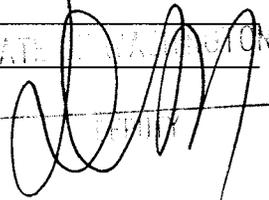


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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

MATTHEW NORRIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 05-1-02385-8

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Whether the trial court properly instructed the jury on the burden of proof when diminished capacity is asserted where it instructed the jury that the State must prove the requisite mental states beyond a reasonable doubt. 1

 2. Whether the defendant failed to show ineffective assistance of counsel based on counsel’s failure to propose a separate instruction regarding the burden of proof in a diminished capacity defense where the defendant was not entitled to such an instruction and was not prejudiced by counsel’s failure to offer it 1

B. STATEMENT OF THE CASE. 1

 1. Procedure 1

 2. Facts 6

C. ARGUMENT..... 14

 1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE BURDEN OF PROOF WHEN DIMINISHED CAPACITY IS ASSERTED BECAUSE IT INSTRUCTED THE JURY THAT THE STATE MUST PROVE THE REQUISITE MENTAL STATES BEYOND A REASONABLE DOUBT..... 14

 2. THE DEFENDANT FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL’S FAILURE TO PROPOSE A SEPARATE INSTRUCTION REGARDING THE BURDEN OF PROOF IN A DIMINISHED CAPACITY DEFENSE BECAUSE THE DEFENDANT WAS NOT ENTITLED TO SUCH AN INSTRUCTION AND WAS NOT PREJUDICED BY COUNSEL’S FAILURE TO OFFER IT. 22

D. CONCLUSION. 25

Table of Authorities

State Cases

<i>State v. Acosta</i> , 101 Wn.2d 612, 683 P.2d 1069 (1984)	16, 17, 20, 21
<i>State v. Bowerman</i> , 115 Wn.2d 794, 808, 802 P.2d 116 (1990).....	22
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2001).....	22, 23, 24
<i>State v. Clausing</i> , 147 Wn.2d 620, 626, 56 P.3d 550 (2002).....	15
<i>State v. Fuller</i> , 42 Wn. App. 53, 708 P.2d 413 (1985)	16
<i>State v. James</i> , 47 Wn. App. 605, 609, 736 P.2d 700 (1987)	16, 17, 18, 19, 20, 21, 22, 24
<i>State v. Johnston</i> , 143 Wn. App. 1, 177 P.3d 1127 (2007)	22, 23, 24
<i>State v. Lucky</i> , 128 Wn.2d 727, 731, 912 P.2d 483 (1996), <i>overruled on other grounds by State v. Berlin</i> , 133 Wn.2d 541, 544, 947 P.2d 700 (1997)	15
<i>State v. McCullum</i> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	16, 17, 20, 21
<i>State v. McFarland</i> , 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)	23
<i>State v. Ng</i> , 110 Wn.2d 32, 41, 750 P.2d 632 (1988).....	15
<i>State v. Riley</i> , 137 Wn.2d 904, 909, 976 P.2d 624 (1999)	15
<i>State v. Teal</i> , 117 Wn. App. 831, 838, 73 P.3d 402 (2003)	15
<i>State v. Thomas</i> , 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).....	23
<i>State v. Walker</i> , 136 Wn.2d 767, 771, 966 P.2d 883 (1998).....	15

Federal and Other Jurisdictions

<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).....	22, 23, 24
---	------------

Constitutional Provisions

Article I, section 22 of the Washington State Constitution22
Sixth Amendment to the United States Constitution.....22, 23

Statutes

RCW 9A.16.09020

Other Authorities

WPIC 18.204, 5, 18
WPIC 4.014, 5

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly instructed the jury on the burden of proof when diminished capacity is asserted where it instructed the jury that the State must prove the requisite mental states beyond a reasonable doubt.
2. Whether the defendant failed to show ineffective assistance of counsel based on counsel's failure to propose a separate instruction regarding the burden of proof in a diminished capacity defense where the defendant was not entitled to such an instruction and was not prejudiced by counsel's failure to offer it.

B. STATEMENT OF THE CASE.

1. Procedure

On May 16, 2005, Appellant Mathew Norris, hereinafter referred to as "defendant", was charged by information with attempted murder in the first degree with a firearm sentence enhancement in count I, and unlawful possession of a firearm in the first degree in count II. CP 1-4.

On June 7, 2005, the court ordered the defendant to undergo a competency evaluation, CP 6-13; RP 06/07/2005 1-4, and, on August 11, 2005, signed an order of commitment for ninety days, CP 14-16, RP 08/11/2005. On November 2, 2005, Western State Hospital (WSH) filed a forensic psychological report requesting "an additional 90 days", CP 17-18, and a second order of commitment for an additional ninety days was

issued on November 9, 2005. RP 11/09/2005 3; CP 19-21. WSH filed letters regarding the defendant's progress on January 18, 2006, and on February 2, 2006. CP 22-25; CP 28-39. On February 2, 2006, the court entered an order of commitment for a third ninety-day period. RP 02/02/2006 3-4; CP 26-27. WSH wrote another report dated April 25, 2006, CP 43-47. On May 1, 2006, the court conducted a competency hearing and found the defendant competent to stand trial. RP 05/01/2006 2-5.

An amended information was filed on November 2, 2006, charging the defendant with attempted murder in the first degree in count I with a firearm sentence enhancement, assault in the first degree in count II with a firearm sentence enhancement, and unlawful possession of a firearm in the first degree in count III. CP 54-55.

On September 4, 2007, the defendant was arraigned on the amended information. RP 09/04/2007 4-5. The matter was then called for trial before the Honorable Judge Lisa Worswick, and recessed until October 10, 2007, due to scheduling conflicts. RP 09/04/2007 25-27.

On October 15, 2007, the defense attorney stated that he had concerns about the defendant's present competency to stand trial. RP 10/15/2007 92-94. The court therefore issued an order for expedited examination by Western State Hospital. CP 149-152. On October 17,

2007, the court entered an order of commitment for ninety days to restore competency, CP 153-155, and declared a mistrial. RP 10/17/2007 121.

On January 8, 2008, the court again found the defendant competent to stand trial, RP 01/08/2008 13-15. On November 20, 2008, the case was called for trial before the Honorable Judge John Hickman. RP 2. The court conducted a hearing pursuant to Criminal Rule 3.5, RP 17; 24- 29, and heard preliminary motions the same day. RP 29-56. Jury selection occurred November 24 to 25, and December 1 to 2, 2008. RP 65-75; RP 76-248; RP 249-441; 442-563.

The parties gave opening statements on December 3, 2008. RP 569. The State subsequently took the testimony of Dianna Konik, RP 569-683, Deputy Aaron Wright, 684-696, Chief Robert Hudspeth, RP 697-704, Firefighter-medic Dan Baublits, RP 704-718, Detective Rayoman Shaviri, RP 726-733, Brianna Miller, RP 733-37, Deputy Sean Kadow, RP 738-40; Mary Lou Hanson-O'Brien, RP 743-61, Detective Jane McCarthy, RP 770-819, Dr. Thomas Ferrer, M.D., RP 826-58, Steven Wilkins, RP 858-62, Brenda Lawrence, RP 862-73, and Dr. Roman Gleyzer, M.D., RP 1065-1144. The State rested on December 9, 2008.

The defendant called Dr. Marsha Kent, M.D., RP 888-953, Melissa Genin, RP 953-66, Dr. Brent Trowbridge, Ph.D., RP 1007-53, and Ted Thomas, RP 1157-71. The defense rested on December 15, 2008. RP 1171.

The court considered jury instructions on December 10, 2008, and December 15, 2008. RP 972-1005; RP 1150-54; RP 1172-75.

The defense proposed, among other instructions, an instruction concerning diminished capacity, which added a second paragraph to the standard pattern instruction found at WPIC 18.20. CP 196-208; RP 986-88.

The deputy prosecutor noted that the jury would already be given WPIC 4.01 as well as the relevant “to-convict” instructions, and that all of these instructions would inform the jury that the State has the burden of proving each element of the crimes charged beyond a reasonable doubt, including the *mens rea* of the charged crimes. RP 989. Given these instructions, the State proposed using the standard instruction at WPIC 18.20, instead of the modified instruction proposed by the defense attorney. RP 986, 989-90. The deputy prosecutor reasoned that WPIC 18.20 would permit the jury to consider evidence of diminished capacity “in determining whether the State has carried its burden with respect to the *mens rea* requirement.” *Id.* The deputy prosecutor concluded by noting

that the burden of proof would be clearly established by WPIC 4.01 and the “to-convict instructions” and that “[a]dding the additional language [proposed by the defense] is simply not necessary”. RP 990.

The court, having taken a recess to “read the case law”, *Id.*, agreed and ultimately instructed the jury using WPIC 18.20. RP 992- 96; CP 266-304. The Court noted that the defendant’s proposed instruction could “cause unintentional confusion” and perhaps result in “burden shifting”, while 18.20 would allow the defendant “to argue his theory of the case.” RP 995. *See* RP 1174-75.

After the parties rested on December 15, 2008, the Court read the instructions to the jury, RP 1176, and the parties gave their closing arguments. RP 1177-1202; RP 1203-1236; RP 1236-52.

On December 16, 2008, the jury returned verdicts of guilty to attempted murder in the second degree, a lesser included charge of the crime charged in count I, guilty to assault in the first degree as charged in count II, and guilty to unlawful possession of a firearm in the first degree as charged in count III. RP 1261; CP 305-10. The jury also returned special verdicts indicating that the defendant was armed with a firearm at the time of his commission of the crimes in counts I and II. RP 1261-62; CP 311-14.

On February 27, 2009, the court sentenced the defendant to the low end of the standard range on count I, plus sixty months for the firearm sentence enhancement, for a total of 175.5 months in confinement. RP 1298. He was also sentenced to a standard-range sentence of 31 months in total confinement on count III, to be served concurrently. *Id.* Count II involved the same conduct as count I, and the defendant was not sentenced thereon. RP 1276-79.

The defendant filed a timely notice of appeal the same day. CP 362.

2. Facts

Dianna Konik met the defendant in 2003, and married him on September 18, 2004. RP 572-73. The defendant seemed to be a successful general contractor, who owned his own business. RP 573-74. In fact, in the Spring of 2005, he was contracted to complete a \$104,000 addition and was working every day. RP 637.

However, all did not remain so sanguine. The defendant began to accuse Dianna of being unfaithful to him in March and April, 2005. RP 587-88; RP 629-30. He started to try to control her. RP 630. The defendant's accusations of infidelity became even more serious after Dianna attended a "women's conference" without the defendant during the last weekend in April, 2005. RP 673-74.

On the morning of May 14, 2005, Dianna had planned on going shopping without the defendant, with her sister. RP 574. Although the defendant had known of her plans, he got upset with her. RP 575. That morning, as Dianna was getting ready in the bathroom of their home, the defendant came in and shoved her onto the ground, causing her to hit her head on the toilet. RP 576. Dianna then decided to change her plan and go shopping in the evening. RP 577. The defendant then spent the day working in the garage, refinishing and staining cabinets for a job he had been hired to complete. RP 577-78.

When Dianna changed to go shopping that evening, the defendant again got upset. RP 580. After she arrived at the Tacoma Mall, the defendant called repeatedly to check where she was and what she was doing. RP 581-83. He did not seem to believe that Dianna was actually at the Mall. *Id.*

When Dianna arrived home that evening, the defendant “seemed kind of mad” and told her that he had something to show her. RP 584-85. The defendant then shoved her into a closet wall inside the couple’s home office, causing her to fall to the floor. RP 585-86. He showed her something on the computer, and began yelling that she was going to tell him the truth about who she had been sleeping with. RP 586-87. Dianna denied doing anything wrong, but the defendant grew more and more angry with her. RP 588-89.

Dianna, who was still on her knees before the defendant, told him that she had to use the bathroom and started to crawl towards the bathroom. RP 589. The defendant yelled, but she continued to crawl. *Id.* The defendant then followed her to the bathroom and watched her from the door while she used the toilet. *Id.* Dianna then got up and tried to walk to the stairway, but the defendant grabbed her and shoved her back into the room. RP 590. She said that she flailed at him and told him to let her go, but that the defendant slapped her across the face, causing her to “hit the floor.” RP 590-91. A bruise later formed on Dianna’s face from the defendant’s slap. RP 603.

While Dianna was on the floor, crying and holding her face, the defendant got on top of her and told her that he was going to make her shut up. RP 591. He then put his hand over Dianna’s mouth, such that she could not breathe. RP 591-92. She grabbed at the defendant’s arm and, after awhile, he stopped suffocating her. RP 592.

Dianna continued to plead with the defendant and to tell him that she did nothing wrong, RP 592, but he grabbed a knife and told her, “you don’t know what torture is.” RP 594. The defendant threatened his wife, telling her, “I’m going to show you, and I’m going to stab you in the eye.” *Id.*

Dianna again told the defendant that she “didn’t do anything”. RP 595. The defendant continued to accuse of her of “doing stuff on the computer” and of “sleeping with multiple people”. RP 596. He then

pulled out a gun. *Id.* The defendant shoved the gun in his wife's face. *Id.* Dianna reported, that "[h]e stuck it into my cheek and was jabbing it in there, telling me that he was going to blow my fucking head off." *Id.*

Dianna told the defendant that she was telling him the truth. RP 597. The defendant told her that she was not, but that she was going to and placed the firearm against her forehead. *Id.*

Dianna, who was on her knees in front of the defendant, said, "okay, I'll tell you the truth," but paused and again reported that she "didn't do anything." RP 597; RP 599. The defendant then put his hand on her head, as though to steady her, and fired the gun. RP 597; RP 657-58.

He then grabbed her and said, "oh, my God, I shot you, I shot you." *Id.* According to Dianna, the defendant shot her in the back near her neck, "an inch away from that bone that kind of sticks out from your spine". RP 598. She reported that her "whole arm just felt like it was on fire". RP *Id.*

The defendant began pacing around saying, "what am I going to do"? RP 599; RP 660. Dianna kept telling him to call 911, but he kept pacing around. RP 599. She said that he went to the file cabinet and "did something in the top of the file cabinet". *Id.* The defendant then took the "clip" out of the gun, grabbed Dianna's hand, placed the clip in her hand, and laid it on her stomach. *Id.*; RP 665. The defendant later said, "no, no" and put the magazine in her pants pocket before wandering around,

asking, “what am I going to do”? RP 599-600. Dianna told the defendant, again, to call 911, but the defendant refused to do so until she told him to say that the shooting was an accident. RP 600.

The defendant called 911 and an engine and medic unit from Central Pierce Fire and Rescue responded. RP 603; RP 698-99. Firefighter-medic Dan Baublits examined Dianna Konik and found “a small entrance wound at the back of her neck just to the right of her spine.” RP 705-06, 708. He could not find an exit wound, RP 707, but did notice that “she had a black eye to the left eye.” RP 706. Baublits testified that he “didn’t have that much interaction” with the defendant, but that the defendant “was highly excitable.” RP 714.

Dianna Konik was ultimately transported via ambulance to Tacoma General Hospital’s emergency department. RP 603; RP 709-10; RP 832. She was seen there by a trauma team, which included Dr. Thomas Ferrer. *Id.* Dr. Ferrer noted that Konik had suffered a “missile wound” which was “lateral to the midline of the neck at the level of what we call the cervical six level”. RP 834. He testified that he could feel at least one bullet inside. RP 833, 835. That bullet remained lodged inside Dianna and was later removed in a clinic at “St. Joe’s.”¹ RP 605-06, 843-45. Photographs of Dianna’s injuries were admitted at trial. RP 606-11.

¹ St. Joseph Medical Center in Tacoma, Washington

Konik did not notice anything unusual about the defendant that day, and the defendant did not say anything about hearing voices on that day or at any time before. RP 579. Konik reported that she had never known the defendant to take prescription medication, that he had never seen a psychologist or psychiatrist, and that he had never talked to her about “hearing voices”. RP 624.

Detective Shaviri met Konik at the hospital, RP 727, and while there, took possession of the pants that she had been wearing during the shooting. RP 729. Inside those pants “was a .380 caliber gun magazine” which contained “a few rounds”. *Id.*

Brianna Miller, who worked for the hospital’s security department, testified that she received the bullet removed from Dianna Konik from a nurse and handed it over to a law enforcement officer. RP 736-37. Deputy Sean Kadow testified that he was the one who retrieved the bullet from Miller, and that he booked it into the Sheriff’s Department’s evidence locker. RP 738-39.

A pistol was found sitting on the corner of the desk next to where Dianna lay bleeding. RP 710-11; RP 701. Photographs of the pistol and of the crime scene were also admitted into evidence. RP 611-17; RP 747-53. The pistol, its magazine, and cartridges were admitted into evidence as well. RP 754-60. A .380 caliber spent casing, found underneath a computer in the room in which Konik was shot, was also admitted into evidence. RP 860-62.

Mary Lou Hanson-O'Brien, a forensic investigator for the Pierce County Sheriff's Department, processed the pistol for fingerprints, but found none. RP 756-58. Brenda Lawrence, a forensic scientist with the Washington State Patrol Crime Laboratory, RP 863, performed an operability examination on the pistol and found it to be operable. RP 867-68. She also did microscopic comparisons using the test-fired bullets and found that the bullet recovered from Konik's body was fired by the pistol recovered from the defendant's home office. RP 867-70.

After Diana was taken to the hospital, the defendant was handcuffed and placed into a patrol car until a detective could arrive. RP 687. When Detective McCarthy arrived, she read the defendant the *Miranda* warnings, RP 773-76, and interviewed him at his own dining room table. RP 773-87. The defendant started out saying that the shooting was an accident, and that he was showing Konik how to clean the gun when it "went off." RP 776-77. The defendant then said that Konik had stumbled over a chair, that he reached to catch her with the pistol in his hand, and that somehow the gun went off. RP 777-78. The defendant then changed his version of events again and said that he was holding the gun when he tried to "hug her" and that the gun accidentally fired. RP 778. The defendant admitted to being angry with Konik and to slapping her. *Id.* Detective McCarthy described the defendant as "kind of nervous and agitated" throughout the interview, RP 780, but testified that, for the most part, he was able to give coherent answers to her questions. RP 787.

The parties stipulated that the defendant had previously been convicted of a serious offense. RP 886.

Dr. Marsha Kent, a psychiatrist who was completing a forensic psychiatry fellowship with the University of Washington at Western State Hospital, performed “a competency-to-stand-trial assessment” on the defendant under the supervision of Dr. Roman Gleyzer. RP 888-99. She indicated that the defendant suffered from a “treatment-resistant” form of “schizophrenia, paranoid type.” RP 903; RP 936. Dr. Kent testified that she did have some concern that the defendant may be embellishing his symptoms, RP 910-12, 934-35, but indicated that the defendant was probably suffering from paranoid schizophrenia on the day of the shooting. RP 920-21. However, Dr. Kent, noted that the defendant was able to engage in “goal-directed behavior” and “interact with his wife as his wife”. RP 921-23. She therefore testified that, in her opinion, which was based on variety of information, the defendant “had the capacity to form the intent to kill his wife” at the time of the crimes at issue. RP 921-23; RP 937-42.

Brent Trowbridge, PhD., who met with the defendant once for about three hours for a diminished capacity evaluation, RP 1022, testified that the defendant “suffers from chronic paranoid schizophrenia”. RP 1015-18. He said that, on the date of the incident, the defendant’s “ability to form that mental state of intent was substantially diminished.” *Id.* However, Dr. Trowbridge later testified that the defendant never indicated

that he shot his wife as a result of any delusion. RP 1035-38. In fact, the defendant portrayed the shooting as an accident to Dr. Trowbridge. *Id.*

Dr. Roman Gleyzer, a forensic psychiatrist at Western State Hospital, who is also part of the faculty of the University of Washington, RP 1067, testified that he had met with the defendant “many times”, produced six reports, and formed a diagnosis of “schizophrenia, paranoid type.” RP 1070-73. Dr. Gleyzer indicated that he and Dr. Kent tried to “assess the defendant’s behavior from all available sources”. RP 1076. He testified that based on their evaluations, while the defendant “most likely experienced active hallucinations” at the time of the shooting at issue, “these symptoms did not interfere with [the defendant’s] ability to act in a purposeful and goal-directed and meaningful fashion around that time.” RP 1076-77.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE BURDEN OF PROOF WHEN DIMINISHED CAPACITY IS ASSERTED BECAUSE IT INSTRUCTED THE JURY THAT THE STATE MUST PROVE THE REQUISITE MENTAL STATES BEYOND A REASONABLE DOUBT.

Jury instructions are appropriate if they “permit each party to argue his [or her] theory of the case and properly inform the jury of the applicable law.” *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624

(1999). See *State v. Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988); *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

“A trial court has discretion to decide how instructions are worded.” *Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988). The standard of review applied to a challenge to a trial court’s instructions depends on whether the trial court’s decision is based on a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court decision based upon a ruling of law is reviewed *de novo*. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997).

The rule is well-established that instructions must be read together and viewed as a whole. *State v. Teal*, 117 Wn. App. 831, 838, 73 P.3d 402 (2003). “[W]hen the State has the burden to disprove a defense beyond a reasonable doubt, that burden may be set forth in the ‘to convict’ instruction, or addressed by a separate instruction; the test is whether the jury is informed of the State’s burden in an understandable way.” *Id.* at 839. “[A] requested instruction need not be given if the subject matter is adequately covered elsewhere in the instructions.” *Ng*, 110 Wn.2d 32, 41, 750 P.2d 632 (1988)).

Moreover, “[t]here is no necessity to instruct the jury that the State has the burden of proving the absence of diminished capacity or

intoxication when it ha[s] already been instructed that the State must prove the requisite mental state beyond a reasonable doubt.” *State v. James*, 47 Wn. App. 605, 609, 736 P.2d 700 (1987). See *State v. Fuller*, 42 Wn. App. 53, 708 P.2d 413 (1985). Rather, the “to convict” instruction which indicates that the State has the burden of proving each element beyond a reasonable doubt “sufficiently allocates the burden of proof to the prosecuting attorney” such that “a separate instruction is not required in diminished capacity cases.” *Id.* at 606.

In *James*, the defendant was charged with two counts of first-degree assault, three counts of first-degree kidnapping, and one count of unlawful possession of a firearm. *James*, 47 Wn. App. at 606. “The trial court instructed the jury in the ‘to convict’ instructions and in a general instruction that the State had the burden of proving each element of the crimes beyond a reasonable doubt.” The trial court also instructed the jury on diminished capacity by intoxication. *James*, 47 Wn. App. at 607. However, the trial court expressly declined to instruct that the State had the burden of disproving the defense of diminished capacity by intoxication. *Id.* The defendant in *James*, like the defendant here, argued on appeal, based on *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983), and *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984), that the court must instruct the jury that the State bears the burden of disproving diminished capacity beyond a reasonable doubt. However, the Court in *James* held that “*McCullum* and *Acosta* are inapposite to

diminished capacity cases.” *James*, 47 Wn. App. at 608. They both deal with the independent statutory defense of self-defense.” *Id.* Because “[s]elf-defense is a lawful act”, a claim of “[s]elf-defense adds another element to the State’s case” in that it requires the State to prove that the defendant “acted unlawfully.” *Id.* at 608. As a result, in *McCullum* and *Acosta*, the absence of self-defense was an element of the State’s case “not covered by the ‘to convict’ instruction”, and the Court in those cases “held that a specific burden instruction should be given in self-defense cases to avoid juror confusion about who had the burden of proof on the self-defense issue.” *Id.*

James noted that “unlike self-defense, diminished capacity does not add an additional element to the charged offense” and that, consequently, a claim of diminished capacity does not present an element or issue beyond that covered in the ‘to convict’ instructions. *Id.* at 609. Rather, the court found that the only issue raised by diminished capacity was “whether the defendant is capable of forming the requisite intent” and that “[t]his is a factual issue to be determined by the jury when deciding whether the State has proved the requisite mental state of the defendant beyond a reasonable doubt.” *Id.* Therefore, there is no need to instruct the jury that the State has the burden of proving the absence of diminished capacity where it has already been instructed that the State must prove the requisite mental state beyond a reasonable doubt. *Id.*

The present case is indistinguishable from *State v. James*. In the present case, as in *James*, the trial court instructed the jury in both the “to convict” instructions, numbered 7, 13, 15, 20, and 29, and in a general instruction, numbered 2, that the State had the burden of proving each element of the crimes charged, including the requisite mental states, beyond a reasonable doubt. CP 266-304; Appendix A. As in *James*, the trial court also instructed the jury on diminished capacity in instruction 9A, which followed WPIC 18.20. CP 266-304. Like the court in *James*, the trial court here did not specifically instruct that the State had a burden of disproving the defense of diminished capacity. However, as in *James*, the only issue raised by diminished capacity is “whether the defendant is capable of forming the requisite intent”. Therefore, the defendant here was in the same legal and factual posture as James and *James* is controlling.

Because the question of whether the defendant is capable of forming the requisite mental state “is a factual issue to be determined by the jury when deciding whether the State has proved the requisite mental state”, *James*, 47 Wn. App. at 609, and the jury in the present case had already been instructed that the State must prove the requisite mental state beyond a reasonable doubt, there was no need to again instruct the jury that the State had the burden of proving the absence of diminished capacity. Therefore, the trial court’s failure to so instruct cannot be error and it should be affirmed.

Although the defendant argues that “*James* should not be followed”, his arguments are unpersuasive. Brief of Appellant, p. 24-27. The defendant first asks this court to distinguish *James* because it dealt with diminished capacity by intoxication rather than by mental illness, *Id* at 24-26, but he may assume too much. Indeed, the trial court in *James* gave both an instruction on diminished capacity caused by intoxication, and an instruction “on diminished capacity caused by mental disease or defect.” *James*, 47 Wn. App. at 609. The Court in *James* specifically noted this, and then wrote, in the very next sentence, “[w]e conclude that there is no necessity to instruct the jury that the State has the burden of proving the absence of diminished capacity *or* intoxication when it had already been instructed that the State must provide the requisite mental state beyond a reasonable doubt.” *Id* (emphasis added). In the only other explicit enunciation of its holding, the Court stated, “[w]e conclude that the ‘to convict’ instruction sufficiently allocates the burden of proof to the prosecuting attorney and that a separate instruction is not required *in diminished capacity cases*.” *Id.* at 606(emphasis added). Thus, *James* seems to have specifically addressed both diminished capacity by intoxication and diminished capacity by mental illness. If so, there is no distinction between *James* and the present case, and *James* must control.

However, even assuming *arguendo* that this is not the case, and that *James* was decided only in the context of diminished capacity by intoxication, this is a distinction without a difference. Although the

defendant claims that the Court in *James* specifically relied upon the intoxication statute, RCW 9A.16.090, in reaching its conclusion, Brief of Appellant, p. 25, this is simply not correct. Instead, the Court in *James* relied upon the fact that “a claim of diminished capacity or intoxication does not present an issue in addition to or beyond the issue of the required mental state set forth in the ‘to convict’ instructions.” *James*, 47 Wn. App. at 609. As a result, a separate instruction beyond the “to convict” instructions is not required in diminished capacity cases. *Id.* at 606. Because this is true regardless of whether the diminished capacity is caused by intoxication or mental illness, the holding of *James* must be equally applicable to cases involving both diminished capacity by intoxication, and diminished capacity by mental illness. Therefore, *James* must control the present case and the trial court should be affirmed.

The defendant’s final argument for not following *James* is that, in his view, “*James* was simply wrong” because, he argues, both *Acosta* and *McCullum* were decided upon a determination that proof of self-defense negated an element of the state’s case, not that it created a new element. Brief of Appellant, p. 26-27. See *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984); *State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983). The defendant is incorrect.

While it is true that the Court in both *Acosta* and *McCullum* decided that proof of self-defense would negate the mental element of the crimes before them, it is equally true that it did so only as an analytical

tool “to determine whether absence of self-defense is an element or ingredient of the crime which the State must prove.” *Acosta*, 101 Wn.2d at 615-16. See *McCullum*, 98 Wn.2d at 490. Having so found that absence of self-defense was indeed an element of the State’s case, *Acosta*, 101 Wn.2d at 616-17; *McCullum*, 98 Wn.2d at 494-96, the Court noted that this element was not covered in the “to-convict” instructions, and hence that an additional instruction should be given informing the jury that the State has the burden of proving the absence of self-defense beyond a reasonable doubt. *Acosta*, 101 Wn.2d at 622-25; *McCullum*, 98 Wn.2d at 496-501. Thus, the decisions in *Acosta* and *McCullum* were, indeed, as *James* noted, based on the fact that “the absence of self defense is an element of the State’s case not covered in the ‘to-convict’ instruction,” and hence, “that a specific burden instruction should be given in self-defense cases to avoid juror confusion about who had the burden of proof on the self-defense issue.” *James*, 47 Wn. App. at 608. Therefore, *James* was not wrongly decided and, because it is not distinguishable from the present case, should control the decision of the present case.

In the present case, the diminished capacity defense, unlike self-defense, did not add an additional element to the charged offenses and hence, the defendant’s claim of diminished capacity did not present an element beyond those covered in the ‘to convict’ instructions. *Id.* at 609. Indeed, as noted in *James*, the only issue raised by diminished capacity was “whether the defendant is capable of forming the requisite intent” and

“[t]his is a factual issue to be determined by the jury when deciding whether the State has proved the requisite mental state of the defendant beyond a reasonable doubt.” *James*, 47 Wn. App. at 609. Because the jury here had already been repeatedly instructed that the State must prove the requisite mental state beyond a reasonable doubt, there was no need to again instruct the jury that the State had the burden of proving the absence of diminished capacity. Therefore, the trial court’s failure to so instruct cannot be error and it should be affirmed.

2. THE DEFENDANT FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL’S FAILURE TO PROPOSE A SEPARATE INSTRUCTION REGARDING THE BURDEN OF PROOF IN A DIMINISHED CAPACITY DEFENSE BECAUSE THE DEFENDANT WAS NOT ENTITLED TO SUCH AN INSTRUCTION AND WAS NOT PREJUDICED BY COUNSEL’S FAILURE TO OFFER IT.

“A criminal defendant has the right to effective assistance of trial counsel under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution.” *State v. Johnston*, 143 Wn. App. 1, 177 P.3d 1127 (2007).

“Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation.” *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001)(citing *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)). That test requires

that the defendant meet both prongs of a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). See also *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “First, the defendant must show that counsel’s performance was deficient” and “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687; *Cienfuegos*, 144 Wn.2d at 226-27. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

The first prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Thus, “[t]o establish deficient performance, the defendant must show that trial counsel’s performance fell below an objective standard of reasonableness.” *Johnston*, 143 Wn. App. at 16. “The reasonableness of trial counsel’s performance is reviewed in light of all the circumstances of the case at the time of counsel’s conduct.” *Id.* To show ineffective assistance of counsel resulting from a failure to propose a jury instruction, the defense must show that the defendant was entitled to the instruction. *State v. Johnston*, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007).

With respect to the second prong, “[p]rejudice can be shown only if there is a reasonable probability that, absent counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 16. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Cienfuegos*, 144 Wn.2d at 229.

In the present case, although the defendant alleges that counsel was ineffective in failing to propose a separate instruction that the State had the burden of disproving diminished capacity, he cannot meet either prong of the *Strickland* test. *See* Brief of Appellant, p. 27-29.

The defendant cannot meet the first prong because, as argued above, he was not entitled to such a jury instruction. Because the jury here had already been instructed that the State must prove the requisite mental state beyond a reasonable doubt, there was no need to again instruct the jury that the State had the burden of proving the absence of diminished capacity. *Id.* Therefore, under *James*, the defendant was not entitled to such a separate instruction and, as a result, under *Johnston*, he cannot show ineffective assistance of counsel from a failure to propose that instruction. *See James*, 47 Wn. App. at 609, *Johnston*, 143 Wn. App. at 21. Consequently, the defendant cannot make an adequate showing under the first prong of the *Strickland* test.

Therefore, his claim of ineffective assistance of counsel must fail and the trial court should be affirmed.

D. CONCLUSION.

The trial court properly instructed the jury on the burden of proof when diminished capacity is asserted because it instructed the jury that the State must prove the requisite mental state beyond a reasonable doubt.

Moreover, the defendant failed to show ineffective assistance of counsel based on counsel's failure to propose a separate instruction regarding the burden of proof in a diminished capacity defense because the defendant was not entitled to such an instruction, and was not prejudiced by counsel's failure to offer it.

Therefore the trial court should be affirmed.

DATED: April 23, 2010.

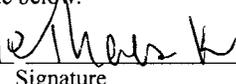
MARK LINDQUIST
Pierce County
Prosecuting Attorney


Brian Wasankari
Deputy Prosecuting Attorney
WSB # 28945

FILED
COURT OF APPEALS
10 APR 23 PM 4:43
STATE OF WASHINGTON
BY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

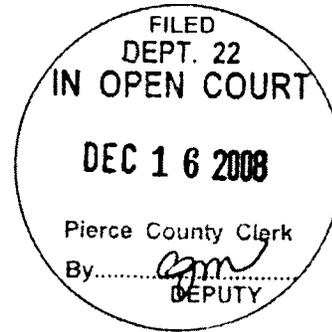
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Date Signature

APPENDIX “A”

Jury Instruction



05-1-02385-8 31119388 CTINJY 12-18-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-02385-8

vs.

MATTHEW WILLIAM NORRIS

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

DATED this 11 day of Dec., 2008.

JUDGE

ORIGINAL

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

INSTRUCTION NO. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

A person commits the crime of Attempted Murder in the First Degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 1

To convict the defendant of the crime of Attempted Murder in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 15th day of May, 2005, the defendant did an act which was a substantial step toward the commission of Murder in the First Degree;
- (2) That the act was done with the intent to commit Murder in the First Degree; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 8

A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.

INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes the crime.

INSTRUCTION NO. 9A

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form intent as required in Counts I and II and their lesser included offenses.

INSTRUCTION NO. 10

A person commits the crime of Attempted Murder in the Second Degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.

A person commits the crime of murder in the second degree when with intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.

INSTRUCTION NO. 11

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

INSTRUCTION NO. 12

The defendant is charged in count I with Attempted Murder in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty of that crime, then you will consider whether the defendant is guilty of the lesser crime of Attempted Murder in the Second Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 13

To convict the defendant of the crime of Attempted Murder in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 15th day of May, 2005, the defendant did an act which was a substantial step toward the commission of Attempted Murder in the Second Degree;
- (2) That the act was done with the intent to commit Murder in the Second Degree; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 4

A person commits the crime of Assault in the First Degree when, with intent to inflict great bodily harm, he assaults another with a firearm.

INSTRUCTION NO. 15

To convict the defendant of the crime of Assault in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 15th day of May, 2005, the defendant assaulted Dianna Norris;
- (2) That the assault was committed with a firearm;
- (3) That the defendant acted with intent to inflict great bodily harm; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

An assault is an intentional shooting of another person that is harmful or offensive. A shooting is offensive, if the shooting would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 17

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 18

The defendant is charged in count II with Assault in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty of that crime, then you will consider whether the defendant is guilty of the lesser crimes of Assault in the Second Degree or Assault in the Third Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 19

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 or assaults another with a deadly weapon.

INSTRUCTION NO. 20

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 15th day of May, 2005, the defendant:
 - (a) intentionally assaulted Dianna Norris and thereby recklessly inflicted substantial bodily harm; or
 - (b) assaulted Dianna Norris with a deadly weapon; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that element (2) and either element (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

Elements (1)(a) and (1)(b) are alternatives and only one need be proved.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 21

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

INSTRUCTION NO. 22

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

Recklessness also is established if a person acts intentionally or knowingly.

INSTRUCTION NO. 23

A person commits the crime of Assault in the Third Degree when he or she with criminal negligence causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.

INSTRUCTION NO. 24

To convict the defendant of the crime of Assault in the Third Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 15th day of May, 2005, the defendant caused bodily harm to Dianna Norris;

(2) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm;

(3) That the defendant acted with criminal negligence; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 25

Bodily injury, physical injury or bodily harm means physical pain or injury, illness or an impairment of physical condition.

INSTRUCTION NO. 26

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Criminal negligence is also established if a person acts intentionally or knowingly or recklessly.

INSTRUCTION NO. 27

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 28

A person commits the crime of Unlawful Possession of a Firearm in the First Degree when he has previously been convicted of a serious offense and knowingly owns or has in his possession or control any firearm.

INSTRUCTION NO. 29

To convict the defendant of the crime of unlawful possession of a firearm in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 15th day of May, 2005, the defendant knowingly had a firearm in his possession or control;

(2) That the defendant had previously been convicted of a serious offense; and

(3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 3

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised.

INSTRUCTION NO. 31

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime charged for that special verdict form. The State must also prove beyond a reasonable doubt that there is a connection between the firearm and defendant and between the firearm and the crime.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive purposes.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 32

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 33

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and six verdict forms, A, B, C, D, E, and F. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

When completing the verdict forms, you will first consider the crime of Attempted Murder in the First Degree as charged in Count I. If you unanimously agree on a verdict, you

must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty of the crime of Attempted Murder in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Attempted Murder in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.

You are next to consider the crime of Assault in the First Degree as charged in Count II. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form C the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form C.

If you find the defendant guilty on verdict form C, do not use verdict form D. If you find the defendant not guilty of the crime of Assault in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Assault in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form D the words "not guilty" or the word "guilty", according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form D.

If you find the defendant guilty on verdict form D, do not use verdict form E. If you find the defendant not guilty of the crime of Assault in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Assault in the Third Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form E the words "not guilty" or the word "guilty," according to the decision you reach.

You must also consider the crime of Unlawful Possession of a Firearm in the First Degree as charged in Count III. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form F the words "not guilty" or the word "guilty," according to the decision you reach.

You will also be given special verdict forms for the crimes charged in counts I and II. If you find the defendant not guilty of a crime, do not use the special verdict form for that crime. If you find the defendant guilty of a crime, you will then use the special verdict form for that crime and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.