No. 47547-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Chase Devyver,

Appellant.

Pierce County Superior Court Cause No. 14-1-00260-4

The Honorable Judge K.A. van Doorninck

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Devyver's convictions were obtained in violation of his due process right to the presumption of innocence.
2. Mr. Devyver's convictions violated his Sixth and Fourteenth Amendment right to a fair trial by an impartial jury.
3. The trial court erred by trying Mr. Devyver under guard without adequate cause.
4. The trial court erred by failing to hold a hearing prior to requiring that Mr. Devyver be tried under guard.
5. The trial court erred by trying Mr. Devyver under guard without considering less restrictive alternatives.
6. The trial court erred by refusing to grant a mistrial after some jurors learned that Mr. Devyver was being tried under guard.

   ISSUE 1: Absent extraordinary circumstances, a trial judge may not allow use of security measures that undermine the presumption of innocence or impair an accused person's right to a fair trial by an impartial jury. Did the trial court improperly allow Mr. Devyver to be tried under guard and thereby undermine the presumption of innocence and violate his right to a fair trial by an impartial jury?

7. Mr. Devyver's convictions were obtained in violation of his Fourteenth Amendment right to present a defense.
8. The trial court's intoxication instruction misstated the law by telling jurors that Mr. Devyver's acts were no less criminal by reason of intoxication.
9. The trial court's intoxication instruction was internally inconsistent and failed to make the proper standard manifestly apparent to the average juror.
10. Mr. Devyver was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
11. Defense counsel unreasonably proposed an intoxication instruction that undermined the defense theory.

    ISSUE 2: In criminal cases, jury instructions must make the relevant standard manifestly apparent to the average juror. Did the trial court's intoxication instruction infringe Mr. Devyver's right to present a defense by failing to make the law manifestly clear?

ISSUE 3: The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Did defense counsel provide ineffective assistance by proposing an intoxication instruction that misstated the law and undermined the defense theory?

ISSUE 4: A defendant whose convictions were obtained in violation of the constitution should not be deprived of a remedy for the violation. Should the Court of Appeals exercise its discretion to review Mr. Devyver's claim of instructional error, notwithstanding the invited error doctrine and the Supreme Court's decision in *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999)?

12. The trial judge erred by refusing to instruct the jury on the lesser included offense of second-degree manslaughter.

13. Mr. Devyver's conviction was entered in violation of his statutory right to have the jury consider applicable lesser offenses.

14. The trial judge violated Mr. Devyver's Fourteenth Amendment right to due process by refusing to instruct on an applicable lesser included offense.

ISSUE 5: An accused person has an unqualified statutory right to instructions on applicable lesser-included offenses. Did the court improperly refuse to instruct jurors on second-degree manslaughter, a lesser-included offense of second-degree felony murder under the particular charge brought by the prosecution in this case?

ISSUE 6: Due process requires the court to instruct on applicable lesser-included offenses upon request. Did the court violate Mr. Devyver's Fourteenth Amendment right to due process by refusing to instruct on second-degree manslaughter?

15. If the argument relating to instruction on second-degree manslaughter is not preserved, Mr. Devyver was denied the effective assistance of counsel.

16. Defense counsel made the wrong legal arguments in advocating for instruction on the lesser-included offense of second-degree manslaughter.

ISSUE 7: The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. If Mr. Devyver's arguments regarding instruction on a lesser-included offense are not

preserved, was he deprived of his right to the effective assistance of counsel?

17. The trial court erred by giving Instruction No. 2.
18. The trial court's reasonable doubt instruction violated Mr. Devyver's right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.
19. The trial court's reasonable doubt instruction violated Mr. Devyver's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.
20. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.
21. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

ISSUE 8: A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Devyver's constitutional right to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Chase Devyver was a combat medic in the Army. RP[1] 98, 297. He deployed twice to Iraq. CP 97-98. His shoulder sustained long-term damage, and in 2013 he was honorably discharged, having earned multiple commendations. CP 98. Mr. Devyver suffered post-traumatic stress disorder from his experiences in a war zone, as well as anxiety and

[1] All of the transcripts are sequentially numbered except sentencing. Citations will be to RP, except for the final sentencing hearing which took place on May 8, 2015, which will be cited as RP (5/8/15).

insomnia. RP 37-39; CP 99. Following his discharge, issues with his VA benefits prevented him from getting his prescribed medications. CP 99.

Mr. Devyver was in a relationship with Laura Reneer. By January of 2014, they'd lived together a month and a half, sharing a house in Puyallup with their friend Margaret Braswell-Donoho. RP 93, 667-668, 681. Their relationship was described as normal, with only typical disagreements, and no physical violence. RP 213-214, 477, 493-494, 681.

On the evening of January 19, 2014, a group of friends got together to celebrate and go out dancing. RP 99. This group included Reneer, Braswell-Donoho, and Mr. Devyver. RP 99. It also included Shawn Woods, who had met Braswell-Donoho when they served in the Army. RP 96. The group started at Braswell-Donoho's, and most of them had at least one drink there. RP 103-104, 142, 153. The drove to a bar, then some left to eat at the restaurant next door. RP 105-107, 156-157, 411. The group reformed at the bar, where they danced and talked and drank until closing time. RP 107, 111, 404-408.

Mr. Devyver became drunk. RP 108, 110, 143-144, 158-166, 284. Woods too got very intoxicated: he got sick in the parking lot, in the car, and several times later at Braswell-Donoho's. RP 109, 111, 114, 167-169, 171, 417-418, 420. Both Reneer and Mr. Devyver helped Woods once they got to Braswell-Donoho's home. RP 117-118, 140.

Reneer had consumed enough alcohol that hours after she stopped drinking, her blood alcohol level was 0.115. RP 239. When she spoke to police that morning (prior to 5:00 a.m.) she told them she had blacked out. RP 542.

What next happened at Braswell-Donoho's home is also a mystery to Mr. Devyver. Once the group left the bar, Mr. Devyver's memory is a blank. RP 672, 693. His next clear memory is of finding himself in jail much later. RP 698.

Reneer would later claim that once they got home, she and Mr. Devyver argued and that he stabbed her and then fought with Woods. RP 175-181. She said Mr. Devyver went "running around the house," at one point demanded her wallet after threatening her with his gun, and then drove off in her car. RP 182, 184-187. Woods died from his wounds. RP 319, 320, 441. His blood alcohol level was 0.13. RP 319.

Police chased Mr. Devyver until they caused him to hit and break a phone pole and crash the car. RP 264-273, 327-329, 600-610. As he came out of the vehicle, Mr. Devyver asked them to shoot him multiple times. RP 273, 277, 611, 617. Mr. Devyver's blood alcohol level at the time of the accident was estimated to be 0.16. RP 647.

The state charged Mr. Devyver with felony murder, alleging that he caused the death of Shawn Woods during the course of second-degree

assault. CP 1.[2] This charge carried a deadly weapon enhancement. CP 1. The state also charged assault one with a deadly weapon enhancement (for stabbing Reneer), robbery one with a firearm enhancement (for taking Reneer's wallet), and attempting to elude. CP 1-3.

When the case went to trial, Reneer told the jury that she felt Mr. Devyver hugging her from behind, and then she felt a stab. RP 175. But she had told police that morning that she thought Mr. Devyver was trying to kiss her, and that she was not in any distress. RP 547.

Reneer told the jury she had five stab wounds. RP 210-3211. But the doctor who treated her said she had two stab wounds. RP 232, 247.

At trial, Reneer also claimed that she saw Mr. Devyver and Woods struggle. RP 178-182. She didn't remember that she told the police officer she didn't see them struggle at all. RP 291, 544.

Blood tests showed Reneer's blood alcohol level was 0.115 at 5:13 am. A breath test at 8 am was still up at 0.074. RP 239-240. Reneer was so intoxicated at the hospital that she was unable to give any family background information. RP 259.

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[2] The prosecution alternatively alleged that the death occurred during the course of first-degree or third-degree assault. CP 1. However, by special verdict, jurors acquitted Mr. Devyver under the third-degree alternative, and were unable to reach a verdict under the first-degree alternative. CP 34.

During "every moment" of the trial, there were always two uniformed guards "within pretty close proximity" of Mr. Devyver. RP 133-134. During one recess, some jurors saw these uniformed officers guarding Mr. Devyver in a small room that linked the courtroom to the lobby. RP 128-131. One of these jurors asked for directions from the nearer of the guards. RP 133. The officer quickly closed the door to the room and stood in front of the window to block the view as the rest of the jury came out of the jury room. RP 133.

Defense counsel asked for a mistrial, and the court questioned the officers. RP 128-134. It became clear that some jurors had been able to see Mr. Devyver in custody of the two officers in the small room. RP 128-134. Neither guard could rule out the possibility that jurors had seen Mr. Devyver in handcuffs. RP 129-130. The court denied the defense motion. RP 128-134.

The defense submitted instructions that would allow the jury to find Mr. Devyver guilty of manslaughter two instead of murder two. RP 702; CP 11-14. Mr. Devyver's counsel argued that because the felony murder was charged with a predicate of assault three, manslaughter would apply as a lesser. RP 702-703. Counsel also told the court that if the predicate for the felony murder was assault two, then there would be no

argument for the lesser. RP 703. The court refused the instructions. RP 705.

The defense proposed an intoxication instruction. CP 9. After some discussion, the court changed it without defense objection. RP 709-711. The instruction that the jury heard was:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent, knowledge, willfulness, or recklessness.
> CP 53.

The court defined reasonable doubt with an instruction that concluded with this sentence: "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 49.

The jury convicted Mr. Devyver of murder two, assault two, robbery one, and attempting to elude. CP 30-34. They endorsed assault two as the crime predicate to the murder two conviction.[3] CP 34. They also endorsed all special verdicts. CP 35-38.

[3] They were unable to reach a verdict as to first-degree assault, and acquitted Mr. Devyver of felony murder based on third-degree assault. CP 34.

At sentencing, Mr. Devyver said that he became a medic to save people, not to harm them. He also told the court that he could not forgive himself. RP (5/8/15) 12-13.

He timely appealed. CP 105-120, 149-165.

ARGUMENT

I. THE TRIAL COURT IMPROPERLY ALLOWED THE JURY TO DELIBERATE EVEN AFTER SOME JURORS LEARNED THAT THE TWO UNIFORMED OFFICERS STATIONED "WITHIN PRETTY CLOSE PROXIMITY" OF MR. DEVYVER FOR "EVERY MOMENT" OF THE TRIAL WERE THERE TO STAND GUARD OVER HIM RATHER THAN MERELY TO PROVIDE GENERAL COURTROOM SECURITY.

A. Standard of Review

Constitutional issues are reviewed *de novo*. *State v. Beaver*, No. 91112-6, 2015 WL 5455821, at *3 (Wash. Sept. 17, 2015). This includes review of "alleged violations of the right to an impartial jury and the presumption of innocence." *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005).

Manifest error affecting a constitutional right can be raised for the first time on appeal.[4] RAP 2.5(a)(3). To raise a manifest error, an appellant need only make "a plausible showing that the error… had practical and

[4] Defense counsel sought a mistrial. RP 128. He based his motion in part on the possibility that jurors had seen Mr. Devyver in handcuffs and in part because "the jurors saw two officers standing with [him]." RP 128-133. Counsel made reference to "the potential issues involved, and the prejudiced involved." RP 128. Even if counsel's motion and argument did not alert the trial court to all of the due process and equal protection arguments set forth here, they may nonetheless be raised for the first time on review pursuant to RAP 2.5(a)(3).

identifiable consequences in the trial." *State v. Lamar,* 180 Wn.2d 576, 583, 327 P.3d 46 (2014).[5] An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara,* 167 Wn.2d 91, 100, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010).

B. Some jurors were improperly exposed to "unmistakable indications of the need to separate [Mr. Devyver] from the community at large," in violation of his rights to due process and equal protection.

Two uniformed officers remained "within pretty close proximity" of Mr. Devyver for "every moment" of the trial. RP 133-134. In addition, some jurors saw the two officers guarding Mr. Devyver, his back to the wall, in one corner of a small room leading from the courtroom to the lobby. RP 128-131. One of these jurors even interacted with a deputy standing guard over Mr. Devyver in this small room. RP 133.

Thus, at least some jurors knew that Mr. Devyver was being tried under guard. RP 128-134. This violated his right to the presumption of innocence, his right to a fair trial by an impartial jury, and his right to equal protection.

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[5] The showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Id.*

1. Due process requires trial judges to shield jurors from routine security measures, and to avoid "unmistakable indications of the need to separate a defendant from the community at large."

Every criminal defendant "is entitled to a fair trial by an impartial jury." *Gonzalez*, 129 Wn. App. at 900; U.S. Const. Amends. VI, XIV; art. I, §§ 3, 21, 22. This right encompasses the right to the presumption of innocence. *Id.* An accused person "has the right to appear in court... without manifestations that he is being held in jail." *Gonzalez*, 129 Wn. App. at 897.

In keeping with these principles, the constitution mandates that trial court judges "shield the jury from routine security measures." *Gonzalez*, 129 Wn. App. at 901.[6] No jury should learn that a defendant is "being tried under guard." *Id.*

This case involves two uniformed officers stationed "within pretty close proximity" of Mr. Devyver during "every moment" of the trial. RP 133-134. Some jurors learned that this constant proximity was not a

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[6] Security measures may "impermissibly influence[ ] a jury's decision-making process and jeopardize[ ] the presumption of innocence." *State v. Jaime*, 168 Wn.2d 857, 862, 233 P.3d 554 (2010), *as amended on denial of reconsideration* (Sept. 30, 2010). Thus, for example, an accused person may not be tried in a jailhouse courtroom absent "careful analysis of the facts of the situation to determine whether the extraordinary measure is warranted." *Jaime*, 168 Wn.2d at 865. Similarly, restraints may not be used "'unless some *impelling necessity* demands the restraint of a prisoner to secure the safety of others and his own custody.'" *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999) (emphasis in *Finch*) (quoting *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981)). Requiring an inmate to appear in jail garb violates due process and equal protection. *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

coincidence when they spotted these same two deputies guarding Mr. Devyver in a small room connecting the courtroom to the lobby. RP 128-134. One of these jurors even interacted with the deputy standing guard in the small room. RP 133.

Seating guards "around or next to the defendant during a jury trial [is] likely to create the impression in the minds of the jury that the defendant is dangerous or untrustworthy." *Kennedy v. Cardwell*, 487 F.2d 101, 108 (6th Cir. 1973). Accordingly, a judge may only place guards around a defendant "on a clear showing that [he] pose[s] an immediate threat to the peace and order of the trial." *Dorman v. United States*, 435 F.2d 385, 398 (D.C. Cir. 1970).

At least some jurors in this case knew that Mr. Devyver was "being tried under guard." *Gonzalez*, 129 Wn. App. at 901. Like a defendant tried in prison clothes or subject to restraints, Mr. Devyver was marked with "unmistakable indications of the need to separate [him] from the community at large." *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

The trial judge violated Mr. Devyver's rights to due process and to equal protection by allowing trial to continue even after jurors realized that Mr. Devyver was being tried under guard. *Gonzalez*, 129 Wn. App. at 901-905. The judge's failure to shield jurors from security measures

requires reversal of Mr. Devyver's convictions and remand for a new trial. *Id.*

2. The convictions violated Mr. Devyver's state and federal right to equal protection of the laws.

A defendant who is indigent "also has the same right to the unqualified presumption of innocence as one who can afford to post bail." *Id.*, at 897. Any condition imposed solely on "defendants who cannot make bail is 'repugnant to the concept of equal justice embodied in the Fourteenth Amendment.'" *Id.*, at 904 (quoting *Estelle*, 425 U.S. at 505-506).

Mr. Devyver is indigent. CP 141-148. Notice of Appearance and Request for Discovery, Supp. CP. He was forced to attend trial under guard because he was unable to post the $2,000,000 cash or bond required for his release. Order Establishing Conditions of Release, Supp. CP.

Had Mr. Devyver been able to afford bail, he would not have been "tried under guard." *Gonzalez*, 129 Wn. App. at 901. Jurors would have been exposed, at most, to the deployment of uniformed officers in the courtroom. No jurors would have seen him being held under guard by those same uniformed officers.

Mr. Devyver's convictions violated his right to equal protection. *Id.*, at 904; *Estelle,* 425 U.S. at 505-506. His case must be remanded for a new trial. *Gonzalez*, 129 Wn. App. at 901-905.

3. *Holbrook* does not require this court to affirm Mr. Devyver's convictions, because the *Holbrook* court examined only the effect of a general deployment of security personnel.

Placing guards around or next to the defendant differs from the mere "deployment of security personnel in a courtroom during trial." *Holbrook,* 475 U.S. at 568. In *Holbrook,* the defendant challenged the presence of "four uniformed and armed officers" who were "quietly sitting in the first row" behind six codefendants.[7] *Holbrook,* 475 U.S. at 570, 571.

The *Holbrook* court addressed only "the presence of security guards *in general,*" and found that even the conspicuous deployment of officers in a courtroom was not "inherently prejudicial." *Jaime*, 168 Wn.2d at 863 (emphasis in original). Such general deployment, even if conspicuous, is not necessarily "the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." *Holbrook*, 475 U.S. at 568-569.

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[7] The defendant in *Holbrook* did not challenge the presence of eight other security officers who were also present for trial. *Id.*, at 570. The court thus addressed only the presence of the four uniformed and armed officers. *Id.*

The *Holbrook* court cautioned that "the sight of a security force within the courtroom might under certain conditions 'create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.' *Id.*, at 569 (quoting *Kennedy* 487 F.2d at 108). Because of "the variety of ways in which such guards can be deployed," the Supreme Court endorsed a "case-by-case approach" rather than a blanket presumption that "any use of identifiable security guards in the courtroom is inherently prejudicial." *Id.*

Unlike *Holbrook,* this case does not involve the general deployment of courtroom security. Rather, all jurors knew that Mr. Devyver sat in close proximity to uniformed officers throughout the trial, and some became aware that he was actually being tried under guard. RP 128-134. Accordingly, the general rationale of *Holbrook* does not apply.

C. Even absent constitutional violations, the Court of Appeals should exercise its inherent supervisory power to ensure that uniformed officers do not guard accused persons at their criminal jury trials, except in the most extraordinary cases.

Although the *Holbrook* court upheld the defendant's conviction, it made the following observation:

> [I]n our supervisory capacity, we might express a preference that officers providing courtroom security in federal courts not be easily identifiable by jurors as guards.

Holbrook, 475 U.S. at 572 (footnote omitted).

Washington appellate courts have supervisory powers over our state's trial courts. *State v. Bennett*, 161 Wn.2d 303, 317-318, 165 P.3d 1241 (2007).[8] Washington courts will exercise supervisory authority when required by "sound judicial practice." *Id.*

Sound judicial practice requires "that officers providing courtroom security… not be easily identifiable by jurors as guards." *Holbrook*, 475 U.S. at 572 (footnote omitted). This is especially true where, as here, the officers are not merely deployed to provide general courtroom security, but are in fact responsible for guarding the accused person. RP 128-134.

Even absent a constitutional violation, this court should exercise its supervisory authority to provide guidance to trial courts. Except in extraordinary circumstances, uniformed officers should not guard an accused person for "every moment"[9] of a criminal trial. *Holbrook*, 475 U.S. at 572.

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[8] This authority extends to the Court of Appeals. *In re Marriage of Wixom & Wixom*, 182 Wn. App. 881, 903-904, 332 P.3d 1063 (2014) *review denied sub nom. In re Marriage of Wixom*, 353 P.3d 632 (Wash. 2015).

[9] RP 133-134.

II. THE TRIAL COURT'S INTOXICATION INSTRUCTION WAS NOT MANIFESTLY CLEAR BECAUSE IT MISSTATED THE LAW AND WAS INTERNALLY INCONSISTENT.

A. Standard of Review.

Constitutional issues are reviewed *de novo. Beaver*, at *3. Manifest error affecting a constitutional right can be raised for the first time on appeal. RAP 2.5(a)(3). In addition, the court may accept review of any issue argued for the first time on appeal. RAP 2.5(a); *see State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

B. The trial court's intoxication instruction misstated the law and violated Mr. Devyver's constitutional right to present a defense.

Due process requires a trial judge to instruct the jury in a manner that allows the defense to "argue all theories... supported by sufficient evidence. *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010).[10] The court's instructions must "fully instruct the jury on the defense theory" and "inform the jury of the applicable law." *Id.* Failure to do so violates the right to present a defense. *Id.*

Furthermore, jury instructions "must make the relevant legal standard manifestly apparent to the average juror." *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (internal quotation marks and citation omitted). Instructions must be manifestly clear because jurors

[10] *See also State v. George*, 161 Wn. App. 86, 100, 249 P.3d 202 (2011).

cannot rely on the rules of interpretation familiar to lawyers and judges. *State v. Harris*, 122 Wn. App. 547, 553-554, 90 P.3d 1133 (2004).

Thus, "the standard for clarity in jury instructions is higher than that for a statute because although courts may use statutory construction, juries lack these same interpretive tools." *Id.* In other words, statutory language will not necessarily provide a standard that is manifestly apparent to the average juror. *Id.; Kyllo*, 166 Wn.2d at 864.

Mr. Devyver's charges stemmed from acts committed during an alcoholic blackout. RP 672, 693. Each charge required proof of Mr. Devyver's mental state. *See* CP 54-57, 67-73, 76, 82-86. The court agreed to give an instruction on voluntary intoxication and thus necessarily found evidence that Mr. Devyver's drinking "'affected [his] ability to acquire the required mental state.'" *State v. Walters*, 162 Wn. App. 74, 82, 255 P.3d 835 (2011) (quoting *State v. Everybodytalksabout,* 145 Wn.2d 456, 479, 39 P.3d 294 (2002)).

The jury was thus entitled to find that Mr. Devyver did not "act[ ] with intent, knowledge, willfulness, or recklessness." CP 53.[11] Such a finding would have "'raise[d] a reasonable doubt as to the mental state element of the State's case, thus leading to an acquittal or conviction for a

[11] The jury rejected felony murder based on third-degree assault, and thus conclusively decided that Mr. Devyver did not act with criminal negligence. CP 34.

lesser included offense.'" *State v. Sao*, 156 Wn. App. 67, 76, 230 P.3d 277 (2010) (quoting *State v. James,* 47 Wn. App. 605, 608, 736 P.2d 700 (1987)).

The court's instructions did not make this standard "manifestly apparent." *Kyllo*, 166 Wn.2d at 864 (internal quotation marks and citation omitted).

Instead, the court told jurors that Mr. Devyver's acts were *not* any less criminal as a result of his intoxication: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition..." CP 53.[12] This language is incorrect. *Sao*, 156 Wn. App. at 76. Acts committed by an intoxicated person *are* "less criminal," if intoxication interferes with the actor's ability to form the mental state required for conviction. *Sao*, 156 Wn. App. at 76.

The instruction's first sentence improperly negated the defense theory. CP 53. The prosecutor capitalized on this in closing, and even urged jurors to "disregard" the defense theory entirely rather than evaluating whether intoxication affected Mr. Devyver's mental state. RP 744-745.

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[12] The quoted language stems from RCW 9A.16.090, and has been incorporated into WPIC 18.10. The legislature likely intended this language to convey that "[a] criminal act committed by a voluntarily intoxicated person is not justified or excused," and that intoxication does not "add an additional element to the charged offense." *James*, 47 Wn. App. at 608.

Jurors who accepted the first sentence at face value—as the prosecutor encouraged them to do—would not have considered intoxication while assessing Mr. Devyver's mental state. To accept the defense theory, jurors would have had to ignore the first sentence and the prosecutor's argument. CP 53; RP 744-745.

The instruction violated Mr. Devyver's constitutional right to due process. *Koch*, 157 Wn. App. at 33. It deprived him of his constitutional right to present a defense. His convictions must be reversed and his case remanded for a new trial. *Id.*

C. Defense counsel provided ineffective assistance by proposing an erroneous instruction that undermined Mr. Devyver's intoxication defense.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *Kyllo*, 166 Wn.2d at 862; RAP 2.5(a). Appellate courts review ineffective assistance claims *de novo*. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). Reversal is required if counsel's deficient performance prejudices the accused person. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the

circumstances and (2) cannot be justified as a tactical decision.[13] U.S. Const. Amends. VI, XIV; *Kyllo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Id.*

Here, defense counsel provided deficient performance by proposing an instruction that negated the defense theory. The error prejudiced Mr. Devyver, because there is a reasonable probability jurors would have acquitted him or convicted him of a lesser charge had they been properly instructed.

The defense theory rested on Mr. Devyver's intoxication: defense counsel argued that he did not act with the mental state required for each offense and thus should be acquitted. RP 757-770. Despite this, counsel proposed the erroneous language adopted by the court. CP 9, 53. Defense counsel had no valid strategic reason for negating his own defense theory. *Kyllo*, 166 Wn.2d at 871.

Mr. Devyver was prejudiced by his attorney's deficient performance. His defense theory rested entirely on the intoxication instruction. Had jurors been provided a manifestly clear instruction, they would not have had any reason to disregard the defense theory. As given,

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[13] Although courts apply "a strong presumption that defense counsel's conduct is not deficient," a defendant rebuts that presumption if "no conceivable legitimate tactic explain[s] counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

the instruction directed jurors that Mr. Devyver's acts were no "less criminal" as a result of his intoxication, and were thus free to disregard evidence of intoxication altogether in assessing his mental state. CP 9, 53.

Defense counsel provided ineffective assistance. *Kyllo*, 166 Wn.2d at 871. The convictions must be vacated and the case remanded for a new trial. *Id.*

D. The invited error doctrine and *Studd* should not bar Mr. Devyver's claim of error; this court should recognize the error and grant relief.

Under the invited error doctrine, a party may not request an instruction and later complain on appeal that the court gave the instruction. *State v. Vander Houwen*, 163 Wn.2d 25, 36-37, 177 P.3d 93 (2008). An exception to this rule exists if the party's attorney provided ineffective assistance of counsel by proposing the instruction. *Kyllo*, 166 Wn.2d at 861. But it may not be deficient performance for a defense attorney to propose a pattern jury instruction that has not yet been called into doubt. *Studd*, 137 Wn.2d at 551.

Where *Studd* eliminates an ineffective assistance claim, the invited error rule allows the court to affirm convictions obtained in violation of the constitution. *See Studd,* 137 Wn.2d at 555 *et seq.* (Sanders, J., dissenting); *State v. Henderson*, 114 Wn.2d 867, 871 *et seq.*, 792 P.2d 514

(1990) (Utter, J., dissenting); *In re Griffith*, 102 Wn.2d 100, 103 *et seq.*, 683 P.2d 194 (1984).

A conviction should be reversed if it is based on jury instructions that misstate the law or prevent the jury from fully considering the defense theory. The sole exception should be for cases in which the error is harmless beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997). If *Studd* and the invited error rule bar Mr. Devyver's claim, he'll be left without a remedy despite the prejudicial violation of his constitutional rights.

The invited error rule should not be applied in circumstances such as these. It is fundamentally unfair to affirm a conviction obtained in violation of the accused person's constitutional right to due process, solely because the error was brought about by defense counsel.

III. THE TRIAL COURT SHOULD HAVE INSTRUCTED JURORS ON SECOND-DEGREE MANSLAUGHTER, AN OFFENSE INCLUDED WITHIN FELONY MURDER COMMITTED BY MEANS OF SECOND-DEGREE ASSAULT.

A. Standard of Review

Appellate courts review constitutional challenges *de novo*. *Beaver*, at *3. A trial court's refusal to instruct on a lesser offense is reviewed *de*

novo. State v. Corey, 181 Wn. App. 272, 276, 325 P.3d 250 *review denied,* 181 Wn.2d 1008, 335 P.3d 941 (2014).[14]

B. The trial judge infringed Mr. Devyvyer's unqualified statutory right to instructions on a lesser-included offense.

An accused person has an "unqualified" statutory right to instructions on an applicable lesser-included offense. *State v. Parker,* 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984); RCW 10.61.003; RCW 10.61.010. The right attaches where two conditions are met.

First, the lesser offense must "consist[ ] solely of elements that are necessary to conviction of the greater, charged offense." *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015). The elements should not be examined "in isolation;" rather, a reviewing court must give "due regard to their necessary relational nature." *State v. Gamble*, 154 Wn.2d 457, 466, 114 P.3d 646 (2005).

Under this first prong, the court examines the greater offense "as charged and prosecuted, rather than... [as it] broadly appear[s] in statute."

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[14] Some courts have erroneously applied an abuse-of-discretion standard when the refusal is based on the factual prong of the *Workman* test. *See, e.g., State v. Boswell*, 185 Wn. App. 321, 333, 340 P.3d 971 (2014) *review denied,* 183 Wn.2d 1005, 349 P.3d 857 (2015) (citing *State v. Workman,* 90 Wn.2d 443, 584 P.2d 382 (1978) and *State v. LaPlant*, 157 Wn. App. 685, 687, 239 P.3d 366 (2010)). This is incorrect; the legal sufficiency of the evidence supporting an instruction involves the application of law to facts. *Corey,* 181 Wn. App. at 276. Such errors are invariably reviewed *de novo. See, e.g., State v. Jones*, 183 Wn.2d 327, 338, 352 P.3d 776 (2015) (Jones I). The dispute is not implicated in this case, because the trial judge rejected Mr. Devyver's request under the legal prong. RP 702.

State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).[15]

Second, the evidence must "support[ ] an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense." *Id.*, at 316. The evidence is viewed in a light most favorable to the instruction's proponent. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). The instruction must be given if "even the slightest evidence" suggests that the person may have committed only the lesser offense. *Parker,* 102 Wn.2d at 163-164.

Here, the proposed instructions on second-degree manslaughter satisfied both prongs of the *Workman* test. Because of this, the trial court violated Mr. Devyver's unqualified statutory right to instructions on the lesser included offense. *Parker,* 102 Wn.2d 163-164.

4. The proposed lesser included offense satisfied the legal prong of the *Workman* test under the specific charges filed by the prosecutor in this case.

As charged in this case, felony murder (based on second-degree assault)[16] includes the lesser offense of second-degree manslaughter. However, the trial judge "looked at the cases really carefully" and rejected

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[15] Where the state charges alternate means, the court must instruct jurors on a requested lesser offense included within *any* of the alternate means charged. *Condon*, 182 Wn.2d at 317-318 (citing *Berlin* and *State v. Warden,* 133 Wn.2d 559, 947 P.2d 708 (1997)). The same is true where the prosecution files alternative charges. *Condon*, 182 Wn.2d at 318.

[16] By special verdict, the jury acquitted Mr. Devyver of felony murder based on third-degree assault and were unable to reach a verdict on the first-degree assault predicate charge. CP 34.

the instruction under *Workman's* legal prong. RP 705. According to the trial judge, "there's no legal basis" for the instruction. RP 705. This was error.[17]

In felony murder cases, courts consider the elements of the predicate felony to determine whether or not an offense is included offense. *Gamble*, 154 Wn.2d at 466. The elements of both felony murder and any proposed lesser should not be examined "in isolation;" rather, a reviewing court must give "due regard to their necessary relational nature." *Id.*, at 467.

Thus, for example, first-degree manslaughter's two elements—recklessness and death—require proof that the defendant knew of and disregarded "'a substantial risk that a [*homicide*] may occur.'" *Gamble*, 154 Wn.2d at 467 (alterations and emphasis provided in *Gamble*) (quoting RCW 9A.08.010(1)(c)). The two elements are considered in relation to each other, rather than in isolation; this means first-degree manslaughter requires proof not just of recklessness, but of recklessness as it relates to the death. *Id.*

Here, the state charged felony murder based on second-degree assault.[18] The critical issue under *Workman* involves two elements of the

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[17] Because the court rejected the instructions under *Workman's* legal prong, review is *de novo*, even under the cases that erroneously differentiate review of the two prongs. *See, e.g.*, *Boswell*, 185 Wn. App. at 333.

predicate assault, considered in relation to each other.[19] These two critical elements are Mr. Devyver's mental state and his use of a deadly weapon. When examined in relation to each other, rather than in isolation, these two elements establish that second-degree manslaughter is a lesser-included offense of felony murder as charged in this case.

The mental state required to prove felony murder is "the same as that which is required to prove the predicate felony." *State v. Bolar*, 118 Wn. App. 490, 504, 78 P.3d 1012 (2003), *as amended on denial of reconsideration* (Oct. 1, 2003). Because the prosecution charged felony murder predicated on second-degree assault,[20] the *mens rea* for the murder was the mental state required to prove the predicate assault. *Id.*

Here, in contrast to some felony murder charges (including the offense charged in *Gamble*), the specific alternatives selected by the state required proof, *inter alia,* of at least negligence towards "a substantial risk that a [*homicide*] may occur.'" *Gamble*, 154 Wn.2d at 467 (alterations and

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[18] As noted, jurors were unable to reach a verdict regarding the predicate crime of first-degree assault; they acquitted Mr. Devyver of felony murder based on third-degree assault. CP 34.

[19] This is so because both second-degree felony murder and second-degree manslaughter require proof that the defendant "cause[d] the death of" another person. RCW 9A.32.050(b); RCW 9A.32.070. This element is thus identical for both crimes, and proof that the defendant caused another's death will always satisfy both offenses.

[20] The charge also alleged first and third-degree assault. CP 1. However, jurors acquitted Mr. Devyver of felony murder based on third-degree assault, and were unable to reach a verdict with first-degree assault as the predicate felony. CP 34.

emphasis provided in *Gamble*) (quoting RCW 9A.08.010(1)(c)). Proof of felony murder thus necessarily established second-degree manslaughter.

This can be seen by examining the elements of the predicate assault in relation to each other rather than in isolation, as required under *Gamble*. The court instructed jurors that conviction of felony murder by means of second-degree assault required proof, *inter alia,* that Mr. Devyver "intentionally assault[ed] another with a deadly weapon." CP 56.[21] The court further instructed jurors that a deadly weapon could be any item used in a manner "readily capable of causing death." CP 62.

When these two elements are considered in relation to each other, rather than in isolation, second-degree manslaughter passes the legal prong of the *Workman* test. As a matter of law, conviction of felony murder (based on a death resulting from intentional assault with a deadly weapon) necessarily establishes the elements of second-degree manslaughter.

A person who intentionally assaults another with something "readily capable of causing death" necessarily risks the victim's death. Thus, even though felony murder doesn't require proof of intent to cause death, the combination of elements establishes a culpable mental state with respect to the probability of death. Because of this, felony murder

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[21] For purposes of *Workman's* legal prong, it is sufficient that manslaughter is included within *any* of the charged alternative means. *Id.*

based on an intentional assault involving a deadly weapon is an offense that necessarily establishes second-degree manslaughter.

In other words, an intentional assault with a weapon used in a manner "readily capable of causing death" is at least criminally negligent with regard to a substantial risk of death. Put another way, conviction of felony murder under the alternative means outlined here required proof that the defendant failed to be aware of "'a substantial risk that a [*homicide*] may occur,'"[22] and that this "failure constitute[d] a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.09.010(1)(d); *see* CP 65.

This is the very *mens rea* required to establish second-degree manslaughter, the lesser-included offense proposed by Mr. Devyver. CP 11-13. Second-degree manslaughter requires proof that a person cause the death of another while acting "with criminal negligence." RCW 9A.32.070. In manslaughter cases, this means a failure "to be aware of a substantial risk that a death may occur," where this failure "constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." CP 13.[23]

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[22] *Gamble*, 154 Wn.2d at 467 (alterations and emphasis provided in *Gamble*) (quoting RCW 9A.08.010(1)(c)).

[23] *See also* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 10.04 (3d Ed) *and State v. Peters*, 163 Wn. App. 836, 847, 261 P.3d 199 (2011) (addressing first-degree manslaughter).

Thus, because the prosecution charged felony murder by means of intentional assault with a weapon readily capable of causing death, second-degree manslaughter is a lesser included offense under *Workman's* legal prong. The trial court erred by rejecting Mr. Devyver's proposed lesser-included offense instructions.

5. Although the *Gamble* court concluded that manslaughter was not an included offense to the felony murder charges brought in that case, *Gamble* supports Mr. Devyver's position under the felony murder charges filed by the state in this case.

Even though the *Gamble* court reached the opposite result, *Gamble* requires reversal in this case. The difference stems from the particular charges filed in *Gamble*.[24]

Prior to *Gamble,* the Supreme Court had "compared the elements of manslaughter and felony murder without consistently conducting any further in depth analysis of the elements of the necessary predicate felony." *Gamble,* 154 Wn.2d at 463-464.[25] The *Gamble* court rejected this

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[24] As the *Gamble* court put it, "manslaughter is not a lesser included offense of second degree felony murder where second degree assault, *RCW 9A.36.021(1)(a)*, is the predicate felony." *Gamble*, 154 Wash. 2d at 460 (emphasis added). Here, the alternative predicate felonies included RCW 9A36.021(1)(c) and RCW 9A.36.011(1)(a), neither of which were at issue in *Gamble*.

[25] Citing *State v. Tamalini*, 134 Wn.2d 725, 953 P.2d 450 (1998); *Berlin*, 133 Wn.2d 541; *State v. Davis*, 121 Wn.2d 1, 846 P.2d 527 (1993) (Davis I); *State v. Dennison*, 115 Wn.2d 609, 801 P.2d 193 (1990); *State v. Frazier*, 99 Wn.2d 180, 661 P.2d 126 (1983).

approach. *Id.*, at 465. Instead, the Supreme Court adopted "the additional step of looking at the elements of the predicate felony." *Id.*[26]

The felony murder charge in *Gamble* rested on allegations that the defendant intentionally assaulted another and recklessly inflicted substantial bodily harm. *Id.* No deadly weapon was involved. *Id.*, at 460. Thus, the *mens rea* elements of the predicate assault did not combine with any other element. The "recklessness" element related to "substantial bodily harm," and had no relationship to the risk of death. *Id.*

Here, by contrast, jurors were instructed that Mr. Devyver could be convicted based on second degree assault committed by means of an intentional assault with a deadly weapon. As outlined above, these two elements, when considered in relation to each other rather than in isolation, combined to require proof that Mr. Devyver acted negligently with respect to the risk of death.

Here, unlike in *Gamble,* conviction of second-degree manslaughter did *not* "require[] proof of an element that does not exist in the second degree felony murder charge the State brought against [Mr. Devyver]." *Id.*, at 468. The felony murder charge here was thus *not* "unamenable to a lesser included offense instruction on the offense of manslaughter." *Id.*

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[26] Although the lower court in *Gamble* "applied the correct process, its conclusion was erroneous." *Id.* Specifically, the Court of Appeals "erroneously examine[d] the elements in isolation, failing to give due regard to their necessary relational nature." *Id.*

Gamble compels the result urged by Mr. Devyver. When the state charges second-degree felony predicated on an intentional assault with a deadly weapon, manslaughter satisfies the legal prong of the *Workman* test. The trial judge should have given Mr. Devyver's proposed instructions on second-degree manslaughter.

6. Taking the facts in a light most favorable to Mr. Devyver, there is at least some evidence that he committed only second degree manslaughter.

The evidence here supported an inference that Mr. Devyver committed only second-degree manslaughter, "to the exclusion of the greater, charged offense." *Condon,* 182 Wn.2d at 316. There is thus at least "the slightest evidence" supporting instructions on manslaughter. *Parker,* 102 Wn.2d at 163-164.

Mr. Devyver stabbed Reneer and killed Woods while in an alcoholic blackout. RP 672. The court instructed jurors on voluntary intoxication. CP 53. This means that the court found not only "substantial evidence of drinking," but also "'evidence that the drinking affected [his] ability to acquire the required mental state.'" *Walters*, 162 Wn. App. at 82 (quoting *Everybodytalksabout,* 145 Wn.2d at 479).

This evidence was likewise sufficient to require the court to instruct jurors on the lesser-included offense. Because there was at least the "slightest evidence" that Mr. Devyver committed only second-degree

manslaughter, the trial court erred by refusing to instruct on that charge. *Parker*, 102 Wn.2d at 163-164. Mr. Devyver's murder conviction must be reversed and the charge remanded for a new trial. *Id.*

C. If trial counsel's erroneous legal argument waived the instructional error, Mr. Devyver was deprived of the effective assistance of counsel.

Here, defense counsel proposed and argued in favor of instructions on the lesser-included offense of manslaughter. CP 9; RP 702-705. Accordingly, his failure to argue the correct legal grounds cannot be described as a "legitimate tactic." *Id.*

The conduct of a reasonable attorney "includes carrying out the duty to research the relevant law." *Kyllo*, 166 Wn.2d at 862. In this case, defense counsel failed to grasp the import of *Gamble*.

Defense counsel apparently believed that *Gamble* precluded instruction on manslaughter as a lesser-included offense of *any* felony murder based on second-degree assault. RP 703. In fact, the *Gamble* court only addressed felony murder when death follows an intentional assault accompanied by the reckless infliction of substantial bodily harm. *See Gamble*, 154 Wn.2d at 469 ("We hold that first degree manslaughter is not a lesser included offense of second degree felony murder where second degree assault, *as defined in RCW 9A.36.021(1)(a)*, is the predicate felony") (emphasis added).

Gamble did not purport to prohibit instruction on manslaughter for all felony murder charges based on second-degree assault. *Id.* In fact, *Gamble* provides the reasoning that supports instruction on manslaughter under the facts in this case. As outlined above, an intentional assault with a weapon "readily capable of causing death"[27] necessarily requires proof that the defendant was at least negligent with respect to "'a substantial risk that a [*homicide*] may occur.'" *Gamble*, 154 Wn.2d at 467 (alterations and emphasis provided in *Gamble*) (quoting RCW 9A.08.010(1)(c)).

Defense counsel incorrectly conceded that felony murder based on first and second-degree assault could not include the lesser offense of second-degree manslaughter.[28] This erroneous concession as to the law should not affect the reviewability of Mr. Devyver's claim of error, because "[i]t is error for a court to treat parties' stipulations to law as binding." *Worden v. Smith*, 178 Wn. App. 309, 327, 314 P.3d 1125 (2013) (citing *State v. Drum,* 168 Wn.2d 23, 34, 225 P.3d 237 (2010)).

However, if counsel's error precludes consideration of the correct legal standards on review, Mr. Devyver was deprived of the effective assistance of counsel. *Reichenbach*, 153 Wn.2d at 130.

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[27] CP 62.

[28] Similarly, counsel provided erroneous argument regarding felony murder based on third-degree assault. RP 702-705.

IV. THE TRIAL JUDGE VIOLATED MR. DEVYVER'S STATE AND FEDERAL DUE PROCESS RIGHTS TO INSTRUCTIONS ON A LESSER-INCLUDED OFFENSE.

Summary of Argument: Failure to instruct on an applicable lesser-included offense violates due process. This rule, applicable in capital cases, should apply in noncapital cases as well. Washington courts should apply the traditional *Mathews* balancing test to reach this conclusion.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Beaver*, at *3. Issues of law are also reviewed *de novo*. *State v. Mayer*, No. 90846-0, 2015 WL 6388248, at *3 (Wash. Oct. 22, 2015).

A manifest error affecting a constitutional right can be raised for the first time on appeal. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015); RAP 2.5(a)(3). To raise a manifest error, an appellant need only make "a plausible showing that the error… had practical and identifiable consequences in the trial." *Lamar*, 180 Wn.2d at 583. The showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Id.* An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *O'Hara*, 167 Wn.2d at 100.

B. *Mathews* is the proper test for Washington courts to evaluate procedural due process claims in criminal cases, notwithstanding

the federal court system's reliance on the more deferential *Patterson* standard in evaluating state criminal procedures.

The government may not deprive a person of liberty without due process. U.S. Const. Amend. XIV; art. I, § 3.[29] Ordinarily, courts balance three factors when evaluating due process claims. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). These factors include (1) the private interest, (2) the risk of error under current procedure and the probable value of additional procedures, and (3) the government's interest in maintaining the existing procedure. *Id.*

The Washington Supreme Court has been inconsistent in its evaluation of procedural due process challenges in criminal cases.[30] *Compare Beaver*, at *6 (applying *Mathews*) *with State v. Coley*, 180 Wn.2d 543, 558, 326 P.3d 702 (2014) *cert. denied*, 135 S.Ct. 1444, 191 L.Ed.2d 399 (2015) (rejecting *Mathews*).

Such inconsistency need not persist. *Mathews* should apply when Washington courts evaluate Washington criminal procedure. This result can be achieved by either (1) applying art. I, § 3, or (2) recognizing the inapplicability of the U.S. Supreme Court's federalism concerns in

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[29] In some contexts, art. I, § 3 provides greater protection than does the Fourteenth Amendment's due process clause. See, e.g., *State v. Bartholomew*, 101 Wn.2d 631, 639-640, 683 P.2d 1079 (1984).

[30] Washington courts apply *Mathews* balancing to procedural due process challenges in civil cases. *See, e.g., In re Det. of Morgan*, 180 Wn.2d 312, 320, 330 P.3d 774 (2014).

adopting a more deferential standard for federal courts' evaluation of state criminal proceedings. As outlined below, the *Mathews* test should apply when Washington courts evaluate Washington criminal procedures under both art. I, § 3 and under the Fourteenth Amendment.

1. In criminal cases, the *Mathews* balancing approach applies to procedural due process challenges brought under Wash. Const. art. I, §3.

Under the federal constitution, the *Mathews* test is the law of the land when it comes to civil matters. *See, e.g., Morgan*, 180 Wn.2d at 320; *In re A.W.*, 182 Wn.2d 689, 703-04, 344 P.3d 1186 (2015); *In re Disciplinary Proceeding Against Petersen*, 180 Wn.2d 768, 788, 329 P.3d 853 (2014). Under the state constitution, no less protective test can apply to civil cases because "the federal constitution sets a minimum floor of protection, below which state law may not go." *Orion Corp. v. State*, 109 Wn.2d 621, 652, 747 P.2d 1062 (1987).

Criminal matters involve liberty interests at least as important as those in civil cases. Because of this, the *Mathews* test applicable to civil liberties should protect individual interests in criminal matters as well.

Generally, independent analysis of a provision of the state constitution must be justified under the six nonexclusive Gunwall criteria. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). *Gunwall* may be unnecessary here, because Mr. Devyver asks the court to do no

more than apply the traditional federal standard for evaluating procedural due process claims. Nonetheless, a brief *Gunwall* analysis follows.

The language of the state provision. The strong and direct language of art. I, § 3 establishes a concern for individual rights. The acknowledgment that the state may deprive a person of rights suggests the need to balance such rights against state interests. The *Mathews* test meets this need.

Differences between the state and federal provisions. Identity of language does not end the inquiry under this factor. Instead, the state constitution may depart from federal law where justified by policies underlying the constitutional guarantee. *State v. Davis*, 38 Wn. App. 600, 605 n. 4, 686 P.2d 1143 (1984) (Davis II). The federalism concerns discussed by the U.S. Supreme Court do not apply to art. I, § 3. *Medina v. California*, 505 U.S. 437, 445, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992).

State constitutional and common law history. While no legislative history suggests that art. I, § 3 differs from the federal provision; this does not mean they are coextensive. Nor does the common law preclude application of the balancing test outlined in *Mathews*. The Supreme Court has noted that *Mathews* sets the minimum standard in civil cases, so the state constitution "would not provide less due process

protection" than that required under *Mathews*. *In re Dependency of MSR*, 174 Wn.2d 1, 20, 271 P.3d 234 (2012), *reconsideration denied* (May 9, 2012), *as corrected* (May 8, 2012).

Pre-existing state law. Washington has a long tradition of balancing competing interests in criminal cases. For example, the Supreme Court long ago balanced the competing interests attached to conflicting presumptions in rape cases. *State v. Jones*, 80 Wash. 588, 596, 142 P. 35 (1914) (Jones II). Pre-existing state law suggests that balancing tests are consistent with art. I, § 3.

Structural differences between the two constitutions. This factor always supports an independent constitutional analysis. *State v. Young,* 123 Wn.2d 173, 180, 867 P.2d 593 (1994).

Matters of local concern. State criminal procedure **is** a local concern. *Medina,* 505 U.S. at 445.

Conclusion: Five of the six *Gunwall* factors support an independent application of art. I, § 3. The remaining factor does not prohibit application of the *Mathews* balancing test. Accordingly, art. I, § 3 requires analysis of criminal procedures using the balancing test set forth in *Mathews.*

In this case, the question presented is whether the erroneous refusal to instruct on a lesser-included offense violates due process. The *Mathews* balancing test establishes that it does, as outlined later in this brief.

2. In Washington courts, *Mathews* balancing should also apply to Fourteenth Amendment due process challenges to criminal procedures.

Federal courts do not apply *Mathews* to state criminal proceedings; instead, they apply the *Patterson* test. *Medina*, 505 U.S. at 444-445) (citing *Patterson v. New York,* 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977)). This is because federal courts are loathe to "construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson,* 432 U.S. at 201; *see also Medina,* 505 U.S. at 445 (quoting *Patterson*). A federal court will not invalidate a state criminal procedure "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Patterson.* 432 U.S. at 201-202.

Washington courts are not constrained in this way. The *Medina* decision applies only to federal review of state court proceedings. *Patterson*, 432 U.S. at 201; *Medina*, 505 U.S. at 445. State courts need not adopt the *Patterson* standard when reviewing criminal procedures. State courts may apply a more protective test under the Fourteenth Amendment, despite the U.S. Supreme Court's adoption of the *Patterson* standard in

federal court. Because *Medina* and *Patterson* deviate from *Mathews* only as a result of federalism, this court must apply *Mathews* balancing to Mr. Devyver's procedural due process claim.

As noted above, Washington's Supreme Court has taken an inconsistent approach to evaluating federal due process claims in state criminal cases.[31] Most recently, the court applied *Mathews* without comment in *Beaver*, at *6. Previously, the court has applied *Medina. See Coley*, 180 Wn.2d at 558; *State v. Heddrick*, 166 Wn.2d 898, 904 n. 3, 215 P.3d 201 (2009); *State v. Hurst*, 173 Wn.2d 597, 601, 269 P.3d 1023 (2012).[32]

In *Hurst, Heddrick,* and *Coley,* the Washington Supreme Court accepted the *Medina* court's result without examining its reasoning. None of the three decisions mention the federalism concerns that prompted the application of a deferential standard in *Medina* and *Patterson. Id.*

There is no reason *Medina* and *Patterson* would apply when state courts evaluate their own criminal procedures. The deferential standard should only apply when federal courts evaluate state court procedures for due process violations.

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[31] It does not appear that the court has been presented with a *Gunwall* analysis or argument suggesting that *Mathews* applies under art. I, § 3.

[32] The court has also expressly declined to reach the issue, finding in favor of the state under either *Mathews* or *Medina. See State v. Brousseau*, 172 Wn.2d 331, 346-49 n. 8, n. 9, 259 P.3d 209 (2011).

Mathews should apply here.

C. Under *Mathews,* courts are constitutionally required to instruct on applicable lesser-included offenses because the private interest at stake, the risk of error, and the absence of any countervailing state interest weigh in favor of this result.

Under *Mathews,* courts must instruct on applicable lesser-included offenses. The magnitude of the private interest at stake, the risk of error when jurors do not have the chance to consider a lesser-included offense, and the absence of any real countervailing government interest all weigh in favor of this result.

1. Every criminal case involves a compelling private interest: the accused person's fundamental right to freedom from restraint.

A proceeding that may result in confinement involves the "most elemental of liberty interests," one described as "almost uniquely compelling." *Hamdi v. Rumsfeld*, 542 U.S. 507, 530, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); *Ake v. Oklahoma*, 470 U.S. 68, 78, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). *Mathews* balancing requires significant procedural safeguards when a person faces even brief confinement in a civil proceeding. *Turner v. Rogers*, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011); *Addington v. Texas*, 441 U.S. 418, 433, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). Thus, the private interest here weighs heavily in favor of requiring instruction on a lesser-included offense as a matter of due process.

2. Failure to instruct on an applicable lesser-included offense creates a significant risk of error at a criminal trial.

In federal court, an accused person has the right to instructions on a lesser-included offense. *Stevenson v. United States*, 162 U.S. 313, 322-323, 16 S.Ct. 839, 40 L.Ed. 980 (1896).[33] Similarly, in all capital proceedings, due process requires instruction on applicable lesser-included offenses. U.S. Const. Amend. XIV; *Beck v. Alabama*, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).[34]

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[33] The federal rule is "beyond dispute." *Keeble v. United States*, 412 U.S. 205, 208, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). Any other rule would present "difficult constitutional questions." *Id.,* at 212-213.

[34]Although the *Beck* court explicitly reserved ruling noncapital cases (*Beck,* 447 U.S. at 638, n.14), subsequent decisions have eroded the distinction between capital cases and those resulting in life imprisonment without the possibility of parole. *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Miller v. Alabama*, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The federal circuit courts have wrestled with the question, but only in the context of *habeas corpus* proceedings, where significant procedural bars foreclose a definitive answer. A plurality of federal circuit courts believes that refusal to instruct on a lesser-included offense may violate due process in cases not involving the death penalty. Of these, the third circuit has unequivocally extended *Beck* to noncapital cases. *Vujosevic v. Rafferty,* 844 F.2d 1023, 1027 (1988). Four circuits will address the issue on *habeas* review if the refusal to instruct threatens a fundamental miscarriage of justice. Courts adopting this approach include the first, sixth, seventh, and eighth circuits. *Tata v. Carver*, 917 F.2d 670, 672 (1st Cir. 1990); *Scott v. Elo,* 302 F.3d 598, 606 (6th Cir. 2002)); *Robertson v. Hanks,* 140 F.3d 707, 711 (7th Cir. 1998); *DeBerry v. Wolff*, 513 F.2d 1336, 1339 (8th Cir. 1975). The second circuit has refused to consider the issue on *habeas* review, citing a different procedural bar. *Jones v. Hoffman*, 86 F.3d 46, 48 (2d Cir. 1996). The fourth circuit apparently takes this approach as well. *Stewart v. Warden of Lieber Corr. Inst.*, 701 F.Supp.2d 785, 793 (D.S.C. 2010) (citing unpublished case); *see also Leary v. Garraghty*, 155 F.Supp.2d 568, 574 (E.D. Va. 2001). The D.C. circuit has not faced the issue. The remaining circuit courts—the fifth, ninth, tenth, and eleventh circuits—adhere to a general rule of "automatic nonreviewability" in *habeas* proceedings. *Trujillo v. Sullivan*, 815 F.2d 597, 603 (10th Cir. 1987); *see also Valles v. Lynaugh*, 835 F.2d 126, 127 (5th Cir. 1988); *Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir. 1984); *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004); *Perry v. Smith*, 810 F.2d 1078, 1080 (11th Cir. 1987).

Failing to instruct on applicable lesser-included offenses increases the risk of error at trial. Such a failure "diminish[es] the reliability of the guilt determination," and "enhances the risk of an unwarranted conviction." *Beck,* 447 U.S. at 638.[35] Without instruction on a lesser-included offense, the accused person is

> exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction…

Keeble, 412 U.S. at 212-213.

In other words, failure to instruct on a lesser-included offense creates a risk of conviction even in the absence of proof beyond a reasonable doubt, "simply because the jury wishes to avoid setting [the defendant] free." *Vujosevic,* 844 F.2d at 1027. The risk of error may increase when conviction does not carry the death penalty: in such cases jurors might find themselves *more* willing to convict despite the absence of proof on one element, since erroneous conviction will not result in execution of the innocent.

The second *Mathews* factor weighs in favor of requiring appropriate instruction on lesser-included offenses.

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[35] Providing jurors with three options—guilty, not guilty, or guilty of a lesser charge—"ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." *Beck,* 447 U.S. at 634.

3. The government benefits from proper instruction on applicable lesser-included offenses.

The third *Mathews* factor requires examination of the public interest, including "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews,* 424 U.S. at 335. Appropriate instructions on lesser-included offenses benefit the state. The public interest therefore weighs in favor of a rule requiring such instruction.

First, prosecutors have a duty to act in the interest of justice. *State v. Warren,* 165 Wn.2d 17, 27, 195 P.3d 940 (2008). No prosecutor should seek what the *Beck* court described as an "unwarranted conviction." *Beck,* 447 U.S. at 638. Second, proper instruction on an included offense allows jurors to convict of a lesser charge when they might otherwise acquit the defendant of the charged crime.[36] Juries will convict defendants of the appropriate offense when the state cannot prove the charged offense. Third, unwarranted conviction on a greater charge wastes resources by incarcerating people for longer periods than necessary or appropriate. Instruction on applicable lesser-included offense reduces the possibility that offenders will receive longer sentences than they deserve.

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[36] As the *Beck* court noted, this rationale underlies the common law origin of the practice. *Beck,* 447 U.S. at 633.

The public interest weighs in favor of requiring appropriate instruction on lesser-included offenses.

4. Due process requires trial courts to instruct jurors on applicable lesser-included offenses.

All three *Mathews* factors weigh in favor of a rule requiring courts to instruct jurors on applicable lesser-included offenses when warranted by the evidence and requested by the defendant. *Mathews,* 424 U.S. at 333. The significant private interest, the likely benefits of additional procedural protections, and the benefit flowing to the state all favor such instruction. *Mathews,* 424 U.S. at 333.

Washington courts should adopt the *Beck* court's reasoning, and hold that failure to instruct on a lesser-included offense violates due process when the evidence supports such an instruction and the accused person requests it. Here, the court's instructions forced jurors to either acquit or convict Mr. Devyver. They did not have "the 'third option' of convicting on a lesser included offense…" *Beck,* 447 U.S. at 634.

The trial court's refusal to instruct the jury on second-degree manslaughter violated Mr. Devyver's due process right to a fair trial. U.S. Const. Amend. XIV; art. I, § 3; *Vujosevic.* This manifest error affecting his right to due process may be reviewed for the first time on appeal. RAP 2.5(a)(3).

The court must reverse his conviction and remand the case to the superior court. *Id.* Upon retrial, the court must instruct jurors on any applicable lesser-included offenses. *Id.*

V. THE COURT'S "REASONABLE DOUBT" INSTRUCTION INFRINGED MR. DEVYVER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT IMPROPERLY FOCUSED JURORS ON A SEARCH FOR "THE TRUTH."

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Here, the trial court instructed the jury that proof beyond a reasonable doubt means having "an abiding belief *in the truth of the charge.* CP 49 (emphasis added).

Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. In this case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 49.[37]

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[37] Mr. Devyver does not challenge the phrase "abiding belief." Both the U.S. and Washington Supreme Courts have already determined that phrase to be constitutional. *See Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708 (1887)); *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995). Rather, Mr. Devyver objects to the instruction's focus on "the truth." CP 49.

A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id.* at 757 (citing *Sullivan v. Louisiana,* 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the court confused the critical role of the jury. CP 49.[38]

The court's instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor's misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 49. Jurors were obligated to follow the instruction.

The presumption of innocence can be "diluted and even washed away" by confusing jury instructions. *Bennett*, 161 Wn.2d at 315-16. Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated.[39] *Id.*

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[38] RAP 2.5(a)(3) always allows review of structural error. This is so because structural error is "a special category of manifest error affecting a constitutional right." *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012) (internal quotation marks and citations omitted); *see also Paumier,* 176 Wn.2d at 54 (Wiggins, J., dissenting) ("If an error is labeled structural and presumed prejudicial, like in these cases, it will always be a 'manifest error affecting a constitutional right.'") Because the error here is structural, it may be reviewed for the first time on appeal. *Id.*

[39] Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the "truth" language in that instruction. *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281-82. By equating that standard with "belief in the truth of the charge" the court misstated the prosecution's burden of proof, confused the jury's role, and denied Mr. Devyver his constitutional right to a jury trial.[40] Mr. Devyver's convictions must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

CONCLUSION

Mr. Devyver's convictions must be reversed and the case remanded for a new trial.

First, the trial judge should not have allowed the jury to deliberate after some jurors learned that Mr. Devyver was being tried under guard.

Second, the trial court's intoxication instruction violated Mr. Devyver's right to present a defense.

Third, the court should have instructed jurors on the lesser-included offense of first-degree manslaughter.

Fourth, the court's "reasonable doubt" instruction violated due process because it improperly focused jurors on a search for "the truth."

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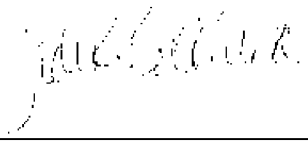
[40] U.S. Const. Amends. VI, XIV; art. I, §§ 3, 21, 22.

Respectfully submitted on November 10, 2015,

BACKLUND AND MISTRY



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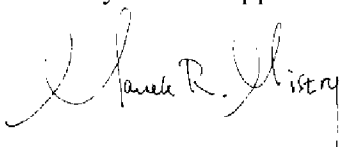

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CERTIFICATE OF SERVICE

I certify that on today's date:

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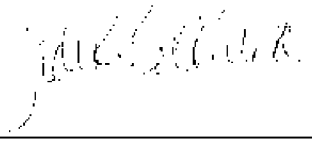
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on November 10, 2015.



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