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Court of Appeals
Division II
State of Washington
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No. 54315-0-II

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

STATE OF WASHINGTON, Respondent

v.

SHANE LYNN, Appellant

APPEAL FROM THE SUPERIOR COURT
OF MASON COUNTY

THE HONORABLE JUDGE DANIEL L. GOODELL

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The Trial Court Violated Mr. Lynn's Constitutional Rights When It Ordered That He Be Shackled Without Conducting An Individualized Inquiry.

LEGAL ISSUE: Physically restraining a criminal defendant in leg shackles is impermissible absent compelling circumstances, and an individualized inquiry into the need for such restraint. This includes pretrial shackling. Did the failure to conduct an individualized inquiry into the need for restraints violate Mr. Lynn's right to appear in court free from shackles and undermine the fairness of the proceedings?

With no showing he individually posed a risk to courtroom security, did the trial court err when it ordered Mr. Lynn to remain in leg shackles?

B. Improper Opinion Testimony Denied Mr. Lynn A Fair Trial.

LEGAL ISSUE: Opinion testimony on innocence or guilt invades the province of the trier of fact and violates the constitutional right to a fair trial. A witness may not offer an opinion, even if inferential, on a defendant's guilt. Where a primary disputed issue was whether Mr. Lynn had the intent to inflict great bodily harm,

did officer opinion testimony about intent deny him his constitutional right to a fair and impartial trial?

C. There Was Insufficient Evidence To Support A Conviction For First Degree Assault. (Conclusion of Law 1-4; CP 20).

LEGAL ISSUE: Was the appellant's right to due process under Washington Constitution, Article I, § 3 and the United States Constitution Fourteenth Amendment violated where the evidence was insufficient to prove the specific intent to inflict great bodily harm by throwing a propane canister into the road?

D. The Trial Court Erred When It Did Not Remove The Interest Clause On The Mandatory Legal Financial Obligation.

LEGAL ISSUE: The trial court found Mr. Lynn to be indigent. Did the trial court lack authority to impose interest on a mandatory legal financial obligation?

II. STATEMENT OF FACTS

Mason County prosecutors charge Shane Lynn by amended information with assault first degree, assault second degree, possession of a stolen motor vehicle, and attempting to elude a police vehicle. CP 7-9.

The matter proceeded to a bench trial. CP 6;RP 25.

DEFENDANT SHACKLED IN TRIAL

On the day of trial, the court administrator from the jail wanted to know if they could bring Mr. Lynn to court in restraints. RP 34. Defense counsel objected on the grounds of due process: Mr. Lynn could not be restrained in the courtroom without a finding he presented a danger to himself or to others during the proceeding. RP 35. The State's attorney disagreed:

Frankly, it's my default position that he be in restraints. There's no jury, and Your Honor can certainly parse that out, you know. You know, Your Honor knows he's in custody, so it's not something that's going to taint him or prejudice him in any way. And I think that if the jail believes that he needs to be in restraints, they are the ones that are holding him and they are the ones that are responsible for his safety, and they're, you know, the safety of others that he might possibly assault. So, the State would ask that the jail's request be honored, and he be in restraints in the courtroom.

RP 35.

DEPUTY VASQUEZ: He is a state prisoner, Your Honor. He is under a sentence from a previous felony that he has committed, so we don't believe that it was going to be - it's going to cause any interference with any kind of trial that he's gonna be in at this time. There's no jury. My understanding is a bench trial, and the current judicial officer has already seen him in restraints when he was brought up to court in a previous hearing, so I would like for him to stay in restraints, Your Honor.¹

RP 37.

¹ The record does not contain discussion or observation of previous shackling of Mr. Lynn.

THE COURT: ...And ... Deputy Vasquez, I understand the concerns of the jail whenever we have somebody in custody, and - but the law is clear that there has to be a finding of the court that given *something unique about this individual defendant that places a risk to the courtroom for him to be not in restraints*; however, the Court is also aware that we are in a courtroom that is very difficult to be secure. And so, based upon the limitations that we have here in this courtroom the Court is going to require that the defendant remain in ankle restraints but not the arm restraints...(emphasis added).

RP 37-38. Mr. Lynn wore the leg restraint throughout the proceedings.

FACTS

On June 29, 2018, Deborah Kitts-Ragner rode as a passenger in a truck with someone she knew as Sean. RP 57-58. They drove to the home of Maria Zorrozu. RP 42. Ms Zorrozu was in her carport, and saw a patrol car approach, with its light flashing. RP 42. As the patrol car got behind the truck, the truck drove away, first hitting her carport, and then driving out to the backroad. RP 42-43.

Officer Smith learned earlier that day an unnamed reporting party made a “suspicious call”. The caller said he saw the driver of a stolen vehicle in a confrontation with someone and there was possibly a firearm. RP 90. While he was on patrol Smith saw a truck like the one described as stolen. RP 92.

He followed the truck to a driveway and turned on his lights. RP 93. He watched the truck rev up, drive through the yard and a carport, and onto another road. RP 93. He announced over the radio what he had witnessed. RP 94.

Deputy LaFrance heard the radio dispatch and waited in a pull-out for the truck. RP 66. She saw the truck speeding and followed, staying about 50 feet behind it. RP 69. She saw the truck speed and serve as the driver threw paint cans and small propane canisters out the window. RP 69. The canisters bounced and spun off the road. RP 70. She reported the canisters “exploded” in the sense there was a pressure release, they did not become “fireballs.” RP 81-83. She said the canisters did not come near her car, but the potential of one hitting her car frightened her. RP 84. In response to a defense question as to whether she specifically thought “that thing is going to come up, come through my windshield and physically impact me?” She reported thinking, “this guy is trying anything possible to get away and *he's doing anything possible to hurt myself*, Deputy Anderson, *so he can get away.*” RP 84. Defense counsel did not object.

The chase continued and two roads after the propane had been thrown, the driver shot a flare gun. RP 85. One shot went directly into the woods and the second shot landed on the road about 10 feet in front of her patrol car. RP 71-72. She saw the speeding truck turn a corner. When she

turned the corner, she saw the truck had flipped. RP 72. The driver was not in the vehicle. RP 72.

Deputy Anderson drove behind LaFrance. RP 115-116. He saw the two 6 to 8-inch size canisters go out the window and a puff of smoke when they hit the pavement. RP 107. He explained the officers did not immediately approach the flipped truck because they were afraid the driver had a firearm and “the person driving that same vehicle that we were just pursuing was *actively trying to harm us* as we were pursuing it.” RP 112. In response to defense counsel asking, “Did it appear that the defendant was specifically aiming for windshields, or was he just chucking stuff out the side of the vehicle?” the deputy said, “*I believe that he's aiming for the person in law enforcement* in any way, Sir.” RP 118.(emphasis added).

The court found Mr. Lynn guilty on all counts except for assault second degree, making oral and written findings. RP 146-152; CP 18-21. The written findings recited only the elements of the statutes and included no factual evidence from the testimony. Instead, the court incorporated its oral findings into the written findings. CP 18-19.

In its oral findings, the court stated:

In addition, the defendant fired two rounds from the flare gun at Sergeant LaFrance and threw out two metal twelve to fourteen-inch propane tanks in the path of Sergeant LaFrance...

RP 147-48.

...the Court concludes beyond a reasonable doubt that the propane tanks thrown in the path of Sergeant LaFrance's patrol car, considering all the circumstances presented, were used by a force and means that was likely to produce great bodily harm or death to Sergeant LaFrance.

RP 148

When the Court considers the act of firing two rounds with the flare gun directly at Sergeant LaFrance, the Court is persuaded that the defendant was focusing on harming Sergeant LaFrance. While the flare gun was not a deadly weapon, the defendant followed the shootings with the throwing of propane tanks, which turned into projectiles and became deadly weapons in the fashion that they were used. There is a likelihood the defendant intended to inflict great bodily harm when he threw the first propane tank, with the results being obvious as the propane tank ruptured, and Sergeant LaFrance drove through the cloud of gasses.

When this was followed by the defendant throwing the second propane tank in the path of Sergeant LaFrance, against all - again, all occurring at the speeds of seventy to eighty miles an hour, the Court concludes that the State has met its burden of proving beyond a reasonable doubt that the defendant did intend to inflict great bodily harm when he threw the second propane tank at Sergeant LaFrance's patrol car.

RP 149.

The written conclusions of law also recited only the elements of the statutes. CP 20-21.

At sentencing, the parties agreed on an offender score of over nine. RP 161. The court imposed 270 months, all charges to be served concurrently. RP 171. Mr. Lynn makes this timely appeal. CP 41.

III. ARGUMENT

A. The Trial Court Violated Mr. Lynn's Constitutional Rights And Abused Its Discretion When It Ordered Him To Be Shackled and Restrained.

Article I, § 22 of the Washington State Constitution guarantees a defendant "the right to appear and defend in person." A defendant in a criminal trial is entitled to appear free from all shackles, except in extraordinary circumstances, to ensure a fair and impartial trial, guaranteed under the Washington Constitution and the United States Constitution. *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999); *State v. Hartzog*, 96 Wn.2d 383, 635 P.2d 694 (1981); *See also Illinois v. Allen*, 397 U.S. 337, 98 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

The prohibition against shackling of a defendant in the court supports the presumption of innocence, privilege of testifying on one's own behalf, and to meaningfully consult with counsel during trial. *State v. Walker*, 185 Wn.App. 790, 797, 344 P.3d 227 (2015); *State v. Damon*, 144 Wn.2d 686, 691, 25 P.3d 418 (2001).

Because the constitutional right to be free from restraint is not absolute, trial judges are vested with the discretion to determine measures that implicate courtroom security, and to shackle a defendant if some “*impelling necessity demands restraint*” of the defendant. Thus, whether to shackle a defendant is reviewed under an abuse of discretion standard. *State v. Breedlove*, 79 Wn.App. 101, 114, 900 P.2d 584 (1995). A court abuses its discretion when the discretionary decision rests on grounds unsupported by the facts in the record. *State v. Walker*, 185 Wn.App. at 800. It is legal error for a court to implement a broad general policy ordering physical restraints, and it constitutes a “failure to exercise discretion.” *Hartzog*, 96 Wn.2d at 398.

To properly exercise discretion, the trial court must consider the *Hartzog* factors:

[T]he seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

State v. Breedlove, 79 Wn. App. at 114. (quoting *State v. Hartzog*, 96 Wn.2d at 635. The trial court must engage in an individualized inquiry into the use of restraints.

Here, the deputy made a request that Mr. Lynn be shackled during the proceedings and the prosecutor and deputy stated the court had seen Mr. Lynn in shackles at earlier proceedings. RP 37. In *State v. Jackson*, --- P.3d ---, 2020 WL 4006802, the Court held that a bar on shackling without an individualized inquiry also applied to *nonjury* pretrial proceedings. *Id.* at * 6. “[A] trial court *must* engage in an individualized inquiry into the use of restraints prior to every court appearance.” *Id.* Under *Jackson*, to the extent Mr. Lynn was brought into the court in shackles in *pretrial* proceedings without a *Hartzog* analysis, the court failed to exercise its discretion.

Here, the trial court agreed it needed to make an individualized inquiry per *Hartzog*. However, rather than conducting an inquiry to make an individualized determination, the court simply deferred to the deputy, saying the courtroom was difficult to secure, and ordered restraints. RP 37-38. The truncated inquiry does not meet the standards under *Hartzog*, *Jackson*, or *State v. Lundstrom*, 6 Wn.App.2d 388, 391, 429 P.3d 1116 (2008), (the county court utilized a blanket shackling of defendants, and did not conduct an individualized inquiry were found to be an abuse of discretion). Caselaw and the constitution require more. The trial court abused its discretion and committed a constitutional error when it ordered

that Mr. Lynn be shackled both in his pretrial and trial proceedings, without an individualized inquiry into its need. *Jackson*, at *6.

Unconstitutional shackling is subject to a harmless error analysis. *Jackson*, at * 6. The State bears the burden to prove beyond a reasonable doubt the constitutional violation was harmless. *Id.* In *Jackson*, the Court cited approvingly to Judge Melnick's concurrence opinion:

What we know now regarding the unknown risks of prejudice from implicit bias and how it may impair decision-making, coupled with the practical impossibility for a defendant to prove whether a jury saw the allegedly hidden restraints or *whether the jury or judge was unconsciously prejudiced by the restraints at any point during the case.*

Jackson, at *7. (Emphasis added).

The Court did not distinguish between prejudice which may arise in the context of a jury trial compared to appearances before the trial judge. It recognized the individualized inquiry must be conducted before *every* court appearance regardless of the trier of fact. Thus, whether Mr. Lynn were tried before a jury or in a bench trial, the concerns about unconscious prejudice were present at every hearing.

Jackson was resolved on the principle that is was purely speculative that a jury might not have seen the shackles or was unaware of the shackle. The State simply could not prove harmlessness beyond a reasonable doubt. *Id.* at *7. Most significantly, the Court pointed out that

trial court judges “are explicitly choosing not to engage in individualized determinations.” *Id.* at *7. This failure to follow *Hartzog* “creates a culture in which incarcerated defendants are virtually guaranteed to have their constitutional rights violated.” *Id.*

As in *Jackson*, here it is speculation the trial judge was not unconsciously affected in a way that prejudiced Mr. Lynn. Because the State cannot prove harmless error beyond a reasonable doubt, this matter should be remanded for a new trial, with instructions for the trial judge to make an individualized inquiry into whether shackles or restraints are necessary. *Id.*

B. Improper Opinion Testimony Constituted Harmful Error Requiring Reversal.

The right to have factual questions decided by the trier of fact is to be held inviolate under Washington’s Constitution. U.S. Const. amend. VI; Wash.Const. art.I, §§ 21,22; *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). Where a witness gives an opinion of a defendant’s guilt or innocence, either directly or by inferential statement, it violates the constitutional right to an independent determination of the facts by the trier of fact. *State v. Madison*, 53 Wn.App. 754, 760, 770 P.2d 662 (1989)(rev. denied, 113 Wn.2d 1002, 777 P.2d 1050); *State v. Black*,

109 Wn.2d 336, 348, 745 P.2d 12 (1987). Impermissible opinion testimony includes an opinion on the *intent* of the accused. *State v. Montgomery*, 163 Wn.2d at 592.

In determining whether opinion testimony is impermissible, the court considers the circumstances of the case: “(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

Here, the impermissible opinion testimony was made by law enforcement officers. Opinions by police officers carry an “aura of special reliability and trustworthiness” and may impermissibly influence the trier of fact, denying the defendant a fair and impartial trial. *State v. Carlin*, 40 Wn.App. 698, 703, 700 P.2d 323 (1985); *State v. Demery*, 144 Wn.2d at 763.

The officers gave opinion testimony on Mr. Lynn’s *intent* three times, stating:

“He’s doing anything possible to hurt myself ... so he can get away.”

“The person driving that same vehicle that we were just pursuing was actively trying to harm us as we were pursuing it.”

And in response to whether it was possible the defendant was specifically aiming for the patrol car windshield or just throwing things out the window:

“I believe that he's aiming for the person in law enforcement in any way, Sir.” (emphasis added).

The officers opined on a required element for proof of assault first degree, intent. RCW 9A.36.011.

In both *State v. Farr-Lenzini*, 93 Wn.App. 453, 460, 970 P.2d 313 (1999), and *Montgomery*, officer opinion statements about *the intent* of the defendant were improper. As here, it was the disputed element in both cases.

In *Farr-Lenzini*, the officer testified the driving pattern “exhibited to me that the person driving that vehicle was *attempting to get away* from me and *knew* I was back there and *refusing* to stop.” *Farr-Lenzini*, 93 Wn.App. at 458. Because the defendant’s state of mind lay outside the officer’s law enforcement experience, the Court held that it did not qualify as an expert opinion. *Id.* at 461. Nor was the officer’s opinion on an ultimate issue proper as a lay opinion. The officer’s factual basis was his observation of the accused’s driving. The Court reasoned, the “limited facts provide slim support for the trooper's opinion as to *what the driver was thinking* during the high speed, four-and-a-half-minute pursuit.” *Id.* at

464. Moreover, the Court disagreed with the notion that the officer “merely testified that Farr-Lenzini’s driving behavior was typical of someone eluding the police.” *Id.* at 465. The officer’s statements were a comment on her guilt, as they addressed a critical element of the crime and the major contested question for the trier of fact to determine. *Id.* at 465.

By testifying to her state of mind, intent to elude, and thus her guilt, without providing an adequate factual basis for it, the opinion testimony constituted harmful error. The Court reasoned that it could not be said beyond a reasonable doubt that the testimony did not contribute to the verdict, or that untainted evidence necessarily led to a finding of guilt. *Id.* The error was not harmless under either the “contribution test²” or the “overwhelming evidence test.³ *Id.*

Similarly, in *Montgomery*, the Court reiterated its position “there are some areas that are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the *intent of the accused*,

² The contribution test, an error is harmless if it can be said beyond a reasonable doubt that it did not contribute to the verdict. *State v. Bergeron*, 105 Wn.2d 1,4, 711 P.2d 1000(1985).

³ The overwhelming untainted evidence test holds constitutional error is harmless if it can be said beyond a reasonable doubt that the untainted evidence necessarily leads to a finding of guilt. *State v. Johnson*, 100 Wn.2d 607, 621, 674 P.2d 145 (1983).

or the veracity of witnesses.” *State v. Montgomery*, 163 Wn.2d at 592. (emphasis added).

In *Montgomery*, the defendant was charged with intent to manufacture methamphetamine. *Montgomery*, 173 Wn.2d at 583. One officer testified he believed Montgomery bought items with the requisite intent and a second officer testified that the items “were purchased for manufacturing.” *Id.* at 588. The Court held the testimony on the defendant’s *state of mind* was an improper opinion of guilt. *Id.* at 594-95.

The same improper opinion testimony occurred here. The highly prejudicial opinion that Mr. Lynn was actively trying to harm them, and “aiming for” them was an opinion about the intent element of the offense of assault first degree. RCW 9A.36.011. Based on the facts, it would have been impossible for officers to conclude Mr. Lynn intended to hurt them. Mr. Lynn threw several things out of the window of the truck, and fired a flare gun twice, once out of the back of the truck into the woods and another into the road that fell far short of the pursuing patrol car. It was more than plausible that Mr. Lynn was pitching things into the road to slow down the patrol cars and to allow himself time to escape.

As in *Farr-Lenzini*, officers may testify to what they observed, the substantial facts, but may not testify the defendant had a particular intent.

The officers had no ability to divine Mr. Lynn's state of mind any more than the officers in *Farr-Lenzini* and *Montgomery*.

The testimony constitutes reversible error because it violated Mr. Lynn's constitutional right to a trial, which includes the independent determination of the facts by the trier of fact. *State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014).

For this Court to review un-objected to testimony for the first time on appeal, the error must be manifest, affecting a constitutional right. RAP 2.5(a)(3) requires only that a defendant make a plausible showing that the error resulted in actual prejudice, that is, there were practical and identifiable consequences at trial. *State v. A.M.*, 194 Wn.2d 33, 39, 448 P.3d 35 (2019).

Article I, §§ 21,22 of the Washington Constitution, guarantee a criminal defendant the right to have factual questions decided by the trier of fact. The officer opinion testimony clearly implicates Mr. Lynn's constitutional rights. The improper testimony had practical and identifiable consequences because the trier of fact considered the opinion testimony and stated:

...the defendant fired two rounds from the flare gun *at Sergeant LaFrance*, and threw out two metal twelve-to fourteen-inch propane tanks⁴ in the path of Sergeant LaFrance...

And

...The Court must also consider *whether the defendant intended to inflict great bodily harm* on Sergeant LaFrance. The defendant argues that the State has not met its burden of proving intent and that the intent was just as likely to get the law enforcement officers to back off and to stop chasing him, and nothing more.

The Court is to look at the totality of the circumstances to determine whether the State has proven the element of intent. When the Court considers the act of firing two rounds with the flare gun *directly at Sergeant LaFrance*, the Court is persuaded that *the defendant was focusing on harming Sergeant LaFrance*. While the flare gun was not a deadly weapon, the defendant followed the shootings with the throwing of propane tanks, which turned into projectiles and became deadly weapons in the fashion that they were used. *There is a likelihood the defendant intended to inflict great bodily harm when he threw the first propane tank*, with the results being obvious as the propane tank ruptured, and Sergeant LaFrance drove through the cloud of gasses.

When this was followed by the defendant throwing the second propane tank in the path of Sergeant LaFrance, against all - again, all occurring at the speeds of seventy to eighty miles an hour, the Court concludes that the State has met its burden of proving beyond a reasonable doubt that the defendant did intend to inflict great bodily harm when he threw the second propane tank *at Sergeant LaFrance's patrol car*.

RP 148-49.

Impermissible opinion testimony constitutes manifest

constitutional error when there is “an explicit or almost explicit witness

⁴ In testimony the propane tanks were described as 6-8 inch cannisters, not 12-14 inch tanks.

statement on an ultimate issue of fact.” *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). Here, the constitutional error is manifest as the court’s finding and conclusion rest on the opinion testimony that Mr. Lynn was aiming for and actively trying to harm pursuing officers.

Where the error is manifest, the Court conducts a harmless error analysis. *State v. Grott*, 195 Wn.2d 256, 269, 458 P.3d 750 (2020). Because Constitutional error is presumed prejudicial the burden belongs to the State to prove the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). A constitutional error is harmless only if it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Neder v. United States*, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Under the “contribution test” if there is a reasonable probability the outcome would have been different had the error not occurred, then the error is not harmless. *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). The “overwhelming evidence test” analysis provides the error is harmless if it can be said beyond a reasonable doubt that the untainted evidence necessarily leads to a finding of guilt.

Here, without the improper opinion testimony, the court would have been hard pressed to conclude the flare gun was fired *at* the officer, or the cannisters were *aimed at* the patrol cars. One flare gun shot went

into the woods and the other far in front of her car. The cannisters landed and spun out of the road. At no time were the officers actually endangered by debris hitting a patrol car window. It was the testimony which placed intent in the mind of the trier of fact. The officers' impression of Mr. Lynn's conduct constituted an improper opinion as to his guilt. *Farr-Lenzini*, 93 Wn.App. at 464. This Court should reverse Mr. Lynn's conviction as the impermissible opinion testimony was not harmless beyond a reasonable doubt.

C. Insufficiency of the Evidence Requires Reversal And Dismissal Of Assault First Degree.

Under the due process rights guaranteed under both the Washington Constitution, Article I, §3, and the United States Constitution, Fourteenth Amendment, the state must prove every element of a crime beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Possibility, speculation, suspicion, conjecture, or even a scintilla of evidence, is not substantial evidence and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499, P.2d 16 (1972). In the context of a criminal case, "substantial evidence" means evidence sufficient to persuade "an unprejudiced thinking mind of

the truth of the fact to which the evidence is directed.” *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227 (1970).

The test for determining sufficiency is “whether after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn for the State and interpreted most strongly against the defendant. *Id.*

Under RCW 9A.08.010(1)(a), a person acts with intent when he or she acts with the objective or purpose to accomplish a result constituting a crime. The mens rea of first-degree assault is the specific intent to inflict great bodily harm. RCW 9A.36.011(1); *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994).

Because the crime of first-degree assault requires proof of the specific intent to inflict great bodily harm, generally, the crime involves use of a firearm or other deadly weapon, such as a knife. Absent such a weapon the evidence must show beyond a reasonable doubt that the actual force or means used was “likely to produce great bodily harm.” *State v. Pierre*, 108 Wn.App. 378, 383, 31 P.3d 1207(2001).

“Great bodily harm” is statutorily defined as bodily injury which creates a *probability of death*, or which causes significant serious

permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ. RCW 9A.04.110(c).

Here, in its oral finding, the court stated: “There is a *likelihood* the defendant *intended* to inflict great bodily harm when he threw the first propane tank... followed by the defendant throwing the second propane tank ... the Court concludes that the State has met its burden of proving beyond a reasonable doubt that the defendant did intend to inflict great bodily harm when he threw the second propane tank at Sergeant LaFrance's patrol car. Sergeant LaFrance had great apprehension that she was going to be seriously injured by the defendant's actions.” RP 149.

The issue is not whether Sergeant LaFrance had great apprehension she would be seriously injured, rather it was whether Mr. Lynn specifically intended to inflict great bodily harm; that is, whether Mr. Lynn had the specific intent to create the probability of death or significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.

Specific intent may be “inferred as a logical probability from all the facts and circumstances, however, specific intent must be proved as an independent fact and *cannot be presumed* from the commission of the unlawful act. *State v. Louthier*, 22 Wn.2d 497, 502, 156 P.2d 672 (1945);

Wilson, 125 Wn.2d at 217. Throwing the cannisters into the road does not give rise to a logical inference that Mr. Lynn intended to cause the probability of death or significant and permanent injury.

Specific intent may be “inferred as a logical probability from all the facts and circumstances, however, specific intent must be proved as an independent fact and *cannot be presumed* from the commission of the unlawful act. *State v. Louther*, 22 Wn.2d at 502; *Wilson*, 125 Wn.2d at 217. Mr. Lynn threw debris into the road, but specific intent may not be inferred from evidence that is “patently equivocal.” *State v. Vasquez*, 178 Wn.2d 1,8, 309 P.3d 318 (2013). The evidence of intent in this case is patently equivocal and cannot sustain a conviction for assault in the first degree. The trial court’s finding of specific intent is not supported by the record. This matter must be reversed, and the conviction vacated.

D. The Interest Clause Must Be Stricken On The Judgment and Sentence.

The trial court found Mr. Lynn to be indigent. CP 42-43. In the judgment and sentence, the court imposed the mandatory legal financial obligations, but did not exclude the boilerplate found in § 4.3:

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

CP 30.

Trial courts are prohibited from imposing interest accrual on non-restitution legal financial obligations for indigent criminal defendants. RCW 10.82.090(2)(a). The judgment and sentence should be corrected to reflect that no interest shall accrue on the unpaid balance of his legal financial obligations. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

IV. CONCLUSION

Respectfully submitted this 3rd day of August, 2020.



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on August 3, 2020I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Mason County Prosecuting Attorney at timw@co.mason.wa.us and to Shane Lynn Clatsop County Jail, 638 Duane St. Astoria, OR 97103 .



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