Supreme Court No. 102178-0
(Court of Appeals No. 56086-1-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

PHILLIP JARVIS,

Petitioner

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner, Phillip Jarvis, asks this Court to review the published opinion of the Court of Appeals in *State v. Jarvis*, No. 56086-1-II (filed June 13, 2022). A copy of the opinion is attached as an Appendix.[1]

B. ISSUES PRESENTED FOR REVIEW

1. Shackling is a means of exercising power and control over people of color. It has a devastating physical and symbolic impact on both the accused and the public's perception of the fairness of the proceeding. Here, the Court of Appeals recognized Mr. Jarvis' constitutional rights were violated when he was shackled at arraignment but found the violation harmless because the judge's bail decision was "reasonable" and the shackling did not occur in front of the trial judge or

[1] Mr. Jarvis does not seek review of the portions of the opinion reversing his death-in-prison sentence based upon improper shackling at sentencing and allowing him to raise the constitutionality of the Persistent Offender Accountability Act (POAA) at a full resentencing hearing. Slip op. at 13, 21.

jury. Is review required where the Court of Appeals' opinion conflicts with this Court's holding in *State v. Jackson*[2] by both conflating an abuse of discretion standard with a harmless error analysis and failing to recognize implicit bias in nonjury proceedings? RAP 13.4(b)(1).

2. Under RAP 17.7, an aggrieved party may only challenge a commissioner's ruling by motion to modify. After litigation by both parties, Commissioner Schmidt allowed Mr. Jarvis to supplement the appellate record pursuant to RAP 9.11 with a declaration detailing his pretrial shackling. Although neither party filed a motion to modify the ruling, the Court of Appeals refused to consider the declaration. Is review required where the court's refusal conflicts with other published decisions of the Court of Appeals holding a commissioner's ruling becomes the final decision of the court absent a motion to modify? Is review required where the court's refusal raises a

[2] 195 Wn.2d 841, 852, 467 P.3d 97 (2020)

significant question of law regarding Mr. Jarvis' constitutional right to appear without restraints? RAP 13.4(b)(2)-(3).

3. The statutory definition of assault requires the State to prove beyond a reasonable doubt that the accused (1) assaulted another and (2) acted with the specific intent to cause great bodily harm. Here, instead of relying on the common law definition of "assault," the court adopted the pattern jury instruction defining assault as an "intentional shooting," thereby requiring the State to prove that Mr. Jarvis intentionally shot each individual named in the to-convict instructions. Is review required where the State's failure to prove each element in the to-convict instruction raises a significant question of constitutional law? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

1. The witnesses to the shooting are severely intoxicated.

In 2015, Jason Ashworth converted a shed in his yard into "R Bar." 4/14/21RP 325-26, 352. R Bar was open from

7:00 p.m. to "any odd hours of the night," and Mr. Ashworth and other regulars would often return to R Bar when their local establishment, the Summit Pub, closed at 2:00 a.m. 4/14/21RP 312, 359. According to Mr. Ashworth, "everybody that comes in from the bars is either intoxicated at the time or they are getting intoxicated as they come into my place." 4/15/21RP 21.

True to form, on October 5, 2018, people started arriving at R Bar around 7:00 p.m. 4/14/21RP 357. Mr. Ashworth could not remember exactly who was there because everyone was drinking, and his memory was "kind of blank[.]" 4/14/21RP 357. Mr. Ashford left R Bar to go to sleep around midnight because "it was just a blur at that point because I was so intoxicated. It was time for me to go." RP 358-589.

Mr. Ashford awoke to the sound of gunshots, and saw a Black male ruming from the shed, but did not recognize the person. 4/14/21RP 360-61. He immediately went into the bar and discovered Micah Phillips and William Capers had been shot and injured. 4/14/21RP 363. Stephen Jones was also shot,

but his cell phone stopped the bullet and he was not hurt. 4/14/21RP 363.

Several days later, the police arrested Mr. Jarvis and the State charged him with three counts of first-degree assault with a firearm and one count of unlawful possession of a firearm. CP 3-4.

The evidence at trial confirmed the other partygoers were extremely intoxicated at the time of the shooting. For example, Micah Phillips had been at R Bar for about three hours prior to the incident. 4/15/21RP 96. During that time, Mr. Phillips drank at least three 24-ounce cans of Steel 211 malt liquor[3] and four shots of Wild Turkey 101.[4] 4/14/21RP 358, 4/15/21RP 97.

Mr. Phillips remembered seeing a man he did not know arguing with a regular before storming out of the bar.

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[3] Steel Reserve 211 (High Gravity) has an 8.1 percent alcohol by volume (ABV). Beer Advocate, https://www.beeradvocate.com/beer/profile/257/718/ (last visited June 1, 2022).

[4] "101" refers to the content of alcohol or "proof" of the whiskey.

4/15/21RP 99. The man returned a few minutes later with a gun, and Mr. Phillips along with two other partygoers escorted him out. 4/15/21RP 100-01. According to Mr. Phillips, the man threatened to shoot him if he did not back up. 4/15/21RP 103. When Mr. Phillips again asked the man to leave, the man shot him in the stomach. 4/15/21RP 105. Mr. Phillips did not recall much after the shooting, but ultimately underwent abdominal surgery and the doctors removed part of his intestines. 4/15/21RP 109, 112. He later selected Mr. Jarvis' photo out of a montage as the man who shot him. 5/10/21RP 144.

William Capers arrived after midnight. 4/15/21 148. It was his birthday, and he began drinking at another bar around 5:00 p.m., where he had a "few beers here and there" and up to five shots of whisky. 4/15/21RP 153. He continued to drink beer and take shots at R Bar. 4/15/21RP 152. By the time he arrived at R Bar, "[i]t was a blur." 4/20/21RP 11. Like Mr. Phillips, Mr. Capers remembered a man getting into an argument at the bar. 4/15/21 RP 155. Mr. Capers had his back

to the man, heard shots, and then realized he had been struck in the thigh. 4/15/21RP 158, 166-67. Mr. Capers saw the man with a gun, but did not see the shooting. 4/15/21RP 159, 4/20/21RP 30.

Mr. Capers went to the hospital, was bandaged, and was sent home the same day. 4/15/21RP 172. At the hospital, the doctors discovered his alcohol level was 199 milligrams per deciliter (approximately .20 blood alcohol level), which is consistent with severe visual impairment.[5] Mr. Capers had never met Mr. Jarvis before that night, but somehow picked Mr. Jarvis out of a photomontage nearly 18 months after the incident. 4/15/21RP 174, 180-81.

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[5] ScienceDirect, *Alcohol Blood* Level: From Amitava Dasgupta, *Alcohol, Drugs, Genes and the Clinical Laboratory*, Table 1.2 (2017), https://www.sciencedirect.com/topics/immunology-and-microbiology/alcohol-blood-level.

A jury found Mr. Jarvis guilty on all counts. CP 86-92. The court sentenced him to death in prison under the POAA and 89 months for unlawful possession of a firearm. CP 200.

2. Mr. Jarvis, a Black man, is shackled throughout the court proceedings.

Mr. Jarvis is a Black man. For two and a half years, Mr. Jarvis was incarcerated in the Pierce County jail awaiting trial. During this time, he was repeatedly forced to appear in court in shackles without an individualized inquiry into whether the restraints were necessary. App. B at 2.[6] He appeared at arraignment in a belly chain and handcuffs, where the court set

[6] As discussed below, in July 2022, Mr. Jarvis moved to supplement the appellate record under RAP 9.11 with two declarations clarifying the extent of the pretrial shackling. Commissioner Schmidt granted the motion as to Mr. Jarvis' declaration but denied the motion as to a defense investigator's declaration describing conversations with the Pierce County Jail Court Sargent. In the conversation, the Sargent confirmed the blanket jail policy of using in-court restraints during the timeframe Mr. Jarvis was in custody. Neither party filed a motion to modify under RAP 17.7. Both Commissioner Schmidt's ruling and Mr. Jarvis' declaration are attached hereto.

his bail at a staggering $750,000. CP 222-23. The jail brought Mr. Jarvis in shackles to at least five more pretrial proceedings between October 2018 and February 2019 before the court engaged in the required individualized analysis under *State v. Lundstrom*[7]. App. C at 2; CP 231-32. At that hearing, the prosecution admitted it was not aware of any previous outbursts in court or disruptive behavior at the jail. 2/13/19RP 4. Defense counsel objected to the use of restraints, and the court entered an order denying the prosecution's request. 2/13/19RP 5; CP 231-32.

The order, however, did not specify if it applied to future hearings. CP 231-32. As a result, Mr. Jarvis frequently appeared in front of the court in shackles between February 2019 and March 2020. App. C at 2-3. In March 2020, in response to the COVID-19 pandemic, the Pierce County Superior Court issued emergency order 20-09, providing that

[7] 6 Wn. App. 2d 388, 395, 429 P.3d 1116 (2018).

"Pierce County Corrections Officers transporting in-custody criminal defendants are not required to change restraints in order to escort a defendant into courtrooms."[8] Although the order was scheduled to expire in April 2020, the Superior Court issued a second order in July 2020 providing in-court shackling "shall remain in full force and effect until further order of this Court."[9] In total, Mr. Jarvis appeared in court handcuffed, shackled, and in distinctive prison garb approximately 20 times. App. C at 1. During many of the hearings, Mr. Jarvis was a pro

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[8] Pierce County Superior Court, *Emergency Order #9 Public Health Emergency Order Regarding Pierce County Corrections Restraint Procedures* (Mar. 23, 2020), https://www.courts.wa.gov/content/publicUpload/COVID19_Pierce/Pierce%20County%20Superior%20Court%20Emergency%20Order%20_9_0001.pdf (hereinafter "Emergency Order #9")

[9] Pierce County Superior Court, *Revised Emergency Order #18 Public Health Emergency Order Regarding Pierce County Corrections Restraint Procedures (Amending Emergency Order #9)* (Jul. 29, 2020), https://www.courts.wa.gov/content/publicUpload/COVID19_Pierce/Pierce%20County%20Superior%20Court%20Revised%20Emergency%20Administratvice%20Order%2020-18.pdf (hereinafter "Emergency Order #18") (emphasis added).

se litigant.[10] App. C. at 1. Although he was not restrained during trial, Mr. Jarvis appeared in leg irons, a belly chain, and handcuffs at sentencing. *See* App. C. at 1-2.

The Court of Appeals reversed Mr. Jarvis' sentence due to the State's failure to establish the shackling at sentencing was harmless error. Slip op. at 12-13. However, the court affirmed the convictions, finding the unlawful shackling at arraignment harmless. Slip op. at 11-12. Although neither party moved to modify Commissioner Schmidt's 2022 order supplementing the record, the panel refused to consider Mr. Jarvis' declaration and therefore found Mr. Jarvis did not establish he was restrained at additional pretrial hearings. Slip op. at 14-15.

The Court of Appeals also erroneously concluded the jury instructions did not relieve the State of its burden to prove

[10] Mr. Jarvis subsequently hired an attorney to represent him at trial and sentencing.

each element of first degree assault in the to-convict instruction for counts two and three. Slip op. at 15-18.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review because the Court of Appeals' decision conflicts with this Court's decision in *State v. Jackson*.

There is no dispute that Mr. Jarvis was unlawfully chained at the waist and handcuffed during his arraignment. Although recognizing the shackling violated Mr. Jarvis' constitutional rights, the Court of Appeals wrongly concluded the State met its burden to prove the violation was harmless beyond a reasonable doubt because "the commissioner's bail and conditions of release decisions were reasonable." Slip op. at 12. In so doing, the court appeared to apply the abuse of discretion standard appellate courts typically employ in reviewing bail decisions. *State v. Huckins*, 5 Wn. App. 2d 457, 465-66, 426 P.3d 797 (2018) (noting a trial court abuses its

discretion in setting bail where the decision is "manifestly unreasonable[.]").

But measuring prejudice based on whether a court's decisions are "reasonable" directly conflicts with this Court's decision in *State v. Jackson*, requiring the State to prove the use of restraints was harmless beyond a reasonable doubt. 195 Wn.2d at 855-56 (holding unconstitutional shackling subject to harmless error test as set forth in *State v. Clark*, 143 Wn.2d 731, 775-76, 24 P.3d 1006 (2001)). Under this framework, an error is harmless only where "from an examination of the entire record, it appears the error was harmless beyond a reasonable doubt" or "the evidence was so overwhelming that no rational conclusion other than guilt can be reached." *Clark*, 143 Wn.2d at 775-76 (citing *State v. Belmarez*, 101 Wn.2d 212, 216, 676 P.2d 492 (1984) and *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). The first approach requires the State to prove the shackles could not have contributed to the fact finder's determination; the second approach requires the State

to prove the court's decision would necessarily have been the same absent the shackles. *See Belmarez*, 101 Wn.2d at 216-17.

Thus, to overcome the presumed prejudice resulting from the constitutional violation in Mr. Jarvis' case, the State must not simply prove the court acted reasonably but rather that the shackling could not have contributed to the trial court's determination of probable cause and decision to impose an insurmountable bail. And an examination of the record establishes the State cannot meet its burden in Mr. Jarvis' case. Specifically, faced with a Black man in chains, the court was required to exercise its discretion in finding probable cause and setting bail. Mr. Jarvis argued the State's proposed bail amount was "wildly beyond" his ability to pay and instead asked for a $50,000 bail. 10/12/18RP 44. In support of the request, defense counsel informed the court that Mr. Jarvis had several family members who lived in the area, is a father to two young children, his wife would be undergoing surgery in the near

future, and he had a fulltime job delivering cabinets. 10/12/18RP 43-44.

Despite these compelling facts, the court denied Mr. Jarvis' request and set bail at a staggering $750,000. 10/12/18RP 45. As a result, Mr. Jarvis spent over two years awaiting trial from the Pierce County Jail. During this time, he was separated from his family and unable to work. When Mr. Jarvis sought to proceed pro se, the court explicitly warned him "[d]o you understand that there are a lot of impediments when you are in custody and trying to represent yourself, such as the inability to potentially have witness interviews outside of the use of an investigator, a number of other restrictions that are imposed on an in-custody defendant?" 2/28/20RP 4-5 (emphasis added).

Indeed, over the following five months, Mr. Jarvis repeatedly requested the help of an investigator and receipt of discovery because "[a]s a pro se litigant housed in the Pierce County Jail, the assistance of the investigator is vital to the

Defendant's preparation of his/her trial." CP 41. When the prosecutor stated on the day of trial that she never received a mitigation packet as is the usual practice in a third strike case, Mr. Jarvis responded that there were a lot of things he did not know and wouldn't understand as a pro se defendant "from the standpoint of being incarcerated." 4/12/21RP 7-10. Specifically, he was not aware that he was expected to present a mitigation packet to the prosecution during that time. 4/12/21RP 10. Under these circumstances, the constitutional violation was not harmless.

Second, the Court of Appeals erred when it analyzed the prejudice of shackling during arraignment by focusing on whether the jury or trial judge viewed Mr. Jarvis in chains. Slip op. at 12. As this Court emphasized in *Jackson*, "the constitutional right to a fair trial is also implicated by shackling and restraints at nonjury pretrial hearings." 195 Wn.2d at 852. Relying on what occurred at trial or sentencing to assess prejudice from pretrial shackling also undermines the

requirement that a court engaged in an individualized inquiry into the use of shackles "prior to every court appearance." *Id.* at 854.

Moreover, the notion that prejudice is reduced in a nonjury proceeding is based on the outdated belief that "the trial court is presumed to discharge its duties without prejudice." *Lundstrom*, 6 Wn. App. 2d at 395 n. 2. Yet *Jackson* disavowed this assumption based upon "[w]hat we know now regarding the unknown risks of prejudice from implicit bias." 195 Wn.2d at 856. Indeed, as outlined by amici in Mr. Jarvis' case, "jurors are much more likely to recognize and correct each other's biases" whereas a judge may not be aware of their own biases. Br. of Amici at 25 (citing Leslie Ellis, *Are Juries Really Such a Wildcard with Judges?*, A.B.A. (July 16, 2015), https://perma.cc/2WTV-EY6K).

Finally, the Court of Appeals erred by overlooking the psychological, emotional, or physical impact on Mr. Jarvis, his family, and his community. *See* Slip op. at 11-12. As this Court

explained in *Jackson*, shackles "remain an image of the transatlantic slave trade and the systematic abuse and ownership of African persons that has endured long beyond the end of slavery. … Although these atrocities occurred over a century ago, the systemic control of persons of color remains in society." 195 Wn.2d at 851. Failure to consider the prejudice caused to Mr. Jarvis personally ignores the destructive effects of this cruel, dehumanizing, and racist practice. This Court should grant review.

2. This Court should grant review because the Court of Appeals' failure to consider Mr. Jarvis' declaration conflicts with other published Court of Appeals' decisions.

The record on appeal included a declaration by Mr. Jarvis establishing he was brought into the courtroom in chains in approximately 20 pretrial appearances. App. C; *see* CP 224-49. However, the Court of Appeals refused to consider this unconstitutional shackling, finding Mr. Jarvis did not show he

was restrained because his declaration was not properly in front of the court. Slip op. at 14-15. This was error.

Whether the appellate record should be expanded to include Mr. Jarvis' declaration was heavily litigated. In July 2022, after briefing by both parties, Commissioner Schmidt issued a ruling expanding the appellate record to include Mr. Jarvis' declaration pursuant to RAP 9.11, but denying Mr. Jarvis' request to include a declaration from a defense investigator regarding her conversations with a jail sergeant. App. C. The Commissioner also denied the State's request to strike portions of the brief referring to the declarations, but allowed the State to "address its concerns in its brief." App. C. Neither party filed a motion to modify pursuant to RAP 17.7.

Nearly a year later, the Court of Appeals *sua sponte* disagreed with Commissioner Schmidt's ruling, concluding "the commissioner erred when he accepted Jarvis' declaration under RAP 9.11, and we will not consider it." Slip op. at 14. This directly conflicts with numerous published Court of

Appeals' opinions holding that, where a party fails to modify a ruling under RAP 17.7, the ruling of the commissioner becomes the final decision of the court. *E.g., Gould v. Mutual Life Ins. Co. of New York*, 37 Wn. App. 756, 758, 863 P.2d 207 (1984); *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 548, 815 P.2d 798 (1991); *Det. of Broer v. State*, 93 Wn. App. 852, 857, 957 P.2d 281 (1998).

The Court of Appeals' decision to disregard Mr. Jarvis' declaration was not only inconsistent with the law, but also fundamentally unfair. Because the commissioner's ruling was split in favor of Mr. Jarvis and the State, each party necessarily made a strategic decision not to seek modification of the order. Mr. Jarvis was entitled to rely on the commissioner's decision.

Having already decided it would not consider the declaration, the Court of Appeals noted the failure to file a motion to modify was irrelevant. Namely, the court interpreted the commissioner's ruling that the State could address "its concerns" in its briefing as "an acknowledgment that this ruling

could be challenged directly in the appeal." Slip op. at 14. Again, this was error. First, the most reasonable interpretation of the ruling is that the commissioner intended the State could address its concerns about the reliability of the declarations in its briefing, not whether the record should be supplemented. *See* App. C. Second, even if he wanted to, the commissioner lacked the authority to implicitly allow parties to challenge the ruling in the appellate briefs. RAP 17.7 unambiguously provides "[a]n aggrieved party may object to the ruling of a commissioner … only by a motion to modify the ruling[.]" (Emphasis added). For the same reason, the Court of Appeals could not grant the commissioner such authority.

Critically, this Court has recognized the way to combat racism in the criminal legal system is not only through developing an awareness of our biases, but also through interpreting "court rules in a way that brings greater racial

justice to our system as a whole."[11] (Emphasis added). There is no justice where courts allow meritorious claims to go unaddressed to protect precedent. *Id.*

Shackling promotes the systemic oppression of Black bodies, which "is not merely incorrect and harmful; it is shameful and deadly." *See id.* The dehumanization inherent in the practice is evident Mr. Jarvis' declaration, describing how jail staff would force him to face the wall and "wrap chains around my waist, the chains are fixed with a heavy duty padlock and handcuffs … and my hands would be placed in handcuffs at the front of my waist." App. B at 2. The shackles would remain in place, sometimes for hours, while he waited in a holding cell and was brought in front of a judge. App. B. at 2-

[11] Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. (June 4, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme% 20Court% 20News/Judiciary% 20Legal% 20Community% 20SIGNED% 20060420.pdf.

3. The chains would not be removed until he was brought back to his pod in the jail. App. B at 2-3.

When Mr. Jarvis appeared in shackles, the presiding judge issued unfavorable rulings, including denying Mr. Jarvis' motion to reconsider bail, CP 225, and his motion for expert funds, CP 248, while granting the State's motions to take photographs of Mr. Jarvis' mouth, CP 251, and to redact discovery despite Mr. Jarvis' pro se appearance. CP 253. Each of these motions required the court to exercise its discretion, and the State cannot show that Mr. Jarvis' restraints did not influence the court in making its rulings.

Finally, the ability of Mr. Jarvis to raise the issue in a personal restraint petition (PRP) does not remedy the error. Rather than holding the State to its burden to prove the repeated constitutional violations were harmless, it would be up to Mr. Jarvis to prove he was "actually and substantially prejudiced" by the constitutional violation. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004).

The Court of Appeals' refusal to consider Mr. Jarvis' declaration was contrary to case law and RAP 17.7, and was fundamentally inequitable. This Court should grant review.

3. This Court should grant review because the State's failure to prove each element in the to-convict instruction beyond a reasonable doubt raises a significant question of law.

The State's failure to prove elements in counts two and three violated Mr. Jarvis' constitutional rights, warranting review under RAP 13.4(b)(3).

a. The State was required to prove Mr. Jarvis intended to shoot the specific person listed in each to-convict instruction.

The prosecutor's theory at trial was that Mr. Jarvis only intended to shoot Mr. Phillips, but that he was nevertheless guilty of assaulting Mr. Capers and Mr. Jones under the doctrine of transferred intent. 5/11/21RP 58. Read together, however, the to-convict instructions and the instruction defining "assault" as an "intentional shooting" required the State to

prove Mr. Jarvis specifically intended to shoot Mr. Jones and Mr. Capers.

RCW 9A.36.011 provides:

> (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[.]

Under the statutory language, the *mens rea* for first degree assault with a firearm is the "intent to inflict great bodily harm." *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). The State must also prove that an assault occurred as an element of the offense. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

In *State v. Wilson* and *State v. Elmi*, this Court concluded that, because RCW 9A.36.011 requires the defendant to assault "another" instead of a particular person, first degree assault does not necessarily require that the specific intent to cause great bodily harm match a specific victim. *Wilson*, 125 Wn.2d

at 218; *Elmi*, 166 Wn.2d at 215. However, noting that "assault" is not defined in the criminal code, both *Wilson* and *Elmi* based the conclusion that liability could be transferred to unintended victims on the common law definition of "assault" as an "unlawful touching," *id.* at 215, or "an unlawful touching with criminal intent," *Wilson,* 125 Wn.2d at 218-19.

Yet the jury in Mr. Jarvis' case was instructed on the definition of "assault" in the pattern jury instructions which requires an "intentional shooting" instead of the "unwanted touching" required under the common law. CP 63; 11 Wash. Practice: Pattern Jury Instr. Crim. 35.50 (5th Ed. 2021). This difference is extremely consequential: the WPIC definition of "assault" incorporates a second *mens rea* of intent which must match the specific victim.

Superimposed on the to-convict instruction, the second *mens rea* requirement is clear:

(1) That on or about October 6, 2018, the defendant **intentionally shot** Stephen Jones.[12]

(2) That the assault was committed with a firearm[.];

(3) That the defendant **acted with intent to inflict great bodily harm**[.]

The doctrine of transferred intent cannot relieve the State of its burden. As an initial matter, Washington courts have relied upon the plain language of RCW 9A.36.011–and not the doctrine of transferred intent–to find the *mens rea* for first degree assault can be transferred to unintended victims. *Elmi*, 166 Wn.2d 217; *Wilson*, 125 Wn.2d at 219. Regardless, courts have only addressed the *mens rea* of intent to inflict great bodily harm when considering unintended victims. *See Wilson*, 125 Wn.2d at 218; *Elmi*, 166 Wn.2d at 217 ("once the intent to inflict great bodily harm is established, this intent may transfer to any unintended victim." *Id.* at 217 (emphasis added). In

[12] The to-convict instruction for count three is the same but substitutes "William Capers" for "Stephen Jones." CP 62.

short, neither *Elmi* nor *Wilson* stand for the proposition that the intent to shoot a person–versus the intent to cause great bodily harm–can be transferred to unintended victims.

"In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." *State v. Hickman*, 135 Wn. 2d 97, 102, 954 P.2d 900 (1998). Here, the State proposed a definition of "assault" that required the highest mental state defined by statute. *See* RCW 9A.08.010. It therefore assumed the burden of proving Mr. Jarvis intentionally shot Mr. Jones as alleged in count two, and Mr. Capers as alleged in count three.

b. The State failed to prove Mr. Jarvis intentionally shot the named victims.

The record is clear that Mr. Jarvis did not intentionally shoot or intend to cause bodily injury to either Mr. Jones or Mr. Capers. The prosecutor conceded as much in its closing by arguing Mr. Jarvis' intent to cause great bodily injury to Mr.

Phillips transferred to Mr. Jones and Mr. Capers. 5/11/21RP 58, 71.

The Court of Appeals' failure to follow the law-of-the-case doctrine raises a significant question of constitutional law warranting review.

E. CONCLUSION

For the reasons set forth above, Mr. Jarvis respectfully requests that this Court grant review.

This petition is proportionately spaced using 14-point font equivalent to Times New Roman and contains 4,638 words (word count by Microsoft Word).

DATED this 12th day of July, 2023.

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

June 13, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PHILLIP RENELLE JARVIS, Appellant.	No. 56086-1-II PUBLISHED OPINION

Cruser, J. - Phillip Renelle Jarvis appeals his jury trial convictions for three counts of first degree assault and one count of first degree unlawful possession of a firearm and his life without parole sentence under the "Persistent Offender Accountability Act"[1] (POAA). He argues that (1) the superior court violated his constitutional rights by forcing him to repeatedly appear in restraints at 23 pretrial hearings and his sentencing hearing without first conducting the required individualized assessment, (2) the jury instructions read as a whole required the State to prove that he intended to assault the victims named in counts II and III and there was insufficient evidence of this element, (3) the prosecutor committed misconduct during closing argument by arguing facts outside of the record and by encouraging the jury to convict him on an improper basis, (4) the POAA is unconstitutional because it is administered in a racially disproportionate manner, (5) the

[1] RCW 9.94A.570.

POAA is categorically unconstitutional, and (6) the POAA is unconstitutional because it violates the proportionality doctrine.

We hold that (1)(a) Jarvis has demonstrated that he was improperly shackled at his sentencing hearing and the State fails to establish beyond a reasonable doubt that this improper restraint was harmless, (1)(b) the remainder of Jarvis' shackling arguments fail either because the State shows beyond a reasonable doubt that any potential improper restraint was harmless or because Jarvis does not establish on this record that he was restrained, (2) the jury instructions did not require the State to prove that he intended to assault the victims named in counts II and III, therefore we need not reach the sufficiency argument, (3) Jarvis fails establish that the prosecutor's arguments were improper or overcome waiver as to his prosecutorial misconduct claims, and (4) Jarvis' POAA arguments may be raised at resentencing. Accordingly, we vacate the sentences and remand for a full resentencing hearing at which Jarvis may also present his arguments regarding the constitutionality of the POAA. We otherwise affirm.

FACTS

I. BACKGROUND

On the night of October 5, 2018, a group of friends and acquaintances gathered at Jason Ashworth and Diane Cooper's backyard bar to socialize and drink. Everyone there had either been drinking at the backyard bar all evening or had arrived after drinking at a nearby pub.

In the early morning hours of October 6, Jarvis was asked to leave following a dispute with some of the others present. Jarvis left, but he quickly returned and shot into the bar approximately six times, hitting Micah Phillips, William Capers, and Stephen Jones. Phillips and Capers were injured; Jones' phone stopped the bullet.

II. PROCEDURE

A. CHARGES

On October 12, 2018, the State charged Jarvis with three counts of first degree assault and one count first degree unlawful possession of a firearm. Count I was for the assault of Phillips, count II was for the assault of Jones, and count III was for the assault of Capers. The State also filed a persistent offender notice, advising Jarvis that if he was convicted of or pleaded guilty to first degree assault, he would be classified as a persistent offender because he had previously been convicted of two most serious offenses and, thus, would be subject to a sentence of life without the possibility of parole.

B. PRETRIAL PROCEEDINGS

Jarvis identifies 23 pretrial hearings that occurred between October 12, 2018, and the start of Jarvis' trial in April 2021. None of the pretrial hearings in this case were conducted by the judge who eventually conducted the trial and sentencing hearing.

The only record suggesting that Jarvis was restrained at any of these hearings is a notation on the order issued following the October 12, 2018 probable cause and bail hearing stating that Jarvis was unable to sign the order because he was "shackled." Clerk's Papers (CP) at 222.

On March 23, 2020, in the midst of these pretrial hearings, the Acting Presiding Judge of the Pierce County Superior Court issued Emergency Order 20-09 (Emergency Order #9)[2] addressing the emerging public health emergency caused by the COVID-19 pandemic. Emergency

[2] Emergency Ord. No. 20-09, *Public Health Emergency Order Regarding Pierce County Corrections Restraint Procedures* (Pierce County Superior Ct., Wash. Mar. 23, 2020), https://www.courts.wa.gov/content/publicUpload/COVID19_Pierce/Pierce%20County%20Superior%20Court%20Emergency%20Order%20_9_0001.pdf [https://perma.cc/QT6Q-M35M].

Order #9 stated that in an attempt to reduce close contact between jail staff and in-custody defendants and to protect both staff's and the defendants' health in light of the "existing emergency conditions," jail staff who transported in-custody criminal defendants were "not required to change restraints in order to escort a defendant into courtrooms." Emergency Order #9, at 1-2. This order was effective until "April 24, 2020, unless specifically addressed by the Pierce County Superior Court Presiding Judge." *Id.* at 2. On July 29, 2020, the superior court extended Emergency Order #9 until further notice of the court. Revised Emergency Order 20-18,[3]

C. TRIAL

1. JURY SELECTION AND RELEVANT TRIAL TESTIMONY

The jury trial began on April 12, 2021.

During voir dire, the State questioned the prospective jurors about things that could affect a person's memory. The State asked the prospective jurors if anyone had experienced being "in an accident or . . . a fight, something that was really adrenaline charged," and then questioned individual jurors about how such situations affected their memory of such an event. Verbatim Rep. of Proc. (VRP) (Apr. 12, 2021) at 42. The State then asked the prospective jurors if they would expect that "everyone who's in an adrenaline-charged situation will remember everything or the opposite." *Id.* at 43-44. Several of the prospective jurors responded that they would not expect everyone to remember such an event the same way. And when the State asked if any of the

[3] Emergency Ord. No. 20-18, *Public Health Emergency Order Regarding Pierce County Corrections Restraint Procedures (Amending Emergency Order #9)* (Pierce County Superior Ct., Wash. July 29, 2020), https://www.courts.wa.gov/content/publicUpload/COVID19_Pierce/Pierce%20County%20Superior%20Court%20Revised%20Emergency%20Administratvice%20Order%2020-18.pdf [https://perma.cc/EL4R-6XFH].

prospective jurors did not agree that such a situation could impact someone's memory of an event, none of the jurors responded.

At trial, the witnesses testified as described above. In addition, several of the witnesses identified Jarvis as the shooter in the courtroom and in photographic lineups.

2. JURY INSTRUCTIONS

The superior court provided the jury with to-convict instructions for each charge. The superior court also defined assault, and instructed the jury that under certain circumstances, a defendant's intent to assault one person could be transferred to another person. Jarvis did not object to these instructions. These instructions are set out in full in section II of the analysis.

3. CLOSING ARGUMENTS

In its closing argument, the State argued that the key issues were whether it was Jarvis who had fired the shots and whether he intended to inflict great bodily harm.

During its argument, the State acknowledged that when the shooting happened, "everyone at the . . . [b]ar had been drinking" and everyone was intoxicated to different degrees. VRP (May 11, 2021) at 60. The State also attempted to explain why some witnesses might have remembered the events differently by acknowledging that most of the witnesses were not paying particular attention to what was going on around them and asserting that others' memories might be different due to having been involved in a traumatic event.

Specifically, the State argued:

> This night, I submit to you it's clear no one paid any undue attention to what they were doing or what others were doing, because it's something they had done countless times before. No one expected trouble. No one was on alert. No one was hypervigilant to their surroundings or to the people around them. No one was paying particular attention to anything or anyone, because they had no reason to. No one was expecting anything to happen. Imagine having to describe something

> after the fact that you didn't know you were going to have to describe, like who you were talking to before something happened and how much you had to drink. There was no reason to keep track of these things or to even notice them, because they didn't expect trouble.
>
> Everyone also had their own perspectives. This was a relatively large group of people in a relatively small space. Their perspectives would have been different depending where they were seated or standing, who they were talking to, what they were doing, and, yes, how much they had to drink. But they were all in different areas experiencing different things. Some people didn't even notice that [there] was anything going on for quite some time. But then there were gunshots in place where they didn't expect to hear gunshots. And for [Phillips] having a gun pulled on him, right in front of him, w[h]ere he didn't expect that to happen. Surprising. I submit to you, frightening.
>
> But, again, remember what this atmosphere was like when you're reflecting on, well, people said different things, people remembered things differently, and they were all drinking. Yes, all true. But everybody was certain about this defendant. Everyone knew that there was a gun. The people that saw the gun saw it in his hand.
>
> And that there was a very good and valid reason why other things might be confusing. They had no reason to commit anything to memory. *And when something chaotic like this is happening -- remember it came up in voir dire. There's no reason they would remember things, details that happened leading up to this event at all, because they had no reason to remember them. But people remember traumatic events differently. It affects them differently.* And, again, everyone had their own perspectives wherever they were. Some people tried to help [Capers] and [Phillips]. Others went outside. And [two witnesses] left. . . . I mean, there are reasons why you can't expect everyone to have the same exact memory.

Id. at 66-68 (emphasis added). Jarvis did not object to this argument.

At the end of its closing argument, the State argued,

> All of the evidence that you've heard at this trial points directly to the defendant. *Please hold him responsible for these actions.* For losing his temper, for pulling a gun where he did not need to so at a gathering of friends. *Hold him responsible* for the injuries suffered by [Phillips] and [Capers]. They were hurt. [Phillips] had part of his intestines removed because of the defendant's actions.
>
> *Hold him responsible for that*, and find him guilty as charged. Thank you.

Id. at 77 (emphasis added). Jarvis did not object to this argument.

The jury found Jarvis guilty of all three first degree assault charges and the first degree unlawful possession of a firearm charge.

D. SENTENCING

At sentencing, the State argued that because Jarvis had prior convictions for a 1994 second degree assault and a 1998 first degree assault, the court had no discretion but to impose life without parole sentences for the current first degree assault convictions. Regarding the first degree unlawful possession of a firearm conviction, the State requested an 89-month sentence, which was at the top of the standard range for that offense based on Jarvis' offender score.

The State presented fingerprint comparison evidence and photographs demonstrating that Jarvis was the defendant in the 1994 second degree assault case and the 1998 first degree assault case. Jarvis objected to the admission of the fingerprint comparison report and briefly questioned the witness who wrote the report about the comparison process. The court admitted the fingerprint comparison report.

Jarvis' counsel argued that a life sentence based on a second degree assault for which Jarvis served "a couple of months on," was not "acceptable." VRP (Aug. 12, 2021) at 44. But Jarvis did not contend that the sentence was disproportionate or racially biased or attempt to present any evidence to support such claims. And counsel did not otherwise challenge the POAA sentencing. Jarvis' counsel did not request any sentence for the first degree unlawful possession of a firearm conviction or respond to the State's request for an 89-month sentence.

The superior court found that Jarvis had been convicted for a 1994 second degree assault and a 1998 first degree assault, that these prior offenses had not washed out, and that these convictions were strike offenses. Accordingly, the superior court sentenced Jarvis to life in prison

as a persistent offender. The court also sentenced Jarvis to 89 months for the first degree unlawful possession of a firearm conviction and ran this sentence concurrent to the other sentences.

III. Notice of Appeal and Additional Record

Jarvis appealed his convictions and his sentence.

In his original opening brief, Jarvis attached a declaration from a private investigator who had interviewed jail staff about the jail restraint procedures and a declaration from Jarvis stating that he had been restrained at several pretrial hearings and at sentencing. Jarvis moved to "expand the appellate record" to include the two declarations under RAP 9.11 and RAP 1.2. Mot. to Expand Appellate R. (July 5, 2022). The State argued that neither declaration could be considered as supplemental evidence that could be added to the record under RAP 9.11 because they related to facts that were outside the record.

Commissioner Schmidt "added" Jarvis' declaration to the appellate record under RAP 9.11. Comm'r's Ruling (July 21, 2022). He also denied Jarvis' motion as to the private investigator's declaration and the State's motion to strike portions of Jarvis' brief. But the commissioner further ruled that the State could "address its concerns in its brief." *Id.* Neither party moved to modify the commissioner's ruling.

ANALYSIS

I. Restraints

Jarvis first argues that the superior court violated his constitutional rights by forcing him to appear in restraints at 23 pretrial hearings and at his sentencing hearing without first conducting the required individualized inquiry into whether restraints were necessary. Jarvis also argues that

the State cannot establish beyond a reasonable doubt that the unconstitutional use of restraints was harmless.

The State concedes that Jarvis was subject to unconstitutional restraint at the October 12, 2018 hearing and at his sentencing hearing.

We hold that (1) Jarvis establishes that he was unconstitutionally restrained at sentencing and that the State fails to show beyond a reasonable doubt that this error was harmless, (2) the State establishes beyond a reasonable doubt that the unlawful use of restraints at the October 12, 2018 hearing was harmless, and (3) Jarvis fails to establish on this record that he was restrained at the remaining hearings.

A. LEGAL PRINCIPLES

A defendant's right to a fair trial is protected by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution.[4] *State v. Jackson*, 195 Wn.2d 841, 852, 467 P.3d 97 (2020). This right entitles a defendant to appear at "every court appearance," including nonjury proceedings, " 'free from all bonds or shackles except in extraordinary circumstances.' " *Id.* at 852, 854 (quoting *State v. Finch*, 137 Wn.2d 792, 842,

[4] Amici American Civil Liberties Union of Washington Foundation, Fred T. Korematsu Center for Law and Equality, Disability Rights Washington, and Washington Defender Association, have filed an amicus brief describing the long history of the use of shackling as a form of oppression and discussing the effects of shackling in the courts on defendants and judges. Amici argue that, particularly when there are blanket orders permitting restraints in the courts, the courts should apply the more stringent constitutional harmless error standard rather than the less stringent nonconstitutional harmless error test and that the State cannot establish harmless error in this case.

We agree that the constitutional harmless error standard applies here, and we acknowledge "that . . . the systemic control of persons of color remains in society, particularly within the criminal justice system." *State v. Jackson*, 195 Wn.2d 841, 851, 467 P.3d 97 (2020). But Amici's assertion that the State cannot show harmless error based solely on implicit bias is not persuasive; this issue requires more analysis than that provided by amici.

975 P.2d 967 (1999) (plurality opinion)). But a court has the discretion to require restraints in court if it first conducts an individualized inquiry into whether the use of restraints is necessary. *Id.* at 852-53.

Once an appellant demonstrates that he or she was unconstitutionally physically restrained during a court proceeding, the State must establish that any error was harmless. *Id.* at 855-56. In this context, "the State bears the burden to prove beyond a reasonable doubt that the constitutional violation was harmless as set forth in [*State v.*] *Clark*, 143 Wn.2d [731,] 775-76, 24 P.3d 1006 [(2001)]." *Id.* at 856. *Clark* provides that to establish harmless error, it must appear from an examination of the record that the error was harmless beyond a reasonable doubt or that the evidence against the defendant was so overwhelming that no rational finder of fact could find the defendant not guilty. 143 Wn.2d at 775-76. "The likelihood of prejudice is significantly reduced in a proceeding without a jury." *State v. Lundstrom*, 6 Wn. App. 2d 388, 395 n.2, 429 P.3d 1116 (2018); *State v. E.J.Y.*, 113 Wn. App. 940, 952, 55 P.3d 673 (2002).

B. APPLICATION

In his amended opening brief, Jarvis identifies 20 pretrial hearings that occurred before the superior court issued its emergency COVID-19 orders in mid-March 2020, and he asserts that he was restrained without the superior court first conducting an individualized inquiry as to whether restraints were justified at these hearings. He also identifies 3 pretrial hearings at which he asserts that he was unconstitutionally restrained that occurred after the emergency order #9 was issued. And he asserts that he was unconstitutionally restrained at his sentencing hearing.

The State concedes that Jarvis was restrained and that the superior court failed to engage in the required individualized inquiry before allowing him to be restrained at the October 12, 2018 hearing and at his sentencing.

1. UNCONSTITUTIONAL SHACKLING CONCEDED

a. OCTOBER 12, 2018 HEARING

Jarvis asserts that he was restrained without the superior court first conducting an individualize inquiry at the October 12, 2018 hearing, during which the court found probable cause and set bail and conditions of release. The State concedes that Jarvis was restrained without the court first conducting an individualized inquiry into whether restraints were necessary at this hearing. The notation on the October 12, 2018 order that Jarvis could not sign the order because he was shackled supports the State's concession.

Thus, Jarvis establishes that he was unconstitutionally restrained at the October 12, 2018 hearing, and we need only address whether the State can prove beyond a reasonable doubt that this admitted error was harmless. We hold that the State meets this burden.

At the October 12, 2018 hearing, a superior court commissioner found probable cause based on the declaration for determination of probable cause, set Jarvis' bail at $750,000, and established conditions of release. The record clearly supports the superior court's probable cause determination.

"Probable cause for arrest as it is normally understood is defined in terms of circumstances sufficient to warrant a prudent person in believing that the suspect has committed or was committing a crime." *State v. Parks*, 136 Wn. App. 232, 237, 148 P.3d 1098 (2006). Jarvis was charged with the first degree assaults of Phillips, Jones, and Capers and with first degree unlawful

possession of a firearm. The declaration for determination of probable cause describes the shooting, including that Jarvis was identified as the person who had intentionally shot into the group of people in the bar, hitting Phillips, Jones, and Capers. It also alleged that Jarvis used a gun to commit the assaults and that his criminal history included prior felony convictions. Because the facts in the declaration for determination of probable cause clearly support the commissioner's probable cause finding, the State shows beyond a reasonable doubt that Jarvis' appearance in restraints at this hearing did not contribute to this determination or, as neither jury nor the trial court saw Jarvis in restraints at this hearing, to the jury's verdict or his sentence in any way.

And as to the bail and conditions of release, in setting bail and establishing the conditions of release, the commissioner relied on the fact Jarvis "ha[d] four cases with warrant activity;" the fact his prior offenses were serious crimes, including first and second degree assault; and the fact his current offenses involved multiple first degree assaults caused by Jarvis' dangerous behavior of shooting at least six times into the group of people. VRP (Oct. 12, 2018) at 44. Given these facts, the commissioner's bail and conditions of release decisions were reasonable. Thus, the State has shown beyond a reasonable doubt that the unconstitutional restraint that occurred at the October 12, 2018 hearing was harmless because not only were the commissioner's decisions reasonable, but neither the jury nor the trial court saw Jarvis in restraints at this hearing so the fact he was in restraints could not have influenced the jury's verdict or his sentence in any way.

b. SENTENCING HEARING

The State also concedes that Jarvis was unconstitutionally restrained at his sentencing hearing. The State fails to establish beyond a reasonable doubt that the unconstitutional restraint was harmless. Accordingly, we reverse Jarvis' sentences and remand for resentencing.

As to the life sentences, the superior court based its conclusion that the State had proven the two prior strike offenses were committed by Jarvis on the fingerprint and photograph evidence.[5] Although the life sentences would be mandatory if the two prior strike offenses were proven, in determining whether this evidence established that Jarvis committed the prior offenses the superior court had to make factual determinations, evaluate witness credibility, and make its own comparisons of photographs to Jarvis. Given the nature of the evidence and the superior court's role in evaluating the evidence, the State cannot establish beyond a reasonable doubt that Jarvis' appearance in restraints at sentencing had no impact on the court's decision that Jarvis had committed the two prior offenses.

As to the sentence for the first degree unlawful possession of a firearm conviction, the superior court did have discretion. Because Jarvis' appearance in restraints at the sentencing hearing could have influenced the court's decision to sentence Jarvis at the top of the standard range, the State fails to establish beyond a reasonable doubt that Jarvis appearing in restraints was harmless.

Accordingly, we reverse Jarvis' sentences and remand for full resentencing at which Jarvis can raise any and all issues related to his sentencing.[6]

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[5] We note that the State asserts that Jarvis stipulated to his prior offenses. The State mischaracterizes this stipulation. Jarvis stipulated to the prior serious felony offenses for the sole purpose of establishing the existence of the prior serious offense conviction element of the first degree unlawful possession of a firearm charge. In fact, the stipulation states that "[t]he stipulation is to be considered evidence only of the prior conviction element." CP at 49. Furthermore, the record clearly shows that the parties and the superior court did not rely on this stipulation to prove the existence of the prior strike offenses at the sentencing hearing.

[6] Jarvis also mentions that his appearance in restraints could have influenced the superior court's decision not to set conditions for release pending his appeal. Because we reverse the sentences, we do not address this issue.

2. OTHER PRETRIAL HEARINGS

Jarvis next asserts that he was unconstitutionally restrained at 22 additional pretrial hearings. The record is insufficient to allow us to review these claims.

It is Jarvis' initial burden to establish that he was unconstitutionally restrained, and he cannot do so on this record. *See Jackson*, 195 Wn.2d at 855-56 (examining whether error was harmless after first determining that the appellant established unconstitutional shackling). The clerk's papers and the reports of proceedings before us do not mention whether Jarvis was restrained at any of these 22 pretrial hearings. And, although Jarvis' declaration was accepted by our commissioner, we hold that the commissioner's acceptance of the declaration was in error and decline to consider it.

The commissioner accepted Jarvis' declaration under RAP 9.11, which permits us to "direct that additional evidence on the merits of the case be taken" if certain requirements are established. But Jarvis' declaration, which contains his assertions about whether he was shackled during certain hearings, is not "evidence on the merits of the case." RAP 9.11. Jarvis' declaration is, instead, an attempt to reconstruct an inadequate record, without providing an opportunity for the State to challenge the statements in the declaration, and it does not fall under RAP 9.11. Thus, the commissioner erred when he accepted Jarvis' declaration under RAP 9.11, and we will not consider it. We acknowledge that neither party moved to modify the commissioner's ruling. But we construe the language in the commissioner's ruling that permitted the State to "address its concerns in its brief," as an acknowledgement that this ruling could be challenged directly in the appeal. Comm'r's Ruling (July 21, 2022).

Because we hold that Jarvis fails to establish unconstitutional restraint at these 22 hearings based on this record, we do not examine whether any potential error was harmless with respect to these hearings.[7] If Jarvis has evidence from outside the record regarding whether he was restrained at any of these additional hearings, he can raise these issues in a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

[7] Jarvis also asserts that the Pierce County Jail has a blanket policy requiring all defendants facing conviction for a third strike to be restrained in belly chains and leg irons in all proceedings other than jury trials unless the court orders otherwise. But Jarvis' support for this assertion was the private investigator's declaration that was not admitted and his own declaration, which, as discussed above, we decline to consider. Accordingly, Jarvis' claim that there was a blanket policy is not supported by this record.

II. JURY INSTRUCTIONS AND SUFFICIENCY OF THE EVIDENCE OF ADDITIONAL ELEMENT

Jarvis next argues that reading the to-convict instructions for the assault counts related to Jones and Capers (counts II and III)[8] together with the jury instruction defining assault,[9] required the State to prove that he intended to shoot Jones and Capers and that the State failed to meet this burden. We disagree.

---

[8] These two to-convict instructions provided:

> To convict the defendant of the crime of assault in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about October 6, 2018 the defendant *assaulted* Stephen Jones;
>
> (2) That the assault was committed with a firearm, or a deadly weapon or by a force or means likely to produce great bodily harm or death;
>
> (3) That the defendant *acted with intent to inflict great bodily harm*; and
>
> (4) That this act occurred in the State of Washington.

CP at 61 (Jury Instruction 7) (emphasis added).

> To convict the defendant of the crime of assault in the first degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about October 6, 2018 the defendant *assaulted* William Capers;
>
> (2) That the assault was committed with a firearm, or a deadly weapon or by a force or means likely to produce great bodily harm or death;
>
> (3) That the defendant *acted with intent to inflict great bodily harm*; and
>
> (4) That this act occurred in the State of Washington.

Id. at 62 (Jury Instruction 8) (emphasis added).

[9] Jury instruction 9 provided:

> An assault is an *intentional shooting of another person* that is harmful or offensive, regardless of whether any physical injury is done to the person. A shooting is offensive if the shooting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

Id. at 63 (Jury Instruction 9) (emphasis added).

"[C]onstitutional due process requires that the State prove every element of the [charged] crime beyond a reasonable doubt." *State v. France*, 180 Wn.2d 809, 814, 329 P.3d 864 (2014). Jury instruction not objected to become the law of the case, and the State has the burden of proving any additional elements included in such instructions. *State v. Johnson*, 188 Wn.2d 742, 755, 764-65, 399 P.3d 507 (2017). We "review [ ] challenged jury instruction[s] de novo, within the context of the jury instructions as a whole." *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006).

Jarvis contends that because the to-convict instructions for counts II and III required the jury to find that he assaulted Jones and Capers, and the instructions defined assault as an *intentional* shooting of another, the jury could only convict him of counts II and III if it found that he had intentionally shot Jones and Capers.

Even if Jarvis were correct that the to-convict instructions for counts II and III read in conjunction with the instruction defining assault required the State to prove that he intended to shoot Jones and Capers, this argument fails because Jarvis ignores jury instruction 13.[10]

Jury instruction 13 provided,

> If a person acts with intent to assault or cause great bodily harm to another, but the act harms a third person, the actor is also deemed to have acted with intent to assault or cause great bodily harm to the third person.

CP at 67. So, even if the State had to prove that Jarvis intentionally shot Jones and Capers, jury instruction 13 would permit the jury to deem Jarvis to have acted with intent to shoot Jones and Capers if it found that Jarvis acted with intent to shoot Phillips. And Jarvis does not assert that the

[10] Although Jarvis suggests that the doctrine of transferred intent does not apply to an unintentional shooting, Jarvis does not mention jury instruction 13 or argue that jury instruction 13 was improper.

evidence was insufficient to prove that he acted with intent to shoot Phillips or with intent to inflict great bodily harm upon Phillips.

Because the jury instructions as a whole did not require the State to prove that Jarvis intended to shoot Jones and Capers, this argument fails.

III. PROSECUTORIAL MISCONDUCT

Jarvis further argues that the prosecutor committed misconduct during closing argument by arguing facts outside the record and by encouraging the jury to convict him on an improper basis. Specifically, he argues that (1) the prosecutor's reference to the effect of trauma on memory was argument based on facts outside the record, and (2) the prosecutor's plea to the jury to hold Jarvis responsible was an improper argument that appealed to the jury's passion and prejudice. Because Jarvis does not show that these arguments were improper and fails to show that the alleged misconduct, to which he did not object, was so flagrant and ill-intentioned that it could not have been cured, we reject these arguments.

A. LEGAL PRINCIPLES

To establish prosecutorial misconduct, Jarvis must show that the prosecutor's conduct was both improper and prejudicial in the context of all the circumstances of the trial. *State v. Zamora*, 199 Wn.2d 698, 708, 512 P.3d 512 (2022). Because Jarvis failed to object to the alleged misconduct at trial, a heightened standard of review requires him to show that any alleged misconduct was " 'so flagrant and ill intentioned that [a jury] instruction would not have cured the [resulting] prejudice.' " *Id.* at 709 (alteration in original) (internal quotation marks omitted) (quoting *State v. Loughbom*, 196 Wn.2d 64, 70, 470 P.3d 499 (2020)). The focus of this heightened standard is whether an instruction would have cured the prejudice. *State v. Crossguns*, 199 Wn.2d

282, 299, 505 P.3d 529 (2022). If Jarvis fails to make this showing, the prosecutorial misconduct claim is waived and we need not consider its merits.

B. ALLEGED REFERENCE TO FACTS OUTSIDE THE RECORD

A prosecutor commits misconduct during oral argument by arguing facts not in evidence. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 705, 286 P.3d 673 (2012). Jarvis argues that the State committed prosecutorial misconduct by arguing facts outside the record when it attempted to explain any discrepancies in the intoxicated witnesses' testimonies by arguing that their lack of memory was due to trauma rather than their alcohol consumption when there was no evidence presented at trial regarding whether trauma could affect memory.

Although Jarvis is correct that there was no evidence presented regarding whether trauma could affect memory, the State's argument was not that the discussion during voir dire was evidence. Instead, taken in context, it was a reference to the fact that individual witnesses will remember events differently for a variety of reasons. The prosecutor also commented at length about the multiple other reasons the witnesses could have conflicting or imperfect memories of the shooting, including that they had been drinking, that they were not paying attention, and that they were all viewing the incident from different perspectives. This argument was simply an appeal to the jury to use their common sense when evaluating the inconsistencies in the witnesses' testimonies.

Furthermore, even if this argument was improper, Jarvis does not argue, let alone show, that this allegedly improper argument was so flagrant and ill-intentioned that a curative instruction would not have cured any potential prejudice. Jarvis argues only that there is a substantial likelihood the misconduct led the jury to convict on an impermissible basis. We hold that a curative

instruction would have cured any potential prejudice. Thus, this claim of prosecutorial misconduct is waived.

C. IMPERMISSIBLE BASIS ARGUMENT

Jarvis also argues that the State urged the jury to convict him on an impermissible basis when it urged the jurors to convict Jarvis in order to hold him responsible and that this was an appeal to the jury's passion and prejudice. Citing *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), he compares this argument to arguments asking the jury to "declare the truth," which he asserts also exceeds the scope of the jury's role — "determining whether [the] State proved allegations beyond a reasonable doubt." Am. Br. of Appellant at 49.

First, asking the jury to hold a defendant responsible is more akin to asking the jury to find the defendant guilty, which is permissible. It is not the same as asking the jury to declare the truth, which is akin to telling the jury that its role is to solve the crime and conduct an investigation, and is a misstatement of the jury's true duty of determining whether the State had proved its allegations against the defendant beyond a reasonable doubt. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Asking the jury to hold a defendant responsible by finding them guilty in no way misstates the jury's duty.

Additionally, Jarvis does not argue or show that this argument, even assuming that it was improper, was so flagrant and ill-intentioned that a curative instruction would have cured any potential prejudice. He argues only that there is a substantial likelihood that the alleged misconduct led the jury to convict on an improper basis. We hold that a curative instruction would have cured any potential prejudice because the superior court could have instructed the jury to disregard any potential improper argument and re-instructed the jury that its purpose was to determine whether

the State had met its burden to prove all the elements of the charged offenses. Thus, this claim of prosecutorial misconduct is also waived.

IV. CONSTITUTIONALITY OF POAA

Finally, Jarvis argues that the POAA is (1) unconstitutional because it is administered in a racially disproportionate manner, (2) categorically unconstitutional, and (3) unconstitutional because it violates the proportionality doctrine.

Because we reverse Jarvis' sentences and remand for a full resentencing hearing, we decline to address these issues because Jarvis can now raise these issues at the resentencing hearing.

CONCLUSION

We hold that Jarvis has demonstrated that he was improperly shackled at his sentencing hearing and that the State fails to establish beyond a reasonable doubt that this improper restraint was harmless. Accordingly, we vacate Jarvis' sentences and remand for resentencing at which he can raise his POAA challenges. We otherwise affirm.

Cruser, J.
CRUSER, J.

We concur:

J., J.
LEE, J.

Glasgow, CJ
GLASGOW, C.J.

APPENDIX B

DECLARATION

I, Phillip K. Jarvis, declare under the penalty of perjury;

That I am the defendant/appellant of case NO. 18-1-04107-6 and that the following information regarding the above case number is the truth.

I was arrested on October 10, 2018 in Tacoma Washington and booked in the Pierce County Jail for three counts of Assault in the First Degree and one Count of Unlawful Possession of a Firearm.
I made my first court appearance the following day, October 11, 2018, where I was brought before judge Meagan M. Foley fully shackled. I made my next Court appearance October 12, 2018, where I was brought before the same judge, Meagan M. Foley, and again I was shackled.
Over the course of two and one half years of detention in Pierce County Jail awaiting trial I made no less than twenty Court appearances before my trial and went before the Court in shackles 90% of the time, as well as when I was pro-se, and at my Sentencing. I made my first pro-se appearance ~~on~~ March 16, 2020, and I was shackled (trial was continued due to COVID 19). I was not only shackled at my sentencing but was placed

in leg irons as well, April 12, 2021

The shackling of defendants appearing before the court is a common practice of the officers in Pierce County Jail. If a defendant is charged with a violent crime he appears before the court shackled, if the person is facing a substantial amount of time he is brought before the court in shackles, and since I am a Black man charged with muctiple violent crimes and facing a life sentence it was not even a thought whether or not to place me in shackles, it was absolute procedure to do so.

Whenever I was to appear before the court I was called out of my pod by jail staff, taken to a hallway, told to face the wall and put my hands on the wall. Staff would then wrap chains around my waist, the chains are fixed with a heavy duty padlock and handcuffs. once the chains are snugly wrapped around my waist the officer then locks them in place with the padlock, and my hands would be placed in the handcuffs at the front of my waist. I would then be brought to a holding cell where I would wait to be taken into a courtroom, it may be 30 minutes or it may take three hours, all the while I would be shackled. The shackles would not be

removed untill I was brought back to my pod. Every defendant in a similar situation faced the same treatment.

I appeared before the court shackled at crucial stages leading up to my trial, at my arrangement, October 11, 2019, instead of the court noticing that there was no evidence supporting the Declaration for Determination of Probable Cause, the court (Meagan M. Foley) only saw what must be a dangerous individual before her, why else would I be in shackles? When I went to my first bail reduction hearing to have my bail reduced to a reasonable amount, the judge could not see before her a husband & father of two (at that time a 2 year old and a 7 month old) and the head of the household, all she could see was a dangerous individual before her, why else would I be shackled? At sentencing, April 12, 2021, instead of granting my request for an appeal bond which I am entitled to per R.C.W. 10.73.040, the judge, Susan Adams, denied my request on the bases that she felt that I "Was a danger to the community", why else would I be in shackles and leg irons?

I Declare Under The Penalty Of Perjury Under The Laws Of The State Of Washington That The Foregoing Is True And Correct.

Dated: May 25, 2022
Place: Washington State Penitentiary

Phillip R. Jarvis #722470

APPENDIX C

Washington State Court of Appeals
Division Two

909 A Street, Suite 200, Tacoma, Washington 98402
Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

July 21, 2022

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CASE #: 56086-1-II
State of Washington, Respondent v. Phillip Renelle Jarvis, Appellant

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The declaration of Appellant, dated May 25, 2022, is added to the appellate record under RAP 9.11. The motion to add the declaration of Julie Armijo, dated June 24, 2022, to the appellate record under RAP 9.11 is denied. The request to strike portions of the brief of Appellant is denied. The Respondent can address its concerns in its brief.

Very truly yours,

Derek M. Byrne
Court Clerk

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 56086-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Theodore Cropley, DPA
[Theodore.Cropley@piercecountywa.gov]
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: July 12, 2023

WASHINGTON APPELLATE PROJECT

July 12, 2023 - 4:40 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56086-1
Appellate Court Case Title:	State of Washington, Respondent v. Phillip Renelle Jarvis, Appellant
Superior Court Case Number:	18-1-04107-6

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