

No. 45965-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Eric Morrissey,

Appellant.

Mason County Superior Court Cause No. 13-1-00383-0

The Honorable Judge Amber L. Finlay

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court's two instructions defining recklessness violated Mr. Morrissey's Fourteenth Amendment right to due process.
2. The court erred by giving jury instructions 14 and 22 without clarifying their applicability.
3. The court's two definitions of recklessness did not make the relevant legal standard manifestly clear to the average juror.
4. The court's instructions defining recklessness allowed jurors to convict Mr. Morrissey of manslaughter based on proof that he disregarded a risk of substantial bodily harm.

ISSUE 1: Jury instructions must make the state's burden manifestly clear to the average juror. Here, the court provided two definitions of recklessness, one of which relieved the prosecution of its burden to prove that Mr. Morrissey disregarded a substantial risk of death. Did the court's instructions violate due process by permitting conviction for manslaughter based on proof that Mr. Morrissey disregarded a risk of substantial bodily harm rather than death?

5. Mr. Morrissey's manslaughter conviction violated his Fourteenth Amendment right to due process.
6. The state presented insufficient evidence of first-degree manslaughter.
7. No rational jury could have found beyond a reasonable doubt that Mr. Morrissey knew of and disregarded a substantial risk that his assailant would die as the result of a brief fistfight.

ISSUE 2: Evidence is insufficient for conviction if no rational trier of fact could have found each element beyond a reasonable doubt. Here, the jury convicted Mr. Morrissey of manslaughter based on an eleven-second fight in which he head-butted another person and punched him five to six times. Did the state present insufficient evidence that Mr. Morrissey knew of and disregarded a substantial risk that he would cause the death of another?

8. The jury's inconsistent verdicts violated Mr. Morrissey's Fourteenth Amendment right to due process.

ISSUE 3: A jury's inconsistent verdicts violate due process if the verdict of conviction is not supported by sufficient evidence. Here, the jury found that Mr. Morrissey had disregarded a substantial risk of death, but acquitted him of having disregarded a substantial risk of substantial bodily harm. Did the jury's inconsistent verdicts violate Mr. Morrissey's Fourteenth Amendment right to due process?

9. The court erred by entering finding 4.3 on Mr. Morrissey's Judgment and Sentence.
10. The trial court erred by ordering Mr. Morrissey to pay \$4,750 toward the cost of his defense.
11. The imposition of defense costs without any evidence that Mr. Morrissey has the present or future ability to pay violated his Sixth and Fourteenth Amendment right to counsel.

ISSUE 4: A trial court may only order an accused person to pay defense costs upon finding that s/he has the present or likely future ability to pay. Here, the court imposed \$4,750 in defense costs without finding that Mr. Morrissey had the ability to pay them. Did the trial court violate Mr. Morrissey's Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jacob Rossi was walking in downtown Shelton with two friends when Talon Newman assaulted him in an alley. RP 365-69. Newman believed that Rossi and his friends had been present for a previous fight involving Newman's friend. RP 244-47, 367-69. After Newman punched him several times, Rossi ran and Newman chased after him. RP 247, 370-73. Newman caught up to Rossi and punched him again. RP 372-73. Newman also pulled a knife on Rossi's friend, Sean Davis.¹ RP 384. Rossi fled a second time. RP 374.

Rossi ran to a house that several of his friends, including Eric Morrissey, shared. RP 376-77. Rossi was out of breath and had injuries to his face. RP 435-36, 675. Rossi told his friends that he had just been "jumped." RP 377. Rossi needed help because he had left his friends behind. RP 658. Mr. Morrissey and his roommates went to help Rossi find Davis to make sure he was okay. RP 658-59.

First the group looked for Davis in the alley where the assault had taken place. RP 381-82. Then they walked to the house where Davis was staying and found him there. RP 660. Davis told his friends about the

¹ Sean Davis's legal last name was Harris but that he goes by Sean Davis. RP 358. Likewise, Rossi's legal last name is Curtis, but he goes by Rossi and was referred to as Jacob Rossi throughout the trial. RP 357.

knife. RP 384. Even more concerned, the group walked back to downtown to look for their other friend who had also been present during the fight. RP 660, 662.

The six boys walked in a loose group, searching some streets and alleyways of downtown Shelton. RP 667-68. At one point, Rossi was crossing the street, when one of the other boys heard someone yell, “hey, fat boy.” RP 670. Once on the other side, Rossi turned around and saw Newman walking toward him with another man. RP 670.

Newman and the man inserted themselves into the group and got in Rossi’s face. RP 275, 671. Newman asked Rossi if he wanted to fight. Rossi refused. RP 259, 442, 671. Then Newman got in the face of another boy and asked him if he wanted to fight. RP 442, 672. That boy also said no. RP 442, 672.

Finally, Newman got in Mr. Morrissey’s face and asked him if wanted to fight. Mr. Morrissey told Newman not to touch him, and not to talk to him or his friends that way. RP 443, 674. Newman pushed Mr. Morrissey and lifted an arm to punch him. RP 443, 675. Mr. Morrissey head-butted Newman. RP 443, 675. The two fought for roughly eleven seconds² and Mr. Morrissey ended up kneeling over Newman while he lay

² The length of the fight can be deduced from the time stamp on the state’s video exhibit. RP 933; Ex. 59.

on the ground.³ RP 444, 677, 933; Ex. 59. Mr. Morrissey's friend pulled him up and the boys all jogged away. RP 445, 677.

A bystander called the police. RP 601. The caller told the dispatcher that Newman was still conscious after Mr. Morrissey and his friends left.⁴ RP 603. Newman was taken to the hospital where he died from damage to his spinal cord. RP 133, 154-55.

The state charged Mr. Morrissey with second-degree felony murder (based on assault) and first degree manslaughter. RP 155-56.

At trial, the doctor who had completed the autopsy estimated that Newman had been punched five or six times. RP 168. Newman did not have any broken bones. RP 169. The fatal spinal cord injury could have been caused by some combination of two things: (1) a backwards fall and impact with a hard surface, and (2) a whiplash-like movement caused by a blow to the face. RP 167-68.

The court gave the jury two different definitions of recklessness:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that substantial bodily harm may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

³ Two witnesses testified that other members of Mr. Morrissey's group punched Newman as well. RP 502-03, 594-95. But Newman's friend – who was only a few feet away -- testified that the fight was only between Mr. Morrissey and Newman. RP 261. The autopsy did not reveal injuries on Newman's body beyond those consistent with being punched about five times. RP 168. Mr. Morrissey's friends also did not have any injuries to their hands. RP 436, 579-82.

⁴ Newman's friend testified that he did not appear to be awake after the fight. RP 266.

CP 106.

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a death may occur and this disregard is a gross deviation from the conduct that a reasonable person would exercise in the same situation.

CP 124.

The court told the jurors to “consider the instructions as a whole,” and that “the order of the instructions has no significance as to their relative importance.” CP 93. Nothing in the court’s instructions limited the jury’s consideration of each definition to any particular charge. CP 90-123.

The jury acquitted Mr. Morrissey of murder but convicted him of manslaughter. CP 30.

After trial, defense counsel realized that the court’s recklessness instructions permitted the jury to convict Mr. Morrissey for manslaughter based only on a finding that he had disregarded a risk that substantial bodily harm – not death – would occur. RP 78-79.⁵ Mr. Morrissey moved for a new trial or for arrest of judgment. CP 83-86. The court denied the motions. CP 45.

The court found that Newman had instigated the fight. RP 1029-93. As a result, the court gave Mr. Morrissey an exceptional sentence

⁵ Defense counsel spoke with one of the jurors. RP 78. The juror expressed confusion about the showing required to find that Mr. Morrissey had committed manslaughter. RP 78.

below the standard range. CP 32. The court did not consider whether Mr. Morrissey had the ability or likely future ability to pay legal financial obligations. CP 31. The court ordered Mr. Morrissey to pay \$4,750 toward the cost of his defense. CP 34.

This timely appeal follows. CP 29.

ARGUMENT

I. THE COURT’S INSTRUCTIONS VIOLATED DUE PROCESS BY LOWERING THE STATE’S BURDEN OF PROOF.

A. Standard of Review.

Jury instructions and constitutional issues are both reviewed *de novo*. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012); *Dellen Wood Products, Inc. v. Washington State Dep’t of Labor & Indus.*, 179 Wn. App. 601, 626, 319 P.3d 847 (2014) *review denied*, 180 Wn.2d 1023, 328 P.3d 902 (2014).

B. The court’s instructions permitted a manslaughter conviction absent proof that Mr. Morrissey disregarded a substantial risk that his actions would cause death.

Due process requires the jury to be instructed in a manner that makes the state’s burden manifestly clear. *State v. Kylllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Jury instructions are erroneous if they permit the jury to apply the wrong legal standard. *Id.* at 865.

Instructional error is presumed prejudicial. *State v. Weaville*, 162 Wn. App. 801, 815, 256 P.3d 426 (2011) (citing *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)). Such error requires reversal if it relieves the state of its burden to prove each element of an offense. *Id.* The error is only harmless if the state can establish beyond a reasonable doubt that the verdict would have been the same absent the instructional error. *Id.*

As charged in this case, first degree manslaughter and felony murder based on second degree assault both include a recklessness element. CP 109, 155-156; RCW 9A.32.060(1)(a), 9A.36.021(1)(a). But the facts that the state must prove to establish recklessness are different for the two offenses. *State v. Gamble*, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005).

To convict for assault, the prosecution must demonstrate that the accused knew of and disregarded a substantial risk that substantial bodily harm would occur. *Id.* at 468. For manslaughter, the state must prove that the accused knew of and disregarded a substantial risk of death. *Id.* at 467.

Here, the court's instructions failed to draw a distinction between the two recklessness standards. Rather, the instructions provided two different definitions of recklessness without any clarification that one

applied to the assault predicate for felony murder while the other applied to the manslaughter charge. CP 106, 124.

Because of this, the jury could have convicted Mr. Morrissey of manslaughter based only on his disregard of the risk of injury, rather than the risk of death.⁶ This substantially lowered the state's burden.

The state cannot overcome the presumption that the instructional error prejudiced Mr. Morrissey. *Weaville*, 162 Wn. App. at 815. Mr. Morrissey engaged in a fistfight with Newman lasting fewer than twenty seconds. RP 933; Ex. 59. He punched Newman five or six times, causing no broken bones. RP 168-69. The state's evidence was inconsistent regarding whether Newman was unconscious when Mr. Morrissey left. RP 266, 603. A reasonable jury could have found that Mr. Morrissey disregarded a risk only that he would cause bodily harm to Newman. The state cannot demonstrate beyond a reasonable doubt that the verdict would have been the same without the instructional error. *Id.*

The court's instructions violated due process by failing to make the state's burden manifestly clear to the jury. *Kyllo*, 166 Wn.2d at 864. Mr. Morrissey's manslaughter conviction must be reversed. *Id.*

⁶ And, in fact, it appears that the jury used the wrong standard when deliberating as to the manslaughter charge. CP 78-79.

II. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. MORRISSEY OF MANSLAUGHTER.

A. Standard of Review.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

B. No rational jury could have found beyond a reasonable doubt that Mr. Morrissey disregarded a substantial risk that his actions would cause Newman's death.

To convict for first degree manslaughter, the state must prove that the accused knew of and disregarded a substantial risk that death would occur. *Gamble*, 154 Wn.2d at 467. No rational jury could have found that the state proved this element beyond a reasonable doubt at Mr. Morrissey's trial.

The state's video evidence showed that the fight lasted approximately eleven seconds. RP 933; Ex. 59. Mr. Morrissey did not use a weapon against Newman. *See RP generally*. Newman did not have any injuries beyond those showing that he'd been punched in the face. RP 128-58, 163-87. At most, the state proved that Mr. Morrissey head-butted Newman and punched him five or six times. RP 168. None of the blows

were hard enough to fracture Newman’s facial or spinal bones. RP 169. In short, the prosecution demonstrated only that Mr. Morrissey engaged in a seconds-long fistfight with Newman.

No rational trier of fact could have found that state proved beyond a reasonable doubt that Mr. Morrissey knew of and disregarded a substantial risk that this 11-second fistfight would kill Newman. *Gamble*, 154 Wn.2d at 467; *Chouinard*, 169 Wn. App. at 899. The prosecution presented insufficient evidence to convict Mr. Morrissey of manslaughter. *Gamble*, 154 Wn.2d at 467; *Chouinard*, 169 Wn. App. at 899. Mr. Morrissey’s conviction must be reversed. *Id.*

III. THE JURY’S INCONSISTENT VERDICTS VIOLATED MR. MORRISSEY’S RIGHT TO DUE PROCESS.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *Dellen Wood Products*, 179 Wn. App. at 626. A manifest error affecting a constitutional right may be raised for the first time on appeal. RAP 2.5(a)(3). Inconsistent jury verdicts can create manifest error affecting a constitutional right. *State v. Goins*, 151 Wn.2d 728, 732, 92 P.3d 181 (2004).

B. The jury acquitted Mr. Morrissey of disregarding a substantial risk of substantial bodily harm, but found that he disregarded a substantial risk of death.

Inconsistent jury verdicts violate due process when (1) they are truly inconsistent and (2) the guilty verdict is not supported by sufficient evidence. *Goins*, 151 Wn.2d at 736-37; U.S. Const Amend XIV; Wash. Const. art. I, § 3. Here, the jury returned inconsistent verdicts. The jury found that Mr. Morrissey disregarded a substantial risk of death, but not of substantial bodily injury.

The state charged Mr. Morrissey with first-degree manslaughter, and with felony murder based on a predicate offense of second-degree assault. CP 155-56. To convict Mr. Morrissey of murder, the jury would have to have found that he intentionally assaulted Newman and that he recklessly disregarded a substantial risk that he would cause substantial bodily harm. RCW 9A.36.021(1)(a). To convict Mr. Morrissey for manslaughter, the jury had to find that he recklessly disregarded a substantial risk that he would cause Newman's death. *Gamble*, 154 Wn.2d at 467.

Both parties agreed that Mr. Morrissey fought with Newman.⁷ RP 675-76. By convicting Mr. Morrissey of manslaughter, the jury

⁷ It was contested, however, whether Mr. Morrissey's assault on Newman constituted lawful use of force in self-defense. *See* RP 799-812.

necessarily rejected his excusable-use-of-force defense. The only remaining issue for the jury was whether he acted recklessly, and, if so, the degree of his recklessness. The “not guilty” verdict on murder shows that the jury rejected the state’s argument that Mr. Morrissey disregarded a substantial risk of substantial bodily harm. But the guilty verdict on manslaughter shows that the jury found that he disregarded a substantial risk of death. CP 30. The verdicts are inconsistent. *Goins*, 151 Wn.2d at 736.

As outlined above, the state presented insufficient evidence that Mr. Morrissey knew and disregarded a substantial risk that his actions would cause Newman’s death. Accordingly, the inconsistency in the jury’s verdicts violated his right to due process. *Goins*, 151 Wn.2d at 737.

The jury returned inconsistent verdicts. *Id.* Because the evidence does not support Mr. Morrissey’s manslaughter conviction, it must be reversed. *Id.*

IV. THE COURT VIOLATED MR. MORRISSEY’S SIXTH AMENDMENT RIGHT TO COUNSEL BY IMPROPERLY ORDERING HIM TO PAY DEFENSE COSTS.

A. Standard of Review.

Reviewing courts assess questions of law and constitutional challenges *de novo*. *Dellen Wood Products*, 179 Wn. App. at 626.

B. Erroneously-imposed legal financial obligations (LFOs) may be challenged for the first time on appeal.

A court's authority to impose costs derives from statute. *State v. Hathaway*, 161 Wn. App. 634, 651-653, 251 P.3d 253 (2011) *review denied*, 172 Wn.2d 1021, 268 P.3d 224 (2011).⁸ A court exceeds its authority by ordering an offender to pay legal financial obligations (LFOs) beyond what the legislature has authorized. RCW 9.94A.760.

Although most issues may not be raised absent objection in the trial court, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also*, *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). An offender may challenge imposition of a criminal penalty for the first time on appeal if the sentencing court failed to comply with the authorizing statute. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).⁹

⁸ *See also* *State v. Bunch*, 168 Wn. App. 631, 279 P.3d 432 (2012); *State v. Moreno*, 173 Wn. App. 479, 499, 294 P.3d 812 (2013) *review denied*, 177 Wn.2d 1021, 304 P.3d 115 (2013).

⁹ *See also*, *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining "sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional"); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding "challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal"); *State v. Paine*, 69 Wn. App.

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenges to the court’s finding that the accused had the present or future ability to pay LFOs. *Id.* Those cases do not govern Mr. Morrissey’s claim that the court lacked constitutional and statutory authority to order him to pay absent such a finding.

C. The court violated Mr. Morrissey’s right to counsel by ordering him to pay the cost of his defense without inquiring into his present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. The right to counsel includes the right to a full investigation into the charges against the accused and any experts necessary to do so. *State v. A.N.J.*, 168 Wn.2d 91, 112, 225 P.3d 956 (2010); *see also* CrR 3.1(f); *State v. Kelly*, 102 Wn.2d 188, 200, 685

873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has “established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal”).

P.2d 564 (1984) (noting that CrR 3.1(f) “incorporates constitutional requirements by recognizing that funds must be provided where necessary to an adequate defense.”).

A court may not impose costs in a manner that impermissibly chills an accused’s exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller*, the court must assess the accused person’s current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court’s authority to order an offender to pay the costs of prosecution:

The court *shall not order* a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added).

Nonetheless, Washington cases have not required a judicial determination of the accused’s actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn.

App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.¹⁰ *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute’s provision that “a court may not order a convicted person to pay these expenses unless he ‘is or will be able to pay them.’” *Id.* The court noted that, under the Oregon scheme, “no requirement to repay may be imposed if it appears *at the time of sentencing* that ‘there is no likelihood that a defendant’s indigency will end.’” *Id.* (emphasis added). Accordingly, the court found that “the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship.” *Id.*

Oregon’s recoupment statute did not impermissibly chill the exercise of the right to counsel because “[t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt

¹⁰ In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed.

from any obligation to repay”. *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to require a finding of ability to pay before ordering an offender to reimburse for the cost of counsel. *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) (“A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment”); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) (“The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a manifest hardship. Accordingly, we hold that Minn. Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions”); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) (“In view of *Fuller*, we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or

will be able to pay the reimbursement amount ordered within the sixty days provided by statute”).

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney’s fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

Here, the court repeatedly authorized expenditure of public funds for investigative services. Orders Expending Public Funds (9/26/13, 10/6/13, 10/22/13, 11/19/13, 1/2/14), Supp. CP. By granting Mr. Morrissey’s requests for funds, the court implicitly found them “necessary to an adequate defense.” CrR 3.1(f).

The court did not find that Mr. Morrissey had the present or future ability to pay LFOs. CP 30-39; RP 1009-38. Indeed, the court found Mr. Morrissey indigent at beginning and at the end of the proceedings. CP 27-28; Order Appointing Lawyer (8/29/13), Supp CP. Mr. Morrissey’s felony conviction and lengthy incarceration will also negatively impact his prospects for employment.

Despite this, the trial court ordered Mr. Morrissey to pay \$4750 toward the cost of his defense without conducting any inquiry into his

present or future ability to pay. This violated his right to counsel. Under *Fuller*, the court lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Mr. Morrissey to pay \$4750 in defense costs must be vacated. *Id.*

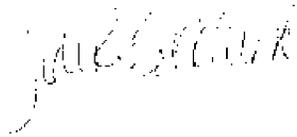
CONCLUSION

The court's two conflicting instructions defining recklessness failed to make the relevant standard manifestly clear to the average juror. The state presented insufficient evidence for a rational jury to find that Mr. Morrissey recklessly disregarded a substantial risk that he would cause Newman's death. The jury's inconsistent verdicts violate due process. Mr. Morrissey's manslaughter conviction must be reversed, and the charged dismissed with prejudice.

In the alternative, the court violated Mr. Morrissey's right to counsel by ordering him to pay defense costs in a manner that impermissibly chills the exercise of his right to counsel. The order for Mr. Morrissey to pay \$4750 in defense costs must be vacated.

Respectfully submitted on August 27, 2014,

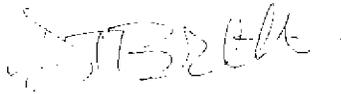
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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Eric Morrissey, DOC #372706
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

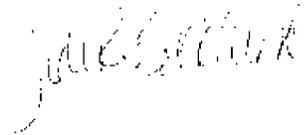
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Mason County Prosecuting Attorney
timw@co.mason.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 27, 2014.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

August 27, 2014 - 1:33 PM

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