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SUPREME COURT NO. 100639-0
COA NO. 36501-8-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DALLAS LANGE,

Petitioner.

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

The Honorable Randall Krog, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Dallas Lange asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Lange requests review of the decision in State v. Dallas John Paul Lange, Court of Appeals No. 36501-8-III (slip op. filed November 30, 2021), attached as Appendix A. The order denying reconsideration, entered January 13, 2022, is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. When a direct appeal and a personal restraint petition raising the same issue are considered concurrently, whether the records can be combined to resolve a public trial issue on its merits?

2. Where courtroom security told petitioner's mother and friend that no seating was available to witness jury selection, whether petitioner's right to a public trial was violated?

3. Whether the exclusion of expert testimony on petitioner's mental state violated the right to present a complete defense on his diminished capacity and self-defense claims?

4. Whether the first aggressor instruction, in not informing the jury that words alone are insufficient to make the defendant the first aggressor in an altercation, was erroneous because it failed to make the relevant legal standard manifestly apparent to the jury and, as a threshold matter, whether this claim can be raised for the first time on appeal?

5. Whether the prosecutor committed misconduct by misstating the first aggressor standard and the components of self-defense in closing argument, or whether defense counsel was ineffective in failing to object?

6. Whether a combination of errors violated the due process right to a fair trial under the cumulative error doctrine?

D. STATEMENT OF THE CASE

Dallas Lange and Jerry Billings argued, wrestled and gouged each other's eyes over something stupid. RP 218-19,

232-33, 238, 332, 349-53, 366-69. Lange then chopped Billings with an axe. RP 220-21, 355-56. The State charged Lange with attempted first degree murder and first degree assault. CP 16-17.

Lange claimed self-defense at trial. CP 180; RP 441-46. Lange knew Billings to be a violent man who stopped at nothing when he became enraged. RP 339-41, 355. Billings had earlier told Lange that when he fights, he fights to the death. RP 339. The room where Lange axed Billings contained knives within Billings's reach. RP 176-77, 231, 351, 354, 393. As Billings moved toward the knives, Lange felt the need to prevent Billings from arming himself. RP 378, 387, 393, 395.

Lange attempted to advance the defense of diminished capacity, hiring Dr. Stephen Cummings, a licensed psychologist, to assess whether a mental condition prevented him from forming the mental intent to murder or assault Billings. CP 21-31, 180. The trial court excluded Dr. Cummings as a witness, ruling his testimony would be irrelevant and confusing to the

jury. CP 18-20; RP 27-32. The jury convicted Lange of first degree assault with a deadly weapon enhancement. CP 139, 141.

Lange raised various arguments on appeal for why his conviction should be reversed. In a RAP 10.10 Statement of Additional Grounds, Lange claimed a public trial violation occurred during jury selection. Lange also raised the public trial claim in a concurrently filed personal restraint petition under No. 37035-6-III.

The appeal and petition were initially consolidated. App. C. Under both appeal numbers, the Court of Appeals ordered a reference hearing on the public trial claim. App. D. The trial court entered findings of fact following that hearing under both appeal numbers. App. E. The Court of Appeals then separated the appeal from the petition and rejected all of Lange's arguments for why the convictions should be reversed in the appeal. Slip op. at 1; App. F. The Court of Appeals also rejected the public trial claim raised in the petition. In re Pers.

Restraint of Lange, __Wn. App. 2d__, 37035-6-III, 2021 WL 5576874 (Nov. 30, 2021). The Court of Appeals denied Lange's motion to reconsider the public trial issue in his appeal. App. B.

E. WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS' REFUSAL TO CONSIDER THE PERSONAL RESTRAINT PETITION RECORD IN DECIDING LANGE'S CONCURRENT APPEAL CONFLICTS WITH PRECEDENT.

The Court dispensed with the public trial issued raised in Lange's Statement of Additional Grounds on the basis that it "relies on facts outside the record on appeal." Slip op. at 21. This conflicts with precedent.

If a "defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal." State v. Sandoval, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011) (quoting State v. McFarland, 127 Wn.2d 322, 335,

899 P.2d 1251 (1995)). Where, as here, an appeal and a PRP are concurrent, it is appropriate to consider the record designated as part of the appeal as well as the PRP record in deciding a claim common to both. In re Pers. Restraint of Ramos, 181 Wn. App. 743, 748-49, 326 P.3d 826 (2014).

In Ramos, the Court of Appeals rejected the State's argument that the appeal is analyzed separate from the PRP when the same claim is raised in both. Id. The court considered affidavits filed in support of the PRP in deciding the same claim raised in the concurrent appeal. Id.

In light of Ramos, it was error for the Court of Appeals to hold it could not review the public trial claim raised in Lange's SAG on the ground that the claim relies on facts outside the record. Under Ramos, Lange is entitled to rely on the record developed as part of the concurrent PRP in deciding the same claim advanced in the appeal. Lange requests review under RAP 13.4(b)(2) because the Court of Appeals' decision conflicts with Ramos.

2. WHETHER A PUBLIC TRIAL VIOLATION OCCURRED IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

At the reference hearing, the trial court found "there did not appear to be any available seats in the courtroom as the jurors occupied all the available seating in the courtroom." App. E (Findings of Fact from Reference Hearing ¶ 3). When Lange's mother and her friend tried to enter the courtroom, Officer Vega told them there were no available seats, but that they could be notified when seats became available. App. E. (Findings of Fact ¶ 4).

This Court has not had occasion to decide whether the actions of a courtroom officer, without trial court knowledge, can cause a public trial violation. Cases from other jurisdictions support the argument that the unilateral actions of court officers can create a courtroom closure. See, e.g., Commonwealth v. Alebord, 80 Mass. App. Ct. 432, 433, 435, 953 N.E.2d 744 (Mass. App. Ct. 2011) (courtroom closure where court officer prevented members of public from entering

courtroom due to lack of available seating and policy that they were not permitted to enter if only standing room was available); Owens v. United States, 483 F.3d 48 (1st Cir. 2007) (closure occurred where court officers prevented two of defendant's family members from entering the courtroom during the first day of jury selection to ensure that there would be enough seats for the jury pool).

Review is needed to clarify what constitutes a courtroom closure due to insufficient seating for members of the public. In State v. Njonge, 181 Wn.2d 546, 556, 334 P.3d 1068 (2014), there was no courtroom closure because there was "no conclusive showing" based on the record "that spectators were totally excluded from the juror excusals." This holding hinged on the observation that the record could be read to show that some members of the public were in the courtroom and "additional persons were admitted as space became available." Id. at 557. It was in this context that Njonge proclaimed "The only thing that is certain from the record is that there were

space limitations in the courtroom. But the size of a courtroom alone cannot effect a closure." Id. (citing United States v. Shryock, 342 F.3d 948, 975 (9th Cir. 2003); United States v. Kobli, 172 F.2d 919, 923 (3d Cir. 1949)).

This isn't a case like Njonge where some members of the public were in the courtroom while others were not. The facts show there were no members of the public in the courtroom during jury selection. This is clear from the reference findings: jurors occupied all available seats, when members of the public attempted to enter the courtroom, the officer told them that there were no available seats, and that he could alert them when seats became available. App. E (Findings of Fact ¶ 3, 4). Access to the courtroom was predicated on available seating, the jurors had all the seats, and no seating was available to anyone other than the jurors during voir dire. From this, it is obvious no member of the public was allowed access to the courtroom.

Shryock, cited by Njonge, involved a fully available courtroom that accommodated seating for the defendant's family members as well as members of the general public. Shryock, 342 F.3d at 974-75. The defendant claimed there was a public trial violation because *additional* family members were not accommodated, but there was no "Sixth Amendment right to force the district court to expand what was sufficient courtroom seating to accommodate family members who did not attend the trial." Id. at 975.[1]

Cases like Shryock "stand for the limited proposition that no single member of the public has a right to gain admittance to a courtroom if there is no available seat. That is, so long as the public at-large is admitted to the proceedings, the Sixth Amendment does not guarantee access to unlimited numbers;

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[1] Kobli, cited by Njonge, merely stands for the proposition that the right to a public trial does not require "holding the trial in a place large enough to accommodate all those who desire to attend." Kobli, 172 F.2d at 923 (emphasis added). Kobli juxtaposed this observation with one that recognized some members of the public must be allowed to attend. Id.

the fact that a particular individual is not admitted does not constitute a violation of the Constitution." Gibbons v. Savage, 555 F.3d 112, 116 (2d Cir. 2009).

It is possible for a public trial violation to occur when the courtroom is closed due to limited seating capacity during jury selection. Presley v. Georgia, 558 U.S. 209, 210, 214-16, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); In In re Pers. Restraint of Orange, 152 Wn.2d 795, 802, 808-12, 100 P.3d 291 (2004).

Unlike Shyrock and Njonge, this is not a case of space limitation that prevented some members of the public from attending while allowing others to be seated inside. The reference findings show the jurors occupied all available seats in the courtroom. There were no members of the public seated inside because jurors occupied all the seats. When two members of the public, including Lange's only family member, tried to enter the courtroom, the officer told them there was no seating for them. The only reasonable inference to be drawn is that the officer turned away members of the public because

there was no available seating inside. In such a case, the lack of seating due to courtroom constraints does not avoid a public trial violation.

On appeal, a public trial violation is structural error requiring reversal due to the presumption of prejudice. State v. Paumier, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012). Lange is due that relief because he has shown a public trial violation as part of this appeal.

3. EXCLUSION OF EXPERT TESTIMONY VIOLATED LANGE'S RIGHT TO PRESENT A DEFENSE.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. VI, XIV; Wash. Const. art. 1, §§ 3, 22. The trial court violated that right in excluding expert testimony relevant to Lange's diminished capacity defense, which prevented him

from asserting the defense altogether. The court also violated that right in excluding expert testimony relevant to Lange's self-defense claim. Lange seeks review under RAP 13.4(b)(3).

a. The expert's testimony was admissible to support a diminished capacity defense.

"To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the specific intent to commit the crime charged." State v. Ellis, 136 Wn.2d 498, 521, 963 P.2d 843 (1998) (quoting State v. Edmon, 28 Wn. App. 98, 107, 621 P.2d 1310 (1981)). To satisfy ER 401 and ER 702, expert testimony "must have the tendency to make it more probable than not that defendant suffered a mental disorder, not amounting to insanity, that impaired the defendant's ability to form the culpable mental state to commit the crime charged." State v. Atsbeha, 142 Wn.2d 904, 918, 16 P.3d 626 (2001).

The Court of Appeals opined "nothing in Dr. Cummings's report demonstrated that Lange's mental disorders impaired his ability to form the intent to assault or kill Billings." Slip op. at 10.

Contrary to the Court of Appeals' view, expert testimony, based on Dr. Cummings's evaluation, related to Lange's mental functioning and was admissible under the rules of evidence. In Ellis, where the trial court erred in excluding expert testimony on diminished capacity, the defendant suffered from a personality disorder related to impulsive behavior and emotional disregulation in reaction to stress. Ellis, 136 Wn.2d at 520-21. Lange's case presents a similar dynamic. Lange described suffering from a "mental breakdown" due to stress. CP 27. According to Dr. Cummings, Lange "essentially snapped." CP 27. Lange was a "severely depressed and traumatized man under great financial stress." CP 30. Lange's diagnosed mental conditions made him likely to experience

"periods of marked emotional, cognitive, or behavioral dysfunction." CP 28.

In this regard, the PTSD and anxiety diagnoses are particularly significant. "PTSD is recognized within the scientific and psychiatric communities and can affect the intent of the actor resulting in diminished capacity." State v. Bottrell, 103 Wn. App. 706, 715, 14 P.3d 164 (2000), review denied, 143 Wn.2d 1020, 25 P.3d 1019 (2001).

Lange had experienced a traumatic event during which he suffered intense fear and pain. CP 27, 29. The trauma had a residual and persistent effect on Lange. CP 29. Trying to avoid exposure to cues that resemble the traumatic event may result in other signs of distress, including "outbursts of anger" and "panic attacks." CP 29. In conjunction with PTSD, Lange suffered from an anxiety disorder. CP 28. Dr. Cummings tied Lange's mental impairment to what happened on December 6, 2017, the day in question. On that day, Lange "reacted to mounting internal stress and genuine perception of danger to his

well being." CP 30. He "snapped" and made a "momentary impulsive decision." CP 30. "When his very existence seemed to be threatened, he lost control[.]" CP 30-31.

Expert testimony that Lange suffered from major depression, anxiety disorder and PTSD exacerbated by stress is relevant because it tends to make the existence of Lange's intent less probable than it would be without the evidence. Dr. Cummings's view of Lange's mental problems was "capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime." State v. Greene, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999). From that, the jury would have had a complete picture by which to judge whether Lange actually intended to kill with premeditation or assault with intent to inflict great bodily harm.

b. Apart from diminished capacity, the expert's testimony was admissible to support the claim of self-defense.

To assess the self-defense claim, the jury needed to stand in Lange's shoes and consider all the relevant circumstances

from his point of view. State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The Court of Appeals acknowledged expert testimony, if relevant, should be allowed to support a claim of self-defense. Slip op. at 12. But it artificially reduced what Dr. Cummings had to say on the matter and then deemed it irrelevant.

Expert testimony on PTSD is relevant to a claim of self-defense and is helpful to the trier of fact in assessing the claim. State v. Allery, 101 Wn.2d 591, 592-93, 596-97, 682 P.2d 312 (1984); Janes, 121 Wn.2d at 235-36 (same). Janes and Allery show expert testimony on a PTSD condition is needed for jurors to place themselves in the defendant's position, consider the defendant's perception of events through the lens of that mental condition based on all of the circumstances known to the defendant, and then assess the reasonableness of the defendant's perception of imminence and danger from that standpoint.

Lange's perception of imminent harm was based on his knowledge of Billings. Lange knew Billings fought to the death. RP 339. He knew Billings was subject to rages. RP 341, 355, 375. He knew Billings was capable of assaulting someone with a deadly weapon based on Billings's description of an earlier attack. RP 339. He knew Billings had charged at him and gouged his eyes. RP 350-53. He knew Billings had deadly weapons within arm's reach and was moving toward them in an angry rage when Lange, from his perspective, used the axe to defend himself. RP 354-55, 371, 393, 395. In addition, Lange suffered from PTSD, which jurors could view as affecting his perception of the danger he faced. CP 28-29. Dr. Cummings opined that Lange was a severely depressed and traumatized man who genuinely feared for his safety and responded in a stressful situation when his very existence seemed threatened. CP 30-31.

Expert testimony, then, was relevant to Lange's claim of self-defense and would have helped the jury assess this claim through consideration of the situation as perceived by Lange and the reasonableness of his fear. The court violated Lange's right to present relevant evidence in support of his self-defense claim in excluding expert testimony on the subject.

4. THE FIRST AGGRESSOR INSTRUCTION FAILED TO MAKE THE LAW MANIFESTLY APPARENT TO THE JURY AND PREJUDICED LANGE'S SELF-DEFENSE CLAIM, REQUIRING REVERSAL OF THE CONVICTION.

In State v. Kee, 6 Wn. App. 2d 874, 876, 431 P.3d 1080 (2018), the trial court committed reversible error in giving a first aggressor instruction "without also instructing the jury that words alone are not sufficient to make a defendant the first aggressor in an altercation." As in Kee, the first aggressor instruction in Lange's case fails to specify that words alone cannot constitute the provoking act. The conviction must be reversed because the instruction failed to make the law on self-

defense manifestly apparent to the jury. Lange seeks review under RAP 13.4(a)(3).

The court gave the following pattern instruction, which is the same instruction given in Kee:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill or use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense. CP 132 (Instruction 22).

In Riley, the Supreme Court held that "words alone cannot be the provoking conduct that justifies a first aggressor instruction." Kee, 6 Wn. App. 2d at 880-81 (citing State v. Riley, 137 Wn.2d 904, 911-12, 976 P.2d 624 (1999)). However, the pattern jury instruction in Kee did not convey this rule of law because the trial court did not instruct the jury that words are not adequate provocation to negate self-defense. "WPIC 16.04 does not include an express statement that words alone cannot constitute aggression that negates self-defense." Kee, 6

Wn. App. 2d at 882. The pattern instruction's reference to an "intentional act" and the "defendant's acts" could be viewed as requiring some physical conduct. Id. "But verbally abusing someone also constitutes an 'act.' When there is evidence that the defendant provoked an altercation with words, particularly when the State suggests that those words constitute first aggression, the language of WPIC 16.04 is inadequate to convey the law established in Riley." Id.

The same concerns are present in Lange's case. There is conflicting evidence on who initiated the physical altercation on the porch between Lange and Billings. Compare RP 219, 221, 226 (Billings testimony) with RP 350-53, 366 (Lange testimony) and RP 332 (Fletcher testimony). However, the interaction between Billings and Lange started with a verbal altercation, before anyone got physical. RP 163, 173, 182, 218, 233, 313, 350. The evidence supported a finding that Lange's *words* alone, rather than his physical acts, first provoked the physical altercation.

From the evidence presented at trial, a reasonable juror could have concluded that Lange's argument, cursing, or comment about slashing the tires, provoked Billings. "By failing to instruct the jury that words alone are insufficient provocation for purposes of the first aggressor jury instruction, the trial court did not ensure that the relevant self-defense legal standards were manifestly apparent to the average juror." Kee, 6 Wn. App. 2d at 881-82.

The Court of Appeals recognized the constitutional magnitude of the error but held it did not constitute a manifest error under RAP 2.5(a)(3). Slip op. at 14. Manifest error requires a plausible showing that the asserted error had practical and identifiable consequences, which can be measured by determining whether the trial court could have corrected the error given what it knew at the time. State v. Grott, 195 Wn.2d 256, 269, 458 P.3d 750 (2020).

"[F]irst aggressor instructions are used to explain to the jury one way in which the State may *meet* its burden: by

proving beyond a reasonable doubt that the defendant provoked the need to act in self-defense." Id. at 268. Instructions that contain "an ambiguity regarding an elemental component of the self-defense instruction" can be challenged for the first time on appeal under RAP 2.5(a)(3). State v. O'Hara, 167 Wn.2d 91, 108, 217 P.3d 756 (2009) (addressing State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996)).

According to the Court of Appeals, it is not enough that the instruction "*permitted* to find that the State disproved his self-defense claim on the erroneous basis that he verbally provoked Billings." Slip op. at 14. It did not find "this theoretical error plausibly occurred" because the State in closing argument supposedly at no time suggested Lange's self-defense claim was precluded because of words alone. Slip op. at 14.

Manifest constitutional error does not turn on what the prosecutor argued. In LeFaber, an ambiguous self-defense instruction permitted an erroneous interpretation of the law and

was constitutionally infirm. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).[2] In State v. Ackerman, 11 Wn. App. 2d 304, 309-10, 453 P.3d 749 (2019), ambiguous jury instructions "potentially diluted" the State's burden by incorrectly conveying the elements of self-defense, so the error was a manifest constitutional error under RAP 2.5(a)(3). In neither case did the prosecutor's argument to the jury play any role in the analysis.

This makes sense because the jury receives the law from the trial court, not the prosecutor. The trial court knew from presiding over the trial that there was abundant evidence of Lange's verbal provocation. The court, knowing this, could and

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[2] O'Hara disapproved of LeFaber to the extent it suggested all errors in self-defense instruction are automatically reviewable for the first time on appeal under RAP 2.5(a)(3). O'Hara, 167 Wn.2d at 101. O'Hara held "appellate courts should analyze unpreserved claims of error involving self-defense instructions on a case-by-case basis to assess whether the claimed error is manifest constitutional error." Id. at 104.

should have corrected the instructional error that permitted the jury to reject Lange's self-defense claim based on words alone.

Regardless of what the prosecutor argued, the error here had the practical and identifiable consequence of permitting the jury to find the State disproved Lange's claim of self-defense on the erroneous basis that Lange verbally provoked Billings to react. Self-defense was the only defense Lange was able to present. The instructional error undercut that defense by making it easier for the jury to reject it.

5. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT VIOLATED LANGE'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct can violate the due process right to a fair trial. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. In this case, the prosecutor

committed misconduct by misstating the first aggressor standard and the law on self-defense to the jury.

In addressing the first aggressor standard, the State argued Lange could not "create a situation" where he needed to use self-defense, which is broad enough to encompass the provoking words used by Lange. RP 432-33. The State also contended "Jerry is totally justified in getting up and making sure that his tires aren't going to get slashed," thereby inviting the jury an invitation to treat Lange's threat to slash the tires — Lange's words — as basis to find a provocation that renders self-defense unavailable. RP 434.

A prosecutor's misstatement of the law is a particularly serious error with "grave potential to mislead the jury." Davenport, 100 Wn.2d at 763. Words alone, such as a threat to slash tires, do not constitute sufficient provocation under the first aggressor standard. Riley, 137 Wn.2d at 909-11. The prosecutor's argument that Lange could not "create a situation" where he needed to act in self-defense is also a misstatement of

the law because it exceeds the confines of the first aggressor standard. The legal standard is whether the defendant "create[d] a necessity for acting in self-defense." CP 132; see Riley, 137 Wn.2d at 908-09 (approving of instruction defining the standard in this manner). The argument that self-defense was unavailable when the defendant "creates a situation" where self-defense is needed is a misstatement of the law because it encompasses words alone and is not confined to situations where provocation reasonably justifies a violent response.

The prosecutor also committed misconduct in misstating the self-defense standard in closing argument. The prosecutor argued "self-defense is measured not by what the defendant thinks but what a reasonable person would think" and "self-defense, it's all based upon a reasonable-man standard." RP 433, 434.

The self-defense standard is measured by what the defendant thinks and it's not all about a reasonable person standard. There are subjective and objective components to

self-defense. Janes, 121 Wn.2d at 239. "The subjective aspects ensure that the jury fully understands the totality of the defendant's actions from the defendant's own perspective," whereas the objective part of the inquiry provides the external standard to assess the reasonableness of the action. Janes, 121 Wn.2d at 239. The prosecutor's argument treated Lange's subjective belief as irrelevant and, in doing so, warped the standard for the jury's assessment of self-defense.

The prosecutor's cumulative improper argument went to the key issue in the case: whether Lange acted in self-defense, and whether the first aggressor rule made that defense unavailable. Case law and professional standards clearly warned against the conduct. Under the circumstances, the error is reviewable in the absence of objection because it is flagrant and ill-intentioned. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012).

Alternatively, defense counsel was ineffective in failing to object to the misconduct. Lange is guaranteed the right to

effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI; Wash. Const., art. I, § 22.

"If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." In re Pers. Restraint of Cross, 180 Wn.2d 664, 722, 327 P.3d 660 (2014). No legitimate reason supported the failure of counsel to properly object or request curative instruction given the prejudicial nature of the prosecutor's comments. Defense counsel's deficient performance prejudiced Lange because the case turned on whether the State proved that Lange did not act in self-defense. The misconduct here undercut the correct standard for determining the self-defense claim. Lange seeks review under RAP 13.4(b)(3).

6. CUMULATIVE ERROR VIOLATED LANGE'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007); U.S. Const. Amend. XIV. An accumulation of errors affected the outcome and produced an unfair trial in Lange's case, including (1) exclusion of expert testimony (section E.3., supra); (2) deficient first aggressor instruction (section E.4., supra); (3) prosecutorial misconduct (section E.5., supra); and (4) ineffective assistance in failing to object to the misconduct (section E.5., supra). Lange seeks review under RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated, Lange requests that this Court grant review.

I certify that this document was prepared using word processing software and contains 4,880 words excluding those portions exempt under RAP 18.17.

DATED this 10th day of February 2022.

Respectfully submitted,

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APPENDIX A

FILED
NOVEMBER 30, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. DALLAS JOHN PAUL LANGE, Appellant.	)	No. 36501-8-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Dallas Lange appeals his conviction for the crime of first degree assault while armed with a deadly weapon and aspects of his sentence. We affirm Mr. Lange's conviction, but remand for additional findings to support the requirement that he receive a mental health evaluation and for the trial court to strike the drug evaluation requirement and the criminal filing fee.

FACTS[1]

Dallas Lange swung an axe down on Jerry Billings, fileting his cheek and cutting deeply into his chest. The State originally charged Lange with attempted first degree murder and asserted a deadly weapon enhancement. Lange asserted the defenses of self-defense and diminished capacity. He hired Dr. Stephen Cummings, a licensed psychologist, to assess whether various factors prevented him from forming the mental intent to murder or assault Billings.

Dr. Cummings reviewed the various written witness accounts and interviewed Lange to learn what happened. Lange had been in prison for 10 months by the time of the interview.

According to Lange, he and his girlfriend, Theresa Pauling, lived in a recreational vehicle next to a house rented by Billings and Kirsten Pauling, Theresa's mother. Lange paid rent to Billings, and Billings paid rent to his landlord.

Theresa Pauling went to the trailer and asked her mother to ask Billings for keys to a car that Lange was purchasing from Billings. Billings, who had received an eviction

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[1] The only issue that requires a recitation of facts is whether the trial court erred when it granted the State's motion to exclude Dr. Stephen Cummings from testifying. For this reason, our statement of facts comes from the information the trial court considered in its ruling, Dr. Cummings's report, and Officer Leo Lucatero's certified statement of probable cause.

notice, refused unless Lange paid him $250. This led to an argument between Lange and Billings. The argument escalated and Lange swung at Billings and missed. Billings, who is much larger than Lange, grabbed him. Lange tried to leave the house and slammed the door on Billings who was following him outside. The two men continued fighting and gouged at each other's eyes. Kirsten Pauling then separated the two men. They went inside, with Billings going into his office, and Lange going into the living room. There were several hunting knives laid out in the kitchen area.

A few minutes later, Billings came out of his office and told Lange and Theresa Pauling they were "'out of here,'" possibly meaning evicted from the mobile home. Clerk's Papers (CP) at 5. Lange responded, "'no, you're out of here,'" and grabbed a large axe that was hanging on the wall next to the wood stove. CP at 5.

Lange described to Dr. Cummings what he was feeling: "'I had a mental breakdown from stress, the money, and sleep deprivation. I wasn't expecting to get attacked. I had tunnel vision and picked up the nearest thing on the wall. A big axe. I took a step forward and swung it.'" CP at 27.

In his report, Dr. Cummings stated that his role was "to explain why Dallas Lange engaged in the actions which resulted in being charged with assault, then attempted murder." CP at 23. Dr. Cummings gave Lange the Millon Clinical Multiaxial Inventory-

IV (MCMI-IV), a psychological test comprised of 195 true-false questions. He noted in his report that the testing algorithm did not account for the fact that Lange had been in prison for 10 months.

Based on interviews with Lange and his mother, and administering the testing algorithm, Dr. Cummings concluded:

> Dallas is[2] experiencing a *severe mental disorder*. He appears to fit the following personality disorders best: Melancholic Disorder, with Avoidant Personality Type; Schizoid Personality Type, and Borderline Personality Style. Furthermore, clinical syndromes suggested by his test profile include: Major Depression, recurrent, severe; Generalized Anxiety Disorder, and Posttraumatic Stress Disorder.

CP at 28.

Based on this diagnosis, Dr. Cummings explained why Lange acted in the manner he did:

> My best professional guess is that Dallas Lange harbored increasing resentment towards Jerry Billings for his deceitfulness and financial exploitation. . . . Thus we have a defining moment in time . . . when he reacted to mounting internal stress and genuine perception of danger to his well being, by securing the nearest potent weapon in order to neutralize the very source of that immediate danger, to wit, Mr. Billings, who weighs 145 kgs. (about 320 pounds). His momentary impulsive decision was surely regrettable but reflected a build-up of deep anger that had been masked via his passive-aggressive demeanor until he snapped.

---

[2] The context of the report suggests that the diagnosis relates to Lange's condition at the time of the interview, not at the time of the alleged assault.

> Like many fights, this one was verbally provocative and with its escalation and the nearby access to lethal weapons, the likelihood of inflicting physical harm was clearly enhanced. . . . When his very existence seemed to be threatened, he lost control and his actions have accordingly changed the course of his life.

CP at 30-31.

Well before trial, the State moved to amend the charges to include first degree assault. The trial court granted the motion. Also at that time, the State moved to exclude the testimony of Dr. Cummings. The court heard argument, reserved ruling, and days later entered a written ruling explaining its decision to exclude the expert's testimony. We highlight the following aspects of the court's written ruling:

> It is not enough that a defendant may be diagnosed as suffering from a particular mental disorder. The diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime. The opinion concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged.
>
> . . . .
>
> . . . While Dr. Cummings opines that the defendant appears depressed he does not logically and reasonably articulate that the defendant's medical condition precluded the defendant from forming the premeditated "intent" to cause . . . the death of the alleged victim.

CP at 19-20.[3]

The matter proceeded to trial. After the parties submitted their evidence, the trial court provided the jury with instructions on the law, including the law of self-defense and the standard first aggressor instruction. Lange did not object to the first aggressor instruction.

The jury could not unanimously agree on the charge of attempted first degree murder, but returned a guilty verdict on the charge of first degree assault. It also found that the State had proved the deadly weapon enhancement.

The trial court sentenced Lange to 147 months of confinement and 36 months of community custody. As part of community custody, the trial court ordered Lange to undergo treatment for substance abuse disorder and mental health disorder. The trial court also ordered Lange to pay the criminal filing fee and community custody supervision fees.

Lange timely appealed to this court.

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[3] The trial court had recently granted the State's motion to amend charges to include first degree assault. However, the order excluding Dr. Cummings discusses only the original charge of attempted first degree murder.

ANALYSIS

DUE PROCESS RIGHT TO PRESENT A DEFENSE

Lange contends the trial court violated his constitutional right to present a defense. He argues that Dr. Cummings's testimony was relevant to his diminished capacity defense and his claim of self-defense.

Constitutional principles

We review constitutional claims de novo, as questions of law. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). We review a trial court's decisions admitting or excluding evidence for abuse of discretion. *State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999).

The Fifth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution guarantee that no person shall be "deprived of life, liberty, or property, without due process of law." This right to due process includes the right to be heard and to offer testimony. *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). The accused's right to due process "is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). And the right "to call witnesses in one's own behalf [has] long been recognized as essential to due process." *Id.* "Just as

an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

A criminal defendant's right to present witnesses has limits. A defendant must "at least make some plausible showing of how [a witness's] testimony would have been both material and favorable to his defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). The defendant's right must yield to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *State v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967 (1999).

Evidentiary principles with respect to diminished capacity

"To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the specific intent to commit the crime charged." *State v. Ellis*, 136 Wn.2d 498, 521, 963 P.2d 843 (1998). "The opinion of an expert concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form

the culpable mental state to commit the crime charged." *State v. Atsbeha*, 142 Wn.2d 904, 918, 16 P.3d 626 (2001).

Dr. Cummings's opinions did not meet this standard. In his report, Dr. Cummings sought to explain why Lange assaulted Billings. Dr. Cummings did not conclude that Lange's disorders caused him to be unable to form the intent to assault or kill Billings. Instead, Dr. Cummings concluded that Lange's passive-aggressive personality disorder caused him to react impulsively and snap. A person can react impulsively and snap and still intend to assault or kill someone. Most violent acts occur due to a combination of impulsivity and loss of control.

Lange likens his case to *Ellis*. There, the Supreme Court concluded that the trial court abused its discretion in excluding expert testimony to support a diminished capacity defense. 136 Wn.2d at 523. There, Ellis was charged with premeditated first degree murder of his mother and his two-year-old half sister. *Id.* at 500. One defense expert opined that Ellis suffered from a borderline personality disorder and intermittent explosive disorder. *Id.* at 520. He explained that these disorders underlay Ellis's killings because they related to his "emotional discontrol." *Id.* This expert opined that Ellis was "'an individual whose perceptional process, whose interpreting process, his decision making capacity and his ability to properly regulate his behavior, was severely

compromised as a direct result of this ongoing personality disturbance.'" *Id.* The expert concluded that Ellis's "'continuously disregulated state'" caused him to kill his sister because the maternal attachment between his mother and young half sister triggered an "'intense exasperation of an already existing level of emotional discontrol.'" *Id.*

But in *Ellis*, the defense presented an opinion from a second expert that tied together Ellis's mental disorders with his inability to form the requisite intent. The second expert opined that Ellis suffered from an antisocial personality disorder and impulse control disorder. When asked how Ellis's mental disorders causally connected the lack of intent, this second expert testified:

> "[W]hen he went over three in that situation with his mother, he walked in there with this history of problems, this history of mental disorder. . . . He is in a situation where certain stressors arise. And given the weaknesses in his psychological makeup, the mind is overpowered basically by—there is a breakdown in the deliberation process, in forming judgments and decisions, and the person ends up acting from disarray and from confusion and emotional forces, rather than from a deliberate forming of intent. . . ."

Id. at 520-21 (alterations in original).

We distinguish *Ellis*. There, expert testimony demonstrated that mental disorders impaired the defendant's ability to form the specific intent to commit the crime charged. Here, nothing in Dr. Cummings's report demonstrated that Lange's mental disorders impaired his ability to form the intent to assault or kill Billings.

Evidentiary principles with respect to self-defense

Lange also argues that Dr. Cummings's testimony was erroneously excluded because it was relevant to self-defense. Lange argued to the trial court: "At a minimum, even if they don't find that there is diminished capacity, it is relevant mental state evidence that the jury should be able to use given Dr. Cummings' background and his examination of Mr. Lange." Report of Proceedings (RP) at 26. On this point, we do not believe the trial court abused its discretion.

Evidence of self-defense "must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). This approach incorporates both subjective and objective components. *Id.* It is subjective in that the jury is entitled to stand as nearly as practicable in the shoes of the defendant and from this point of view determine the character of the act. *Id.* It is also subjective in that the jury is to consider the defendant's actions in light of all the facts and circumstances known to the defendant. *Id.* The defendant must subjectively believe in good faith that he was in imminent danger of being injured. *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). The evaluation is objective in determining what a reasonably prudent person similarly situated would have done. *Janes*, 121 Wn.2d at 238.

Excluding Dr. Cummings's testimony had no effect on Lange's own ability to testify about his subjective point of view. Lange was able to and did testify what he knew about Billings. Lange testified that Billings is a very aggressive person who does not stop fighting, and he feared for his life when Billings entered the kitchen and so many lethal weapons were nearby.

We acknowledge that expert testimony, if relevant, should be allowed to support a claim of self-defense. *See State v. Kelly*, 102 Wn.2d 188, 196 n.2, 685 P.2d 564 (1984) (Evidence of battered woman syndrome is admissible to show subjective state of mind to support self-defense.). Here, Dr. Cummings would have testified that (1) Lange had pent up anger toward Billings, lost control of his anger, and (2) took the axe off the wall because he genuinely perceived a threat to his existence. The first portion of the opinion ties Lange's passive-aggressive disorder to his loss of control. But loss of control is not relevant and is even antithetical to self-defense. The second portion of the opinion does not tie any of Lange's various mental disorders to why he possibly overreacted. We conclude that Dr. Cummings's testimony was not relevant to Lange's self-defense claim, and the trial court did not abuse its discretion when excluding that testimony.

FIRST AGGRESSOR INSTRUCTION

Lange contends the trial court erred by giving the jury a first aggressor instruction. He argues the instruction allowed the jury to surmise that words alone constituted a provocation that disqualified his defense of self-defense. But Lange did not object to the first aggressor instruction at trial.

This court typically does not review issues that were not first raised in the trial court. RAP 2.5(a). One of the exceptions to this rule is where the alleged error is a manifest error of constitutional magnitude. RAP 2.5(a)(3). In *State v. Grott*, 195 Wn.2d 256, 458 P.3d 750 (2020), our Supreme Court recently addressed manifest constitutional error in the context of a court giving a first aggressor instruction.

Claim of constitutional error

In *Grott*, the court recognized that jury instructional errors that relieve the State of its burden of proof qualify as constitutional errors. *Id.* at 268. The court clarified that "first aggressor instructions are used to explain to the jury one way in which the State may *meet* its burden: by proving beyond a reasonable doubt that the defendant provoked the need to act in self-defense." *Id.* And for this reason, the giving of a first aggressor instruction does not necessarily relieve the State of its burden of proof. *Id.* at 268-69.

Lange argues the error he claims is one of constitutional magnitude because an inaccurate first aggressor instruction is tethered to a self-defense claim. He argues the instruction given failed to adequately inform the jury that words alone are insufficient provocation for purposes of the first aggressor instruction and thus relieved the State of its burden to disprove self-defense. We agree that such a claim of error is of constitutional magnitude.

Manifest error

Lange must also establish that the claimed constitutional error is manifest. "Manifest error" requires a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case. *Id.* at 269.

Lange argues the error is manifest because the jury was *permitted* to find that the State disproved his self-defense claim on the erroneous basis that he verbally provoked Billings. Lange fails to persuade us that this theoretical error plausibly occurred.

Nowhere during closing argument did the State suggest that Lange's self-defense claim was precluded because of words alone. Rather, the State argued: "And who's the first person who brings violence to it? The defendant. He slams the door in [Billings's] face, then [Lange] punches him." RP at 434. This is not "words alone," but an act of physical aggression.

Because Lange cannot plausibly show an identifiable consequence of the alleged error, any potential error is not manifest. Therefore, we will not review it.

PROSECUTORIAL MISCONDUCT

Lange contends the prosecutor committed misconduct during closing arguments. He argues the prosecutor misstated the law for the first aggressor standard and for the self-defense standard. We disagree.

When reviewing an allegation of prosecutorial misconduct, this court looks at the prosecutor's statements, within the context of the entire case, to determine whether the conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Where a defendant has not objected to the statements, he waives the error unless he can show the statement is so flagrant and ill intentioned that it caused enduring prejudice that could not be neutralized by an admonition to the jury. *Id.* at 443.

We have already discussed Lange's first argument above. Unlike how Lange characterizes the State's closing argument, the prosecutor did not argue that Lange was the first aggressor because of his words or threats. He stated plainly to the jury that Lange was the first aggressor because of the physical attacks he made on Billings. This is well within the proper argument for a first aggressor instruction.

Lange further argues that the prosecutor misstated the law on the first aggressor instruction by stating Lange created the "situation" where he would need to act in self-defense as opposed to provoking the necessity to act in self-defense. He argues creating the "situation" involves scenarios where the defendant did or said something that provoked the complaining witness, but would not qualify as legal provocation. Again, within the context of the case as a whole, this was not what the State argued. It argued that the act of slamming the door and hitting Billings was provocation for a fight. We need not look at hypothetical scenarios here. Within the context of the case, the prosecutor's arguments regarding first aggressor were proper.

Finally, Lange contends the prosecutor omitted part of the self-defense standard. He argues the State only gave the jury part of the standard, what a reasonable person would believe is necessary to defend themselves, and ignored the subjective part of the standard, Lange's own perceptions at the time. Again, unlike Lange's characterizations, the prosecutor did not tell the jury to ignore Lange's subjective perception, implicitly or explicitly. In fact, the prosecutor stated in its argument, "It's got to be reasonable to what the perceived threat is, and here there is no threat." RP at 434. The prosecutor did not commit misconduct in his statements.

Lange argues, in the alternative, that his counsel was ineffective for not objecting to the prosecutor's statements. However, since we find there was no misconduct, it cannot be ineffective assistance to have not objected here.

MENTAL HEALTH TREATMENT CUSTODY CONDITION

Lange contends the trial court erred by ordering mental health evaluation and treatment as part of his community custody conditions. He argues the trial court did not make the statutorily required findings. The State correctly concedes this issue and we agree.

The trial court is empowered to order mental health evaluations and treatment only when the court has made a finding "that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense." RCW 9.94B.080. The trial court in this case made no such findings. Because the trial court never found Lange mentally ill and never found any mental illness likely influenced his attack of Billings, it abused its discretion in ordering a mental health evaluation and treatment.

The State contends the proper remedy is to remand to allow the trial court to determine whether Lange is mentally ill and, if so, make the proper findings. *State v.*

Shelton, 194 Wn. App. 660, 676, 378 P.3d 230 (2016). We agree and remand to the trial court to make this determination.

DRUG EVALUATION AND TREATMENT CONDITION

Lange contends the trial court erred in ordering an evaluation and treatment for a substance abuse disorder. Lange argues that there was no evidence that any drug use on his part was reasonably related to his assault on Billings and that it is not crime related. We agree.

The court is authorized to require an offender to "[p]articipate in crime-related treatment or counseling services" and in "rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(c), (d). However, the trial court may only impose drug abuse treatment where evidence in the record supports the proposition that an offender's drug use was related to the underlying offense. *State v. Munoz-Rivera*, 190 Wn. App. 870, 892-93, 361 P.3d 182 (2015). Substantial evidence must support this determination. *State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830 (2015).

The State contends Dr. Cummings's report shows that Lange regularly smoked "dabs"[4] on a regular basis since his adolescence and had routinely done so just prior to his projected drive to work that day. It further argues that Lange, when asked about concentrated tetrahydrocannabinol, said "'you just don't want to move . . . like a high dose of OxyContin.'" CP at 25. However, nothing about this evidence shows that Lange's habitual drug use led to his assault of Billings.

Because substantial evidence was not presented to support Lange's drug use being crime related, we remand to have the condition struck.

LEGAL FINANCIAL OBLIGATIONS (LFOs)

Lange contends the trial court erred by imposing discretionary LFOs despite finding him indigent. He argues the criminal filing fee and community supervision fees are discretionary and are barred from being imposed.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018), which became effective June 7, 2018, prohibits trial courts from imposing discretionary LFOs on defendants who are indigent at the time of sentencing. LAWS OF 2018, ch. 269, § 6(3); *State v. Ramirez*, 191 Wn.2d 732, 738, 747, 426 P.3d 714 (2018). This change to the criminal filing fee statute is now codified in RCW 36.18.020(2)(h). As held

[4] CP at 25.

in *Ramirez*, these changes to the criminal filing fee statute apply prospectively to cases pending direct appeal prior to June 7, 2018. *Id.* at 738. Accordingly, the change in law applies to Lange's case. Because Lange is indigent, the criminal filing fee must be struck pursuant to *Ramirez*.

In *State v. Spaulding*, 15 Wn. App. 2d 526, 536-37, 476 P.3d 205 (2020), Division Two of this court held that a sentencing court is not prohibited by RCW 10.01.160(3) from imposing community supervision fees on an indigent defendant. *Spaulding* recognizes that RCW 10.01.160(3) prohibits discretionary costs from being imposed on an indigent defendant. *Spaulding* then notes that RCW 10.01.160(2) "defines 'cost' as an expense specially incurred by the State to prosecute the defendant, to administer a deferred prosecution program, or to administer pretrial supervision." *Id.* *Spaulding* correctly concludes that community supervision fees do not qualify as a "cost" under that definition. *Id.* at 537.

Nevertheless, RCW 9.94A.703(2)(d) explicitly permits a trial court to waive community custody supervision fees. There is no evidence here the trial court intended to waive such fees. If it declined to waive these fees, it acted within its discretion. But if it overlooked this and desires to waive such fees, it is not foreclosed from doing so on remand.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW (SAG)

SAG I: PROSECUTORIAL MISCONDUCT

Lange contends the prosecutor committed misconduct by misstating the law on self-defense. Because we have addressed this above, we need not readdress it here.

SAG II: CLOSING COURTROOM

Lange contends the trial court erred by denying two members of the public from sitting in on his voir dire. This assertion relies on facts outside the record on appeal, and this court cannot review it. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Affirmed in part; remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Pennell, C.J.

Siddoway, J.

APPENDIX B

FILED
JANUARY 13, 2022
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 36501-8-III**
	)	
Respondent,	)	
	)	**ORDER DENYING**
v.	)	**MOTION FOR**
	)	**RECONSIDERATION**
DALLAS JOHN PAUL LANGE,	)	
	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration of this court's opinion dated November 30, 2021, and is of the opinion the motion should be denied.

THEREFORE, IT IS ORDERED that the motion for reconsideration is hereby denied.

PANEL: Judges Lawrence-Berrey, Pennell, and Siddoway

FOR THE COURT:

REBECCA PENNELL
CHIEF JUDGE

APPENDIX C

Renee S. Townsley
Clerk/Administrator

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September 20, 2019

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CASE # 365018
State of Washington v. Dallas John Paul Lange
KLICKITAT COUNTY SUPERIOR COURT No. 171001441
Consolidated
CASE # 370356
Personal Restraint Petition of Dallas John Paul Lange
KLICKITAT COUNTY SUPERIOR COURT No. 171001441

Counsel and Petitioner:

A personal restraint petition was received on September 3, 2019 and has been assigned case number 370356. A copy of the petition and any related documents are enclosed for counsel. The following notation ruling is entered:

> **Filing fee for the petition is waived. State v. Dallas John Paul Lange, case #365018 is hereby consolidated with Personal Restraint Petition of Dallas John Paul Lange, case #370356.**

Given the above matters are consolidated with cause number 365018 being the lead case, please refer to cause number **365018** on all correspondence and filings.

Mr. Quesnel, the response to the petition may be included in the respondent's brief. The brief of respondent is now due November 19, 2019.

Mr. Lange, please be reminded that you will be considered pro se in the personal restraint petition. Your reply to the petition, if any, is due within 30 days of service of the respondent's brief (with response to personal restraint petition included).

Petitioner shall keep the clerk of this Court advised of any address changes.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:jld

APPENDIX D

FILED
MAR 31, 2021
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 36501-8-III**
	)	**(consolidated with**
Respondent,	)	**No. 37035-6-III)**
	)	
v.	)	
	)	
DALLAS PAUL LANGE,	)	**ORDER TRANSFERRING**
	)	**APPEAL TO SUPERIOR**
Appellant.	)	**COURT FOR REFERENCE**
In the Matter of the Personal Restraint of	)	**HEARING**
	)	
DALLAS PAUL LANGE,	)	
	)	
Petitioner.	)	

Dallas Lange seeks relief from personal restraint (PRP) as a result of his judgment and sentence entered on December 18, 2019, convicting him of assault in the first degree—domestic violence, and with a deadly weapon enhancement.

Mr. Lange presents two declarations, one perhaps by his mother and the other perhaps by a family friend. According to the declarations, Court Security/Corrections

Officer Edger Vega denied one of the declarants entry into the courtroom during voir dire because the courtroom was full and there was no room for the public. Mr. Lange argues he is entitled to a new trial because his right to a public trial was violated.

The State presents a certified statement from Officer Vega. According to Officer Vega, Mr. Lange's family asked if the trial had started, he said it had not, and the jury was watching a movie. He says the family declined to go in because the room was full. He told them he would let them know when jury selection started. He further states he notified the family when jury selection started, and they entered the courtroom at that time. The State argues that Mr. Lange's right to a public trial was not violated.

Having considered the sworn statements and the briefs filed by the parties, the court has determined that a reference hearing is necessary so the trial court may enter written findings of fact to assist this court's analysis of the public trial issue presented in the PRP.

Accordingly, IT IS ORDERED that the petition is transferred to the Klickitat County Superior Court for a reference hearing to be conducted within the purview of RAP 16.12. In accordance with the rule, the judge presiding over the hearing may not be the trial judge. The hearing judge must ensure that Mr. Lange has counsel appointed at public expense to represent him in preparation for and at the hearing. The hearing judge must enter written findings of fact toward resolving the competing factual claims of the parties.

IT IS FURTHER ORDERED that the superior court shall transmit to this court, within 90 days of the date of this order, its written findings of fact, together with a certified record of the reference hearing. (If, because of COVID-19, additional time is

required, the State shall make application to our court clerk). The record of the hearing shall be provided to this court at public expense. Thereafter, this court will determine the disposition of Mr. Lange's PRP.

REBECCA PENNELL
CHIEF JUDGE

APPENDIX E

FILED
JUN 21 2021
KLICKITAT COUNTY CLERK

FILED
Court of Appeals
Division III
State of Washington
6/25/2021 11:39 AM

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No.36501-8-III**
	)	**(consolidated with**
Respondent,	)	**No. 37035-6-III)**
v.	)	
DALLAS PAUL LANGE,	)	**Findings of Fact from**
	)	**Reference Hearing**
Appellant.	)	
In the Matter of the Personal Restraint of	)	
	)	
DALLAS PAUL LANGE,	)	
	)	
Petitioner.	)	

Pursuant to this court's order of March 31, 2021, a reference hearing was held in Klickitat County Superior Court on June 14, 2021, in connection with the appellant's request for relief from personal restraint in this matter. The respondent was represented by Klickitat County Chief Deputy Prosecuting Attorney, David Wahl; and appellant-petitioner was represented by attorney, Christopher Lanz. Testimony was presented at the hearing by three witnesses: Violet Van Meter, Janice Dougherty, and Klickitat County Corrections Officer, Edgar Vega. The court, having reviewed the testimony of these witnesses, the exhibits admitted at the hearing, the argument of counsel, and the court files herein, and being fully advised in the premises, makes the following findings of fact.

1. Defendant's criminal trial in Klickitat County Superior Court commenced on December 5, 2018. Prior to summoning the jury into the courtroom, several defendants, prosecutors, and defense lawyers were in the courtroom working out which of numerous cases would proceed to trial on that day. This work was completed at approximately 8:15 am. During these discussions, Ms. Van Meter and Ms. Dougherty were present in the courtroom.

2. Sometime after it was decided that the defendant's matter would proceed to trial on that day, the court took a break and Ms. Van Meter and Ms. Dougherty left the courtroom.

3. When Ms. Van Meter and Ms. Dougherty returned to the courtroom the prospective jurors had been summoned to courtroom. Ms. Dougherty observed at that time that there did not appear to be any available seats in the courtroom as the jurors occupied all the available seating in the courtroom.

4. When Ms. Dougherty and Ms. Van Meter approached the door to the courtroom, they were informed by Corrections Officer Vega that there were not any available seats in the courtroom and the jury was watching a video on jury service. He offered to alert the women when seating became available in the courtroom. The women then retreated from the courtroom and did not enter again until sometime after the lunch break that day.

5. Although Officer Vega did not encourage Ms. Van Meter and Ms. Dougherty to stand in the back of the courtroom during jury selection, he also did not prohibit the women from entering the courtroom during jury selection, nor did he ever remove the women from the courtroom.

6. Ms. Van Meter and Ms. Dougherty were not present in the courtroom for the *voir dire* process commencing with the playing of a jury orientation video through the selection of the jurors.

7. Ultimately, Ms. Van Meter and Ms. Dougherty were able to observe the opening statements, examination of the witnesses, closing arguments and sentencing in this matter. Ms. Dougherty did not observe the jury delivering its verdict because she had gone home and did not anticipate that the jury would reach a decision as quickly as it did.

8. Ms. Dougherty did not inquire with Officer Vega about standing in the courtroom when she was told that there were no seats available. Furthermore, Ms. Dougherty testified that she did not believe that she would have been physically able to stand for an extended period of time while the jury selection process was underway.

9. Ms. Dougherty and Ms. Van Meter submitted affidavits that were essentially identical in language making the same allegation that they had been refused entry to the courtroom during *voir dire*. Notwithstanding these allegations, neither woman could testify that they knew what the term *voir dire* meant.

Dated this 21 day of June, 2021.

Jeffrey Baker
Superior Court Judge Pro Tem

APPENDIX F

FILED
NOVEMBER 30, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 36501-8-III**
	)	**(consolidated with**
Respondent,	)	**No. 37035-6-III)**
	)	
v.	)	
	)	
DALLAS JOHN PAUL LANGE,	)	
	)	**ORDER SEPARATING**
Appellant.	)	**APPEALS**
	)	
In the Matter of the Personal Restraint of:	)	
	)	
DALLAS JOHN PAUL LANGE,	)	
	)	
Petitioner.	)	

Per RAP 3.3(b), the court may order the separation of cases for the purpose of review.

NOW, THEREFORE, IT IS ORDERED that 36501-8-III shall be separated from 37035-6-III.

PANEL: Judges Lawrence-Berrey, Pennell, and Siddoway

FOR THE COURT:

REBECCA PENNELL
CHIEF JUDGE

NIELSEN KOCH & GRANNIS P.L.L.C.

February 10, 2022 - 11:24 AM

Transmittal Information

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Appellate Court Case Number:	36501-8
Appellate Court Case Title:	State of Washington v. Dallas John Paul Lange
Superior Court Case Number:	17-1-00144-1

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