Supreme Court No. 93937-3
Court of Appeals No. 47547-2-II
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Chase Devyver
Appellant/Petitioner

Pierce County Superior Court Cause No. 14-1-00260-4
The Honorable Judge K.A.van Doorninck

Amended PETITION FOR REVIEW

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DECISION TO BE REVIEWED AND ISSUES PRESENTED

Petitioner Chase Devyver, the appellant below, seeks review of the Court of Appeals unpublished opinion entered on October 25, 2016.[1] The following issues are presented:

ISSUE 1: Was defense counsel ineffective in proposing an instruction that misstated the law and failed to make Mr. Devyver's intoxication defense manifestly clear to the average juror?

ISSUE 2: Did the court's erroneous intoxication instruction violate Mr. Devyver's right to due process and his right to present a defense?

ISSUE 3: Should the Supreme Court revisit the *Studd* rule, which is incorrect and harmful because it forecloses any remedy for certain prejudicial constitutional violations?

ISSUE 4: Did the trial judge violate Mr. Devyver's statutory and due process rights to instructions on an applicable lesser-included offense?

ISSUE 5: Should the standard for evaluating procedural due process claims in criminal cases provide at least as much protection as the standard used in civil cases?

ISSUE 6: Did defense counsel provide ineffective assistance by making the wrong legal argument in advocating for instructions on an applicable lesser-included offense?

ISSUE 7: Should the Supreme Court accept review of additional federal constitutional issues and the issues raised by Mr. Devyver in his Statement of Additional Grounds?

[1] See Appendix.

STATEMENT OF THE CASE

Chase Devyver, a combat medic with two deployments to Iraq, earned multiple commendations prior to his honorable discharge from the Army. RP[2] 97-98, 297. He suffered post-traumatic stress disorder, anxiety, and insomnia. RP 37-39; CP 99. Issues with his VA benefits prevented him from getting his prescribed medications. CP 99.

While heavily intoxicated one night in January of 2014, Mr. Devyver stabbed his girlfriend, took her wallet, stabbed and killed another friend, and then led police on a high-speed chase in his girlfriend's car. RP 108, 110, 143-144, 158-166, 182, 184-187, 284, 319, 320, 441, 647. After crashing, he asked police to shoot him. RP 264-273, 277, 327-329, 600-611, 617. Mr. Devyver had no prior convictions and no history of domestic violence. RP 213-214, 477, 493-494, 681.

The state charged Mr. Devyver with felony murder for causing the death of Shawn Woods during a first, second, or third-degree assault. CP 1.[3] This charge carried a deadly weapon enhancement. CP 1. The state also charged first-degree assault with a deadly weapon enhancement (for stabbing his girlfriend), robbery in the first degree with a firearm enhancement (for taking her wallet), and attempting to elude. CP 1-3.

Defense counsel submitted instructions on second-degree manslaughter. RP 702; CP 11-14. Mr. Devyver's counsel argued that man-

[2] All of the transcripts (except sentencing) are sequentially numbered, and will be referred to as RP. This Petition makes no reference to the sentencing hearing.

[3] However, by special verdict, jurors acquitted Mr. Devyver under the third-degree alternative, and were unable to reach a verdict under the first-degree alternative. CP 34.

slaughter was a lesser-included charge of felony-murder based on third-degree assault but not second-degree assault. The court refused the instructions. RP 705.

Defense counsel also proposed a pattern intoxication instruction.[4] CP 9. The court instructed jurors that

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

The jury convicted Mr. Devyver of second-degree murder, second-degree assault, first-degree robbery, and attempting to elude. CP 30-34. By special verdict, jurors endorsed second-degree assault as the predicate crime for the murder conviction.[5] CP 34. Mr. Devyver appealed, and the Court of Appeals affirmed. CP 105-120, 149-165; App. 1, 35.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE SUPREME COURT SHOULD RECONSIDER THE *STUDD* RULE, WHICH IS INCORRECT AND HARMFUL BECAUSE IT DENIES A REMEDY FOR PREJUDICIAL CONSTITUTIONAL VIOLATIONS. THE LOWER COURT'S DECISION CONFLICTS WITH *KYLLO*. THIS CASE ALSO RAISES SIGNIFICANT QUESTIONS OF CONSTITUTIONAL LAW THAT ARE OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4(B)(1), (3), AND (4).

Mr. Devyver was very intoxicated at the time of the offenses. RP 108, 110, 143-144, 158-166, 284. He could not remember doing any of the

[4] After some discussion, the court made changes to the instruction. RP 709-711.

[5] Jurors could not reach a verdict as to first-degree assault; they acquitted him of felony murder based on third-degree assault. CP 34. They also answered 'yes' on special verdicts for each enhancement. CP 35-38.

things with which he was charged. RP 672, 693, 698. His entire defense rested on an intoxication theory. By instructing on intoxication, the trial judge necessarily found evidence that Mr. Devyver's drinking "'affected [his] ability to acquire the required mental state.'" *State v. Walters*, 162 Wn.App. 74, 82, 255 P.3d 835 (2011) (citation omitted).

Defense counsel proposed an instruction that erroneously told jurors that "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition." CP 9. The court gave the instruction, and jurors convicted Mr. Devyver despite overwhelming evidence of his intoxication. RP 108, 110, 143-144, 158-166, 284; CP 30-38; 53.

A. Defense counsel proposed a standard jury instruction that misstated the law and deprived Mr. Devyver of his constitutional right to present a defense.[6]

Ineffective assistance requires reversal if counsel's deficient performance prejudiced the accused. U.S. Const. Amend. VI, XIV; *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Here, counsel proposed an erroneous intoxication that deprived Mr. Devyver of due process and his right to present a defense.[7]

[6] The right to present a defense is rooted in the Sixth and Fourteenth Amendments. *Holmes v. S. Carolina*, 547 U.S. 319, 325, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

[7] Due process violations, deprivations of the constitutional right to present a defense, and ineffective assistance claims are all reviewed *de novo*. *See, e.g., State v. Davila*, 184 Wn.2d 55, 75, 357 P.3d 636 (2015) (due process); *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010) (*Jones* I) (right to present a defense); *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (ineffective assistance).

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness and (2) cannot be justified as a tactical decision.[8] *Kyllo*, 166 Wn.2d at 862. Deficient performance prejudices the accused if there is a reasonable probability that it affected the outcome. *Id.*

Here, counsel proposed an erroneous instruction that negated the defense theory. CP 9. The error prejudiced Mr. Devyver, because there is a reasonable probability that proper instruction would have resulted in acquittal or conviction on lesser charges.

Due process requires instruction that allows the defense to "argue all theories... supported by sufficient evidence. U.S. Const. Amend. XIV; *State v. Koch*, 157 Wn.App. 20, 33, 237 P.3d 287 (2010).[9] The instructions must "fully instruct the jury on the defense theory" and "inform the jury of the applicable law." *Id*. Failure to do so violates the right to present a defense. *Id.* The instruction here did not inform the jury of the applicable law; instead, it deprived Mr. Devyver of his right to present a defense.

Jury instructions "must make the relevant legal standard manifestly apparent to the average juror." *Kyllo*, 166 Wn.2d at 864 (internal quotation marks and citation omitted). Instructions must be manifestly clear because jurors cannot rely on the rules of interpretation familiar to lawyers and judges. *State v. Harris*, 122 Wn.App. 547, 553-554, 90 P.3d 1133 (2004). Thus, "the standard for clarity in jury instructions is higher than that for a

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

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

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

The intoxication instruction was given in the language of the statute – it did not meet the "higher" standard for clarity in jury instructions. *Harris,* 122 Wn.App. at 553-554. Nor did it make the relevant standard manifestly apparent. *Kyllo*, 166 Wn.2d at 864.

Jury instructions must be read "the way a reasonable juror could have interpreted" them. *State v. Miller*, 131 Wn.2d 78, 90, 929 P.2d 372 (1997), *as amended on reconsideration in part* (Feb. 7, 1997). A reasonable juror could understand the instruction here to mean that Mr. Devyver's intoxication could not support acquittal.

The Court of Appeals erroneously concluded that the instruction correctly stated the law. App. 16. Its decision conflicts with *Kyllo*, because the court did not apply *Kyllo's* "manifestly apparent" standard. Nor did the court explain how the statutory language met this higher standard for clarity. Instead, the court relied on cases purportedly upholding the pattern instruction as a correct statement of the law in general. App. 17 (citing *State v. Corwin*, 32 Wn.App. 493, 498, 649 P.2d 119 (1982); *State v. Coates*, 107 Wn.2d 882, 891, 735 P.2d 64 (1987); and *State v. Hackett*, 64 Wn.App. 780, 786-87, 827 P.2d 1013 (1992)).

The cited cases did not address the challenge raised by Mr. Devyver. Nor did they purport to uphold the pattern instruction against all

future challenges. There are no cases specifically upholding the first sentence of the pattern instruction as an appropriate charge for a jury considering the effects of voluntary intoxication.

Mr. Devyver's charges stemmed from acts committed during an alcoholic blackout, and each charge required proof of Mr. Devyver's mental state. *See* RP 672, 693; CP 54-57, 67-73, 76, 82-86. The court found the evidence sufficient to warrant instruction on intoxication. CP 53; RP 709-711. Under these circumstances, jurors were entitled to find that Mr. Devyver did not "act[ ] with intent, knowledge, willfulness, or recklessness." CP 53.[10] But for the erroneous language, this could have "'lead[ ] to an acquittal or conviction for a lesser included offense.'" *State v. Sao*, 156 Wn.App. 67, 76, 230 P.3d 277 (2010) (quoting *State v. James*, 47 Wn.App. 605, 608, 736 P.2d 700 (1987)).

Instead of making the relevant standard manifestly apparent, the court told jurors (at defense counsel's request) that Mr. Devyver's acts were *not* any less criminal because of intoxication: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition." CP 9, 53.[11]

This language misstates the law. Acts committed by an intoxicated person *are* "less criminal," if intoxication interferes with the actor's ability

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

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

to form the mental state required for conviction. *Sao,* 156 Wn.App. at 76. The instruction's first sentence improperly negated the defense theory. CP 9, 53.

The instruction violated Mr. Devyver's constitutional right to due process and deprived him of his constitutional right to present a defense. *Koch,* 157 Wn.App. at 33. Defense counsel provided ineffective assistance by proposing an erroneous instruction that eliminated Mr. Devyver's intoxication defense. *Kyllo,* 166 Wn.2d at 862.

The defense theory rested on Mr. Devyver's intoxication: defense counsel argued that he did not have the mental state required for each offense. RP 757-770. Despite this, counsel proposed the erroneous language adopted by the court. CP 9, 53. Defense counsel had no valid strategic reason for negating his own defense theory. *Id.,* at 871.

The prosecutor capitalized on the error in closing, and urged jurors to "disregard" the defense theory entirely rather than evaluating whether intoxication affected Mr. Devyver's mental state. RP 744-745. Jurors who accepted the first sentence at face value—as the prosecutor encouraged them to do—would not have considered intoxication while assessing Mr. Devyver's mental state. To accept the defense theory, jurors would have had to ignore the first sentence and the prosecutor's argument. CP 53; RP 744-745.

Mr. Devyver was prejudiced by counsel's deficient performance. His defense theory rested entirely on the intoxication instruction. A manifestly clear instruction would not have given jurors any reason to disregard

the defense theory. Instead, the instruction told jurors that his acts were no "less criminal" as a result of his intoxication; thus jurors were free to disregard his intoxication altogether in assessing his mental state. CP 9, 53.

Mr. Devyver's level of intoxication prior to the stabbings was extreme. His actions – stabbing two people without apparent motive, crashing a car, asking police to shoot him—suggest that he was still impaired at the time of his arrest. RP 273, 277, 611, 617, 647, 672, 693. This is confirmed by his testimony that he could not remember anything of the incident. RP 672. Given all this, the suggestion that he was not prejudiced because "he did not appear drunk" lacks merit. App. 18.

Defense counsel provided ineffective assistance. *Kyllo*, 166 Wn.2d at 871. Mr. Devyver's convictions violated his right to due process and his right to present a defense. *Jones* I, 168 Wn.2d at 720. The convictions must be vacated and the case remanded for a new trial. *Id.*

B. The invited error doctrine and *Studd* should not bar Mr. Devyver's constitutional claims; this court should recognize the errors and grant relief.

Invited error occurs when a party requests an instruction and later complains on appeal that the court gave the instruction. *State v. Vander Houwen*, 163 Wn.2d 25, 36-37, 177 P.3d 93 (2008). An exception to this rule exists if the party's attorney provided ineffective assistance of counsel by proposing the instruction. *Kyllo*, 166 Wn.2d at 861. But under the *Studd* rule, proposing a pattern instruction does not qualify as deficient

performance. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999), *as amended* (July 2, 1999).

Where *Studd* eliminates an ineffective assistance claim, the invited error rule allows the court to affirm convictions obtained in violation of the constitution. *See Studd*, 137 Wn.2d at 555 *et seq.* (Sanders, J., dissenting); *State v. Henderson*, 114 Wn.2d 867, 871 *et seq.*, 792 P.2d 514 (1990) (Utter, J., dissenting); *In re Griffith*, 102 Wn.2d 100, 103 *et seq.*, 683 P.2d 194 (1984).

The Supreme Court should revisit *Studd* because it is both incorrect and harmful. *See State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) ("this court will reject its prior holdings only upon 'a clear showing that an established rule is incorrect and harmful'") (citation omitted).

The *Studd* decision is incorrect because Washington courts have a long tradition of reviewing constitutional issues raised for the first time on appeal—either directly, or through an ineffective assistance claim—and *Studd* marked a departure from that tradition. *See State v. Bertrand*, 165 Wn.App. 393, 408, 267 P.3d 511 (2011) (Quinn-Brintnall, J., concurring) ("[T]he exception allowing review of an error raised for the first time on appeal for 'manifest error affecting a constitutional right,' long existed before the adoption of RAP 2.5(a)(3)") (citing *Williams v. Ninemire*, 23 Wash. 393, 63 P. 534 (1900)).

The *Studd* rule is harmful because it allows convictions to stand despite prejudicial constitutional error. Such errors have the potential to "seriously affect the fairness, integrity, or public reputation of judicial

proceedings." *See United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 80 L. Ed. 555 (1936). A conviction should not rest on an unconstitutional foundation. When reviewing courts allow serious felony convictions to stand despite prejudicial constitutional error, the "fairness, integrity, [and] public reputation of judicial proceedings" are all undermined. *Id.*

Appellate courts should reverse convictions when instructional error prevents the jury from fully considering the defense theory. The sole exception should be for cases in which the error is harmless beyond a reasonable doubt. *See State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997). If *Studd* and the invited error rule bar Mr. Devyver's claim, he'll be left without a remedy despite the prejudicial violation of his constitutional rights. The Supreme Court should revisit its decision in *Studd*. Because *Studd* is both incorrect and harmful, it should be overruled.[12]

C. The Supreme Court should accept review and reverse Mr. Devyver's convictions.

Based on the court's erroneous intoxication instruction, the jurors deciding Mr. Devyver's case believed that his acts were no less criminal by reason of his intoxication. CP 53. This misstatement of the law deprived Mr. Devyver of his right to due process and his right to present a defense. This Court should accept review and grant Mr. Devyver a remedy, either for the underlying constitutional violations or on grounds of ineffective assistance. This requires the court to revisit and overrule *Studd*.

[12] The Court of Appeals did not address Mr. Devyver's argument regarding invited error and *Studd*. App. 16, n. 8.

This case presents significant constitutional issues that are of substantial public interest and should be decided by the Supreme Court. RAP 13.4(b)(3) and (4). In addition, the Court of Appeals decision conflicts with *Kyllo,* because the court failed to apply *Kyllo's* "manifestly apparent" standard. The Supreme Court should accept review under RAP 13.4(1).

II. THE SUPREME COURT SHOULD REVERSE FOR A VIOLATION OF MR. DEVYVER'S STATUTORY AND DUE PROCESS RIGHTS TO INSTRUCTIONS ON AN APPLICABLE LESSER-INCLUDED OFFENSE. THE LOWER COURT'S DECISION CONFLICTS WITH *GAMBLE*. THIS CASE ALSO RAISES SIGNIFICANT CONSTITUTIONAL QUESTIONS AND ISSUES OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4(B)(1), (3), AND (4).

The state charged Mr. Devyver with felony murder based on three alternative felonies: first, second, and third-degree assault. CP 1-3. The court refused to instruct on second-degree manslaughter as a lesser charge. RP 702; CP 11-14. This violated Mr. Devyver's statutory and due process rights to instructions on applicable lesser included offenses. RCW 10.61.003; RCW 10.61.010; U.S. Const. Amend. XIV.

A. The Supreme Court should review Mr. Devyver's claims de *novo,* whether based on pure issues of law or on the application of law to facts.

Appellate courts review constitutional challenges *de novo,* even when based on discretionary decisions in the trial court. *Jones* I, 168 Wn.2d at 719; *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009). Furthermore, issues involving the application of law to facts are also reviewed *de novo*. *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016).

A trial court's refusal to instruct on a lesser offense involves the application of law to facts. *State v. Corey*, 181 Wn.App. 272, 276, 325 P.3d 250 (2014), *review denied*, 181 Wn.2d 1008, 335 P.3d 941 (2014). Such a refusal must therefore be reviewed *de novo. Samalia*, 186 Wn.2d at 269; *see also State v. Fisher*, 185 Wn.2d 836, 849, 374 P.3d 1185 (2016) (Where "the basis for the trial court's refusal to give [a] requested jury instruction appears to be lack of evidence," the reviewing court's "standard of review is de novo.") [13]

Here, the law regarding lesser-included offenses must be applied to the facts taken "in the light most favorable to [Mr. Devyver.]" *Fisher*, 185 Wn.2d at 849. The Supreme Court must review this mixed question of law and fact *de novo. Id.; Samalia*, 186 Wn.2d at 269.

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

An accused person has an "unqualified" statutory right to instructions on an applicable lesser-included offense. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984); RCW 10.61.003; RCW 10.61.010. The right attaches where two conditions are met. First, the lesser offense must "consist[ ] solely of elements that are necessary to conviction of the

[13] In rare cases, a trial court's refusal to instruct will be based on a "factual *dispute*, …reviewable only for abuse of discretion." *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998) (emphasis added). Such cases are rare because the evidence must be taken in a light most favorable to the proponent of the instruction; any disputes are resolved in the proponent's favor. *Id.*, at 780-781. Here, the Court of Appeals erroneously referred to the abuse-of-discretion standard. App. 15 (citing *Walker*). This case does not turn on a factual dispute. Instead, it involves the application of law to facts, and the facts must be taken in a light most favorable to Mr. Devyver. *Samalia*, 186 Wn.2d at 269; *Fisher*, 185 Wn.2d at 849.

greater, charged offense." *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015).

The elements should not be examined "in isolation;" rather, a reviewing court must give "due regard to their necessary relational nature." *State v. Gamble*, 154 Wn.2d 457, 466, 114 P.3d 646 (2005). Under this first prong, the court examines the greater offense "as charged and prosecuted, rather than... [as it] broadly appear[s] in statute." *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).[14]

Second, the evidence must "support[ ] an inference that *only* the lesser offense was committed, to the exclusion of the greater, charged offense." *Condon*, 182 Wn.2d at 316. The evidence is viewed in a light most favorable to the instruction's proponent. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). The instruction must be given if "even the slightest evidence" suggests that the person may have committed only the lesser offense. *Parker*, 102 Wn.2d at 163-164.

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

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

As charged in this case, felony murder (based on second-degree assault)[15] includes the lesser offense of second-degree manslaughter. However, the trial judge "looked at the cases really carefully" and concluded "there's no legal basis for it." RP 705. This was error.

In felony murder cases, courts consider the elements of the predicate felony to determine whether an offense is included offense. *Gamble*, 154 Wn.2d at 466. The elements of both felony murder and any proposed lesser should not be examined "in isolation;" rather, a reviewing court must give "due regard to their necessary relational nature." *Id.*, at 467.[16]

Here, the state charged felony murder based on first, second, and third-degree assault.[17] CP 1-3. Under one alternative alleged by the prosecution, second-degree manslaughter qualifies as a lesser-included offense of the murder charge. Specifically, second-degree manslaughter is a lesser included offense of the state's allegation that Mr. Devyver committed felony murder by stabbing Woods in a manner "readily capable of causing death." CP 1-3, CP 62.

When considered in relation to each other, the mental element of second-degree manslaughter (negligence with respect to death) fits within

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

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

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

felony murder by means of assault with a deadly weapon under the facts alleged here. Second-degree manslaughter consists "solely of elements that are necessary to conviction of" second degree felony murder based on an intentional assault with a deadly weapon. *Condon*, 182 Wn.2d at 316. In other words, second-degree manslaughter is a lesser-included offense of felony murder as charged in this case and under the evidence introduced by the state at trial.

The mental state required to prove felony murder is "the same as that which is required to prove the predicate felony." *State v. Bolar*, 118 Wn.App. 490, 504, 78 P.3d 1012 (2003), *as amended on denial of reconsideration* (Oct. 1, 2003). Because the prosecution charged felony murder predicated on second-degree assault, the *mens rea* for the murder was the mental state established by proof of the second-degree assault. *Id.* Second degree assault (as charged) required proof that Mr. Devyver "intentionally assault[ed] another with a deadly weapon." CP 56. The instructions told jurors that "[a]n assault is an intentional cutting of another person." CP 61. The mental state required for the felony murder charge was thus intent to assault or intent to cut. CP 56, 61.

When taken in isolation, the intent-to-assault (or intent-to-cut) element of second-degree felony murder does not establish negligence as to death (as required for second-degree manslaughter). However, the elements are not to be taken in isolation; rather they must be considered in relation to each other. *Gamble*, 154 Wn.2d at 466.

Negligence is necessarily established by evidence that a person acted with intent. RCW 9A.08.010(2). Furthermore, the court instructed jurors that a deadly weapon could be any item used in a manner "readily capable of causing death." CP 62. The state's evidence at trial suggested that Mr. Devyver caused Woods's death by intentionally stabbing him with a knife.

Considering these elements in relation to each other, second-degree manslaughter is a lesser-included offense of the felony murder charge alleged and proved here. The prosecution's evidence that Mr. Devyver caused the death by intentionally stabbing another person, using a knife in a manner "readily capable of causing death" also proves that he was negligent in causing that death. A person who intentionally stabs another using a knife in a manner readily capable of causing death is at least negligent regarding any death that results.

Thus, proof of felony murder by means of an intentional assault with a deadly weapon (used in a manner readily capable of causing death) also proves second-degree manslaughter. RCW 9A.32.070. The first prong of the test is met. *Condon*, 182 Wn.2d at 316. The trial court erred by concluding that "there's no legal basis for" the proposed instructions on second-degree manslaughter. RP 705.

The *Gamble* court reached a different result because of the different charges filed in that case.[18] Prior to *Gamble*, the Supreme Court "com-

[18] As the *Gamble* court put it, "manslaughter is not a lesser included offense of second degree felony murder where second degree assault, *RCW 9A.36.021(1)(a)*, is the predi-

pared the elements of manslaughter and felony murder without consistently conducting any further in depth analysis of the elements of the necessary predicate felony." *Gamble,* 154 Wn.2d at 463-464.[19] *Gamble* rejected this approach. *Id.,* at 465. Instead, the Supreme Court adopted "the additional step of looking at the elements of the predicate felony." *Id.*[20]

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

Here, by contrast, jurors were instructed that Mr. Devyver could be convicted based on an intentional assault with a deadly weapon, used in a manner "readily capable of causing death." CP 62. When the evidence on each element is considered in relation to the other elements (rather than in isolation), the charged offense required proof that Mr. Devyver negligently caused another's death.

Here, unlike in *Gamble,* conviction of second-degree manslaughter did *not* "require[] proof of an element that does not exist in the second de-

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cate felony." *Gamble*, 154 Wn.2d at 460 (emphasis added). Here, the alternative predicate felonies included RCW 9A36.021(1)(c) and RCW 9A.36.011(1)(a), neither of which were at issue in *Gamble*.

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

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

gree felony murder charge the State brought against [Mr. Devyver]." *Id.,* at 468. The felony murder charge here was thus *not* "unamenable to a lesser included offense instruction on the offense of manslaughter." *Id.*

Gamble compels the result urged by Mr. Devyver. When the state charges second-degree felony predicated on an intentional assault with a deadly weapon, manslaughter satisfies the first prong of the test for a lesser-included offense instruction. The trial judge should have given Mr. Devyver's proposed instructions on second-degree manslaughter. The Court of Appeals misapplied *Gamble* in reaching the opposite conclusion. App. 22-25. Its decision conflicts with the reasoning in *Gamble.*

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

Mr. Devyver stabbed Reneer and killed Woods while in an alcoholic blackout. RP 672. He could not remember anything he had done that evening. This provided at least some evidence that Mr. Devyver's drinking affected his ability to form intent, as required to prove second-degree felony murder based on assault. In fact, the state conceded sufficient proof to warrant the intoxication instruction, and the court gave the instruction. CP 53.

This means that the court found not only "substantial evidence of drinking," but also "'evidence that the drinking affected [his] ability to acquire the required mental state.'" *Walters,* 162 Wn.App. at 82 (citation omitted). His "[in]ability to acquire the required mental state" – intent – means that he may have acted with recklessness or negligence. So the court did find facts sufficient to show that Mr. Devyver committed only second-degree manslaughter to the exclusion of second-degree felony murder. The Court of Appeals' claim—that the evidence, the state's concession, and the trial court's implicit finding were insufficient to support the instruction—is without merit. App. 21-22.

The Court of Appeals also erroneously concluded that the trial court "was not asked to give the instruction." App. 20. This is demonstrably false. Mr. Devyver submitted proposed instructions telling jurors to consider second-degree manslaughter if they were not satisfied beyond a reasonable doubt that he was guilty of second-degree murder. CP 11. He proposed instructions defining manslaughter and criminal negligence. CP 12-13. He submitted a "to convict" instruction on second-degree manslaughter. CP 14. The fact that he made the wrong legal argument in support of these instructions may have been ineffective, but it does not mean that he failed to submit the instructions. RP 702-705.

When taken in a light most favorable to Mr. Devyver as proponent of the manslaughter instructions, the evidence showed that he committed only that crime and not second-degree felony murder based on intentional assault. The jury was entitled to decide that he was negligent but that his

alcohol consumption interfered with his ability to form intent. Because there was at least the "slightest evidence" that Mr. Devyver committed only second-degree manslaughter, the trial court violated his unqualified statutory right to instruction on the lesser charge. *Parker,* 102 Wn.2d at 163-164. The murder conviction must be reversed and the charge remanded for a new trial. *Id.*

C. By refusing to instruct on second-degree manslaughter, the trial judge violated Mr. Devyver's due process right to instructions on an applicable lesser-included offense.[21]

The government may not deprive a person of liberty without due process. U.S. Const. Amend. XIV; Wash. Const. art. I, §3.[22] Ordinarily, courts balance three factors when evaluating due process claims. *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). These factors include (1) the private interest, (2) the risk of error under current procedure and the probable value of additional procedures, and (3) the government's interest in maintaining the existing procedure. *Id.*

The Washington Supreme Court has been inconsistent in its evaluation of procedural due process challenges in criminal cases.[23] Compare *State v. Beaver*, 184 Wn.2d 321, 336, 358 P.3d 385 (2015) (applying

[21] This qualifies as a manifest error affecting Mr. Devyver's right to due process. The error had "practical and identifiable consequences in the trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46, 50 (2014). This is so because "the court could have corrected the error," given what it knew. *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). Accordingly, the error may be reviewed under RAP 2.5(a)(3).

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

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

Mathews) with *State v. Coley*, 180 Wn.2d 543, 558, 326 P.3d 702 (2014) *cert. denied*, --- U.S. ---, 135 S.Ct. 1444, 191 L.Ed.2d 399 (2015) (rejecting *Mathews*); *State v. Hurst*, 173 Wn.2d 597, 601, 269 P.3d 1023 (2012) (same); *State v. Heddrick*, 166 Wn.2d 898, 904 n. 3, 215 P.3d 201 (2009) (same). The court has also expressly declined to reach the issue. *See State v. Brousseau*, 172 Wn.2d 331, 346-49 n. 8, n. 9, 259 P.3d 209 (2011) (finding in favor of the state under any test).

Such inconsistency need not persist. *Mathews* should apply when Washington courts evaluate Washington criminal procedure. This result can be achieved by either (1) adopting *Mathews* under an independent application of Wash. Const. art. I, §3, or (2) recognizing the inapplicability of the U.S. Supreme Court's federalism concerns in adopting a more deferential standard for federal courts' evaluation of state criminal proceedings. As outlined below, the *Mathews* test should apply when Washington courts evaluate Washington criminal procedures under both art. I, §3 and under the Fourteenth Amendment.

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

Under the federal constitution, the *Mathews* test is the law of the land when it comes to civil matters. *See, e.g., Morgan*, 180 Wn.2d at 320; *In re A.W.*, 182 Wn.2d 689, 703-04, 344 P.3d 1186 (2015); *In re Disciplinary Proceeding Against Petersen*, 180 Wn.2d 768, 788, 329 P.3d 853 (2014). No less protective test can apply to civil cases under the state con-

stitution because "the federal constitution sets a minimum floor of protection, below which state law may not go." *Orion Corp. v. State*, 109 Wn.2d 621, 652, 747 P.2d 1062 (1987).

Criminal matters involve liberty interests at least as important as those in civil cases. *See, e.g., United States v. Pelullo*, 14 F.3d 881, 893 (3d Cir. 1994) (noting that "the liberty interest of a criminal defendant takes priority over the usual concerns for efficient judicial administration so often found in civil proceedings"). Because of this, the *Mathews* test applicable to civil liberties should protect individual interests in criminal matters as well.

Generally, independent analysis of a provision of the state constitution must be justified under the six nonexclusive *Gunwall* criteria. *State v. Gunwall*, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986). *Gunwall* may be unnecessary here, because Mr. Devyver asks the court to do no more than apply the traditional federal standard for evaluating procedural due process claims. Nonetheless, a brief *Gunwall* analysis follows.

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

Differences between the state and federal provisions. Identity of language does not end the inquiry under this factor. Instead, the state constitution may depart from federal law where justified by policies underly-

ing the constitutional guarantee. *State v. Davis*, 38 Wn.App. 600, 605 n. 4, 686 P.2d 1143 (1984) (Davis II). The federalism concerns discussed by the U.S. Supreme Court in *Medina* do not apply to art. I, §3. *Medina v. California*, 505 U.S. 437, 445, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992) .

State constitutional and common law history. While no legislative history suggests that art. I, §3 differs from the federal provision; this does not mean they are coextensive. Nor does the common law preclude application of the balancing test outlined in *Mathews*. The Supreme Court has noted that *Mathews* sets the minimum standard in civil cases, so the state constitution "would not provide less due process protection" than that required under *Mathews*. *In re Dependency of MSR*, 174 Wn.2d 1, 20, 271 P.3d 234 (2012), *reconsideration denied* (May 9, 2012), *as corrected* (May 8, 2012).

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

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

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

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

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

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

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

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

spite the U.S. Supreme Court's adoption of the *Patterson* standard in federal court. Because *Medina* and *Patterson* deviate from *Mathews* only as a result of federalism, this court must apply *Mathews* balancing to Mr. Devyver's procedural due process claim.

As noted above, Washington's Supreme Court has taken an inconsistent approach to evaluating federal due process claims in state criminal cases.[24] In those cases rejecting *Mathews*, the Washington Supreme Court accepted the *Medina* court's result without examining its reasoning. *Coley*, 180 Wn.2d at 558; *Hurst*, 173 Wn.2d at 601; *Heddrick*, 166 Wn.2d at 904 n. 3. The Supreme Court's prior decisions on the issue make no mention of the federalism concerns that prompted the application of a deferential standard in *Medina* and *Patterson. See Medina*, 505 U.S. at 445.

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

This court should use *Mathews* to determine if there is a due process right to a lesser-included-offense instruction. *Mathews* should apply either through an independent application of Wash. Const. art. I, §3 or because it is the appropriate test under the Fourteenth Amendment.

3. Procedural due process requires courts to instruct on applicable lesser-included offenses because of the strong private interest at stake, the great risk of error, and the absence of any countervailing

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

state interest.

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

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

The risk of error. In federal court, an accused person unquestionably has the right to instructions on a lesser-included offense. *Stevenson v. United States*, 162 U.S. 313, 322-323, 16 S.Ct. 839, 40 L.Ed. 980 (1896).[25] Similarly, in state capital proceedings, due process requires instruction on applicable lesser-included offenses. U.S. Const. Amend. XIV;

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

Beck v. Alabama, 447 U.S. 625, 634, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).[26]

Failing to instruct on applicable lesser-included offenses increases the risk of error at trial; such a failure "diminish[es] the reliability of the guilt determination," and "enhances the risk of an unwarranted conviction." *Beck*, 447 U.S. at 638.[27] Without instruction on a lesser-included offense, the accused person is

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

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

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

Keeble, 412 U.S. at 212-213. In other words, failure to instruct on a lesser-included offense creates a risk of wrongful conviction, "simply because the jury wishes to avoid setting [the defendant] free." *Vujosevic*, 844 F.2d at 1027. The risk of error may increase when conviction does not carry the death penalty: in such cases jurors might find themselves *more* willing to convict despite the lack of proof on one element, since erroneous conviction will not result in execution of the innocent.

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

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

First, prosecutors have a duty to act in the interest of justice. *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). No prosecutor should seek what the *Beck* court described as an "unwarranted conviction." *Beck*, 447 U.S. at 638. Second, proper instruction on an included offense allows jurors to convict of a lesser charge when they might otherwise acquit the defendant of the charged crime.[28] Juries will convict defendants of the appropriate offense when the state cannot prove the charged offense. Third,

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

unwarranted conviction on a greater charge wastes resources by incarcerating people for longer periods than necessary or appropriate. Instruction on applicable lesser-included offense reduces the possibility that offenders will receive longer sentences than they deserve.

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

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

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

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

superior court. *Id.* Upon retrial, the court must instruct jurors on any applicable lesser-included offenses. *Id.*

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

Defense counsel proposed and argued in favor of instructions on the lesser-included offense of manslaughter. CP 9; RP 702-705. Accordingly, his failure to argue the correct legal grounds cannot be described as a "legitimate tactic." *Reichenbach*, 153 Wn.2d at 130. The conduct of a reasonable attorney "includes carrying out the duty to research the relevant law." *Kyllo*, 166 Wn.2d at 862. In this case, defense counsel failed to grasp the import of *Gamble.*

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

Gamble did not purport to prohibit instruction on manslaughter for all fact patterns involving felony murder based on second-degree assault. *Id.* In fact, *Gamble* provides the reasoning that supports instruction on manslaughter under the facts in this case. As outlined above, an intentional

stabbing with a knife used in a manner "readily capable of causing death"[29] necessarily requires proof that the defendant was at least negligent with respect to "'a substantial risk that a [*homicide*] may occur.'" *Gamble*, 154 Wn.2d at 467 (alterations and emphasis provided in *Gamble*) (quoting RCW 9A.08.010(1)(c)). Thus second-degree manslaughter meets the first prong of the test for a lesser-included instruction of second-degree felony murder as prosecuted here.

Defense counsel incorrectly conceded that felony murder based on first and second-degree assault could not include the lesser offense of second-degree manslaughter.[30] RP 702-705. This erroneous concession as to the law should not affect the reviewability of Mr. Devyver's claim of error, because "[i]t is error for a court to treat parties' stipulations to law as binding." *Worden v. Smith*, 178 Wn.App. 309, 327, 314 P.3d 1125 (2013) (citing *State v. Drum*, 168 Wn.2d 23, 34, 225 P.3d 237 (2010)).

However, if counsel's error precludes consideration of the correct legal standards on review, Mr. Devyver was deprived of the effective assistance of counsel. U.S. Const. Amend. VI, XIV; *Reichenbach*, 153 Wn.2d at 130. Second-degree manslaughter *can* be a lesser-included offense of second-degree felony murder based on second-degree assault, because *Gamble* requires that the elements be viewed in relation to each other rather than in isolation.

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[29] CP 62.

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

The murder conviction must be remanded for a new trial with appropriate instructions on second-degree manslaughter as a lesser-included offense.

E. The Supreme Court should accept review, reverse the murder conviction, and remand that charge for a new trial.

The trial court violated Mr. Devyver's unqualified statutory right to have the jury instructed on second-degree manslaughter as a lesser-included offense. This also violated Mr. Devyver's right to due process. If defense counsel's failure to argue the correct grounds precludes review, Mr. Devyver was also denied his right to counsel's effective assistance.

The Supreme Court should accept review and reverse the felony murder conviction. The Court of Appeals decision conflicts with *Gamble.* In addition, this case involves a significant question of constitutional law, and raises issues that are of substantial public interest. Review is therefore appropriate under RAP 13.4(b)(1), (3), and (4).

III. THE SUPREME COURT SHOULD ACCEPT REVIEW OF ADDITIONAL FEDERAL CONSTITUTIONAL ISSUES AND THE ISSUES RAISED BY MR. DEVYVER IN HIS STATEMENT OF ADDITIONAL GROUNDS.

The Supreme Court should accept review of two additional federal constitutional issues raised in the Court of Appeals. First, some jurors were exposed to security measures which marked Mr. Devyver with "unmistakable indications of the need to separate [him] from the community at large." *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). Second, the court's reasonable doubt instruction misstated the reasonable doubt standard and thus requires automatic reversal.

Sullivan v. Louisiana, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

In his Statement of Additional Grounds, Mr. Devyver argued "(1) that he did not receive sufficient trial transcripts… (2) that the trial court improperly instructed the jury…(3) that insufficient evidence supported his assault in the second degree conviction against Reneer… (4) that he should not have been charged with robbery in the first degree and a deadly weapon enhancement, and in the alternative, that the deadly weapon enhancement was not supported by sufficient evidence… [and] (5) that he received ineffective assistance of counsel because his counsel did not argue he lacked the requisite criminal intent." App. 26. Mr. Devyer respectfully asks the Supreme Court to accept review of these issues.

CONCLUSION

The Supreme Court should accept review, reverse Mr. Devyver's convictions, and remand for a new trial with proper instructions.

Respectfully submitted December 29, 2016.

BACKLUND AND MISTRY

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Amended Petition for Review, postage pre-paid, to:

Chase Devyver, DOC #382720
Monroe Correctional Complex
PO Box 777
Monroe, WA 98272

and I sent an electronic copy to

pcpatcecf@co.pierce.wa.us

through the Court's online filing system, with the permission of the recipient(s).

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

Signed at Olympia, Washington on December 29, 2016.

_____
Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX :

Court of Appeals Unpublished Opinion

Filed October 25, 2016

Filed
Washington State
Court of Appeals
Division Two

October 25, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHASE HARRISON DEVYVER, Appellant.	No. 47547-2-II UNPUBLISHED OPINION

MELNICK, J. — Chase Harrison Devyver appeals his convictions for felony murder in the second degree, assault in the second degree, both with a deadly weapon enhancement, and robbery in the first degree, with a firearm enhancement. Devyver was also convicted of attempt to elude a pursuing police vehicle. We conclude Devyver's rights were not violated after two jurors saw him with security officers outside the courtroom, and the trial court did not abuse its discretion by denying Devyver's motion for a mistrial. In addition, we conclude the trial court properly instructed the jury on voluntary intoxication and reasonable doubt, and correctly denied Devyver's manslaughter instruction as a lesser included offense for felony murder in the second degree. We also conclude that Devyver did not receive ineffective assistance of counsel. Finally, we conclude Devyver's SAG does not establish any error. We affirm.

FACTS

On the evening of January 18, 2014, a group of people including Devyver, his girlfriend Laura Reneer, Reneer's housemate Margaret Braswell-Donoho, Shawn Woods, Caleb Roth, and Nick Lafont, gathered at Braswell-Donoho's house to go out for the evening. Devyver began

staying at the house with Reneer approximately a month before hand. Devyver seemed upset about a misunderstanding from days before regarding a possible double date. Reneer assured Devyver she was not interested in being set up with another man but the topic came up several times throughout the evening.

Braswell-Donoho and Roth were the designated drivers for the night. Everybody else took at least one shot of whiskey before leaving. They arrived at a bar around 9:30 P.M. and did not return to the house until after closing time, approximately 3:00 A.M. Devyver and Woods appeared intoxicated at the bar. According to several witnesses, Devyver was very intoxicated at the beginning of the night but became less so as the night progressed.

Everyone but Roth and Lafont returned to the house. Upon returning to the house, Braswell-Donoho went to bed and Woods laid down on the couch in the living room. Woods intermittently got up so he could vomit. Devyver and Reneer helped Woods get back and forth from the couch to the bathroom.

Shortly thereafter, Devyver approached Reneer from behind. She did not know if he was hugging her or what he was doing. Devyver wrapped his arm around her and stabbed her twice in the back. Reneer felt sharp pains in her back and started screaming. She told Devyver to stop, but he kept "escalating." 3 Report of Proceedings (RP) at 178. Reneer heard Devyver say, "Why would you do this to me now." 3 RP at 177. Woods got up from the couch to intervene. Reneer got away, and Devyver and Woods fought.

Devyver stabbed Woods twice, once fatally in the heart. Devyver then ran around the house for a brief period of time, seemingly collecting items from the upstairs and the garage. During that time, Reneer and Woods remained on the floor near each other. Woods was not moving, but Reneer heard "gargling" noises. 3 RP at 184. Reneer saw Devyver washing

something in the sink. The items in his hand looked like "sharp metal objects, probably a knife." 3 RP at 184.

Devyver then returned to the living room, held a gun to Reneer's forehead, and asked her where her wallet was. Reneer told him she did not know, and he hit her in the head with the gun. Devyver threatened to kill Reneer, saying that if he did not kill her, she would have time to call the police. She pleaded with him not kill her and told him to take her keys and "just leave." 3 RP at 188. Devyver drove away in Reneer's car.

Reneer crawled up the stairs to find Braswell-Donoho. Reneer woke Braswell-Donoho, and they called the police. They went downstairs when the police arrived. Reneer then tried to walk back upstairs but fell. Her shirt was covered in blood.

While responding to the scene in marked patrol vehicles, the police observed Devyver driving away. Two officers passed Reneer's vehicle, driven by Devyver, and turned around to follow it. The officers activated their emergency lights, but Devyver did not stop. Devyver increased his speed immediately, and the officers activated their sirens.

Devyver did not pull over for the police and proceeded to drive between 90 and 100 miles per hour down a stretch of road. He drove through three red lights. Devyver slowed to 75 miles per hour at a hill. The lead police vehicle initiated a PIT (pursuit intervention technique) maneuver[1] to bring the chase to a stop. Devyver's vehicle spun out, broke through a telephone pole, and rolled several times into a yard. The officers could see items flying out of the vehicle as it rolled.

[1] A PIT maneuver is a method used to stop another moving vehicle. It is performed when one vehicle pulls up along the side of another vehicle and pushes the rear bumper of the vehicle to make it spin out.

The vehicle stopped with the passenger side on the ground. The officers approached the vehicle and could see Devyver trying to grab something from the floor. The officers had their weapons drawn and instructed Devyver to show his hands and come out of the vehicle with his hands in the air. Devyver pulled himself out of the car through the driver's side window, got on top of the car, and climbed to the ground without assistance. When Devyver exited the car, he stated, "Shoot me, just f***ing shoot me." Clerk's Papers (CP) at 6. Devyver yelled at the officers to shoot him several times but kept his hands in the air. He did not respond to officer commands to get on the ground so officers tased him. The police arrested Devyver and took him to the hospital in an ambulance.

The officers investigating the car crash scene found a firearm in the grass where the vehicle rolled over. Officers also recovered a hard-shelled gun case and another gun case. The gun was a Smith and Wesson nine millimeter semi-automatic pistol. Police also recovered two pocket knives with locking blades and a kitchen knife. Additionally, the police recovered Reneer's wallet from the car.

Reneer was taken to the hospital to receive medical attention. Reneer had two "puncture, stab wounds" in her back—one in her mid-back on top of her spine and one over her right scapula. 3 RP at 212. The wounds were approximately one half inch long and a quarter inch deep. They were both over bone. The trauma surgeon who tended to Reneer said there was no penetration into the chest cavity because the knife hit bone. The trauma surgeon saw no indication that Reneer had a head injury, stating, "She was awake and alert, oriented;" however, he acknowledged that she had a "laceration" to her head. 4 RP at 253. Photos were taken to document the head laceration.

I. THE TRIAL

The State charged Devyver in a second amended information with one count of felony murder in the second degree with a deadly weapon enhancement involving Woods (count I), assault in the first degree with a deadly weapon enhancement involving Reneer (count II), robbery in the first degree, while armed with a deadly weapon or while causing bodily injury, with a firearm enhancement involving Reneer, (count III), and attempting to elude a pursuing police vehicle (count IV). The charging document specified that the predicate felony for the murder charge was "the crime of assault in the first degree, assault in the second degree, or assault in the third degree." CP at 1. The State further alleged that Devyver and Reneer were part of the same household for the assault in the first degree charge.[2]

At trial, Devyver testified, but he did not refute any other witnesses' testimony because he could not remember anything from that night between shortly after he arrived at the bar up until when the police tased him. Devyver previously worked as a medic in the army. He testified that "[a]t the right depth" the mid-spine area is a "particularly vulnerable area." 7 RP at 688. He also stated, however, that the wound "wasn't deep enough to even reach the spine." 7 RP at 689. Devyver further testified that the top of the lung was in the area of the second wound but that the type of knife "wouldn't actually make it all the way through the bone." 7 RP at 689.

Devyver stated that he owned a Smith and Wesson semi-automatic handgun. He also stated that one gun case the police recovered appeared to be one he owned and the other he was not certain about because there was nothing particularly identifiable about it. According to Devyver, he also usually carried a black pocket knife with a locking blade in his pocket. He did not confirm

[2] RCW 9.94A.530, .533; RCW 10.99.020(3).

the knife in evidence was his, but he stated he owned a similar knife and could not remember exactly what brand it was because he had not seen it in a while.

Reneer testified that she did not know guns well but that she knew Devyver owned a pistol. She also thought that the pistol in evidence looked similar to the one with which Devyver struck her.

A Washington State Patrol Crime Laboratory employee tested the three knives found in the vehicle for blood. He found blood that matched Devyver's "DNA[3] profile" on the knives. 5 RP at 389. On one knife, the sample showed the presence of both Devyver's and Woods's DNA.

II. MISTRIAL MOTION

The trial began at the end of March, 2015 and lasted 7 days. On the first day of testimony, when the court reconvened from lunch, Devyver made the court aware of an incident. While transporting Devyver back to the jail, two officers held Devyver in a small room connected to the lobby. Two jurors left the jury room and passed the small room. Devyver moved for a mistrial.

The trial court and attorneys questioned the two officers. One stated that he watched the jury room door close and his partner then placed Devyver in handcuffs. That officer stood in the doorway to make sure the jurors were not coming out from the jury room and waited for the elevator. Two jurors exited the jury room and looked in the direction of the officers and Devyver. The officer closed the door and stood in front of the narrow window in the door before any other jurors left the jury room.

The other officer stated he could not be certain but thought it very unlikely either of the two jurors could see the handcuffs. The jurors likely did see that two officers were standing with

[3] Deoxyribonucleic acid.

Devyver. One of the jurors also stopped briefly to ask the officer who was outside the room whether they could go down the stairs.

The trial court denied the motion for a mistrial. It stated, "[i]t sounds . . . like nobody saw the handcuffs, probably couldn't physically be able to." 3 RP at 133. Further, the trial court decided not to interview the jurors because it would draw attention to the incident. The court also stated,

> [F]or the record the two officers have been present every moment. I know the jurors have seen them in the courtroom. I don't know what they think of that. They are not stupid. They usually pretty much figure out what's going on given the nature of the charges and the fact that we have two uniformed officers present within pretty close proximity of your client.

3 RP at 133-34.

III. JURY INSTRUCTIONS

Devyver proposed an instruction on voluntary intoxication. The parties agreed to list the specific *mens rea* to which the instruction applied. When the State objected to including negligence in the list, Devyver agreed to exclude it. The instruction given read, "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent, knowledge, willfulness, and recklessness." CP at 53.

Devyver also proposed instructions on lesser included offenses. He proposed a manslaughter in the second degree lesser included instruction for felony murder in the second degree. He argued the instruction was proper because the State charged assault in the third degree as one of the possible predicate felonies for murder in the second degree. He also argued that if the State selected assault in the first or second degree, he would not be entitled to a manslaughter instruction.

The trial court declined to give the proposed lesser included instruction, finding that there was no legal basis for it. Devyver noted his objection.

Devyver also proposed a theft in the third degree lesser included instruction for robbery in the first degree. The court asked for an explanation and Devyver argued it was because the robbery in the first degree statute included robbery in the second degree and theft in the third degree as lesser included offenses. Devyver did not provide factual support for the instruction. The court declined to give the instruction.

IV. THE VERDICT

The jury found Devyver guilty of felony murder in the second degree (count I), assault in the second degree (count II), robbery in the first degree (count III), and attempting to elude a police vehicle (count IV). The jury did not unanimously find that Devyver caused the death of Woods while committing assault in the first degree, but did unanimously find that he caused the death while committing assault in the second degree. Further, the jury found Devyver did not cause Woods's death while committing assault in the third degree.

The jury also returned special verdict forms. It found Devyver was armed with a deadly weapon, i.e., a knife, when he committed the crimes in counts I and II. It also found that Devyver and Reneer were "members of the same family or household" on count II, making the offense a domestic violence offense. CP at 37. Finally, it found that Devyver was armed with a firearm during the commission of count III, robbery in the first degree. Devyver appeals his convictions.

ANALYSIS

I. SECURITY MEASURES AND RESTRAINTS

Devyver argues security measures during his trial violated his rights to the presumption of innocence, to a fair trial by an impartial jury, and to equal protection before the law. We disagree.

A. Legal Principles and Standard of Review

The United States and Washington State Constitutions entitle every criminal defendant to a fair trial by an impartial jury. U.S. CONST. amends. VI, XIV, § 1; WASH. CONST. Art. I, §§ 3, 21, 22. The right to a fair trial includes the right to the presumption of innocence. *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005). "The presumption of innocence guarantees every criminal defendant all 'the physical indicia of innocence,' including that of being 'brought before the court with the appearance, dignity, and self-respect of a free and innocent man.'" *Gonzalez*, 129 Wn. App. at 901 (quoting *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999)).

Central to the right to a fair trial is the principle that a defendant is "'entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial,'" not "'official suspicion, indictment, continued custody, or other circumstances'" short of proof. *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986) (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978)). It is the trial court's constitutional duty "to shield the jury from routine security measures." *Gonzalez*, 129 Wn. App. at 901. If necessary, a trial court has the discretion to grant a mistrial to remedy the inadvertent exposure of security measures. *Gonzalez*, 129 Wn. App. at 902.

A trial court should grant a mistrial only if a defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). We review a trial court's denial of a mistrial for abuse of discretion,

and find abuse only "'when no reasonable judge would have reached the same conclusion.'" *Emery*, 174 Wn.2d at 765 (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). We review alleged violations of the right to an impartial jury and the presumption of innocence de novo. *State v. Johnson*, 125 Wn. App. 443, 457, 105 P.3d 85 (2005).

Generally, we do not review unpreserved claims of error. RAP 2.5(a). However, a "manifest error affecting a constitutional right" is an exception to the rule. RAP 2.5(a)(3). To fit under this exception, the appellant must demonstrate that the error was "truly of constitutional dimension" and that the "error was manifest." *State v. Fehr*, 185 Wn. App. 505, 511, 341 P.3d 363 (2015). The appellant must also show that "'the alleged error actually affected'" his trial rights. *Fehr*, 185 Wn. App. at 511 (quoting *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011)).

B. Presumption of Innocence & Impartial Jury

Devyver argues the trial court violated his right to an impartial jury and the presumption of innocence. He relies on both the general presence of two security guards throughout his trial and the incident outside the courtroom during his transport to the jail. He contends that the error was a manifest error affecting a constitutional right and therefore, should be reviewed for the first time on appeal.

We address Devyver's argument in two parts: first, the general presence of security officers, and second, the incident outside the courtroom. Devyver's argument regarding the general presence of officers in the courtroom is unsupported by the record. Devyver only cites the trial court's statement after it denied the mistrial to support the presence of officers guarding Devyver during his trial. The statement was made after the first half day of trial. At that time, the court stated the two officers had been "present every moment" and "within pretty close proximity"

to Devyver. 3 RP at 133-34. The trial court's statement does not establish what security measures were used, much less that the court utilized unreasonable security measures or failed to properly conceal necessary security measures from the jury over the course of a seven day trial.[4] *See Gonzalez*, 129 Wn. App. at 901.

As to the incident outside the courtroom, Devyver moved for a mistrial in the trial court. Therefore, he is not raising the issue for the first time on appeal. As a result, RAP 2.5(a)(3) is inapplicable. Asserting an argument in constitutional terms does not change the applicable standard of review. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). Instead, we review whether Devyver's right to an impartial jury and the presumption of innocence was violated de novo and whether the trial court abused its discretion by denying a mistrial motion. *Johnson*, 125 Wn. App. at 457; *Emery*, 174 Wn.2d at 765.

Trial courts do not grant a mistrial every time a juror is inadvertently exposed to security measures utilized during a criminal trial. *See Gonzalez*, 129 Wn. App. at 902. For example, in *State v. Mullin-Coston*, an appellant analogized the jury hearing about him being in jail through witness testimony with the jury seeing a defendant shackled in court. 115 Wn. App. 679, 693-94,

[4] Devyver's appellate briefs repeatedly use the trial court's quote "every moment" when talking about security measures throughout the trial when it clearly only referenced the first half day. There is also nothing to support Devyver's statement in his reply brief that, "Two uniformed officers remained 'within pretty close proximity' of Mr. Devyver during 'every moment' of the trial," Reply Br. at 1 (quoting 3 RP at 133-34), and "some jurors saw these same two deputies guarding Mr. Devyver in a small room." Reply Br. of Appellant at 1. These statements do not accurately portray what occurred or what the record reflects. The record is nonexistent as to the security measures actually being used after the first half day of trial.

64 P.3d 40 (2003), *aff'd*, 152 Wn.2d 107, 95 P.3d 321 (2004). In weighing the potential prejudice, the court juxtaposed the general reality that jurors likely know persons awaiting trial "often do so in custody" with the implications of restraining a defendant in front of jurors while trial transpires. *Mullin-Coston*, 115 Wn. App. at 693. The court rejected the appellant's analogy. *Mullin-Coston*, 115 Wn. App. at 694.

The court in *Mullin-Coston* distinguished between the implications of a jury hearing about the custody status of a defendant through testimony and a jury seeing a defendant shackled. 115 Wn. App. at 693-94. The court reasoned that factors such as the seriousness of the crime and ability to pay bail go into whether a defendant is in custody, whereas, a jury is likely to assume from restraints during trial that the judge and court security are genuinely concerned that the defendant poses a threat. *Mullin-Coston*, 115 Wn. App. at 693-94. The court concluded that testimony referencing a defendant's presence in jail did not violate his right to the presumption of innocence. *Mullin-Coston*, 115 Wn. App. at 694. Similarly here, courtroom restraints or security measures are not at issue. Two jurors may have become aware that Devyver was in custody after seeing the same officers in the courtroom with him outside the courtroom. The trial court remarked that the jurors may well have put it together that Devyver was in custody due to the nature of the charges and the officers. However, as in *Mullin-Coston*, the fact that the jurors may believe Devyver was in custody is not automatically a violation of Devyver's right to an impartial jury or the presumption of innocence. We conclude the incident in the hallway did not violate his constitutional rights and was not so prejudicial that it warranted a mistrial.

In *Holbrook*, the Court considered whether the presence of four state troopers in the first row of seats behind the defendants' table violated the presumption of innocence. 475 U.S. at 562. The Court held that deployment of noticeable security personnel, "where justified by an essential

state interest specific to each trial" is not inherently prejudicial. *Holbrook*, 475 U.S. at 568-69. The case at hand is dissimilar from *Holbrook* because it does not involve courtroom security during trial. The jurors saw Devyver outside the courtroom with two security officers. There is no evidence to indicate what the security measures were utilized in the courtroom. And Devyver cites no authority for granting a mistrial every time there is some implication the defendant might be in custody.

Devyver clarifies his position in his reply brief, arguing that when the jurors saw him with the same officers who had been in the courtroom, they realized the officers were there for him specifically, not just for courtroom security. However, the trial court heard testimony from the two officers and determined the jurors did not see restraints. It acknowledged that the jurors might reasonably presume that Devyver was in custody during the trial due to the seriousness of the crimes charged and the presence of the officers in the courtroom. The court denied the mistrial motion after hearing testimony from the two officers, which was subject to cross-examination. It issued a reasoned decision based on the adduced facts. The trial court did not abuse its discretion, and Devyver's rights to an impartial jury and the presumption of innocence were not violated.

C. Equal Protection

In a related argument, Devyver appears to argue that his equal protection rights were violated by the general security measures employed by the trial court throughout trial and the incident outside the courtroom. As stated above, with the exception of moving for a mistrial, Devyver did not otherwise object to the security measures used during trial. There is no record to indicate improper security measures were used. Therefore, we solely consider whether the presence of security officers to transport Devyver to the jail violated Devyver's equal protection rights.

First, Devyver fails to clearly identify a suspect class or any evidence of unequal treatment. Devyver seems to argue he was treated differently because as an indigent defendant he was kept in custody.[5] Specifically, Devyver contends that if he could have afforded bail, he would not have been "tried under guard" and the jurors never would have seen him with officers outside the courtroom.[6] Br. of Appellant at 13. The record supports neither contention. The argument is based on speculation.

Indigence alone is not a suspect class. *Harris v. McRae*, 448 U.S. 297, 323, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). The equal protection clause requires that persons similarly situated with respect to legitimate purposes of the laws receive like treatment. *In re Pers. Restraint of Bratz*, 101 Wn. App. 662, 668, 5 P.3d 759 (2000). It does not require that all persons be treated identically, but the distinction must have some relevance to the purpose for which the classification is made. *Bratz*, 101 Wn. App. at 668. Also, there is no record to show that Devyver was tried "under guard." Br. of Appellant at 13.

When Devyver moved for a mistrial, he did not argue an equal protection violation. Because he cannot prove error, he cannot establish a manifest constitutional error. RAP 2.5(a)(3). Therefore, the issue is not preserved for our review.[7] RAP 2.5(a).

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[5] Devyver seems to be comparing indigent defendants to non-indigent defendants rather than in-custody defendants to out-of-custody defendants. He provides no support that all pretrial detainees are indigent.

[6] It should also be noted that Devyver's bail was set at $2,000,000; therefore, indigence may not have been the sole reason he remained in custody.

[7] Devyver goes further to argue that even if we find no constitutional violation, we should review the issue by asserting "inherent supervisory power." Br. of Appellant at 15. He argues we should exercise our discretion to prevent uniformed officers from guarding defendants "every moment," except in the most extraordinary of cases. Br. of Appellant at 16. Again, the quote to the record is taken out of context. We decline to address the issue because the record does not warrant it.

II. JURY INSTRUCTIONS

Devyver argues the trial court committed reversible error in its instruction to the jury. We disagree.

A. Standard of Review

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). "[J]ury instructions read as a whole must make the relevant legal standards manifestly apparent to the average juror." *State v. Marquez*, 131 Wn. App. 566, 575, 127 P.3d 786 (2006). The proper standard of review to assess the instructions given depends on whether the trial court's refusal to give a jury instruction was based on a matter of law or fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998).

Generally, we review jury instructions de novo. *State v. Clausing*, 147 Wn.2d 620, 626-27, 56 P.3d 550 (2002). However, we review a trial court's refusal to give an instruction based on the facts for abuse of discretion. *State v. Walker*, 136 Wn. 2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). A trial court is under no obligation to give inaccurate or misleading instructions. *State v. Ehrhardt*, 167 Wn. App. 934, 939, 276 P.3d 332 (2012).

"Because prejudice is presumed when an instruction misstates the law, a defendant is entitled to a new trial unless the error can be declared harmless beyond a reasonable doubt." *State v. Woods*, 138 Wn. App. 191, 202, 156 P.3d 309 (2007). To show harmless error, the State must

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We also note that we do not possess the kind of "inherent supervisory power" suggested in Devyver's brief. Br. of Appellant at 15; *see* RCW 2.06.010, .030.

prove that "[f]rom the record, it . . . appear[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002).

B. Voluntary Intoxication Instruction

Devyver argues that the voluntary intoxication instruction misstated the law and thus, violated his right to present a defense. Devyver argues this issue as constitutional error, specifically a due process violation, susceptible to review for the first time on appeal under RAP 2.5(a)(3). By doing so, Devyver "avoids one thicket only to become entangled in another." *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Devyver's counsel proposed the instruction. Nobody objected to it.[8] While a jury instruction that misstates the law could be an error of constitutional magnitude, *Marquez*, 131 Wn. App. at 576, the voluntary intoxication instruction given by the trial court did not misstate the law.

Devyver argues that the instruction improperly informed the jury that his acts "were *not* any less criminal as a result of his intoxication." Br. of Appellant at 19. We disagree.

The instruction stated, "No act committed by a person while in a state of voluntary intoxication is *less criminal* by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent, knowledge, willfulness, or recklessness." CP at 53 (emphasis added). Devyver cites *State v. Sao*, 156 Wn. App. 67, 76, 230

[8] The State contends that Devyver's argument should be precluded by the invited error doctrine. The invited error doctrine prevents a party, under most circumstances, from appealing an error that he or she created. *State v. Vander Houwen*, 163 Wn.2d 25, 37, 177 P.3d 93 (2008). Devyver argues that we should review the issue because the instruction is a misstatement of the law and his counsel provided deficient representation by offering the instruction. While it is true that "[i]f instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review," *State v. Kyllo*, 166 Wn.2d 856, 861, 215 P.3d 177 (2009), that is not the circumstance here because there is no error.

P.3d 277 (2010), arguing that rather than stating "is less criminal," Br. of Appellant at 19, the instruction should have stated, "is not justified or excused." Br. of Appellant at 19 n.12. The WPIC on which the instruction is based, WPIC 18.10, relies on RCW 9A.16.090. That statute states,

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

RCW 9A.16.090. This WPIC instruction has been upheld as a "correct statement of the law." *State v. Corwin*, 32 Wn. App. 493, 498, 649 P.2d 119 (1982); *see also State v. Coates*, 107 Wn.2d 882, 891, 735 P.2d 64 (1987); *State v. Hackett*, 64 Wn. App. 780, 786-87, 827 P.2d 1013 (1992).

In his reply brief, Devyver argues that *Coates* does not address the issue he raises. However, in *Coates*, the court examined the language "less criminal" and stated that the combination of that language with the second sentence of the instruction regarding requisite mental state indicates "how the statute is to be employed." 107 Wn.2d at 889. The court stated,

> This means that such evidence cannot form the basis of an affirmative defense that essentially admits the crime but attempts to excuse or mitigate the actor's criminality. Rather, evidence of voluntary intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with a particular degree of mental culpability.

Coates, 107 Wn.2d at 889. We conclude that the instruction did not misstate the law.

Additionally, Devyver argues that he received ineffective assistance of counsel because his counsel proposed the voluntary intoxication instruction, which was erroneous and "negated the defense theory" of the case. Br. of Appellant at 21. Devyver also argues there is a reasonable probability the jury would have convicted him of a lesser offense if it had been properly instructed. To prevail on an ineffective assistance of counsel claim an appellant must establish (1) that defense

counsel's performance was deficient, falling below an objective standard of reasonableness, and (2) that defense counsel's deficient performance prejudiced the appellant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009) (applying *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *State v. McLean*, 178 Wn. App. 236, 246, 313 P.3d 1181 (2013), *review denied*, 179 Wn.2d 1026 (2014).

Here, counsel's performance was not deficient because the instruction proposed by defense counsel was not erroneous and was entirely in line with the defense theory of the case. Devyver testified that he did not remember any of the events of the night because of alcohol consumption. Furthermore, Devyver cannot establish prejudice because a substantial amount of evidence showed Devyver had become much less intoxicated as the evening progressed, and that he did not appear drunk back at the residence. Additionally, the instruction did not misstate the law. Credibility determinations are for the trier of fact and we defer to the trier of fact on issues of conflicting testimony, credibility of witness, and persuasiveness of the evidence. *State v. Rafay*, 168 Wn. App. 734, 843, 285 P.3d 83 (2012). We conclude Devyver's ineffective assistance of counsel argument fails.

Because the instruction accurately stated the law, there is no error, constitutional or otherwise. The issue has not been preserved for review. RAP 2.5(a)(3).

C. Reasonable Doubt Instruction

Devyver next argues that the trial court improperly instructed the jury on reasonable doubt. Specifically, he contends the language "'an abiding belief *in the truth of the charge*,'" misinformed the jury because it instructed the jury to search for the truth. Br. of Appellant at 47 (quoting CP at 49). He does not challenge the "abiding belief" language, only "the truth of the charge" language.

Br. of Appellant at 47 n.37. Devyver did not object to the instruction. However, his asserted error implicates a constitutional interest. *See State v. Kalebaugh*, 183 Wn.2d 578, 582, 584, 355 P.3d 253 (2015).

We recently considered the same issue in *State v. Jenson*, 194 Wn. App. 900, 378 P.3d 270 (2016), and upheld the instruction. Other cases are in accord. *State v. Lizarraga*, 191 Wn. App. 530, 567, 364 P.3d 810 (2015), *review denied*, 185 Wn.2d 1022; *State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870, *review denied*, 181 Wn.2d 1019 (2014); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784, *review denied*, 181 Wn.2d 1009 (2014). The trial court did not err.

D. Manslaughter Lesser Included Offense Instruction

Devyver also argues that the trial court erred by declining to instruct the jury on manslaughter in the second degree as a lesser included offense to felony murder in the second degree where assault in the second degree was the predicate felony. Here again Devyver presents the issue as one of constitutional error, to be reviewed de novo.[9]

[9] Devyver asks us to apply the test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 74 L. Ed. 2d 18 (1976), to reach the conclusion that his constitutional rights were violated and relies on a *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), analysis. Because of our resolution of the issue above, we do not address these arguments.

Devyver proposed the instruction, but only if assault in the third degree was the predicate felony. Devyver emphasized this point in a colloquy with the trial court. Therefore, Devyver is asking that we review an issue the trial court never addressed.[10]

Devyver also argues that we should review the court's failure to give a lesser included instruction as a violation of his procedural due process rights. First, Devyver was not entitled to the instruction. Second, he acknowledges that the rule is only applicable in capital cases but argues it should be extended to noncapital cases. We follow case precedent and directly controlling law. That precedent does not state that a criminal defendant is entitled to a lesser included offense he did not ask for in all circumstances. *See State v. Tamalini*, 134 Wn.2d 725, 730-31, 953 P.2d 450 (1998). We decline to decide constitutional issues where alternate grounds exist. *Citizens' All. for Prop. Rights v. Sims*, 145 Wn. App. 649, 656, 187 P.3d 786 (2008). Here, the court was not asked to give the instruction. Therefore, we do not reach the issue of whether Devyver's due process rights were violated.

However, because Devyver also makes an ineffective assistance of counsel claim related to this issue, we must conduct some review of whether Devyver was entitled to the instruction to determine whether Devyver received ineffective assistance of counsel. Because "[a] defendant cannot claim that the trial court erred in refusing an instruction he did not offer unless the failure to so instruct is violative of a constitutional right," we review this claim as an ineffective assistance of counsel claim. *Tamalini*, 134 Wn.2d at 730-31.

[10] Devyver also argues that we should not let defense counsel's "concession as to the law" prevent review. Br. of Appellant at 34. He quotes *Worden v. Smith*, 178 Wn. App. 309, 327, 314 P.3d 1125 (2013), stating, "it is error for a court to treat parties' stipulations to law as binding." Br. of Appellant at 34. This quote is taken out of context and does not apply to this circumstance where the court asked for clarification on what instruction defense counsel proposed and defense counsel answered.

To demonstrate prejudice on an ineffective assistance of counsel claim, an appellant must show a reasonable probability that but for counsel's performance, the outcome would have differed. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Devyver cannot meet this burden because he was not entitled to an instruction on manslaughter in the second degree as a lesser included offense of the offense charged. "The right to a lesser included offense instruction is statutory, codified at RCW 10.61.006." *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015). A defendant is entitled to an instruction on a lesser included offense if two conditions are met: (1) each of the elements of the lesser offense must be a necessary element of the offense charged and (2) the evidence in the case must support an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The first prong is often referred to as the legal prong and the second as the factual prong. *State v. Gamble*, 154 Wn.2d 457, 463, 114 P.3d 646 (2005).

To satisfy the factual prong, the evidence must raise an inference that only the lesser included offense was committed to the exclusion of the charged offense. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). More specifically, a requested jury instruction on a lesser included offense should be given "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997).

Devyver argues that the evidence, supports an inference that he committed only manslaughter in the second degree. He contends that the facts show he killed Woods in an "alcoholic blackout." Br. of Appellant at 32. Such a state does not necessarily mean a person acted without intent. Further, voluntary intoxication does not negate criminal negligence. Manslaughter in the second degree requires proof that the defendant, with criminal negligence,

caused the death of another person. RCW 9A.32.070. Devyver points only to his drunkenness to support his argument. He cites to no other evidence in the record to indicate he acted with negligence.

We decline to "comb the record" to find the support Devyver fails to provide for the assertion. RAP 10.3(6); *State v. Wise*, 176 Wn.2d 1, 12-13, 288 P.3d 1113 (2012). We conclude Devyver has not satisfied the factual prong because it is insufficiently briefed, and moreover, Devyver has failed to show that a jury could find him guilty of manslaughter in the second degree to the exclusion of felony murder in the second degree on this record.

Addressing the legal prong, the State charged Devyver with murder in the second degree, with assault in either the first, second, or third degree as the predicate felony. Below, Devyver concurred with the trial court that manslaughter was not a lesser included offense to felony murder if the predicate offense was assault in the first or second degree. Devyver now retreats from that position and argues that a conviction for murder in the second degree based on a death occurring through assault in the second degree with a deadly weapon, under RCW 9A.36.021(1)(c), "necessarily establishes the elements of [manslaughter in the second degree]." Br. of Appellant at 28. We disagree.

Washington courts have repeatedly held that manslaughter is not a lesser included offense for felony murder in the second degree, predicated on assault in the first and second degree, because felony murder lacks a specific *mens rea*. *Bowman v. State*, 162 Wn.2d 325, 334-35, 172 P.3d 681 (2007); *Tamalini*, 134 Wn.2d at 729-30; *see also State v. Berlin*, 133 Wn.2d 541, 550, 947 P.2d 700 (1997); *State v. Davis*, 121 Wn.2d 1, 6, 846 P.2d 527 (1993), *abrogated on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997); *State v. Dennison*, 115 Wn.2d 609, 626-27, 801 P.2d 193 (1990). However, Devyver argues that *Gamble* alters this precedent.

Gamble, 154 Wn.2d 457, may impact how we review the issue, but it did not overrule the line of cases preceding it.

In *Gamble*, the court considered whether manslaughter in the first degree could be a lesser included offense for felony murder in the second degree when assault in the second degree, under the "recklessly inflict[s] substantial bodily harm" prong, was the predicate offense. 154 Wn.2d at 467. The court held that manslaughter was not a lesser included offense of murder in the second degree under that specific charge. *Gamble*, 154 Wn.2d at 469. In reaching this holding, the court reasoned that although it is important to examine the elements of the offense the State actually charged, it also is essential that the court "give due regard to [the elements] necessary relational nature." *Gamble*, 154 Wn.2d at 467. The court held that felony murder predicated on assault by recklessly inflicting substantial bodily harm, did not contemplate a risk of homicide and therefore, was "unamenable to a lesser included offense instruction on the offense of manslaughter." *Gamble*, 154 Wn.2d at 468.

Here, the State in relevant part to this analysis, charged Devyver with felony murder in the second degree with assault in the second degree as the predicate offense. The State alleged two prongs under the assault in the second degree statute: intentional assault of another thereby recklessly inflicting substantial bodily harm and intentional assault of another with a deadly weapon. We need not repeat the analysis from *Gamble* on the former prong because nothing has changed. Therefore, we only address the assault with a deadly weapon prong.

Devyver argues that assault with a deadly weapon "necessarily" means the defendant knew and disregarded a substantial risk that a homicide might occur. Br. of Appellant at 28. We disagree.

The elements of assault in the second degree, as charged here, include: "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: . . . (c) Assaults another with a deadly weapon." RCW 9A.36.021(1). The elements of manslaughter in the second degree are "with criminal negligence" that person "causes the death of another person." RCW 9A.32.070(1).

The mental state required to prove felony murder predicated on assault with a deadly weapon is different from the mental state required to prove manslaughter. We do not compare mental state elements in isolation; rather, we examine mental states as they necessarily relate to the defendant's acts. *Gamble*, 154 Wn.2d at 467. Here, the requisite mental state of assault with a deadly weapon does not require the State to prove Devyver caused the death of another person with a criminally negligent state of mind as is required for manslaughter. RCW 9A.32.070(1).

"A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(d). In the context of manslaughter, the "wrongful act" caused by a defendant's actions is homicide. *State v. Henderson*, 182 Wn.2d 734, 744, 344 P.3d 1207 (2015); *Gamble*, 154 Wn.2d at 467.

To obtain a manslaughter conviction, the State must prove that the defendant (1) knew of and disregarded a substantial risk that a *death* may occur or (2) failed to be aware of a substantial risk that a *death* may occur. RCW 9A.32.060(1)(a); RCW 9A.32.070(1). On the contrary, to obtain a felony murder conviction, the State here was required to prove that the defendant assaulted another with a deadly weapon. RCW 9A.36.021(1)(c). Significantly, assault in the second degree as charged here does not contemplate a risk of death. Manslaughter does. In fact, the felony

murder in Devyver's case did not require the State to prove any mental element as to the resulting death itself. On the other hand, manslaughter requires proof of a mental element vis-à-vis the resulting death. *See Gamble*, 154 Wn.2d at 468–69.

Assault with a deadly weapon does not "necessarily" mean the defendant acted with criminal negligence that resulted in death. Instead, it means that the defendant intentionally acted in a way likely to cause substantial bodily harm. The offense becomes felony murder because in the course of and in furtherance of committing the felony, the defendant caused the death of another. As in *Gamble*, the felony murder as charged, did not contemplate the risk of a homicide. Manslaughter in the second degree is not a lesser included offense to murder in the second degree with the relevant predicate felonies charged in this case. Furthermore, there was overwhelming evidence to support Devyver's conviction and he provides no argument to suggest the outcome of his trial would have differed with a lesser included offense instruction.

Additionally, while his counsel may not have argued that *Gamble* encouraged a case by case approach, this inaction by itself does not establish conduct falling below an objectively reasonable standard. An attorney need not advance every argument, regardless of merit, *In re Pers. Restraint of Frampton*, 45 Wn. App. 554, 562 n.8, 726 P.2d 486 (1986), nor must an attorney pursue strategies that appear unlikely to succeed. *State v. Brown*, 159 Wn. App. 366, 371, 245 P.3d 776 (2011). Moreover, Devyver's counsel was correct in stating that he was not entitled to the instruction. Counsel's conduct cannot be said to be deficient. Here, Devyver was not entitled to the instruction, his counsel did propose and argue the instruction on other grounds, and his counsel otherwise advocated for Devyver throughout his trial. It cannot be said that the jury was improperly instructed or that Devyver received ineffective assistance of counsel.

III. STATEMENT OF ADDITIONAL GROUNDS

In Devyver's SAG, he asserts (1) that he did not receive sufficient trial transcripts and (2) that the trial court improperly instructed the jury. He also asserts (3) that insufficient evidence supported his assault in the second degree conviction against Reneer and (4) that he should not have been charged with robbery in the first degree and a deadly weapon enhancement, and in the alternative, that the deadly weapon enhancement was not supported by sufficient evidence. Finally he argues (5) that he received ineffective assistance of counsel because his counsel did not argue he lacked the requisite criminal intent.

A. Trial Transcripts

Devyver asserts that "[j]ury instructions, opening statements from the [S]tate, and opening statements from defense counsel have not been transcribed in the trial transcripts. Without these sections I have no way to check for prosecutorial misconduct, ineffective assistance of counsel from defense, or procedural misconduct from the court." SAG at 1. While it is true that the court's oral reading of the jury instructions and opening statements are not transcribed, Devyver does not actually assert an issue from which we can grant relief.

The onus is on the party seeking review to arrange for transcription within 30 days of filing the notice of appeal. RAP 9.2(a). The party seeking review "should arrange for the transcription of all those portions of the verbatim report of proceedings [RPs] necessary to present the issues raised on review." RAP 9.2(b). If the RP is provided at public expense it does not include opening statements unless ordered by the trial court. RAP 9.2(b). The rule also states, "If the party seeking review intends to urge that the court erred in giving or failing to give an instruction, the party should include in the record all of the instructions given, the relevant instructions proposed, the party's objections to the instructions given, and the court's ruling on the objections." RAP 9.2(b).

The RAP rule regarding SAGs states, "If within 30 days after service of the brief prepared by defendant's counsel, defendant requests a copy of the [RPs] from defendant's counsel, counsel should promptly serve a copy of the [RPs] on the defendant and should file in the appellate court proof of such service." RAP 10.10(e).

The trial court found Devyver to be indigent and there does not appear to be a special order to include opening statements. Furthermore, despite not including the court's oral reading of the instructions, the record does include the instructions given, the instructions proposed, the party's objections, and the court's rulings. Additionally, Devyver is not making an ineffective assistance of counsel argument, he is merely asserting that he may have been prejudiced. As such, we do not consider the issue because it is based on facts outside the record. *State v. Lough*, 70 Wn. App. 302, 335, 853 P.2d 920 (1993), *aff'd*, 125 Wn.2d 847, 889 P.2d 487 (1995).

B. Jury Instructions

1. Voluntary Intoxication Instruction

Devyver asserts that the voluntary intoxication jury instruction included erroneous mental state language because it listed possible mental states but excluded "criminal negligence" from the list. SAG at 1. This issue is not preserved for review.

The instruction stated, "[E]vidence of intoxication may be considered in determining whether the defendant acted with intent, knowledge, willfulness, and recklessness." CP at 53. As stated above, Devyver proposed the instruction and did not object to its form at trial. Therefore, Devyver must show that the instruction was a manifest error affecting a constitutional right to warrant review. RAP 2.5(a)(3). Devyver cannot do so because the instruction was proper.

"A person is criminally negligent or acts with criminal negligence when he . . . fails to be aware of a substantial risk that a wrongful act may occur and his . . . failure to be aware of such

substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(d). Courts have previously held that "[b]ecause this mental state is based on a reasonable person standard, evidence of defendant's voluntary intoxication can not work in any way to negate or obviate the mental state." *Coates*, 107 Wn.2d at 892. The trial court does not err where it declines to instruct the jury from considering voluntary intoxication as a defense to a crime requiring criminal negligence as the mental state. *See Coates*, 107 Wn.2d at 893. A trial court is under no obligation to give inaccurate or misleading instructions. *Ehrhardt*, 167 Wn. App. at 939. The court did not err.

2. Lesser Included Offense Instructions

Devyver asserts the trial court erred by declining to instruct the jury on manslaughter in the second degree as a lesser included offense to murder in the second degree, and by declining to instruct the jury on theft in the third degree as a lesser included offense to robbery. We disagree.

a. Manslaughter in the Second Degree

Devyver asserts that the trial court erred by declining to instruct the jury on manslaughter in the second degree as a lesser included offense. The issue is addressed above and Devyver does not make any new arguments. The trial court did not err because the manslaughter in the second degree instruction fails the factual and legal prongs of the *Workman* test in this case.

b. Theft in the Third Degree

Devyver also asserts the trial court err by declining to give a theft in the third degree lesser included instruction for robbery in the first degree. Because it is not enough that the jury might disbelieve the evidence pointing to guilt, the evidence must affirmatively establish the defendant's theory of the case, Devyver's claim fails. *Fernandez-Medina*, 141 Wn.2d at 456.

Theft in the third degree satisfies the legal prong of the *Workman* test in this case. A person is guilty of theft in the third degree if he commits theft of property that does not exceed seven hundred fifty dollars in value. RCW 9A.56.050(1). One element of the robbery in the first degree charge was that Devyver "intended to commit theft of the property." CP at 76. Each element of theft in the third degree is a necessary element of the robbery charge. *Workman*, 90 Wn.2d at 447-48. However, theft in the third degree cannot satisfy the factual prong in this case.

The second prong, the factual test, includes a requirement that there be a factual showing more particularized than that required for other jury instructions. *Fernandez-Medina*, 141 Wn.2d at 455. The evidence must raise an inference that only the lesser included offense was committed to the exclusion of the charged offense. *Fernandez-Medina*, 141 Wn.2d at 455. More specifically, a requested jury instruction on a lesser included offense should be administered "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *Warden*, 133 Wn.2d at 563.

Defense counsel did not provide any factual support for giving the instruction below and there appears to be none. Even construed in the light most favorable to Devyver, as the moving party, the jury heard testimony that at the time Devyver began trying to leave the house, running around seemingly collecting items, Reneer had been stabbed, Woods had gotten between her and Devyver, and Woods was lying on the ground near her with a stab wound to his chest. Then, Devyver returned to Reneer holding a gun. He held the gun to her forehead and told her to give him her wallet.

Reneer testified that Devyver hit her in the head with the gun and photos of a laceration to her head taken at the hospital were admitted. Reneer also testified that Devyver threatened to kill her while holding the gun to her head. She pleaded with him not to kill her and told him to take

her car keys and "just leave." 3RP at 188. He then drove off in her car and police later recovered Reneer's wallet inside the overturned car. Devyver did not refute any of the testimony because he testified that he did not remember anything from that night from shortly after arriving at the bar until he was tased and placed in an ambulance.

Moreover, Devyver cannot demonstrate any prejudice from the instructions because the jury was provided instructions for both the offense charged, robbery in the first degree and the lesser included offense of robbery in the second degree. The jury found Devyver guilty of the greater offense and returned a special verdict that he was armed with a firearm. The jury could have found that Devyver simply took property from Reneer against her will by force or fear; however, it found that Devyver committed robbery in the first degree when he took property from Reneer while armed with a deadly weapon. Thus, Devyver cannot show prejudice. *See, e.g.*, *State v. Guilliot*, 106 Wn. App. 355, 368-69, 22 P.3d 1266 (2001).

C. Sufficiency of the Evidence

Devyver argues his conviction for assault in the second degree against Reneer was not supported by sufficient evidence. We disagree.

1. Standard of Review

We review the sufficiency of the evidence supporting a criminal conviction, in the light most favorable to the State. *Ehrhardt*, 167 Wn. App. at 943. We ask "'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010) (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). By challenging sufficiency, an appellant "admits the truth of the State's evidence and all reasonable inferences therefrom." *Ehrhardt*, 167 Wn. App. at 943.

We accord the same weight to direct and circumstantial evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A jury may properly infer the mental element of an offense "from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

2. Assault in the Second Degree

Devyver asserts there was "no forensic evidence" of assault. SAG at 3. Specifically, he contends that Reneer's DNA was not on any weapon, that her wounds were superficial, and that the only evidence supporting a higher degree was the testimony that "if the knife would've gone deeper," it would have caused more harm. SAG at 3.

To prove assault in the second degree, the State needed to prove beyond a reasonable doubt that Devyver intentionally assaulted Reneer, with a deadly weapon, recklessly inflicting substantial bodily harm, in the State of Washington. RCW 9A.36.021. The jury was instructed that assault "is an intentional cutting of another person, with unlawful force, that is harmful or offensive." CP at 61. The jury was also instructed that "[s]ubstantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part." CP at 64.

Reneer testified that Devyver came up behind her and she did not know if he was hugging her or what he was doing. She then felt sharp pains in her back and started screaming. She told Devyver to stop but he kept "escalating" and she felt him stabbing her. 3 RP at 178. She had two puncture stab wounds in her back—one in her mid-back on top of her spine and one over her right scapula. The wounds were approximately half an inch long and a quarter of an inch deep. They were both over bone. Reneer crawled up the stairs of the house to find Braswell-Donoho. She

and Braswell-Donoho came downstairs when the police arrived and Braswell-Donoho testified that Reneer, whose shirt was covered in blood, then tried to walk back up the stairs and fell.

Reneer was taken to the hospital to receive treatment and the wounds were stapled closed. The trauma surgeon that saw Reneer at the hospital testified that there was no penetration to the chest cavity because the knife "hit the bone." 4 RP at 247. Reneer testified that Devyver was washing somethings in the sink after stabbing Woods and that the items in his hand looked like "sharp metal objects, probably a knife." 3 RP at 184. Devyver himself testified there were particularly essential body parts underneath the bone in the two places Reneer was stabbed.

The State called an employee from the Washington State Patrol Crime Laboratory who had tested the three knives found in the vehicle for blood. The witness stated he found blood that matched Devyver's DNA profile on the knives. He also stated on one knife the sample indicated both Devyver's and Woods's DNA was present.

Devyver is correct that the evidence did not prove Reneer's blood was on the knives. However, there was significant other circumstantial evidence. Viewing the evidence in the light most favorable to the State, there was sufficient evidence for a jury to find Devyver guilty of assault in the second degree.

D. Firearm Enhancement

1. Improper Enhancement

Devyver argues that the trial court erred by applying a firearm enhancement to a charge of robbery in the first degree because the only difference between robbery in the first degree and robbery in the second degree is the use of a weapon. We disagree.

Washington case law does not support Devyver's argument. A firearm deadly weapon finding may be used for two purposes, an element and an enhancement. *State v. Harris*, 102

Wn.2d 148, 158-61, 685 P.2d 584 (1984), *overruled on other grounds by State v. McKinsey*, 116 Wn.2d 911, 810 P.2d 907 (1991); *State v. Harvey*, 34 Wn. App. 737, 741, 664 P.2d 1281 (1983); *State v. Woods*, 34 Wn. App. 750, 754-55, 665 P.2d 895 (1983); *State v. Willoughby*, 29 Wn. App. 828, 834, 630 P.2d 1387 (1981). We follow that precedent.

2. Sufficiency of the Evidence

Devyver also asserts that if the enhancement was proper, it was not supported by sufficient evidence. He contends there was a lack of forensic evidence and no positive identification of the gun. We disagree.

To prove the enhancement, the State needed to prove beyond a reasonable doubt that Devyver was armed with a firearm at the time he committed robbery in the first degree. Reneer testified that Devyver held a gun to her forehead and told her to give him her wallet. Reneer also testified that he hit her in the head with the gun and photos of a laceration to her head taken at the hospital were admitted at trial. Although the trauma surgeon who saw Reneer testified she did not have a head injury, stating, "She was awake and alert, oriented," he also acknowledged that she had "a laceration" to her head. 4 RP at 253. Reneer further testified that Devyver threatened to kill her, and that she pleaded with him to not kill her and told him to take her car keys and "just leave." 3 RP at 188.

The officers at the scene of the car crash found a firearm in the grass where the vehicle rolled over. Officers also recovered a hard-shelled gun case and another gun case at the scene of the crash. Inside one of the gun cases was a Smith and Wesson nine millimeter semi-automatic pistol. Reneer testified that she did not know guns well but that she knew Devyver owned a pistol. She also stated that the pistol in evidence looked similar to the one Devyver struck her with. Devyver testified that he owned a Smith and Wesson semi-automatic handgun. He also stated that

one case recovered appeared to be one he owned and that he was not certain about the other because there was nothing particularly identifiable about it.

Viewing the evidence in the light most favorable to the State, there was sufficient evidence for the jury to return a special verdict finding Devyver was armed with a firearm.

E. Ineffective Assistance of Counsel

Devyver asserts that he received ineffective assistance of counsel because his attorney failed to argue Devyver lacked the requisite criminal intent. We disagree.

During closing argument, Devyver's counsel introduced the voluntary intoxication instruction. Counsel quoted the instruction and explained that it was something the jury could consider when assessing intent. Counsel proceeded to identify specific testimony that indicated Devyver was highly intoxicated throughout the evening, including witnesses at the bar, Reneer's testimony, testimony of an officer after the car crash, and the toxicologist.

Counsel stated several times that the jury could look at Devyver's intoxication when determining intent to commit the acts later that night, specifically referencing robbery and eluding. He stated, "There is, because of the circumstances, the alcohol involved and the nature of the injuries, the nature of what happened, there's a reasonable doubt that [Devyver] had any intent as to any of these crimes." 7 RP at 768. The record does not support Devyver's argument. Counsel's conduct did not fall below a reasonable standard, and thus, Devyver cannot establish his ineffective assistance of counsel claim.

Devyver has also filed a supplemental brief requesting that we waive appellate costs under *State v. Sinclair*, 192 Wn. App. 380, 389-90, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016). He argues that the trial court found him indigent and his status is unlikely to change. We will give

a party the benefit of an order of indigency unless a trial court finds otherwise. RAP 15.2(f). We waive appellate costs.

We affirm Devyver's conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Lee, P.J.

Sutton, J.

BACKLUND & MISTRY

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