

NO. 37675-0

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KI KANG LEE, APPELLANT

Appeal from the Superior Court of Pierce County
No. 06-1-05223-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was trial counsel effective where defendant cannot satisfy either prong of the *Strickland* test?
2. Did the trial court properly deny defendant's request for a voluntary intoxication instruction where defendant presented no evidence that the alcohol effected his mind or body?
3. Is defendant entitled to relief under the cumulative error doctrine where there was no error?

B. STATEMENT OF THE CASE.

1. Procedure

On November 2, 2006, the State charged Ki Kang Lee, hereinafter referred to as "defendant," with attempted first degree murder with a deadly weapon enhancement. CP 1-2. A corrected information as to name only was filed on the same day. CP 4-5. An amended information was filed on October 24, 2007 adding one count of first degree assault with a deadly weapon enhancement. CP 31-32.

The parties appeared before the Honorable Bryan E. Chushcoff on February 19, 2008, for trial. RP 4. Defense counsel advised the court that defendant would be proceeding on a general denial/diminished capacity defense. RP 7. He further advised the court that he would have an expert testify and potentially three lay witnesses who would testify as to the

relationship between defendant and the victim and one witness who would testify as to why defendant had the knife in his possession. RP 8.

Defendant made no statements to law enforcement and a CrR 3.5 hearing was not held. RP 10.

Defendant proposed jury instructions that included lesser included crimes of second degree assault and third degree assault, diminished capacity, and voluntary intoxication. CP 43-50. The State did not propose any lesser included jury instructions. CP 57-85. The court granted defendant's request to instruct the jury on second degree assault and third degree assault as lesser included offenses of the charged offense of first degree assault. CP 86-120. The court also granted defendant's request for a diminished capacity instruction, but denied his request for a voluntary intoxication instruction. CP 86-120; RP 463.

The jury returned verdicts of guilty for both attempted murder in the first degree and first degree assault and returned special verdict forms finding that defendant was armed with a deadly weapon on each of those counts. RP 555-56; CP . The court found that the assault conviction merged into the attempted murder conviction and only sentenced defendant on the attempted murder conviction. On April 25, 2008, defendant was sentenced to a standard range sentence of 180 months plus 24 months for the deadly weapon enhancement. CP 140-152.

2. Facts

Jin Kyung Kim met defendant while traveling to Hawaii in July of 2002. RP 66, 67. Ms. Kim and defendant remained in contact after their respective vacations were over and began dating after defendant's divorce later that same year. RP 68-69.

During the course of their relationship, defendant and Ms. Kim had several businesses. First, they opened a delivery service business in Seoul that lasted three months. RP 70, 71. Next, Ms. Kim and defendant returned to Hawaii to open a cold noodle business. RP 71. However, their relationship deteriorated while in Hawaii because defendant would blame her when matters did not work out as planned. RP 72. Ultimately, the cold noodle business did not work out and Ms. Kim and defendant returned to Korea. RP 71, 72. Before returning to Korea, Ms. Kim told defendant she wanted to end their relationship. Defendant did not want the relationship to end and told Ms. Kim that he would do better. RP 74. Defendant repeatedly asked her to stay in the relationship, and, because he was being very nice, Ms. Kim agreed. RP 74.

Once back in Seoul, defendant and Ms. Kim made plans to open a bakery in Seattle. RP 74. In 2005, they moved to Washington and opened a Korean bakery in Tacoma. RP 75. When the bakery opened, Ms. Kim was living with defendant and his two children in an apartment. RP 76. Defendant was able to obtain an investment visa, which required him to show a transfer of \$250,000. RP 76-77. This was done, in part, with

\$100,000 Ms. Kim borrowed from her parents. RP 77. Some of the money for defendant's visa came from Dr. Shin Wu Lee, a friend of defendant's who also put in about \$100,000. RP 77.

Ms. Kim had a 10 year visa which required her to return home every six months to maintain her visa. RP 78. The first time she went to Korea to comply with the terms of her visa, Ms. Kim chose not to stay with her parents because she still had not paid back the \$100,000. RP 77. The second time she returned to Korea, Ms. Kim went to her parent's home. Ms. Kim's parents, who did not know about Ms. Kim's romantic relationship with defendant, were suspicious of several things and hid her passport from her. RP 71, 80, 82, 136. Ms. Kim testified that she was not in a hurry to return to the United States because, once again, her relationship with defendant was not very good. RP 82. However, defendant wanted her to return and begged her to do so. RP 82. At defendant's request, Ms. Kim returned to the United States, but only stayed for one week. RP 80, 82, 83. Once again when she was back in Korea, defendant asked her to return to Tacoma. RP 83. When she refused, defendant threatened to tell her parents about their relationship. RP 83. Defendant threatened Ms. Kim's parents by saying he knew where they lived and where their business was located – defendant told Ms. Kim that he would not leave her family alone. RP 83. Specifically, defendant threatened to kill Ms. Kim's parents. RP 84.

Defendant promised that Ms. Kim could end their relationship if she returned to the U.S. to help him open a second bakery. RP 84. Ms. Kim told her father about her relationship with defendant and obtained his permission for her to return to the U.S. for approximately one month. RP 84. Once in the United States, Ms. Kim lived with defendant for three months. RP 85, 86. For the first two weeks, defendant was very good to her, but things were quite bad between them for the remainder of time. RP 86. Ms. Kim left two days after the second bakery opened. RP 85.

When she went back to Korea, Ms. Kim believed her and defendant's relationship was over. RP 86. Ms. Kim stayed in contact for a little while as the bakery became established and then told defendant that she would no longer be in contact with him. RP 87. Defendant attempted to contact her by email, but Ms. Kim did not open the email. RP 90.

In August 2006, defendant traveled to Korea where he contacted Ms. Kim's sister and the three of them met. RP 90. Ms. Kim's decision to end their relationship did not change defendant returned to the U.S. RP 91. Before he left, defendant, Dr. Shin Wu Lee, Ms. Kim's father, and Ms. Kim all met. RP 91. The four of them agreed that defendant would not contact Ms. Kim regarding their relationship anymore. RP 91. If defendant needed to contact Ms. Kim regarding business, then he would contact Dr. Shin Wu Lee, who would then contact Ms. Kim. RP 91.

On three separate occasions, defendant really wanted to talk directly to Ms. Kim and she agreed to speak with him. RP 92. Defendant told Ms. Kim that he was facing a trial over the first bakery and that he needed her to come back to the United States to participate in the trial because she was involved in the finances of the bakery. RP 92. When Ms. Kim told defendant she would not come for the trial, defendant began calling her parent's house almost daily and every day he left numerous voice mail messages on her sister's phone. RP 92, 140, 142. When her sister stopped answering the phone, there were times that defendant left over 80 messages on her phone. RP 93, 142. During this time, defendant threatened to kill Ms. Kim's family – he told Ms. Kim to pick a family member and he would kill that family member. RP 92-93. Defendant told Ms. Kim that if she came back to help him with the trial, then their relationship would be over and defendant would not hurt her or her family. RP 93.

Ms. Kim decided to return to the United States to try to finally resolve their relationship. RP 93. The conditions she set for returning were that the relationship would be over, he would no longer hurt her or her family in any physical manner, and that the only thing she would assist with while in the United States was the trial. RP 94, 143. She would not see his children. RP 93, 96. She would not stay with him. RP 94. Through Dr. Shin Wu Lee, Ms. Kim was assured she would be able to stay

in a hotel while she was in the United States to assist with the trial. RP 94. Ms. Kim testified that she had some fear about coming to the States, but “I also didn’t quite believe something like this would happen.” RP 143.

Ms. Kim arrived in the United States on October 31, 2006. RP 94. Defendant picked her up from the airport around noon that day. RP 94. In the car, they fought about where Ms. Kim would stay. RP 95. When they stopped for something to eat, Ms. Kim took her bags from the car to show him that “I had a strong will to stay at a hotel for this trip.” RP 95, 144, 149. Defendant told her that he understood and asked her to please get back into the car. RP 95. However, once she was back in the car, he again insisted that she stay with him. RP 95. When the car stopped at a light, Ms. Kim again took her bags and got out the vehicle. RP 95-96. Ms. Kim testified that she did not want to see defendant’s children or to stay at defendant’s house because then everything would go back to the way it was before; their relationship would not be resolved. RP 96. Therefore, when defendant stopped the car at a light, Ms. Kim got out of the car and waited at a bus stop until defendant returned from taking care of an errand with his daughter. RP 96. When he returned, Ms. Kim got back into the car with him. RP 96.

Defendant and Ms. Kim looked for a motel after he completed his errand for his daughter. RP 97. He did not want Ms. Kim to stay at a Korean run hotel because he was afraid they would be talked about. RP

96. They were not able to find a hotel for Ms. Kim. RP 97. At some point defendant stopped at the bakery and his office. RP 97. Ms. Kim waited in the car while defendant went into the bakery. RP 97. When defendant returned to the car he had some roll cakes, which he placed in the back seat, and a cake box, which he placed in the trunk space of the Hyundai Santa Fe he was driving. RP 97. Defendant then went to his office. RP 99. Again, Ms. Kim waited for defendant in the car. RP 99. When defendant returned to the car, he said he needed to meet with his attorney to discuss the civil trial involving the first bakery. RP 99.

Defendant and Ms. Kim went to the first bakery site and waited for the attorney. RP 100-01. While waiting, defendant cried and asked why Ms. Kim had left him in the past and why her family treated him the way they did. RP 101. The attorney arrived and the three of them went out to eat. RP 101. They were later joined by a doctor who had similar issues with the business owner. RP 102. During dinner, defendant drank a bottle of Korean alcohol. RP 102. Defendant wanted to order another bottle of alcohol, but Ms. Kim did not want him to. RP 103. She was tired and her hotel arrangements had not been made. RP 103. In response, defendant hit the table with his fist quite hard. RP 104. When they left the restaurant, Ms. Kim got into the driver's seat because defendant had consumed alcohol and she was afraid that if defendant drove he would not take her to a hotel. RP 104. While Ms. Kim sat in the driver's seat, defendant went to the back of the vehicle, took the cake box from the trunk area, and

placed it in the back seat. RP 104. Defendant then got into the passenger seat. RP 104, 152.

Ms. Kim testified that she did not notice anything out of the ordinary in defendant's demeanor. RP 104. She testified that defendant normally drinks more than one bottle of alcohol and he is alright. She can also drink more than a bottle and be fine – the reason she wanted to drive is that she had less to drink than he did and she was afraid that if he drove he would take her to his house instead of a hotel. RP 104-05.

While Ms. Kim was driving, defendant asked Ms. Kim for her calling card number and for her father's number. RP 105, 151. He did not say why he wanted to call her father. Ms. Kim would not give him the numbers despite his repeated requests for them. RP 105, 151. Near the fire station in Steilacoom, defendant told Ms. Kim to pull the car over to the side of the road, which she did. RP 105-06, 151. After she stopped the car, defendant repeatedly asked Ms. Kim for her father's number and her calling card number. RP 107. Then defendant pulled a large kitchen knife from the cake box and repeatedly stabbed Ms. Kim in her abdomen and demanded that she give him the numbers. RP 108, 110, 113, 151, 152. During the assault, defendant had a hold of her neck and pulled her toward the middle of the vehicle as he stabbed her. RP 153. Ms. Kim said she told defendant she would give him the numbers, but he continued to stab her. RP 110, 154. Sometimes when the knife would not go in very well, "I think that he tried to push it in further into my body. I do remember him

pushing it in harder.” RP 110. Defendant kept saying that she needed to die and that she was someone that should die. RP 110. While defendant tried to call her father, he stuck the knife in a tissue box. RP 111. Ms. Kim grabbed defendant’s hands so he could not stab her anymore, but then he choked her and asked her “Do you want me to kill you this way?” As he choked her, Ms. Kim lost the strength in her hands and let go of him. RP 111. Defendant again grabbed the knife and stabbed her several more times before the call to her father went through. RP 111-12.

When Ms. Kim’s father answered the phone, defendant loudly and repeatedly asked him whether he loved his daughter RP 113, 114. At this point, defendant restrained Ms. Kim by pushing her head into the seat. RP 114. Ms. Kim was able to free herself and exited the vehicle. RP 115. She ran, screaming, in the direction of the Steilacoom fire station, but kept herself in the middle of the street so passing vehicles could see her. RP 115, 116. Ms. Kim looked back and saw defendant chasing her with the knife. RP 115. Ms. Kim ran toward an oncoming vehicle. RP 115. The people in the car got out and restrained defendant. RP 115.

Eight people witnessed defendant chase Ms. Kim down Steilacoom Blvd on the evening of October 31, 2006. All eight of them testified at trial. Jonathan Tinsley, a Lakewood firefighter and EMT, testified that he, his wife, and a group of six other friends were on their way to a movie that night. RP 166-68. They were in three different cars driving down Steilacoom Blvd. RP 167-68. He saw defendant’s car pulled partially off

to the side of road and partly on the sidewalk. RP 168, 170. He could see people running in the middle of the road and one person tackle the other. RP 168-69, 170, 179. At first he thought it might be some kids running in the road, but then he could see the two people struggling with each other. RP 171. The woman's face was distressed and the man's face was full of anger. RP 171. Tinsley knew the woman was in trouble and jumped out of the car and tackled the man, who was later identified as defendant. RP 171, 175, 179. Tinsley held defendant face down on the ground with his hands behind his back. RP 172. Defendant struggled and made a lot of loud noises. RP 172, 175. Tinsley could smell alcohol on defendant. RP 177, 179. After Tinsley had defendant restrained, he saw a bloody knife laying about 10 feet away on the ground. RP 173. There was also quite a lot of blood on the ground. RP 173.

The other seven witnesses testified similarly. Molly Tinsley testified that she and her husband, Jonathan, were going to the movies with some friends on October 31, 2006. RP 180-81. As they drove down Steilacoom Blvd., they saw a man attack a lady in the middle of the road. RP 181. The man and woman were running in the street when the man tackled the woman. RP 181. Ms. Tinsley identified defendant as the man she saw assaulting the woman that night. 187. Ms. Tinsley stopped the car and called 911 while her husband got out of the car and tackled the man. RP 183. After her husband tackled defendant, Ms. Tinsley went to the woman to see if she was okay. RP 183-84, 187. The woman was frantic

and spoke very little English. RP 185, 186. She was trying to get her stuff and trying to get away. RP 185. Ms. Tinsley could see the blood running down the back of the woman's pants and Matt Peschon lifted up the woman's shirt and could see a cut on her back. RP 185. The medics arrived and took over the woman's care. RP 186, 190.

Jeffrey Rix is an EMT for Trimmed Ambulance. RP 189. He, his wife and a group of friends were on their way to the movies when they saw two people running in the street. RP 190, 191. At first he thought some kids were goofing around, but then saw that it was an assault with the man striking the woman, who was trying to get away. RP 191-92. When Tinsley tackled defendant, Rix saw a knife fall from the area of defendant's hand. RP 196. Rix helped Tinsley restrain defendant, who resisted their efforts to control him. RP 192. Rix did not smell intoxicants on defendant's breath. RP 193. Defendant was generally yelling and said something like "get off me." RP 193. Defendant may have said some Korean words, but many of the words he spoke were in English. RP 198-99. Rix saw the woman run toward her vehicle and a knife laying on the ground. RP 193, 196.

Stacy Rix testified that she and some friends were going to the movies on October 31, 2006. RP 200. When she realized something was happening, she called 911. RP 201, 202. Once the police arrived, Stacy. Rix saw a knife on the ground. RP 203.

Andrew Davis testified that he along with a group of friends was going to the movies on October 31, 2006, when he saw two people in the middle of the street. RP 236, 237. They appeared to be fighting and the male appeared to be the aggressor. RP 237. Davis saw Tinsley tackle the defendant and a knife fall from defendant's hand. RP 240. The knife was about 7 feet away from where defendant was being restrained and Davis kicked it a little bit further away from everyone. RP 240.

Joshua Bartz is a community corrections officer for the Department of Corrections. RP 250. He and his friends were on the way to the movies when he saw two people running through the street on Steilacoom Blvd. RP 251, 252. Tinsley got out of the car and tackled the man who pushed the woman down. RP 251, 253. When Tinsley tackled defendant, Bartz saw a flash in the area of defendant's hands that turned out to be a knife falling to the ground. RP 254, 255, 258. The knife was large, about 10-12 inches. RP 254. Bartz identified defendant as the man he saw assaulting the woman that night. RP 255. Bartz assisted Tinsley restrain defendant by sitting on defendant's legs. RP 255. Defendant was screaming, whining, and after a while crying. RP 256. Bartz could not understand what defendant was saying because defendant was speaking Korean. RP 256.

Sarah Bolesh testified that she along with several friends were heading out to the movies on October 31, 2006, when she saw Tinsley fly out of his car and tackle a man who was in the process of tackling a woman. RP 262, 263, 264. When the man fell forward, something came out of his hand. RP 265. It appeared that the impact of Tinsley tackling the man caused something to fall out of the man's hand. RP 272. She saw Tinsley, Rix, and Bartz restraining the man on the ground. RP 267. Bolesh saw the woman run down the street to her vehicle. RP 269. The vehicle looked like it had been hurriedly parked and not safely off the roadway. RP 270.

Matthew Peschon testified that he is a firefighter for Poulsbo Fire Department. RP 365. On October 31, 2006, Peschon and several of his friends were on their way to the movies when they saw what appeared to be a man beating up a girl. RP 367, 369. When Tinsley got out of his car and tackled the man, a knife flew out of the man's hand. RP 369, 376. The girl got up and kicked the knife away and then Peschon kicked the knife further away. RP 369, 370, 376. The knife was a large kitchen knife with blood on it. RP 369-70, 371. Peschon saw blood on the girl's clothes and tried to help her, but there was a language barrier. RP 370-71. The woman was pretty hysterical. RP 374. Peschon ran across the street to the fire station to get the medics. RP 372.

After Tinsley and the others restrained defendant, Ms. Kim went back to the car to get her bag with her passport. RP 115, 156. Ms. Kim testified that she was so afraid that she wanted to get her bag with her passport so she could return to Korea right away. RP 115, 116. She recalled that someone told her to stop because she was bleeding and to calm down because she was screaming. RP 116.

Ms. Kim was taken by ambulance to the hospital. RP 117. Emergency room physician Jennifer Burtner testified that she treated Ms. Kim at St. Clare Hospital for lacerations on October 31, 2006. RP 344, 345. Ms. Kim told Dr. Burtner that she had been stabbed with a kitchen knife. RP 348. Dr. Burtner noted that Ms. Kim had four large lacerations, some of which were gaping, on her body. RP 348. She had one on her right lower back, a puncture wound on the left side of her chest/upper abdomen, one on the left side of her thigh, and one quite near her vaginal area. RP 348. The lacerations were consistent with stab wounds. RP 350. Dr. Brutner noted Ms. Kim also had linear red marks on her neck as though she had been choked. RP 349. Dr. Brutner was concerned that the lacerations may have been deep and sent her to have a CAT scan to see if there was any penetration into her internal organs. RP 350-51. There are a great many internal organs in the abdomen and many blood vessels that could have been injured when Ms. Kim was stabbed. RP 352.

While at the hospital, the police interviewed Ms. Kim through a Korean officer and took photographs of her injuries. RP 118, 119, 156. She gave a taped statement. RP 118.

When she returned to Korea, Ms. Kim had surgery for a bone she had broken during her struggle with defendant and follow up care for the sutures. RP 120, 156. Ms. Kim testified that she kept having nightmares so she went to a rest center where she could recover from the incident. RP 120, 156. She stayed there for two months. RP 120.

Detective Larson testified that the knife that was seized from the scene had a 9 ½ inch blade on it. RP 334. In defendant's vehicle, Detective Larson located a cake box and a tissue box, both with puncture cuts in the boxes. RP 328.

In court, Ms. Kim identified defendant as the man who stabbed her with the knife and choked her. RP 121.

Dr. Paul Leung testified for the defendant regarding defendant's ability to form intent and to premeditate. RP 378. Dr. Leung is a psychiatrist who is currently employed at the Oregon Health and Science University, School of Medicine and is the intracultural psychiatric program director and the medical director for the Asian Health and Service Center. RP 379-80.

Dr. Leung testified that he met the defendant on two occasions for a total of seven hours. RP 381. Dr. Leung reviewed defendant's medical records from Dr. Hwang, a physician who treated defendant in October and November of 2006. RP 381-82. Those records showed that defendant consulted a physician in Korea approximately 4 months before he saw Dr. Hwang. The Korean physician prescribed several psychiatric medications including antidepressant, anti-anxiety, and sleep medications for defendant. RP 382. Dr. Hwang continued treating defendant for anxiety, depression, and sleeplessness, but used different medications. RP 382. There were only 3 or 4 visits in Dr. Hwang's records, most occurred after October 31, 2006. RP 382. Dr. Hwang diagnosed defendant with clinical depression – a major depression for specific single episodes. RP 382-83.

Dr. Leung's opinion that in April and May of 2007 (6 months after incident) defendant still had active symptoms of major depression, which Dr. Leung believes began in late 2005 when he began facing stressors related to business, his personal relationship, and the Korean community. RP 384, 385.

With respect to the incident, Dr. Leung testified that defendant did not know what he was doing on October 31, 2006. RP 387. Dr. Leung's opinion was based solely upon the information that defendant gave to him. RP 387. Defendant did not remember the details of what happened on

October 31, 2006, but he told Dr. Leung that he believed what other people had told him had happened. RP 387. Defendant told Dr. Leung that he had consumed quite a bit of alcohol in the restaurant that day, but Dr. Leung had no information that defendant passed out from the alcohol he consumed. RP 388-89. The medication defendant was taking had side effects and those side effects can be expanded when combined with alcohol. RP 389. Dr. Leung could not testify to defendant's level of impairment from intoxicants. RP 408.

Dr. Leung testified that Asians have a very colorful language when it comes to threats. RP 397. They will say things like "Just to make you believe me, I'm going to drop dead right now," or "I'm going to make you disappear. You would not walk this earth again." RP 397. Dr. Leung testified that defendant had not planned the assault or an attempt to kill Ms. Kim. RP 397. Defendant did not have the intent to assault or kill Ms. Kim. RP 397.

Dr. Leung testified on cross-examination that defendant was not insane on the October 31, 2006, and knew right from wrong, but was 'distressed' and suffering from a major depression. RP 399. Dr. Leung's opinion that defendant could not form intent or premeditate was based upon his review of Dr. Hwang's records, the police reports, the witness statements contained within the police reports, and defendant's Western

State Hospital evaluation. RP 400-01. He did not have Ms. Kim's taped statement, did not have Ms. Kim's medical records, nor did he have photographs of the scene or the 911 tape. RP 402-03.

Defendant told Dr. Leung that he had dinner with his attorney and Ms. Kim. RP 413. That he was upset and angry about the discussion. RP 413-14. Dr. Leung conceded that eating, drinking, discussing business is all goal directed behavior. RP 415. Making a telephone call, asking for the number, for the calling card is all goal directed behavior. RP 416. Asking Ms. Kim to pull the car over was goal directed. RP 416-17. Dr. Leung said that he would agree getting the knife from the box and stabbing Ms. Kim was goal directed, but maintained that he did not believe that defendant had planned that out. RP 418.

Dr. Leung testified that despite the fact that defendant has engaged in lots of goal directed behaviors, stabbed his girlfriend more than once, he still did not believe defendant intended to harm her or plan it out in advance. RP 422. Dr. Leung further testified that seeing the photographs and 911 would not have made a difference in this case. RP 423. Now that he knows that the cake box was moved, it would not have made a difference in his opinion. RP 424. Dr. Leung testified that the only evidence that would have changed his opinion regarding defendant's lack of intent and ability to premeditate would have been someone saying that defendant has been talking about setting Ms. Kim up all along or that he had the knife already sharpened. RP 424.

In the State's rebuttal, Dr. Lori Thiemann testified that she is a clinical psychologist working for Western State Hospital. RP 429. Her main responsibilities are to do forensic evaluations for the courts. RP 430. These include competency to stand trial, insanity and/or diminished capacity at the time of the crime. RP 430. Depression is a mental disorder. RP 432. Dr. Thiemann evaluated defendant in September 2007. RP 434. Dr. Thiemann considered information from the police reports, witness statements, transcript of victim interview, Dr. Leung, and Dr. Hwang. RP 435. Additionally, they do 24 hour a day evaluations of defendant while he housed at Western State Hospital, talk to staff members, and consult with his staff psychiatrist. RP 425. Dr. Thiemann testified that she diagnosed defendant with a major depressive disorder, single episode, moderate, and alcohol abuse. RP 438. Defendant self reported that he was using alcohol to escape from his problems by drinking on a daily basis. RP 439. In contrast to Dr. Leung, Dr. Thiemann testified that defendant was experiences depression at the time of the incident, but was capable of forming intent. RP 440. Defendant described engaging in goal-directed behavior up to about one hour before the incident and then after the incident. RP 441. (Like picking girlfriend up from airport, making phone calls) etc. RP 441. Witnesses described defendant engaged in goal-directed behaviors like chasing Ms. Kim with knife, continuing pursuit until tackled. RP 442.

Dr. Thiemann testified that alcohol intoxication contributes poor judgment, impulsivity, and mood swings, but it would not have impacted defendant's ability to engage in intentional or premeditated acts. RP 443. She testified that it was not unusual that defendant could not remember the assault b/c people often have amnesia over high emotional states (victim or perpetrator). RP 444. Dr. Thiemann did not link defendant's amnesia with his alcohol consumption.

C. ARGUMENT.

1. TRIAL COUNSEL WAS EFFECTIVE WHERE
DEFENDANT CANNOT SATISFY EITHER PRONG OF
THE **STRICKLAND** TEST.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was

rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L.Ed.2d 305 (1986).

To prevail on a claim of ineffective assistance of counsel, defendant must meet both prongs of a two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); see also *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). First, a defendant must establish that defense counsel’s representation fell below an objective standard of reasonableness. Second, a defendant must show that defense counsel’s deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687; *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To satisfy the first prong, deficient performance, the defendant has the “heavy burden of showing that his attorney ‘made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.’” *State v. Howland*, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting *Strickland v. Washington*, 466 U.S. 668, 687). Defendant may meet this burden by establishing that, given all the facts and circumstances, his attorney’s conduct failed to meet an objective standard of reasonableness. *State v. Huddleston*, 80 Wn. App. 916, 912

P.2d 1068 (1996). There is a strong presumption that counsel's representation was reasonable and, taking into consideration the entire record, that counsel made all significant decisions in the exercise of reasonable professional judgment. *State v. McFarland*, 127 Wn.2d at 335.

Matters that go to trial strategy or tactics do not show deficient performance. *State v. Hendrickson*, 129 Wn.2d at 77-78. The decision of when or whether to object is an example of trial tactics and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objection had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

To satisfy the second prong, resulting prejudice, a defendant must show that, but for counsel's deficient performance, the trial's outcome would have been different. *McFarland*, 127 Wn.2d at 337; *see also*

Strickland, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.”).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).

- a. Ju Yeop Kim’s and Hyuk Seo’s testimony would have been cumulative of other testimony and therefore trial counsel’s failure to compel their testimony cannot be considered deficient nor was defendant prejudiced by their failure to testify.

Defendant claims on appeal that trial counsel’s failure to call Ju Yeop Kim and Hyuk Seo to testify in defendant’s case constituted ineffective assistance of counsel. PRP at 8, 21-22. Defendant’s argument fails because their testimony would have been cumulative of other witnesses’ testimony or had limited evidentiary value.

Defendant’s witness list indicates that Ju Yeop Kim was prepared to testify “regarding the sharpening of knives for Boulangerie Bakery and Café II. CP 25. Additionally, defendant attached a declaration from Ju

Yeop Kim to defendant's personal restraint petition in which Ju YeopKim states he looked at a certain knife on October 29, 2006, and agreed with defendant that it needed to be sharpened.¹ *See* PRP, Exhibit 5. According to defendant's witness list, defendant anticipated that Hyuk Seo would testify that he was responsible for sharpening all of defendant's knives during the relevant time. CP 25. Unlike Ju Yeop Kim, defendant has not supplemented the record with a declaration from Hyuk Seo. *See* PRP.

Neither Ju Yeop Kim's nor Hyuk Seo's proposed testimony can be considered critical to defendant's defense. Ms. Kim testified that the knife that was used to stab her was not very sharp and defendant had to apply force when the knife did not penetrate her body easily. RP 109, 110. In addition to Ms. Kim's testimony, Dr. Leung, testified that prior to the incident defendant had picked up a knife that was in need of sharpening from the bakery. RP 398. Dr. Leung testified that defendant was going to have someone sharpen the knife and then return it to the bakery. RP 398. Because evidence that the knife was dull and in need of sharpening had been admitted through the testimony of other witnesses, trial counsel

¹ It is unclear from Ju Yeop Kim's declaration whether the knife he inspected was even the knife used to stab Ms. Kim and therefore his declaration offers little if any relevant information. *See* PRP, Appendix 5.

cannot be considered deficient for failing to call Ju Yeop Kim and Hyuk Seo to provide cumulative testimony on a matter of negligible evidentiary value.

Defendant alleges Ju Yeop Kim's and Hyuk Seo's testimony would be exculpatory because it explained why the knife was in the vehicle and went to the issue of premeditation. Defendant's PRP at 22. However, this mischaracterizes the State's argument on premeditation. The State did not argue that the presence of the knife in defendant's vehicle was evidence of premeditation. Instead, the State argued that the fact that after dinner defendant moved the knife from the trunk to the back seat, where the knife would be accessible to him during the assault, was evidence of premeditation and goal directed behavior. RP 417. Defendant's argument must fail.

- b. Defendant claims trial counsel failed to investigate by failing to interview Jongwn Yi and Dr. Steve Baek prior to trial and for failing to call them to testify as witnesses at trial.

Trial counsel has a duty to make reasonable investigations or to make a reasonable decision that particular investigations are unnecessary. *Strickland*, at 691, 104 S.Ct. at 2066. When defendant alleges ineffectiveness for failing to investigate, the decision not to investigate

must be assessed for reasonableness under all the circumstances.

Strickland, at 691, 104 S. Ct. at 2066.

In this case, defendant alleges that trial counsel was deficient for failing to interview Jongwon Yi and Dr. Steve Baek who, defendant asserts, would have provided evidence necessary to secure a voluntary intoxication instruction. *See* PRP at 18.

A criminal defendant is entitled to a voluntary intoxication instruction only if: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state. ***State v. Gallegos***, 65 Wn. App. 230, 239, 828 P.2d 37 (1992) (*citing* RCW 9A.16.090; ***State v. Simmons***, 30 Wn. App. 432, 435, 635 P.2d 745 (1981), *review denied*, 97 Wn.2d 1007 (1982)). The evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." ***State v. Gabryschak***, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996).

Here the trial court found there was evidence that defendant had consumed alcohol at dinner prior to the assault, but there was insufficient evidence of how much alcohol defendant consumed and no evidence regarding how the alcohol effected defendant's mind or body. RP 461. In denying defendant's request for a voluntary intoxication instruction, the

court ruled that under *Gabryschak* “there must be substantial evidence of the effects of the alcohol on the defendant’s mind or body.” RP 461.

Defendant asserts that trial counsel was deficient for failing to interview Jongwon Yi and Dr. Steve Baek in preparation for trial. PRP at 22. First, in his personal restraint petition, defendant does not assert that he gave the name and contact information of these potential witnesses to his trial counsel. *See* PRP. Thus, it is unclear how trial counsel would have been able to identify these potential witnesses or know how to contact them. Even if trial counsel was somehow able to identify Dr. Baek and Jongwon Yi as potential witnesses, based upon the declarations they have provided in support of defendant’s personal restraint petition, they would not have provided evidence of how the alcohol defendant consumed affected defendant’s mind or body. *See* PRP, Exhibits 3 and 4.

In his declaration, Jongwon Yi states that he met with defendant and Ms. Kim at a restaurant on October 31, 2006, to discuss a business issue relating to defendant’s bakery. PRP, Exhibit 3. There is nothing in his declaration that addresses whether defendant consumed any alcohol that night and, if he did consume alcohol, how that alcohol effected defendant’s mind or body. Thus, trial counsel’s failure to interview Mr. Yi was not deficient and defendant cannot show prejudice.

Similarly, based upon Dr. Baek’s declaration, his testimony would not have assisted defendant in obtaining a voluntary intoxication instruction. *See* PRP, Exhibit 4. While Dr. Baek states in his declaration

that he observed defendant consume nearly two bottles of alcohol and was obviously intoxicated, he gave no information as to how the alcohol affected defendant's mind or body. Unlike *State v. Rice*, 102 Wn.2d 120, 122-23, 683 P.2d 199 (1984), where the court found an intoxication instruction appropriate because there was evidence that defendant's drank beer all day, ingested between two and five Quaaludes, spilled beer and were unable to hit ping-pong ball, and one of the defendants was so drunk that he did not feel it when he was struck by a car, Dr Baek gives the court no such detail. Because Dr. Baek's declaration lacks the detail that a court would require to find that defendant's mind and body were substantially effected by the alcohol he consumed, trial counsel cannot be found deficient for having failed to interview him. More importantly, defendant cannot show that the trial court would have made a different ruling and granted defendant's request for a voluntary intoxication instruction, which is required for defendant to show he was prejudiced under *Strickland*.

Defendant also claims in his direct appeal that trial counsel never asked whether defendant's behavior indicated he was intoxicated. BOA at 22. However, defendant does not indicate which witness should have been asked this question and how they would have known the answer. Ms. Kim was the only witness to testify at trial that she observed defendant drinking that evening and observed his demeanor after consuming the alcohol. RP 102-105. She testified that he consumed one bottle of alcohol during dinner and wanted to order more, but she wanted

to leave and asked him not to drink anymore. RP 103-04. After asking him not to order more drinks, defendant hit the table with his fist, paid for the meal, and left without ordering more alcohol. RP 104. Ms. Kim testified that she insisted on driving after dinner, in part, because defendant had consumed more alcohol than she had, but also because she was afraid he would take her to his house. RP 104. The prosecutor specifically asked Ms. Kim if defendant had drunk so much that he could not drive. RP 104. Ms. Kim replied that she could drink one bottle and be fine and that defendant normally drank more than that. RP 104. Contrary to defendant's assertions, a reasonable inference from Ms. Kim's testimony was that defendant was not intoxicated and the alcohol he had consumed had not substantially effected his mind or body.

Defendant also alleges that trial counsel was deficient for failing to prove how much alcohol was in the bottle defendant consumed at dinner, whether defendant had taken his medications that day, and the effects of mixing alcohol with those medications. BOA at 23. While defendant raises the specter of 'what-ifs' he makes almost no effort to address these issues in his personal restraint petition which was consolidated with this direct appeal. In the personal restraint petition, defendant includes his own affidavit, but does not state in that affidavit whether he took his prescribed medication on the day of the assault, he does not state how much alcohol he consumed that day nor does he state how the alcohol effected his mind or body. PRP, Exhibit 6. The only additional evidence

defendant has provided this court is in the form of Dr. Baek's conclusory declaration and that simply is not enough.

Defendant was not entitled to an intoxication instruction based upon the evidence produced at trial or even based upon the evidence defendant has provided this court in his personal restraint petition. Defendant's claim that trial counsel was ineffective for failing to obtain one is without merit and must fail.

- c. Defendant's claim that counsel was ineffective for not providing certain documents to Dr. Leung prior to trial is without merit.

Defendant asserts that trial counsel was ineffective for failing to adequately prepare Dr. Leung for trial. See BOA at 20-21. Defendant alleges that defense counsel failed to provide Dr. Leung with Dr. Thiemann's report until the day of trial, that Dr. Leung was not provided with the victim's transcribed statement, the witnesses handwritten statements, photos of the scene, the victim's medical records, nor a copy of the 911 tape. See Brief of Appellant at 20-21. Defendant alleges that the failure to provide Dr. Leung with this information made his performance at trial "obviously limited and weak." BOA at 21. However, Dr. Leung testified that had he reviewed these documents, they would not have altered his opinion. RP 423. The only information that would have changed Dr. Leung's opinion that defendant did not premeditate the

assault and could not form the requisite intent would be if someone told him that defendant had been talking about setting up Ms. Kim or even if defendant had already sharpened the knife used in the assault. RP 424.

Because Dr. Leung testified that his opinion would not have been any different if he had seen the additional information prior to trial, trial counsel cannot be considered deficient for having failed to provide it to him. Additionally, the evidence of defendant's guilt in this case was overwhelming. The victim testified that when she tried to end her relationship with defendant he threatened to harm her and her family on several occasions. RP 83, 84, 92-93. Ms. Kim testified that after a dinner/business meeting with defendant and his attorney, defendant moved a cake box containing a knife from the vehicle's trunk to the back seat. RP 104. On the way to find a motel, defendant demanded that she stop the vehicle and give him her calling card number and father's telephone number. RP 105, 107, 151. When she refused, defendant took the knife from the cake box and began stabbing her repeatedly with it while demanding she call her father and give defendant her calling card number. RP 108, 110, 113, 151, 152. As a result of defendant's acts, Ms. Kim suffered multiple lacerations that required sutures. RP 117, 348, 355. When Ms. Kim was able to escape from the vehicle she ran in the middle of the road toward traffic to get away from defendant. RP 115. Eight witnesses observed Ms. Kim running from defendant, who chased her with a large knife. RP 168-69, 170, 179, 181, 187, 191-92, 196, 203, 237, 240,

251, 252, 253, 258, 262, 263, 264, 367, 369-70, 376. All of the witnesses identified defendant as the aggressor. Because the evidence of defendant's guilt was overwhelming even if the court were to find that trial counsel was deficient for failing to provide the documents to Dr. Leung prior to trial, defendant cannot show he was prejudiced as a result especially where Dr. Leung testified that his opinion would not have changed. RP 424.

- d. The trial court properly admitted defendant's prior threats to kill under the intent exception to ER 404(b).

Under ER 404(b), evidence of other crimes, wrongs or acts is not admissible to prove a defendant's character or propensity to commit crimes, but may be admissible for other purposes:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action purposes, such as proof of motive, opportunity, intent, accident.

State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Evidence of prior bad acts must be necessary to prove a material issue. *Powell*, 126 Wn.2d at 262. Generally, when malice or premeditation is at issue, evidence of prior disputes between the victim and the accused is admissible because it "tends to show the relationship of the parties and their feelings toward one another, and often bears

directly upon the state of mind of the accused.” *Id.* at 261 (quoting *State v. Davis*, 6 Wn.2d 696, 705 108 P.2d 641 (1940)). Evidence is relevant if it tends to make the existence of any significant fact more or less probable than it would be without the evidence. ER 401.

On appeal, defendant alleges that trial counsel was ineffective because the trial court did not limit testimony of defendant’s threats to just the victim, but allowed testimony regarding threats to Ms Kim’s family. BOA at 25². Defendant does not cite any case law in support of his argument nor does he reference any portion of the record as required by RAP 10.3. Therefore, this issue is not properly before the court and this court should decline to review it.

If this court should find that the issue is properly before the court, defendant’s argument fails because he cannot show that trial counsel was deficient. Trial counsel objected to the admission of prior bad acts evidence and vigorously argued against its admission. RP 54-63. The trial court overruled trial counsel’s objection.

² Defendant lists this issue in his assignments of error as an abuse of discretion issue, but briefed it as an ineffective assistance of counsel issue. If the court so directs, the State will respond in a supplemental brief to the abuse of discretion issue.

- e. Trial counsel was effective when he chose not to request that the jury be instructed on attempted murder in the second degree.

The decision of whether to request an instruction on a lesser-included offense is a matter of trial strategy. See *State v. Hoffman*, 116 Wn. 2d 51, 112, 804 P.2d 577 (1991); *United States v. Windsor*, 981 F.2d 943, 947 (7th Cir. 1992). The decision not to request a lesser-included instruction will not constitute ineffective assistance when requesting the instruction would conflict with a reasonable trial strategy. *Kubat v. Thieret*, 867 F.2d 351, 364-365 (7th Cir. 1989), *cert. denied*, 493 U.S. 874 (1989)(seeking lesser-included instruction in kidnapping case would conflict with alibi defense); see also, *Moyer v. State*, 620 SE2d 837 (Ga. App. 2005); *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998) (a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense).

“All or nothing” strategies are disfavored in Washington. See *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004), and *State v. Pittman*, 134 Wn. App. 376, 166 P.3d 720 (2006). However, other jurisdictions have recognized that presenting the jury with an all-or-nothing choice is a

reasonable trial strategy because, although it involves a risk, it increases the chances of an acquittal. See *Collins v. Lockhart*, 707 F.2d 341, 345-46 (8th Cir. 1983) (Gibson, J. concurring); *United States ex rel. Sumner v. Washington*, 840 F. Supp. 562, 573-74 (N.D. Ill. 1993); *Parker v. State*, 510 So. 2d 281, 286 (Ala. Crim. App. 1987); *Henderson v. State*, 664 S.W.2d 451, 453 (Ark. 1984); see also *Heinlin v. Smith*, 542 P.2d 1081, 1082 (Utah 1975) (court noted that counsel's failure to request a lesser included offense instruction was not unreasonable, but a likely tactic involving the idea that an all-or-nothing stance might better lead to an outright acquittal).

In the present case, the State concedes that attempted second degree murder is a lesser included offense to attempted first degree murder. However, it was clearly a tactical decision on defendant's part not to request the instruction. Trial counsel requested, and obtained, lesser included instructions on both second and third degree assault. Through Dr. Leung, defendant presented evidence that he could not act intentionally and did not premeditate in this incident.

Trial counsel's closing argument focused on defendant's inability to form an intent, and the fact that all of Ms. Kim's injuries were in her abdomen and buttocks areas. RP 503-530. Not areas, trial counsel argued, that one would typically target if the intent was to kill. Nor was a busy

street in front of a fire station a likely location to attempt a murder. RP 527-28. Counsel also focused on the fact that the knife was dull and defendant would be unlikely to premeditate a murder with a dull knife. 528-29. Because trial counsel did offer lesser included instructions consistent with his case theory it is clear that his decision not to request an instruction on attempted murder in the second degree was strategic.

Defendant invites this court to order a reference hearing on this issue if the court needs additional facts to make a ruling. The State spoke with trial counsel in early June regarding a declaration as to this issue. Mr. James Kim advised me he would review defendant's pleadings and let me know if he would do a declaration. To date, I have not heard from Mr. James Kim. For that reason, if the court finds it needs additional facts to resolve this issue, the State would join in defendant's request for a reference hearing.

2. THE TRIAL COURT PROPERLY DENIED
DEFENDANT'S REQUEST FOR A VOLUNTARY
INTOXICATION INSTRUCTION

A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). The standard for review applied to a trial court's failure to give a

jury instruction depends on whether the trial court's refusal to grant the instruction was based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give an instruction to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo.

In the present case, the court refused defendant's request for an involuntary intoxication instruction based upon the facts of this case. Therefore, the court's ruling is subject to review only for a clear showing of an abuse of discretion. *See State v. Lucky*, 128 Wn.2d 727, 731.

On appeal, defendant argues both 1) that the trial court abused its discretion when it declined to give the involuntary intoxication instruction requested by defense counsel and, in the alternative, 2) that trial counsel was ineffective for failing to provide the court with sufficient evidence to warrant the instruction. PRP at 17-19 and BOA at 12-16. *See above* for State's argument as to why defendant's ineffective assistance of counsel argument fails. Defendant's argument that the court erred when it declined to give defendant's proposed voluntary intoxication instruction fails because there was overwhelming evidence that defendant

intentionally and repeatedly stabbed Ms. Kim with a knife in an attempt to kill her and there was no evidence that the alcohol defendant consumed prevented him from forming that intent.

A criminal defendant is entitled to a voluntary intoxication instruction only if: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state. *State v. Gallegos*, 65 Wn. App. 230, 239, 828 P.2d 37 (1992) (citing RCW 9A.16.090; *State v. Simmons*, 30 Wn. App. 432, 435, 635 P.2d 745 (1981), review denied, 97 Wn.2d 1007 (1982)). The evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996).

Here, as argued above, defendant can satisfy only the first prong of the three prong test established in *Gallegos*. Intent is an element of both attempted first degree murder and first degree assault. Because both attempted first degree murder and first degree assault have intent as an element, the first prong has been satisfied.

Defendant, however, cannot satisfy either of the remaining two prongs and therefore the court did not abuse its discretion in denying defendant's request for a voluntary intoxication instruction. The second prong requires defendant to have produced substantial evidence of

defendant's intoxication. Here there is evidence that defendant consumed a bottle of alcohol at dinner, but there is no evidence as to the size of that bottle, nor the alcohol content. The victim, Ms. Kim testified that defendant usually drinks more than one bottle and that she can drink a bottle and still be fine. Therefore, there no evidence in the record that defendant consumed a substantial quantity of alcohol.

The third prong requires defendant to produce evidence that defendant's intoxication interfered with his ability to form the required level of culpability to commit the crimes of attempted first degree murder and first degree assault. *See State v. Gabryschak*, 83 Wn. App. 249, 254, 921 P.2d 549 (1996). The *Gabryschak* court emphasized that "intoxication is not an all or nothing proposition." *Gabryschak*, at 254. Rather, it is a spectrum on which at one end a person can be intoxicated, but able to form the requisite mental state and at the other end of the spectrum a person could be so intoxicated as to be unconscious. *See Id.* "Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state." *Id.*

In *Gabryschak*, police were called to an apartment complex where they heard a loud male voice emanating from behind the broken front door of one of the apartments. 83 Wn. App. 249, 251. The officers also heard an elderly woman's voice arguing and whispering with the man, who was later identified as Scott Gabryschak. When officers entered the apartment,

Gabryschak grabbed one of the officer's legs and was sprayed with pepper spray. *Id.* Both the elder woman and Gabryschak appeared to be intoxicated. *Id.* While being escorted to the police vehicle, Gabryschak attempted to escape and while being transported to the jail, Gabryschak leaned forward and threatened to kill one of the officers. *Id.* at 252. The trial court denied Gabryschak's request for a voluntary intoxication defense, and the court of appeals affirmed. Division I found that a voluntary intoxication instruction was not appropriate because there was no testimony that Gabryschak's speech was slurred, that he stumbled or appeared confused, or that he was disoriented as to time or place, that he could not feel the pain of pepper spray, or any other symptom that would all a reasonable jury to conclude that he could not form the requisite mental states for the crimes with which he was charged.

Defendant relies on *State v. Kruger*, 116 Wn. App. 685, 67 P.3d 1147 (2003) to support his argument that there was "substantial evidence in the record to allow a jury to decide that the drinking affected [defendant's] ability to acquire the required mental state." BOA at 14. Defendant's reliance on *Kruger* is misplaced. Division three found substantial evidence of intoxication where Daniel Kruger "blacked out," vomited at the police station, had slurred speech, and was impervious to pepper spray. *Id.* at 692. Here, no such evidence was produced. Instead, the minimal evidence of defendant's intoxication consisted of the victim's testimony that defendant drank a bottle of alcohol at dinner and that one

bottle was less than defendant usually drank and testimony from Dr. Leung who could not opine as to defendant's level of intoxication.

In contrast to the minimal evidence that was produced at trial regarding defendant's intoxication, there was substantial evidence of defendant's intent to kill Ms. Kim and his ability to accomplish goal-directed behavior. The court properly denied defendant's request for a voluntary intoxication instruction

3. DEFENDANT IS NOT ENTITLED TO RELIEF
UNDER THE CUMULATIVE ERROR
DOCTRINE.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Neder v. United States*, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). "[A] defendant is entitled to a fair trial but

not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g., Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. *Compare, State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970), *review denied*, 78 Wn.2d 992 (1970) (holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988), *review denied*, 112 Wn.2d 1008 (1989) (holding that three

errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979), *review denied*, 92 Wn.2d 1002 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see, e.g., State v. Coe*, 101 Wn.2d 772 (holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many

times that a curative instruction lost all effect, *see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498. Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *Id.*

As argued above there was no error and therefore no cumulative error. Reversal is not required.

D. CONCLUSION.

For the reasons argued above, the State respectfully requests this court to affirm defendant's convictions for attempted first degree murder. If this court should decide it needs additional information to resolve the issues raised in defendant's personal restraint petition, the State joins in defendant's request for a reference hearing.

DATED: June 25, 2009.

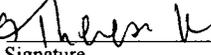
GERALD A. HORNE
Pierce County
Prosecuting Attorney



KAREN A. WATSON
Deputy Prosecuting Attorney
WSB # 24259

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6-25-09  _____
Date Signature

CO. REC'D
STATE OF WASHINGTON
BY _____
JUN 25 2009
TACOMA, WA

APPENDIX "A"

Declaration

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6
7 IN THE COURT OF APPEALS
8 OF THE STATE OF WASHINGTON
9 DIVISION II

10 STATE OF WASHINGTON,

11 Respondent,

NO. 37675-0

12 v.

DECLARATION OF KAREN WATSON

13 KI KANG LEE

14 Appellant.

15 I, Karen A. Watson, declare under penalty of perjury under the laws of the State of
16 Washington, the following is true and correct:

17 1. That I am an attorney in the Appellate Unit of the Pierce County
18 Prosecutor's Office.

19 2. On June 3, 2009, I emailed trial counsel, James Kim, to advise him that I
20 was responding to a personal restraint petition that alleged ineffective assistance of
21 counsel. Several days later, I followed up my email with a telephone call to Mr. Kim's
22 office. I spoke with Mr. Kim and advised him of issues in Mr. Lee's direct appeal and
23 personal restraint petition. Mr. Kim indicated he was hesitant to write a declaration
24 regarding his representation of Mr. Lee including strategic decisions he made during the
25

1 course of that representation. However, he did allow me to email the brief and personal
2 restraint petition to him in PDF format so he could review them and make a decision as to
3 whether he would write a declaration. I advised Mr. Kim of my June 25, 2009, deadline to
4 file the State's response and asked that he get his declaration to me several days in advance
5 so that I could include it in my response. To date, I have not received a declaration or any
6 other communication from Mr. Kim.

7 Dated: June 25, 2009.

8 Signed at Tacoma, WA.

9
10 
KAREN A. WATSON

11 Certificate of Service:

12 The undersigned certifies that on this day she delivered by U.S. mail
13 and or ABC-LMI delivery to the attorney of record for the appellant and
14 appellant c/o his attorney true and correct copies of the document to which
15 this certificate is attached. This statement is certified to be true and correct
16 under penalty of perjury of the laws of the State of Washington. Signed at
17 Tacoma, Washington, on the date below.

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