

NO. 35543-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARTIN WARREN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 04-1-01585-3

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED August 30, 2007, Port Orchard, WA *KIM A. SAKMANSKI*
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's claim of ineffective assistance of counsel must fail when: (1) the decision to not request a lesser included offense instruction is a tactical decision and tactical decision cannot serve as the basis for an ineffective assistance claim; and, (2) the defendant has failed to show that he was prejudiced?

2. Whether, although the trial court's instructions on unlawful possession of a firearm failed to include the implied element that the possession must be knowing, the error was harmless when the uncontested evidence was that the Defendant possessed a firearm on the day of the murder; a fact which the Defendant himself accepted on the stand?

3. Whether the Defendant is precluded from contesting the trial court's admission of the protection order below when he failed to object to the admission of the order and specifically conceded that it was admissible?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Martin Warren, was charged by amended information filed in Kitsap County Superior Court with: (1) aggravated murder in the first degree with the special allegations that the crime was committed against a family or household member and was committed while armed with a firearm;

(2) assault in the second degree with the special allegations that the crime was committed against a family or household member and was committed while armed with a firearm; and, (3) unlawful possession of a firearm in the first degree. CP 49-53.¹ At trial, the defendant was convicted of aggravated first degree murder with the special allegations, and was convicted of unlawful possession of a firearm in the first degree. He was acquitted of the charge of assault in the second degree. The trial court imposed a sentence of life in prison without the possibility of parole on the murder charge and a standard range sentence on the firearm charge. CP 221. This appeal followed.

B. FACTS

i. Background

In October of 2004, the Defendant and his girlfriend Kathy Moore, his brother Ivan Warren, his mother Dortha Warren, and his father, Russell Warren were living on a piece of property located at 2851 Komichan Lane in Seabeck, Washington. RP 600-01, 695. The property was almost three acres in size. RP 601, 695. There were a number of living quarters on the property, including a main residence (a double-wide trailer) where the homicide occurred, a secondary residence (often referred to as the “old homestead”) that was under construction, and a motor home. RP 456-57, 604,

¹ The Defendant was also charged with manufacture of methamphetamine and possession, but those counts were severed after the Defendant filed a motion to sever, and the counts were later dismissed after the defendant was sentenced on the other charges. CP 6-48, 219-20.

695. Dortha, Ivan and Russell stayed in the main residence, and the Defendant and Kathy lived in the motor home. RP 696.

Ivan Warren was aware that the Defendant had a .380 handgun, and had occasionally seen the gun in the motor home. RP 603-04. Ivan Warren was also aware that the Defendant sometimes kept the .380 in a gun case under the driver's seat of the Ford truck. RP 604-05. Several days before the murder, a gun was seen in a gun case underneath the seat of the truck. RP 672, 801.

On the Friday night before the murder, the Defendant was "irritated" that his father had taken parts out of his computer without permission, and had said, "I hate him" and "I ought to beat his ass" or "kill him." RP 674.

ii. October 11, 2004 - The Day of the Murder.

On the morning of October 11, 2004, Kathy Moore spoke with M the Defendant who was irritated because he needed to run an errand in Port Orchard and also needed to get the brakes on his truck fixed, and could not do both of these himself. RP 772-73. The Defendant told Kathy to ask his parents if she could borrow a vehicle so she could go to Port Orchard for him and "do something to help him out once in a while." RP 773. Kathy Moore then went into the main residence to ask Russell Warren if she could borrow a vehicle. RP 610, 698, 774. Russell Warren declined to loan a car to Ms. Moore, stating that the last time she had borrowed a vehicle she had not gone

where she stated she was going. RP 610-11, 699, 775-76. Dortha Warren overheard this conversation, and Ivan Warren was in a nearby bedroom and could also hear this conversation. as his door was open. RP 610, 699.

Kathy Moore then left the residence and went outside. RP 611, 700, 777. Ms. Moore spoke with the Defendant outside the house and informed him that Russell Warren would not loan her a vehicle. RP 612, 778. Ms. Moore stated that the Defendant was very angry and “just, you know, just exploded, enraged immediately, and went inside the house to talk to his dad, to yell at his dad basically. He was very, very angry.” RP 778. Ivan Warren overheard this conversation and could tell that the Defendant was angry and heard him say that his father “was an asshole and a stingy fucker.” RP 612-13.

A few minutes after Kathy Moore had left the residence, the Defendant came into the house and spoke with Russell. RP 612-13, 701, 778. Russell Warren was lying on a couch, and the Defendant was “calling his father out on how he was,” and was using a loud voice. RP 614, 701. Ivan Warren stated that the Defendant was yelling at his father and calling him a “stubborn fucker” and said that “he hates him and everybody hates him.” RP 643, 701. Russell Warren was calm and “just sat there,” and said, “Okay, whatever.” RP 614, 644. When the Defendant said that he hated Russell, Russell shrugged his shoulders and said, “I know.” RP 703

The Defendant then left the house and walked over to the motor home where Kathy Moore was. RP 615, 781. The Defendant was very angry and was pacing back and forth. RP 781. He then walked over towards Kathy Moore and said, "I should just kill him." RP 781. Ms. Moore asked the Defendant what he was talking about, and the Defendant responded, "I should just kill him. He has made enough people miserable for long enough. I should just fucking shoot him." RP 781. Ms. Moore told the Defendant that this was not what he wanted to do, but Martin responded, "No, it is what I want to do. Look, I am going to go to prison anyway. I might as well go to prison for a good reason." RP 781. Ms. Moore tried to calm the Defendant down, and asked him to think about his family and what would happen to them, but the Defendant only responded by saying, "I don't fucking care. I don't fucking care." RP 782. The Defendant then told Ms. Moore, "You are a fucking pussy. You will never stand up for yourself, will you? You will let people do whatever they want to you." RP 783-84.

During this same time frame, Ms. Moore saw the Defendant walk over to the F-150 truck and retrieve a gun. RP 784. Ms. Moore then said, "Okay, whatever. So do you want some of this food that I am about ready to heat up?" RP 786. The Defendant just shook his head and walked back towards the truck. RP 786. Ms Moore thought the Defendant was going to

put the gun away and was calming down. RP 786-87. Ms Moore then walked into the old homestead to microwave some food. RP 787-88.

The Defendant, however, returned to the main residence. RP 616. Ivan was on his way to the kitchen as the Defendant entered the house and saw something shiny in the Defendant's hand, but didn't look at what it was. RP 616. Dortha Warren noticed that the Defendant's face was "all white" and saw that the Defendant had a silver gun in his hands and was walking with both hands on the gun with his hands down by his legs. RP 704-05. Dortha then tried to pull Ivan outside, but Ivan resisted and went into the kitchen. RP 615-16. Ivan then heard the Defendant say, "You're dead," and then saw him shoot Russell Warren as he was lying on the couch. RP 617-18. Ivan Warren explained that Russell Warren was unarmed and was sitting in his underwear. RP 633. Dortha Warren was outside and described hearing four shots. RP 708. Kathy Moore heard what she thought was five shots. RP 787.

Dortha Warren then went up to the porch and told the Defendant that he had to get out of the house and leave. RP 709. After the Defendant went outside, Ivan went over and saw his father "take his last breath of air," and then went to retrieve a handgun, intending to shoot his brother. RP 618-20. When Ivan went outside, he saw the Defendant getting into a truck, but Ivan

did not shoot the Defendant as his mother came between them. RP 621. Ivan then told his mother to call 911 and went to put his gun away. RP 622.²

Dortha Warren called 911 and reported that her son had just killed her husband, gave the dispatcher the address, and told them the he had left in a white truck. RP 714-15. Ivan Warren also eventually called 911 and asked the dispatcher what he needed to do to assist his father. RP 627-28. He then held a towel to a wound as instructed, and attempted to remove the blood from his father's mouth, and remained with his father until the police arrived. RP 628.

iii. Law Enforcement Arrives at the Scene

Deputy Lee Watson was the first deputy to arrive at the scene and as he approached the house, Dortha Warren came out of the house and was extremely upset. RP 538-41. Deputy Watson asked her what had happened, and she said that her husband had been shot. RP 542. When asked who shot him, Ms. Warren responded, "Ma-Ma-Ma-Martin." RP 542. Deputy Watson then went into the home and saw Ivan Warren kneeling over the victim and attempting to clear blood from the victim's mouth with a turkey baster. RP 544. Ivan Warren was clearly upset and was "frantic" for help. RP 544. Deputy Watson checked for a pulse, but was unable to find one. RP 544.

² Note: there was testimony about an exchange of gunfire between Ivan and the Defendant when the Defendant was at the end of the driveway and Ivan was near the house, and the Defendant was charged with assault in the second degree based on this exchange, but the jury

Deputy Watson checked the residence to make sure no one else was present and then came back to talk to Ivan Warren. RP 545. Ivan Warren was crying and appeared to be in shock. RP 545.

Deputy Watson asked Ivan Warren who the victim was, and Ivan stated it was his father, Russell Warren. RP 555. When asked, Ivan stated that his brother, the Defendant, had shot the victim. RP. Ivan Warren also told the deputy that the gun used was a .380 automatic, and that the Defendant had shot his father because "He wouldn't let the girlfriend use the truck." RP 555. Ivan Warren described that the Defendant "just came right into the house and started shooting his dad." RP 556.

Other deputies and three aid personnel arrived at the scene. RP 557. The aid personnel tended to the victim, and started a patient evaluation. RP 575. Deputy Watson observed that when the aid personnel rolled the victim over, brain matter was observed. RP 558. The aid personnel found that the victim was not breathing and had no pulse, and given the gunshot wounds to the head, decided not to begin CPR as dictated by their protocols. RP 576.

iv. The Defendant is Located and Arrested.

Deputy James Kent responded to a report of a gunshot injury at the Komichan Road address, and was advised that a vehicle involved in the incident was leaving the area. RP 518-19. Deputy Kent was told that the

ultimately acquitted the Defendant of this charge. See RP 623-26.

vehicle was a white Ford truck and was given the license plate number. RP 519. As Deputy Kent was approaching the area, he saw the truck come by him at a high rate of speed. RP 519-20. Deputy Kent described that the he first saw the truck near the intersection of Lakeview and Holly Road. RP 521. Deputy Kent made a U-turn and he and Deputy Argyle caught up to the truck and conducted a high-risk felony stop of the truck. RP 520-21.

Deputy Argyle verbally commanded the Defendant to exit the truck, and Warren complied. RP 527. Warren appeared “very coherent,” and did not appear intoxicated. RP 527. He was sweating a little bit, which Deputy Argyle found unusual, but he seemed alert and was focusing on the deputy when he was talking. RP 527. The Defendant was arrested, handcuffed, and advised of his Miranda warnings, which he appeared to understand. RP 521, 528.

Deputy Argyle asked the Defendant if he had had some trouble at his house, and the Defendant stated that he wasn’t at his house and that he had come from a friend’s house in Belfair. RP 528. The Defendant was placed in the back of a patrol car and the truck was impounded and brought to the impound yard. RP 522.

v. ***Evidence is Recovered From the Scene and From the Truck.***

In the main home, deputies recovered five bullet casings. RP 495. These casings were admitted as Exhibits 31, 32, 33, 36, and 37. RP 468-73.

The motor home was eventually searched, and a box of ammunition was found on a shelf that had five bullets missing. RP 485-87. The box of ammunition was admitted as Exhibit 40. RP 487. The Defendant's driver's license was also found on the shelf. RP 488.

The truck the Defendant was driving was impounded and later searched. RP 489-91. A magazine loaded with three .380 semiautomatic bullets was found in an ashtray, and a gun case was found under the driver's seat. RP 491-92.

vi. The Firearm is Found.

Deputies searched the stretch of roadway between the Komichan Lane property and the scene of the eventual traffic stop and arrest, and a firearm was found in some brush just off the roadway near the intersection of Lakeview and Holly Road. RP 440-41, 582, 588. The gun contained a magazine with one live round in it and one round was also found in the chamber of the gun itself. RP 592-93. The gun was sent to the crime lab. RP 493. The handgun was admitted as Exhibit 45. RP 591. This firearm was a .380 caliber handgun RP 821

vii. The Autopsy and Ballistics Tests.

An autopsy was performed on Russell Warren's body on October 12. RP 678. The forensic pathologist who performed the autopsy found a gunshot wound on the back of the victim's left hand and determined that the

bullet that caused this wound then entered the right side of the victim's face. RP 732, 740, 742-43. The next wound was a grazing wound to the left index finger, and the pathologist determined that the bullet that caused this wound then entered the victim's head on the left side, and imbedded in the skull. RP 745-46. Another gunshot wound was found in the right upper-front chest area, and the bullet that caused this wound entered the chest cavity, fractured the second rib in front, and penetrated the left lung. RP 750. Another wound was found on the right side of the chest, and the bullet that caused this wound entered the chest cavity and penetrated the middle lobe of the right lung, causing a pool of blood of approximately four liters in the right chest cavity. RP 752. The pathologist ultimately concluded that the cause of death was the gunshot wounds to the head and chest and the associated massive internal bleeding. RP 753. A number of bullets and bullet fragments were recovered from the victim's face, head, tongue, upper chest and lower chest. RP 678-86.

The .380 firearm and the bullet casings found at the scene of the murder were analyzed at the Washington State Patrol crime lab, and testing showed that the five casings had been fired from the .380 handgun. RP 831-32. In addition, the four bullet "jackets" recovered from the victim were also analyzed at the lab and were found to have been fired from the .380. RP 833-34.

viii. Stipulation that the Defendant Was Free on Bond Pending Trial.

Near the end of the State's case, the court read a stipulation to the as follows,

That on October 11, 2004 the person before the court who has been identified in the charging document as Defendant Martin K. Warren was free on bond or personal recognizance pending trial for a serious offense in State of Washington versus Martin K. Warren, Kitsap County Superior Court Cause number 04-1-00988-8.

RP 838.

ix. The Protection Order.

A copy of an order for protection (Exhibit 10) was admitted without objection. RP 838. The protection order listed Russell M. Warren as the petitioner and Martin K. Warren as the respondent. Ex.10. The Order stated, inter alia, that,

Respondent is restrained from causing physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking petitioner.

Respondent is restrained from coming near and from having any contact whatsoever, in person or through others, by phone, mail, or any means, directly or indirectly, except for mailing or service of process of court documents by a 3rd party or contact by Respondent's lawyer(s) with petitioner.

Respondent is excluded from petitioner's residence. Petitioner waives confidentiality of the address which is: 2851 NW Komichan LN, Seabeck WA 98380.

Respondent is restrained knowingly coming within 500 feet of petitioner's residence or workplace.

Other: The respondent's contact with Dortha A. Warren is unrestricted except as prohibited by the restraints concerning Russell Warren herein. Respondent shall not come within 50 feet of residence.

Ex 10.

During a hearing regarding the motions in limine, defense counsel stated that he agreed that the no contact order was admissible with respect to the aggravating circumstance. RP 25. The Defendant never objected to the admission of the order itself, nor did he raise any challenges to the order based on a claim of vagueness. Rather, during opening statement, defense counsel addressed the no contact order and stated that the victim was manipulative and obtained the order as a means of control, stating, "Everyone will recognize that once Russell Warren had the restraining order, he was in control." RP 405-06.

x. The Defense Theory of the Case Differentiates Between Premeditation and Intent.

During the defense case, the Defendant announced an intention introduce evidence regarding "family history" consisting of a number of events that occurred in the past between the Defendant and his father, as well as a number of other family members. RP 865-66. Outside the presence of the jury, the court discussed these matters with the State and with the defense. The defense argued that these events would later come in as part of the testimony of the defense expert regarding diminished capacity, but also

argued that the events were independently admissible regarding the issue of premeditation under the theory that the murder was “an emotional blow-up” and not premeditated. RP 869. In particular, the defense argued,

But as far as the issue of premeditation, whether there was simply an emotional blow up, if you don't reach diminished capacity, family history is still relevant and still comes in under this basis. If the state were charging second degree murder and manslaughter, they might have an argument, but as long as they are charging premeditation, then those thought processes going to Mr. Warren's state of mind come in in terms of being able to argue against premeditation.

RP 869. Later, the defense continued,

Diminished capacity is at issue here and the state has not responded at all to our argument that when it comes to premeditation, the emotional baggage that comes with family history is of relevance and importance to establish whether there was premeditation or just an emotional breakdown, not quite to the level of diminished capacity, but enough to say it wasn't premeditated.

RP 872. Ultimately, the court held that while this “family history” evidence might ultimately be admitted, it was not proper to admit the evidence until after the testimony of the defense expert, and the Defendant waited until the doctor testified to introduce this evidence. RP 874-77, 881.

xi. Expert Testimony.

Dr. John Melson, a psychiatrist, testified for the Defendant and outlined much of the “troubled” family history concerning the Defendant and Russell Warren. See RP 896-908. Dr. Melson also diagnosed the Defendant with a number of mental disorders, namely: attention deficit hyperactivity

disorder; post-traumatic stress disorder; amphetamine dependence; and amphetamine intoxication-delirium. RP 917, 920, 925-26. Based on this diagnosis, Dr. Melson stated that in his opinion the Defendant would not have been capable of forming the intent to commit a crime of October 11. RP 927.

In rebuttal, the state called its own forensic psychiatrist, Dr. Sarah Leisenring, who reached a very different conclusion than Dr. Melson. RP 1101. Dr. Leisenring stated that her opinion, after reviewing everything, was that there was evidence that Martin Warren's behavior was intentional and purposeful, and that he was capable of engaging in goal-directed behaviors. RP 1108. Dr. Leisenring also did not agree with Dr. Melson's diagnosis of ADHD and found no evidence of PTSD. RP 1110-11. Rather, Dr. Leisenring noted that one of the most telling things she found was that at the time she interviewed the Defendant he noted that he felt better than he ever had and attributed this to being off of methamphetamine. RP 1114-15. Dr. Leisenring stated that she "didn't see any signs of mental illness," and that these facts were strong evidence that much of what the Defendant may or may not have been feeling at the time could well have been due to methamphetamine. RP 1115. In conclusion, Dr. Leisenring stated that it was her opinion that there was not anything that prevented the Defendant from being able to form the intent to commit a crime. RP 1118.

xii. The Defendant Testifies.

The Defendant also testified. RP 1014. He explained that six months prior to the murder, his father had quit his job and then began to help the Defendant with construction on the homestead building. RP 1032-33. Russell Warren, however, then “just quit” on the Defendant and stopped helping. RP 1033. After this time, the Defendant stated that his father would steal his tools and also leave them out in the rain, ruining them. RP 1033.

The relationship deteriorated to the point that the Defendant had decided to move to Eastern Washington. RP 1034-35. The Defendant gave a friend \$5,000 to help pay for a property in Eastern Washington, and this friend came to visit the Defendant several days before the murder to take a number of building materials to this new property. RP 1035-36. The Defendant stated that he was planning on leaving as soon as possible. RP 1036. He also stated that he had his friend take the building materials because his father had been stealing some of the building materials and that he complained about this to his friend, stating, “It’s getting out of hand. Everything I do he sabotages.” RP 1036. The Defendant also stated that was not planning on taking Kathy Moore and explained, “I had had it. I just have had it with that lifestyle, with the people not helping, not doing anything. It just was time to go.” RP 1045-46. The Defendant also acknowledged that he couldn’t take it anymore and wanted to start over again. RP 1080.

The Defendant also stated that in the days preceding the murder he had gone to Montana to pick up a friend and had been using a lot of methamphetamine. RP 1041-43. The Defendant had purchased a computer just before leaving for Montana, and upon his return he found that his father had taken the back off of the computer and removed some parts, which the Defendant stated made him upset and "pissed off." RP 1044.

On the morning of the murder, the Defendant testified that he got high and later asked Kathy to go and borrow a truck. RP 1050. He then went back into the motor home and got high again. RP 1050. When Kathy returned she told him that his father had refused to loan Kathy a vehicle and had said, "Use your own fucking truck." RP 1051. The Defendant admitted that he got upset and went over to tell his father "how I felt about this." RP 1051. The Defendant claimed he did not remember what he said to his father when he went to the house, but he did state that,

All I remember, that's - - I remember him just having a smile on his face, like a smirk. I don't remember him saying anything. I don't remember what I said. That's the last thing I remember is him just smiling at me like, "Not my problem," or I don't know what was going through his head, but just a smile on his face.

RP 1052. The Defendant claimed that he had no memory of the murder, and that the next thing he remembered was opening the gate to the property and then talking to a lawyer at the jail. RP 1052.

The Defendant was asked about the protection order, and acknowledged that it was his signature on the order, and that the order prohibited him from having contact with his father. RP 1069.

The Defendant also stated that he believed he killed his father by shooting him five times, was responsible for it, and accepted that he had a gun in his possession that day. RP 1084.

xiii. Jury Instructions.

The State submitted proposed jury instructions, and the defense “adopted” the state’s proposed instructions with the addition of a few additional instructions. RP 1055. When the completed packet was ultimately prepared and presented to the judge, the defense stated that there would be no argument about the instructions. RP 1172. The defense did make one formal objection to the instructions, and this was concerning the unlawful possession of a firearm instruction, which the defense argued should require the state to prove that the defendant knowingly possessed the firearm. RP 1175.

The court’s “to convict” instruction to the jury on unlawful possession of a firearm stated that the state was required to prove that on or about October 11th, 2004, the defendant had a firearm in his possession or control, was free on bond or personal recognizance pending trial for a serious offense, and that these acts occurred in the State of Washington. CP 162.

xiv. Closing Arguments.

In closing arguments, defense counsel argued at length that the killing was an “emotional reaction” and was not premeditated, echoing his earlier arguments before the judge. RP 1226. Defense counsel then argued,

If you are going to premeditate, if you are going to make a plan, “I want to get rid of the old bugger because he won’t go away,” are you going to do it in front of other people? That doesn’t suggest a plan. Are you going to do it in a way that everyone in the world is going to know that it’s you? That doesn’t suggest a plan. Are you going to have the means to get away before anyone even knows you have been around? None of those things happened. No planning, just emotional reaction.

RP 1235-36. Later, defense counsel argued, “Did they show premeditation, that plan? They didn’t get there.” RP 1239. Defense counsel also stated,

The state charged first degree premeditated murder and nothing else related to Russell Warren. That is what has to be decided here. That is the weakness in their case. That is where it fails.

RP 1239. Finally, defense counsel argued that,

[T]hese jury instructions will lead you to the conclusion that this was an emotional event, not premeditated. Even if you don’t all agree on diminished capacity, it was an emotional event, not premeditated.

RP 1245.

xv. Verdict.

After deliberation, the jury found the Defendant guilty of murder in the first degree and unlawful possession of a firearm in the first degree. RP

1257-58. In addition, the jury found: (1) that at the time of the murder, the Defendant was prohibited by court order from contacting Russell Warren and that the Defendant had knowledge of the order; (2) that the victim was a family or household member; and, (3) that the Defendant was armed with a firearm at the time of the murder. RP 1258. Each of the twelve jury members was polled by the judge and stated that this was their verdict and the verdict of the jury. RP 1258-60.

III. ARGUMENT

A. THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE: (1) THE DECISION TO NOT REQUEST A LESSER INCLUDED OFFENSE INSTRUCTION IS A TACTICAL DECISION AND TACTICAL DECISION CANNOT SERVE AS THE BASIS FOR AN INEFFECTIVE ASSISTANCE CLAIM; AND, (2) THE DEFENDANT HAS FAILED TO SHOW THAT HE WAS PREJUDICED.

The Defendant argues that his trial counsel was ineffective for failing to request a lesser included offense instruction. App.'s Br. at 16. This claim is without merit because the decision to not seek a lesser included instruction was a legitimate trial strategy and the Defendant has failed to demonstrate any prejudice.

To establish that counsel was ineffective, the Defendant must show (1) counsel's performance was deficient; and (2) the deficient performance

prejudiced him. *State v. Thomas*, 109 Wn.2d at 225-26, 743 P.2d 816 (1987), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). A reviewing court will find counsel to be ineffective if his representation fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A defendant is prejudiced where there is a reasonable probability that but for the deficient performance, the outcome of the case would have differed. *In re Pers. Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant must prove both prongs of the test in order to prove ineffective assistance of counsel. *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147, review denied, 150 Wn.2d 1024, 81 P.3d 120 (2003).

As a preliminary matter, the State agrees that second degree murder and second degree manslaughter are lesser included offenses of aggravated first degree murder under Washington law with respect to the legal prong of the *Workman* test. See *State v. Bowerman*, 115 Wn.2d 794, 805, 802 P.2d 116 (1990)(finding that second degree murder is a lesser included offense of aggravated first degree murder); *State v. Warden*, 133 Wn.2d 559, 947 P.2d 708 (1997)(finding that first and second degree manslaughter may be lesser included offenses of premeditated murder and instructions may be given to a jury when the facts support such an instruction). Moreover, second degree

murder is also an inferior degree of first degree murder. *State v. Johnston*, 100 Wn. App. 126, 134, 996 P.2d 629, *review denied*, 11 P.3d 827 (2000).

As the Defendant points out, under the factual prong of the *Workman* test, the evidence in the case must support an inference that the lesser crime was committed. App.'s Br. at 17. Furthermore, the evidence must support an inference that only the lesser offense was committed. *Bowerman*, 115 Wn.2d at 805-06; *State v. Karp*, 69 Wn. App. 369, 376, 848 P.2d 1304, *review denied*, 122 Wn.2d 1005 (1993).³

It is debatable whether there was actually a factual basis for an instruction on murder in the second degree in the case below. The defense below was diminished capacity as well as an associated argument similar to a "heat of passion" argument that the Defendant acted "emotionally" as opposed to acting with premeditation or intent. Both of these arguments, if believed by the jury, would potentially preclude a jury finding of guilt on second degree murder as they would negate the intent required for that crime as well. *See, for instance, Bowerman*, 115 Wn.2d at 806 (holding that lesser included instruction of second degree murder was not warranted when defense was diminished capacity because if the jury believed this defense

³ Both the inferior degree and lesser included tests the same analysis to determine whether the evidence supported giving the lesser included/inferior offense instruction. See *State v. Fernandez Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000); *State v. Ieremia*, 78 Wn.App. 746, 755 n. 3, 899 P.2d 16 (1995), *review denied*, 128 Wn.2d 1009 (1996).

then it could not have found defendant guilty of second degree murder). In any event, the defense of diminished capacity would not apply to second degree manslaughter, so for the sake the argument, the State will assume that there was a factual basis for instructions on both second degree murder and second degree manslaughter.

The fact that a defendant was legally entitled to lesser instruction, however, does not prove that defense counsel was ineffective for failing to request a lesser included offense instruction. Rather, Washington applies the two-part *Strickland* test to determine whether a defendant received effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Cienfuegos*, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001). The defendant must first show that trial counsel's performance was deficient. Then, the defendant must show that the deficient performance prejudiced the defense. *Cienfuegos*, 144 Wn.2d at 226-27, 25 P.3d 1011.

It is well settled under Washington law that when a trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it does not support a claim of ineffective assistance. *See, State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); *State v. Sardinia*, 42 Wn. App. 533, 542, 713 P.2d 122 (1986).

Furthermore, in reviewing claims of ineffective assistance of counsel, an appellate court gives great deference to trial counsel's performance and begins the analysis with a strong presumption of counsel's effectiveness. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 337.

Washington courts have also recognized that defense counsel's decision to pursue an "all or nothing" strategy--seeking acquittal on a greater offense rather than requesting a lesser included offense instruction--does not necessarily constitute deficient performance. For instance, in *State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1979), the defendant was charged second degree assault and defense counsel did not request a lesser included offense instruction of simple assault. On appeal, the defendant argued ineffective assistance based on a number of reasons including the failure to request the lesser included instruction. *King*, 24 Wn. App. at 499-501. The court, however, rejected the defense claim, stating,

Defendant complains because counsel failed to offer an instruction on the lesser included offense of simple assault. Such an instruction would almost have insured a conviction for at least a misdemeanor. Counsel's tactic, as demonstrated by his argument to the jury, was to attempt to persuade the jurors that the affray was not as violent as some witnesses suggested and that the injuries sustained did not produce pain and suffering of a sufficient magnitude to qualify as grievous bodily harm. It was an all-or-nothing tactic that well could have resulted in an outright acquittal.

King, 24 Wn. App. at 501.

Similarly, in *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991), a prosecution for first degree murder, our Supreme Court rejected the suggestion that the trial court had erred by acquiescing in the defense's decision not to request lesser included offense instructions:

Had the jury decided (as the defendants strenuously argued) that the evidence did not prove the charges of murder in the first degree and assault in the first degree beyond a reasonable doubt, then under the instructions given, the defendants would have been acquitted. The defendants cannot have it both ways; having decided to follow one course at the trial, they cannot on appeal now change their course and complain that their gamble did not pay off. Defendants' decision to not have included offense instructions given was clearly a calculated defense trial tactic and, as we have held in analogous situations, it was not error for the trial court to not give instructions that the defendant objected to.

Hoffman, 116 Wn.2d at 112-13.

Thus both the Washington Supreme Court's language in *Hoffman* and the Court of Appeals decision in *King* state that a defense decision to not have lesser included offense instructions is a tactical decision. As a tactical decision can not serve as a basis for a claim of ineffective assistance, the Defendant's claim of ineffective assistance must fail.

Although not cited by the Defendant, the State is aware of one Division One case that has reached the opposite conclusion. In *State v. Ward*, 125 Wn.2d 243, 104 P.3d 670 (2004), the defendant was charged with second degree assault after he allegedly pointed a gun at two men who were

repossessing his car. On appeal, the court held that defense counsel's "all or nothing" strategy to not request a lesser included instruction for unlawful display of a weapon was deficient. In making this determination, the court considered the significant difference in penalties between the greater and lesser offenses, the fact that the defendant's theory of the case applied to both offenses, and the particularly risky nature of the defendant's claim of self-defense. *Ward*, 125 Wn. App. at 249-50.

This court should not follow *Ward* for three reasons: (1) it is inconsistent with the Supreme Court's language in *Hoffman* and with Division One's previous holding in *King*; (2) it is factually distinguishable; and, (3) it was wrongly decided.

As outlined above, tactical decisions cannot support a claim of ineffective assistance and the Washington Supreme Court (and Division One of the Court of Appeals) has characterized the decision to not ask for a lesser included instruction as a tactical decision. *Hoffman*, 116 Wn.2d at 112-13; *King*, 24 Wn. App. at 501. As *Ward* is inconsistent with these decisions, this court should decline to follow *Ward*.

Second, *Ward* is distinguishable. In *Ward*, two repossession agents were confronted by Ward as they tried to repossess his car. The agents claimed Ward pointed a gun at them. *Ward*, 125 Wn. App. at 246. The State

charged Ward with two counts of second degree assault, both with firearm enhancements. *Ward*, 125 Wn. App. at 247. At trial, Ward claimed that he believed the agents were car thieves and that he was trying to defend his property. He and his girlfriend also testified that Ward only displayed the gun by opening his coat. *Ward*, 125 Wn. App. at 248. Defense counsel did not offer an instruction for the lesser included offense of unlawful display of a weapon, and, on appeal, Ward argued that this was ineffective assistance. Division One agreed, concluding that it was objectively unreasonable to use the “all-or-nothing” strategy in Ward's case because (1) the lesser included offense was a misdemeanor which carried considerably less jeopardy than the two second degree assault felonies; (2) the defenses would have been the same for both charges, thus the additional of a lesser included offense created little risk; and (3) the all or nothing approach was risky because it relied on Ward's credibility regarding his claim of self-defense and Ward had been seriously impeached. *Ward*, 125 Wn. App. at 249-50.

None of the three *Ward* factors is present here. First, unlike in *Ward*, the lesser included offenses in the present case were not misdemeanors, but rather were serious felonies that, especially with the associated firearm enhancements, would have carried lengthy prison sentences. In addition, even though the lesser included offenses would not have resulted in a life sentence, the Defendant was well aware that if he was only convicted of a

lesser offense the State could have sought to try him on the manufacture of methamphetamine and possession charges that were severed, resulting in an even longer prison sentence.⁴ CP 6-48, 219-20.

Second, the Defendant's defense to aggravated first degree murder focused largely on the argument that there was reasonable doubt regarding premeditation. As Defense counsel argued,

[T]hese jury instructions will lead you to the conclusion that this was an emotional event, not premeditated. Even if you don't all agree on diminished capacity, it was an emotional event, not premeditated.

RP 1245. Thus, the defenses on murder in the first degree and the lesser included offense of murder in the second degree would have been different, since the primary attack on the first degree charge went to the issue of premeditation which is not an element of second degree murder. In addition, neither premeditation nor intent is an element of second degree manslaughter, and thus, diminished capacity is not even a defense to this charge. The defense to the charged offense, therefore, would not apply equally to the lesser included offenses.

Third, in Ward, the defendant was severely impeached and the defense was self-defense. Ward told police when they first arrived that he knew the agents were coming to repossess the car, but at trial stated that he

⁴ These counts were, understandably, later dismissed after the Defendant was sentenced to

thought the agents were thieves. *Ward*, 125 Wn. App. at 250. Nothing like that happened in the present case.

While the arguments against premeditation were not without unassailable, the Defendant's testimony did not suffer from the blatant contradictions, as was the case in *Ward*. *Ward*, therefore, is distinguishable. Defense counsel in the present case forced the State to proceed on first degree murder and thereby required the state to prove premeditation beyond a reasonable doubt. This gave the Defendant an opportunity to attack the State's evidence regarding premeditation and claim that the murder was an "emotional," not premeditated crime. By choosing this course, the defense forced the State to carry the highest burden possible and prove premeditation beyond a reasonable doubt. If he had been successful, the Defendant could have potentially walked away. Given all of these facts, trial counsel used a legitimate trial strategy by choosing to instruct on first degree murder only.

Furthermore, the State would urge this court to not follow *Ward*, as it was wrongly decided. As outlined above, *Ward* is inconsistent with the well settled principal that trial tactics and strategy can not support a claim of ineffective assistance and with the Washington Supreme Court's

life in prison without the possibility of parole. See CP 219-20.

characterization of the decision to not request lesser instructions as a trial tactic.

In addition, countless other courts throughout the country have held that the decision to not seek lesser included offense instructions is a legitimate trial strategy that cannot support a claim of ineffective assistance of counsel. *See, for instance, Sarwacinski v. State*, 564 N.E.2d 950, 951 (Ind.Ct.App.1991)(rejecting claim of ineffective assistance based on failure to seek lesser included instruction and noting that it was apparent that trial counsel decided to rely solely on the defense of self-defense and that if counsel had submitted an instruction on voluntary manslaughter he would have weakened the self-defense case and diminished appellant's chances of acquittal, and the court found no reason to second-guess the strategic decision of counsel); *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind.1998)(holding that that trial counsel was not ineffective for failing to request lesser-included offense instructions on a charge of murder because it represented a reasonable "all or nothing" tactical choice by defense counsel to obtain a full acquittal for the defendant); *People v. Barnard*, 470 N.E.2d 1005, 1012 (Ill. 1984)(the failure of defendant's trial counsel to tender self-defense and manslaughter instructions may well have been part of the strategy ... to force the jury to vote guilty or not guilty on the murder charge and not to give the jury an opportunity to compromise by finding the defendant guilty of manslaughter

was not ineffective assistance of counsel under the Strickland test); *State v. Lee*, 654 S.W.2d 876, 879 (Mo. banc 1983) (recognition of proper trial strategy of counsel to elect not to request instruction on lesser degree of homicide); *Love v. State*, 670 S.W.2d 499, 502 (Mo. banc 1984)(same); *State v. Clayton*, 402 N.E.2d 1189, 1191 (Ohio 1980)(rejecting claim of ineffective assistance where defense counsel had made “a tactical choice” not to include an instruction on attempted voluntary manslaughter); *State v. Griffie*, 658 N.E.2d 764 (Ohio 1996)(in which the Supreme Court of Ohio ruled: “Failure to request instructions on lesser-included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel”).⁵

⁵ See also, *Woratzeck v. Ricketts*, 820 F.2d 1450, 1455 (9th Cir.1987), cert. granted and judgment vacated, 486 U.S. 1051 (1988), remanded on other grounds, 859 F.2d 1559 (9th Cir.1988)(The decision not to request a lesser included offense instruction falls within the wide range of reasonable professional representation. Consequently, we conclude that this argument does not support Woratzeck's claim that he was denied effective assistance of counsel.); *United States v. Hall*, 843 F.2d 408, 413 (10th Cir.1988)(“We conclude that here the decision not to request a lesser included offense instruction falls within the wide range of reasonable professional representation.”); *Colon v. Smith*, 723 F.Supp. 1003, 1008 (S.D.N.Y.1989)(Submission of lesser included offenses may give the jury a basis of finding petitioner guilty of a crime where the prosecution may be unable to prove the elements of the original crime beyond a reasonable doubt. Because counsel may have wished to avoid this possibility, the decision not to request lesser included offenses is not ineffective assistance of counsel); *Kubat v. Thieret*, 867 F.2d 351, 364-65 (7th Cir. 1989) (“The decision not to request a lesser included offense instruction falls within the wide range of reasonable professional representation.”) (quoting *Woratzeck v. Ricketts*, 820 F.2d 1450, 1455 (9th Cir. 1987)); *Bashor v. Risley*, 730 F.2d 1228, 1241 (Mont. 1984) (“With the benefit of hindsight we know that [the all-or-nothing] strategy was incorrect; however, it did not constitute ineffective assistance of counsel.”); *Henderson v. State*, 664 S.W.2d 451, 453 (Ark. 1984) (explaining that “as a matter of trial strategy, competent counsel may elect not to request an instruction on lesser-included offenses The success or failure of a particular trial strategy does not mean counsel was ineffective”); *Metcalf v. State*, 451 N.E.2d 321, 326 (Ind. 1983) (refusing to find that counsel was ineffective for failing to seek lesser included instructions even though the defendant's strategy failed); *Martin v. State*, 712 S.W.2d 14, 17-18 (Mo. 1986) (noting that the jury's failure to acquit did not affect the reasonableness of using an all-or-nothing strategy); *Sendejo v. State*, 26 S.W.3d 676, 678-80 (Tex.App.-Corpus Christi

In addition to being inconsistent with *Hoffman* and a wealth of court opinions from other jurisdictions, the *Ward* case also inconsistent with the well established principle that jurors are presumed to follow the court's instructions. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994); *State v. Davenport*, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984); *State v. Grisby*, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). The *Ward* court, however, cited a 1973 U.S. Supreme Court decision for the position that although "in theory" a jury must acquit a defendant if the state has failed to prove the elements of the charge beyond a reasonable doubt, the failure to give a lesser included instruction creates a substantial risk that the jury's practice will diverge from theory. *Ward*, 125 Wn. App. at 250, citing *Keeble v. United States*, 412 U.S. 205, 212-13, 93 S.Ct 1993, 36 L. Ed. 2d 844 (1973). *Ward's* reliance on *Keeble* is misplaced for several reasons. First, *Keeble* was not an ineffective assistance of counsel case. Rather, the defense counsel in *Keeble* sought a lesser included instruction but this request was denied by the trial court on the basis that the defendant was a Native American who had committed a crime on a reservation and the court's jurisdiction was limited to certain enumerated offenses that did not include the lesser included offense. *Keeble*, 412 U.S. at

2000)(rejecting claim of ineffective assistance for counsel's failure to request lesser included instruction and choosing instead chose to "roll the dice" with an "all-or-nothing" strategy, noting that court could not say this was anything other than sound trial strategy); *Mathre v. State*, 619 N.W.2d 627, 630 (N.D.2000)(As a matter of trial strategy, a defendant may waive instructions on lesser included offenses and thereby take an all or nothing risk that the jury

206-07, 93 S. Ct. at 1995. The Supreme Court noted that a non-Native American defendant would have been entitled to a lesser included instruction, and that its reading of the relevant statutes did not indicate that Congress intended to deprive Native American defendants of procedural rights guaranteed to other defendants. *Keeble*, 412 U.S. at 2121, 93 S. Ct. at 1997. These facts, however, are distinguishable from the present case and from the facts in *Ward*.

In addition, the *Ward* court failed to note that the language in *Keeble* (a case that did not involve an ineffective assistance of counsel claim) was inapposite to the United States Supreme Court's later language in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which is widely regarded as the leading case on ineffective assistance of counsel. In *Strickland*, the Court wrote that, "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight..." *Strickland*, 466 U.S. at 689. The Court, without mentioning *Keeble*, went on to state that the exact type of speculation that the *Keeble* court engaged (that is, speculating that the jury would likely not follow the court's instructions) was not proper, stating,

In making the determination whether [counsel's] errors resulted in the required prejudice, a court should presume,

will not convict of the greater offense).

absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

Strickland, 466 U.S. at 694-95. The *Ward* court, therefore, improperly relied on *Keeble* for the proposition that in ineffective assistance of counsel claims, the appellate court can speculate that the failure to request a lesser included instruction caused the jury to somehow ignore the trial court's instructions since *Keeble* was not an ineffective assistance case and because the Supreme Court later specifically stated that this type of speculation was improper.

This Court, therefore, should decline to follow *Ward* because it conflicts with previous decisions from the Washington Supreme Court, the United States Supreme Court, and countless decisions from other jurisdictions. As the decision to not seek lesser included offense instructions is a tactical decision, and because tactical decisions cannot serve as a basis for a claim of ineffective assistance of counsel, the Defendant's claim must fail,

Finally, even if counsel's performance were deemed deficient, the Defendant cannot show prejudice. As the Defendant notes, to prevail on a claim of ineffective assistance of counsel, he must show that he was

prejudiced by counsel's error. App.'s Br. at 16, *citing Strickland*, 466 U.S. at 687. A defendant is prejudiced where there is a reasonable probability that but for the deficient performance, the outcome of the case would have differed. *Pirtle*, 136 Wn.2d at 487.

In the present case, the jury found beyond a reasonable doubt that the Defendant was guilty of aggravated first degree murder. This fact alone demonstrates that the inclusion of a lesser included offense instruction would have had no effect.⁶ The possibility of a jury pardon is not a proper consideration under *Strickland*, and the Defendant, therefore, cannot meet his burden of establishing the probability of a different outcome. In addition, the unrebutted evidence demonstrated that the murder was premeditated. For these reasons, the Defendant's claim should be rejected.

Furthermore, a finding by this court that there was a reasonable probability that but for the deficient performance the outcome of the case would have differed could only be justified by one of two possible assumptions. This court would have to assume that either: (1) the jury did not actually find beyond a reasonable doubt that the defendant committed each of the elements of aggravated first degree murder yet chose to find him guilty; or, (2) assume that the jury did find beyond a reasonable doubt that the

⁶ See also, *In re Thomas*, 766 So.2d 975 (Ala. 2000) cited by the Defendant. App.'s Br. 21. In *Thomas*, the Alabama court found no prejudice in failing to seek a lesser included because

defendant was guilty of aggravated murder in the first degree, but would have nevertheless compromised on a lesser included offense if given the opportunity to do so. Under *Strickland*, however, both of these assumptions are improper. The first assumes that the jurors ignored their instructions and convicted the defendant without proof that he was guilty. The second assumes that, given the chance, the jurors would have ignored their instructions and engaged in nullification. A finding of prejudice from ineffective assistance cannot be based on this kind of guesswork.

An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, “nullification,” and the like. . . . The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

Strickland, 466 U.S. at 694-95.

The defendant bears the burden of proving prejudice. *McFarland*, 127 Wn.2d at 337. In this context, he would be prejudiced only if the jurors did not or would not follow their instructions. Since there is no evidence of that fact, any error committed by counsel was not prejudicial. Both of the above mentioned assumptions that this court would be required to make in order to find prejudice require this court to implicitly assume jury lawlessness or

the jury had rejected a different lesser included instruction. App.’s Br. at 21.

nullification. Strickland, however, prohibits this court from so doing, and the Defendant's claim, therefore, must fail.

Finally, this court should disregard the arguments regarding trial counsel's previous disciplinary proceedings. The Defendant cites at some length to a previous, unrelated disciplinary proceeding against his trial counsel. App.'s Br. 22-23. The Defendant argues that one cannot help but to speculate that the trial counsel has a "tendency" to place too much confidence in his abilities. App.'s Br. at 22. The State submits that the fact that defense counsel had a previous disciplinary matter on an unrelated issue is not relevant to the case at bar. In particular, the Defendant cites no authority for the position that once an attorney has had suspension for any issue he is no longer presumed to be effective. The State, therefore, would ask this court to decline to consider this portion of the Defendant's brief, as it is improper.

B. ALTHOUGH THE TRIAL COURT'S INSTRUCTIONS ON UNLAWFUL POSSESSION OF A FIREARM FAILED TO INCLUDE THE IMPLIED ELEMENT THAT THE POSSESSION MUST BE KNOWING, THE ERROR WAS HARMLESS BECAUSE THE UNCONTESTED EVIDENCE WAS THAT THE DEFENDANT POSSESSED A FIREARM ON THE DAY OF THE MURDER; A FACT WHICH THE DEFENDANT HIMSELF ACCEPTED ON THE STAND.

Warren next claims that the court's instruction to the jury on unlawful possession of a firearm failed to include the requirement that the state must prove knowing possession. App.'s Br. at 24. The State concedes that the instruction as given was incorrect, but the error in this regard was harmless.

An omission or misstatement of the law in a jury instruction that relieves the State of its burden to prove every element of the crime charged is error. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

The trial court's "to convict" instruction on unlawful possession of a firearm stated that the state was required to prove that the defendant had a firearm in his possession or control, was free on bond or personal recognizance pending trial for a serious offense, and that these acts occurred in the State of Washington. CP 162. The instruction did not inform the jury that the State was required to show a knowing possession.

In *State v. Anderson*, 141 Wn.2d 357, 360, 5 P.3d 1247 (2000), the Washington Supreme Court held that "knowing possession" is an implied element of the crime of second degree unlawful possession of a firearm. Although the Defendant in the current case was charge with unlawful possession of a firearm in the first degree, the State can find no basis to distinguish the two degrees of unlawful firearm possession. The State, therefore, concedes that the trial court's instruction in the present case was

defective, and it did not include the implied element of “knowing” possession.

The error below, however, was harmless. In *State v. Thomas*, 150 Wn.2d 821, 844-45, 83 P.3d 970 (2004), the Washington Supreme Court stated that it had adopted the rule that an erroneous jury instruction that omits an element of the charged offense or misstates the law is subject to harmless error analysis. *Thomas*, 150 Wn.2d at 844, citing *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). The *Thomas* court also noted that, “[A]n instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Thomas*, 150 Wn.2d at 845, citing *Neder*, 527 U.S. at 9, 119 S. Ct. 1827. Finally, the *Thomas* court stated that, “The *Neder* test for determining the harmlessness of a constitutional error is: ‘whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Thomas*, 150 Wn.2d at 845, citing *Neder*, 527 U.S. at 15, 119 S. Ct. 1827. The Washington Supreme Court, therefore, held that, “In order to hold the error harmless, we must ‘conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.’” *Brown*, 147 Wn.2d at 341, citing *Neder*, 527 U.S. at 19, 119 S. Ct. 1827. Ultimately, the *Brown* court held that,

Under recent Washington case law, as well as *Neder v. United States*, an erroneous jury instruction that omits or misstates an element of a charged crime is subject to harmless error analysis to determine whether the error has not relieved the State of its burden to prove each element of the case. To determine whether an erroneous instruction is harmless in a given case, an analysis must be completed as to each defendant and each count charged. From the record, it must appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

Brown, 147 Wn.2d at 344.

Similarly, in the *Thomas* case, the Court outlined that,

Under the evidence that was presented, it was Thomas who: devised the plan to rob; thought about killing Geist beforehand; was friends with the victim and could lure him out on false pretenses; brought his gun with him that evening; was known to the victim and thus, had to eliminate him as a witness; solicited others to help him in his plan. We agree that “[Thomas] was so entrenched as a major participant in the murder that his culpability cannot be lessened even if his accomplice pulled the trigger.” For purposes of upholding Thomas's conviction for first degree murder, we find the errors in the accomplice liability and “to convict” instructions to be harmless beyond a reasonable doubt. We thereby affirm Thomas's conviction for first degree murder

Thomas, 150 Wn.2d at 846 (citations omitted).

In the present case, the evidence was overwhelming that the Defendant knowingly possessed a firearm. The Defendant's mother, brother, and girlfriend all testified that they saw him holding a firearm. RP 617-18, 704-05, 784. In addition, the Defendant himself, while claiming he had no

memory of the actual shooting, acknowledged that he was the shooter and accepted that he had a gun in his possession that day. RP 1084. Finally, the firearm itself was found on the side of the road along the route taken by the Defendant when he fled the scene. RP 440-41, 582, 588. Given all of this evidence, the record shows beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. In addition, even though the Defendant did put forth some evidence of diminished capacity, the jury clearly rejected this defense when it found him guilty of murder in the first degree, which required the jury to find both intent and premeditation. Given all of these factors, this court should conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error, and the error, therefore, was harmless.

C. THE DEFENDANT IS PRECLUDED FROM CONTESTING THE TRIAL COURT'S ADMISSION OF THE PROTECTION ORDER BELOW BECAUSE HE FAILED TO OBJECT TO THE ADMISSION OF THE ORDER AND SPECIFICALLY CONCEDED THAT IT WAS ADMISSIBLE.

Warren next claims that the order of protection was vague and unenforceable and that the trial court erred by admitting the order into evidence. App.'s Br. at 26. This claim is without merit because the issue was not preserved for appeal because there was no objection to the admission

of the order at trial, and, even if this court were to address this claim, the Defendant's arguments are not supported by Washington law.

A reviewing court reverses trial court rulings on the admissibility of evidence only upon a showing of manifest abuse of discretion. *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992). A trial court abuses its discretion when it adopts a view no reasonable person would take. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

In order to preserve an evidentiary challenge on appeal, a party must make a specific objection to the admission of the evidence before the trial court. ER 103; RAP 2.5(a); *State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000)(Holding that because the defendant did not object to the admission of the disputed evidence at trial, he could not raise this issue on appeal), *citing State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Failure to object at trial waives the issue on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A party must specifically object to evidence presented at trial to preserve the matter for appellate review.

In the present case the Defendant never challenged the validity or the admissibility of the protection order. Rather, the Defendant acknowledged that the protection order was admissible with respect to the aggravating factor and made no objection when it was admitted. RP 838, 1069. The

Defendant's failure to contest the validity or admissibility of the protection precludes him from challenging the protection order on appeal.

In addition, the State is not required to prove that the protection order is valid in order for it to serve as the basis for the aggravating factor. In *State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005), the court held that the validity of a no contact order was not an element of the crime of violation of a no contact order. *Miller*, 156 Wn.2d at 27-28. The court did note, however, that with respect to the admissibility of an order, the trial court can examine the order for applicability to the charges in the case. *Miller*, 156 Wn.2d at 31. The *Miller* court, therefore, establishes that challenges to a no contact order are a question of admissibility, not an element of the crime.

Again, in the present case the Defendant at no time challenged the admissibility of the protection order. The issue of its admissibility was not, therefore, preserved, and this court should decline to hear this issue.

Even if this court were to consider the Defendant's challenges to the protection order, the Defendant's arguments must still fail. Defendant essentially argues that the order was vague because it prohibited the Defendant from coming within 50 feet of a residence despite the fact that he lived nearby and authorized the Defendant to have contact with his mother "except as prohibited by the restraints concerning Russell Warren herein."

Ex. 10. App.'s Br. at 26-27. The Defendant fails to explain why these prohibitions, while inconvenient, were vague. In addition, he fails to point out that the order was not vague in any way with respect to the fact that it prohibited the Defendant from contacting Russell Warren. In particular, the order stated in no uncertain terms that,

Respondent is restrained from causing physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking petitioner.

Respondent is restrained from coming near and from having any contact whatsoever, in person or through others, by phone, mail, or any means, directly or indirectly, except for mailing or service of process of court documents by a 3rd party or contact by Respondent's lawyer(s) with petitioner.

Respondent is excluded from petitioner's residence. Petitioner waives confidentiality of the address which is: 2851 NW Komichan LN, Seabeck WA 98380.

Ex 10. The uncontested evidence at trial was that the Defendant came into his father's residence and shot his father. This action clearly violated numerous provisions of the protection order. In addition, the Defendant admitted on the stand that it was his signature on the order and that the order prohibited him from having contact with his father. RP 1069

Defendant also argues that the order was vague because prohibited the Defendant from coming within 50 feet of the "residence" despite the fact that the Defendant lived on a motor home on the same property and "presumably" had to drive past (and within 50 feet of) Russell Warren's residence to get to

his home. App.'s Br. at 26-27. The Defendant, however, again fails to explain how this vague. The order does not specifically authorize the Defendant to live on the property and grants him no right to come within 50 feet of his father's residence. The Defendant argues that the only running water was in the main residence, and he would often use the residence for showering. App.'s Br. at 27. Again, however, the Defendant offers no reason why this means the order itself was vague rather than merely inconvenient. The fact that the Defendant may have been continuously violating the order, even with Russell Warren's consent, does not render the order vague.

In essence, the Defendant's argument appears to be that since he often violated the inconvenient order, the order must have been vague. This argument is without merit. This court is undoubtedly aware that no contact orders are often issued in cases where the defendant and the protected party share a residence and the no contact order effectively prohibits the defendant from returning home. It is obviously no defense in such cases that the order is somehow "vague" because the defendant lives at the residence as well.

Next, the Defendant argues that the order is vague because it authorized him to have contact with his mother "except as prohibited by the restraints concerning Russell Warren," and that a person of reasonable intelligence would not understand what contact is prohibited. App.'s Br. at

27. It defies logic to think that the Defendant did not believe that the protection order prohibited him from coming into his father's residence and shooting him when the order stated that he was: (1) restrained from causing physical harm, bodily injury, assault, and from molesting, harassing, or threatening Russell Warren; (2) restrained from coming near and from having any contact whatsoever, in person or through others, by phone, mail, or any means, directly or indirectly with Russell Warren; and, (3) excluded the Defendant from Russell Warren's residence and prohibited him from coming within 50 feet of the residence. The fact that the order allowed the Defendant to have contact with his mother might have been confusing to some degree if not for the fact that the order said he was allowed to have contact with his mother "except as prohibited by the restraints concerning Russell Warren." Ex. 10.

In addition, even if this court were to presume, for the sake of argument, that the order was vague as alleged by the Defendant, the Defendant's argument must still fail because he has not shown how he was prejudiced by the vagueness. *See, for example, State v. Sutherland*, 114 Wn. App. 133, 56 P.3d 613 (2002)(holding that defendant's claims failed because he failed to show how an inaccurate statutory reference in a no contact order resulted in prejudice to him), *citing State v. Storhoff*, 133 Wn.2d 523, 946 P.2d 783 (1997) (inaccurate advice of time to appeal and incomplete statutory

reference did not violate due process or invalidate driver's license revocation absent prejudice); *Dep't of Licensing v. Grewal*, 108 Wn. App. 815, 822-23, 33 P.3d 94 (2001) (inaccuracy in statutory breath test warnings did not render them invalid absent prejudice).

In the present case, even if this court were to assume for the sake of argument that there were some vague portions of the protection order, the Defendant would still not be able to demonstrate prejudice since he admitted on the stand that it was his signature on the order and that he was aware that the order prohibited him from having contact with his father. RP 1069.

Finally, the Defendant argues that the order was vague because it failed to warn him that a murder in violation of the order would be aggravated murder. App.'s Br. at 27. The Defendant, however, fails to cite any authority that specifically requires a protection order to carry such a warning. While at least one Washington court has previously held that a no contact order was not valid because it failed to carry certain warnings, that case was based on the fact that a statute mandated that the orders must carry certain warnings. *See, State v. Marking*, 100 Wn. App. 506, 509, 997 P.2d 461 (holding that statute under which such an order "shall" include warning that violation of order will subject violator to arrest, even if person with whom contact is made consents to contact, is mandatory). In the present case, the Defendant does not contend that any statute requires that a protection

order warn a defendant that a homicide in violation of protection order can be aggravated first degree murder. The State is also not aware of any such requirement. Thus, there is no ambiguity in the order.

As the Defendant failed to object to the admission of the protection order and did not otherwise challenge the protection order below, the Defendant is precluded from challenging the order on appeal. In addition, even if this court were to reach the merits of the Defendant's claim, the claim must fail for all of the reasons outlined above.

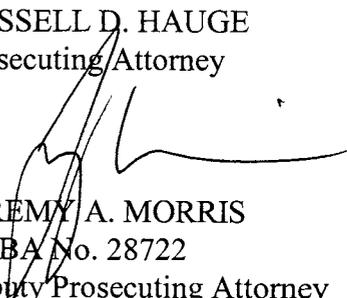
IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED August 30, 2007.

Respectfully submitted,

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