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Division I, No. 87210-9-I

Case #: 1040512

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT TODD THYSELL, SR.,

Petitioner

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PETITION FOR REVIEW FOLLOWING  
APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KLIKITAT COUNTY

The Honorable Randall C. Krog

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PETITION FOR REVIEW

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## **TABLE OF CONTENTS**

A. <u>IDENTITY OF PETITIONER</u> .....	1
B. <u>DECISION FOR WHICH REVIEW IS SOUGHT</u> .....	1
C. <u>ISSUE PRESENTED FOR REVIEW</u> .....	1
D. <u>STATEMENT OF THE CASE</u> .....	1
E. <u>ARGUMENT</u> .....	7
Issue 1: Whether Mr. Thysell’s constitutional right to counsel was denied during a critical stage of the proceedings, warranting review pursuant to RAP 13.4(b)(3) and (4).....	8
F. <u>CONCLUSION</u> .....	17

## **TABLE OF AUTHORITIES**

### **Washington Supreme Court Cases**

*State v. Heddrick*, 166 Wn.2d 898, 215 P.3d 201 (2009) ..... 11

*State v. Heng*, 2 Wn.2d 384, 539 P.3d 13 (2023)..... 8, 10, 11, 14

### **Court of Appeals**

*In re Sanchez*, 197 Wn. App. 686, 391 P.3d 517 (2017) ..... 9, 10

*Bragg v. State*, 28 Wn. App. 2d 497,  
536 P.3d 1176 (2023)..... 12

*State v. Schlenker*, 31 Wn. App.2d 921,  
553 P.3d 712 (2024)..... 11

### **Constitutions**

Const. art. I, sec. 22 ..... 8, 16

U.S. Const. amend. VI..... 8, 16

### **Court Rules**

CrR 3.1(a)..... 9

CrR 3.1(b)(1)..... 10

CrR 3.2(b)(2)(A) ..... 9

CrR 3.2.1(c)(1) ..... 9

CrR 4.1 ..... 15

CrR 4.1(a).....	15
CrR 4.1(b).....	15
RAP 13.4(b)(3).....	1, 7, 8, 16
RAP 13.4(b)(4).....	1, 7, 8, 16
RAP 18.17 .....	17

### **A. IDENTITY OF PETITIONER**

Petitioner, Robert Todd Thysell, Sr., asks this Court to accept review of the Court of Appeals' decision that affirmed his conviction.

### **B. DECISION FOR WHICH REVIEW IS SOUGHT**

The Court of Appeals, Division III, unpublished opinion, filed on March 10, 2025. A copy of this opinion is attached as "Appendix A."

### **C. ISSUE PRESENTED FOR REVIEW**

**Issue 1: Whether Mr. Thysell's constitutional right to counsel was denied during a critical stage of the proceedings, warranting review pursuant to RAP 13.4(b)(3) and (4).**

### **D. STATEMENT OF THE CASE**

Around midnight on June 20, 2021, Lisa<sup>1</sup> Thysell contacted 911. (RP 217-218). She wanted law enforcement to come to her home in Appleton, Washington, because she and

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<sup>1</sup>Lisa Thysell is referred to by the first name "Lisa" throughout this brief to avoid confusion. No disrespect is intended.

her husband were engaged in a domestic dispute. (RP 218-219, 225-231, 253). Upon arriving at the residence, a sergeant pulled his vehicle up and flashed his red and blue lights. (RP 182-188). As the sergeant exited his vehicle and Lisa and Todd Thysell approached him, he noticed a loud generator running. (RP 189). As Mr. Thysell came closer with a rifle in his hand, the sergeant told Mr. Thysell to drop the gun. (RP 189). However, Mr. Thysell raised the gun; he did not shoulder it but held it at his side, pointing outwards. (RP 190, 311; State's Ex. 2 at 1:05 to 1:30). Lisa got in front of Mr. Thysell and pushed the gun down towards the ground. (RP 190). After Mr. Thysell released the gun, law enforcement placed him in custody. (RP 190-192).

By amended information the State charged Mr. Thysell with assault in the second degree (against law enforcement) and a firearm enhancement in Count 1. (CP 52). The State also charged Mr. Thysell with fourth degree assault against a family or household member (Lisa) in Count 2. (CP 53).

### Pretrial Proceedings

On June 21, 2021, at a preliminary appearance in this case, the trial court inquired whether Mr. Thysell qualified for a public defender. (Supp. RP 6-12). The trial court ultimately determined Mr. Thysell was not indigent at this initial appearance and not eligible for counsel at public expense. (Supp. RP 11-12). The trial court proceeded to address release conditions and adopt the ones requested by the State. (Supp. RP 18). No attorney was present for Mr. Thysell to consult. (Supp. RP 3-22). The State requested one of the conditions of Mr. Thysell's release was that he sign of a waiver of extradition. (Supp. RP 16). The trial court explained what a waiver of extradition was, advising Mr. Thysell it must be signed before the trial court would be willing to release him, along with an address and posting of bail. (Supp. RP 20-21). Mr. Thysell did not have anyone to assist him with release conditions, prepare him for the hearing, or advise him on his eligibility for a public defender. (Supp. RP 3-22). Mr. Thysell

also did not have an address of a location prepared where he could stay if released, having no advice of counsel. (Supp. RP 12-13).

In arguing about imposition of release conditions, the State made the following statements regarding the allegations:

... I don't know what was going through Mr. Thysell's mind, but he aimed a loaded rifle at a sheriff's deputy and had his wife not jumped in front of him, Mr. Thysell probably would not be with us today. And that is very dangerous.

(Supp. RP 16).

After hearing from the State as to its requested bail amount of \$35,000 and release conditions, the following exchange took place:

[THE COURT]: ... Mr. Thysell, is there anything you want to tell me before I make a decision as to what the appropriate release conditions are?

[MR. THYSELL]: Yeah, I heard what he said. I had this discussion with Officer Anderson as well last night. And—

[THE COURT]: Okay. Mr. — Mr. Thysell, I'm gonna just remind you one time, you do have a right to remain silent.

[MR. THYSELL]: Yeah.



[THE COURT]: Regarding the allegations in this case. Okay? Do you understand that?

[MR. THYSELL]: I understand.

[THE COURT]: Okay. Go ahead, sir.

[MR. THYSELL]: I just wanted to—I just wanted to let him know that I had no idea that it was a deputy that had drove up the driveway. So, he said he flashed or turned his lights on. I never seen them. So, I had not idea it was a deputy. As soon as I, you know, as soon as I realized it was, I – I let go of the rifle and walked – turned around and walked off. But I had not idea that there was a deputy that had drove up the driveway. So, that's all I have to say about that.

(Supp. RP 17-18). The trial court then imposed release conditions and set bail at \$15,000. (Supp. RP 18-19). The court advised Mr. Thysell what a waiver of extradition was, informing him it must be signed before the trial court would be willing to release him, along with an address and posting of bail. (Supp. RP 20-21). Mr. Thysell signed this form without advice of counsel. (CP 8; Supp. RP 20-21).

On July 6, 2021, Mr. Thysell reappeared for arraignment. (Supp. RP 23-27). Having been told a variety of things about

whether he would be appointed an attorney, Mr. Thysell had not retained one at this point. (Supp. RP 23-24). The trial court continued arraignment because it felt uncomfortable proceeding when Mr. Thysell did not yet have counsel; and Mr. Thysell agreed to the continuance. (Supp. RP 25-26).

At the next hearing on July 19, 2021, Mr. Thysell retained Christopher Lanz to represent him. (Supp. RP 28-29). Mr. Lanz assisted Mr. Thysell in entering a plea of not guilty to the charged crime of assault in the second degree and set a schedule for trial. (Supp. RP 28-29).

A jury trial was held in October of 2021, and witnesses testified consistent with the facts above. (RP 178-315).

The jury found Mr. Thysell guilty of assault against Sergeant Anderson in the second degree with a firearm enhancement. (CP 180-181; RP 370).

Perhaps not finding Lisa's story credible or perhaps finding Mr. Thysell's use of force to defend himself against his

wife was justified, the jury found Mr. Thysell not guilty of fourth degree assault against his wife. (CP 182; RP 370).

Mr. Thysell now petitions for review.

### **E. ARGUMENT**

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

**Issue 1: Whether Mr. Thysell’s constitutional right to counsel was denied during a critical stage of the proceedings, warranting review pursuant to RAP 13.4(b)(3) and (4).**

Mr. Thysell argued in his Statement of Additional Grounds that his right to counsel was denied for the following reasons: (1) he was not represented at the time probable cause was found, (2) he waived his Fifth Amendment right to silence at a preliminary hearing without advice of counsel—constituting a waiver of other possible defenses, (3) he signed a waiver of extradition without advice of counsel, and (4) a delay in arraignment occurred because he did not have counsel. (Statement of Additional Grounds). This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

The federal and state constitutions guarantee criminal defendants a right to counsel. U.S. Const. amend. VI; Const. art. I, sec. 22; *State v. Heng*, 2 Wn.3d 384, 388, 539 P.3d 13 (2023). The right attaches when a defendant first appears before a judicial officer and is informed of the formal

accusation against him, and his liberty is restricted. *Id.* at 389.

Washington court rules likewise require defendants have counsel at “every stage of the proceeding.” *Id.* at 389 (citing CrR 3.1(a), (b)(2)(A); CrR 3.2.1(c)(1)).

“An accused’s right to be represented by counsel is a fundamental component of our criminal justice system.” *In re Sanchez*, 197 Wn. App. 686, 698, 391 P.3d 517 (2017) (citation omitted). “[T]he period from arraignment to trial is perhaps the most critical period of the proceedings during which the accused requires the guiding hand of counsel.” *Id.* at 698 (quotations and citations omitted).

“A person facing criminal charges needs counsel at their first preliminary appearance to protect their constitutional rights while the court decides bail and other important questions.” *Id.* at 17. A bail hearing requires the trial court to carefully consider facts about the defendant and the crimes charged. *Id.* at 17. This inquiry is required before the State can restrain an accused’s liberty. *Id.* at 17.

CrR 3.1(b)(1) states the right to counsel accrues “as soon as feasible after defendant is taken into custody, appears before committing magistrate, or is formally charged, whichever occurs earliest.” *Sanchez*, 197 Wn. App. at 698-699 (citing CrR 3.1(b)(1)).

Failure to have counsel present during a critical stage of prosecution is structural error, requiring automatic reversal. *Heng*, 2 Wn.3d at 392 (citations omitted). A “critical stage is one where a defendant’s rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.” *Id.* at 394 (internal quotations & citations omitted).

“[N]ot all pretrial hearings are critical stages.” *Heng*, 2 Wn.3d at 392. The substance of the hearing must be examined, and if there is no possibility a defendant is or would be prejudiced in defense of the case then there is a reluctance to overturn a trial. *Id.* at 392-393 (citations omitted). Structural

error occurs if the denial of counsel at a pretrial hearing affected and contaminated the entire proceeding. *Id.* at 394.

The *Heng* Court recognizes that the federal and state constitutions and court rules require counsel to be present at all preliminary hearings. *Heng*, 2 Wn.3d at 394 (citations omitted). When deciding whether to apply automatic reversal for failure of counsel to be present the court will consider whether rights were lost in a way that demonstrably affected the outcome of the trial. *Id.* at 394 (citing *State v. Heddrick*, 166 Wn.2d 898, 910, 215 P.3d 201 (2009)).

In *State v. Schlenker*, the court of appeals held that the defendant's constitutional right to counsel was breached because the defendant objected to remote appearances, complained he was unable to privately and confidentially confer with counsel, and the trial court failed to provide the facilities to allow client to confer confidentially with counsel. *State v. Schlenker*, 31 Wn. App.2d 921, 923-926, 553 P.3d 712 (2024).

*Bragg v. State* is also relevant to the case at hand.

*Bragg v. State*, 28 Wn. App. 2d 497, 536 P.3d 1176 (2023).

There, the trial court violated the defendant's right to counsel by not providing the defendant a means of privately conferring with his counsel during several noncritical stages of the proceedings. *Id.* 28 Wn. App. 2d at 506.

In this case, Mr. Thysell asserts he lost rights, waived defenses, and waived privileges for several reasons. (Statement of Additional Grounds; Supp. RP 3-22).

First, Mr. Thysell was not represented by counsel at the time the determination of probable cause was made, thus he was not provided counsel at a critical stage of the proceedings. (Statement of Additional Grounds; CP 7; Supp. RP 15).

Second, despite advising Mr. Thysell he had the right to remain silent, the trial court deliberately elicited a response from Mr. Thysell during his preliminary appearance by asking him to "Go ahead" and let the court know if he had any comments regarding the conditions of release. (Supp. RP 17-



18). The State used an adversarial narrative—alleging Mr. Thysell could have been dead—to establish release conditions, all while Mr. Thysell had no one to advocate for him. (Supp. RP 16). These State’s comments were prejudicial, and Mr. Thysell was requested by the trial court to respond to the release conditions, but he had no experience or legal training to do so. (Supp. RP 16-18). Moreover, the trial court did not advise Mr. Thysell of his right to consult an attorney, nor did it warn Mr. Thysell that any statements he made could be used against him later. (Supp. RP 17-18). Thus, Mr. Thysell waived his Fifth Amendment right to silence when he responded to the trial court’s question, making statements about his defense in open court. (Supp. RP 17-18). Mr. Thysell did not know he should not speak if he did not want to waive any defenses, having no attorney present to advise him, and the statements were a waiver as to any defenses he could have presented later at trial. (Supp. RP 17-18). His response boxed him into a theory of defense without first discussing any of the case

without first discussing any of the case with counsel. (Supp. RP 16-18). Admittedly, Mr. Thysell did claim self-defense at trial, which was consistent with his statements during the first preliminary hearing. (CP 169-171; RP 258, 265, 274, 307-309). However, the fact remains that he waived his Fifth Amendment rights during the preliminary hearing without advice of counsel, and it is impossible to predict how that waiver could have affected the outcome of the trial and his choice of defenses. Because Mr. Thysell waived his Fifth Amendment privilege and lost other potential defenses as a result, this preliminary hearing was a critical stage of the proceedings. *Heng*, 2 Wash.3d at 394.

Third, Mr. Thysell was asked to sign a waiver of extradition, without the benefit of counsel's advice, thus waiving a right to contest it. (Statement of Additional Grounds; CP 8; Supp. RP 16, 19-20, 22).

Fourth, pretrial conditions of release and bail were set without advice of counsel, and had counsel been present Mr.

Thysell's bail may not have been set so high. (Statement of Additional Grounds; Supp. RP 5, 12, 13, 15, 17-21).

Fifth, delay in the arraignment occurred because Mr. Thysell did not have counsel to advise him. (Statement of Additional Grounds; Supp. RP 23-29). Counsel could not advise him he had a right to a timely arraignment, pursuant to CrR 4.1. Here, the information was filed on June 21, 2021, yet he was not arraigned until July 19, 2021. (CP 1; Supp. RP 28-29). Had Mr. Thysell had the assistance of counsel, his attorney could have objected to the lengthy delay between the filing of the information and arraignment. CrR 4.1(a) & (b). However, having no counsel to advise him, the failure to object to this delay resulted in waiver. CrR 4.1(b).

Finally, Mr. Thysell was not afforded the ability to confer privately with counsel—in fact, Mr. Thysell was not provided counsel at all. Mr. Thysell did not object to the proceedings because, having no counsel, he did not know he should object to the proceedings. (*Id.*). *Schlenker* is like Mr. Thysell's case

because in neither instance did the defendant have the ability to privately confer with counsel.

The preliminary hearing was a critical stage of the proceedings. Mr. Thysell waived his Fifth Amendment rights without advice of counsel, limiting his defense options. It is impossible to predict how that waiver could have affected the outcome of the trial. He waived his extradition rights, and was forced to face pretrial release conditions and bail determinations without advice of counsel. He also unknowingly waived an objection to the delay of arraignment.

For these reasons, Mr. Thysell did not have counsel during critical stages of the proceedings. Rights were lost, defenses waived, and privileges were waived. This Court should grant review because it involves a significant question of law under the state and federal constitutions and because the right to counsel an issue of substantial public interest. U.S. Const. amend. VI; Const. art. I, sec. 22. RAP 13.4(b)(3) and (4).

## **F. CONCLUSION**

For the reasons stated herein, Mr. Thysell requests this Court grant review.

I certify this document contains 2,693 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 9<sup>th</sup> day of April, 2025.

  
\_\_\_\_\_  
Laura M. Chuang, WSBA #36707

IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

STATE OF WASHINGTON	) Supreme Court No.
Respondent,	) _____
vs.	)
	) COA No. 87210-9-I
ROBERT TODD THYSELL, SR.,	)
Petitioner.	) PROOF OF SERVICE
_____	)

I, Laura M. Chuang, assigned counsel for the Petitioner herein,  
do hereby certify under penalty of perjury that on April 9, 2025,  
having obtained prior permission, I served a copy of the Petition for  
Review on the Respondent at [paappeals@Klickitatcounty.org](mailto:paappeals@Klickitatcounty.org) using  
the Washington State Appellate Courts' Portal.

Dated this 9<sup>th</sup> day of April, 2025.

/s/ Laura M. Chuang  
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## Appendix A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
ROBERT TODD THYSELL, SR.,  
  
Appellant.

No. 87210-9-I  
  
DIVISION ONE  
  
UNPUBLISHED OPINION

BIRK, J. — Robert Thysell appeals his conviction of assault in the second degree with a deadly weapon. He argues that he was unlawfully deprived of counsel, but he cannot raise this issue for the first time on appeal because he cannot show manifest error as required by RAP 2.5(a)(3). He also argues that the prosecutor committed reversible misconduct and raises additional issues in a statement of additional grounds for review (SAGR). We affirm.

I

In June 2021, the State charged Thysell by information with one count of assault in the second degree with a deadly weapon. The State alleged that Thysell pointed a rifle at a sheriff's deputy when the deputy arrived at Thysell's home in response to a 911 call from Thysell's wife, who reported that Thysell had assaulted her.<sup>1</sup>

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<sup>1</sup> The State later added a charge of assault in the fourth degree against a family or household member. A jury acquitted Thysell of that charge, and it is not at issue in this appeal.



On June 21, 2021, the trial court found that “there [was] probable cause to believe [Thysell] committed the crime[ ] alleged” and ordered that he was “not to be released before being brought before the Court on Preliminary Appearance.” (Boldface omitted.) Thysell made his preliminary appearance that same day. After informing Thysell of the charge against him, the trial court asked, “Do you understand that you have the right to remain silent and anything you say could be used against you,” and Thysell responded, “Yes.” Thysell did not have an attorney and stated that he wanted one. The trial court determined that Thysell was not indigent, declined to appoint counsel, and directed Thysell to try to retain an attorney on his own.

The court then heard from the State regarding conditions for Thysell’s release. The State argued among other things that bail should be set at \$35,000 and that Thysell should be required to sign a waiver of extradition. The court invited Thysell to speak and reminded him that he had a right to remain silent regarding the allegations against him. Thysell stated he understood, and then said,

I had no idea that it was a deputy that had drove up the driveway. So, he said he flashed or turned his lights on. I never seen them. So, I had no idea it was a deputy. As soon as I, you know, as soon as I realized it was, I . . . let go of the rifle and . . . turned around and walked off. But I had no idea that there was a deputy that had drove up the driveway.

The trial court adopted the State’s requested release conditions “for the most part,” including by requiring Thysell to sign a waiver of extradition. But the

court set bail at \$15,000, citing the fact that Thysell did not have a history of failing to appear and had only limited, misdemeanor history. On June 25, 2021, Thysell posted bail, and he appeared out of custody for later proceedings.

On July 6, Thysell appeared for arraignment. When the trial court asked Thysell if he had retained an attorney, he responded no, explaining that he had started to but was told that counsel would be appointed. The trial court reminded Thysell that it had directed him to retain his own attorney and stated it was “reluctant to go forward with an arraignment . . . without counsel being present.” The court explained that Thysell had the right to be arraigned within 14 days after his preliminary appearance but that Thysell could waive that right to allow additional time to hire counsel. Thysell confirmed he understood, then the trial court asked if Thysell wanted additional time to retain his own attorney rather than handle the arraignment himself. Thysell indicated he “would rather do that,” and the trial court reset arraignment to July 19, 2021.

On July 19, Thysell appeared with counsel and pleaded not guilty. Trial took place in October 2021, and Thysell’s theory was self-defense. He testified that when he saw the deputy’s vehicle coming up his driveway, he “had no idea who it was” and decided to “confront the situation,” realizing only later that the vehicle belonged to law enforcement when he “happened to see the faded star on the side.”

The jury found Thysell guilty of assault in the second degree. Thysell appeals.

II

Thysell argues for the first time on appeal that reversal is required because he was unlawfully deprived of counsel when the court made a determination of probable cause at the June 21, 2021 and July 6, 2021 hearings. Because Thysell does not establish manifest error under RAP 2.5(a)(3), he cannot raise this issue for the first time on appeal.

A

RAP 2.5(a)(3) states that a party may raise for the first time on appeal a “manifest error affecting a constitutional right.” “This rule is intended to allow a reviewing court to correct any ‘serious injustice to the accused’ and to preserve the fairness and integrity of judicial proceedings.” State v. Brashear, 32 Wn. App. 2d 934, 940, 559 P.3d 121 (2024) (quoting State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

To determine whether RAP 2.5(a)(3) applies, we ask whether (1) the error is truly of constitutional magnitude and (2) the error is manifest, meaning the appellant can show actual prejudice. State v. J.W.M., 1 Wn.3d 58, 90-91, 524 P.3d 596 (2023). To demonstrate actual prejudice, the appellant must make a plausible showing that the claimed error had practical and identifiable consequences in the trial of the case. Id. at 91. Accordingly, the trial record must be sufficient to determine the merits of the claim. State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). If it is not, “no actual prejudice is shown and the error is not manifest.” McFarland, 127 Wn.2d at 333.

B

Thysell's deprivation-of-counsel claim is one of constitutional magnitude: Under both the Sixth Amendment to the federal constitution and article 1, section 22 of the Washington constitution, a criminal defendant has the right to the assistance of counsel. State v. Heng, 2 Wn.3d 384, 388-89, 539 P.3d 13 (2023). That right attaches at a defendant's " 'first appearance before a judicial officer' where 'a defendant is told of the formal accusation against him and restrictions are imposed on his liberty.' " Id. at 389 (quoting Rothgery v. Gillespie County, 554 U.S. 191, 194, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008)).

However, Thysell does not show that the absence of counsel actually prejudiced him. He contends that he was prejudiced by counsel's absence from (1) the trial court's probable cause determination, (2) his preliminary appearance, and (3) his initial arraignment hearing. Thysell argues that each of these was a critical stage of the proceedings and, thus, counsel's absence requires automatic reversal.

"[A] critical stage is one where a defendant's rights were lost, defenses were waived, privileges were claimed or waived, or the outcome of the case was otherwise substantially affected." Id. at 394. Thysell does not identify any aspect of the trial court's probable cause determination that would render it a critical stage of trial. Cf. Gerstein v. Pugh, 420 U.S. 103, 123, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) ("Because of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would

require appointed counsel.”). As for the initial arraignment hearing: Although Thysell waived his right to a 14 day arraignment, he does not explain how the resulting 13 day delay substantially affected the outcome of his case, particularly where the reason for the waiver was to allow Thysell time to retain counsel.

Finally, with regard to the preliminary hearing, Thysell asserts that he was prejudiced because he “waived his Fifth Amendment rights without advice of counsel, limiting his defense options.” Thysell bears the burden to establish manifest error. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). Thysell states that it is “impossible to predict how that waiver could have affected the outcome of the trial.” This is true: Thysell points to nothing in the record to show that his statement at the preliminary hearing—that he did not know it was law enforcement approaching his home—cornered him into a self-defense theory that he otherwise would not have advanced or affected the outcome of his trial in any way. Thysell also does not show that his signing a waiver of extradition caused any prejudice given that extradition was never at issue. Cf. State v. Welker, 127 Wn. App. 222, 230 n.7, 110 P.3d 1167 (2005) (“A waiver of extradition is effective only when the state has initiated extradition proceedings against the out-of-state defendant.”), aff’d, 157 Wn.2d 557, 141 P.3d 8 (2006). And while Thysell also asserts that he “was forced to face pretrial release conditions and bail determinations without advice of counsel,” he posted bail, was released pending trial, and did not lose the right to challenge the conditions of his release. Cf. Heng, 2 Wn.3d at 395 (bail setting was not a critical stage where defendant did not lose

his ability to challenge bail).

The record does not support a conclusion that Thysell's trial suffered practical and identifiable consequences because of the pretrial hearings at which Thysell appeared without the assistance of counsel.<sup>2</sup> Accordingly, we decline to review Thysell's deprivation-of-counsel claim for the first time on appeal.

### III

Thysell next contends that the prosecutor committed reversible misconduct during closing argument. We disagree.

To establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the record and all of the circumstances of the trial. State v. Zamora, 199 Wn.2d 698, 708-09, 512 P.3d 512 (2022). When the defendant does not object at trial, we apply a heightened standard of review and require a showing that the prosecutor's misconduct was " 'so flagrant and ill intentioned that [a jury] instruction would not have cured the [resulting] prejudice.' " Id. at 709 (alterations in original) (internal quotation marks omitted) (quoting State v. Loughbom, 196 Wn.2d 64, 70, 470 P.3d 499 (2020)). "In other words, the defendant who did not object must show the improper conduct resulted in incurable prejudice." Id. (emphasis omitted).

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<sup>2</sup> In a SAGR, Thysell contends that his trial counsel was ineffective for not raising the deprivation of counsel issue below. But to prevail on that claim, Thysell must show both that counsel acted unreasonably by not raising the deprivation of counsel issue and that had counsel raised the issue, there is a reasonable probability that the outcome of his trial would have been different. State v. Bertrand, 3 Wn.3d 116, 123, 546 P.3d 1020 (2024). For the reasons discussed, Thysell can make neither showing.

“Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, a prosecutor must ‘seek convictions based only on probative evidence and sound reason.’ ” In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012) (citation omitted) (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991)). “ ‘The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.’ ” Id. (quoting AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE std. 3-5.8(c) (2d ed. 1980)).

Here, the prosecutor argued,

And self-defense is what a reasonable person would do under the same or similar circumstances. . . . What the defendant did was he came home from the rodeo and he didn’t have the food that his wife told him . . . he was gonna bring home. Didn’t have the water that the wife wanted. And whether that demand by his wife is reasonable or unreasonable, it’s not a reason to assault her. . . . [S]he called the police and she asked for help . . . [a]nd then, when law enforcement came, he was gonna deal and confront that situation.

And, in confronting that situation, he committed a crime. Aimed a deadly weapon at [the sheriff’s deputy] and put him in fear and apprehension of . . . death or serious bodily injury. *And the fact that he didn’t pull the trigger only means that we’re not here on a more serious charge. That’s the only difference. If he’d pulled the trigger, it’d be something else. It might even be even more tragic than this case already is.*

(Emphasis added.) Thysell contends that by arguing that the situation could have been more serious and tragic had he pulled the trigger, the prosecutor “improperly focuse[d] on an appeal to the jury’s fears, and implies the jury should send a message by finding [Thysell] guilty.”

The prosecutor should not have speculated about what might have happened as opposed to arguing what the evidence supported did happen. See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (references to evidence outside the record constitute misconduct). But Thysell did not object, and any prejudice could have been cured by instructing the jury to disregard the above emphasized part of the prosecutor's argument. Accordingly, reversal is not required.

Thysell contends that the prosecutor's statements caused incurable prejudice because the evidence was "not overwhelming" that he knew it was law enforcement on his property. But he cites only favorable evidence and does not acknowledge any evidence to the contrary. This evidence included a video of the incident and Thysell's wife's testimony that Thysell was "standing right there" when she was on the phone with 911 and that she told him law enforcement was coming. Moreover, the jury was instructed to decide the facts "based upon the evidence presented" during trial and that the lawyers' arguments were not evidence. Thysell's contention is not persuasive.

#### IV

Thysell has filed a SAGR in which he raises a number of additional issues, none of which warrant reversal.

Thysell first contends that his trial counsel was ineffective for (1) not objecting to the conditions placed on Thysell's release and the delay of his arraignment, (2) not objecting to the prosecutor's statement during a pretrial



hearing that Thysell “is lucky to be alive,” (3) not moving to suppress any evidence at Thysell’s CrR 3.6 hearing, (4) not challenging “any warrantless arrest issues,” (5) not challenging “any improper characterization of evidence,” (6) not challenging “any assumption of facts not in the evidence,” and (7) not investigating the evidence or “hav[ing] any expert analysis.” A defendant alleging ineffective assistance bears the burden “to show from the record a sufficient basis to rebut the ‘strong presumption’ counsel’s representation was effective.” McFarland, 127 Wn.2d at 337 (quoting State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). The defendant also “bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel’s deficient representation.” Id.

Thysell does not explain what warrantless arrest “issues” counsel should have raised, what evidence he believes was mischaracterized or should have been suppressed, what facts were improperly assumed, what additional investigation counsel should have undertaken, or what expert analysis counsel should have obtained. Cf. RAP 10.10 (appellate court “will not consider a [SAGR] if it does not inform the court of the nature and occurrence of alleged errors” and “is not obligated to search the record in support of claims made in a [SAGR]”). Also, he does not allege or establish that the outcome of his trial would have been different had counsel made the objections Thysell claims should have been made. Cf. State v. Gerdtz, 136 Wn. App. 720, 726-27, 150 P.3d 627 (2007) (defendant basing ineffective assistance claim on counsel’s failure to object must show that an

objection would likely have been successful). Thysell's ineffective assistance claim fails.

Thysell next takes issue with a number of jury instructions. But each challenged instruction is consistent with the version Thysell proposed, so he waived any challenge. See State v. Eplett, 167 Wn. App. 660, 664, 274 P.3d 401 (2012) (appellant cannot challenge instruction he proposed). Thysell also argues that trial counsel was deficient for not challenging the instructions, but he does not identify any meritorious basis for such a challenge. He is correct that instruction 5 could be read out of context to imply there were multiple defendants,<sup>3</sup> but it would have been obvious to the jury that Thysell was the sole defendant, and Thysell points to no evidence that the jury was confused in this regard or that any such confusion affected the verdict.

Finally, Thysell argues that cumulative error warrants reversal. The cumulative error doctrine entitles a defendant to a new trial "when cumulative errors produce a trial that is fundamentally unfair." State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). Reversal is not required where the errors are few and have little to no effect on the outcome of trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because Thysell does not show that any of his claimed

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<sup>3</sup> Instruction 5 stated, "A separate crime is charged in each count. You must separately decide each count charged against each defendant. Your verdict on one count as to one defendant should not control your verdict on any other count or as to the other defendant."

errors—individually or considered together—affected the fairness of his trial, the cumulative error doctrine does not apply.

We affirm.

      Birke, J.      

WE CONCUR:

      Brunner, J.      

      Mann, J.

# NORTHWEST APPELLATE LAW

April 09, 2025 - 10:42 AM

## Transmittal Information

**Filed with Court:** Court of Appeals Division I  
**Appellate Court Case Number:** 87210-9  
**Appellate Court Case Title:** State of Washington v. Robert Todd Thysell, Sr.  
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