Supreme Court No. 97797-6
(Court of Appeals No. 78274-6-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH LAMAR HOLLAND,

Appellant.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Joseph Holland, Appellant, asks this Court to review the opinion of the Court of Appeals in *State v. Holland*, No. 78274-6-I (filed September 23, 2019). A copy of the opinion is attached as an Appendix.

B. ISSUES PRESENTED FOR REVIEW

1. The Sixth Amendment guarantees Mr. Holland a right to present a defense. In cases where a defendant raises a defense of voluntary intoxication, the jury must determine whether intoxication prevented that particular defendant from forming the requisite *mens rea*. Is a significant question of law under the state and federal constitutions involved where the trial court erroneously excluded relevant testimony regarding the effects of phencyclidine (PCP) on Mr. Holland's mental health symptoms as evidence of voluntary intoxication?

2. Mr. Holland's constitutional right to a unanimous jury is inviolable. Where the State files one count of criminal conduct while putting forth evidence of multiple acts that could serve as a basis for a conviction, the jury must be given a unanimity instruction, unless it can be established that the acts constituted a "continuing course of conduct." Is a significant question of law under the state and federal constitutions involved where the State charged Mr. Holland with one count of second-

degree assault but provided evidence of two separate incidents without a unanimity instruction?

3. To establish second-degree assault, the State must prove beyond a reasonable doubt that (1) Mr. Holland intended to assault Mr. Murray and (2) Mr. Holland recklessly inflicted substantial bodily harm. The *mens rea* of recklessness includes both a subjective and objective component. The State failed to introduce any evidence that Mr. Holland knew of Mr. Murray's unique medical status or was aware that his conduct posed a risk of substantial harm. Is a significant question of law under the state and federal constitutions involved where Mr. Holland was convicted upon insufficient evidence of recklessness?

4. A statute fixing a sentence may be void for vagueness where it fails to give fair notice of the conduct it punishes or is so standardless as to invite arbitrary enforcement. Is a significant question of law under the state and federal constitutions involved where the aggravating factor under RCW 9.94A.535(3)(y), rests solely on the status of the victim and is so subjective as to invite arbitrary enforcement?

C. STATEMENT OF THE CASE

Mr. Holland has long-standing mental health and substance abuse diagnoses, and has experienced hallucinations beginning at age 10. RP 482. He has used PCP and other substances to self-medicate, trying to

make the voices stop and to "stop hearing the devil in [his] mind." RP 494, 555-56. In October 2016, Mr. Holland entered GT Recording, a storefront on Aurora Avenue, where he was met by an employee, Michelle Ressler. RP 190-91. According Ms. Ressler, Mr. Holland was shirtless and did not say anything, instead smiling in an odd way and looking around. RP 194-95, 228-29. When Ms. Ressler asked Mr. Holland whether he needed assistance, he began to mimic her, "just smiling and repeating, just repeating back everything I was saying[.]" RP 194-95.

Mr. Murray, who owns the store, and his wife, Connie Lenstrom, were in the back when Mr. Holland entered. RP 195. After hearing the interaction between Mr. Holland and Ms. Ressler, Mr. Murray came to the front desk. RP 309. Mr. Murray noticed that Mr. Holland appeared to be looking around and possibly hearing voices and asked him to leave, stating "you can tell those voices to be quiet." RP 312-13. Mr. Holland began to leave but then screamed "no" and ran back towards the counter, swiping his arm and brushing the side of Mr. Murray's face with his fingertips. RP 314, 319.

Mr. Murray, a large man, came out from behind the counter to confront Mr. Holland, who at this point was flailing and twirling around the small lobby, as well as kicking and swiping the counter. RP 315. In the process, Mr. Holland struck Mr. Murray in the head at least once. RP 314-

15. Mr. Murray initially testified that, although Mr. Holland was hitting him with a closed fist, "it didn't seem like he was trying to – to punch me, it seemed like he was just – just flailing every which way." RP 315, 320. On cross-examination, Mr. Murray described Mr. Holland's behavior as a combination of flailing and intentional hitting. RP 342-43. Mr. Holland ultimately fell backwards and then ran out of the store screaming. RP 318.

Mr. Holland continued to scream in the parking lot, going to a bus stop approximately 40-50 feet from the entrance. RP 318. While Mr. Holland was at the bus stop, Mr. Murray asked his wife to take a picture of Mr. Holland in case he left before the police arrived. RP 320. Mr. Holland then crouched and ran back towards the building. RP 321. He pulled Mr. Murray out of the store and the two struggled on the pavement, with Mr. Holland striking and kicking Mr. Murray. RP 322-24. Two bystanders restrained Mr. Holland until the police arrived. RP 148. For over 10 minutes, Mr. Holland yelled incoherently, repeatedly screamed "Allahu Akbar" and told officers his name was God. RP 181, 276, 467-69.

Mr. Murray is blind in his left eye due to complications from a premature birth and glaucoma. RP 304-07. His eyesight in his right eye is significantly impaired due to glaucoma, and he has an artificial lens. RP 305-06. The lens improved his vision but did not restore it. RP 307. Unfortunately, Mr. Holland dislodged Mr. Murray's artificial lens during

the first incident. *See* RP 321. Mr. Murray required surgery to have the lens moved back into position. Although the doctor who performed the surgery described it as a success in terms of placement and vision improvement, both Mr. Murray and Ms. Lennstrom testified to the lasting effects of the injury. RP 405, 289-92, 333-36. Namely, Mr. Murray needed frequent breaks at work to rest his eye, went to bed much earlier due to exhaustion, and had difficulty riding in cars. RP 289-92. The incidents also resulted in bruising and swelling, and some marks on Mr. Murray's extremities. RP 284-87.

At trial, defense counsel sought to present defenses of both diminished capacity and voluntary intoxication. RP 14. Counsel sought to introduce testimony by Dr. Marnee Milner, an independent forensic psychologist who evaluated Mr. Holland in 2011 and 2017. RP 17, 475. The State objected to any testimony regarding Mr. Holland's mental health diagnoses based upon a pretrial interview with Dr. Milner, in which she informed the prosecutor that she did not have an opinion on the issue of diminished capacity, *i.e.* whether Mr. Holland's mental health conditions prevented him from forming the requisite intent at the time of the incident. RP 16-20.

The court sided with the State and excluded any opinion testimony regarding diminished capacity. RP 22. In a drastic move, the court also

precluded any testimony by Dr. Milner about Mr. Holland's cognitive or mental health conditions, finding the information was irrelevant to any question other than the defense of diminished capacity. RP 37-38. Defense counsel again requested that Dr. Milner be able to testify to Mr. Holland's underlying mental health symptoms as relevant to the defense of voluntary intoxication based upon Dr. Milner's opinion that Mr. Holland's cognitive baseline and behavior were exacerbated by PCP. *See* RP 458-59. The court ultimately allowed defense to introduce the topic of self-medication, but precluded further testimony regarding Mr. Holland's co-occurring diagnoses or mental health symptoms. RP 462-63.

The jury found Mr. Holland guilty of second-degree assault and returned a special verdict, finding Mr. Murray's injuries "substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm," an aggravating factor under RCW 9.94A.535(3)(y). CP 42, 44. The court sentenced Mr. Holland to 96 months of confinement, including a 12-month exceptional sentence. CP 105.

The Court of Appeals affirmed Mr. Holland's conviction but remanded the case to the sentencing court to strike the DNA collection fee from the judgment and sentence. Appendix.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Mr. Holland was denied his constitutional right to present a defense, warranting review under RAP 13.4(b)(3).

The court violated Mr. Holland's right to present his defense of voluntary intoxication when it limited Dr. Marnee Milner's testimony regarding how the symptoms of Mr. Holland's underlying mental health conditions were exacerbated when he consumed PCP. Both the federal and state constitutions guarantee an accused the right to present a defense. U.S. Const. Amend. VI, XIV; Const. art. I § 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). The right to present a defense includes the right to call witnesses and present relevant testimony. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

Testimony that Mr. Holland's PCP use exacerbated underlying mental health issues, including psychotic features, was unquestionably relevant to his defense of voluntary intoxication. ER 401; ER 402. Voluntary intoxication, while not a complete defense, negates the *mens rea* of intent required to convict an individual of second-degree assault. *See* RCW 9A.36.021; *State v. Kruger*, 116 Wn. App. 685, 691, 67 P.3d 1147 (2003). As compared to diminished capacity, no expert opinion on whether a defendant was able to form intent is needed to present a defense of voluntary intoxication. *State v. Thomas*, 123 Wn. App. 771, 782, 98

P.3d 1258 (2004). Where a defendant claims voluntary intoxication, expert testimony need only be relevant and assist the jury in understanding the evidence to be admissible. *State v. Atsbeha*, 142 Wn.2d 904, 917, 16 P.3d 626 (2001); ER 401; ER 402; ER 702.

In this case, both the trial court and the Court of Appeals erroneously determined that, because Dr. Milner could not give an ultimate opinion about diminished capacity or Mr. Holland's intent on the day of the incident, any and all evidence of Mr. Holland's underlying mental health conditions was irrelevant. RP 37-38; *see* Appendix at 8. The inability to directly connect Mr. Holland's mental health to a defense of diminished capacity, however, does not automatically render evidence of his mental health diagnoses or symptoms irrelevant in all other aspects of the proceedings. *State v. Clark*, 187 Wn.2d 641, 654, 389 P.3d 462 (2017). Indeed, had the court allowed defense to further question Dr. Milner, she would have testified that Mr. Holland's history evidenced that his mental health symptoms and the effects of his drug use acted in tandem in terms of his ultimate behavior. *See* Pretrial Ex. 2, p. 7.

Where a defendant is deprived of the right to present a defense, a conviction must be reversed unless the State can prove beyond a reasonable doubt that the error was harmless. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In this case, with the

relevant information, the jury could have determined that, although an individual can form intent while under the influence of drugs, Mr. Holland did not form such an intent given his baseline and the impact of PCP on his mental health features. The violation of Mr. Holland's constitutional right warrants review under RAP 13.4(b)(3).

2. Mr. Holland was deprived of his right to a unanimous jury, warranting review under RAP 13.4(b)(3).

Mr. Holland was deprived of his constitutional right to a unanimous jury when the State elected to charge one count of assault yet presented evidence of two incidents at trial. An individual's right to a unanimous jury must be protected. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled on other grounds by State v. Kitchen,* 110 Wn.2d 403, 756 P.2d 105 (1988). Where the State charges a defendant with one count of criminal conduct while putting forth evidence of multiple acts that could serve as a basis for a conviction, the State may either elect which acts it will rely on to establish a conviction or the jury must be instructed on its duty to unanimously agree that a single underlying criminal act was established beyond a reasonable doubt. *Petrich*, 101 Wn.2d at 572. One exception to this requirement is where the State can establish each act was part of a "continuing course of conduct." *Petrich*, 101 Wn.2d at 571. "To determine whether one continuing offense

may be charged, the facts must be evaluated in a common-sense manner." *Id.*[1]

In this case, the State presented evidence of two separate incidents. While the incidents involved the same victim and timeframe, they were disconnected when Mr. Holland left the store. RP 202. This is evidenced by Ms. Lennstrom ending the first 911 call, telling the operator she would call back if Mr. Holland returned. RP 213. Additionally, after Mr. Holland exited the store, Ms. Lennstrom was concerned that he would leave the scene entirely. RP 320. It was this concern that prompted her to video Mr. Holland. RP 320. Mr. Holland was then observed yelling at the bus stop approximately 50 feet from the store entrance. RP 202. He was not making sense, and it was unclear whether the yelling was directed towards anyone in the store. RP 202, 236. It was only after this break in events that Mr. Holland reentered the store. RP 204.

Most importantly, the separate acts did not share a common purpose. "A continuing course of conduct requires an ongoing enterprise with a single objective." *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d

[1] Although it is a highly fact-specific inquiry, courts consider (1) the time elapsed between incidents; (2) whether the acts took place in the same location; (3) whether the acts were committed with a single purpose or motivation; (4) whether the acts were interrupted or there were intervening acts; and (5) whether there was an opportunity for the defendant to reconsider his actions. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 985, 329 P.3d 78 (2014); *see also State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996).

395 (1996); *see also State v. Gooden*, 51 Wn. App. 615, 754 P.2d 1000 (1988). Even in instances occurring over a short period of time and involving the same victim, courts have relied, in part, on the fact that the defendant's acts were designed to achieve an ultimate purpose. *State v. Handran*, 113 Wn.2d 11, 775 P.2d 453 (1989). Mr. Holland's actions, by comparison, had no apparent purpose. He was experiencing an acute crisis, brought on by mental health issues and substance use.

Failure to give a unanimity instruction is presumed prejudicial unless it can be shown to be harmless. *State v. Kitchen,* 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Here, a juror could have found reasonable doubt as to whether Mr. Holland intentionally assaulted Mr. Murray during the first incident. *Id.* at 411-12. Both Mr. Murray and Ms. Lennstrom described Mr. Holland as flailing around in the store and apparently responding to internal stimuli. RP 253, 314-16. While suggesting Mr. Holland intentionally struck him during the first incident, RP 342-43, Mr. Murray also testified that he was unsure if Mr. Holland intended to strike him and stated that "it didn't seem like he was trying to – punch me." RP 315.

This violation of Mr. Holland's right to a unanimous jury is a significant question of law under both the United States and Washington constitutions, requiring review under RAP 13.4(b)(3).

3. Mr. Holland was convicted upon insufficient evidence, warranting review under RAP 13.4(b)(3).

The evidence at trial was insufficient to establish that Mr. Holland recklessly inflicted substantial bodily harm. Due process demands the State prove all elements of an offense beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3. Whether the State has met its burden is a question of law reviewed de novo. *Rich*, 184 Wn.2d at 903. Although the evidence is viewed in the light most favorable to the prosecution, "[i]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez,* 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

To support a conviction for second-degree assault, the State must prove both that a defendant *intended* to commit an assault and they *recklessly* inflicted substantial bodily harm. RCW 9A.36.021(1)(a); *State v. Hayward*, 152 Wn. App. 632, 641, 217 P.3d 354 (2009). "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur[.]" RCW 9A.08.010(1)(c). Washington courts have interpreted "reckless" to include both a subjective and component. *State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d 1253 (1999); *State v. Koch*, 157 Wn. App. 20, 36, 237 P.3d 287 (2010). In assessing the subjective component, "the court must consider the specific

facts of the case to decide if the defendant, under the particular circumstances, knew of and disregarded a considerable risk[.]" *Rich*, 184 Wn.2d at 906-07.

Proof of an intentional assault that results in a substantial injury is insufficient in itself to establish recklessness. *Hayward*, 152 Wn. App. at 647-48. Much like this case, the defendant in *State v. Hayward* punched the victim in the face, breaking his jaw and requiring surgery. *Id.* at 635. Hayward admitted to intentionally assaulting the victim and the State put forth extensive evidence regarding the serious nature of the resulting injury. *Id.* at 647-48. Although the specific issue presented *Hayward* was whether the trial court erroneously instructed the jury on recklessness, in reversing Hayward's conviction, the appellate court found the State's uncontroverted evidence of the intentional assault and the significant injury "is not sufficient to support a finding that Hayward recklessly inflicted substantial bodily harm[.]" *Id.* at 647-48.

Nor is the fact that a defendant acts in a way that clearly poses a risk of substantial harm sufficient, in itself, to establish the defendant acted "recklessly." In *State v. Rich*, the Supreme Court addressed whether the State met its burden to establish the *mens rea* of recklessness in the context of reckless endangerment, where the evidence established that Rich was speeding while extremely intoxicated, with her young nephew in

the front seat of the car. 194 Wn.2d at 903. The court concluded that neither proof of driving under the influence nor proof of speeding, without more, were sufficient to establish reckless endangerment. *Id.* at 905. It nevertheless reinstated Rich's conviction, finding the evidence supported both the subjective and objective components of recklessness. *Id.* at 910. Namely, a jury could find that her behavior – admitting to driving "tipsy" and comments to her nephew – reflected that she was attempting to cover up conduct she subjectively *knew* was risky. *Id.* at 909-10.

By comparison, courts have determined the evidence sufficient to establish the subjective component of recklessness where the defendant has some preexisting knowledge of the susceptibility or vulnerability of the victim. In *State v. Hovig*, the Court of Appeals found the subjective component of "recklessness" satisfied where the defendant – the victim's father – had special knowledge of the victim's young age and particular vulnerability to injury based upon his experiences parenting the victim and the fact that the victim was previously injured with even minor physical contact. 149 Wn. App. 1, 9-10, 202 P.3d 318 (2009). Similarly, in *State v. Harris*, the court found the evidence sufficient to support a finding of recklessness where the defendant had experience caring for the child and was previously told not to pick up the child too fast as well as how to

properly care for a baby. 164 Wn. App. 377, 390-91, 263 P.3d 1276 (2011).

Here, the Court of Appeals erred by focusing solely on the objective component, finding that "any reasonable person knows" that punching someone would result in substantial bodily harm. Appendix at 11. Although subjective knowledge may be inferred from a defendant's actions, "[w]hether an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts." *R.H.S.*, 94 Wn. App. at 847 (evidence of defendant's actual subjective belief about whether a punch could result in harm would establish a defense to second-degree assault).

Allowing the State to establish Mr. Holland's recklessness based solely on the perspective of a reasonable person essentially creates strict liability for injuries resulting from intentional assaults. Proof that Mr. Holland intentionally assaulted Mr. Murray is not enough; proof that Mr. Murray suffered substantial harm is not enough. The State failed to present evidence showing Mr. Holland's knowledge under "the particular circumstances." The resulting conviction violated Mr. Holland's right to due process, and this Court should accept review pursuant to RAP 13.4(b)(3).

4. RCW 9.94A.535(3)(y) is unconstitutionally vague, warranting review under RAP 13.4(b)(3).

Even should this Court find Mr. Holland recklessly inflicted substantial bodily harm, reversal is required as the aggravating factor supporting his exceptional sentence is unconstitutionally vague.[2] Whether a statute is vague is reviewed de novo. *City of Spokane v. Neff*, 152 Wn.2d 85, 88, 93 P.3d 158 (2004).

RCW 9.94A.535(3)(y) allows a court to impose an exceptional sentence where "[t]he victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." For second-degree assault, the State must prove beyond a reasonable doubt that the injuries "substantially exceed" "substantial bodily harm." RCW 9.94A.535(3)(y); RCW 9A.36.021. There is no statutory definition or explicit guidance on what constitutes "substantially exceed[ing]" substantial bodily harm. Juries are instead expected to determine the minimum level of injury that would constitute substantial bodily harm and then "compar[e] of the victim's injuries against the minimum injury

[2] The Court of Appeals exercised its discretion to address Mr. Holland's argument that RCW 9.94A.535(3)(y) without addressing the issue of whether aggravating factors are subject to a vagueness challenge. Appendix at 12 n. 1. To the extent there is any doubt that aggravating factors may be challenged as vague, Mr. Holland incorporates by reference arguments in Appellant's Opening Brief, pp. 25-31 and Appellant's Reply Brief, pp. 11-18.

necessary to satisfy the offense." *State v. Pappas*, 176 Wn.2d 188, 192-93, 289 P.3d 634 (2012).

RCW 9.94A.535(3)(y) does not provide fair notice of what conduct crosses a proscribed line and fails to guard against arbitrary enforcement. Citizens are apprised by the first and second-degree assault statutes that the infliction of injuries less than "great bodily injury" but more than "substantial bodily injury" constitute second-degree assault. Because of the definitions of these two degrees of assault, RCW 9.94A.535(3)(y) does nothing to enhance citizens' understanding that more severe penalties may follow from some second-degree assaults. It serves only to confuse. While judges may understand what "substantially exceeds" means, the term has no commonsense meaning that could consistently be applied by jurors.

The unique approach of RCW 9.94A.535(3)(y) makes this standard even more nebulous. Subsection (3)(y) is the *only* aggravating factor that is conditioned solely on the status of the victim, without regard to the conduct or knowledge of the defendant.[3] *See* RCW 9.94A.535(3). The reliance on a victim-centered perspective necessarily requires the

[3] All other aggravating factors include characteristics specific to the defendant or the defendant's conduct, even where the identity of, or impact on, the victim is considered. Thus, the defendant is arguably put on notice that his particular circumstances or particular conduct will result in an increased statutory maximum and can tailor his behavior to avoid criminal liability. *See* RCW 9.94A.535(2).

defendant to have some pre-existing knowledge of a particular victim, facts that a defendant could not readily inform himself and thereby take measures to avoid criminal liability. *State v. Pomianek*, 110 A.3d 841, 854 (N.J. 2015) (striking down as unconstitutionally vague a bias-crime statute allowing an elevated sentence where the victim reasonably believed the offense was a result of bias, regardless of whether the defendant's conduct was actually motivated by bias).[4]

RCW 9.94A.535(3)(y) "fails to set a standard that places a reasonably intelligent person on notice when he is crossing a proscribed line." *Pomianek*, 110 A.3d at 854. Instead, the extent of the victim's injuries "may depend on facts beyond the knowledge of the defendant or not readily ascertainable by him." *Id.* It also fails to protect citizens from arbitrary enforcement. Requiring the jury to make a subjective assessment based only upon the status of the victim and without regard to a defendant's actions or mental state invites inconsistent application.

This fundamental flaw could not be clearer than it is in Mr. Holland's case. Mr. Murray is a quintessential eggshell victim. Although Mr. Holland may have been on notice that intentionally assaulting and recklessly inflicting injury upon Mr. Murray constituted criminal conduct,

[4] The hate-crime bill was a later version of the same statute struck down in *Apprendi v. New Jersey.*

he could not "readily inform" himself of Mr. Murray's unique status and could therefore not take measures to avoid criminal liability for the particular harm that served as the basis for the aggravating factor. Contrary to the Court of Appeals' opinion, whether a reasonable person would understand that such injuries constituted substantial bodily harm does not resolve the fact that an average person would not be on notice that their conduct would result in injuries substantially exceeding substantial bodily harm. Appendix at 14.

Mr. Holland's exceptional sentence is predicated on this unconstitutionally vague aggravator. This Court should accept review pursuant to RAP 13.4(b)(3).

E. CONCLUSION

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

DATED this 23rd day of October, 2019.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSEPH LAMAR HOLLAND, Appellant.	No. 78274-6-I DIVISION ONE UNPUBLISHED OPINION FILED: September 23, 2019

CHUN, J. — Joseph Holland appeals the judgment and sentence imposed pursuant to his jury conviction for second degree assault and possession of phencyclidine (PCP). Holland argues that (1) he was denied his right to present a defense when the trial court limited the scope of his expert's testimony, (2) he was deprived of his right to a unanimous jury when the State presented evidence of multiple acts of assault, (3) the evidence was insufficient to establish that he acted recklessly, (4) the aggravating factor in RCW 9.94A.535(3)(y) is unconstitutionally vague, (5) the trial court's findings of fact supporting the exceptional sentence were inadequate, and (6) he received ineffective assistance of counsel.

We remand for the trial court to strike the DNA collection fee from the judgment and sentence. In all other respects, we affirm.

BACKGROUND

Gordon Murray owns and operates GT Recording Service, a digitizing business on Aurora Avenue North in Seattle. For most of his life, Murray has been completely blind in his left eye and partially blind in his right eye. Murray has an artificial lens implanted in his right eye that enables him to read with that eye, using a magnifying glass.

On the afternoon of October 6, 2016, Murray was at the business along with his wife, Connie Lennstrom, and an employee, Michelle Ressler. A man, later identified as Holland, came in and approached Ressler, who was working at the front counter. Ressler asked Holland twice if she could help him. Each time, Holland simply repeated her question back to her. Murray then approached Holland and asked what he needed. Holland continued to repeat back anything said to him. Finally, Murray calmly asked Holland to leave. Holland initially acted as though he would leave, but then his demeanor changed and he became enraged. He screamed "no" and lunged at Murray, swiping at him. Holland flailed around, kicking the front counter and knocking things over. Murray opened the door, to get Holland to leave, and Holland punched Murray in the face several times. Holland then ran out into the parking lot, screaming.

Lennstrom held the door open to capture a video of Holland on her cell phone while Ressler called 911. Holland dropped into a crouch in the parking lot. Suddenly, Holland charged back towards the store at a full sprint. Murray attempted to close the door but could not do so in time. Holland grabbed Murray

and dragged him out into the parking lot. He knocked Murray onto the ground and proceeded to punch and kick Murray in the face, chest, and stomach.

Passersby pulled Holland off Murray and restrained him until officers arrived. When arrested, Holland was still agitated and yelling, insisting he was "God." At the hospital, a nurse found a vial of PCP in Holland's underwear.

Holland's assault knocked Murray's artificial lens loose and tore the surrounding tissue, requiring surgery. Murray lost a substantial part of his remaining eye function. He experienced frequent pain in his eyes and dizzy spells. His business was also significantly affected because he could not work for more than an hour at most without needing to rest.

The State charged Holland with second degree assault and possession of PCP. The State also alleged as an aggravating factor that "the injuries of the victim of the current offense substantially exceeded the level of bodily harm necessary to satisfy the elements of the crime."

Holland asserted a voluntary intoxication defense, arguing that he could not form the requisite intent because he was under the influence of PCP. A jury convicted Holland as charged and also returned a special verdict finding the State proved the aggravating factor beyond a reasonable doubt. Holland appeals.

DISCUSSION

1. Limitations on Dr. Milner's testimony

Holland argues that the trial court violated his right to present a defense when it prohibited his expert witness from testifying regarding his mental health

conditions. Because the witness did not establish a nexus between Holland's mental health conditions and his ability to form the requisite intent for the crime, the trial court did not abuse its discretion in excluding the testimony.

Holland initially asserted both diminished capacity and voluntary intoxication defenses. He retained licensed psychologist Dr. Marnee Milner to "assess [his] cognitive and psychological abilities currently and at the time of the crime." Dr. Milner performed an evaluation of Holland in which she conducted an in-person interview, reviewed Holland's legal and medical records provided by defense counsel, and administered neuropsychological testing. Dr. Milner observed that Holland was cooperative and polite but exhibited a flat affect and some bizarre thought content. Holland disclosed a history of auditory and visual hallucinations, but did not appear to currently be suffering from either. Dr. Milner noted that Holland "appeared to embellish his symptoms" and it was therefore difficult "to comment with certainty on his current psychiatric symptoms."

Dr. Milner noted that Holland's records reflected a history of long-term drug use, intellectual disability and mood and psychotic disorders. She also noted that Holland had a history of "poor frustration tolerance" and "poor coping skills." She admitted she was "not an expert on specific drugs" and was unable to speculate as to the effect that PCP would have on Holland's mental state. Instead, she stated she could opine only generally about the effects of PCP on behavior. But she stated that, based on past history, Holland's "underlying features/deficits increase and he becomes more impulsive, volatile and assaultive when high on illicit drugs."

> To me it seems that he already has a level of poor frustration tolerance and poor coping skills, and that is due to his mood symptoms – you know, his – his diagnoses, but I think at the time that was completely exacerbated by the drugs.

Dr. Milner did not offer an opinion about Holland's mental state during the assault. And she stated that she was unable to opine at all about diminished capacity or Holland's intent when he assaulted Murray.

The State moved to preclude Dr. Milner from testifying regarding Holland's "underlying cognitive deficits, mood disorders or psychiatric conditions." Citing State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001), the State argued that these issues were "not relevant to a diminished capacity defense, because she's not rendering an opinion about diminished capacity." The prosecutor stated:

> So Doctor Milner has told us she cannot connect the Defendant's mental health mood disorder, cognitive deficits with a [sic] asserted inability to form intent at the day of this crime – or when this incident occurred. And if she's not able to do that, the question then becomes, why would that testimony become relevant. How would it assist the jury in making a – a factual determination? And it wouldn't in this case.
>
> Again, I'm not asking the Court to preclude testimony about being high on drugs. I think defense will be able to lay a foundation for a voluntary intoxication defense. But certainly bringing in all this other evidence about Mr. Holland's mood and psychiatric condition is – is not relevant because the expert did not apply those to a diminished capacity defense.

Holland conceded that Dr. Milner's testimony did not support a diminished capacity defense. But he argued that his mental health conditions were relevant to his voluntary intoxication defense:

> [E]ven if I'm precluded from arguing diminished capacity, the – the baseline of my client, I believe, is relevant in assisting the jury to understand the voluntary intoxication in understanding who my client was, otherwise you're not getting the full picture of how that would be relevant to the application of voluntary intoxication.

The trial court granted the State's motion, finding that Dr. Milner was unable to link Holland's mental health conditions to his mental state at the time of the crime:

> The issue is whether or not Mr. Holland was unable to form the specific intent in this case. I believe the Doctor's going to testify that due to the voluntary intoxication he could not, or it would have affected him, but didn't make any association between his underlying mental disorders and that specific intent. She specifically said on more than one occasion there's – she's not saying there's diminished capacity due to any of his mental disorders, so I don't see how it would be relevant or helpful to the jury to allow that evidence in.

Criminal defendants have a constitutional right to present a defense under the Sixth Amendment of the United States Constitution and article I, section 22 of Washington's constitution. State v. Morales, 196 Wn. App. 106, 122, 383 P.3d 539 (2016). But this right is not unfettered, and a defendant does not have a right to offer irrelevant or inadmissible evidence. State v. Ellis, 136 Wn.2d 498, 528, 963 P.2d 843 (1998).

ER 702 requires that expert testimony be helpful to the trier of fact. "Expert testimony is helpful to the jury if it concerns matters beyond the common knowledge of the average layperson and is not misleading." State v. Groth, 163 Wn. App. 548, 564, 261 P.3d 183 (2011).

We review a trial court's decision about the permissible scope of expert testimony for abuse of discretion. State v. Black, 191 Wn.2d 257, 266, 422 P.3d 881, 885 (2018). A trial court abuses its discretion if its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Black, 191 Wn.2d at 266.

"Evidence of intoxication and its effect on the defendant may be used to prove that the defendant was unable to form the particular mental state that is an essential element of a crime." State v. Gallegos, 65 Wn. App. 230, 237, 828 P.2d 37 (1992). A defendant is entitled to a voluntary intoxication instruction when "(1) the charged offense has a particular mens rea, (2) there is substantial evidence the defendant was drinking and/or using drugs, and (3) there is evidence the drinking or drug use affected the defendant's ability to acquire the required mental state." State v. Webb, 162 Wn. App. 195, 209, 252 P.3d 424 (2011).

Holland argues that the trial court erred in prohibiting Dr. Milner from testifying regarding his history of mental health issues. As he did below, he contends that testimony that his PCP use "exacerbated underlying mental health issues, including psychotic features, was unquestionably relevant to his defense of voluntary intoxication."

But Dr. Milner's testimony would not have assisted the jury in determining Holland's mental state at the time of the crime. Dr. Milner admitted she could not speculate on the effect that PCP would have on Holland's mental state. And while she believed that drug use made Holland more impulsive and volatile because it exacerbated his already poor coping skills, at no point did she state that his drug use – either alone or coupled with his mental health issues – rendered him unable to form the mens rea for assault. When asked about Holland's mental state at the time of the crime, Dr. Milner stated:

> I didn't really give . . . a really clear conclusion because in – in essence at the time I think he had these same underlying issues that he currently has. So there's some level of mood disorder, there's some level of psychotic symptoms present, but for the most part, based on . . .what I – I was able to – to gather was that . . . he was high on drugs. And so some [of] the behavior – a – a lot of the behavior that you were seeing to me seemed more drug related behavior.

If the opinion of an expert does not reliably connect the defendant's mental disorder to an inability to form the requisite intent, the evidence is not helpful to the trier of fact. Atsbeha, 142 Wn.2d at 918. The trial court did not abuse its discretion in limiting Dr. Milner's testimony.

2. Right to a unanimous jury

Holland argues that he was deprived of his right to a unanimous jury. He contends that the State presented evidence of two distinct acts of assault that could have formed the basis for the crime, but did not make an election and no unanimity instruction was given. Because the two assaults were part of a continuing course of conduct, no election or unanimity instruction was needed.

A criminal defendant has a right to a unanimous jury verdict under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. State v. Fisher, 165 Wn.2d 727, 755, 202 P.3d 937 (2009) (citing State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)). We review constitutional errors de novo. State v. Jorgenson, 179 Wn.2d 145, 150, 312 P.3d 960 (2013).

When the State presents evidence of several acts that could constitute the charged crime, the jury must agree unanimously on which act constituted the charged crime. Kitchen, 110 Wn.2d at 411. Either the State must elect the act

on which it relies or the court must instruct the jury to agree unanimously as to what act or acts the State proved beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411. Failure to do so is constitutional error because of "the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Kitchen, 110 Wn.2d at 411.

But "the State need not make an election and the trial court need not give a unanimity instruction if the evidence shows the defendant was engaged in a continuing course of conduct." State v. Fiallo–Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995) (internal quotation and citation omitted). Washington courts have defined a continuing course of conduct as "an ongoing enterprise with a single objective." State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). To determine whether criminal conduct constitutes one continuing act, the trial court must evaluate the facts in a commonsense manner. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). A reviewing court will consider "(1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose." State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010) (citing Love, 80 Wn. App. at 361).

Here, the two assaults were part of a continuing course of conduct. The time between the assaults was brief, long enough only for Ressler to call 911 and Lennstrom to begin recording Holland on her phone. Murray did not even have time to close the door. Moreover, they were committed against the same victim and took place in the same location, near the entrance to Murray's business.

Holland argues that the two assaults "were interrupted, with an opportunity for Mr. Holland to reconsider his options." But we cannot infer from the evidence that he actually did so. And while Holland argues that the two assaults did not share a purpose because his actions were the result of drug-induced psychosis and had no apparent purpose, there is no requirement that the purpose be a rational one. Holland's aim in both assaults was to assault Murray. Accordingly, the State was not required to elect the act upon which it would rely, and the court was not required to give a unanimity instruction.

3. Sufficiency of the evidence

Holland argues that the evidence was insufficient to establish that he "recklessly" inflicted substantial bodily harm. He contends that he had no knowledge that hitting Murray in the face risked dislodging Murray's artificial lens. He further argues that "there was no evidence that [he] was aware his conduct was wrongful" due to his longstanding substance abuse and mental health issues. Viewed in the light most favorable to the State, the evidence was sufficient to establish that Holland acted recklessly.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, 119 Wn.2d at 201. We defer to the trier of fact on issues of

conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

As charged here, a person is guilty of assault in the second degree if they "[i]ntentionally assault[ ] another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a). Thus, the State was required to prove both that Holland intentionally assaulted Murray and that, in doing so, he recklessly inflicted substantial bodily harm to Murray.

> RCW 9A.08.010(1)(c) defines "recklessness" as follows:
>
> A person is reckless or acts recklessly when [they know] of and disregard[ ] a substantial risk that a wrongful act may occur and [their] disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Thus, there is both a subjective and an objective component to the mens rea of "recklessness." State v. Rich, 184 Wn.2d 897, 904, 365 P.3d 746 (2016). Whether sufficient evidence supports finding a defendant acted recklessly "depends on both what the defendant knew and how a reasonable person would have acted knowing these facts." State v. Graham, 153 Wn.2d 400, 408, 103 P.3d 1238 (2005).

Holland contends the State failed to prove he acted recklessly because there was no evidence he knew of, and disregarded, Murray's unique vulnerability. But "[w]ithout question, any reasonable person knows that punching someone in the face could result in a broken jaw, nose, or teeth, each of which would constitute substantial bodily harm." State v. R.H.S., 94 Wn. App. 844, 847, 974 P.2d 1253 (1999). The State was not required to present evidence

that Holland knew of Murray's artificial lens in order to establish that Holland acted recklessly by punching Murray in the face, chest and stomach.

Holland further contends that he was unable to form the requisite intent of recklessness because of his mental health issues and drug use. But Holland abandoned his diminished capacity defense. And the evidence showed only that PCP made Holland more impulsive and volatile. It did not show that Holland's PCP use interfered with his ability to understand the wrongfulness of his conduct. A reasonable jury could find that Holland acted recklessly.

4. Vagueness challenge to the aggravating factor

Holland argues that the aggravating factor in RCW 9.94A.535(3)(y) is unconstitutionally vague. Assuming without deciding that a criminal defendant may challenge an aggravating factor on vagueness grounds, we conclude that the language of the aggravating factor is not unconstitutionally vague.[1]

"[T]he due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct." State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). A statute is unconstitutionally vague if it "fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it,

[1] Washington courts have consistently held, based on State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003), that aggravating factors are not subject to a vagueness challenge because they "do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State." Baldwin, 150 Wn.2d at 459. Holland argues that the Washington Supreme Court impliedly overruled Baldwin when it addressed the merits of a vagueness challenge to the rapid recidivism aggravator, RCW 9.94A.535(3)(t), in State v. Murray, 190 Wn.2d 727, 738, 416 P.3d 1225 (2018). We exercise our discretion to consider the merits of Holland's vagueness challenge to RCW 9.94A.535(3)(y), without deciding whether Holland is entitled to raise such a challenge with regard to an aggravating factor.

or if it does not provide standards sufficiently specific to prevent arbitrary enforcement." State v. Duncalf, 177 Wn.2d 289, 296-97, 300 P.3d 352 (2013) (quoting State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004)). The test for vagueness is whether a person of reasonable understanding is required to guess at the meaning of the statute. State v. Branch, 129 Wn.2d 635, 648, 919 P.2d 1228 (1996).

We review de novo whether a statute is unconstitutionally vague as a question of law. State v. Watson, 160 Wn.2d 1, 5, 154 P.3d 909 (2007). We presume a statute is constitutional, and the party challenging the statute bears the burden of proving otherwise. Bahl, 164 Wn.2d at 753.

RCW 9.94A.535(3) lists aggravating factors that can support a departure from the sentencing guidelines if the "facts supporting aggravating circumstances" can be "proved to a jury beyond a reasonable doubt." RCW 9.94A.537(3). One such factor is if "[t]he victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense." RCW 9.94A.535(3)(y).

The injury required to convict a person of second degree assault, as charged here, is "substantial bodily harm." RCW 9A.36.021(1)(a). RCW 9A.04.110(4)(b) defines "substantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part."

Here, Murray experienced permanent injury. After the assault he lost even more of his limited vision. The changes to his vision impaired his ability to perform routine daily activities like reading, working or riding in a car. He also experienced frequent pain. It would be clear to a person of reasonable understanding that such permanent injuries are significantly greater than those contemplated by the legislature in defining "substantial bodily harm." RCW 9.94A.535(3)(y) is not unconstitutionally vague as applied to Holland.[2]

5. Findings of fact supporting the exceptional sentence

Holland contends that the trial court's findings of fact did not suffice to support the imposition of an exceptional sentence. This claim fails because the jury's finding of the aggravating factor by special verdict provides a sufficient basis on which to justify Holland's exceptional sentence.

If a jury unanimously finds beyond a reasonable doubt the existence of "one or more of the facts alleged by the state in support of an aggravated sentence," the court may impose an exceptional sentence "if it finds, considering the purposes of this chapter, that the facts found [by the jury] are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6). Once the jury has made its factual determination by special verdict, "[t]he trial judge [is] left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional

[2] Holland contends that Murray is "a quintessential eggshell victim" and Holland "could not 'readily inform' himself of Mr. Murray's unique status and could therefore not take measures to avoid criminal liability for the particular harm that served as the basis for the aggravating factor." But the statute focuses solely on the seriousness of the injury, not the defendant's intent or conduct in causing it.

sentence." State v. Sage, 1 Wn. App. 2d. 685, 708, 407 P.3d 359 (2017) (alteration in original) (citing State v. Suleiman, 158 Wn.2d 280, 290-91 & 291 n.3, 143 P.3d 795 (2006)).

> The only permissible "finding of fact" by a sentencing judge on an exceptional sentence is to confirm that the jury has entered by special verdict its finding that an aggravating circumstance has been proven beyond a reasonable doubt. Then it is up to the judge to make the legal, not factual, determination whether those aggravating circumstances are sufficiently substantial and compelling to warrant an exceptional sentence.

Sage, 1 Wn. App. 2d at 709. The court "shall set forth the reasons for its decision in written findings of fact and conclusions of law." RCW 9.94A.535.

We review under a clearly erroneous standard whether evidence supports the reasons given by the sentencing judge to impose an exceptional sentence. State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). We review de novo whether those reasons justify a departure from the standard sentence range. Law, 154 Wn.2d at 93.

Here, the trial court's written findings of fact and conclusions of law provide as follows:

> Pursuant to RCW 9.94A.535, and having reviewed all the evidence, records, and other information in this matter including the jury's findings of an aggravating circumstance, and having considered the arguments of counsel, this Court hereby imposes an exceptional sentence of 12 months on the offense of Assault in the Second Degree charged in Count I. This exceptional sentence is based on the following facts and law:
>
> A. FINDINGS OF FACT
>
> The defendant's offender score for the offense of Assault in the Second Degree is 14. The defendant's standard range for this offense is 63-84 months.
>
> On February 28, 2018, the jury found the following aggravating circumstance beyond a reasonable doubt, pursuant to RCW

> 9.94A.535(3)(y): the victim's injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the crime of Assault in the Second Degree, i.e., the victim's injuries substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm.
>
> B. CONCLUSIONS OF LAW – SUBSTANTIAL AND COMPELLING REASONS FOR IMPOSING EXCEPTIONAL SENTENCE
>
> Considering the purposes of the Sentencing Reform Act, the aggravating circumstance specified in these Findings of Fact is a substantial and compelling reason that supports this Court imposing an exceptional sentence above the standard range.

The jury found by special verdict that the State proved "[t]he victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense" beyond a reasonable doubt. The trial court's findings of fact accurately reflected the jury's special verdict. This was the only finding required to authorize the trial court's imposition of the exceptional sentence "because the jury's finding in itself provides the trial court with a substantial and compelling reason to impose such a sentence." State v. Perry, 6 Wn. App. 2d 544, 556-57, 431 P.3d 543 (2018) (citing Duncalf, 177 Wn.2d at 296).

6. DNA collection fee

Holland challenges the $100 DNA collection fee imposed as part of his sentence. He contends, and the State concedes, that the fee must be stricken because he is indigent and because his DNA was collected following a prior felony conviction. Although these fees were mandatory when imposed, the Washington Supreme Court has since held in State v. Ramirez, 191 Wn.2d 732, 746-50, 426 P.3d 714 (2018), that courts may not impose discretionary legal financial obligations on an indigent criminal defendant. We accept the State's

concession and remand for the trial court to strike the DNA collection fee from the judgment and sentence.

7. Statement of additional grounds

In a pro se statement of additional grounds, Holland argues that he was denied the effective assistance of counsel because his attorney failed to request a jury instruction on the inferior degree offense of fourth degree assault.[3]

We review claims of ineffective assistance of counsel de novo. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to establish ineffective assistance of counsel, a defendant must demonstrate both that counsel's conduct was deficient (i.e., that it fell below an objective standard of reasonableness given the circumstances) and that the deficient performance resulted in prejudice (i.e., that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different). State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If counsel's conduct can be characterized as a legitimate trial strategy or tactic, performance is not deficient. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). We engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

A party requesting an instruction on an inferior degree offense must show:

[3] Though Holland refers to fourth degree assault as a "lesser included" offense of second degree assault, it is more accurately characterized as an "inferior degree" offense. RCW 10.61.003.

> (1) the statutes for both the charged offense and the proposed inferior degree offense 'proscribe but one offense'; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

State v. Fernandez–Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). When determining whether the evidence is sufficient to support an inferior degree offense instruction, we view the evidence in the light most favorable to the party requesting the instruction. Fernandez–Medina, 141 Wn.2d at 455–56. But the evidence must affirmatively establish the defendant's theory of the case, not merely allow the jury to disbelieve evidence of guilt. Fernandez–Medina, 141 Wn.2d at 456.

A person commits assault in the fourth degree when, "under circumstances not amounting to assault in the first, second, or third degree, [they assault] another." RCW 9A.36.041. Fourth degree assault is an inferior degree offense to second degree assault. State v. Villanueva–Gonzalez, 180 Wn.2d 975, 982 n.3, 329 P.3d 78 (2014). But for Holland to have been entitled to an instruction on fourth degree assault, there must have been affirmative evidence at trial that he assaulted Murray under circumstances not amounting to second degree assault – in other words, that he did not recklessly inflict substantial bodily harm.

Even viewed in a light most favorable to Holland, there was no evidence showing that he committed only fourth degree assault to the exclusion of second degree assault. As discussed above, Holland did not present evidence that his

drug use relieved him of the ability to form the requisite mental state. And the evidence was uncontroverted that the assault caused Murray substantial bodily harm. Holland fails to show that he was entitled to an inferior degree offense instruction or that his attorney was ineffective for failing to request one.

We remand for the trial court to strike the DNA collection fee from the judgment and sentence. In all other respects, we affirm Holland's judgment and sentence.

Chun, J.

WE CONCUR:

Leach, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78274-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: October 23, 2019
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