SUPREME COURT NO. 101328-1

NO. 82334-5-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEON CARIL, II

Petitioner.

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

The Honorable Patrick Oishi, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Leon Caril, II, appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' published decision in State v. Caril, II, No. 82334-5-I, (filed August 29, 2022) (Appendix).

B. ISSUE PRESENTED FOR REVIEW

Is review appropriate under RAP 13.4(b)(1), (b)(3), and (b)(4), where the Court of Appeals opinion affirming the trial court's exclusion of conclusions upon which the defense expert based his opinion that Caril, II lacked the mental capacity to form the required intent, misconstrues the rules of evidence and this Court's opinion in State v. Jennings, 199 Wn.2d 53, 502 P.3d 1255 (2022)?

C. STATEMENT OF THE CASE

1. Trial & Diminished Capacity.

Caril, II has a longstanding history of mental health issues. He was first diagnosed with paranoid schizophrenia in

2010. He also likely suffers from antisocial personality disorder and other unspecified psychotic disorders. CP 234-51, 286-98; 1RP[1] 119, 212-14, 272.

Consistent with this history, Caril, II's mental capacity to stand trial and form the specific intent of the murder charges were reoccurring themes throughout this case. A competency assessment conducted by psychologist, Brandi Lane, in October 2018, determined Caril, II was not competent to stand trial and an order for competency restoration was entered. CP 12-17, 20-23, 234-51. Caril, II's psychotic symptoms abated after forced medication therapy. 1RP 272-83, 286.

A January 10, 2019 competency evaluation by psychologist, Jenna Tomei, concluded that Caril, II presented no significant symptoms of mental illness that significantly impaired his ability to understand the nature of the proceedings or assist in his own defense. CP 296-97. The report noted that

[1] The index to the citations to the record is found in the Brief of Appellant (BOA) at 5, n.1.

Caril, II was compliant with his prescribed psychiatric medication, but explained that "If Mr. Caril were to discontinue his prescribed medication, he would likely decompensate." Id. at 11. Under the heading, "RCW 71.05 Recommendation," Dr. Tomei's competency report concluded:

> Based upon the information referred to in this report, there is no evidence to indicate Mr. Caril presents an *imminent* risk of danger to himself or others. However, records indicate that Mr. Caril has exhibited aggression towards others during times of decompensation.

Id. (emphasis in original).

Defense expert and clinical psychologist, Dr. Paul Spizman, disagreed with the conclusions of the prosecution's experts that Caril, II was competent to stand trial. 1RP 105, 117-18, 135, 165, 179.

A contested competency hearing was held which included the testimony of Dr. Spizman, Dr. Tomei, and psychiatrist Dr. Daniel Ruiz Paredes. See 1RP 92-353.

Following the hearing, the trial court found Caril, II competent to stand trial on April 17, 2019. 1RP 353; CP 67-68.

Caril, II raised voluntary intoxication and diminished capacity defenses to the charges of first degree murder and second degree felony murder predicated on assault. CP 82-84. His diminished capacity defense was supported by the testimony of Dr. Spizman. 2RP 1243, 1248.

The evidence at trial revealed that on June 23, 2017, Caril, II was unemployed, extremely intoxicated, and was actively experiencing a delusional and cognitively impaired thought process because of his paranoid schizophrenia. 2RP 999, 1001, 1036-37, 1117, 1166-68, 1277, 1301-02, 1304, 1319, 1326, 1357, 1402, 1456, 1462-63, 1471, 1473-74, 1479, 1481-82, 1484. Early that morning, Andrew Pimentel and his friends sat down outside the Queen Anne Dick's Drive-In. 2RP 853-56, 875, 892, 949-50, 968, 1320-23, 1360-61, 1381-85, 1395, 1402, 1456, 1473, 1479-82, 1484.

Pimentel, Russell Ross, and Tammy Nguyen had spent the prior evening at local area bars singing karaoke and drinking alcohol. 2RP 851-52, 913, 943-47, 965-66, 968, 1144. After sitting down, Nguyen heard Caril, II yelling "incoherent[]" "nonsense" from across the street. 2RP 969-70, 972-73. No one in the group had threatened Caril, II or said anything to him. 2RP 969-70, 1163. About five minutes later, Caril, II yelled "shut the fuck up." 2RP 902-03, 918. A two-liter bottle was then thrown toward the group from across the street. 2RP 856-59, 897, 902, 952-53, 970.

Ross yelled toward Caril, II, "that's a really good way to get your ass kicked." 2RP 856-59, 897, 904, 956, 970-71. Shortly after, Ross saw Caril, II cross the street with a knife in his hand. 2RP 859, 877-78, 905-06. Ross told his friends to run, but Pimentel remained seated. 2RP 859-60, 909-10, 952-53, 971. Caril, II said nothing, but Nguyen watched him crouch down before appearing to punch Pimentel in the chest three times. 2RP 883, 909, 912, 914-15, 954-56, 1153. Nguyen did

not see a knife. 2RP 953-56. Ross and a parked Lyft driver, Jaapir Hussen, saw a knife pulled from Pimentel's chest. 2RP 861, 1152, 1157-58, 1169, 1172-73. Caril, II put the knife into his jacket and walked back across the street. 2RP 861, 880-81, 910-11, 922, 1152, 1174. Pimentel took a few steps before collapsing. 2RP 860, 910, 956, 1141, 1154, 1160, 1171. An autopsy confirmed that a stab wound had punctured Pimentel's heart and diaphragm, leading to his death. 2RP 862, 964, 1127-33, 1136, 1141-42.

Hussen opined that the incident happened "suddenly and spontaneously" and without provocation. 2RP 1163-64, 1170-71. Hussen screamed at Caril, II, who responded "do you want some too?" 2RP 1153, 1174-75. Hussen and hotel employee, Carson Williams, watched Caril, II place something into a suitcase and begin to walk away. 2RP 980-81, 1153-55, 1160, 1175. Williams followed Caril, II. 2RP 984-85, 988-91. Caril, II uttered things that Williams could not understand. 2RP 989, 1000. When Williams told Caril, II that he was calling 911, he

responded, "do you know who I am? I am the man who just stabbed someone." 2RP 985, 990-91, 1000.

Williams was present when police contacted Caril, II in a nearby alley. 2RP 994, 1001, 1011, 1070-71. Caril, II was "basically cooperative" with police commands and acknowledged having a knife in one of his bags. 2RP 1014-16. 1035, 1080-81. The knife had blood on it, and later DNA testing identified a 1 in 190 nonmillion match to Pimentel's DNA profile. 2RP 1072, 1214-16, 1226-27. Caril, II told police that Pimentel had been talking "shit" about him, so he stabbed him in the chest. 1RP 467, 481-83; 2RP 1488-89.

A search of Caril, II's bags and the area around the incident location revealed a half full Vodka bottle and paperwork for homeless resources and mental health appointments. 2RP 1117-19. No medication was found in any of Caril, II's bags. 2RP 1119.

Dr. Spizman diagnosed Caril, II with paranoid schizophrenia. 2RP 1266-67. Dr. Spizman's diagnosis was

made after interviewing Caril, II twice, and reviewing his handwritten letters, public health and mental health records, and the reports of other experts, including Dr. Tomei and the prosecution's clinical psychologist, Dr. Kenneth Muscatel. 2RP 1278-80, 1282-85, 1287-90, 1295-96, 1299, 1325, 1331, 1367. Based on this data, Dr. Spizman explained that he did not see the need to conduct another psychological evaluation of Caril, II. 2RP 1331-33.

Caril, II's mental health records revealed a schizophrenia diagnosis from as far back as 2010. 2RP 1276, 1288. This was consistent with Dr. Tomei's competency evaluation which additionally concluded that Caril, II suffered from antisocial personality disorder. 2RP 1295-96. Dr. Spizman explained that the primary symptoms of paranoid schizophrenia included delusions and hallucinations, which could vary in intensity. 2RP 1256-57, 1264. Other symptoms included slowed cognitive functioning, confusion, suspiciousness, hostility, aggression,

impaired social functioning, and "deadening of emotion." 2RP 1267-69, 1273.

Dr. Spizman explained that medication was the primary method of treating schizophrenia and often led to improvement and a decrease in symptoms. 2RP 1258-1261. Caril, II had previously been prescribed antipsychotic medications. 2RP 1286-87, 1289, 1463-65, 1480. Although Caril, II, was prescribed antipsychotic mood stabilizing medication at the time of the incident, he reported not taking it. 2RP 1327-28, 1429, 1436-38, 1477.

During their interviews, Caril, II's paranoid schizophrenia symptoms were "apparent." 2RP 1276. Caril, II reported to Dr. Spizman that Pimentel was making statements toward him, or about him. 2RP 1320-23, 1384, 1395, 1402. Caril, II could not recall specifically what had been said, but explained that he was tired of the partying, loud music, and drug use in the area, as well as "tired of hearing voices". 2RP 1381, 1383-85. Dr. Spizman explained that Caril, II's

perceptions of people in the area talking about him was a delusion based on his conflated perception of what was occurring. 2RP 1330, 1360, 1381-82. Given his diagnoses it would have been difficult for Caril, II to tolerate normal everyday stressors. 2RP 1381-82.

Dr. Spizman explained that Caril, II had no rational basis to want to assault or kill anyone. 2RP 1415. Indeed, Caril, II acknowledged there was "really no reason" why Pimentel was specifically targeted. 2RP 1381-82. While Caril, II acknowledged stabbing Pimentel, he indicated he did not intend to kill him. 2RP 1322, 1325, 1391-92.

Dr. Spizman opined that Caril, II's cognitive functioning was "significantly impaired" at the time of the incident by psychosis, schizophrenia, and delusional content. 2RP 1268-69, 1289-90, 1342, 1356-57, 1397-98, 1410. As Dr. Spizman explained, Caril, II interpreted "benign typical conversation in the environment as directed negatively toward him." 2RP 1271, 1410. Caril, II was also likely hearing voices and experiencing a

"mood episode" at the time of the incident. 2RP 1271-72. Caril, II's paranoid and delusional beliefs were further compounded by his heavy intoxication during the incident and the stress associated with his homelessness. 2RP 1260, 1277, 1300-04, 1319, 1326, 1330-31, 1336-39, 1357-58, 1399, 1402, 1407-08.

Based on these factors, Dr. Spizman opined that Caril, II's mental impairment impacted his ability to form the premeditated intent to kill. 2RP 1276-77, 1341, 1399-1401. As Dr. Spizman later acknowledged however, Caril, II had the capacity to understand the nature and quality of his act at the time it happened. 2RP 1355-56. Thus, at a "very basic level," Caril, II had the capacity to form the intent to kill or assault Pimentel. 2RP 1354, 1397-98. Elaborating, Dr. Spizman explained that Caril, II's ability to form complex plans at the time of the incident would have been "markedly compromised". 2RP 1415. Thus, the extent of Caril, II's capacity to "formulate a basic plan" was limited to "very low level[,] very basic" tasks

such as acquiring alcohol or putting himself on a waiting list for homeless shelters. 2RP 1372-73, 1415.

Dr. Muscatel, disagreed with Dr. Spizman's conclusions as to Caril, II's capacity to form the required intent. 2RP 1421, 1425-28, 1483.

Dr. Muscatel also interviewed Caril, II, reviewed his medical records, and conducted a psychological assessment. 2RP 1424, 1428-29, 1439-1444, 1450, 1455, 1460-61, 1477. Dr. Muscatel recognized Caril, II was mentally ill, and diagnosed him with multiple mental disorders, including schizophrenia or schizophrenic form disorder, chronic psychotic disorder with a possible mood instability component, and "antisocial features" compounded by his alcohol use. 2RP 1426, 1444-47, 1472, 1479. Caril, II had previously reported suffering from auditory hallucinations and paranoid thinking, which at times became "grandiose and unrealistic." 2RP 1469.

Caril, II indicated his intent was to harm, but not kill, Pimentel. 2RP 1481, 1483. He could not explain why he

stabbed Pimentel and did not even realize he did so, until he saw blood on the knife. 2RP 1475-76. Caril, II took out his knife because he believed someone was going to start a fight. Dr. Muscatel reasoned this demonstrated Caril, II had the capacity to understand the wrongfulness of his conduct. 2RP 1426, 1475.

Dr. Muscatel acknowledged that Caril, II's schizophrenia impacted his judgement and thinking. 2RP 1447. Indeed, he opined Caril, II was only "marginally functional" in society. 2RP 1447-48, 1477. At the time of the incident, Caril, II was impaired by intoxication and his chronic mental disorders. 2RP 1456, 1473, 1479, 1481-82, 1484. He was suffering from sensitivity because of his paranoid and "delusional" thinking. 2RP 1456, 1480-81. Dr. Muscatel nonetheless opined that Caril, II had the mental capacity to form the specific intent of the crimes with which he was charged. 2RP 1425, 1427-28, 1483. Dr. Muscatel explained that Caril, II had the mental capacity

necessary to think over, acquire the knife, cross the street, and stab Pimentel. 2RP 1427-28, 1458.

The jury acquitted Caril, II of first degree murder. CP 205; 1RP 579. Caril, II was convicted of second degree intentional murder and second degree felony murder. CP 207, 209; 1RP 579. The jury also returned a special verdict, concluding that Caril, II was armed with a deadly weapon during the commission of the second degree intentional murder. CP 208; 1RP 579-80.

2. Excluded Evidence.

Dr. Spizman explained that he had relied on Dr. Tomei's January 2019 competency evaluation of Caril, II to examine "another professional['s]" perspective on Caril, II's history, symptoms, and diagnosis. 2RP 1292-93. When defense counsel began to question Dr. Spizman at trial as to whether Dr. Tomei's evaluation mentioned "what would happen if Mr. Caril, II decompensated" the prosecutor objected based on hearsay. 2RP 1294. Defense counsel responded that under ER

703 and ER 705, Dr. Spizman could properly rely upon another's data to reach a conclusion. 2RP 1294.

Following a sidebar, defense counsel briefly elicited that Dr. Tomei had diagnosed Caril, II with specified schizophrenia, unspecified schizophrenia spectrum, and antisocial personality disorder. 2RP 1294-96. During the recess the trial court put the sidebar on the record, explaining the parties had agreed to pass over the line of questioning until it could be further discussed. 2RP 1307.

During the recess discussion, defense counsel explained what specific portions of Dr. Tomei's report he sought to have Dr. Spizman testify about relying upon. Those portions included the following:

> "If Mr. Caril were to discontinue his prescribed medication, he would likely decompensate."
>
> "However, records indicate that Mr. Caril has exhibited aggression towards others during times of decompensation. Further, if he were to decompensate his symptoms of psychosis would likely interfere with his ability to carry out

> activities of daily living and provide for his basic needs of health and safety."

2RP 1307-08; CP 297. Dr. Spizman confirmed that he had relied on those portions of Dr. Tomei's report in reaching his own opinions and conclusions. 2RP 1308.

The prosecutor declined the opportunity to cross-examine Dr. Spizman on those points. 2RP 1309. The prosecutor nonetheless argued that it did not make sense for Dr. Spizman to rely on the portions of Dr. Tomei's report addressing decompensation because he was opining as to Caril, II's mental status at the time of the crime, whereas Dr. Tomei's report was made after the incident and for different purposes. 2RP 1310-11. The prosecutor argued Dr. Spizman's reliance on Dr. Tomei's report amounted to irrelevant opinion evidence. 2RP 1310-12.

The prosecutor opined that she did not believe the evidence was relevant because it seemed doubtful that Dr. Spizman had "genuinely" relied on it. 2RP 1311-12. The

prosecutor also maintained that cross-examination would be ineffective because Dr. Tomei was not testifying and "we don't have her body of work." 2RP 1312.

Defense counsel responded that Dr. Spizman had clearly indicated that he relied upon Dr. Tomei's report and that the prosecution had an opportunity to cross-examine him about it. Counsel argued the evidence was relevant because it opined what happened when Caril, II did not take medication and circumstantially demonstrated Caril, II was actively psychotic at the time of the incident. 2RP 1313-14.

The trial court concluded that ER 703 permitted admission of Dr. Tomei's conclusions regardless of hearsay. The trial court also opined that whether Dr. Spizman actually relied on the conclusions of Dr. Tomei went to weight and not admissibility and was an area that could be explored during cross-examination. 2RP 1312, 1315. Finally, the trial court also found the evidence was relevant. 2RP 1316.

Still, the trial court excluded the evidence, concluding it was "problematic for a couple of reasons." 2RP 1316. The trial court reasoned that Dr. Tomei's report from 2019 could cause confusion for the jury based on its timing and the "cherry picked snippets of information that Dr. Tomei apparently gave [] in a completely different context" as it related to competency to stand trial and a civil committed under RCW 71.05. 2RP 1317. The trial court explained that allowing cross-examination of Dr. Spizman on the issue would open a "can of worms". 2RP 1317. Despite finding the evidence relevant, the trial court concluded its probative value was substantially outweighed by the danger of unfair prejudice. 2RP 1317.

Defense counsel asked the trial to reconsider its ruling the following day. 2RP 1351. Counsel explained the evidence would not be confusing to the jury because they would not hear any evidence related to the issue of civil commitment. Rather, counsel maintained the evidence was relevant and admissible under ER 703 because Dr. Tomei's report detailed that

aggression was a symptom of Caril, II's psychosis when he was not taking his medication. 2RP 1351-52. The trial court denied the motion for reconsideration. 2RP 1352.

3. Appeal.

Caril, II argued on appeal that the trial court violated the rules of evidence and his right to present a defense when it refused to permit Dr. Spizman to testify that he relied on Dr. Tomei's competency report in forming his expert opinion that Caril, II lacked the mental capacity to form the required intent to commit murder. BOA at 20-42.

The Court of Appeals first concluded the trial court acted within its discretion in excluding the statements from Dr. Tomei's report under ER 403. Op. at 12. The Court reasoned that the jury would have been confused or diverted from properly considering the issues at trial if it had heard about Dr. Tomei's recommendation which focused on Caril, II's competency to assist with his defense and trial and potential changes to his "custodial situation." Op. at 11-12.

The Court of Appeals acknowledged Dr. Tomei's excluded report was at least minimally relevant on the issue of the basis for Dr. Spizman's opinions, but concluded the prosecution had an interest in excluding the evidence because it was potentially confusing and only marginally relevant in bolstering Dr. Spizman's opinion. Op. at 13-17. The Court reasoned that the evidence did not completely bar Caril, II from presenting his defense of lack of intent or capacity. Op. at 16.

Caril, II now seeks this Court's review.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review is appropriate because the excluded evidence was crucial to Caril, II's case, violated the rules of evidence and his right to present a defense, and was not harmless.

The trial court violated Caril, II's constitutional right to present a defense, and the rules of evidence, when it prohibited Dr. Spizman from explaining to the jury that his expert opinion relied on Dr. Tomei's conclusions that during periods of mental decompensation, Caril, II was unable to carry out daily living

activities and exhibited aggression toward others. The Court of Appeals erred in affirming.

Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee the criminal defendant's right to present a defense. State v. Starbuck, 189 Wn. App. 740, 750, 355 P.3d 1167 (2015); State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). "The right of an accused in a criminal trial 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). A defendant's right to an opportunity to be heard in his defense includes the rights to offer testimony, is basic in our system of jurisprudence. Id.

In analyzing whether a trial court's evidentiary decision violated a defendant's Sixth Amendment right to present a defense, the court first reviews the court's evidentiary ruling for an abuse of discretion. State v. Jennings, 199 Wn.2d 53, 58, 502

P.3d 1255 (2022); State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019); State v. Markovich, 19 Wn. App. 2d 157, 167, 492 P.3d 206 (2021), rev. denied, 198 Wn.2d 1036, 501 P.3d 141 (2022). If the evidentiary ruling was not an abuse of discretion, the court then considers de novo whether the exclusion of evidence violated the defendant's constitutional right to present a defense. Jennings, 199 Wn.2d at 59

When determining whether a defendant's right to present a defense has been violated by the trial court's exclusion of defense evidence, a reviewing court first determines whether the evidence was at least of "minimal relevance." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). If the defense evidence is at least minimally relevant, the analysis moves to the second step, and the burden shifts to the State to demonstrate the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Id. If the State meets this burden, then the analysis moves to the third step –

balancing the State's interest in excluding prejudicial evidence against the defendant's need for the information for evidence. Id.

Here, the Court of Appeals concluded the trial court did not error in excluding the statements from Dr. Tomei's report under ER 403 for two reasons. First, hearing about information and a recommendation focused on Caril, II's competency to assist with his defense and potential changes to his custodial situation could confuse the jury or divert them from deciding whether he had the mental capacity to form the required intent to commit murder. Second, because Dr. Tomei did not testify at trial, it would have been speculative whether she would support the use of her opinions as data relevant to Caril, II's capacity to form intent at the time of the incident. Op. at 12. The Court of Appeals reasoning is problematic for several reasons.

First, the Court of Appeals conclusion that such evidence would have been confusing to the jury erroneously conflates the context of Dr. Tomei's report with the data relied upon to reach

the specific conclusions therein. Dr. Tomei's report makes clear that her specific conclusions were based on an understanding of Caril, II's behavior during periods of previous decompensation; not the context from which that behavior was assessed.

Second, even if Dr. Tomei's conclusions were based on the specific context of her report, this went to weight not admissibility. Dr. Spizman's opinions regarding Caril, II's mental competency was based on complicated assessments of Caril, II's mental health history, mental health diagnoses, and human psychology, all of which are beyond the ken of the average juror. See State v. Ellis, 136 Wn.2d 498, 517, 963 P.2d 843 (1998) ("[M]ental disorders are beyond the ordinary understanding of lay persons."). Dr. Spizman's explanation that his opinions were based in part on Dr. Tomei's findings about Caril, II's prior decompensation when not taking medication would not have been confusing to the jury, especially where the jury had already heard extensive testimony about Caril, II's competency evaluations and how both experts relied on those

evaluations in forming their opinions. See e.g., 2RP 1249-51, 1278, 1282, 1291-93, 1299, 1334, 1425, 1460, 1476.

Any potential risk of confusion to the jury was further mitigated by the prosecution's opportunity to cross-examine Dr. Spizman and question his credibility, methodology, and the context and timing of Dr. Tomei's conclusions that he had relied upon. Moreover, defense counsel assured the trial court that the jury would not hear that Dr. Tomei's conclusions were made under a "RCW 71.05 Recommendation" heading, or that Caril, II was assessed for whether he satisfied the criteria for a civil commitment under RCW 71.05. 2RP 1352. Indeed, as the State acknowledged in the Court of Appeals, a limiting instruction could have further properly guided the jury's consideration of the evidence. See Brief of Respondent (BOR) at 21-22, 30-32, 36, 45-46 (citing In re Det. of Marshall, 156 Wn.2d 150, 162, 125 P.3d 11 (2005); In re Det. of Leck, 180 Wn. App. 492, 511, 334 P.3d 1109 (2014)).

Finally, the Court of Appeals reasoning that it would be "speculative" as to whether Dr. Tomei "would support the implied use of her opinions as data relevant to Caril's capacity to form intent at the time of the attack," conflicts with ER 703 and ER 705. Op. at 12. There is nothing in those rules of evidence which requires the expert, upon whose opinions and date is relied, to acquiesce to a reliance on that information. Rather, by its plain terms, ER 703 requires only that "the facts or data in the particular case *upon which an expert bases an opinion or inference*," be of the type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject. ER 703 (emphasis added). Here, Dr. Spizman confirmed that he had relied on those portions of Dr. Tomei's report in reaching his own opinions and conclusions. 2RP 1308. That is all the rule requires.

In short, the evidence would not have been disruptive to the fairness of the fact-finding process at trial. Jones, 168 Wn.2d 720 (quoting Darden, 145 Wn.2d at 622). The proposed

testimony was of similar character to the other testimony the court permitted. Any potential confusion could have been reduced via cross-examination or a limiting instruction. There was nothing misleading or confusing about this proposed component of Dr. Spizman's testimony.

The Court of Appeals also concluded that although relevant, the excluded evidence was of minimal need to Caril, II because he was still able to put forth a defense of lack of intent or capacity. Op. at 16. As recently observed by this Court in Jennings, however, for a constitutional violation to occur, the exclusion of such evidence need not eliminate the "entire defense." Jennings, 199 Wn.2d at 63-64. Moreover, "prejudice" to the State is not merely that the prosecution would find the evidence inconvenient; rather, the State bears the burden of showing the evidence would "disrupt the fairness of the fact-finding process" itself in order for this factor to weigh against admission. See Hudlow, 99 Wn.2d at 15.

Applying the correct formulation, demonstrates that there was no countervailing State interest—the prosecution cannot demonstrate that the evidence was "so prejudicial as to disrupt the fairness of the fact-finding process." Id. Here, the proposed expert testimony was relevant and an important component of Caril, II's defense. It was not disruptive to a fair trial. Thus, its exclusion violated Caril, II's right to present a defense, and the exclusion was not harmless.

Finally, the error was not harmless under either the evidentiary or constitutional error standard. Constitutional error is presumed prejudicial, and the State bears the burden of showing the error was harmless beyond a reasonable doubt. State v. Chicas Carballo, 17 Wn. App. 2d 337, 355, 486 P.3d 142, rev. denied, 198 Wn.2d 1030 (2021). It cannot do so here.

The only dispute was whether Caril, II had the mental capacity to form the necessary intent required to commit murder. Resolution of this dispute came down to a battle of two

expert witnesses. Jurors therefore had to decide whether Dr. Spizman or Dr. Muscatel's expert opinion carried more weight.

As a general matter, under Washington law, "where there are justifiable inferences from the evidence upon which reasonable minds might reach different conclusions, the questions are for the jury," not the court. Holland v. Columbia Irr. Dist., 75 Wn.2d 302, 304, 450 P.2d 488 (1969). "It is the ... province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact." State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967). Under this record, the differing views among the experts demonstrates that there were disputed issues of fact and that reasonable minds had reached different conclusions as to Caril, II's mental capacity at the time of the incident. As such, the question should have been given to the jury to decide.

This Court has cautioned against trial courts usurping the role of the jury in cases where there are factual disputes.

> We believe that the jury's ability to "separate the wheat from the chaff" deserves more deference than was afforded by the courts below, and we are loathe to allow expansion of the trial judge's authority into the fact-finding province of the jury.

State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). Unfortunately, in Caril, II's case, the trial court engaged in the type of invasive gatekeeping rejected by Fernandez-Medina.

It was the jury's job to assess credibility and the weight to be given to the conflicting expert opinions. In the end, this was "a classic battle of the experts, a battle in which the jury must decide the victor." Intalco Aluminum v. Dep't of Labor & Indus., 66 Wn. App. 644, 662, 833 P.2d 390 (1992) (citation omitted).

The jury clearly doubted Caril, II's mental capacity as evidenced by its not guilty verdict on the charge of first degree premeditated murder. CP 205; 1RP 579. Thus, any evidence capable of bolstering Dr. Spizman's expert opinion that Caril, II likewise lacked the mental capacity necessary for second degree

murder was crucial to the defense. Testimony that Dr. Spizman's expert opinion relied on, and was supported, by facts and opinions contained in Dr. Tomei's evaluation, would likely have persuaded jurors that Dr. Spizman's opinion was the correct one, and therefore led jurors to also conclude that Caril, II lacked the required mental capacity. See State v. Mitchell, 102 Wn. App. 21, 27, 997 P.2d 373 (2000) ("[t]he jury learns from the expert how the mental mechanism operates, and then applies what it has learned to all the facts introduced at trial.").

Exclusion of the relevant defense evidence both violated the rules of evidence and denied Caril, II the right to present a defense. This Court should reverse Caril, II's conviction.

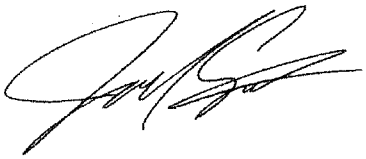
E. CONCLUSION

Caril, II respectfully asks this Court to grant review and reverse his conviction.

I certify that this document contains 4,972 words, excluding those portions exempt under RAP 18.17.

DATED this 28th day of September, 2022.

Respectfully submitted,
NIELSEN KOCH & GRANNIS, PLLC



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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. LEON CARIL, II, Appellant.	No. 82334-5-I DIVISION ONE PUBLISHED OPINION

BIRK, J. — Leon Caril, II, appeals his conviction and sentence for second degree murder. He asserts he was in a state of compromised mental health when he stabbed and killed a person. At trial, Caril, who suffers from paranoid schizophrenia, called an expert psychologist who testified that Caril lacked the capacity to form criminal intent at the time of the incident. The trial court allowed this testimony, but prohibited Caril's expert witness from testifying to hearsay statements from another psychologist's report that the expert relied on, because the excluded statements concerned the collateral issues of Caril's competency to stand trial and potential future need for civil commitment. We conclude the trial court did not abuse its discretion by excluding this evidence, and Caril's Sixth Amendment right to present a defense was not violated. The State concedes several errors that require resentencing. We affirm Caril's conviction, vacate his sentence, and remand for resentencing.

I

A

During the night of June 22-23, 2017, Russell Ross, Tammy Nguyen, and Andrew Pimenthal spent part of the night with a group of friends in an evening out. In the early morning hours, they obtained take-out meals and sat on the curb outside the restaurant to eat as they conversed. From across the street, an individual shouted, "[S]hut the fuck up," and threw a two-liter soda bottle in their direction, which landed by their feet. Ross shouted back that throwing the bottle was a "good way to get your ass kicked."

Ross observed the individual, later identified as Caril, start across the street towards the group brandishing a knife. Ross told everyone to "run" and that the approaching individual had a knife. Nguyen and Ross withdrew, but Pimenthal was not able to do so in time. While running away, Ross saw Caril stab Pimenthal. Nguyen saw Caril "punch" Pimenthal three times in the chest. Jaapir Hussen, who observed these events from his car nearby, exited his vehicle and shouted at Caril asking if he was "crazy" and "why" he stabbed Pimenthal. Caril asked Hussen if he "want[ed] some too." Pimenthal died from his injuries.

Ross summoned the police. Caril walked back across the street. Carson Williams was informed by people in the area that Caril was the one who stabbed Pimenthal, Williams started following Caril, and he saw Caril stuff something into a suitcase. Carson dialed 911, informing Caril that he was doing so. Caril replied, "[D]o you know who I am. I am the man who just stabbed someone." Police

responding to the 911 call located Caril. Officer Zachary Pendt asked Caril if he had a knife, which Caril confirmed was in his bag. Caril complied with the responding officers' requests and was cooperative. The officers did not find any medication among Caril's belongings. The State charged Caril with murder in the second degree, and later added murder in the first degree by amended information.

B

In 2010, 2011, 2012, 2015, and 2016, Caril was diagnosed with paranoid schizophrenia. Before the June 23, 2017 incident, Caril had a long-term housing placement and he had long-term outpatient treatment through Sound Mental Health. On June 16, 2017, Caril lost his housing after engaging in an altercation with another resident. And he lost his outpatient treatment services on July 12, 2017 due to his arrest and incarceration related to Pimenthal's murder.

On October 3, 2018, the superior court entered an order finding Caril incompetent and committing him to Western State Hospital (WSH) for a restoration period of 90 days. On October 30, 2018, Daniel Peredes-Ruiz, MD requested that the State seek judicial authority for WSH to treat Caril with antipsychotic medications involuntarily, since he had been unwilling to actively participate in treatment. In a competency assessment completed by Brandi Lane, PsyD, which was attached to the request letter, Dr. Lane concluded that Caril lacked the capacity to assist in his defense with a reasonable degree of rational understanding. Additionally, Caril was said to have ongoing delusional thinking,

disorganized thought process, grandiose thinking, and poor judgment. On February 7, 2019, the superior court entered an order granting the State's motion for involuntary medication for maintenance of competency.

On January 10, 2019, Jenna Tomei, PhD, completed a competency evaluation report of Caril. In her report, Dr. Tomei opined that Caril met diagnostic criteria for unspecified schizophrenia spectrum and other psychotic disorder and had the capacity to understand the nature of the proceedings against him and to assist in his own defense. Dr. Tomei's report stated that previously observed symptoms appeared to be well managed with Caril's then current medication regimen. Before the court order allowing for Caril to be involuntarily medicated, Caril had been described as "resistant," "guarded," "isolative," "withdrawn," and "suspicious" while at WSH. Additionally, Dr. Tomei's report noted that before being involuntarily medicated, Caril had been involved in a physical altercation and had yelled at others in competency restoration groups.

Dr. Tomei's report contrasted these characteristics to those observed after Caril was involuntarily medicated. The report described Caril as appearing to be more reality-based compared to his prior evaluation with no overt delusional thought processes. At the end of the report, Dr. Tomei stated, "If Mr. Caril were to discontinue his prescribed medication, he would likely decompensate. In such an event, he may or may not continue to present with the requisite capacities to proceed." Dr. Tomei concluded the report with an "RCW 71.05" (behavioral health detention) recommendation noting Caril "exhibited aggression towards others

during times of decompensation." It stated a designated crisis responder (DCR) would be required to assess Caril for commitment if there was a change in his "custodial situation."

On April 17, 2019, the superior court entered an order finding Caril competent to proceed to trial.

C

After the State rested its case-in-chief, Caril called Paul Spizman, PsyD as a defense expert. Dr. Spizman is a licensed forensic psychologist in Washington. Dr. Spizman has experience working with individuals who suffer from schizophrenia. While explaining general characteristics of schizophrenia, Dr. Spizman described it as a manageable mental illness, as opposed to a curable one, as some cases may go into "a type of remission." Dr. Spizman posited two hypothetical patients suffering from schizophrenia to illustrate the ebb and flow in severity of symptoms: a patient who is homeless and engaging in substance abuse would be under great stress and likely show more symptoms compared to one who is medicated, living in a stable environment, and with less stress, who may demonstrate relatively minimal symptoms. Dr. Spizman testified that medication is the primary method for treating schizophrenia. Dr. Spizman testified that a person suffering from schizophrenia who is taking medication is statistically more likely to have a reduction in or not experience any symptoms. Dr. Spizman stated that on many occasions, symptoms of paranoid schizophrenia are triggered from environmental factors, such as a car driving by one's house. He testified that "[f]or

a person who suffers from paranoid schizophrenia, and is not taking their or may not be taking their prescribed medications, . . . there [is] concern that they could act aggressively." When asked about what can trigger aggression from a person suffering from paranoid schizophrenia, Dr. Spizman testified that the trigger could be fairly benign stimuli, such as someone walking down the street talking on a cellphone or a group of people having a general conversation.

Dr. Spizman diagnosed Caril with schizophrenia and testified that he suffers from paranoid schizophrenia. He testified to his opinions specific to Caril and the June 23, 2017 incident. Dr. Spizman explained he formed his opinions after reviewing police reports and associated witness accounts of that incident, written materials Caril sent his attorneys, two interviews with Caril, Caril's mental health records, and Dr. Tomei's competency evaluation report. Dr. Spizman testified that Caril's delusions were the most prominent symptom on the morning of the incident. He stated that at the time of the incident, Caril was interpreting information around him as being directed toward him and believed Pimenthal and his friends were making statements toward and about him. Dr. Spizman testified that Caril said he did not know right from wrong at the time of the incident. And Caril had reported to Dr. Spizman that Caril consumed approximately half a gallon of vodka from 11:00 p.m. to 1:00 a.m. Dr. Spizman opined that Caril's mental illness impaired his ability to form premeditated intent to kill Pimenthal.

Caril's counsel questioned Dr. Spizman about Dr. Tomei's report and whether it mentioned "what would happen if Caril decompensated." Dr. Spizman

answered he did not recall. Defense counsel sought to point Dr. Spizman to the disputed section of Dr. Tomei's report when the State objected on hearsay grounds.

In an offer of proof outside the presence of the jury, defense counsel indicated he had planned to ask Dr. Spizman to relate statements from the following paragraphs in Dr. Tomei's report:

> It should be noted that the current evaluation took place during a time when Mr. Caril was compliant with his psychiatric medication. If Mr. Caril were to discontinue his prescribed medication, he would likely decompensate. In such an event, he may or may not continue to present with the requisite capacities to proceed.
>
> RCW 71.05 RECOMMENDATION
> Based upon the information referred to in this report, there is no evidence to indicate Mr. Caril presents an imminent risk of danger to himself or others. However, records indicate that Mr. Caril has exhibited aggression towards others during times of decompensation. Further, if he were to decompensate his symptoms of psychosis would likely interfere with his ability to carry out activities of daily living and provide for his basic needs of health and safety. Therefore, an evaluation by a DCR does appear necessary should Mr. Caril's custodial situation change.

(Boldface omitted) (emphasis in original). Dr. Spizman testified that he relied on these statements by Dr. Tomei in arriving at his opinions.

The trial court excluded the statements in Dr. Tomei's report on the basis that while relevant, their probative value was substantially outweighed by the danger of unfair prejudice to both parties, and the risk that they could cause confusion or mislead the jury. The trial court pointed to the difference between an evaluation of competency to stand trial and dangerousness in a potential civil

commitment proceeding versus an evaluation of capacity to form intent at the time of the incident. The trial court denied Caril's later motion for reconsideration.

On count I, Caril was acquitted of first degree murder, but the jury found him guilty of the lesser included crime of second degree murder (intentional murder) with a deadly weapon. Caril was found guilty of second degree murder (felony murder) with a deadly weapon on count II. The trial court entered an order vacating count II for sentencing only.

At sentencing, based on Caril's four convictions for robbery in the second degree from 1998 and a conviction for attempted robbery in the first degree in 2002, the trial court found this was his sixth "most serious offense" making Caril a persistent offender. The trial court sentenced Caril to life in prison without the possibility of parole. The judgment and sentence contained references to both count I and count II. Caril appeals.

II

Caril contends that the trial court violated his right to present a defense under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution by prohibiting Dr. Spizman from testifying to the excluded statements in Dr. Tomei's report. Caril alleges that the excluded testimony was highly probative and integral to his defense.

A

A defendant has a constitutional right to present a defense. U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, § 22. This right is not absolute. It may, "'in

appropriate cases, bow to accommodate other legitimate interests in the criminal trial process,'" including the exclusion of evidence considered irrelevant or otherwise inadmissible. State v. Giles, 196 Wn. App. 745, 756-57, 385 P.3d 204 (2016) (quoting Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

In analyzing whether a trial court's evidentiary decision violated a defendant's Sixth Amendment right to present a defense, we first review the court's evidentiary ruling for an abuse of discretion. State v. Jennings, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022); State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019); State v. Markovich, 19 Wn. App. 2d 157, 167, 492 P.3d 206 (2021), review denied, 198 Wn.2d 1036, 501 P.3d 141 (2022). If we conclude that the evidentiary ruling was not an abuse of discretion, we then consider de novo whether the exclusion of evidence violated the defendant's constitutional right to present a defense. Jennings, 199 Wn.2d at 59.

B

Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. ER 403. We review a trial court's ER 403 admissibility ruling for abuse of discretion. State v. Rice, 48 Wash. App. 7, 11, 737 P.2d 726 (1987). A trial court abuses its discretion if no reasonable person would take the view adopted by the trial court. Jennings, 199 Wn.2d at 59.

An expert witness is permitted to base an opinion on "facts or data" that are not admissible in evidence if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." ER 703. When a party seeks to introduce otherwise inadmissible facts or data through an expert witness who has relied on them, the trial court has discretion to determine the extent to which the expert may relate the inadmissible information to the trier of fact. See ER 705. The trial court has discretion to exclude inadmissible information on which an expert has relied to prevent an expert's opportunity to explain the basis for an opinion from becoming merely "a mechanism for admitting otherwise inadmissible evidence" or "to avoid the rules for admissibility of evidence." State v. Anderson, 44 Wn. App. 644, 652, 723 P.2d 464 (1986); State v. Martinez, 78 Wn. App. 870, 879, 899 P.2d 1302 (1995).

The evidence rules contemplate that an opposing party may inquire into the facts or data on which an expert has relied when cross-examining the expert. ER 705. At other times, as here, the party offering the expert may seek to ask the expert on direct examination to relay inadmissible facts or data on which the expert has relied in forming opinions. When inadmissible facts or data are offered under ER 705, the trial court should "determine under ER 403 whether to allow disclosure of inadmissible underlying facts based upon whether the probative value of this information outweighs its prejudicial or possibly misleading effects." Martinez, 78 Wn. App. at 879.

An expert's testimony disclosing inadmissible facts or data to explain the expert's opinion "is not proof of them" as substantive evidence. Grp. Health Coop. of Puget Sound, Inc. v. Dep't of Revenue, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986); State v. Wineberg, 74 Wn.2d 372, 381-82, 444 P.2d 787 (1968). An expert testifying to otherwise inadmissible facts or data under ER 705 may do so "only for the purpose of explaining the basis for [the expert's] opinion." In re Det. of Marshall, 156 Wn.2d 150, 163, 125 P.3d 111 (2005). When the trial court allows an expert to testify to otherwise inadmissible facts or data for nonsubstantive purposes to show the basis of the expert's opinion, the trial court should give an appropriate limiting instruction. In re Det. of Coe, 175 Wn.2d 482, 513-14, 286 P.3d 29 (2012); Marshall, 156 Wn.2d at 163; In re Det. of Leck, 180 Wn. App. 492, 511, 513, 334 P.3d 1109 (2014) (limiting instruction that inadmissible information was to be considered "'only in deciding what credibility and weight'" to give expert's opinion and not as evidence that the information "'is true or that the events described actually occurred'").

Here, the trial court found the evidence to be relevant, but excluded it because its probative value was substantially outweighed by the danger of unfair prejudice to both parties, it could mislead the jury and confuse the issues. Dr. Tomei's January 10, 2019 competency evaluation report included a description of Caril's then current mental status, an opinion on Caril's competency to proceed to trial, discussion of whether Caril's competency was restorable and what steps would be appropriate to achieve restoration, and discussion of whether Caril

should be evaluated by a DCR under chapter 71.05 RCW. This report sought to provide information to the trial court related to either the resolution of Caril's criminal case, his future competency and ability to participate in his defense, or assessing civil commitment if his custodial situation changes. At no point in her report did Dr. Tomei evaluate Caril to determine his competency or state of mind on the date of the incident.

Had the statements from Dr. Tomei's report been admitted, the State would likely have cross-examined Dr. Spizman on the context of those statements in Dr. Tomei's report. Such testimony, as the trial court pointed out, would have been likely to reveal Caril's risk of dangerousness in connection with Dr. Tomei's recommendation for an evaluation by a DCR should Caril's custodial situation change. The jury, however, was charged with determining, relevant to this discussion, Caril's state of mind when he stabbed and killed Pimenthal. Hearing about information and a recommendation focused on Caril's competency to assist with his defense and trial and potential changes to his "custodial situation" could confuse the jury or divert the jury from the issues it was charged with deciding. Moreover, given that Dr. Tomei did not testify at trial, it would be speculative whether she would support the implied use of her opinions as data relevant to Caril's capacity to form intent at the time of the attack.

The trial court acted within its discretion in excluding the statements from Dr. Tomei's report under ER 403.

C

Because we conclude that the trial court's evidentiary ruling was not an abuse of discretion, we next consider de novo whether the exclusion of evidence violated the Sixth Amendment. Jennings, 199 Wn.2d at 59; Arndt, 194 Wn.2d at 797-98; Markovich, 19 Wn. App. 2d at 167.

Under Washington's test for evaluating whether the exclusion of evidence violates the Sixth Amendment, we first consider whether the excluded evidence was at least minimally relevant. State v. Orn, 197 Wn.2d 343, 353, 482 P.2d 913 (2021); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). This is because a defendant has no constitutional right to present irrelevant evidence. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); Markovich, 19 Wn. App. 2d at 167. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. If the evidence is relevant, then the State must demonstrate that the evidence was so prejudicial as to disrupt the fairness of the fact-finding process at trial, such that the State's interest in excluding the prejudicial matter outweighs the defendant's right to produce relevant evidence. See Jennings, 199 Wn.2d at 63; Orn, 197 Wn.2d at 353; Hudlow, 99 Wn.2d at 15-16; Markovich, 19 Wn. App. 2d at 167-68.

There is no dispute that the excluded hearsay statements from Dr. Tomei's report were at least minimally relevant on the issue of the basis for Dr. Spizman's opinions. However, as alluded to above and discussed further below, because the statements were admissible for only the limited purpose of showing the basis for

Dr. Spizman's opinions—the substance of which the jury heard in full—the balance in this case tips strongly in favor of the State's interest in excluding this evidence due to its potential confusing effect and against the defendant's interest in marginally bolstering Dr. Spizman's methodology.

For highly probative evidence, "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1 § 22." Hudlow, 99 Wn.2d at 16. The greater the probative value of the excluded evidence, the more likely a court will find a constitutional violation, such as in cases where a ruling excluded a defendant's "entire defense." Jones, 168 Wn.2d at 721. In Jones, the court found a Sixth Amendment violation where the defendant was barred from testifying that the victim had engaged in a many-hour course of conduct involving significant drug use during which the victim engaged consensually in the conduct on which the charges against the defendant were based. Id. at 717-18, 721. Cf. Holmes v. South Carolina, 547 U.S. 319, 323, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (exclusion of evidence that another person had committed the crime charged); Crane v. Kentucky, 476 U.S. 683, 691, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (exclusion of evidence of the physical circumstances that yielded a confession challenged as unreliable); Chambers, 410 U.S. at 292-93, 297-98 (exclusion of testimony by three witnesses that another person had admitted committing the crime charged, together with barring cross-examination of that person); Washington v. Texas, 388 U.S. 14, 16, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)

(exclusion of witness who, the defendant asserted, would testify that the defendant had departed before a shooting). Similarly, the court found a constitutional violation where the trial court allowed only a limited, misleading inquiry into a witness's cooperation with the investigating police department. Orn, 197 Wn.2d at 358-59. The court reasoned that "the right to present evidence of a witness's bias is essential to the fundamental constitutional right of a criminal defendant to present a complete defense, which encompasses the right to confront and cross-examine adverse witnesses." Id. at 352.

The balance more often tips against a constitutional violation when a defendant asserts a right to present a defense violation based on evidentiary limitations imposed on a defense that is otherwise presented and developed. The trial court in Arndt imposed limitations on testimony from a certified arson investigator on how the State's expert determined the cause and origin of a house fire that resulted in a death. 194 Wn.2d at 790, 796. The Supreme Court concluded that (1) Arndt's proffered evidence was not excluded entirely and the investigator was able to testify at length to asserted deficiencies in the prosecution's fire investigation, and (2) Arndt was able to advance her defense theory without the excluded evidence. Id. at 813-14. Thus, Arndt's Sixth Amendment right to present a defense was not violated. Id. Cf. Jennings, 199 Wn.2d at 67 (excluding a toxicology report that showed the victim had methamphetamine in his system did not violate defendant's Sixth Amendment right to present a defense where defendant was able to present evidence of his

subjective fear and belief in the victim's intoxication); Markovich, 19 Wn. App. 2d at 163, 169 (excluding as speculative defense expert's opinions about possible effects of concussion on a substance-induced brain-functioning issue, where expert was permitted to testify about effects of intoxication).

Here, similar to Arndt and unlike Jones, the trial court did not completely bar Caril's defense of lack of intent or capacity by excluding the hearsay statements in Dr. Tomei's report. Instead, the trial court prohibited Caril from introducing two paragraphs taken from a report written in a different context, which would have been allowable only for the purpose of explaining Dr. Spizman's opinions—not for substantive purposes. Allowing the statements presented a risk to the State in having to cross-examine Dr. Spizman on the statements about decompensation from Dr. Tomei's report and lead the jury into the irrelevant issues of civil commitment and future dangerousness. Eliciting such testimony would risk misleading the jury or confusing the issues. Although the excluded evidence was relevant, Caril's need to present this testimony was minimal.

Moreover, because the evidence at issue was relevant for only a limited purpose, and not as substantive evidence, its probative value was low in comparison to the evidence at issue in cases finding a constitutional violation. Caril fails to cite any case in which a court found a constitutional violation based on the exclusion of substantively inadmissible evidence offered solely for the limited purpose to provide additional context for an expert opinion. Courts are permitted to "'exclude evidence that is repetitive . . ., only marginally relevant or

poses an undue risk of harassment, prejudice, [or] confusion of the issues.'" Holmes, 547 U.S. at 326-27 (alterations in original) (internal quotation marks omitted) (quoting Crane, 476 U.S. at 689-90). It is undisputed the hearsay statements in Dr. Tomei's report were not admissible as substantive evidence to show that the matters Dr. Tomei stated were true. In other words, it is undisputed the statements were not admissible to prove that it was true that when not taking medication Caril was in danger of experiencing worsening symptoms and exhibiting aggressive behavior towards others. When limited to the only proper purpose the evidence could serve, it provided, at most, "datapoint[s]" that Dr. Spizman considered in forming his opinions. To the extent the fact of Dr. Spizman's considering the report and its content could potentially enhance to some degree the credibility of his opinions, the excluded statements were only marginally relevant evidence that a court should balance against the State's interest in excluding the evidence.

We hold that the trial court did not violate Caril's constitutional right to present a defense by excluding the hearsay statements in Dr. Tomei's report, and we affirm Caril's conviction for second degree murder.

III

The State concedes that certain errors require resentencing.

First, based on four prior second degree robbery convictions, the trial court sentenced Caril as a persistent offender. See State v. Reynolds, 21 Wn. App. 2d 179, 187, 505 P.3d 1174 (2022) (explaining "persistent offender" designation);

RCW 9.94A.030(37) (defining "persistent offender"). However, under RCW 9.94A.647(1), effective July 25, 2021, Caril's four prior second degree robbery convictions may not be used to sentence Caril as a persistent offender. RCW 9.94A.647(1), (3). A sentencing court is required to grant a motion for relief from the original sentence if it finds that a current or past conviction for robbery in the second degree was used as a basis for a finding that the offender was a persistent offender. RCW 9.94A.647(1), (2). Therefore, the statute provides that Caril "must have a resentencing hearing." RCW 9.94A.647(1).

Second, Caril's offender score at the time of sentencing included a 1998 conviction for violating the Uniform Controlled Substances Act (VUCSA), chapter 69.50 RCW. State v. Blake held Washington's strict liability drug possession statute, RCW 69.50.4013(1), "violates the due process clauses of the state and federal constitutions and is void." 197 Wn.2d 170, 195, 481 P.3d 521 (2021). Because the court found the underlying statute unconstitutional, it vacated the defendant's conviction. Id. Caril is entitled to be resentenced under Blake.

Third, the State concedes no reference to Caril's conviction for felony murder in the second degree should have been made in his judgment and sentence under double jeopardy principles. The United States and Washington State constitutions protect persons from being twice put in jeopardy for the same offense. See U.S. CONST. amend. V; WASH. CONST. art. I, § 9. Both clauses protect against "being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after conviction, and (3)

punished multiple times for the same offense." State v. Linton, 156 Wn.2d 777, 783, 132 P.3d 127 (2006); Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

In State v. Turner, the Supreme Court held that "a court may violate double jeopardy either by reducing to judgment both the greater and the lesser of two convictions for the same offense or by conditionally vacating the lesser conviction while directing, in some form or another, that the conviction nonetheless remains valid." 169 Wn.2d 448, 464, 238 P.3d 461 (2010) (emphasis omitted). Double jeopardy prohibits courts from explicitly holding vacated lesser convictions for reinstatement should the more serious conviction for the same criminal conduct be overturned on appeal. Id. at 465. The judgment and sentence cannot have any reference to the vacated conviction, and an order appended to the judgment and sentence also cannot contain such a reference. Id. Turner concluded, "In the future, the better practice will be for trial courts to refrain from any reference to the possible reinstatement of a vacated lesser conviction." Id. at 466.

Here, the trial court entered an order vacating Caril's conviction for felony murder for purposes of sentencing to avoid violating double jeopardy, but this was insufficient under Turner. Caril's conviction for felony murder in the second degree and the associated deadly weapon enhancement should not be in the judgment and sentence. Thus, resentencing consistent with Turner is appropriate.

Finally, Caril seeks correction of a scrivener's error in the judgment and sentence. The judgment and sentence originally incorrectly cited RCW

9A.32.030(1)(a) as the relevant statute for Caril's conviction for second degree intentional murder. The correct statute is RCW 9A.32.050(1)(a). This error was corrected by the trial court in a subsequent order and is moot.

IV

We affirm Caril's conviction, vacate his sentence, and remand for resentencing.

Birk, J.

WE CONCUR:

Cohen, J.

Dwyer, J.

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

September 28, 2022 - 11:52 AM

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