SUPREME COURT NO. 97676-7

NO. 76503-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

AARON YBARRA,

Petitioner.

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

The Honorable Jim Rogers, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Aaron Ybarra, appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Ybarra seeks review of the Court of Appeals decision in State v. Ybarra, No. 7650305-I (Slip Op. filed August 19, 2019). A copy of the decision is attached as an appendix.

C. REASONS TO ACCEPT REVIEW

This Court should accept review because the decision raises significant questions of law under Wash. Const. article 4, § 16, which prohibits judicial comment on evidence, conflicts with this Court's decision regarding what constitutes an improper judicial comment on the evidence and because the decision conflicts with this Court's decision in State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978) and its progeny involving when a defendant is entitled to have the jury instructed on lesser included offenses. RAP 13.4(b)(1), (3).

D. ISSUES PRESENTED FOR REVIEW

Ybarra was charged with premeditated first degree murder and attempted premediated first degree murder after shooting several people on the campus of Seattle Pacific University (SPU). Ybarra admitted being the shooter, but claimed he was not guilty by reason of insanity (NGRI).

Ybarra also argued the prosecution failed to prove the shootings that did occur were premeditated.

Mental health experts testified for each side regarding the NGRI defense, and their testimony conflicted. The trial court told jurors the defense expert was a "very important" witness, and that their verdicts would turn on the testimony of these experts.

1. Did the trial court's comments about the mental health experts constitute improper judicial comments on the evidence in violation of article 4, § 16, because they unfairly implied the only issue was whether Ybarra was NGRI, when before reaching that issue the prosecution had to first prove commission of the crimes charged beyond a reasonable doubt, and when whether the shootings were premediated was a contested issue?

2. Ybarra testified his premeditated intent was to enter a classroom and start killing people, but he never made it to a classroom. Ybarra testified that the shootings that did occur were done because of how the victims responded to him carrying a shotgun on campus, and not as part of the planned classroom killings. Did the trial court err in refusing to instruct the jury that second degree murder and attempted second degree murder were lesser-included offenses to the first degree murder and attempted first degree murder charges in light of the Ybarra's

testimony that the shootings he did commit were intentional but not premeditated?

E. STATEMENT OF THE CASE

On June 5, 2014, SPU student Anna Sophia Curturlio-Hackney was talking to fellow student Thomas Fowler outside of Otto Miller Hall (OMH) on the SPU campus when Ybarra walked up pointing a gun at them and ordering them to "Get inside." 8RP[1] 207, 213-15, 393. Curturlio-Hackney thought it was joke, so she laughed and turned away and started talking to Fowler again. 8RP 214-15. She then heard a loud bang and saw another student, Paul Lee, fall to the ground with a severe head wound. 8RP 215-17.

Curturlio-Hackney recalled looking at Ybarra after he shot Lee, saw he had the gun pointed at her and then heard a "click," after which Ybarra brought the gun down and started "manipulating it somehow."

[1] There are 31 volumes of verbatim report of proceedings referenced as follows: **1RP** -9/7/16 (first day of trial) & 2/17/17 (sentencing); **2RP**-two-volume consecutively paginated set for 9/14/16; **3RP** – 9/20/16; **4RP** – 9/21/16 (*a.m.*); **5RP** – 9/21/16 (*p.m.*); **6RP** – 9/19/16 (erroneously double paginated as part of 8RP); **7RP -** 11/15/16; **8RP** – 23-volume consecutively paginated set for the dates of 9/12/16, 9/19/16 (different than 6RP), 9/22/16, 10/3/16 (*a.m.*), 10/3/16 (*p.m.*) 10/10-13/16, 10/17/16, 10/25-27/16, 10/31/16, 11/1-3/16, 11/7-9/16, 11/14/16, and 11/16/16; and **9RP** – 8/9/17 (restitution hearing before the Honorable Timothy A. Bradshaw).

8RP 218. Fowler and Curturlio-Hackney looked at each other and then ran away. 8RP 218-19.

The next person Ybarra interacted with was Tristan Cooper-Roth, who was studying and listening to music with headphones in the lobby of OMH when Ybarra entered. 8RP 349. Cooper-Roth recalled Ybarra pointing a gun at him and telling him, "Don't disrespect because I shot somebody outside that disrespected me." 8RP 350, 352-53. Cooper-Roth said Ybarra then turned his attention to Sarah Williams, who was coming down the stairs, and shot her. 8RP 353-54, 435-36. Cooper-Roth thought Ybarra shot Williams only after she failed to follow his order to stop. 8RP 355. As Ybarra discharged the spent shell casing, Cooper-Roth fled the building. 8RP 356-57.

Williams recalled reaching the bottom of the stairs in OMH and seeing a man pointing a "rifle-type" gun at another man in the lobby. 8RP 43-35. Williams said she "froze," and then the man with the gun turned, pointed the rifle at her and shot, striking her in the right chest area and knocking her back. 8RP 436. Williams did not recall Ybarra saying anything before he shot. 8RP 437. Williams denied laughing or smiling at him before he shot. 8RP 438.

John Meis was a building monitor at OMH. 8RP 390-91. Meis was sitting in the monitor's room with his headphones on when someone

entered, and he did not think anything of it until he looked up and saw a man pointing a shotgun at people, who had their hands up and loudly telling them to "'Don't move,' or, 'Nobody move,' something." 8RP 393, 396. Meis next heard a gunshot and saw students running and then the man, Ybarra, had the "shotgun broken open, trying to reload." 8RP 394. Meis pepper sprayed Ybarra in the face and wrestled the shotgun away from him. 8RP 394, 402. When he saw Ybarra then crouch on the ground try to pull something out of his pocket, Meis grabbed him from behind, causing Ybarra to drop a knife, and then held him to the ground until law enforcement arrived and took him into custody. 8RP 394, 402-03, 505.

Ybarra testified at trial, explaining that at about the time he started drinking alcohol he began obsessing about committing a school shooting after he started hearing the voices of Eric Harris, one of the Columbine shooters, and God in his head. 8RP 1174, 1244-45. God told Ybarra he had been "cut off from Heaven, and I'm set to go to Hell, so I have to - - so he is going to have Satan control the destruction part. I have to do destruction in order to go to Hell." 8RP 1245. Ybarra explained God wanted him to serve as an example of sin to "the community, and also the world." 8RP 1245, 1374. Ybarra claimed Harris's voice was in his head "[e]very day. Every time throughout the day." 8RP 1246. Drinking helped quiet the voices. 8RP 1246, 1248.

Ybarra became suicidal in 2010 as a result of his drinking and the voices in his head. 8RP 1251. He recalled laying out in the cold and rain one night waiting to die of hypothermia. Id. It was at about this time that he first felt betrayed by God, so he turned to Satan. 8RP 1382-83.

By the spring of 2014, Harris' voice was absent, but God and Satan were both pressuring Ybarra to commit a school shooting. 8RP 1284. Ybarra said he kept a journal about his plans for the shooting, but in it never mentions "God's plan." Id. Ybarra explained the plan was for him to die in the incident so that he could not explain why it occurred, which would leave "professionals" to focus on what was going on in the world. 8RP 1284-85, 1342.

With regard to his post-arrest interview with police, Ybarra said he never mentioned "God's plan" at the time as the plan was still underway because he was not yet dead. 8RP 1287-88, 1338. Ybarra said the desire to kill himself in jail subsided after he was put on various medications and moved to a new floor. 8RP 1288. Prior to that, Ybarra tried to keep God's plan secret. 8RP 1289.

When pressured on cross examination about keeping the God's plan secret for almost two years since his arrest, and only divulging it when he was interviewed by the prosecution's expert witness, Dr. Kenneth Muscatel, Ybarra admitted he was scared by the plan, not wanting to hurt

others or end up in Hell. 8RP 1292-93. Ybarra later clarified that he told both the defense expert, Dr. Craig Beaver, and Dr. Muscatel about "God's plan" when he spoke to them. 8RP 1384. Ybarra admitted he knew it was legally and morally wrong to kill. 8RP 1293.

Ybarra said he did not target Lee, but instead Lee just walked into his line of fire. 8RP 1294. But he also admitted that he shot Lee for not respecting the fact that Ybarra was armed with a shotgun. 8RP 1295, 1297, 1340. Ybarra claimed he aimed at Lee's shoulder, and that it was supposed to be a "warning shot," and not a shot to kill. 8RP 1369-71. Ybarra also said he tried to shoot at Curturlio-Hackney and Fowler for the same reason, but the gun unexpectedly failed to fire. 8RP 1297-99.

When asked why he did not shoot others outside before approaching Curturlio-Hackney and Fowler, Ybarra explained that "it wasn't a good way to start." 8RP 1300. Ybarra explained the plan was to enter through the backdoor, but the door was locked, so instead he entered the main entrance and was planning to make his way to a classroom with students present and start killing. 8RP 1301, 1303, 1306, 1318, 1377. Ybarra said he was telling those in the lobby to cooperate so he could pass through to get to a classroom. 8RP 1303.

Ybarra also admitted he considered taking Curturlio-Hackney, Fowler and Lee hostage when he approached them to help get him into

OMH, and then release them as he made his way to a classroom. 8RP 1311. But as he approached, they did not respond as expected, so he shot at them, intending just to wound them. 8RP 1312-15.

Ybarra recalled approaching Cooper-Roth in the OMH lobby with the gun to see how he would react. 8RP 1361. Ybarra did not shoot Cooper-Roth because he seemed to be paying attention and giving Ybarra respect the situation called for. 8RP 1361-62.

Ybarra said he did not notice Williams coming down the stairs into OMH lobby until she was near the bottom. 8RP 1362. She "froze" when she saw him, and Ybarra told her, "I don't want to have to hurt you." 8RP 1362-63. She gave him an initial look of confusion, but then "laughed, like whatever," as if it were just a joke. 8RP 1363. She kept walking so Ybarra shot her. 8RP 1304, 1363-64. As with Lee, Ybarra claimed he did not intend to kill Williams with the shot, which was also intended as a "warning shot." 8RP 1371.

Following Ybarra's testimony, the jury heard testimony from Ybarra's therapist, Samantha Goode (8RP 1386-1504), his psychiatrist, Dr. Heidi Iwanski (8RP 1699-1782), his pediatric neurologist, Dr. Stephen Glass (8RP 1783-1811), the jail chaplain (8RP 1812-1829), Dr. Beaver (8RP 1509-1662), and Dr. Muscatel (8RP 1887-2094).

Dr. Beaver is a psychologist who evaluated Ybarra while he was in jail after the shooting. 8RP 1510, 1520. Dr. Beaver opined that Ybarra's "schizoaffective disorder, limited intellectual abilities, his social difficulties with [A]spergers or autism spectrum," constitute a "severe mental disease or defect" that "impacted his ability to understand the wrongfulness of his actions." 8RP 1531. Dr. Beaver also opined that Ybarra knew shooting others was "legally wrong," but failed to recognize the moral wrongness because it was part of "the grand plan of God, and that he had no choice in the matter because of that." 8RP 1574, 1617. In other words, Ybarra "was being directly commanded by God, through Satan and Lucifer, to engage in the shootings." 8RP 1575. Dr. Beaver did not think Ybarra was not smart enough to conjure up a deific command defense and believed Ybarra "felt he was directly commanded by God, via Satan, to engage in" the shootings at SPU. 8RP 1596, 1645.

The prosecution expert, Dr. Muscatel, a psychologist who also evaluated Ybarra after the shootings, was the final witness at trial, and he disagreed with Dr. Beaver's assessment of Ybarra's culpability. 8RP 1887, 1892, 2010. Dr. Muscatel "professional opinion" was that Ybarra "understood that [the shootings were legally and morally wrong], but I think he felt influenced by other forces. But I think he understood it was

wrong, that's why I couldn't conclude that he was legally insane." 8RP 2010.

The jury rejected Ybarra's NGRI defense and found him guilty as charged. CP 292-314; 8RP 2232-87. Ybarra received a high-end standard range sentence of 1,343 months. CP 337-44; 1RP 34-35.

On appeal, Ybarra argued improper judicial comments on the evidence and the failure to instruct the jury on second degree murder and attempted second degree murder deprived his of his right to a fair trial. Brief of Appellant (BOA) at 2-35. The Court of Appeals rejected both claims. Appendix. Ybarra now seeks review of that decision.

F. ARGUMENT

1. THE COURT OF APPEALS DECISION RAISES SIGNIFICANT QUESTION OF LAW UNDER WASH. CONST. ARTICLE 4, § 16 AND CONFLICTS WITH THIS COURT'S DECISIONS.

On appeal, Ybarra claimed the trial court made improper judicial comments to the jury on three separate occasions, each in reference to the testimony of Dr. Beaver and Dr. Muscatel, each exacerbating the prejudicial effect of the others, and that this deprived him of a fair trial. BOA at 19-28.

The first improper comment occurred following a recess on the 10th day of trial, when therapist Goode was testifying. The trial court

chose to update jurors on the anticipated schedule for the rest of the week. 8RP 1413-14. As part of that update, the court noted Dr. Beaver would be testifying the following day and told jurors the court considered him "an important witness for the defense." 8RP 1414.

The second improper comment occurred at the conclusion of Dr. Beaver's testimony. The court explained for jurors, "We planned a long period of time for this witness, obviously, an important witness, so in case it took all day, and we have no other witnesses planned for today." 8RP 1685.

The third improper comment occurred early in the prosecutor's direct examination of the final witness, Dr. Muscatel, who was asked to refer to a "marked up" copy of his report before responding to a question. 8RP 1896. The court allowed the doctor to do so, but then explained to jurors they would only see admitted exhibits, but the parties were entitled to view any exhibit used at trial. The court then stated:

> The testimony of the witnesses is the evidence, for example, Dr. Muscatel will be talking from his report and, of course, Dr. Beaver did the same. Those reports were not admitted into evidence, so their testimony is the evidence that you will use in making your decision about this case.

8RP 1896 (emphasis added).

In rejecting Ybarra's claim that these comments were improper, the Court of Appeals faults him for no citing "a case where a trial court's

comments about scheduling or characterizing that a witness is 'important' demonstrates the court's attitude towards the witness or the witness's credibility." Appendix at 13. In reaching this conclusion, the Court of Appeals took a myopic view of how jurors may have interpreted the court's comments. This raises the question; what is the appropriate standard for evaluating whether a trial court comment at least implicitly improperly indicates the court's attitude about contested trial issues? There are no published decisions in Washington that set forth such a standard. Therefore, review is warranted to answer this significant question of law under article 4, § 16. RAP 13.4(b)(3).

The Court of Appeals decision also seems to assume that judicial comments must explicitly reveal the court's views about evidence to constitute a violation of article 4, § 16, which conflicts with this Court's prior decisions holding that judicial comments violate this constitutional provision even if they only *implicitly* indicate the court's opinion about the evidence. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006); State v. Eisner, 95 Wn.2d 458, 462, 626 P.2d 10 (1981); State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). Review is therefore warranted under RAP 13.4(b)(1).

2. THE COURT OF APPEALS DECISION CONDONING THE TRIAL COURT'S REFUSAL TO INSTRUCT JURORS ON THE LESSER INCLUDED OFFENSES OF SECOND DEGREE MURDER AND ATTEMPTED SECOND DEGREE MURDER CONFLICTS WITH WORKMAN AND ITS PROGENY.

Ybarra's counsel requested the jury be instructed on second degree murder and first degree manslaughter as lesser included offenses to the premeditated first degree murder charge and attempted second degree murder as lesser included offense to the attempted premeditated first degree murder charges. CP 210-15, 231-37. Defense counsel noted Ybarra's premeditated plan was to kill students in a classroom, and the evidence supported finding Ybarra's decisions to shoot at Lee, Fowler, Curturlio-Hackney and Williams were not part of that plan, but instead were made at the instant he shot. 8RP 2101-04.

The court disagreed, explaining:

> The evidence in this case is that Mr. Ybarra planned and thought about taking the shotgun to Seattle Pacific University for the purpose of a school shooting. There is some discrepancy or differences in the testimony as to whether he meant to go and kill as many students as possible, or whether he meant to do something different, which is to injure students. That's why the manslaughter lesser is appropriate. But I find no evidence consistent with the concept of simple intent as opposed to premeditation. All the evidence appears to be that any pointing and shooting of the gun was something that was thought as more than a moment in time, and not a simple intentional act. All of the evidence mandates towards Mr. Ybarra planning this, planning on using the gun, planning

> on shooting the gun. So there is no evidence from which -- and [defense counsel], I think, has made the best argument she can, but frankly, the arguments she made all supported the idea of premeditation. . . . So I will not give the lesser included of murder in the second degree. They will be instructed on murder in the first degree and manslaughter in the first degree.

8RP 2104-06 (emphasis added).

Ybarra's counsel took exception to the trial court's decision. 8RP 2130. Counsel exception was appropriate given that evidence supporting a finding that Ybarra's decision to shoot were spontaneous and outside the scope of the planned killings, which were to occur in a classroom, not outside or in the lobby of OMH. The trial court erred in failing to properly assess the evidence available in support of that finding, and the Court of Appeals perpetuated the error by rejecting Ybarra's claim on appeal. Appendix at 14-19.

Under RCW 10.61.006, a defendant is entitled to an instruction on a lesser included offense upon two conditions. First, under the legal prong, each of the elements of the lesser offense must be a necessary element of the offense charged. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Second, under Workman's factual prong, the evidence presented in the case must support an inference that only the lesser crime was committed. Id.

A trial court's decision on the legal prong of Workman is reviewed de novo. State v. Condon, 182 Wn.2d 307, 316, 343 P.3d 357 (2015). A trial court's decision on the factual prong of Workman is reviewed for an abuse of discretion. Id.

The trial court rejected Ybarra's request for lesser included instructions on second degree murder and attempted second degree murder was based on a finding they were not supported by the evidence. 8RP 2140-06. That decision, therefore, is appropriately reviewed under the abuse of discretion standard. Even under this liberal standard, the trial court erred in failing to instruct the jury as requested by Ybarra.

Ybarra was charged with the premeditated first degree murder of Lee and the attempted premeditated first degree murders of Fowler, Curturlio-Hackney and Williams. CP 10-12. Second degree intentional murder meets the legal prong under Workman because every element of second degree murder is included in the charge of premeditated first degree murder. Condon, 182 Wn.2d at 319. The only additional element necessary for a premeditated first degree murder conviction is a finding beyond a reasonable doubt that the killing involved "premeditation." Compare RCW 9A.32.030(1)(a) (premeditated first degree murder statute) with RCW 9A.32.050(1)(a) (second degree intentional murder statute).

"Premeditation" is "'the deliberate formation of and reflection upon the intent to take a human life'" and involves "'the mental process of ... deliberation, reflection, weighing or reasoning for a period of time, however short.'" State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995) (quoting State v. Gentry, 125 Wn.2d 570, 597–98, 888 P.2d 1105 (1995)). Premeditation must involve "more than a moment in point of time." RCW 9A.32.020(1).

The issue here is whether there was evidence from which jurors could reasonably conclude Ybarra intended to kill Lee, Fowler, Curturlio-Hackney and Williams when he shot at them, but that the intent in each circumstance was not premeditated. If there was, then the trial court abused its discretion in refusing Ybarra's requested for lesser include offense instructions on second degree murder and attempted second degree murder.

There was ample evidence from which jurors could conclude the shootings Ybarra did commit were intentional, but not premeditated. The trial court, however, failed to recognize this because it seemed unable to distinguish between the specific plan Ybarra had of going to a classroom and start killing before being killed or committing suicide, and the acts Ybarra actually committed in his effort to get to the classroom to carry out that plan. Instead it made a broad assumption that because Ybarra planned

to kill people at SPU, any intentional killing or attempted intentional killing that did occur were necessarily premeditated. 8RP 2104-06. The court's assumption was too broad, and it erred in failing to leave this factual determination to the jury.

Given the opportunity, reasonable jurors could have concluded Ybarra failed to carry out any of the premeditated killings because he never made it to a classroom. They could have also concluded the one death that did occur was the result of a spontaneous decision by Ybarra to shoot Lee for failing to "respect" that he was armed with a gun. Similarly, they could have concluded Ybarra's intentions in his attempts to kill Fowler, Curturlio-Hackney and Williams were not premeditated, but instead spontaneous decisions made based on their reactions to seeing him with a gun on campus.

Ybarra made clear at trial that he never intended as part of carrying out "God's plan" to kill anyone outside OMH, noting "it wasn't a good way to start." 8RP 1300. Rather, Ybarra testified the plan was to enter OMH through the backdoor, but it was locked, so he went to the main entrance intending to make his way to a classroom to carry out the planned killings. 8RP 1301, 1303, 1306, 1318, 1377. Before he could get into an OMH classroom, however, he encountered students, both inside and out, who did not respond to an armed man as he had expected, so he shot at

them. 8RP 1304, 1312-15, 1363-64. Based on this evidence alone, Ybarra was entitled to have the jurors consider second degree murder and attempted second degree murder as lesser included offenses to the charged crimes.

That the jury failed to convict Ybarra of first degree manslaughter for the death of Lee, which the jury instructions allowed for (CP 263-66, Instructions 15-18), supports Ybarra's claim here. It supports his claim because it shows the jury, at least with regard to the death of Lee, concluded Ybarra intended to kill him and rejected his claim he only intended to wound him. 8RP 1315, 1370-71. Faced with only two conviction options, premeditated murder or manslaughter, it is likely jurors chose to convict him of the more serious offense because they found beyond a reasonable doubt he intended to kill, even if they harbored reasonable doubts about whether that killing was premeditated.

Evidence supported the inference that Ybarra committed only second degree murder and/or attempted second degree murders. Whether Ybarra's acts constituted premeditated first degree murder and attempted premeditated first degree murder, or instead second degree murder and attempted second degree murder, were questions that should have gone to the jury because there was evidence to support finding he only committed the lesser offenses. The Court of Appeals' contrary conclusion conflicts with this Court's

decision in Workman and its progeny because there was factual support that Ybarra only committed the lesser offenses and therefore the jury, not the trial court, should have been left to decide whether the shots fired outside a SPU classroom were premeditated or merely intentional. Therefore, review is warranted under RAP 13.4(b)(1).

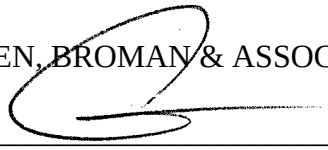
G. CONCLUSION

For the reasons stated herein, this Court should accept review.

DATED this 18th day of September 2019

Respectfully submitted,

NIELSEN, BROMAN & ASSOCIATES



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. AARON REY YBARRA, Appellant.	)	No. 76503-5-I consolidated with No. 77400-0-I DIVISION ONE UNPUBLISHED OPINION FILED: August 19, 2019

MANN, A.C.J. — Aaron Ybarra planned a school shooting and chose Seattle Pacific University (SPU) as his target. On June 5, 2014, Ybarra drove to the SPU campus to carry out his plan. Ybarra killed one student and injured several others. Ybarra appeals his conviction and sentence for one count of first degree murder, three counts of attempted first degree murder, one count of second degree assault—all with a firearm enhancement and the aggravator that the crime involved a destructive and foreseeable impact on persons other than the victims. Ybarra alleges that there were three improper judicial comments on the evidence, that the trial court erred in denying his request for second degree murder and second degree attempted murder instructions, and that his counsel was ineffective at sentencing. We affirm.

I.

A.

On June 5, 2014, Ybarra left his house with a double-barrel shotgun in a garbage bag and drove to SPU. Ybarra chose to carry out his plan at Otto Miller Hall ("OMH") because it was close to the street and parking was easy. Ybarra parked his truck behind OMH so he could enter a classroom through the back door, but it was locked. Instead, Ybarra parked his car across the street from OMH. Ybarra filled his pockets with 50 shotgun shells before crossing the street and making his way toward the front doors of OMH.

SPU students Anna Sophia Curturlio-Hackney and Thomas Fowler were standing outside the front doors of OMH when Ybarra aimed the gun at them and said "freeze" or "get inside." At the same time, Paul Lee walked between Ybarra and Cuturlio-Hackney, wearing headphones, unaware of the threat Ybarra posed. Ybarra yelled "freeze" at Lee and fatally shot him in the back of the neck.

Bird shot from the blast hit Fowler in the face, neck, and chest. Ybarra then aimed his shotgun at Curturlio-Hackney and pulled the trigger, but the shotgun did not fire. Curturlio-Hackney and Fowler both fled behind the building.

Ybarra entered OMH lobby and aimed his shotgun at Tristan Cooper-Roth, who was studying at a table in the lobby. Ybarra told Cooper-Roth not to "disrespect him because he shot someone outside." Ybarra then turned to Sarah Williams. Williams was walking down the stairs into the lobby when Ybarra shot her in the chest. Ybarra began reloading the shotgun as Cooper-Roth fled the building.

Jon Meis, who was in the building-monitor office, entered the OMH lobby and heard Ybarra say "don't move" while pointing his shotgun at a student. Meis was out of Ybarra's line of sight and hit the panic button to alert campus security. Meis heard the gunshot that hit Williams and saw Ybarra trying to reload the shotgun. Meis grabbed a canister of pepper spray and sprayed Ybarra in the face. Meis then tackled Ybarra and wrestled the shotgun away. Ybarra attempted to pull a hunting knife from his pocket, but Meis pinned Ybarra's arm and kicked it away. Justin Serra and Meis held Ybarra until campus security and Seattle Police arrived. Ybarra told them they should have let him keep his knife because he was going to use it to kill himself.

The State charged Ybarra with first degree murder of Lee, three counts of attempted first degree murder of Fowler, Curturlio-Hackney, and Williams, and second degree assault of Cooper-Roth. Each count had a firearm enhancement and alleged that the crime involved a destructive and foreseeable impact on persons other than the victims under RCW 9.94A.535(3)(r). Ybarra argued that he was not guilty by reason of insanity, was acting on God's plan, and was influenced by Satan and Lucifer.

B.

At trial, the jury heard testimony about Ybarra's premeditation of the crimes from three primary sources: Ybarra's journal, a police interview, and Ybarra's testimony at trial. In both Ybarra's journal and during the police interview, he explained that he planned to kill students at SPU because of his hatred toward the world and was inspired by the Columbine and Virginia Tech shootings. At trial, however, Ybarra's story changed, instead he was carrying out "God's Plan."

Ybarra's Journal Entries

Ybarra explained his intent in his journal. On June 2, 2014, Ybarra explained how and why he chose to target SPU:

> I use to always hate violence towards women, but there is no doubt that I'm going to kill quite a few in the shootout, I don't care anymore. There are a few universities in the state to pick from that I'm planning to attack. Washington State is the main target. I can't make it there with out [sic] any suspision, [sic] my parents will keep wondering where I'm at and plus I'm not yet prepared for it, I have plans B's Central, Eastern and Seattle Pacific. I was focusing on Central but not prepared for that either. Didn't think about Eastern because I'm only prepared to be local. I picked Seattle Pacific because I'm less familiar with it and I can see that University of Washington and Seattle University represent Seattle more. I didn't want to have to attack my own city. I went to the SPU campus to get info and find a good area to attack. A couple Mondays ago I was trying to give myself a tour and asking where certain buildings were, acting like a transfer student. I asked this nice black girl where the history building was. For about ten minute's [sic] she showed me around some of the places she knew, I forgot how to say her name. Minutes later, I met a cute white girl named Kylene. She offered to show me around for about fifteen or twenty minutes. These girls were very nice and they treated me well. Because they showed me around the campus without me asking them to, I will single them out of the shooting if I see them.

Ybarra's journal entries became angrier and more hostile as it got closer to the day of the shooting. Ybarra explained that he still loved his family and friends but, "Everybody else in the world, I just want to blow their faces out with a 12 gauge shot gun blast!" Ybarra wrote the last journal entry the morning of the shooting, while parked in his truck outside SPU.

> This is it! I can't believe I'm finally doing this! So exciting I'm jumpy. Since Virginia Tech and Columbine, I've been thinking about these a lot. I use to feel bad for the ones who were killed, but now Eric Harris and Seung Hui Cho became my Idols. And they guided me til today. No matter how cute the girl is and no matter how cool the guy is, I just want people to die! And I'm gonna die with them. I'm not asking for forgiveness because there won't be any. But it is what it is. I'm doing

> some people a favor by sending them to heaven. But those who are sinners like me, I'll see you in hell.

Police Interview

Detectives James Cooper and Dana Duffy interviewed Ybarra at the police station following his arrest. During the interview, Ybarra explained his plan, motive, procurement of a weapon, stealth, and method of choosing his victims.

Ybarra explained that three years prior, when he was 23, he began having "bad feelings." Ybarra was diagnosed with obsessive compulsive disorder (OCD) when he was 13 but did not begin having "bad feelings" until his bedroom furniture was replaced by his parents. Ybarra explained that he told his parents to wait to replace his bedroom furniture, but they didn't listen and afterwards he "started losing it." After Ybarra's parents took his furniture away, he "felt nothing but hate. Hundred percent hatred towards the world. Towards everyone. I threatened to massacre the local bar once cause I just wanted everything and everyone to die. And then Columbine came into mind. I don't know how, but it just hit me." Ybarra explained that he felt disrespected, that God had betrayed him when he asked for help, and was overcome with hatred toward the world.

Ybarra planned to attack SPU students using a double-barrel shotgun. Ybarra bought the shotgun when he was 19 years old, but Ybarra's parents put a trigger lock on the shotgun because Ybarra had "rant[ed] about killing people." Ybarra hid bolt cutters in his room so that he could break the trigger lock on his shotgun. Ybarra saved up money for "the right weapons, the right equipment" and was "trying to be well-organized." Ybarra bought three boxes of ammunition over two shopping trips, which

totaled 75 rounds. With that amount of ammunition, Ybarra thought he "was gonna kill and injure more people." Ybarra specifically chose bird shot because "at close range, [bird shot] would disintegrate a human face." Ybarra chose a shotgun, rather than a pistol because Ybarra can hit a moving target more accurately with a shotgun than a pistol.

Ybarra used a "hunter and fisherman's technique," scouting the SPU campus two weeks before the shooting. While on campus, Ybarra pretended to be a transfer student and two students gave Ybarra a tour of the first floor of OMH. Ybarra also talked to an academic advisor and pretended he was transferring from Edmonds Community College. When discussing these encounters during the police interview, Ybarra explained how he "manipulated" the students and academic advisor to get the information he needed. Since the two students treated Ybarra nicely, Ybarra made the conscious decision to show them "remorse" if he saw them during the shooting and spare their lives.

In an effort to plan the shooting when many students were on campus, Ybarra asked the academic advisor when finals began. Ybarra did not want to plan the shooting when classes were not in session and feared if he did not complete the plan soon, he would have to wait until fall semester. While Ybarra was scouting, he was also "mak[ing] sure people were [on campus]."

Ybarra's Trial Testimony

Ybarra testified at trial about hateful feelings, how he formulated his plan from the Columbine and Virginia Tech shootings, and his thought process on the day of the shooting. Ybarra explained the hateful feelings were implanted by Satan and Lucifer,

that God had banished Ybarra to hell, and before Ybarra died, Ybarra had to carry out "God's Plan" and Satan's destruction so that people would focus on "keep[ing] this country a better place." Ybarra explained that he had to keep "God's Plan" a secret, which was why he did not explain the plan in his journal, during the police interview, to his therapists, or the defense's and State's experts. Portions of Ybarra's testimony contradicted itself and Ybarra explained that everything he said prior to his testimony about feeling hatred and admiring the Columbine and Virginia Tech shootings was a "cover-up" and, instead, Ybarra was carrying out "God's Plan."

C.

Dr. Craig Beaver, the defense's expert, and Dr. Kenneth Muscatel, the State's expert, evaluated Ybarra while he was in jail after the shooting and both testified about whether Ybarra was legally insane. Dr. Beaver opined that Ybarra's severe mental disease or defect, "impacted his ability to understand the wrongfulness of his actions." Dr. Beaver explained that Ybarra knew that the shootings were morally wrong, but because he was receiving a direct command from God, he was unable to recognize the moral wrongness of his actions. Dr. Muscatel countered that Ybarra understood that shootings were both legally and morally wrong, but "felt influenced by other forces" and Dr. Muscatel "couldn't conclude that he was legally insane."

D.

The court instructed the jury on manslaughter but denied Ybarra's request to instruct the jury on second degree murder and attempted second degree murder. The manslaughter instruction was consistent with Ybarra's theory that he was firing "warning shots" and wanted to take hostages, rather than intending to kill. The court denied

Ybarra's request for second degree murder instructions because there was no evidence presented that Ybarra intended to kill without premeditation. The jury convicted Ybarra as charged, including all enhancements and aggravators. The court sentenced Ybarra to a standard range sentence, totaling 1,343 months in prison. Ybarra appealed.

At the restitution hearing, the court ordered Ybarra to pay $10,504 to the Crime Victims' Compensation Fund (Victims' Fund) and $2,615.90 to Lee's family for funeral expenses. The court ordered Ybarra to pay Hannah Judd's medical expenses totaling $86.04 from October 21, 2014. Judd assisted Williams with her gunshot wound until paramedics arrived.

Ybarra appeals the judgment and sentence and restitution order.

II.

Ybarra first contends that the trial court improperly commented on the evidence in violation of article IV, section 16 of the Washington Constitution. We disagree.

The standard of review for a claim of judicial comment on the evidence is whether the error was harmless beyond a reasonable doubt. State v. Levy, 156 Wn.2d 709, 731, 132 P.3d 1076 (2006). Judicial comments on the evidence are prohibited under article IV, section 16 of the Washington Constitution, which provides, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A comment on the evidence is an error of constitutional magnitude, thus a defendant's failure to object or move for mistrial does not foreclose a defendant from raising the issue for the first time on appeal. State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

The purpose of article IV, section 16 is to prevent the court's opinion of the evidence from improperly influencing the jury and its deliberation. State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). "To constitute a comment on the evidence, it must appear that the trial court's attitude toward the merits of the cause is reasonably inferable from the nature or manners of the court's statements." State v. Miller, 179 Wn. App. 91, 107, 316 P.3d 1143 (2014). If the court's evaluation of a disputed issue is inferable from the judge's statement or the judge communicates their feelings about the veracity of testimony, then the judge improperly commented on the evidence. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

If the trial court commented on the evidence, those comments are presumed prejudicial. Levy, 156 Wn.2d at 721. The State bears the burden of showing the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. State v. Hartzell, 156 Wn. App. 918, 937, 237 P.3d 928 (2010). The test to determine whether the comments resulted in actual prejudice to the defendant is whether there is "overwhelming untainted evidence" to support the conviction. State v. Sivins, 138 Wn. App. 52, 61, 155 P.3d 982 (2007).

Ybarra contends he was denied a fair trial when the court made three separate comments on the evidence. The first alleged improper comment was on the 10th day of trial. The court updated the jurors on the anticipated schedule for the rest of the week and noted that Dr. Beaver would be testifying the following day. Ybarra objects to the court's statement: "we will go until the [sic] least 4:30 tomorrow afternoon with Dr. Beaver, who is an important witness for the defense. And then we will be starting on

Thursday morning at 8:30 in the morning, so I want you here at 8:20 to continue with Dr. Beaver."

The second alleged improper comment was at the end of Dr. Beaver's testimony. The court explained the upcoming schedule and why he was releasing jurors early that day:

> Thank you, Dr. Beaver, you are all done. You are excused, and so are you. We planned a long period of time for this witness, obviously, an important witness, so in case it took all day, and we have no other witnesses planned for today. So the next time we are going to meet will be next Monday, at nine o'clock. There is still much more to hear, the defense has more witnesses to call, the State is planning on putting on rebuttal testimony, so please continue to keep an open mind as you proceed through the case.

The third alleged improper comment occurred during Dr. Muscatel's testimony. After the State asked Dr. Muscatel to refer to a "marked up" copy of his report, the court interjected and explained to the jury that the report would not be available during deliberations:

> If you wish to look at it. Any exhibit used by the witness is viewable by counsel in any case, so we are taking a moment for that and I probably should have said this earlier, but many exhibits that have been marked in this case, as you know, witnesses relied upon them to either remember to refresh their memory, or perhaps they have no memory, and we have provided them those exhibits. The testimony of the witnesses is the evidence, for example, Dr. Muscatel will be talking from his report, and of course, Dr. Beaver did the same. Those reports were not admitted into evidence, so their testimony is the evidence that you will use in making your decisions about this case.

Ybarra avers that together the court's comments implied that the court believed Dr. Beaver's and Dr. Muscatel's testimony was "some of the most significant evidence at trial" and that the State had met its burden of proving the underlying crimes, and "the

only issue for jurors was whether Ybarra should be found [not guilty by reason of insanity]."

Ybarra first contends the court's comments are analogous to the trial court's comments in Lampshire. In Lampshire, the prosecutor objected to the materiality of testimony offered by the defendant. The trial court sustained the objection, commenting that "Counsel's objection is well taken. . . . I don't see the materiality, counsel." Lampshire, 74 Wn.2d at 891. While the Supreme Court recognized that the court's comment was inadvertently made while ruling on a motion, it concluded that "the remark implicitly conveyed to the jury his personal opinion concerning the worth of the defendant's testimony." Lampshire, 74 Wn.2d at 892.

Unlike Lampshire, the trial court's comments during Ybarra's trial were about scheduling witnesses, not the value of their testimony. Both parties anticipated long, multi-day testimony from Dr. Beaver and scheduled two full days. On the second day of Dr. Beaver's testimony, no other witnesses had been scheduled and the jury was released early. The court's comment related to why the jury was released early, but reminded the jury that there was still more testimony to hear. The court's opinion of the credibility or worth of the testimony is not apparent from the comment. Instead, it is readily apparent from the comments that the judge was informing the jury about scheduling in a multi-week trial.

Ybarra points next to State v. James, 63 Wn.2d 71, 385 P.2d 558 (1963). In James, the State moved to discharge one of the defendants so that he could testify for the State. The trial court granted the motion and explained to the jury that "the prosecuting attorney made a motion to discharged defendant Topper so that he may

testify as a witness for the state, and the Court has granted that motion provided that he testify fully as to all material matters within his knowledge." Id. at 74. The Supreme Court concluded that the trial court's comment deprived James of a fair trial because after Topper's testimony and subsequent discharge as a defendant, the "the jury could draw only one conclusion: the court was satisfied that Topper had testified 'fully as to all material matters within his knowledge.'" Id. at 76. But here, unlike James, neither doctor was allowed to testify conditionally based on the veracity of testimony.

Ybarra next analogizes to State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963). In Bogner, defense counsel argued that there were two issues before the jury: whether a robbery occurred, and then who did it. The following colloquy took place between the trial court and defense counsel [Haley]:

> The Court: Are you denying that there was a robbery at the housing project at that time on that date? Mr. Haley: I don't know, your Honor. I think that is what we are here to determine. The Court: We are here to determine, as I understand it, who did it, if anyone. Mr. Haley: Of course, we have a two-fold purpose. We are trying to determine whether or not there was a robbery and the second point is, who committed the robbery. The Court: Don't you think we are getting a little ridiculous, or aren't we?

Bogner, 62 Wn.2d at 249. The Supreme Court concluded the trial court's comment violated the defendant's constitutional right because:

> the remarks of the trial judge could only have had the effect of indicating to the jury that the judge believed that at this point in the trial it could not be denied that a robbery had taken place, and that this essential element of the prosecution's case had been so well established that to suggest otherwise was 'getting a little ridiculous.'

Bogner, 62 Wn.2d at 250.

Again, unlike Bogner, the trial court here did not comment about whether the State proved an essential element of its case. Instead, the court's comment related to

managing the proceedings and informing the jury of scheduling in a trial spanning multiple weeks.

Finally, Ybarra relies on State v. Vaughn, 167 Wn. 420, 423-24, 9 P.2d 355 (1932). In Vaughn, the court commented on the credibility of the prosecutor, who was called as a witness to testify about a secret agreement between Vaughn's codefendant and the prosecutor. The judge's comment had the effect of vouching for the veracity and rectitude of the prosecutor. Vaughn, 167 Wn. at 424. Again, here, the trial court did not make comments alluding to the veracity and rectitude of the testifying physicians. Thus, Vaughn is not analogous.

Ybarra has not provided a case where a trial court's comment about scheduling or characterization that a witness is "important" demonstrates the court's attitude towards the witness or the witness's testimony. The length of this trial informs the context of these comments. For instance, Dr. Beaver and Dr. Muscatel testified in early November, in a trial that began in early October and ended in early November, with over 40 witnesses testifying. In a long trial, the trial court must keep jurors informed of scheduling and periodically remind jurors to remain open-minded throughout testimony. At one point, the court explained that no other witnesses were scheduled because all parties had anticipated that Dr. Beaver's testimony would take all day and the jurors were being released early because of that scheduling decision. Finally, the court's explanation to the jury that the doctors' reports would not be in evidence, and that during deliberation, the jurors would rely on the doctors' testimony, does not show the judge's personal opinion about the doctors' testimony. None of these comments

suggest that the court believed the State had met its burden of proof or that the court believed certain testimony to the detriment of other testimony.

Even analyzing these comments together, the trial court's attitude about the veracity of witnesses' testimony or a disputed issue of fact is not apparent. We conclude that the trial court did not improperly comment on the evidence.

III.

Ybarra next contends that the trial court abused its discretion by denying his request for jury instructions on second degree murder and attempted second degree murder. We disagree.

The standard of review for instructional errors depends on whether the court's decision to deny the instruction was based on a factual determination or a legal conclusion. State v. Condon, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015). Decisions based on a factual determination are reviewed for abuse of discretion, while legal determinations are reviewed de novo. Condon, 182 Wn.2d at 315-16. We review the trial court's decision to deny Ybarra's request for instructions on second degree murder and attempted murder for abuse of discretion because the court denied Ybarra's request based on a lack of evidence proving simple intent versus premeditation. A trial court abuses its discretion when the "decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

In State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), our Supreme Court set out a two-pronged test to determine whether a party is entitled to an instruction on a lesser included offense. Under the first, or legal prong, the court asks

"whether the lesser included offense consists solely of elements that are necessary to conviction of the greater, charged offense." Condon, 182 Wn.2d at 316. Under the second, or factual prong, "the court asks whether the evidence presented in the case supports an interference that only the lesser offense was committed, to the exclusion of the greater, charged offense." Id. at 316. When the answer to both prongs is "yes," the requesting party is entitled to the lesser included offense instruction. Id. at 316.

In Condon, the Supreme Court concluded that second degree murder is a lesser included offense to aggravated first degree murder under the Workman legal prong "because it consists solely of elements that are necessary for conviction of that greater offense." Condon, 182 Wn.2d at 319.[1] Since second degree murder is a lesser included offense of first degree murder, only the factual prong is at issue in this appeal.

The factual prong "incorporates the rule that each side may have instructions embodying its theory of the case if there is evidence to support that theory." State v Berlin, 133 Wn.2d 541, 546, 947 P.2d 700 (1997). The standard is that "some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given." Id. at 546 (citing State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)). "When evaluating whether the evidence supports an inference that the lesser crime was committed, courts view the evidence in the light most favorable to the party who requested the instruction." State v. Henderson, 182 Wn.2d 734, 344 P.3d 1207 (2015).

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[1] *Compare* RCW 9A.32.050 (a person commits second degree murder when, with intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person), *with* RCW 9A.32.030(1)(a) (a person commits first degree murder, when with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person), *and* RCW 10.95.020 (listing aggravating circumstances).

Ybarra requested jury instructions on the lesser included offense of murder and attempted murder in the second degree. "A person is guilty of murder in the second degree when: (a) [w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person." RCW 9A.32.050(1)(a). "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020.

Second degree murder is first degree murder without premeditation. RCW 9A.32.030(1)(a).[2] Premeditation is "the deliberate formation of and reflection upon the intent to take a human life" and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995). Premeditation "must involve more than a moment in point of time." RCW 9A.32.020(1). The following factors are relevant to establish premeditation: motive, procurement of a weapon, stealth, and method of killing. State v. Pirtle, 127 Wn.2d 628, 644, 904 P.2d 245 (1995).

Ybarra contends that the evidence supported his theory that he lacked premeditation because his premediated plan was to enter the OMH classroom through the back door and kill as many people as possible. Ybarra argues that the plan was not carried out because the back door was locked and he instead entered through the main entrance and shot at Lee, Fowler, Curturlio-Hackney, and Williams in the OMH lobby on his way to the OMH classroom. He contends his decisions to shoot were

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[2] "A person is guilty of murder in the first degree when: (a) with a premeditated intent to cause the death of another person, he or she causes the death of such person or a third person."

spontaneous—based on the victims' reactions to seeing him with a gun on campus and "failing to respect that he was armed with a gun." The State responds that "there was no evidence that Ybarra intended, but did not premeditate the crimes."

Intent to kill without premeditation can be shown with evidence that the defendant killed in an impulsive or reactionary manner to the victim's resistance. In Condon, the Court held that the trial court erred when it did not instruct the jury on second degree murder in addition to premeditated first degree murder. Condon, 182 Wn.2d at 311. The defendant, Joel Condon, and Jesus Lozano entered the home of Carmelo Ramirez and Enedina Gregorio under the mistaken belief that it was the home of a drug dealer whom they planned to rob. Condon, 182 Wn.2d at 311. During the robbery, Ramirez put Lozano in a choke hold and when Lozano was losing consciousness from lack of oxygen, Condon shot Ramirez. Condon, 182 Wn.2d at 312. Ramirez died before reaching the hospital. Condon, 182 Wn.2d at 312.

The trial court refused to instruct the jury on second degree murder because Condon shot Ramirez twice and was reflective and cool enough "to be able to say at some point that Lozano was lucky he didn't get shot and that ultimately he probably should have shot him too." Condon, 182 Wn.2d at 320. This reasoning, however, was not sound because the evidence showed Condon's later reflection on the shooting, not his premeditated intent prior to the shooting. Condon, 182 Wn.2d at 320. The Supreme Court held that, while there was evidence from which a rational juror could find that the shooting was premeditated, there was also evidence supporting a lack of premeditation through "an inference that the shooting was a sudden reaction, based in fear rather than

'weighing or reasoning'" and was impulsive and reactionary. Condon, 182 Wn.2d at 320.

Condon is distinguishable from the facts here. Condon entered the home with the intent to commit robbery, but murdered the victim when he fought back. Condon, 182 Wn.2d at 311-12. There was evidence of both first and second degree murder, depending on whether the jury believed Condon had premeditated before pulling the trigger, or whether the intent to murder was a direct and impulsive reaction to the victim fighting back and made without premeditation.

In contrast, Ybarra went to SPU with the premeditated intent to kill students. There is ample evidence that Ybarra planned, over a period of several weeks, to kill students at SPU. Ybarra scouted the SPU campus, planning where the shooting would occur. Ybarra purchased three boxes of ammunition and brought two weapons and the ammunition to campus for the purpose of killing students. Ybarra explained that if he saw the students who had given him a tour of the SPU campus, Ybarra intended to show them mercy. Ybarra went to campus that day with premeditated intent to kill students.

Ybarra tries to cabin his premeditated intent to kill students specifically in the OMH classroom, and argues that there was evidence that Ybarra intended to kill, but lacked premeditation for any shots fired outside OMH or in the lobby of OMH. Ybarra indicated that he "wasn't trying to kill anyone outside, the plan was just to wound them." This supports the manslaughter instructions, but not the second degree murder instructions. There is no evidence to support Ybarra's theory that he intended to kill, but without premeditation, thus the trial court did not abuse its discretion.

Furthermore, Ybarra's argument that his premeditated intent to kill was confined to killing students in a classroom ignores the plain language of RCW 9A.32.030 which states:

> (1) A person is guilty of murder in the first degree when:
> (a) With a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.[3]

Thus, even if Ybarra intended only to kill students in the OMH classroom, in carrying out this premeditated intent, there is no dispute that he caused the death of a third person on his way to the classroom. His actions still meet the definition of first degree murder.

The evidence presented does not support an inference that Ybarra only intended to commit the lesser offense of second degree murder to the exclusion of first degree murder. Condon, 182 Wn.2d at 316. Because Ybarra does not meet the factual prong of the Workman test, the trial court did not abuse its discretion in denying Ybarra's request for a lesser included instruction of second degree murder.

IV.

Finally, Ybarra contends that his counsel was ineffective for failing to object to the $86.04 restitution charge for Judd's medical expenses. We disagree.

The Sixth Amendment affords a defendant the right to be represented by counsel in all criminal prosecutions. U.S. CONST. amend. VI. A defendant's counsel is ineffective where the attorney's performance was deficient and the deficiency prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. E. 2d 674 (1984). The defendant must show that both (1) his attorney's performance was

[3] (Emphasis added.)

deficient and not a matter of trial strategies or tactics, and (2) that he was prejudiced. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003). "There is a presumption of effective representation, and the defendant must show in the record the absence of a legitimate strategic or tactical reason supporting the challenged conduct by counsel." Mannering, 150 Wn.2d at 286.

A defendant is prejudiced when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Ybarra raised the issue of whether Judd was a victim in his motion to oppose restitution. At the restitution hearing, the trial court noted that "[t]here was a specific exception taken to restitution requests submitted by Hannah Judd. As far as other specifics, I think it was about the scope of the funeral home." Counsel for defense agreed with the court's characterization of the defense's motion and stated that prior counsel, "did file a brief on some of the issues, and I'm just resting on the brief. No further arguments."

Argument moved to specifics and defense counsel indicated "I'm prepared to concede causal connection to most of the costs or restitution requests that the State has submitted in this matter, and I can narrow them down to three specific items that—or actually it's two." Discussion moved on to costs related to Lee's funeral.

The court sentenced Ybarra to a standard range sentence, totaling 1,343 months in prison. The court ordered Ybarra to pay $10,504 to the Victims' Fund, $2,615.90 to Lee's family for funeral expenses, and $86.04 for Judd's medical expense.

It is within a defense attorney's strategic choice to concede the causal connection for an $86.04 restitution charge when the defendant was facing 111 years in prison and had been ordered to pay a total of $13,119.90 in restitution. We conclude that Ybarra's counsel was not ineffective for conceding the $86.04 restitution charge for Judd's medical expenses.

Affirmed.

Mann, ACJ

WE CONCUR:

Dwyer, J.

Andrus, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

September 18, 2019 - 11:12 AM

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