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Court of Appeals
Division II
State of Washington
10/9/2020 4:51 PM

No. 54315-0-II

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

STATE OF WASHINGTON, RESPONDENT

V.

SHANE LYNN, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell, Judge

No. 19-1-00259-23

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>STATE’S COUNTER-STATEMENTS OF ISSUES PERTAINING TO EACH OF APPELLANT’S ASSIGNMENTS OF ERROR</u>	1
B. <u>FACTS AND STATEMENT OF CASE</u>	1
C. <u>ARGUMENT</u>	2
1. The trial court did not engage in a detailed hearing followed by detailed findings of fact regarding whether Lynn should be restrained during his bench trial, but on the unique and Compelling facts of this case, any resulting error was harmless.....	2
2. Lynn identifies three incidences from the record where he asserts that witnesses improperly testified as to their opinion of his intent when committed the crime of assault in the first degree against pursuing police officers. The State alleges that these incidences do not constitute improper opinion testimony but that in any event this Court should decline to consider the issue because: Lynn invited two of the three alleged errors by eliciting the testimony on cross examination; the claims of error were not preserved by an objection in the trial court; and, if error did occur, it was harmless beyond a reasonable doubt.....	6
a) Because Lynn elicited the challenged testimony during cross examination, the invited error doctrine should bar consideration of two of the three incidences where Lynn asserts, for the first time on appeal, that the testimony was improper opinion testimony.....	10
b) For the first time on appeal, Lynn asserts that improper opinion testimony was introduced at his bench trial. But Lynn did not object in the trial court. Because Lynn has not met his burden of showing that the alleged error is manifest, this Court should decline to consider this issue where is being raised	

for the first time on appeal.....	11
c) The challenged testimony stemmed from the witnesses’ actual, first-hand, sensory perceptions and was, thus, testimony about the inferences reasonably drawn from their experiences rather than opinion testimony.....	13
d) The State contends that the challenged testimony was not improper opinion testimony but that even if error did occur, it was harmless beyond a reasonable doubt.....	14
3. Sufficient evidence supports the trial court’s finding and verdict of guilty that Lynn committed the crime of assault in the first degree, as charged.....	16
4. Trial court mistakenly failed to remove boilerplate language that required the accrual of interest on nonrestitution legal financial obligations; therefore, this case should be remanded for the trial court to strike the boilerplate language at issue.....	19
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

State Cases

<i>State v. Abuan</i> , 161 Wn. App. 135, 257 P.3d 1 (2011)	<u>17</u>
<i>State v. Blake</i> , 172 Wn. App. 515, 298 P.3d 769 (2012)	<u>12, 13, 14</u>
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980)	<u>16</u>
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967 (1999)	<u>3, 4</u>
<i>State v. Fiser</i> , 99 Wn. App. 714, 995 P.2d 107, review denied, 141 Wn.2d 1023, 10 P.3d 1074 (2000)	<u>17</u>
<i>State v. Franklin</i> , 180 Wn.2d 371, 325 P.3d 159 (2014)	<u>14</u>
<i>State v. Grott</i> , 195 Wn.2d 256, 458 P.3d 750 (2020)	<u>11</u>
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985)	<u>14</u>
<i>State v. Henderson</i> , 114 Wn.2d 867, 792 P.2d 514 (1990)	<u>10, 11</u>
<i>State v. Jackson</i> , 195 Wn.2d 841, 467 P.3d 97 (2020)	<u>2, 5, 6</u>
<i>State v. King</i> , 167 Wn.2d 324, 219 P.3d 642 (2009)	<u>13</u>
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	<u>11</u>
<i>State v. Korum</i> , 157 Wn.2d 614, 141 P.3d 13 (2006)	<u>10, 11</u>
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	<u>12</u>

State v. Montgomery,
163 Wn.2d 577, 183 P.3d 267 (2008) 12, 13, 14

State v. O'Hara,
167 Wn.2d 91, 217 P.3d 756 (2009) 15

State v. Salinas,
119 Wn.2d 192, 829 P.2d 1068 (1992) 16

State v. Scherf,
192 Wn.2d 350, 429 P.3d 776 (2018) 15

State v. Thomas,
150 Wn.2d 821–75, 83 P.3d 970 (2004) 16

Statutes

RCW 9A.36.011 17, 18
RCW 10.82.090 19

Constitutions

U.S. Const. Amend. VI.....2
U.S. Const. Amend. XIV.....2
Wash. Const. art. I, § 22 2

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

1. The trial court did not engage in a detailed hearing followed by detailed findings of fact regarding whether Lynn should be restrained during his bench trial, but on the unique and Compelling facts of this case, any resulting error was harmless.
2. Lynn identifies three incidences from the record where he asserts that witnesses improperly testified as to their opinion of his intent when committed the crime of assault in the first degree against pursuing police officers. The State alleges that these incidences do not constitute improper opinion testimony but that in any event this Court should decline to consider the issue because: Lynn invited two of the three alleged errors by eliciting the testimony on cross examination; the claims of error were not preserved by an objection in the trial court; and, if error did occur, it was harmless beyond a reasonable doubt.
3. Sufficient evidence supports the trial court's finding and verdict of guilty that Lynn committed the crime of assault in the first degree, as charged.
4. Trial court mistakenly failed to remove boilerplate language that required the accrual of interest on nonrestitution legal financial obligations; therefore, this case should be remanded for the trial court to strike the boilerplate language at issue.

B. FACTS AND STATEMENT OF THE CASE

For the purposes of the issues raised in this appeal, the State accepts Lynn's statement of facts, except where additional or contrary facts are offered below in support of the State's arguments. RAP 10.3(b).

State's Response Brief
Case No. 54315-0-II

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C. ARGUMENT

1. The trial court did not engage in a detailed hearing followed by detailed findings of fact regarding whether Lynn should be restrained during his bench trial, but on the unique and compelling facts of this case, any resulting error was harmless.

Defendants in Washington have a constitutional right under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution to appear in court without shackles unless the court first engages in an individualized determination of the need for shackles in that particular case. *State v. Jackson*, 195 Wn.2d 841, 852-53, 467 P.3d 97 (2020).¹ The decision whether to order a defendant to wear shackles when appearing before a trial court is within the discretion of the trial court and is, therefore, reviewed on appeal for an abuse of discretion. *Id.* at 850. “A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *Id.* (internal quotation and citations omitted).

¹ The bench trial in this case occurred on November 4, 2019; thus, the trial court did not have the benefit of *State v. Jackson*, 195 Wn.2d 841, 467 P.3d 97 (2020), when it ordered leg restraints in this case.

In the instant case, Lynn was already in the custody of the Department of Corrections serving a sentence on a different felony case when jail staff transported him to the trial court for a bench trial in this case. RP 37. The jail staff and the prosecutor took the position that Lynn should be shackled as a standard procedure. RP 34-37. However, the trial court judge rejected the prosecutor's and the jail staff's positions and declared that "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 not to be in restraints...." RP 37.

The trial court judge then engaged in an individualized determination of the need for shackles in the instant case. RP 37-38. Our Supreme Court has previously identified several factors for the trial court's consideration when exercising its discretion about whether to require restraints in a particular case. *Jackson* at 853. Courts need only to consider those factors that in a particular case bear on the security of the courtroom. *State v. Finch*, 137 Wn.2d 792, 850, 975 P.2d 967 (1999). One of the several factors includes "the nature and physical security of the courtroom[.]" *Jackson* at 853. In the instant case, the trial court noted that the particular courtroom was difficult to secure and thus ordered that

Lynn should “remain in ankle restraints but not the arm restraints[.]” RP 38.

Our Supreme Court and other courts hold “that restraints should ‘be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.’” *State v. Finch*, 137 Wn.2d 792, 846, 975 P.2d 967 (1999) (quoting *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981). “The trial court must base its decision to physically restrain a defendant on evidence which indicates that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner while in the courtroom.” *Finch* at 850. “To do otherwise is an abuse of the trial court's discretion.” *Id.*

Here, the trial court did not order restraints based on a blanket policy; instead, the court engaged in an individualized determination and ordered restraints because the circumstances of the courtroom made it difficult to secure the courtroom during the bench trial. RP 38.

Additionally, the court disallowed any restraints other than leg restraints, which did not hinder Lynn’s ability to participate in the trial. *Id.* Thus,

the State contends that the trial court judge did not abuse discretion in this case by ordering that Lynn wear leg restraints during the bench trial.

Nevertheless, the trial court judge did not articulate the security concerns of the courtroom, other than to state that such concerns existed. RP 38. If an unconstitutional shackling error occurs in the trial court, it is subject to constitutional harmless error analysis on appeal, which requires the State to show that the error was harmless beyond a reasonable doubt. *State v. Jackson*, 195 Wn.2d 841, 856, 467 P.3d 97 (2020).

Here, the facts show that Lynn engaged in very dangerous, life threatening conduct when attempting to escape from pursuing police officers. CP 18-20; RP 40-118. The facts also show that Lynn was already in the custody of the Department of Corrections when the bench trial in this case occurred and that he, thus, was a flight risk. RP 37. Still more, Lynn had warrants in two other states and was expected to be extradited to New Mexico to serve a prison sentence there, thus further suggesting that he was a flight risk. RP 142. The evidence showing that Lynn had directed life-threatening assaults at officers and that he was a flight risk justified the court's requirement that he wear ankle restraints during the trial.

The State contends that given Lynn’s dangerous behavior when trying to escape in the instant case – combined with the fact that he was serving a prison sentence in Washington when the bench trial occurred and the fact that he was wanted in two other states and was facing extradition to one of them – supports a finding that the use of leg restraints during the bench trial was warranted. Still more, because the trial was a bench trial, Lynn suffered no prejudice due to the fact that he was wearing simple leg restraints. The State contends that if any error occurred due to the trial court’s order requiring leg restraints, on the unique facts of this case the error was harmless beyond a reasonable doubt. *State v. Jackson*, 195 Wn.2d 841, 855-58, 467 P.3d 97 (2020).

2. Lynn identifies three incidences from the record where he asserts that witnesses improperly testified as to their opinion of his intent when committed the crime of assault in the first degree against pursuing police officers. The State alleges that these incidences do not constitute improper opinion testimony but that in any event this Court should decline to consider the issue because: Lynn invited two of the three alleged errors by eliciting the testimony on cross examination; the claims of error were not preserved by an objection in the trial court; and, if error did occur, it was harmless beyond a reasonable doubt.

Lynn provides three quotes from the trial testimony without any context and asserts that each of the three quotes constitutes improper opinion testimony about the element of intent. Br. of Appellant at 13-14. Two of these three quotes are from testimony elicited by Lynn on cross examination.

During cross examination of Deputy LaFrance, Lynn interrogated her about her thoughts when Lynn began throwing propane tanks and other objects at her from his vehicle as she pursued him, as follows:

Q. What were you afraid would have happened with that propane tank? What were you in that moment afraid of?

A. I was afraid that something that he was throwing out of that car was going to bounce up and hit my car or hit Deputy Anderson's car.

Q. Okay. So you were afraid of damage to the vehicles then?

A. I was afraid of getting hurt, Deputy Anderson getting hurt.

Q. What would have hurt you?

A. What would have hurt me?

Q. Yes.

A. A propane tank coming through the windshield, a flare coming through my windshield.

Q. Okay. I'm talking about the propane tank right now. We'll get to

the flare in a second. When you saw the propane tank, you specifically thought that thing is going to come up, come through my windshield and physically impact me? Is that what you thought when you saw the propane tank?

A. *At the time I was thinking oh, my God, 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.*

Q. Did you come anywhere near to having the propane tank actually injure you?

A. No.

RP 83-84 (emphasis added). Lynn did not object or move to strike the answers he elicited from this witness.

Later in the trial, during Lynn's cross examination of Deputy Anderson, Lynn elicited the following testimony:

Q. Did it appear that the defendant was specifically aiming for windshields, or was he just chucking stuff out the side of the vehicle?

A. *I believe that he's aiming for the person in law enforcement in any way, Sir.*

RP 118 (emphasis added). Lynn did not object or move to strike the testimony he elicited.

The third instance of testimony alleged by Lynn to be improper opinion testimony occurred during the prosecutor's direct examination of Deputy Anderson. Because identity of the perpetrator was at issue in this case, the prosecutor was questioning Deputy Anderson about the inability of officers to find Lynn in the eluding vehicle after it crashed. RP 111-13. The following testimony was presented to explain the conduct of officers when they approached Lynn's vehicle in the woods after it had wrecked:

Q. Okay. So, there was a rear window in the vehicle. Was it tinted or was it just clear glass?

A. It was tinted.

Q. Alright. And therefore, you couldn't see inside the vehicle because it was tinted?

A. No, Sir.

Q. So, I guess I'll just ask the obvious question. Why didn't you walk around and look into the passenger window then?

A. It was first and foremost for the safety concern. We were initially called there for the possibility of there being a firearm. *The person driving that same vehicle that we were just pursuing was actively trying to harm us as we were pursuing it.*

Q. Uh-hum.

A. So, we had a large safety concern as to why we took a different method to go up to the vehicle, but also due to the fact that the vehicle had crashed and it was pretty much resting on its

passenger's side, so it was obstructed.

RP 112 (emphasis added). Lynn did not object or move to strike this testimony.

- a) Because Lynn elicited the challenged testimony during cross examination, the invited error doctrine should bar consideration of two of the three incidences where Lynn asserts, for the first time on appeal, that the testimony was improper opinion testimony.

Even where the error is manifest error that affects a constitutional right, an appellant is barred from raising the error on appeal if the appellant invited it in the trial court. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006).

Two of the three incidents from which Lynn now claims improper opinion testimony was allowed in the trial occurred during Lynn's cross examination of the witnesses. RP 83-84, 118. Lynn actually elicited the testimony that he now asserts is improper. *Id.* Lynn did not object to the answers he elicited on cross examination, and he did not move to strike the testimony. *Id.*

The State contends that by eliciting the testimony and by failing to object to or move to strike the testimony, Lynn invited the claim of error now

asserts for the first time on appeal. Because Lynn invited the error, if any, the invited error doctrine should bar consideration of it on appeal. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006).

- b) For the first time on appeal, Lynn asserts that improper opinion testimony was introduced at his bench trial. But Lynn did not object in the trial court. Because Lynn has not met his burden of showing that the alleged error is manifest, this Court should decline to consider this issue where it is being raised for the first time on appeal.

Because Lynn failed to object in the trial court, he may bring this claim for the first time on appeal only if he shows that the purported opinion testimony constitutes a manifest error that has affected a constitutional right. *State v. Grott*, 195 Wn.2d 256, 267, 458 P.3d 750 (2020); RAP 2.5(3). If improper opinion testimony is wrongfully admitted, it is an error of constitutional magnitude. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). However, in such cases, the appellant must also show that the error is manifest. *Id.*

To prove that constitutional error is manifest, the appellant must show that the purported error had practical and identifiable consequences at trial. *Grott* at 269. “It is not enough that the Defendant allege prejudice – actual

prejudice must appear in the record.” *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Lynn has not shown that the error he alleges caused any prejudice at all.

In *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), the Court reasoned that error related to improper opinion testimony was not manifest where the jury was properly instructed that they were the sole judges of credibility and were not bound the witness’s opinion. *Id.* at 595. “Proper instructions obviate the possibility of prejudice.” *State v. Blake*, 172 Wn. App. 515, 531, 298 P.3d 769 (2012).

In the instant case, there were no jury instructions because this was a bench trial rather than a jury trial. RP 145. It is fair to presume that the trial court judge knows the law and that he knew that it was his province and his alone to determine the facts of the case. Here, as in *State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008), there is no evidence that the fact-finder, in this case a judge, was unfairly influenced by the challenged testimony. In fact, the trial court judge’s oral findings of fact following the bench trial (incorporated by reference into the written findings of fact) do not even mention any witness’s opinion. RP 145-52; CP 18-21.

State’s Response Brief
Case No. 54315-0-II

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“Because prejudice cannot be established, RAP 2.5(a)(3) does not allow for appellate review.” *State v. Blake*, 172 Wn. App. 515, 531, 298 P.3d 769 (2012).

- c) The challenged testimony stemmed from the witnesses’ actual, first-hand, sensory perceptions and was, thus, testimony about the inferences reasonably drawn from their experiences rather than opinion testimony.

A law enforcement officer’s improper opinion testimony may be particularly prejudicial because it carries “a special aura of reliability.” *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)). An opinion is also more likely to be improper if it is “stated in conclusory terms parroting the legal standard.” *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267 (2008).

The witnesses involved here were police officers, but rather than to be limited to the role of investigator, these officers were the direct victims of Lynn’s acts when he shot flare guns at them and threw propane canisters at them while they pursued him at high speeds. RP 65-122. Neither officer parroted the language of the relevant legal standard of

intent when providing their challenged testimony. RP 83-84, 112, 118.

Nor did the challenged testimony include mention of the word intent. *Id.*

“‘[T]estimony that ... is based on inferences from the evidence is not improper opinion testimony.’” *State v. Blake*, 172 Wn. App. 515, 523, 298 P.3d 769 (2012) (quoting *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). Here, the challenged testimony stemmed from the officers’ personal observations and sensory perceptions as objects were being thrown at them during a dangerous pursuit. RP 83-84, 112, 118. “Because the witnesses’ testimony stemmed from their own perceptions, the [judge] was free to disbelieve either or both witnesses and reach a finding of not guilty. Consequently, the testimony in question did not constitute opinions at all; rather, the testimony was to “inferences from the evidence.” *Blake* at 525-26 (quoting *Heatley* at 578).

- d) The State contends that the challenged testimony was not improper opinion testimony but that even if error did occur, it was harmless beyond a reasonable doubt.

The State bears the burden on appeal of showing that constitutional error was harmless beyond a reasonable doubt. *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014); *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

State’s Response Brief
Case No. 54315-0-II

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Constitutional error is harmless if the reviewing court is “convinced beyond a reasonable doubt that any reasonable trier of fact would have reached the same result despite the error.” *State v. Scherf*, 192 Wn.2d 350, 370, 429 P.3d 776 (2018) (quoting *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004)). To determine whether a manifest, constitutional error is harmless, the reviewing court will view the error in the context of the entire record to determine whether it caused actual prejudice. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Here, the trial was a bench trial rather than a jury trial. The judge, as the finder of fact, could independently assess Lynn’s intent. In his oral ruling and in his written ruling, it is apparent that the fact finder did not rely on anyone’s opinion when rendering his verdict. RP 145-52. Instead, the trial court judge as the finder of fact set for the overwhelming evidence that supported his guilty verdict and never mentioned any opinion testimony. *Id.* These facts show beyond a reasonable doubt that the purported opinion testimony had no effect on the outcome of the trial.

3. Sufficient evidence supports the trial court's finding and verdict of guilty that Lynn committed the crime of assault in the first degree, as charged.

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

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

State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000).

Here, Lynn challenges the sufficiency of the evidence to support the element of intent for the crime of assault in the first degree. Br. of Appellant at 20-23. As relevant to the instant case, the elements of the crime of assault in the first degree are as follows:

- (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
 - (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death[.]

RCW 9A.36.011. Specific criminal intent can be inferred from conduct that plainly indicates such intent as a matter of logical probability. *State v. Abuan*, 161 Wn. App. 135, 155, 257 P.3d 1 (2011).

The evidence at trial proved that as Lynn fled from police he shot two shots at them with a flare gun and that he threw two propane tanks at them as they chased his vehicle at speeds of 70 to 80 miles per hour. RP 69-72, 80-81, 85, 106-09, 116. Based on this evidence, the trial court judge, as the finder of fact in this bench trial, considered the element of intent and found as follows:

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. Sergeant LaFrance had great apprehension that she was going to be seriously injured by the defendant's actions.

RP 149.

Thus, the record shows that the trial court carefully considered the element of intent as it is defined in RCW 9A.36.011(1)(a). Substantial evidence supports the trial court's findings that the propane canisters were likely to produce great bodily harm or death when used in the manner that they were used, which was to throw them at officers while they pursued Lynn from a distance of 50 feet at speeds of 70 to 80 miles per hour.

State's Response Brief
Case No. 54315-0-II

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Additionally, the fact that Lynn made several attempts to injure the officers, by shooting flares at them and by throwing the propane canisters at them, is substantial evidence shows that Lynn intended to inflict great bodily harm in order to achieve his purpose of escape.

4. Trial court mistakenly failed to remove boilerplate language that required the accrual of interest on nonrestitution legal financial obligations; therefore, this case should be remanded for the trial court to strike the boilerplate language at issue

The trial court's judgment and sentence in this case included old boilerplate language that requires the accrual of interest on unpaid legal financial obligations. CP 30. However, "[e]ffective June 7, 2018," RCW 10.82.090(1) now requires that "no restitution shall accrue on nonrestitution legal financial obligations." Accordingly, the State concedes that the boilerplate language here was erroneously included in the judgment and sentence and that this case should be remanded to the trial court for the trial court to strike the boilerplate language requiring the accrual of interest on nonrestitution legal financial obligations.

D. CONCLUSION

Lynn was not prejudiced by the trial court's order that he be restrained by leg restraints during his bench trial. Thus, on the unique facts of this case, any error related to the court's restraint order was harmless beyond a reasonable doubt.

Lynn should not be permitted to raise his unpreserved claim of error related to purported opinion testimony for the first time on appeal because he had not shown that any resulting error is manifest. It appears that the challenged testimony was proper testimony regarding inferences rather than improper opinion testimony. Additionally, two of the three incidences were invited by Lynn and should be denied under the invited error doctrine. Finally, even if error did occur, it was harmless beyond a reasonable doubt.

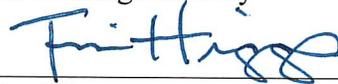
The evidence was sufficient to sustain the trial court's guilty verdict for the crime of assault in the first degree.

Accordingly, this Court should sustain the trial court's verdicts in this case. However, the case should be returned to the trial court for the trial court to strike from the judgement and sentence the outdated,

boilerplate language requiring the accrual of interest on legal financial obligations.

DATED: October 9, 2020.

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October 09, 2020 - 4:51 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Respondent v. Shane Ammel Lynn, Appellant
Superior Court Case Number: 19-1-00259-0

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