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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

EDUARD LASHKEY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Was there sufficient evidence to establish that a body part of the defendant knowingly and unlawfully entered or remained in the victim's residence to support the conviction for first-degree criminal trespass?

2. If the defendant actually alleges an abuse of discretion rather than a manifest constitutional error regarding the trial court's unobjected-to written response to a jury question during deliberations, has he established a manifest constitutional error that resulted in actual prejudice which is necessary for this Court to consider and potentially grant him relief on appeal?

3. Has the defendant overcome the strong presumption of effective representation and established prejudice where his lawyer agreed to the court's recommendation to have the jury refer to the court's written instructions in response to a jury question?

4. Even though the trial court found the defendant indigent for the purpose of filing a criminal appeal, did the trial court abuse its discretion, after conducting a brief hearing at sentencing and finding the defendant not indigent, when it ordered the defendant to pay the \$200 criminal filing fee?

II. STATEMENT OF THE CASE

Eduard Lashkey was charged in superior court with residential burglary. CP 1. A jury convicted Lashkey of the lesser included offense of first-degree criminal trespass.¹ CP 53-54.

Substantive facts.

During May 2018, Taylor Rydeen lived alone and rented the property at 211 East Princeton in Spokane. RP 132. The property had a detached garage/shed, a six-foot cedar fence surrounding the backyard, and a residence. RP 135-36, 138, 160. On May 4, 2018, the doors to the shed and home, and the gate to the backyard on the property were all closed. RP 140-41. Rydeen was at work on that day and returned twice to her residence, at noon for lunch and then at 5:20 p.m. RP 133. Nothing was out of order in Rydeen's residence during the noon hour. RP 149.

After work, Rydeen returned to her home; the door to her shed and gate to the backyard had been opened and the backdoor of her residence had either been kicked or pried open. RP 134, 140-41, 149. No one, including the defendant, had permission to enter Rydeen's residence, shed or backyard on that day.² The unsecured lock to the shed was damaged and

¹ This Court has determined that criminal trespass is a lesser included offense of residential burglary. *State v. J.P.*, 130 Wn. App. 887, 895, 125 P.3d 215 (2005).

² Rydeen did not know the defendant. RP 146.

lying on the ground. RP 139, 162. The backdoor of the residence was secured with a deadbolt lock. RP 142-43, 163. That door and the structure that surrounded it was damaged after the break-in. RP 143-44, 163-64. Rydeen called the police. RP 137.

After police arrived, Rydeen noticed that her television, an LED makeup mirror, jewelry, cosmetics and perfume were missing from her residence. RP 145-46, 150. Rydeen estimated the value of the items to be around \$2,000. RP 147. In addition, tacks that had previously been in a container in her bedroom had been spread on her bedroom floor. RP 144-45.

Spokane Police Officer Corporal Derek Bishop, with training and experience in the collection of physical and fingerprint evidence, arrived at Rydeen's residence around 6:00 p.m. on the day of the incident. RP 154-56, 159. Bishop observed the backdoor of Rydeen's residence had significant damage from being pried open and the door and door frame had obvious tool marks. RP 160-61, 164, 173-74. Bishop collected a latent print from the exterior of the backdoor's deadbolt assembly. RP 175-76.

Spokane County Sheriff Office Forensic Specialist Trayce Boniecki was a certified latent print examiner with the International Association for Identification. RP 210-11. Boniecki analyzed and compared the latent fingerprint card submitted by Bishop, taken from the deadbolt lock, to a

known fingerprint previously taken from Lashkey. RP 229-32, 237. A known fingerprint is taken from an individual in a controlled environment. RP 217. Boniecki determined that the known right thumb fingerprint of Lashkey matched the latent print taken from Rydeen's deadbolt lock. RP 236-237. Boniecki's conclusion was confirmed by a second fingerprint specialist who conducted an independent examination by comparison and analysis of both the latent and known prints in this case. RP 239-40.

Lashkey claimed that on the day of the event, he became intoxicated in the afternoon. RP 269-71. A friend dropped Lashkey off at Rydeen's home, with Lashkey believing it was his friend "Steve's" home, whom he had not visited for a considerable time. RP 271. Lashkey alleged that his friend "Steve" previously had a couch blocking the main door to the residence, so he walked around the house, while intoxicated, through the gate into the backyard. When asked on the stand how his fingerprint was deposited on the deadbolt lock on the backdoor, Lashkey responded, "[m]aybe when it was kind of hard to stand still so I was leaning, trying to hold and knock until he opened [the back door]." RP 271-72. Lashkey was not asked, nor did he provide an explanation as to how the garage door was opened and the lock on that door was damaged.

During cross-examination, Lashkey could not remember or did not know his friend "Steve's" last name. RP 274. Lashkey was also unclear on

how many years he had known this friend, “maybe three or four years.” RP 275. Furthermore, Lashkey could not identify his friend “Steve’s” street address. RP 276.

III. ARGUMENT

A. BASED UPON THE DEFERENTIAL STANDARD OF REVIEW, THE STATE’S EVIDENCE ESTABLISHED THAT A BODY PART OF LASHKEY KNOWINGLY AND UNLAWFULLY ENTERED THE VICTIM’S RESIDENCE AND THAT HE COMMITTED FIRST-DEGREE CRIMINAL TRESPASS.

Standard of review for sufficiency of the evidence.

An appellate court reviews the sufficiency of the evidence de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in a 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. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). 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). All reasonable inferences from the evidence must be interpreted most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A reviewing court must

defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Circumstantial evidence carries the same weight, and is as reliable as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). Nevertheless, “a verdict does not rest on speculation or conjecture when founded on reasonable inferences drawn from circumstantial facts.” *State v. Jameison*, 4 Wn. App. 2d 184, 197-98, 421 P.3d 463 (2018).

In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). In that regard, our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the

record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981). Similarly expressed:

The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negative guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict.

State v. Randecker, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971).

Lashkey asserts there is insufficient evidence to support the fact that he unlawfully entered or remained in a building - Rydeen's home. He claims the jury could have convicted him for unlawfully entering Rydeen's fenced backyard, basing this assertion on a single question from the jury during its deliberations and the trial court's remarks at sentencing. This argument fails under both established caselaw and the facts as presented to the jury.

A person is guilty of first-degree criminal trespass if he or she "knowingly enters or remains unlawfully in a building." RCW 9A.52.070. As defined for the jury, "the term building means a building in its ordinary sense." CP 48; *see* RCW 9A.04.110(5) and *State v. Joseph*, 195 Wn. App. 737, 739, 381 P.3d 187 (2016), *aff'd*, 189 Wn.2d 645 (2017) (a general discussion of the term "building").

Regarding the elements of the crime, the jury was instructed:

To convict the defendant of the crime of criminal trespass in the first-degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 1) That on or about May 4, 2018 the defendant knowingly entered or remained in a building;
- 2) That the defendant knew that the entry³ or remaining was unlawful; and
- 3) That this act occurred in the State of Washington.

CP 50.

During deliberations, the jury sent a question to the court asking: “Is criminal trespass unlawfully getting into the backyard without permission?” CP 32; RP 356. The court informed the deputy prosecutor and defense counsel that it believed the appropriate response was to refer the jury to the written instructions and did so. RP 356-57. Neither counsel had an objection to this response. RP 356. Specifically, defense counsel stated: “No, Your Honor, we’d be in agreement with the Court’s decision.” RP 356.

After the jury returned its verdict finding Lashkey guilty of first-degree criminal trespass, the trial court polled the jury; each juror affirmed that the “guilty” verdict was his or her own and the verdict of the jury. RP 359-61.

³ “Unlawful entry” may be proved by circumstantial evidence. *J.P.*, 130 Wn. App. at 893.

At sentencing, the trial court asked the deputy prosecutor if it would be appropriate for the court to consider its post-verdict discussions with the jurors, when considering a suitable sentence.⁴ RP 368. The deputy prosecutor was against the court's proposal. RP 368. Remarkably, the court then took a peculiar and unorthodox step, and sua sponte, remarked:

I think it's important not to make comments that would potentially either be disrespectful to their decision or not in deference to their decision or to somehow taint their future jury service because sometimes concluding one trial does not indicate to being done with jury service for that week.

I'm just going to put it out on the record, I'm not indicating I considered it, and I didn't ask the jury how they came to the decision but several offered the information that they had reasonable doubt as to whether he went inside the residence. They mentioned that to this Court that they had reasonable doubt and indicated they didn't think the State had sufficient evidence to prove that.

I'm not -- I don't know, frankly, I don't if it's appropriate to take in jurors' statements so I'm just sharing that information with the parties so that you're aware of what I'm aware of.

RP 368-69.

The Supreme Court has clearly held that a jury question during deliberations cannot be used to impeach its verdict:

The individual or collective thought processes leading to a verdict "inhere in the verdict" and cannot be used to impeach a jury verdict. Here, the jury's question does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached. "[Q]uestions from the jury are not final

⁴ Apparently, both counsel for the State and defense also spoke with the jury after the verdict independently of the court. RP 368-69.

determinations, and the decision of the jury is contained exclusively in the verdict.”

State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988) (internal citations omitted; alteration in original). As an example, a trial court cannot consider post-verdict juror statements made by the jury that inhere in the verdict when ruling on a motion for a new trial. *Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003); *State v. Gaines*, 194 Wn. App. 892, 898, 380 P.3d 540, *review denied*, 186 Wn.2d 1028 (2016).

Lashkey attempts to impeach the jury’s verdict by virtue of the inquiry it made, and by extension, the sufficiency of the evidence necessary to convict him of first-degree criminal trespass. Lashkey’s suggestion that the jury’s question supports his conclusion that there was insufficient evidence to convict him is defeated by the court’s holding and rationale in *Ng*. Although the jury asked a question that may have signaled confusion as to what constitutes a first-degree criminal trespass, a reviewing court cannot assume that any potential confusion was not resolved during the remainder of the deliberations. Accordingly, relying on the jury’s question to support a claim of insufficiency of the evidence has no merit or any basis in the law.

Likewise, the jury’s post-verdict statements to the trial court are matters which inhere in the verdict and cannot be used to attack the jury’s

verdict or, in a broader sense, the sufficiency of the evidence. *See Ng*, 110 Wn.2d at 43. In context, there was no explanation by the trial court for the jurors' presumed remarks; the lawyers were placed in the unique position of not being able to "cross-examine" the trial court about the post-verdict remarks it heard from the jury; there was no framework given by the trial court as to what stage of deliberations did one or more jurors express doubt or at what stage the asserted confusion occurred; and, without any prompting from the State or defense counsel, why the trial court felt it necessary to place the assumed, hearsay remarks by one or more jurors into the record when such remarks remain inherent in the verdict. Certainly, there is no authority that a trial court should, or in this case, did consider the jury's post-verdict comments when considering or fashioning the appropriate sentence. Notwithstanding the trial court's extraneous remarks and the jury's inquiry, the verdict and the post-verdict polling of the jury negate any assertion that the jury was not unanimous and firm in its belief that the State had established the elements of first-degree criminal trespass beyond a reasonable doubt.

Regarding the sufficiency of the evidence, fingerprint evidence alone is sufficient to support a conviction if "the trier of fact could reasonably infer from the circumstances that it could only have been impressed at the time the crime was committed." *State v. Lucca*,

56 Wn. App. 597, 599, 784 P.2d 572 (1990). To support a finding of guilt beyond a reasonable doubt in a “fingerprint-only” case, the State must establish that the object upon which the fingerprint was found was generally inaccessible to the defendant at a previous time. *State v. Bridge*, 91 Wn. App. 98, 100, 955 P.2d 418 (1998).⁵ “While the government need not exclude all inferences or reasonable hypotheses consistent with innocence, ... the record must contain sufficient probative facts from which a factfinder could reasonably infer a defendant’s guilt under the beyond a reasonable doubt standard.” *Id.* (internal quotations omitted).

For example, in *Lucca*, the defendant’s fingerprint was lifted from a piece of broken glass from a window in the back of the residence. 56 Wn. App. at 598. A fence enclosed the residence, making the window generally inaccessible to the public. *Id.* No direct evidence showed the print was made at the time of the burglary and no evidence placed the defendant in the vicinity at the time of the burglary. *Id.* at 599. However, the resident did not know the defendant and the defendant did not have permission to enter. *Id.* at 601. The defendant offered no alternate explanation for how his

⁵ In *Bridge*, this Court determined that a fingerprint found on a tool at the scene of a burglary was insufficient evidence to support a conviction because the fingerprint was found on a moveable object accessible to the public. 91 Wn. App. at 100-01. This case is distinguishable from *Bridge* because the fingerprint found on the deadbolt lock at the rear of residence was a fixed object attached to the structure.

prints came to be on the glass and the window was in a location that was generally inaccessible to the public. *Id.* Division One of this Court concluded that the evidence was sufficient to support the conviction. *Id.* at 603.

Here, the evidence established that the fingerprint was lifted from the deadbolt lock on the backdoor of Rydeen's residence. Rydeen testified that the backdoor to her residence, the gate into her fenced backyard, and the door to her garage were all closed when she left for work on May 4, 2018. There was nothing out of the ordinary when she returned home for lunch on that day. When she returned home after work, the door to her garage was open, the lock to the shed was lying on the ground and was damaged, the gate to her fenced backyard was open, and a prybar had been used to open her backdoor, which remained open upon her arrival. Rydeen had not given Lashkey permission enter onto her property or into her home. Items had been taken from the residence, in addition to tacks that were spread on her bedroom floor, which had been previously been in a container.

By Lashkey's own admission at trial, he was at Rydeen's residence and touched the deadbolt lock on the backdoor of the residence during the time in which the State alleged the criminal trespass occurred. The deadbolt lock was such that it was not generally accessible to the public. Lashkey offered an alternative explanation for the placement of his fingerprint,

which the jury obviously disbelieved and gave no weight to his story of why he entered Rydeen's property or premises that day.

Regarding Lashkey's entry into Rydeen's home, the term "enter," for the purpose of "enters or remains unlawfully" under the burglary and trespass statutes,⁶ includes the insertion of any part of a person's body. RCW 9A.52.010(1), (2); *State v. Koss*, 158 Wn. App. 8, 16, 241 P.3d 415 (2010), *aff'd*, 181 Wn.2d 493 (2014), *disapproved on other grounds State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). Accordingly, a sufficient entry is made when any part of the body of an intruder is inside a building; a partial entry is all that is needed to support a criminal trespass conviction. The jury could have reasonably inferred that Lashkey unlawfully entered Rydeen's home because it would have been necessary for Lashkey to use his arm, hand, foot or shoulder to exert force to breach the door and consequently pass through the threshold of the backdoor when prying and opening it; the door opened inward and was open when Rydeen returned home after work.⁷

⁶ See RCW 9A.52 *et. seq.*

⁷ This fact provides a reasonable explanation for the one or more jurors asserted post-verdict comment to the trial court. The jury could have doubted during deliberations that Lashkey's entire body entered the residence, and committed a burglary within, but may have believed that a part of his body made entry into the residence by merely opening the door.

Moreover, the jury certainly could have reasonably inferred that Lashkey was on the prowl for tangible items and after he opened both the garage and residence doors, inaccessible to the public, he entered those spaces. Indeed, it is illogical that Lashkey would have made the effort to open both the garage and residence doors, damaged the lock to the garage door and the structure of the residence, but did not enter those buildings after doing so. Certainly, there was a reasonable inference and evidence that Lashkey entered the residence based upon, at a minimum, the tacks being strewn on the bedroom floor.

Finally, there is no evidence, as suggested by Lashkey, that the jury concluded that the Rydeen's fenced backyard was a "building in its ordinary sense." *See* Appellant's Br. at 11. This assertion is based upon nothing more than conjecture. As stated above, the jury obviously disregarded its earlier inquiry to the court regarding whether entry into fenced back yard could be considered a criminal trespass as evidenced by its verdict and polling by the court. Moreover, Lashkey's assertion ignores this Court's standard of review that a claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can be drawn from that evidence. There was sufficient evidence to convict Lashkey of first-degree criminal trespass.

B. LASHKEY FAILS TO MAKE A PLAUSIBLE SHOWING THAT ANY ALLEGED ERROR IN THE TRIAL COURT’S RESPONSE TO A JURY QUESTION REGARDING A DEFINITIONAL INSTRUCTION WAS MANIFEST ERROR OR THAT IT CAUSED ACTUAL PREJUDICE.

Lashkey is barred under RAP 2.5(a) from raising the argument that the trial court erred when it instructed the jury to refer to the court’s written instructions in response to the jury’s question. The defense did not seek a further instruction, nor did it object to the instruction already given regarding the definition of “building.”⁸ *See* RP 295.

The general rule is that an appellate court will not consider an issue on appeal which was not first presented to the trial court. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). However, RAP 2.5(a)(3) permits a party to raise initially on appeal a claim of “manifest error affecting a constitutional right.” This authority is permissive; an appellate court will refuse to consider such issues if the record is not sufficient to permit review of the claim. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). In that regard, it is constitutional error to fail to properly instruct the jury on the *elements* of the crime. *Scott*, 110 Wn.2d at 688 n.5. If the instructions properly inform the jury of the

⁸ Indeed, during the instructions conference, the court granted defense counsel’s request to make a simple revision to the State’s proposed instruction regarding the definition of “building,” to make it more precise. RP 295.

essential elements of the crime, an error in defining terms that describe the elements of a crime is not an error of constitutional magnitude. *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011); *Scott*, 110 Wn.2d. at 688 n.5. Here, Lashkey’s claim that the trial court did not, on its own initiative, further define “building” for the jury runs squarely against *Gordon* and *Scott*; both decisions hold such a claim is not manifest constitutional error, and cannot be presented for the first time on appeal.

Moreover, in most circumstances, a trial court’s decision on whether to give a supplemental instruction to a deliberating jury is generally reviewed for abuse of discretion. *Sublett*, 176 Wn.2d at 82; *In re Det. of Pouncy*, 168 Wn.2d 382, 390, 229 P.3d 678 (2010)⁹ (review for abuse of discretion); *see also* CrR 6.15(f)(1). However, where there is no objection by the defense to the lack of further instruction, the defendant must show actual prejudice caused by a constitutional error. *Sublett*, 176 Wn.2d at 82-83.

Although Lashkey attempts to assert a constitutional error alleging a due process violation, in practical terms, he argues an abuse of discretion asserting the trial court “could have provided a more informative answer to

⁹ Whether words used in an instruction require definition is a matter of discretion to be exercised by the trial court. *In re Det. of Pouncy*, 168 Wn.2d at 390. Courts do not need to define words and expressions that are of ordinary understanding. *Id.*

the jury's question had it understood the true nature of the jury's confusion." Appellant's Br. at 13. Lashkey's claim of an abuse of discretion is based on supposition supported only by his personal view that the jury was confused. He fails to allege or establish a manifest constitutional error, let alone actual prejudice. His claim lacks merit.

If this Court chooses to address Lashkey's unpreserved argument, it still fails. Due process requires that a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). "Accordingly, a trial court errs by failing to accurately instruct the jury as to each element of a charged crime if an instruction relieves the State of its burden of proving every essential element of the crime beyond a reasonable doubt." *State v. Williams*, 136 Wn. App 486, 493, 150 P.3d 111 (2007). In addition, due process requires that the jury be fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Jury instructions are sufficient if they allow the parties to argue their theories of the case and properly inform the jury of the applicable law. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

Lashkey does not allege the court's instructions failed to inform the jury as to the elements of first-degree criminal trespass, that court failed to

instruct the jury on the State's burden to establish that crime beyond a reasonable doubt, or that his counsel was unable to argue the defense theory of the case. Rather, Lashkey argues the trial court should have taken the jury's putative "confusion" at face value and provided a supplemental, definitional instruction. *See* Appellant's Br. at 13. Without any support from the record, Lashkey claims "the jury question indicated it may have relied on [a] legally insufficient theory to convict." Appellant's Br. at 14. To the contrary, the jury never indicated it relied on an improper theory to convict Lashkey, nor is there anything in the record to support his conclusion that the jury was or remained confused as to what constituted a "building." The instruction given to the jury was not ambiguous and could only support one reading that the term "building" had to be a roofed and walled structure to constitute a "building" within its ordinary sense as instructed in this case.

Also, contrary to Lashkey's argument is that jurors are presumed to have followed the court's instructions. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), *as clarified on denial of reconsideration* (June 22, 1990); *State v. Morfin*, 171 Wn. App. 1, 12, 287 P.3d 600 (2012). In *Ng*, the defendant argued the trial court erred by not answering "yes" to a jury question as to whether duress applied to lesser included instructions. The trial court answered with: "Please refer to the instructions. The court cannot provide any additional instructions or explanations." 110 Wn.2d at 42. The

defendant argued on appeal that the trial court should have answered “yes” because it was an accurate statement of the law. *Id.* Like what occurred in the present case, the trial court in *Ng* stated, in pertinent part: “In my opinion it would have been wrong for the court to further explain the instructions that had been given the jury. Since the instructions answered the [question] that was being asked of the court.” *Id.* at 43 (alteration in the original).

In affirming the defendant’s convictions, our high court held that where the instructions accurately state the law, the trial court need not further instruct the jury. *Id.* at 42-44. Importantly, the court found that a trial court does not abuse its discretion by referring the jury to the instructions already given that correctly state the law. *Id.* More so, jury questions do not create an inference that the “entire jury was confused, or that any confusion was not clarified before a final verdict was reached.” *Id.* at 43. In addition, questions from the jury are not final determinations; “the decision of the jury is contained exclusively in the verdict.” *Id.*; *see also, State v. Linton*, 156 Wn.2d 777, 787, 132 P.3d 127 (2006), *as amended* (June 19, 2006) (“[t]he mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors’ intentions and beliefs, are

all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself").

For example, in *State v. Langdon*, the defendant was charged with and instructed on first-degree robbery, as well as accomplice liability and theft. 42 Wn. App. 715, 717, 713 P.2d 120 (1986). During deliberations, the jury sent a question to the court asking, "Does 'committing' mean aid in escaping?" *Id.* The trial court replied, "You are bound by those instructions already given to you." *Id.* On appeal, Langdon argued that the judge's reply was inaccurate because it failed to answer the jury's question. Division One of this Court summarily rejected this argument, noting that the trial court had no duty to answer the question and there was no underlying instructional error to be cured. Moreover, even if the jury were genuinely confused about the accomplice instruction, that instruction was not challenged below or on appeal, so its adequacy was not before the court. *Id.* at 718.

Similarly, in *State v. Miller*, 40 Wn. App. 483, 486, 698 P.2d 1123, *review denied*, 104 Wn.2d 1010 (1985), the jury sent an inquiry to the court during deliberations: "Does the acceptance of nonsolicited money offered to prevent real or imagined injury constitute robbery?" *Id.* There was nothing in the record as to the trial court's response. *Id.* Division

One of this Court found, even accepting the facts as presented by the defendant, that:

[E]ven if the jury was confused at the time of the inquiry, this situation could have changed during deliberations. This court has recently held that questions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict.

Id. at 489.

Likewise, in *State v. Bockman*, 37 Wn. App. 474, 493, 682 P.2d 925, review denied, 102 Wn.2d 1002 (1984), the jury asked during deliberations, “If the defendants leave the scene of a second degree burglary, then an assault occurred by a third party, are those two then guilty by association of first degree burglary?” *Id.* Like this case, the trial court told the jury, “You have received all of the Court’s instructions.” *Id.* The *Bockman* court held that the question sent to the judge is not a final determination by the jury. *Id.* Only the final verdict contains the jury’s decision. *Id.*

In the present case, the jury was instructed on the statutory elements of first-degree criminal trespass, the requisite definitions, and that the State had the burden of proving all elements beyond a reasonable doubt. Lashkey does not assign error to any particular instruction as being an inaccurate statement of the law or that the instructions as a whole are unconstitutionally inadequate and violate due process. The single question by the jury was not a final determination and its decision was contained exclusively within its

verdict and ratified by the court's subsequent polling of the jury. Moreover, Lashkey's failure to challenge the underlying instructions, including the definitional instructions, in the trial court and now on appeal precludes a finding that he was actually prejudiced.

C. LASHKEY'S DEFENSE COUNSEL WAS NOT INEFFECTIVE BY AGREEING TO THE COURT'S RESPONSE TO THE JURY'S QUESTION.

Ineffective assistance of counsel – Standard of review.

Regarding Lashkey's argument that his lawyer's acquiescence to the court's response to the jury's question constituted ineffective assistance of counsel, that claim has no basis.

An appellate court reviews ineffective assistance claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. Martinez*, 161 Wn. App. 436, 253 P.3d 445, *review denied*, 172 Wn.2d 1011 (2011). To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's performance was "objectively unreasonable and that he was prejudiced." *In re Garland*, 191 Wn.2d 1001, 428 P.3d 122 (2018); *see also Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This requires showing a reasonable probability that, except for counsel's unprofessional errors, the result of the proceedings would have been different. *McFarland*, 127 Wn.2d at 334-35. Failure to meet either prong of the two-part test for ineffective

assistance of counsel ends the inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). A reviewing court approaches an ineffective assistance of counsel argument with a strong presumption that counsel's representation was effective. *In re Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

As stated above, whether to give a further instruction in response to a request from a deliberating jury is within the discretion of the trial court. *State v. Becklin*, 163 Wn.2d 519, 529, 182 P.3d 944 (2008). To establish ineffective assistance based on counsel's failure to request a jury instruction, the defendant must show that he was entitled to the instruction, counsel was deficient in failing to request it, and failure to request the instruction caused prejudice. *State v. Johnston*, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007); *see Strickland*, 466 U.S. at 687.

Where counsel has no strategic reason for failing to request jury instructions on a defense theory and prejudice results, courts have held counsel to be ineffective. For example, in *State v. Backemeyer*, 5 Wn. App. 2d 841, 428 P.3d 366 (2018), *review denied*, 192 Wn.2d 1025 (2019), the jury sent two successive, similarly worded questions regarding self-defense. *Id.* at 846-47. This Court found that the jury's second question made it clear that the jury had not read the instruction regarding self-defense and that defense counsel was deficient by not requesting the trial court direct

the jury to reread the specific, written instruction defining self-defense. *Id.* at 849. That case is easily distinguished from the facts here in that there has been no showing that the jury did not reread the court's written instructions after being directed to do so by the trial court or that the jury was confused about the meaning of a "building" after rereading the court's instructions. Any claim otherwise is unsubstantiated.

Deficient performance.

Lashkey relies on nothing more than guesswork regarding his assertion that his lawyer should have proposed an additional instruction that a building does not include a fenced area. If there was confusion, there is nothing in the record to indicate that the jury did not resolve that issue on its own after rereading the court's instructions. The jury was given an accurate instruction which defined the term "building" as meaning "a building in its ordinary sense." CP 48. For that matter, in *Joseph*, 189 Wn.2d at 652, our high court found that the phrase "building in its ordinary sense," regarding criminal trespass, "properly restricts first degree trespass to unlawful entries into ordinary 'buildings,' a descriptor that needs no further definition." *Id.* at 653.

As defined for the jury in this case and with the aid of common sense and logic, the definition of building did not include a fenced back yard for purposes of committing a first-degree criminal trespass. For that matter,

neither party argued during their respective summations that the term “building” included a fenced back yard. RP 326-35 (State’s closing argument), 340-50 (defense closing argument), 350-52 (State’s rebuttal argument).

This Court gives great deference to trial counsel’s performance and begins the analysis with a strong presumption that counsel was effective, Lashkey fails to overcome the strong presumption that his trial counsel was effective given that the trial court’s instructions accurately stated the law, including the instruction defining “building,” and that the State had the burden of proof beyond a reasonable doubt.

Prejudice.

In assessing prejudice under an ineffective assistance of counsel argument, “a court should presume, absent [a] challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law and must exclude the possibility of arbitrariness, whimsy, caprice, nullification and the like.” *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (internal citations omitted).

When ineffective assistance is raised in the context of failing to ask a trial judge to make a discretionary decision, the defendant has the burden to establish prejudice, and, in doing so, that a trial judge would have made a discretionary decision in the defendant’s favor. *Backemeyer*,

5 Wn. App. 2d at 852 (Korsmo, J. dissenting). Lashkey makes no effort to establish nor does he argue the trial court would have exercised its discretion in his favor if defense counsel had requested the court to further instruct the jury regarding the definition of “building,” especially since the trial court had no obligation to do so. Accordingly, Lashkey fails to establish either deficient performance or that he suffered any prejudice. His claim fails.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED \$200 IN COURT COSTS.

Lashkey challenges the imposition of the \$200 criminal filing fee authorized under RCW 36.18.020(2)(h). Under that amended provision, a criminal defendant “shall be liable” for the criminal filing fee unless he or she is found indigent as defined by RCW 10.101.010(3)(a) through (c). RCW 36.18.020(2)(h). If the sentencing court has not found a defendant indigent under RCW 10.101.010(3)(a) through (c), it must impose the fee.

Standard of review.

This Court reviews the imposition of LFOs for abuse of discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015), *remanded on other grounds*, 187 Wn.2d 1009 (2017). “Discretion is abused when it is exercised on untenable grounds or for untenable reasons.” *Id.* This Court reviews a “trial court’s factual determination concerning a defendant’s resources and ability to pay” under “the clearly erroneous standard.” *Id.*

Lashkey claims he was found indigent based upon his motion and declaration in support of the trial court ordering an appeal at public expense and the court's order authorizing the same, most likely under RCW 10.101.010(3)(d). CP 64-67. The trial court's determination that Lashkey was indigent under RCW 10.101.010(3)(d), when ordering an appeal at public expense, is not relevant to the court imposed \$200 filing fee as discussed below.

At sentencing on November 19, 2019, the trial court questioned Lashkey regarding his ability to pay his legal financial obligations. Lashkey informed the court that he had worked several years before his current conviction, that he was capable of gainful employment, but had been unsuccessful in finding a job. RP 378. Lashkey further told the court that he was not receiving any Social Security benefit payments or disability payments. *Id.* at 378. The trial court found that Lashkey was not indigent for purposes of paying his LFOs and imposed the \$500 victim assessment and \$200 court filing fee. However, as discussed above, the court did later sign an order on November 22, 2019, permitting Lashkey to appeal his conviction at public expense. CP 68-69.

RCW 36.18.020(2)(h)¹⁰ prohibits the imposition of the criminal filing fee at sentencing if the defendant is indigent defined by RCW 10.101.010(3)(a) through (c).¹¹ Likewise, RCW 10.01.160(3) prohibits a trial court from imposing costs on a defendant who is found indigent under RCW 10.101.010(3)(a) through (c). *See State v. Catling*, 193 Wn.2d 252, 258, 438 P.3d 1174 (2019); *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). “In determining the amount and method of payment of costs for defendants who are not indigent as defined in RCW 10.101.010(3) (a) through (c), the [trial] court shall take account of

¹⁰ RCW 36.18.020(h) states:

Upon conviction or plea of guilty, upon failure to prosecute an appeal from a court of limited jurisdiction as provided by law, or upon affirmance of a conviction by a court of limited jurisdiction, an adult defendant in a criminal case shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3) (a) through (c).

¹¹ RCW 10.101.010(3)(a) through (c) states:

- 3) “Indigent” means a person who, at any stage of a court proceeding, is:
- (a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or
 - (b) Involuntarily committed to a public mental health facility; or
 - (c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level; or

the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

Notwithstanding, if a defendant is found indigent under RCW 10.101.010(3)(d),¹² which allows an appeal at public expense, a trial court may still impose costs in accordance with *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Criminal filing fees are costs. RCW 10.01.160(1), (2); *see Ramirez*, 191 Wn.2d at 739. The record must show that the trial court made an individualized inquiry into the defendant’s current and future ability to pay, the defendant’s other debts, and the amount of time the defendant has spent incarcerated. *Blazina*, 182 Wn.2d at 838.

Under RCW 36.18.020(2)(h), which governs the \$200 criminal filing fee, “an adult defendant in a criminal case *shall be liable for a fee of two hundred dollars, except this fee shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c).*” (Emphasis added.) A reading of the statute suggests the criminal filing fee

¹² RCW 10.101.010(3)(d) states:

- 3) “Indigent” means a person who, at any stage of a court proceeding, is:
...
- (d) Unable to pay the anticipated cost of counsel for the matter before the court because his or her available funds are insufficient to pay any amount for the retention of counsel.

is mandatory unless a court applies RCW 10.101.010(3)(a) through (c) and finds a defendant indigent.

Stated otherwise, if a defendant is found indigent only under RCW 10.101.010(3)(d), as occurred in the present case, the \$200 criminal filing fee is still mandatory under RCW 36.18.020(2)(h) unless a defendant is specifically found indigent under the criteria set forth under RCW 10.101.010(3)(a) through (c); a finding of indigency under RCW 10.101.010(3)(d) has no bearing on whether a defendant is indigent under RCW 10.101.010(3)(a) through (c), for the purpose of imposing the criminal filing fee. Under the doctrine of “expressio unius est exclusio alterius,” “[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim expressio unius est exclusio alterius—specific inclusions exclude implication.” *In re Det. of Lewis*, 163 Wn.2d 188, 196, 177 P.3d 708 (2008) (alteration in original).

Since the trial court is required to impose the criminal filing fee after conviction unless the defendant is found indigent under RCW 10.101.010(3)(a) through (c), it logically follows the defendant has the burden of production – to produce evidence (as outlined under RCW 10.101.010(3)(a) through (c)), from which the court could determine

the defendant's indigency status at sentencing.¹³ Certainly, the State does not have access to any of the information required for the court to make such a determination.

Here, the trial court conducted a hearing at sentencing. Lashkey provided no financial declarations and the trial court heard no evidence, after its colloquy with the defendant, that Lashkey met the criteria under RCW 10.101.010(3)(a) through (c). In doing so, the court determined that Lashkey had the ability to become gainfully employed and had been employed in the past. For that matter, Lashkey received a credit for time served sentence. RP 377. The court did not find Lashkey indigent for the purpose of imposing the criminal filing fee. There was no objection by defense counsel or the defendant as to the court's finding. In effect, the trial court later found Lashkey was indigent under RCW 10.101.010(3)(d), but never under RCW 10.101.010(3)(a) through (c). The trial court did not abuse its discretion when it determined from the facts presented that Lashkey was not indigent under the applicable statutes and had the ability to pay the \$200 criminal filing fee; such a factual finding was not clearly erroneous.

¹³ For example, in *Ramirez*, the defendant had supplied the court with a financial declaration. 191 Wn.2d at 736.

IV. CONCLUSION

For the reasons stated herein, the State requests the Court affirm the judgment and sentence.

Respectfully submitted this 21 day of August, 2020.

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

STATE OF WASHINGTON,

Respondent,

v.

EDUARD LASHKEY,

Appellant.

NO. 37229-4-III

CERTIFICATE OF MAILING

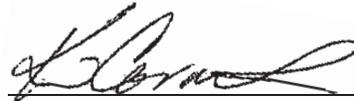
I certify under penalty of perjury under the laws of the State of Washington, that on August 21, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Christopher Gibson

gibsonc@nwattorney.net; sloanej@nwattorney.net

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