NOTICE: SLIP OPINION
(not the court's final written decision)

The opinion that begins on the next page is a slip opinion. Slip opinions are the written opinions that are originally filed by the court.

A slip opinion is not necessarily the court's final written decision. Slip opinions can be changed by subsequent court orders. For example, a court may issue an order making substantive changes to a slip opinion or publishing for precedential purposes a previously "unpublished" opinion. Additionally, nonsubstantive edits (for style, grammar, citation, format, punctuation, etc.) are made before the opinions that have precedential value are published in the official reports of court decisions: the Washington Reports 2d and the Washington Appellate Reports. An opinion in the official reports replaces the slip opinion as the official opinion of the court.

The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court's opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: https://www.lexisnexis.com/clients/wareports.

For more information about precedential (published) opinions, nonprecedential (unpublished) opinions, slip opinions, and the official reports, see https://www.courts.wa.gov/opinions and the information that is linked there.

Filed
Washington State
Court of Appeals
Division Two

February 28, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHAD DANIEL FERGUSON, Appellant.	No. 55768-1-II PUBLISHED IN PART OPINION

PRICE, J. — Chad Ferguson appeals his convictions following a jury trial. Ferguson argues that the trial court abused its discretion in denying his request for a mistrial when COVID-19 protocols affected his trial. He also argues that the trial court erred when it denied his request for a jury instruction on criminal trespass as a lesser included offense of first degree burglary and he received ineffective assistance of counsel.

In the published portion of this opinion, we hold that the trial court did not abuse its discretion by making trial management decisions that modified courtroom procedures in response to the COVID-19 pandemic. In the unpublished portion, we reject Ferguson's remaining arguments. We affirm.

FACTS

I. BACKGROUND

On April 16, 2019, Doug Brown and his son, Brandon Brown, left Doug's house to go to the store.[1] When they returned, they noticed a man, who they recognized to be Ferguson, inside the garage. An altercation occurred, and soon thereafter, Ferguson fled the scene by running through a nearby field to a neighbor's home. The police responded and ultimately found Ferguson at the neighbor's house. Ferguson was arrested.

Ferguson was initially charged with first degree burglary of Doug's house. By the time his trial date arrived, Ferguson's charges were amended to also include felony harassment, third degree malicious mischief, second degree criminal trespass of the neighbor's house, bail jumping, and witness tampering.

II. TRIAL COURT'S COVID-19 PROTOCOLS

Following delay and multiple continuances partly due to the COVID-19 pandemic, Ferguson's case proceeded to trial. Ferguson's jury trial was the first to take place in the county since the beginning of the COVID-19 pandemic. Accordingly, the trial court implemented a variety of COVID-19 protocols for the trial. As shown in the video record of Ferguson's trial, some members of the jury were seated behind the counsel tables in the courtroom gallery because of the need to socially distance the jurors and the participants. And everyone in the court room was instructed to wear face masks. The trial court also instructed the jurors to raise their hands if they could not hear something during the trial.

[1] Because Doug Brown and Brandon Brown have the same last name, we refer to them by their first names. We intend no disrespect.

Plexiglass partitions were also placed between participants, including between Ferguson and his counsel at their table. Throughout the trial, Ferguson and his counsel would lean or move back behind the partition to speak to each other and would pass notes to each other.

After all witnesses had testified, Ferguson's counsel requested a mistrial based on the COVID-19 protocols. Specifically, counsel argued the plexiglass partition between counsel and Ferguson, coupled with the seating arrangement for the jurors, compromised their ability to have necessary attorney-client communications. Ferguson's counsel contended that because they could not hear each other through the plexiglass partition, the jurors were possibly able to overhear private communications. Counsel stated, "[Ferguson] speaks too loudly, and so I was -- I think -- the jurors were sitting within six feet of him. And usually they're on the other side of the room." Verbatim Rep. of Proc. (VRP) at 482. The trial court suggested that a mistrial based on the trial layout should have been requested on "day one" of the trial, not just before closing arguments, and denied the motion for a mistrial. VRP at 487.

The jury found Ferguson guilty of first degree burglary, third degree malicious mischief, second degree criminal trespass, bail jumping on a class A felony, and tampering with a witness.

Ferguson appeals.

ANALYSIS

I. BACKGROUND OF COVID-19 AND COURT OPERATIONS

On February 29, 2020, Governor Jay Inslee declared a state of emergency due to the COVID-19 pandemic. Order, No. 25700-B-602, *In re Response by Washington State Courts to*

the Public Health Emergency in Washington State, at 1 (Wash. Mar. 4, 2020) (March 4 Order).[2] In response to this emergency, our Supreme Court issued a series of orders authorizing trial courts to alter their regular operations and procedures. *See, e.g.*, *id.* As the March 4 Order recited:

> [D]uring this state of emergency, it may become necessary for courts in these counties to close, relocate, or otherwise significantly modify their regular operations; and
>
> [T]he presiding judges in these counties need sufficient authority to effectively administer their courts in response to this state of emergency, including authority to adopt, modify, and suspend court rules and orders as warranted to address the emergency conditions.

Id.

Less than three weeks later, on March 20, 2020, our Supreme Court noted that public health authorities and government officials were making increasingly stringent public health recommendations. Amended Order, No. 25700-B-607, *In re Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency*, at 1 (Wash. Mar. 20, 2020) (March 20 Order).

> [D]uring this state of emergency, the Centers for Disease Control and Prevention and the Washington State Department of Health have recommended increasingly stringent social distancing measures of at least six feet between people, and encouraged vulnerable individuals to avoid public spaces; and
>
> [C]onsistent with these recommendations, Governor Inslee has barred gatherings of more than fifty people and ordered all schools, businesses, faith-based organizations, and other public venues to close during the ongoing public health emergency, and the CDC has recommended restricting gatherings to no more than 10 people . . . .

Id.

[2] Our Supreme Court's orders can be found at: https://www.courts.wa.gov/opinions/index.cfm?fa=opinions.scorders.

Our Supreme Court recognized that court facilities were not well-equipped for the spatial demands of social distancing:

> [M]any court facilities in Washington are ill-equipped to effectively comply with social distancing and other public health requirements and therefore continued in-person court appearances jeopardize the health and safety of litigants, attorneys, judges, court staff, and members of the public . . . .

Id. at 1-2.

Because the crisis was "increasing daily," our Supreme Court required that courts consider closing or "significantly modify[ing] their operations" for public health and safety:

> [P]ursuant to this Court's March 4, 2020 order, many Washington courts have already taken important steps to protect public health while ensuring continued access to justice and essential court services; however, the crisis is increasing daily and it may become necessary for courts to close, suspend in-building operations or otherwise significantly modify their operations . . . .

Id. at 2. The March 20 Order also suspended all criminal trials until after April 24, 2020. *Id.* at 3.

Our Supreme Court then decided to extend the suspension of criminal trials several more times, until after May 4, 2020, and again until July 6, 2020. Order, No. 25700-B-615, *In re Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency*, at 3 (Wash. Apr. 13, 2020) (April 13 Order); Order, No. 25700-B-618, *In re Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency*, at 3 (Wash. Apr. 29, 2020) (April 29 Order).

When criminal jury trials were permitted to resume on July 6, 2020, our Supreme Court again instructed trial courts to alter typical courtroom procedures to allow for social distancing and provided the respective presiding judges with the authority to make required modifications:

> [S]afely resuming jury trials will require modifications to court rules and procedures to allow for social distancing and compliance with public health protocols, to minimize the risk of coronavirus exposure by jurors, court personnel, litigants and the public . . . .

Order, No. 25700-B-631, *In re Statewide Response by Washington State Courts to the COVID-19 Public. Health Emergency*, at 1-2 (Wash. June 18, 2020) (June 18 Order). The Supreme Court further ordered, "[C]ourts must conduct all such proceedings consistent with the most protective applicable public health guidance in their jurisdiction . . . ." *Id.* at 3.

II. COVID-19 PROTOCOLS FOR FERGUSON'S TRIAL

Against this backdrop of modified court operations rooted in the public health emergency, Ferguson argues that the trial court's COVID-19 protocols for his September 2020 trial were *trial irregularities* and the trial court erred when it denied his motion for a mistrial. The State argues that the COVID-19 precautions were permissible *trial management decisions* within the discretion of the trial court. We agree with the State.

A. LEGAL PRINCIPLES

We review the trial court's denial of a motion for a mistrial for an abuse of discretion. *State v. Garcia*, 177 Wn. App. 769, 776, 313 P.3d 422 (2013), *review denied*, 179 Wn.2d 1026 (2014). "A trial court's denial of a mistrial motion will be overturned only when there is a substantial likelihood that the error affected the jury's verdict." *Id.*

Trial irregularities are irregularities that occur during a criminal trial that implicate the defendant's due process right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 761 n.1, 675 P.2d

1213 (1984).[3] We examine three factors "when determining whether an irregularity warrants a mistrial: '(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.' " *Garcia*, 177 Wn. App. at 776 (internal quotation marks omitted) (quoting *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012)).

Courts have also categorized certain trial court decisions as "trial management decisions." *See State v. Dye*, 178 Wn.2d 541, 547, 309 P.3d 1192 (2013) (whether presence of facility dog with witness during live testimony violated defendant's fair trial rights was analyzed as a trial management decision); *State v. Caver*, 195 Wn. App. 774, 780, 381 P.3d 191 (2016) (whether the trial court's refusal to allow the defendant to wear jail clothes was a due process violation was analyzed as a trial management decision), *review denied*, 187 Wn.2d 1013 (2017); *State v. Jaime*, 168 Wn.2d 857, 862, 233 P.3d 554 (2010) (provisions for the order and security of the courtroom were analyzed as trial management decisions). Because the trial court is generally in the best position to perceive and structure its own proceedings, the trial court has broad discretion over trial management decisions. *Dye*, 178 Wn.2d at 547.

Some examples of trial management decisions are provisions for the order and security of the court room and the manner and order of interrogating witnesses. *Id.* at 547-48. The physical layout of the courtroom is also generally a matter of the trial court's discretion. *State v. Johnson*, 77 Wn.2d 423, 425, 462 P.2d 933 (1969) ("Physical arrangement of the courtroom, including

[3] Examples of trial irregularities include spectator misconduct, a codefendant's outburst in front of the jury, and a reference to evidence the trial court previously agreed to exclude. *State v. Sage*, 1 Wn. App. 2d 685, 706, 407 P.3d 359 (2017), *review denied*, 191 Wn.2d 1007 (2018), *cert. denied*, 139 S. Ct. 1267 (2019); *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012); *State v. Wade*, 186 Wn. App. 749, 774-75, 346 P.3d 838, *review denied*, 184 Wn.2d 1004 (2015).

placement of jurors, counsel and parties, and the location of bench, witness box, court reporter and clerk during all stages of trial" are discretionary matters for the trial court.).

We review trial management decisions under an abuse of discretion standard. *Caver*, 195 Wn. App. at 780. The trial court abuses its discretion if:

> (1) The decision is "manifestly unreasonable," that is, it falls "outside the range of acceptable choices, given the facts and the applicable legal standard";
>
> (2) The decision is "based on untenable grounds," that is, "the factual findings are unsupported by the record"; or
>
> (3) The decision is "based on untenable reasons," that is, it is "based on an incorrect standard or the facts do not meet the requirements of the correct standard."

Dye, 178 Wn.2d at 548 (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

However, if the trial management decision is inherently prejudicial, we scrutinize it more closely.[4] *See Caver*, 195 Wn. App. at 780. The court in *Caver* explained:

> When the decision is "inherently prejudicial," we scrutinize it closely, asking if it was "necessary to further an essential state interest." To determine if a courtroom arrangement is "inherently prejudicial," we ask if it presents "an unacceptable risk" of bringing "impermissible factors" into play. This risk comes from "the wider range of inferences that a juror might reasonably draw" from the arrangement. We use "reason, principle, and common human experience" to evaluate the likely effects of a measure on a juror's judgment.

Id. (internal quotation marks and footnotes omitted) (quoting *State v. Finch*, 137 Wn.2d 792, 846, 975 P.2d 967 (1999); *Jaime*, 168 Wn.2d at 862; *Estelle v. Williams*, 425 U.S. 501, 504, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)).

[4] Some examples of trial management decisions that have been deemed inherently prejudicial include requiring the defendant to wear prison clothes or remain in restraints. *See Caver*, 195 Wn. App. at 780-81.

B. COVID-19 PROTOCOLS ARE TRIAL MANAGEMENT DECISIONS

As an initial matter, the parties disagree on whether COVID-19 protocols are more appropriately considered trial irregularities or trial management decisions. We hold that COVID-19 protocols are trial management decisions, not trial irregularities. The factors to determine whether trial irregularities warrant a mistrial, as a whole, are ill-fitting to analyze the question of whether any particular set of COVID-19 protocols merit a mistrial.

The first trial irregularity factor of "seriousness" could clearly be applied to COVID-19 protocols; these protocols could have the potential of seriously impacting the rights of defendants. One could imagine the possibility of protocols, if taken to their extremes, dramatically affecting the fairness of a trial. For example, placing the defendant and counsel in different rooms to prevent contact without some form of private communication could foreclose effective attorney-client consultation, or if jurors are so overly distanced such that evidence cannot be viewed, the right to present a defense would be compromised.

However, the second factor (whether it involved cumulative evidence) and the third factor (whether remedied by trial court instruction) cannot be readily applied to COVID-19 protocols. COVID-19 protocols do not directly involve evidence from a case, making the second factor irrelevant to analyzing whether these alterations warrant a mistrial. The third factor, too, is not applicable. While COVID-19 protocols would obviously require some initial comment to jurors from the trial court, this type of instruction would not be considered a curative instruction. The lack of meaningful application of two of the three factors shows that the question of whether COVID-19 protocols are appropriate should not be analyzed as trial irregularities, but as trial management decisions instead.

C. TRIAL COURT DID NOT ABUSE ITS DISCRETION

Here, Ferguson challenges the COVID-19 protocols used for his trial—specifically, the trial court's use of plexiglass partitions, the jurors' position in the gallery, and the use of masks in the court room. Ferguson argues that the plexiglass between him and his counsel forced them to lean back to communicate with each other and may have allowed the jurors to overhear them. Ferguson also argues that the masks required him and his counsel to speak louder than they typically would, potentially disclosing their confidential attorney-client communications to the jurors and the State. Ferguson contends the trial court abused its discretion when it denied his request for a mistrial due to these protocols.

The State responds that the trial court did not abuse its discretion with these COVID-19 protocols. According to the State, because the trial court implemented these changes with the express permission of our Supreme Court to conduct jury trials " 'consistent with the most protective applicable public health guidance,' " the trial court did not abuse its discretion. Br. of Resp't at 13 (quoting June 18 Order at 3). The State further contends the possibility that the jurors overheard Ferguson's comments to his counsel is more attributable to his conduct, rather than the placement of the jurors. The plexiglass did not prevent communication between Ferguson and his counsel because they were able to pass notes, speak to each other by minimally backing up, and even the closest jurors were far enough away to not be able to hear if Ferguson did not speak too loudly. In other words, the State argues the presence of masking, plexiglass, and social distancing did not make Ferguson's trial unfair.

Whether these COVID-19 protocols warranted granting a mistrial is reviewed for an abuse of discretion. As the court in *Dye* noted, the trial court is in the best position to perceive and

structure its own proceedings and has the discretion to alter its courtroom. *Dye*, 178 Wn.2d at 547-48. The trial court in this case, knowing its own courtroom facilities and resources as it does, was therefore entitled, within the confines of reasonable discretion, to balance the need for public health and safety with the defendant's trial rights.

Ferguson's trial was the first in the county since the beginning of the pandemic and the suspension of all jury trials. The trial court implemented these protocols to ensure that the trial could safely proceed, as it was required to do by our Supreme Court.[5] Plexiglass partitions, mandatory masking, and social distancing that forced jurors to be located throughout the gallery were all modifications to the trial court's typical courtroom arrangement and procedures that fall within the court's discretion and were based on the Supreme Court's multiple orders. And the impact on Ferguson's rights, while not negligible, was not onerous. Although Ferguson and his counsel were not able to communicate as easily as they would have been without the COVID-19 protections in place, the video record of the trial shows that he and his counsel were able to lean back minimally to speak around the plexiglass partition and write notes to each other. And the record shows that Ferguson and his counsel communicated in those ways frequently. Ferguson claims that he spoke louder than normal because of the masks, but private communication with his counsel would have been more likely because of the same social distancing requirements about which Ferguson now complains.

Even if these COVID-19 protocols are characterized as inherently prejudicial trial management decisions, they pass closer scrutiny. First, these protocols were clearly designed to

[5] *See* March 4 Order; March 20 Order; April 13 Order; April 29 Order; June 18 Order.

further essential state interests. Each of the three main protocols challenged by Ferguson, the plexiglass partitions, required masking, and position of the jurors in the courtroom, was specifically designed to prevent the spread of the COVID-19 virus. And the instructions from our Supreme Court's multiple orders make it clear that the state was in the middle of an evolving public health emergency and stopping the spread of the virus and protecting the public, including litigants, were essential state interests.

Second, there was no risk of "impermissible factors" being brought into play from the "inferences that a juror might reasonably draw" from the protocols. *See Caver*, 195 Wn. App. at 780. In the face of the public health emergency, all jurors were keenly aware that modifications were being made in all segments of our society. No reasonable juror would draw any inference personally against Ferguson because of the implementation of plexiglass partitions, masks, and social distancing. COVID-19 protocols are simply not comparable to other inherently prejudicial decisions, like requiring the defendant to wear prison clothes or restraints that could signal dangerousness. *See Caver*, 195 Wn. App. at 780-81. Because impermissible factors were not brought into play and the changes furthered essential state interests, the COVID-19 protocols satisfy the closer scrutiny required for inherently prejudicial trial management decisions.

We acknowledge the difficult positions trial courts were placed in by the conflict between safety of the public and the rights of the criminally accused, especially in the initial phases of the public health emergency from the COVID-19 pandemic. Balancing these two important interests in the face of rapidly evolving science and guidance about the COVID-19 virus challenged the entire justice system, as evidenced by the multiple orders from our Supreme Court. One could imagine the possibility of some COVID-19 protocols that weigh too heavily on one interest at the

expense of another interest. But here, the trial court's protocols enabled Ferguson's trial to take place with a reasonable balance between participant safety and Ferguson's rights. The COVID-19 protocols were not outside the range of acceptable choices to prevent the spread of the COVID-19 virus. Therefore, these changes were not manifestly unreasonable or an abuse of discretion. We hold the COVID-19 protocols implemented in Ferguson's trial were permissive trial management decisions and the trial court did not abuse its discretion by denying Ferguson's motion for a mistrial.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

ADDITIONAL FACTS

I. ADDITIONAL BACKGROUND

On the day of Ferguson's arrest, Brandon, along with his girlfriend, arrived home from the store around 10:00 am, and Doug returned home about a minute behind them. When Brandon arrived home, he noticed the door to the house was unexpectedly unlocked. Brandon then noticed the door to the garage was ajar. Brandon looked in the garage and noticed Ferguson inside the garage. Brandon recognized Ferguson because they were acquainted and Ferguson had previously been present at the house. Although it was pre-COVID-19, Ferguson was wearing a mask on his face and going through items in the garage. When he noticed Brandon, Ferguson pulled down his mask and told Brandon he was "getting parts for [Doug]." VRP at 283-84.

Brandon grabbed Ferguson by the shoulders and took him outside to where Doug was standing. Ferguson cooperated with being escorted initially, but began to fight Doug when they got outside. Brandon's girlfriend called 911.

Soon after the fight started, Ferguson fled to the neighbor's home. Brandon then noticed that bins of items that had been in the garage were outside in the back yard. The responding police officers found Ferguson at the neighbor's house, where the backyard fence had been damaged and plants had been ripped from a garden.

II. PRETRIAL

As stated above, Ferguson was initially charged with first degree burglary of Doug's house, but his charges were amended to also include felony harassment, third degree malicious mischief, second degree criminal trespass of the neighbor's house, bail jumping, and witness tampering.

Ferguson's trial was continued multiple times. By the readiness hearing on September 17, 2020, Ferguson's counsel had not interviewed the State's witnesses. Ferguson's counsel had scheduled an interview with Doug, but Doug failed to show.[6] Ferguson's counsel had managed to interview Amanda Crepeau, Ferguson's girlfriend, before the trial. Despite not interviewing all of the witnesses, Ferguson wished to proceed with the trial, and his counsel told the trial court she could be ready for the trial scheduled for September 21.

Ferguson's counsel requested multiple pretrial motions in limine, including one motion to preclude referring to the complaining witnesses as "victims." VRP at 170. The trial court granted

[6] Ferguson's prior counsel had interviewed Doug.

the motion, ruling that the complaining witnesses be called by their names or "alleged victim[s]." VRP at 170.

III. TRIAL

A. OPENING STATEMENTS AND WITNESS TESTIMONY

During the defense's opening statement, Ferguson's defense counsel stated that the defense would introduce evidence rebutting some of Ferguson's charges. For example, counsel claimed that Doug wanted Ferguson out of the picture because Doug was in love with Crepeau. Defense counsel alleged that Doug concocted a plan to have Ferguson arrested by fabricating an element of Ferguson's first degree burglary charge.

Crepeau testified at the trial. She testified that Doug had signed a lease for her to rent a house, and she and Ferguson were living together but were facing eviction. Crepeau stated that she and Ferguson thought Doug could help prevent the eviction because he was friends with the landlord. Doug was scheduled to testify, but he failed to appear. Ferguson did not testify.

One of the police officers who investigated the scene testified. He identified a photograph of Doug with blood running down the side of his face and on his head and testified that the injuries in the photograph were consistent with the injuries he saw on Doug at the scene. According to the officer, Doug identified Ferguson as the person who caused his injuries.

During the officer's cross-examination, Ferguson's defense counsel asked the officer about a box on the police report that stated, "Suspect knew [the] victim was home." VRP at 225. During defense counsel's cross-examination of the officer, counsel used the term "victim" while discussing this portion of the report. Throughout the trial, whenever Doug was referenced as a victim, defense counsel made an objection consistent with the pretrial motion in limine ruling. But

after the police officer's testimony, the trial court overruled defense counsel's objections whenever a witness used the term "victim."

By the close of evidence, not all of the evidence discussed during defense counsel's opening statement had been introduced, such as testimony that Doug had concocted a plan involving fabricating evidence to fulfill the elements of Ferguson's first degree burglary charge.

B. POST-TESTIMONY MOTIONS

During discussions about jury instructions, Ferguson's counsel requested an instruction for criminal trespass as a lesser included offense to first degree burglary. The trial court refused to give the instruction, deciding that the mental states for criminal trespass and first degree burglary were connected to different elements of the crimes and, therefore, criminal trespass was not a lesser included offense.

Ferguson's counsel also challenged the trial court's refusal to enforce the in limine rulings that precluded use of the term "victim" to refer to Doug. Defense counsel argued that refusing to enforce the in limine ruling was akin to making a comment on the evidence "so that you are now agreeing that there has been enough foundation laid that we can call them victim[,] if you're understanding my logic." VRP at 479. The trial court noted defense counsel's complaint but did not offer further explanation of its rulings on this issue.

C. FERGUSON'S CLOSING ARGUMENT

The trial proceeded to closing arguments. During closing argument, Ferguson's counsel conceded that Ferguson was guilty of his second degree criminal trespass charge, claiming that the concession was being made to help the jury "understand what is necessary to fulfill guilt beyond a reasonable doubt for every element of a crime." VRP at 540.

The jury found Ferguson guilty of first degree burglary, third degree malicious mischief, second degree criminal trespass, bail jumping on a class A felony, and tampering with a witness.

ANALYSIS

I. LESSER INCLUDED OFFENSE

Ferguson argues that the trial court erred when it denied his request to include first degree criminal trespass as a lesser included offense to first degree burglary. We disagree.

A lesser included offense is an offense that is " 'necessarily included' " in the charge the defendant is facing. *State v. Nguyen*, 165 Wn.2d 428, 434, 197 P.3d 673 (2008) (quoting RCW 10.61.006). We apply the *Workman* test to determine whether an offense is a lesser included offense. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The *Workman* test requires that "[f]irst, each of the elements of the lesser offense must be a necessary element of the offense charged," and "[s]econd, the evidence in the case must support an inference that the lesser crime was committed." *Id.* Courts should typically "err on the side of instructing juries on lesser included offenses." *State v. Henderson*, 182 Wn.2d 734, 736, 344 P.3d 1207 (2015).

The first prong of the *Workman* test is referred to as the "legal prong," and the second is the "factual prong." *State v. Gamble*, 154 Wn.2d 457, 463, 114 P.3d 646 (2005). "The legal prong encompasses the constitutional requirement that a defendant have notice of the charges against [them]." *Id.* The legal prong is met when all of the elements of the lesser offense are necessarily included in the greater offense. *See id.*

The factual prong is typically met when "the evidence positively implie[s] that the lesser crime was committed." *State v. Coryell*, 197 Wn.2d 397, 407, 483 P.3d 98 (2021). The defendant is entitled to a lesser included instruction based on the evidence actually admitted. *Id.* at 406.

"A defendant is not entitled to a lesser included instruction merely because a jury could ignore some of the evidence." *Id.* at 406-07. "[T]he factual requirement for giving a lesser or inferior degree instruction is that some evidence must be presented . . . that affirmatively establishes the defendant's theory before an instruction will be given." *Id.* at 415. To determine whether the factual prong is satisfied, we view the " 'supporting evidence in the light most favorable to the party that requested the instruction. ' " *Id.* (quoting *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000)).

Both prongs of the *Workman* test must be satisfied for the requesting party to be entitled to the requested instruction. *State v. Condon*, 182 Wn.2d 307, 316, 343 P.3d 357 (2015). If either prong of the *Workman* test is not satisfied, the requesting party is not entitled to the instruction and the other prong need not be analyzed. *See State v. Hunley*, 161 Wn. App. 919, 926, 253 P.3d 448 (2011) (the court held the legal prong of the *Workman* test was not met and ended analysis without discussing the factual prong), *aff'd*, 175 Wn.2d 901, 287 P.3d 584 (2012).

A person is guilty of first degree criminal trespass "if he or she knowingly enters or remains unlawfully in a building." RCW 9A.52.070. A person is guilty of first degree burglary "if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person." RCW 9A.52.020.

Rather than start with the legal prong of *Workman* for these crimes, we begin our analysis with the factual prong.[7] Ferguson argues that the factual prong is met because he went to Doug's house intending to clear up the eviction that he and Crepeau were facing, not with the intent to commit a crime, and therefore, he could have been found guilty of only criminal trespass.

But the evidence does not factually support the inference or conclusion that Ferguson committed criminal trespass. Ferguson was interrupted in the midst of going through Doug's possessions in his garage with a mask covering his face (prior to the COVID-19 pandemic). And Doug's items that had previously been in his garage had been moved outside. Even when viewed in the light most favorable to Ferguson, the only reasonable conclusion from this evidence is that Ferguson had no purpose for entering the garage other than to commit a theft crime. Entering the property with the intent to commit a crime is an element of first degree burglary that is not included in criminal trespass.

Additionally, Ferguson's assault on Doug just prior to Ferguson's flight from the scene was undisputed. Committing an assault in the immediate flight from the property is the other

[7] Our Supreme Court recently declined to determine whether first degree criminal trespass satisfies the legal prong of *Workman* as a lesser included offense of first degree burglary. *State v. Moreno*, 198 Wn.2d 737, 756, 499 P.3d 198 (2021) (determining question of whether first degree criminal trespass was a lesser included of first degree burglary was unnecessary to reach). However, opposing rationales were expressed in concurrences. *See id*. at 757 (González, C.J. concurring), 758-59 (Madsen, J. concurring). Chief Justice González posited that because the mental states of each crime were attached to different actions, criminal trespass was not a lesser included offense. *Id*. at 757-58 (González, C.J. concurring). But Justice Madsen reasoned that criminal trespass is a lesser included offense because it is not possible to commit a burglary without also committing criminal trespass when a person who "enters or remains in a building with intent to commit a crime necessarily has the intent to enter or remain unlawfully." *Id*. at 758-59 (Madsen, J. concurring). Because, as shown below, the factual prong of the *Workman* test is not met in this case, we determine it is unnecessary to engage in this analysis.

element of burglary not required for criminal trespass, and the evidence supports that Ferguson's actions fulfill this element because of the assault and fleeing.

As the jury determined, these actions fit the statutory definition of first degree burglary. The record does not reflect that Ferguson could have been factually guilty of criminal trespass instead of first degree burglary unless, contrary to *Coryell*, the evidence discussed above is ignored. Therefore, the factual prong of the *Workman* test is not met. The trial court did not err in denying Ferguson's request for an instruction for criminal trespass as a lesser included offense of first degree burglary.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Ferguson argues that he received ineffective assistance of counsel for the following five reasons: (1) his counsel did not elicit testimony on all of the facts that counsel promised during opening statement, (2) his counsel did not follow the in limine ruling regarding the use of the term "victim," (3) his counsel conceded to the jury that Ferguson was guilty of second degree criminal trespass during the closing argument, (4) his counsel failed to interview witnesses, and (5) his counsel failed to move for a mistrial on the COVID-19 protocols until it was too late. We disagree.

To show ineffective assistance of counsel, the appellant must demonstrate that their attorney's performance was deficient and the deficient performance prejudiced the appellant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 35, 296 P.3d 872 (2013). Failure to establish either prong is fatal to the claim. *Strickland*, 466 U.S. at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011), *cert. denied*, 574 U.S. 860 (2014).

Generally, to show that trial counsel was deficient, " 'the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.' " *State v. Vazquez*, 198 Wn.2d 239, 248, 494 P.3d 424 (2021) (quoting *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). We engage in a strong presumption that counsel's performance was reasonable. *Grier*, 171 Wn.2d at 33. To show prejudice, the appellant must demonstrate a reasonable probability that the outcome of the proceeding would have been different if counsel had not performed deficiently. *State v. Johnson*, 12 Wn. App. 2d 201, 210, 460 P.3d 1091 (2020), *aff'd*, 197 Wn.2d 740, 487 P.3d 893 (2021).

A. ELICITING FACTS CONSISTENT WITH OPENING STATEMENT

Ferguson argues that his counsel was deficient when counsel did not ask questions that would have elicited the facts to support the theory outlined in the defense's opening statement. We disagree.

" '[A]ssuming counsel does not know at the time of the opening statement that [they] will not produce the promised evidence, an informed change of strategy in the midst of trial is virtually unchallengeable.' " *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 898, 952 P.2d 116 (1998) (internal quotation marks omitted) (quoting *Turner v. Williams*, 35 F.3d 872, 904 (4th Cir. 1994)).

Here, it is true that defense counsel did not elicit facts during questioning of witnesses that were discussed in the opening statement, such as counsel's assertions that Doug staged Ferguson's arrest and manufactured evidence to support that Ferguson committed crimes. Defense counsel asserted in the opening statement that Doug targeted Ferguson because Doug was in love with Crepeau, wanted Ferguson out of the picture, and aimed to have Ferguson arrested and convicted of crimes.

However, many of these facts would have been elicited from either Doug, who was scheduled to testify but unexpectedly failed to appear, or Ferguson, who did not testify on his own behalf. Without these witnesses, Ferguson's counsel was likely prevented from eliciting key pieces of testimony supporting counsel's theory. Because some facts that counsel previewed in the opening statement were not brought forth during questioning as a result of the changes to the expected testimony, the decision to shift focus in the midst of the trial was legitimate trial strategy, not deficient performance. Ferguson has not shown ineffective assistance for these decisions.

B. "ALLEGED VICTIM" IN LIMINE RULING

Ferguson also argues that he received ineffective assistance of counsel when his counsel referred to Doug as a "victim" instead of an "alleged victim." We disagree.

Ferguson correctly points out that his counsel used the term "victim" in relation to Doug when counsel was questioning the police officer who had checked a box in his report that read, "Suspect knew [the] victim was home." VRP at 225. And it appears that the trial court thereafter refused to enforce the in limine ruling, over Ferguson's counsel's objections.

The record is insufficient to determine whether the trial court refused to further enforce the in limine ruling because of a perceived waiver by defense counsel's use of the term with the officer or for some other reason. But even if defense counsel had some role in waiving the in limine ruling and, as a consequence, was arguably deficient in their performance, Ferguson cannot show prejudice. By the time the trial court overruled defense counsel's objections, the jury had seen evidence of the assault on Doug. The jury saw pictures of blood running down the side of Doug's face following the fight with Ferguson. Therefore, it was established that Doug was obviously injured and, therefore, a likely victim of *something*. In the face of this evidence of some injury,

combined with the overwhelming evidence of guilt, Ferguson cannot show that any marginal prejudice from the term "victim" instead of "alleged victim" would result in a reasonable probability that the outcome of the proceeding would have been different. Thus, Ferguson was not prejudiced by his counsel's actions related to the in limine ruling.

C. CLOSING ARGUMENTS

Ferguson also argues that his counsel was deficient when counsel conceded to the jury during closing argument that Ferguson was guilty of second degree criminal trespass for fleeing to the neighbor's home after the assault. We disagree.

Conceding guilt in a closing argument can be a legitimate trial strategy when evidence of guilt on a particular count is overwhelming. *State v. Silva*, 106 Wn. App. 586, 596-97, 24 P.3d 477, *review denied*, 145 Wn.2d 1012 (2001). This approach may help win the jury's confidence, gain the defendant some credibility, and lead the jury toward lenience by conceding that the defendant is guilty of a lesser charge. *See id.* at 596 n.37.

A person is guilty of second degree criminal trespass when "he or she knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree." RCW 9A.52.080. Second degree criminal trespass is a misdemeanor. *Id.*

Here, as part of illustrating when evidence meets the beyond a reasonable doubt burden, Ferguson's counsel stated during closing arguments that Ferguson was guilty of second degree criminal trespass of the neighbor's house. Criminal trespass is a misdemeanor and relatively minor compared to Ferguson's first degree burglary charge. And given that Ferguson was found by

police on a neighbor's property without that neighbor's permission to be there, evidence of his guilt of the conceded charge was overwhelming.

This concession was clearly a legitimate trial strategy by defense counsel. *See Silva,* 106 Wn. App. at 596-97. Done as an illustration of when evidence shows guilt beyond a reasonable doubt, it was both demonstrative for the jury and was likely calculated to gain Ferguson some confidence with the jury. As a legitimate trial strategy, Ferguson's counsel did not perform deficiently by making the concession.

D. WITNESSES INTERVIEWS

Ferguson argues that his counsel was deficient when counsel failed to interview witnesses. However, the record does not reflect that Ferguson's counsel did not interview witnesses. Before the trial began, Ferguson's counsel attempted to interview Doug, the prosecution's main witness, but Doug failed to attend the interview and then never appeared as a witness for the trial. Further, the record shows that Ferguson's counsel did interview Crepeau prior to trial. The record otherwise does not show whether other witnesses were or were not interviewed. Because Doug had been interviewed by Ferguson's prior counsel and Ferguson wanted to go to trial despite Doug not being interviewed by trial counsel, there is no showing that Ferguson's counsel performed deficiently regarding witness interviews.

E. TIMING OF MISTRIAL MOTION

Ferguson argues that his counsel was deficient in requesting a mistrial regarding the COVID-19 protocols after both parties rested and not earlier, prior to the testimony. He contends the timing was the main reason for the trial court's denial of the mistrial. However, as explained

above, the trial court did not err in denying Ferguson's request for a mistrial regardless of the timing of the request. Therefore, Ferguson's challenge fails.

Ferguson fails to show he received ineffective assistance of counsel.

CONCLUSION

The trial court did not err in denying Ferguson's request for a mistrial because the challenged COVID-19 protocols were trial management decisions that were not an abuse of discretion. Additionally, the trial court did not err when it did not include first degree criminal trespass as a lesser-included offense of first degree burglary because the factual prong of the *Workman* test is not met. Finally, Ferguson's ineffective assistance of counsel claims fail. We affirm Ferguson's convictions.

Price, J.
PRICE, J.

We concur:

Glasgow, CJ
GLASGOW, C.J.

J, J
J., J.