged toward him while "whooping and hollering" about beating someone up, that they encircled and swarmed around him, and that immediately upon contact with him, Morrissey headbutted him. RP 257-59, 400, 503-04, 588, 591. The initial aggressor instruction was argued at RP 815-24 and at RP 848-58. The trial court judge refused to give the instruction; the State preserved an objection to the court's refusal to give the instruction. RP 858; RP 870.

Where there is evidence to support the instruction, each side is entitled to have the jury instructed in a manner that allows it to argue its theory of the case. *State v. Redmond*, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003) (citing *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 976 P.2d 624 (1999)). "Failure to provide such instructions constitutes prejudicial error." *Id.*

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There was evidence in this case from which the jury could reasonably believe that Newman was the initial aggressor earlier in the evening in regard to his initial confrontation with Rossi, but that Newman's contact with Rossi had ended before Morrissey, together with a group of five other young men, set out in search of Newman. RP 244, 246-47, 248, 250, 254-55, 368-69, 372, 374-79, 382-84.

Although the facts are in dispute, it is arguable from the testimony presented at trial that Newman began to verbally challenge the individual members of the group of six after they encircled him. RP 442-43. But even if this were true, there was also evidence from which the jury could find that, prior to Newman's verbal challenges, the group of six, which included Morrissey, had tracked Newman down at Hodgson's apartment; that they ran or jogged toward him while threatening to assault him; and that upon contact they swarmed and encircled him. RP 386, 499-504, 503-04, 588, 591. Thus, the State was entitled to present its theory that Morrissey was not entitled to the defense of self-defense because he was the initial aggressor. "Where there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in

self-defense, an aggressor instruction is appropriate.” *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999).

Riley also stands for the proposition that, because an initial aggressor instruction impacts a defendant’s claim of self-defense, which the State bears the burden of disproving beyond a reasonable doubt, an initial aggressor instruction should not be given or should be used sparingly when other instructions are sufficient to allow the State to argue its theory of the case. *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). But the instant case is an example of a case where the instructions given did not adequately allow the State to argue its theory of the case. The instructions as given did not dispel the possibility that Morrissey was entitled to the defense of self-defense even if he initiated the contact with Newman and provoked the incident that resulted in the death of Newman.

“An aggressor instruction is appropriate if there is conflicting evidence as to whether the defendant’s conduct precipitated a fight.” *Id.* at 910.

F. STATE'S ARGUMENT IN RESPONSE TO MORRISSEY'S
ISSUES PERTAINING TO HIS ASSIGNMENTS OF ERROR

- 1) Morrissey was charged with two crimes in this case: murder in the second degree based upon the predicate crime of assault in the second degree; and, manslaughter in the first degree. These two crimes each incorporate a unique definition of the term "reckless" or "recklessness." The trial court instructed the jury in regard to both definitions but did not specifically instruct the jury as to which of the two charges each definition should apply. *When considering the jury instructions as a whole, was the application of each definition to its corresponding crime manifestly apparent to the average juror?*

As set forth in other sections of the State's brief, above, when this case proceeded to trial Morrissey was charged with two crimes, murder in the second degree based on the predicate crime of assault in the second degree and manslaughter in the first degree. To prove the crime of murder in the second degree the State was required to prove that Morrissey committed the predicate crime of assault in the second degree, which in this case required proof that Morrissey intentionally assaulted Newman and recklessly inflicted serious bodily harm upon him. RCW 9A.32.050(1)(b). To prove the charge of manslaughter in the first degree, the State was required to prove that Morrissey recklessly caused the death of Newman. RCW 9A.32.060(1)(a).

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The definition of the term “reckless” or “recklessly” varies somewhat between the crimes of assault in the second degree and manslaughter in the first degree. In the context of the instant case, when applied to the allegation of assault in the second degree the term “reckless” or “recklessly” meant that when Morrissey assaulted Newman he knew of and disregarded a substantial risk that Newman might suffer substantial bodily harm. RCW 9A.36.021(1)(a); WPIC 10.03. But when applied to the charge of manslaughter in the first degree the term “reckless” or “recklessly” meant that Morrissey knew of and disregarded a substantial risk that a death may occur. *State v. Gamble*, 154 Wn.2d 457, 467–68, 114 P.3d 646 (2005).

At the close of evidence at trial, the trial court instructed the jury in regard to each definition of “reckless” or “recklessness” as follows:

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.

When recklessness as to a particular result or fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that result or fact.

CP 106 (Jury Instruction No. 14). The above instruction was modeled after WPIC 10.03 and was crafted to apply to the crime of assault in the second degree. The court's second instruction on the definition of "reckless" or "recklessness" was likewise modeled after WPIC 10.03, but it was crafted to apply to the crime of manslaughter in the first degree, as follows:

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 114 (Jury Instruction No. 22).

The trial court did not instruct the jury that Jury Instruction No. 14 applied only to the allegation of assault in the second degree or that Jury Instruction No. 22 applied only to the charge of manslaughter in the first degree. At the next to the last paragraph of Jury Instruction No. 1, the jury was instructed that "[t]he order of these instructions has no significance as to their relative importance. They are all important..." and "you must consider the instructions as a whole." CP 93.

Jury Instruction No. 14, however, is sandwiched into the middle of a group of instructions that pertain to the murder in second degree charge

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and to the predicate crime of assault in the second degree. This group of instructions is then punctuated with Jury Instruction No. 20, the “to convict” instruction for murder in the second degree. Within this group of instructions, the court provided Jury Instruction No. 17, which clarified 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 109. Thus, it would be clear to a juror that the No. 14 definition of “reckless” would apply to the allegation of assault in the second degree.

Immediately after the “to convict” instruction for murder in the second degree, the court instructed the jury in regard to the definition of the crime of manslaughter in the first degree, as follows: “A person commits the crime of manslaughter in the first degree when he or she recklessly causes the death of another person unless the killing is excusable.” CP 113 (Jury Instruction No. 21). Immediately after this instruction, the court then provided the jury with the court’s second definition of “reckless” or “recklessness.” Given the proximity of the instruction and the context of the instructions a whole, it should have been manifestly clear to an average juror that Jury Instruction No. 22 was

provided to define the terms of the jury instruction that immediately preceded it, Jury Instruction No. 21.

But the question that arises is whether the jury mistakenly applied Jury Instruction No. 14 to the charge of manslaughter, so that the jury could have returned a guilty verdict on that charge by finding that Morrissey knew of and disregarded a substantial risk of great bodily harm but did not know of and disregard a substantial risk of death when he assaulted Newman.

A review of the record shows that neither party focused intensively on these instructions or the “recklessness” concept during closing arguments. The prosecutor briefly argued as follows:

Murder in the second degree being the commission of an assault, and the specific type of assault is an intentional assault and recklessly inflicting substantial bodily harm, and death resulting. And manslaughter in the first degree meaning the allegation that the defendant acted with reckless conduct and because of that recklessness, Mr. Newman’s death was caused.

RP 894. Morrissey focused mostly on his claim of self-defense. RP 916-44.

A further review of the record has not revealed any citation to the record where Morrissey entered an objection to the court’s instructions

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regarding the definitions of “reckless” or “recklessness.” Generally, “[a]bsent obvious or manifest injustice,” a reviewing court “will not review an assignment of error based upon the giving of an instruction to which no exception was made sufficient to apprise the trial court of the asserted error.” *State v. Brantley*, 11 Wn. App. 716, 720, 525 P.2d 813 (1974). Generally, an argument that two instructions are inconsistent is not reviewable for the first time on appeal unless the error is of constitutional magnitude. *State v. Dent*, 123 Wn.2d 467, 478, 869 P.2d 392 (1994); *Young v. Group Health Co-op. of Puget Sound*, 85 Wn.2d 332, 339-40, 534 P.2d 1349 (1975).

To convict Morrissey of manslaughter in the first degree the State was required to prove beyond a reasonable doubt that he knew of and disregarded a substantial risk that a death may occur. *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005); *State v. Peters*, 163 Wn. App. 836, 261 P.3d 199 (2011). “When instructions are inconsistent, it is the duty of the reviewing court to determine whether ‘the jury was misled as to its function and responsibilities under the law’ by that inconsistency.” *State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997) (quoting *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1997)).

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Walden stands for the rule that where inconsistent jury instructions are the result of a clear misstatement of law, prejudice is presumed, and the defendant is entitled to a new trial unless the error can be shown to be harmless beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d at 478. But in the instant case neither of the relevant instructions represents a misstatement of the law; instead, the question is whether the jury could have misapplied No. 14 by substituting it for No. 22 when considering the charge of manslaughter in the first degree.

“Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case.” *State v. Ridgley*, 141 Wn. App. 771, 779, 174 P.3d 105 (2007) (quoting *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003)). It is prejudicial error to give irreconcilable instructions upon a material issue in the case. *Hall v. Corp. of Catholic Archbishop of Seattle*, 80 Wn.2d 797, 804, 498 P.2d 844 (1972); *Smith v. Rodene*, 69 Wn.2d 482, 486, 418 P.2d 741, 423 P.2d 934 (1966). Where instructions are inconsistent or contradictory on a given material point, their use is prejudicial because it is impossible to know what effect they may have on the verdict. *Hall*, 80 Wn.2d at 804.

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The instructions at issue in the instant case, however, were not inconsistent or contradictory. “[J]ury instructions, read as a whole, ‘must make the relevant legal standard manifestly apparent to the average juror.’” *State v. Kyлло*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). The State contends that an average juror, when presented with Jury Instructions No. 14 and No. 22 in the instant case would not assume that they could arbitrarily choose between the two instructions; instead, the average juror would know that two instructions were provided because each instruction had its own significance. When considered as a whole, Jury Instruction No. 14 clearly applied to the allegation of assault in the second degree. By extrapolation, and given the location of Jury Instruction No. 22 immediately after the definition of manslaughter in the first degree at Jury Instruction No. 21, it would be manifestly apparent to the average juror that No. 22 was intended to define the term “recklessly” as it appeared in Jury Instruction No. 21.

- 2) Although the defense and the State theories of the case were in disagreement, and although the evidence was in dispute, the jury resolved the conflicting theories and evidence by returning a verdict of guilty for the crime of manslaughter in the first

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degree. Under the established standard of review for claims against the sufficiency of the evidence, was the evidence in the instant case sufficient to sustain the jury's verdict?

Morrissey characterizes his assault against Newman as a de minimis fight that lasted only eleven seconds, and he urges that the de minimis nature of this fight shows that the evidence was insufficient to prove that he knew of and disregarded a substantial risk that his act of assault would result in Newman's death. Br. of Appellant at 10-11. However, the jury received evidence from which it could find that Morrissey surprised Newman with a headbutt that was delivered with great force when Newman was not expecting it and was therefore defenseless against it. RP 259, 400, 503, 594. The jury also received evidence from which it could find that Morrissey then struck Newman in the face or head repeatedly while Newman lay defenseless on the ground. RP 261, 273-74, 306, 400-401, 595. The violence of the assault is demonstrated by the severity of Newman's injuries. Newman lost the function of his brain stem. RP 158. His injuries were consistent with receiving blows to the face, which caused his head to hit the ground, producing whiplash that caused his death. RP 178-79.

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“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court’s findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt; the reviewing court need only find that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000).

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The element of recklessness depends both on what the defendant knew and on how a reasonable person with knowledge of the facts would have acted. *State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d 1253 (1999). “The jury is *permitted* to find actual subjective knowledge if there is sufficient information which would lead a reasonable person to believe that a fact exists.” *State v. Johnson*, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992); *State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d 1253 (1999).

The evidence was sufficient for the jury to find that Morrissey knew that assaulting a surprised and defenseless Newman with the force of violence sufficient to crush his brainstem would result in a substantial risk of his death.

- 3) The jury returned a not guilty verdict for the offense of murder in the second degree and returned a guilty verdict for the offense of manslaughter in the first degree. Morrissey contends that these verdicts violate his due process rights because, he contends, the verdicts are necessarily inconsistent. *Notwithstanding the acquittal of murder in the second degree, where there is sufficient evidence to support the jury’s verdict of guilty on the charge of manslaughter in the first degree, should the jury’s guilty verdict be sustained?*

Morrissey contends that the jury rendered inconsistent verdicts in this case because, he contends, the jury “acquitted [him] of disregarding a

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substantial risk of substantial bodily harm, but found that he disregarded a substantial risk of death.” Br. of Appellant at 12. A more exact description of what occurred, however, is that the jury acquitted Morrissey of murder in the second degree and found him guilty of manslaughter in the first degree. RP 971-72; CP 88-89.

Implicit in the jury’s verdicts, it is apparent that the jury found each of the elements of the crime of manslaughter in the first degree proved beyond a reasonable doubt, but there is no indication as to which one or more of the elements of murder in the second degree were determined by the jury to be deficiently proved. With the exception of the hypothetical possibility of a nullification verdict, the only thing that the not guilty verdict suggests is that the jury found that one or more of the elements of murder in the second degree or of assault in the second degree was not sufficiently proved. But, contrary to Morrissey’s assertions, it is not certain that the jury was not convinced that Morrissey acted recklessly; it is more likely that the jury acquitted based on the element of intent because it did not believe that Morrissey intended the harm that resulted from his reckless act.

As argued in an earlier section of the State's brief in response to Morrissey's arguments against the sufficiency of the evidence, the evidence is sufficient to sustain the jury's guilty verdict in this case. Therefore, it is unnecessary to speculate as to the jury's reasons for acquitting Morrissey of the greater charge of murder in the second degree before the Court can sustain the jury's verdict on the lesser charge of manslaughter in the first degree. This is so because "[w]here the jury's verdict is supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt, [the reviewing court] will not reverse on grounds that the guilty verdict is inconsistent with an acquittal on another count." *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988); *State v. Goins*, 151 Wn.2d 728, 738, 92 P.3d 181 (2004).

- 4) At sentencing, the trial court ordered Morrissey to pay attorney fees and other costs but did not make a finding that he has the current or future ability to pay these costs. Morrissey did not object in the trial court. *Did the trial court lack statutory and constitutional authority to impose these costs because it did not make a finding that Morrissey has the ability to pay these costs, and did the imposition of these costs infringe upon Morrissey's constitutional right to counsel even when he was not denied access to counsel and was not denied any resource needed to obtain a fair trial in this case?*

Boilerplate language at paragraph 2.5 of the judgment and sentence states that the court considered the defendant's present and future ability to pay legal financial obligations, but there appears to be no finding stating that the defendant has the ability to pay, and there is no citation to the record where the court considered evidence relevant to Morrissey's ability to pay. CP 31. At page five of the judgment and sentence the court then imposed costs, which included court-appointed attorney fees and other costs. CP 34.

For the first time on appeal, Morrissey now contends that the court erred by imposing these costs. Generally, objections to legal financial obligations that are not preserved with an objection in the trial court may not be raised for the first time on appeal. *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), review granted, 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, ___ Wn. App. ___, 316 P.3d 496, 507 (No. 67627-0-I, May 28, 2013).

Morrissey contends that he may raise this claim for the first time on appeal because he has characterized the claim as a constitutional claim by averring that the trial court lacked statutory and constitutional authority

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to order him to pay costs without first finding that he had the ability to pay those costs. Br. of Appellant at 14-15. He also contends that requiring him to pay the costs of his court-appointed attorney following his conviction chills his constitutional right to counsel. Br. of Appellant at 15-20. The sentencing court has statutory authority to impose costs following a conviction. RCW 10.01.160. “[T]he sentencing court’s consideration of the defendant’s ability to pay is not constitutionally required.” *Calvin*, 316 P.3d at 507.

Morrissey was sentenced to 60 months of incarceration. CP 32. Morrissey contends that because the trial court found that he qualified for court-appointed counsel the trial court necessarily found that he was indigent. But current indigence does not indicate that Morrissey has an inability to earn money or to acquire assets now or in the future. There is no indication in the instant case that Morrissey suffers from any disability or other limitation that would hinder his ability to earn income.

The State avers that the more meaningful time to assess Morrissey’s ability to pay is when he is released from incarceration and may seek employment or when the State attempts to enforce his obligation to pay. Postponing this inquiry to a time when the State seeks to collect

the costs is supported by past decisions of this Court. *See, e.g., State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811, *review denied*, 165 Wn.2d 1044, 205 P.3d 133 (2008); *State v. Smits*, 152 Wn. App. 514, 523-24, 216 P.3d 1097 (2009); *State v. Baldwin*, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991).

Our State Supreme Court has determined that the imposition of legal financial obligations alone is insufficient to implicate constitutional concerns. *State v. Blank*, 131 Wn.2d 230, 241–42, 930 P.2d 1213 (1997); *State v. Curry*, 118 Wn.2d 911, 917 n.3, 829 P.2d 166 (1992). Even if the error were of constitutional magnitude, the error would not be manifest because Morrissey did not raise an objection in the trial court and, therefore, the record is insufficient to enable this Court to review the merits of the claim. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756; *State v. McFarland*, 127 Wn.2d 31, 33, 896 P.2d 1245 (2009). Still more, Morrissey cannot show that the alleged error has resulted in any actual prejudice, because in fact he had counsel throughout the proceedings and was not denied any resource that he needed to obtain a fair trial.

G. CONCLUSION

There is no evidence to support the proposition that Morrissey had any kind of belief that he was about to be injured by Talon Newman. Even though there arguably is evidence from which a person viewing the circumstances from the perspective of a person who is not fond of fighting might speculate that a timid person might be afraid under the circumstances that he or she would be injured by Newman, there is no evidence in the instant case that Morrissey possessed such a belief or that such a belief was in good faith. Without this basic evidence, the trial court erred by giving the excusable homicide and lawful use of force instructions.

Additionally, even though the facts were in dispute and each side of the case advanced contradictory theories of the case, there was ample evidence to support the State's contention that Morrissey went out looking for Newman with the intent of confronting him over Newman's earlier assault against Rossi, and there was ample evidence that Morrissey and his group of friends ran or jogged up to Newman and swarmed around him immediately before the assault that ended Newman's life. Therefore, there was ample evidence to support the State's proposed initial aggressor

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instruction, and the instructions that were given did not allow the State to argue this theory of the case because the instructions did not instruct the jury that, notwithstanding Morrissey's claim of self-defense, Morrissey's assault against Newman was not lawful if Morrissey was the initial aggressor. Therefore, the trial court erred by not giving the State's proposed initial aggressor instruction.

The facts of the case, the arguments of the attorneys, and the jury instructions taken as a whole all combine to show that the relevant standards and law were manifestly apparent to the average juror so that even though there were two definitions of "reckless" or "recklessness," the jury did not misapply an inappropriate definition when rendering its verdict of guilty on the charge of manslaughter in the first degree. Therefore, the jury's verdict should be sustained.

The evidence in this case was disputed and each side's theory of the case was in conflict, but the jury was presented with the evidence and it resolved the conflicts and found Newman not guilty of murder in the second degree but found him guilty of manslaughter in the first degree. Because it is the jury's function and sole prerogative to resolve conflicts in the evidence and to determine the persuasiveness of the evidence, and

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because there is substantial evidence in the record from which the jury could find as it did, the evidence is sufficient to sustain the jury's verdict.

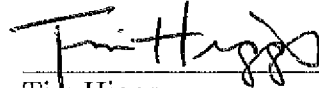
And because there is sufficient evidence to sustain the jury's verdict of guilty on the charge of manslaughter in the first degree, this Court must sustain the jury's verdict notwithstanding Morrissey's contention that the jury's verdicts are in conflict. It is improper to speculate as to why the jury acquitted Morrissey of the charge of murder in the second degree, and because the evidence supports the jury's verdict of guilty of manslaughter in the first degree, the verdict must be sustained notwithstanding Morrissey's assertion that the guilty verdict is inconsistent with jury's acquittal on the greater charge of murder in the second degree.

Finally, Morrissey's challenge of the trial court's authority to impose costs following his conviction should not be considered for the first time on appeal when he did not raise the objection first in the trial court. Morrissey's contention that the trial court lacked statutory and constitutional authority to impose costs against him is erroneous. In conclusion, Morrissey benefited from the assistance of counsel throughout these proceedings and was not denied access to any resource that was

necessary to assure that he received a fair trial. Thus, Morrissey's assertion that imposing costs against him has violated his right to counsel is erroneous.

DATED: December 4, 2014.

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State's Response Brief
Case No. 45965-5-II

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MASON COUNTY PROSECUTOR

December 04, 2014 - 8:00 PM

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Court of Appeals Case Number: 45965-5

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