Supreme Court No. _____
COA No. 86110-7-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

JAYCEE THOMPSON,

Petitioner.

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

PETITION FOR REVIEW

MOSES OKEYO
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Washington Statutes

United States Constitution

Washington Constitution

A. IDENTITY OF PETITIONER AND DECISION BELOW

Under RAP 13.4, Jaycee Thompson asks this Court to review the April 28, 2025 opinion of the Court of Appeals. (Attached as Appendix 1-11).

B. ISSUES PRESENTED FOR REVIEW

1. Article IV, section 16 prohibits courts from commenting on the evidence or instructing jurors that a factual issue is a settled matter of law. The trial commented on the evidence when it gave Instruction No. 11 that misleadingly told the jury, "'Intent to deprive' does not require proof on [sic] intent to permanently deprive the other of the property." This instruction diluted the prosecution's burden of proof by implying the degree of deprivation is irrelevant and minimizing the necessary elements required to prove theft. This Court should grant review to address this important constitutional question.

2. Due process and the right to present a defense guarantee the accused the right to jury instructions that support and explain their theory of defense. The trial court refused to instruct the jury on voluntary intoxication, even though the evidence supported the instruction and was crucial to explain Mr. Thompson's defense that he did not intend to commit the charged crime. The Court should accept review and correct both instructional errors under RAP 13.4(b)(1), (2) and (4).

C. STATEMENT OF THE CASE

Jaycee Thompson went to a local convenience store on an expensive electric bike he recently purchased. RP 738-39, 46; Ex. 6 at 10:00-10:06. After buying a coffee and coming out of the store, a car pulled up and parked. *Id*; Ex. 6 at 9:56-10:04. The driver got out of the car, but left it running. RP 572, 742-43. Mr. Thompson, high on PCP (phencyclidine),

told the man the car was nice and that if he was going to leave it running while in the store, he should let him take it for a spin. RP 740-41. The man, albeit likely jokingly, told Mr. Thompson he could and went into the store. RP 743, 749, 754; Ex. 6 at 10:30-11:00.

Mr. Thompson left his expensive electric bike[1] by the door of the store, walked around to the driver's side door, opened it, got in, set his coffee down, and adjusted the seat. RP 744; Ex. 3 at 02:00-02:06. He put the car in drive and moved the car several feet. RP 747. The man returned and vehemently demanded Mr. Thompson get out. RP 748-49. The man verbally threatened Mr. Thompson, pointed a gun at him, and shot the gun in the air. *Id*. Mr. Thompson, confused because the man had given him permission, opened the door. *Id*. Mr. Thompson got out of the car and walked

---

[1] Which he bought for about $2,600. RP 738-39.

towards his bike. RP 749-51. As he was walking away, Mr. Mohamed shot Mr. Thompson in the back of his left foot. RP 749-53.

The prosecution charged Mr. Thompson with attempted theft of a motor vehicle. CP 36.

At trial, Mr. Thompson testified to the events outlined, including being high on PCP. He testified he had not intended to deprive Mr. Mohamed of his car. RP 791. Video footage from the store and body camera footage from the police officers were admitted into evidence. Exs. 1, 3-4, 5, 8, 11-14.

Over Mr. Thompson's objection, the court gave Instruction No. 11 which told the jury that intent to deprive, an element of theft of a motor vehicle, did not require the intent to permanently deprive. RP 820-22, 834. And despite the evidence of Mr. Thompson's

intoxication, the court denied Mr. Thompson's request to instruct the jury on voluntary intoxication. RP 831.

The jury convicted Mr. Thompson of attempted theft of the car. RP 884.

On appeal, Mr. Thompson argued the conviction should be reversed due to two instructional errors. First, the trial court commented on the evidence by providing the jury a non-pattern instruction defining "intent to deprive." Second, the trial court erred by failing to instruct the jury on voluntary intoxication.

The Court of Appeals affirmed the attempted theft conviction despite the misleading instruction and another instruction that violates the state constitutional prohibition against judicial comments on the evidence.

D. ARGUMENT

1. Review is warranted because the trial court's non-pattern jury instruction defining "intent to deprive" was improper and commented on the evidence.

a. Instruction 11 incorrectly told the jury that "intent to deprive" does not require proof of intent to permanently deprive.

On the prosecution's request, and over Mr. Thompson's objection, the court gave the jury a non-pattern instruction defining "intent to deprive." RP 820-22. It read, "As used in these instructions, 'intent to deprive' means the intent to convert the property to one's own use. 'Intent to deprive' does not require proof on [sic] an intent to permanently deprive the other of the property.'" RP 834.

The Court of Appeals concluded Mr. Thompson did not show manifest constitutional error because the instruction "does no more than accurately state the law pertaining to the charge of attempted theft." Slip. Op.

at 4. It reasoned also that the instruction did not direct the jury to find "intent" had been established as a matter of law, nor otherwise convey the judge's personal opinion regarding credibility, weight, or sufficiency of the evidence presented. *Id.*

The Court of Appeals affirmed the attempted theft conviction despite the misleading instruction that violates the state constitutional prohibition against judicial comments on the evidence. The opinion is mistaken: the instruction's unconstitutional comment on the evidence warrants review under RAP 13.4.

b. Instruction 11 was improper and commented on the evidence in violation of the Washington Constitution.

The instruction defining "intent to deprive" given by the trial court is not a pattern instruction. See 11A Wash. Prac., Pattern Jury Instr. Crim. (5th Ed). In

proposing the instruction, the prosecution cited *State v. Komok*, 113 Wn.2d 810, 783 P.2d 1061 (1989) *and State v. Dorman*, 30 Wn. App. 351, 354-56, 633 P.2d 1340 (1981).[2] But those cases did not alter the essential elements required to prove theft, nor did they approve of the instruction the court gave here.

This Court held that the legislature eliminated this common-law requirement in enacting the theft statute, so the charging document was sufficient. *Komok*, 113 Wn.2d at 816-17. *Dorman*, which predates *Komok*, reached a similar conclusion in a case involving a prosecution of theft by embezzlement. *Dorman*, 30 Wn. App. at 354-56.

---

[2] *Komok* concerned a challenge to a charging document in a theft by taking prosecution. The charging document did not allege intent to permanently deprive, which was a requirement under the common law in theft by taking cases. *Komok*, 113 Wn.2d at 811-12.

There, for reasons that the opinion does not explain, the trial court instructed the jury that "proof of intent to deprive does not require the establishment of the intent to permanently deprive." *Id.* at 354. At common law, this was correct in embezzlement cases, but not in theft by taking (i.e., larceny) cases. *Id.* at 355-56. Based on a theory that the theft statute now required intent to permanently deprive in all theft cases, the defendant argued the instruction was error. *Id.* at 354. This Court rejected this argument, reasoning the distinction between embezzlement and larceny cases remained, but this Court did not endorse the instruction given by the trial court in Mr. Thompson's case. *Id.* at 355-56.

Neither *Komok* nor *Dorman* support giving the jury a negative instruction about what the State need not prove to establish "intent to deprive." It is well

established that, in order to ensure constitutionally fair trials, jury instructions must be manifestly clear to the average juror and not misleading. *State v. Weaver*, 198 Wn.2d 459, 465-66, 496 P.3d 1183 (2021). Because it may mislead the jury, it is not appropriate to copy and paste language from either a statute or judicial opinion into a jury instruction. *Bell v. State*, 147 Wn.2d 166, 177, 52 P.3d 503 (2002) (an instruction that uses statutory language is "appropriate only if the statute is applicable, reasonably clear, and not misleading"); *Swope v. Sundgren*, 73 Wn.2d 747, 750, 440 P.2d 494 (1968) (the language used by the Supreme Court "is not ordinarily designed or intended as a model for jury instructions"); Introduction to Washington's Pattern Jury Instructions for Criminal Cases, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 0.10 (5th Ed) (warning

against this and advocating for instructing the jury using plain language).

Here, the instruction denied Mr. Thompson of a constitutionally fair trial because it is misleading. It implies that the degree of deprivation is irrelevant in evaluating whether the prosecution has proved guilt beyond a reasonable doubt. As this Court has reasoned, "[w]hile proof of intent to permanently deprive is not necessary under the theft statute, the 'intent to deprive" element nevertheless implies that the deprivation be of a greater duration than that required for taking a motor vehicle without permission." *State v. Walker*, 75 Wn. App. 101, 107-08, 879 P.2d 957 (1994).

In other words, stealing a motor vehicle is distinct from joyriding, which concerns a taking without permission rather than a theft. *State v. Ritchey*, 1 Wn. App. 2d 387, 391-92, 405 P.3d 1018

(2017). "The concept of 'taking' denotes a less severe deprivation than that of 'theft;' it represents an unauthorized use of a vehicle without the goal of exercising a more lasting control over it." *Id.* The jury does not need to be instructed that "to deprive" is not the same thing as "to permanently deprive." The "common meaning of deprive is to take something away from or to keep from having or enjoying." *State v. Miller*, 92 Wn. App. 693, 705-06, 964 P.2d 1196 (1998) (cleaned up) (*citing Komok*, 133 Wn.2d at 815 n.4).

Emphasizing that permanent deprivation is not required is misleading, and may lead a juror to conflate a mere unauthorized taking of a motor vehicle, i.e., joyriding, with theft of a motor vehicle. In short, the misleading instruction deprived Mr. Thompson of a constitutionally fair trial.

Beyond being misleading, the instruction in this case was also an unconstitutional comment on the evidence. "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, section 16. The provision "prohibits a comment on the evidence if it conveys or indicates to the jury a personal opinion or view of the trial judge regarding the credibility, weight, or sufficiency of some evidence introduced at trial." *State v. Painter*, 27 Wn. App. 708, 713-14, 620 P.2d 1001(1980) (emphasis added). A comment on the evidence need not be express; it may occur by mere implication. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). Whether a jury instruction comments on the evidence "depends upon the facts and circumstances of each case." *Painter*, 27 Wn. App. at 714.

For example, a jury instruction may comment on the evidence if it is premised on a determination "regarding legal sufficiency." *State v. Brush*, 183 Wn.2d 550, 558, 353 P.3d 213 (2015). This kind of instruction is improper because it relieves the State of its burden of proof. *Id.* at 559.

Contrary to the view of the Court of Appeals, *State v. Sinrud*, 200 Wn. App. 643, 403 P.3d 96 (2017) is illustrative. See Slip. Op. at 5. There, the court held an instruction in a prosecution for possession with intent to deliver drugs commented on the evidence because it improperly conveyed the judge's view on the weight or sufficiency of some evidence. *Sinrud*, 200 Wn. App. at 650-51. The instruction told the jury to find intent to deliver proved, "the law requires at least one additional corroborating factor" in addition to mere possession. *Id.* at 650. This instruction stemmed from

case law concerning sufficiency of the evidence, but this is problematic because a jury's job is to "find guilt beyond a reasonable doubt," not determine sufficiency of the evidence. *Id.* at 650-51. The instruction could be read to mean "that evidence of one corroborating factor was necessarily substantial corroborating evidence" regardless of the other evidence or lack thereof. *Id.* at 651. This misleading instruction commented on the evidence and relieved the prosecution of its burden of proof.

The Court of Appeals is mistaken in its conclusion that instruction 11 "accurately" clarified the level of intent required to find Mr. Thompson guilty of attempted theft.

Instruction 11 suffers from a similar defect as the one in *Sinrud*. It emphasized that "intent to deprive" does not require proof to permanently deprive. As

explained, it misleadingly implied that "intent to deprive without permission," "a less severe deprivation than that of 'theft,'" is equivalent to "intent to deprive." *Ritchey*, 1 Wn. App. 2d at 391-92; *see also Walker*, 75 Wn. App. at 107-08.

Here, the evidence supported a determination of a mere unauthorized taking of a motor vehicle. That is, Mr. Thompson intended to briefly drive the car while Mr. Mohamed was in the store, return it, and then leave on his electric bike, which he left by the door of the store. Under the facts and circumstances of this case, the instruction was a comment on the evidence. *See Painter*, 27 Wn. App. at 714 (where "the only evidence by which the jury could find a justifiable homicide was a threatened striking with hands or fists," instruction that effectively told the jury that

being struck by hands or fists was insufficient constituted a comment on the evidence).

The Court of Appeals's opinion affirmed Mr. Thompson's conviction despite this instruction that was not only misleading, but also an unconstitutional comment on the evidence. This constitutional issue warrants review by this Court under RAP 13.4.

2. Review is also warranted because the trial court refused to instruct the jury it could consider Mr. Thompson's intoxication when deciding whether the prosecution proved he acted with the necessary intent. This violated due process and the right to present a complete defense.

a. The jury must be accurately instructed on the prosecution's burden of proving the accused person acted with the required intent.

The prosecution bears the burden of proving "every fact necessary to constitute the crime" charged, including whether the accused person had the specific

mental state required to commit it. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

As a corollary rule, "the State cannot require the defendant to disprove any fact that constitutes the crime charged." *State v. W.R.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). The prosecution bears the burden of disproving any defense that negates an element of the offense. *Id.* at 762-63; *see State v. Coates*, 107 Wn.2d 882, 890, 735 P.2d 64 (1987) ("The State always has the burden of proving the defendant acted with the necessary culpable mental state.").

This due process protection also guarantees an accused person the right to have the jury accurately instructed on his theory of defense, provided the instruction is supported by substantial evidence and

accurately states the law. *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); U.S. Const. amends. VI, XIV; Const. art. I, § 22. If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. *State v. Agers*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). "A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case." *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

The right to jury instructions that explain the theory of defense ensures the jury knows how and whether it can use evidence supporting the defendant's theory. *See, e.g., State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006) (although jury was instructed State had to prove intent, court erred by declining voluntary intoxication instruction because it would

explain how and whether to consider evidence supporting defense theory); *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983) (jury was instructed State had to prove intent but court erred in not giving diminished capacity instruction which was necessary to apprise jury of the effect it had upon formation of criminal intent); *State v. Conklin*, 79 Wn.2d 805, 809, 489 P.2d 1130 (1971) (despite instructing jury on prosecution's burden to prove intent, lack of "adequate instructions" on intoxication was prejudicial error).

The prosecution charged Mr. Thompson with attempted theft of a motor vehicle. This required proof of intent to commit the specific crime of theft of a motor vehicle. RCW 9A.28.020(1). Theft of a motor vehicle requires proof of intent to deprive. *Ritchey*, 1 Wn. App. 2d at 391. Consequently, voluntary intoxication could

apply to the mental state for this offense. *See Stevens*, 158 Wn.2d at 310.

b. An intoxication instruction clarifies the State's burden of proving a specific mental state.

Intoxication is relevant to determining whether the accused person acted with the particular degree of mental culpability required to commit an offense. *Coates*, 107 Wn.2d at 889. "A voluntary intoxication defense allows the jury to consider 'evidence of intoxication' to determine whether the defendant acted with the requisite intent." *State v. Thomas*, 123 Wn. App. 771, 781, 98 P.3d 1258 (2004). The degree and effect of intoxication on the accused person's capacity to form the required intent is a question for the jury. *Conklin*, 79 Wn.2d at 807.

As provided by statute, "whenever the actual existence of any particular mental state is a necessary

element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state." RCW 9A.16.090. The pattern instruction based on this statute similarly provides: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, in determining whether the defendant [acted] [or] [failed to act] with (fill in the requisite mental state), evidence of intoxication may be considered." Voluntary Intoxication, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.10 (5th Ed).

This instruction does not require supporting expert testimony. *Thomas*, 123 Wn. App. at 782. A defendant is "entitled" to a voluntary intoxication instruction where "there is evidence" that the defendant's use of intoxicants "affected the defendant's

ability to form the requisite intent or mental state." *Id.* at 782 n.4; *State v. Gallegos,* 65 Wn. App. 230, 238, 828 P.2d 37 (1992); *see also Stevens,* 158 Wn.2d at 310. In all cases, "the State is always required to prove the defendant's actual culpable mental state." *State v. Clark,* 187 Wn.2d 641, 653, 389 P.3d 462 (2017) (emphasis in original).

Where the crime contains a mens rea element and some evidence shows the defendant was intoxicated at the time of the crime's commission, the defendant is entitled to have the court instruct the jury on intoxication. *Stevens,* 158 Wn.2d at 310.

In *Stevens,* the jury heard evidence the defendant was intoxicated at the time he allegedly committed child molestation. *Id.* at 310. This offense requires proof the defendant acted for the purpose of sexual gratification. Because there was evidence of the

defendant's intoxication at the time of the incident, the trial court erred in refusing a voluntary intoxication instruction. *Id.*

The *Stevens* Court further explained the necessity of providing a jury instruction on voluntary intoxication:

> Without the proposed jury instruction on voluntary intoxication, Stevens was precluded from arguing his theory of the case to the jury. Although Stevens was allowed to present evidence of intoxication, the jury was not instructed on how or whether they could consider this evidence in determining if Stevens acted with the purpose of sexual gratification. Had the jury believed Stevens' evidence and had they been properly instructed, the jury could reasonably have found Stevens' intoxication prevented him from acting for the purpose of sexual gratification. Failure to give the proposed instruction constitutes reversible error.

Id. at 310.

In similar circumstances, other courts have found the failure to issue or request a voluntary intoxication instruction to be reversible error.

For example, in *State v. Kruger*, 116 Wn. App. 685, 67 P.3d 1147 (2003), the Court held counsel's failure to request a voluntary intoxication instruction was deficient performance requiring reversal because there was ample evidence the defendant was intoxicated, and, if properly instructed, jurors could have reasonably concluded his intoxication prevented him from forming the intent to "head butt" a police officer. *Id.* at 693-95. Because there was sufficient evidence to permit a jury to make this finding, the trial court would have committed reversible error if it had refused to give this instruction. *Id.* at 694.

And in *State v. Hackett*, 64 Wn. App. 780, 784, 827 P.2d 1013 (1992), the defendant was prosecuted for

shooting a police officer and the trial court refused to give an intoxication instruction because it construed this instruction as only applying to alcohol, not drugs. Because evidence showed the defendant ingested cocaine and appeared intoxicated at the time of the shooting, the Court ruled the trial court should have issued a voluntary intoxication instruction. *Id*. at 786-87. General intent instructions are not sufficient, by themselves, to allow a defendant to argue his intoxication impaired his ability to form the intent required for the crime. *Id*. at 785.

c. The jury heard substantial evidence of Mr. Thompson's intoxication yet the court erroneously refused to give an intoxication instruction.

Mr. Thompson testified that before he went to the convenience store, he smoked PCP[3]. RP 740.

---

[3] PCP causes mind-altering, hallucinogenic effects.

He was feeling these effects when he was at the store, when he interacted with Mr. Mohamed, and when he took Mr. Mohamed's car. RP 741, 754. Mr. Mohamed, testified he believed, based on his experience "[l]iving in the hood," that Mr. Thompson had been high and acted strangely because of it. RP 703.

Mr. Thompson also expressed confusion upon being confronted by Mr. Mohamed. RP 749. He did not immediately try to leave despite Mr. Mohamed shooting him. Ex. 3 at 2:30-3:20. And he continued to express confusion when detained by the police and was seemingly unable to answer questions about what happened. Ex. 8 at 0:50-4:30.

When Mr. Thompson was at the hospital being treated for the gunshot wound, hospital staff asked about whether he was intoxicated. RP 805. Police

officers found three PCP cigarettes on Mr. Thompson. RP 805.

Video footage also showed Mr. Thompson moving and acting in a way that showed impairment. Ex. 6 at 1:00-10-:04; RP 824. For example, video from the convenience store showed Mr. Thompson slowly trying to purchase a coffee, dropping change, having difficulty picking up the change, and then being locked out of the store due his strange behavior. RP 580, 783-85, 826; Exs. 3, 6.

The trial court agreed there was evidence of drug use and confusion by Mr. Thompson. RP 827, 829-30. Still, it denied Mr. Thompson's request for the voluntary intoxication instruction based on its determination of "insufficient evidence that the drug consumption affected [Mr. Thompson's] ability to

acquire the required mental state." RP 831. The trial court erred.

"[P]hysical manifestations of intoxication provide sufficient evidence from which to infer that mental processing also was affected, thus entitling the defendant to an intoxication instruction." *State v. Walters*, 162 Wn. App. 74, 83, 255 P.3d 835 (2011).

As explained, the evidence showed Mr. Thompson exhibited physical manifestations of being high on PCP. This evidence of intoxication would have permitted a reasonable juror to conclude that Mr. Thompson, due to his intoxication, did not act with "intent to deprive" Mr. Mohamed of his car. At the least, it could have raised a reasonable doubt on intent. His intoxication made it more probable that Mr. Thompson genuinely believed Mr. Mohamed when he

(jokingly) gave him permission to drive the car and then left the car running. And that Mr. Thompson simply intended to briefly drive the car without intending to deprive Mr. Mohamed of it, and to return so he could reclaim his expensive electric bike. Without the instruction, the jury would not understand that it was permitted to consider Mr. Thompson's intoxication in evaluating whether the prosecution proved intent beyond a reasonable doubt.

Defense counsel was unable to develop an argument to the jury concerning intent because of the lack of a voluntary intoxication instruction. Nonetheless, defense counsel reminded the jury that Mr. Thompson was under the influence of PCP. RP 872. But without the instruction, the jury "lacked direction on how to apply the law to the intoxication." *Walters*, 162 Wn. App. 84.

c. The Court of Appeals is mistaken, this cases is distinguishable from Gabryschak.

The Court of Appeals correctly acknowledged first, that theft of a motor vehicle requires proof of intent to deprive, and second, Mr. Thompson presented substantial evidence showing he was intoxicated at the time of the alleged incident. Slip. Op at 5. It nonetheless rubber stamped the conclusion of the trial court that Mr. Thompson failed to show that his mental state was so affected as to warrant a voluntary intoxication instruction. Slip. Op. at 5.

The opinion relies on *State v. Gabryschak*, 83 Wn. App. 249, 254, 921 P.2d 549 (1996), which held that:

> Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. 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.

Gabryschak was charged with felony harassment and malicious mischief and argued that the trial court improperly denied him a voluntary intoxication instruction. *Id.* at 252. The trial court had held that although ample evidence showed Gabyschak was drunk, there was no evidence that allowed a rational trier of fact to determine that his intoxication impacted his ability to form the required mental state. *Id.* at 254. The trial court took Gabryschak consistent refusal of officers' requests, his preventing police from entering his apartment, and his attempt to escape police custody as proof that he fully understood his situation. *Id.* at 254-55. More importantly, it credited the fact that Gabryschak presented no testimony that his "speech was slurred, that he stumbled or appeared confused, that he was disoriented as to time and place ... or that

he otherwise exhibited sufficient effects of the alcohol" to limit his ability to form the requisite mental state. *Id.* at 255.

Unlike *Gabryschak*, here there was substantial evidence that Mr. Thompson's ingestion of PCP impaired his mind or body and may have limited his ability to form the requisite intent to deprive Mr. Mohamed of his car. Contrary to the view of the Court of Appeals, the quality and strength of the substantial evidence of intoxication reasonably connects intoxication with inability to form the requisite intent to deprive Mr. Mohamed of his car and makes this case distinguishable from *Gabryschak*. The trial court and Court of Appeals reaches this result by a disingenuous twisting of plain facts. Both credited the fact that the officers who arrested Mr. Thompson testified Mr. Thompson appeared "calm," concerned about his

injury, and able to ride his bike. Slip. Op. at 7. Mr. Thompson seemed to know his own name and seemed to answer questions appropriately. *Id.* And Mr. Thompson later testified that the events of the night were clear in his mind without ever expression an opinion the PCP he took rendered him unable to understand what he was doing. *Id.*

But the fact that Mr. Thompson believed Mohamed "told me I could take it [his car] for a spin," suggests he mistook his conversation with Mohamed as permission to test drive the running car. RP 740-41; RP 743, 749, 754; Ex. 6 at 10:30-11:00. This was a sign the PCP affected his version of reality so much so that Mr. Thompson missed the hostile cues and and tried to convince Mr. Mohammed that he said "I could take it for a spin." *Id.*

Unlike in *Gabryschak*, this evidence shows that Mr. Thompson's drug use did affect his ability to acquire the required mental state.

The Court of Appeals opinion misapplied its own case to erroneously affirm the refusal to give this requested instruction. Mr. Thompson was entitled to legal instructions that was supported by the evidence. The instruction was necessary to fully and accurately explained his defense. By refusing Mr. Thompson's request for the intoxication instruction, Mr. Thompson was deprived of his right to present a defense, resulting in an unfair trial. This Court should accept review to address these important constitutional issues.

E. CONCLUSION

The Court should accept review under RAP 13.4(b)(1), (2),(4).

This brief complies with RAP 18.7 and contains 4,793 words.

DATED this 28th day of May 2025.

Respectfully submitted,

MOSES OKEYO (WSBA 57597)
Washington Appellate Project
Attorneys for Petitioner

APPENDICES

FILED
4/28/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JAYCEE CEDRIC THOMPSON, Appellant.	No. 86110-7-I DIVISION ONE UNPUBLISHED OPINION

FELDMAN, J. — Jaycee Thompson appeals his jury conviction for attempted theft of a motor vehicle. He argues the trial court erred in three respects: (1) it commented on the evidence by instructing the jury that "intent to deprive" does not require an intent to "permanently deprive"; (2) it failed to give a voluntary intoxication instruction despite substantial evidence supporting the defense; and (3) it admitted his custodial statements to police in violation of *Miranda*.[1] Finding no error, we affirm.

I

On March 16, 2021, Idris Mohamed stopped at a convenience store for water and snacks. Mohamed parked his car near the store entrance. As he entered the store, he encountered Thompson. Mohamed claims Thompson told him, "Nice car. I should steal

[1] *See Miranda v. Arizona*, 384 U.S. 436, 471, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

it." Thompson, on the other hand, claims he complimented the car and asked Mohamed if he could "take it for a spin," to which Mohamed responded, "go ahead."

Moments later, while Mohamed was in the store, he saw Thompson driving away in his car and ran after it. Mohamed quickly caught up with the car. When he did, Thompson exited the car and a conflict ensued during which Mohamed threatened Thompson with a pistol and fired two warning shots, one of which struck Thompson's foot.

Police were notified and two officers arrived within minutes, tackled Thompson, and handcuffed him. Thompson asked one of the officers whether he had been shot. As discussed in section II.C below, the officer then asked Thompson a series of questions regarding why and how he may have been shot and Thompson repeatedly responded, "I don't know." The officers then arrested Thompson and read him his *Miranda* rights, which Thompson acknowledged he understood.

Before trial, Thompson filed a motion to exclude his pre-*Miranda* statements to police. After holding a CrR 3.5 hearing, the trial court denied Thompson's motion. The pre-*Miranda* statements were then admitted at trial. Following trial, the jury convicted Thompson of attempted theft of a motor vehicle. This timely appeal followed.

II

A

Thompson argues the trial court commented on the evidence by instructing the jury that "intent to deprive" does not require an intent to "permanently deprive." The State argues Thompson waived this argument. We agree with the State.

The failure to timely object usually waives a claim of instructional error on appeal. RAP 2.5(a); *State v. Williams*, 159 Wn. App. 298, 312, 244 P.3d 1018 (2011).

Notwithstanding that rule, a defendant may raise a claim of error for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). "In order to benefit from this exception, 'the appellant must identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" *Gordon*, 172 Wn.2d at 676 (quoting *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)). To determine if this exception is applicable, "It is proper to 'preview' the merits of the constitutional argument to determine whether it is likely to succeed." *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) (quoting *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001)).

Thompson attempts to portray his claim as a manifest constitutional error by arguing the trial court's instruction 11 constituted an improper comment on the evidence. Instruction 11 states:

> As used in these instructions, "intent to deprive" means the intent to convert the property of another to one's own use. "Intent to deprive" does not require proof . . . o[f] an intent to permanently deprive the other of the property.

We review alleged errors of law in jury instructions de novo. *State v. Fleming*, 155 Wn. App. 489, 503, 228 P.3d 804 (2010).

Article IV, section 16 of the Washington Constitution provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A judge is thus prohibited "from 'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'" *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). "A jury instruction that does no more than accurately state the law pertaining to an issue does

not constitute an impermissible comment on the evidence by the trial judge." *State v. Sinrud*, 200 Wn. App. 643, 649, 403 P.3d 96 (2017) (citing *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001)). An instruction improperly comments on the evidence when it resolves an issue of fact that should have been determined by the jury. *Becker*, 132 Wn.2d at 64-65.

Here, instruction 11 is not a comment on the evidence because it does no more than accurately state the law pertaining to the charge of attempted theft. Instruction 11 is not misleading; it simply instructs the jury that "intent to deprive" does not require an intent to "permanently deprive." In so stating, instruction 11 reflects established precedent that Washington's theft statute does not require an intent to permanently deprive someone of their property.[2] The instruction did not direct the jury as to whether Thompson's intent had been established as a matter of law, nor did it convey the judge's personal opinion regarding the credibility, weight, or sufficiency of the evidence presented at trial. Rather, instruction 11 merely clarified the level of intent required to find Thompson guilty of attempted theft.

Thompson argues instruction 11 is analogous to the instruction that we concluded was unconstitutional in *Sinrud*. The instruction at issue there "stated that 'the law requires' substantial corroborating evidence" and, "[i]n the very next sentence, it stated that 'the law requires' at least one additional factor." 200 Wn. App at 651. Accordingly, we held the instruction "conflated these two requirements such that a reasonable juror would have interpreted the second sentence to be defining the first." *Id.* Thus, the instruction created

[2] *State v. Komok*, 113 Wn.2d 810, 816, 783 P.2d 1061 (1989) (holding that the Washington theft statute rejects the common law element of "intent to permanently deprive"); *State v. Crittenden*, 146 Wn. App. 361, 370, 189 P.3d 849 (2008) (trial court correctly refused to instruct jury that intent to deprive requires intent to permanently deprive).

the risk that the jury would believe that if they found "at least one additional factor" then they also found "substantial corroborating evidence." *Id.* As such, the instruction was a comment on the evidence because it relieved the prosecution of its burden of proof. *Id.* at 650-51. Here, in contrast, instruction 11 did not allow the jury to erroneously find one factor based on the presence of another factor, nor did it relieve the prosecution of its burden of proof. Thompson's reliance on *Sinrud* is therefore misplaced.

In conclusion, Thompson has not met his burden of showing a manifest error affecting his constitutional rights, and we therefore do not review this claim of error.

B

Thompson next argues the trial court erred by denying his request for a jury instruction on voluntary intoxication. We disagree.

"A criminal defendant is entitled to a voluntary intoxication instruction if: (1) one of the elements of the crime charged is a particular mental state; (2) there is substantial evidence of ingesting an intoxicant; and (3) the defendant presents evidence that this activity affected his ability to acquire the required mental state." *State v. Harris*, 122 Wn. App. 547, 552, 90 P.3d 1133 (2004) (citing *State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002)). The trial court here found insufficient evidence regarding the third prong of this test. The court explained:

> [E]ven assuming there's substantial evidence of drug consumption, there's, in the Court's mind, insufficient evidence that the drug consumption affected his ability to acquire the required mental state to warrant a voluntary intoxication instruction.
>
> So that is the reason and my finding why the voluntary instruction is not going to be given in this case.

Where a trial court determines there is insufficient evidence to justify giving a jury instruction requested by the defense, we review that ruling for abuse of discretion. *State v. Butler*, 200 Wn.2d 695, 713, 521 P.3d 931 (2022). Relevant here, an abuse of discretion "may occur when a trial court decision 'is unsupported by the record.'" *Id*. at 714 (quoting *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017)).

Thompson argues there is sufficient evidence to warrant a voluntary intoxication instruction because, "The jury heard evidence of Mr. Thompson's intoxication." Thompson testified he smoked PCP and felt its effect when he was at the store. Mohamed similarly testified he "thought maybe [Thompson] was high" based on his interactions with Thompson and because Thompson appeared confused when he was confronted by Mohamed. Thompson also argues he had PCP on him when he was searched by police, and he testified he was confused when the police arrested him. Lastly, Thompson points to the convenience store's video footage where he is seen "slowly trying to purchase a coffee, dropping change, having difficulty picking up the change, and then being locked out of the store due to his strange behavior." Thompson argues this is sufficient evidence of physical manifestations of intoxication from which to infer his mental state was affected, thus entitling him to an intoxication instruction.

As the trial court correctly noted, while such evidence shows that Thompson was intoxicated, it does not establish that his mental state was so affected as to warrant a voluntary intoxication instruction. In so holding, the trial court relied on *State v. Gabryschak*, 83 Wn. App. 249, 252, 921 P.2d 549 (1996), in which the defendant, convicted of felony harassment and third-degree malicious mischief, appealed the denial of a voluntary intoxication instruction. Although there was ample evidence Gabryschak

was intoxicated at the time of his crimes, the trial court did not find "evidence on the record from which a rational trier of fact could reasonably and logically infer that Gabryschak was too intoxicated to be able to form the required level of culpability to commit the crimes with which he was charged." *Id.* at 254. The court noted that Gabryschak refused to let officers into the home and then attempted to run from the police while being escorted to their vehicle, which indicated that Gabryschak understood his situation. *Id.* at 251, 254-55. We affirmed the refusal to give a voluntary intoxication instruction because the evidence did not reasonably connect Gabryschak's intoxication with the asserted inability to form the required level of culpability to commit the crimes charged. *Id.* at 252-53, 255.

This case is like *Gabryschak*. Similar to the police officers' testimony in *Gabryschak*, one of the officers who apprehended Thompson testified Thompson was "calm," concerned about his injury, and able to ride his bike. The officer also testified Thompson knew his own name and answered questions appropriately. Thompson himself stated that the events of the night were clear in his mind. Thompson never testified he was too intoxicated by PCP to understand what he was doing; rather, he repeatedly testified he drove Mohamed's vehicle because he thought Mohamed "told me I could take it for a spin." Thompson testified that, even after Mohamed confronted him, he was trying "to argue with [Mohamed] over the fact that he [] [told] me I could take it for a spin." As in *Gabryschak*, this evidence shows that Thompson's drug use did not affect his ability to acquire the required mental state.

On this record, the trial court did not abuse its discretion in refusing to give a voluntary intoxication jury instruction.

C

Lastly, Thompson argues the trial court erroneously admitted his custodial statements to police in violation of *Miranda*. We disagree.

As noted previously, police quickly arrived on the scene, tackled Thompson, and handcuffed him. Thompson then told the officers he may have been shot, prompting an officer to ask, "why would you have got shot, tell me that?" Thompson answered, "I don't know." The officer continued, "Tell me why you think you got shot?" Again, Thompson answered, "I don't know." The officer repeated, "Again, why do you think you got shot?" and "who shot you?" Thompson responded, "I don't know who shot me."

Before trial, Thompson filed a motion to exclude the statements he made to the officers—repeated protestations of "I don't know"—arguing they were elicited from him before he was read his *Miranda* rights. After holding a CrR 3.5 hearing, the trial court denied Thompson's motion. In its written findings and conclusions, the court explained:

> The Court finds that he was in custody the entire time as he was put in handcuffs immediately. All pre-Miranda statements are admissible as they were not made under questions meant to elicit incriminating statements. They were for information, such as questions about Mr. Thompson's injury.

We review a trial court's conclusions of law at a suppression hearing de novo, we review challenged findings for substantial evidence, and we also review de novo whether an interrogation was custodial. *State v. Shuffelen*, 150 Wn. App. 244, 252, 208 P.3d 1167 (2009).

The trial court's analysis is consistent with applicable precedent. Although statements made in a custodial interrogation without a *Miranda* warning are generally inadmissible, *see State v. Lavaris*, 99 Wn.2d 851, 856-57, 664 P.2d 1234 (1983),

Washington courts have recognized, "Not every question posed in a custodial setting is equivalent to interrogation requiring *Miranda* warnings." *Shuffelen*, 150 Wn. App. at 256-57. The test is "'whether under all of the circumstances involved in a given case, the questions are reasonably likely to elicit an incriminating response from the suspect.'" *Id.* (quoting *United States v. Gonzalez-Mares*, 752 F.2d 1485, 1489 (9th Cir.1985)). "While this test is objective, the subjective intent of the agent is relevant but not conclusive." *Id.*

Generally, questions that are not reasonably likely to elicit an incriminating response from the suspect, and thus may be asked in a custodial setting prior to a *Miranda* warning, are questions regarding "routine information necessary for basic identification purposes,"[3] questions "necessary to contain the situation,"[4] and questions necessary for "the physical protection of the police."[5] In *Richmond*, an officer asked Richmond who had called the police and where this person could be found. 65 Wn. App. at 543. We held Richmond's pre-*Miranda* responses to these questions were admissible, noting, "it was reasonable and prudent for [the officer] to be concerned that someone inside the apartment might be seriously injured." *Id.* at 545. Similarly, in *State v. Lane* 77 Wn.2d 860, 861, 467 P.2d 304 (1970), our Supreme Court held *Miranda* warnings were not required before asking a suspect "Do you have the gun?" The court reasoned "[i]t would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Id.* at 863.

---

[3] *United States v. McLaughlin*, 777 F.2d 388, 391 (8th Cir.1985); accord *State v. Walton*, 64 Wn.App. 410, 414, 824 P.2d 533 (1992), abrogated on other grounds by *In re Cross*, 180 Wn.2d 664, 327 P.3d 660 (2014).
[4] *Richmond*, 65 Wn. App. 541, 543,828 P.2d 1180 (1992).
[5] *State v. Lane* 77 Wn.2d 860, 862, 467 P.2d 304 (1970).

Here, it is undisputed Thompson was in custody and had not been read his *Miranda* rights when he was initially questioned. As such, the dispositive issue is whether the police officers' questions were reasonably likely to elicit an incriminating response. As noted previously, and as Thompson explains in his appellate briefing, the specific questions at issue here asked why Thompson had been shot and who shot him. These questions were intended to secure the scene, ensure the officers' safety, ascertain whether Thompson was injured, and determine who shot him. As *Richmond* and *Lane* confirm, the officers here could properly ask Thompson such questions before he was read his *Miranda* rights.

Thompson argues, "the officer did not merely ask questions to ascertain whether Mr. Thompson was injured or the extent of the injury. Rather, the officer's questions were about why someone shot Mr. Thompson and who shot him." Thompson relies on *Cross*, in which an officer told a suspect "sometimes we do things we normally wouldn't do and feel bad about it later." *In re Pers. Restraint of* Cross, 180 Wn.2d 664, 684-85, 327 P.3d 660 (2014). Our Supreme Court held that this comment was designed to elicit an incriminating response because any response, including silence, would be incriminating. *Id.* at 684-86. The court further explained all of the defendant's possible responses to the police officers' comments were incriminating because the comment "implie[d] Cross committed the murders." *Id*. at 686.

Thompson's reliance on *Cross* is misplaced. Unlike the defendant in *Cross*, Thompson could have responded to the police officers' questions without incriminating himself. When asked who shot him and why he was shot, Thompson could have indicated Mohamed shot him as a result of an argument. Similarly, the officers' questions did not

imply that Thompson committed any crime. To the contrary, the questions asked whether Thompson was the victim of a crime and were reasonably likely to elicit a response that incriminated someone else (Mohamed). Thus, the court's holding in *Cross* is inapposite.

Lastly, even if Thompson's pre-*Miranda* statements were improperly admitted, the error was harmless. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Here, Thompson's pre-*Miranda* statements had no plausible impact on the outcome of the trial because Thompson repeatedly responded "I don't know" when asked about why he was shot and who shot him. Thompson did not confess to any criminal activity, nor were his statements relevant to any element of the attempted theft charge. Additionally, the pre-*Miranda* statements were nearly identical to Thompson's post-*Miranda* statements, which were properly admitted at trial. On this record, we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the asserted error. Thus, even if the pre-*Miranda* statements were improperly admitted, the error was harmless.

Affirmed.

Feldman, J.

WE CONCUR:

Díaz, J.

Bjorgen, J.

WASHINGTON APPELLATE PROJECT

May 28, 2025 - 4:11 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	86110-7
Appellate Court Case Title:	State of Washington, Respondent v. Jaycee Thompson, Appellant

The following documents have been uploaded:

- 861107_Petition_for_Review_20250528161132D1937677_5311.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.052825-12.pdf

A copy of the uploaded files will be sent to:

- paoappellateunitmail@kingcounty.gov
- rbarnea@kingcounty.gov
- richard@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Moses Ouma Okeyo - Email: moses@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20250528161132D1937677