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SUPREME COURT NO. 102507-6
COURT OF APPEALS NO. 84027-4-I

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DAVID SYKES,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

The State of Washington, respondent below, seeks review of the unpublished opinion filed in State v. David Sykes, No. 84027-4-I (Wa. Ct. App. Div. I, filed August 21, 2023). Appendix A. The State's motion for reconsideration of that decision was denied on September 26, 2023. Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. When the Court of Appeals reversed this conviction based on its speculation that the mention of a psychotropic medication in a medical record could have affected the claim of self defense, did it ignore the defendant's burden to establish that deficient performance of counsel caused actual prejudice, where there was no colorable claim of self defense and no mental defense was raised?

2. When the Court of Appeals found that a prior hung jury is a factor in establishing whether an error by defense counsel caused actual prejudice, did its decision endorse an

analysis contrary to the public interest and contrary to established law prohibiting speculation as to jury deliberations?

3. Defense counsel did not recognize a medication in a list included in Sykes' medical record, which was offered by the defense to corroborate his report of an attempted robbery three days before this incident. Has Sykes failed to establish that, in the context of the capable and aggressive advocacy provided by trial counsel, this failure to recognize that medication and redact it was constitutionally deficient performance, and that it caused him actual prejudice?

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant David Sykes was convicted of assault in the first degree with a deadly weapon enhancement for stabbing Richard Moore on March 26, 2021. CP 112, 113; 3RP 598.¹

¹ This petition refers to the Report of Proceedings as follows: 1RP – volume including 8/25/21 to 9/9/21; 2RP – volume

Sykes sought an exceptional sentence downward at sentencing. 3RP 644-47. The court rejected that request, observing that this first-degree assault, stabbing a person in the heart, was about as serious as that crime could get, that Sykes' prior convictions also were for serious crimes, and that Sykes had threatened physical violence to the jurors. 3RP 648-49. Sykes made those repeated and profane threats in open court while the jury was being polled and again at the motion for a new trial. 3RP 598-602, 617-18, 625-26. The court imposed a high-end standard range sentence. CP 180-88; 3RP 649.

2. SUBSTANTIVE FACTS.

Sykes was riding a Metro Bus in Seattle on March 26, 2021, when Richard Moore got on the bus and eventually sat down near Sykes. 3RP 516-17; Exh. 6. Sykes threatened Moore with a knife, then stabbed Moore in the chest as Moore

including 11/29/21 to 12/13/2021; 3RP – last two volumes, including 3/14/22 to 4/20/22.

backed away with empty hands raised. Exh. 4, 6. Sykes told police that he stabbed Moore because Moore had robbed Sykes three days earlier. 3RP 350, 353-54, 368. The incident was recorded by security cameras on the bus. Exh. 6.² The stabbing also was recorded on a cell phone video. Exh. 4.

The video of the stabbing shows that Moore, who was unarmed, never touched Sykes. Exh. 6. Soon after Moore sat down the two spoke. 3RP 518. Sykes, still seated, began yelling, “Don’t talk to me!” Ex. 6 at 2:29. A nearby passenger recalled Sykes raised his voice and said something like, “Get away from me, man. Stay away from me, man. I will F [sic] you up, man.” 3RP 518.

Sykes pulled a knife from his pocket, then stood and moved toward Moore, displaying the open knife, yelling, threatening to “fuck you up” and pointing at Moore. Exh. 6 at

² Exhibit 6 is a compilation of camera angles that shows the series of events chronologically. 3RP 305-06. Exhibit 5 includes the entirety of the video recordings from the bus, including those included in the compilation. 3RP 305.

2:36. Moore can be heard saying, “I didn’t say nothing to you” and a few seconds later, “What are you talking about?” Exh. 6 at 2:40-50.

Sykes sat down again, still yelling, “Don’t talk to me,” and within seconds stood up again, holding his knife in front of him. Exh. 6 at 2:50. Moore was standing at this point and backed up, moving toward the front of the bus. Exh. 4. Sykes pursued Moore and stabbed Moore in the chest. Exh. 4, 6.

The compilation bus video that is Exhibit 6 begins with Moore getting on the bus, shows him go to the front of the bus to get a mask, then stand in the back aisle with his back to Sykes, and about 90 seconds after he boarded, take the seat near Sykes. The recording shows Sykes pull his knife and threaten Moore, and approach Moore with the knife. It has audio that includes Sykes yelling. The stabbing is partially obscured in the bus video by another passenger and a plexiglass panel, but was clearly recorded by a passenger’s cell phone camera. Exh. 4; 3RP 289-90, 313.

Moore had been stabbed in the heart and an artery was severed. 3RP 437-39. The wound would have been fatal without medical care. 3RP 441. No weapons were found on Moore or in his vicinity. 3RP 283, 292, 476-77.

After stabbing Moore, Sykes turned and calmly walked to the rear exit door of the bus; he “just nonchalantly walked off the bus” at the next stop. Ex. 6 at 3:10; 3RP 524-25. The bus continued to the next stop, then stopped and police and medics quickly arrived. 3RP 526-27.

Police obtained a description of the assailant and the direction he had fled. 3RP 341-42. About ten minutes later, King County Sheriff’s Deputy Ruiz spotted Sykes, whose appearance was consistent with that description, and who was yelling and making hand motions. 3RP 341-47, 371. When Ruiz stopped, Sykes approached, agitated and yelling, “Yeah, I did it.” 3RP 349-50.

Sykes said he had stabbed Moore; he repeatedly said that he had been robbed several days before and that was the reason

he had stabbed Moore. 3RP 350, 353-54, 368. Ruiz found the still bloody knife in Sykes' pocket. 3RP 358-59, 472-73.

When Detective Emmons arrived, Sykes told Emmons that Sykes had been robbed a few days before and that the person who did it sat across from Sykes on the bus and said, "What you going to do about it?" 3RP 378-80. Sykes then pulled out a knife, stabbed the man, then walked off the bus and left. 3RP 378.

Without testifying at trial, Sykes presented evidence that he had been the victim of an attempted robbery three days before this assault. The defense called Seattle Police Officer Coleman, who testified to Sykes' report of the attempted robbery on March 23, 2021. 3RP 483-87. Body-camera video from Officer Coleman and from Seattle Police Officer Chang was admitted, showing Sykes reporting and describing the attempted robbery. 3RP 486-92; Exh. 23 (both video recordings). Sykes did not know his assailants. 3RP 491, 497. The defense admitted the medical record of the treatment of

Sykes at Harborview Medical Center after the attempted robbery. Exh. 17. Those records included Sykes' report that he had been punched during an attempted robbery and treatment providers noted swelling on his face and a scratch on his eye. Exh. 17, p. 1, 3; 3RP 447.

Under the title "Medications," the medical record included a list of 14 assorted medications. Exh. 17, pp. 3-4. The tenth medication listed was "olanzapine 10 mg oral tablet Dose: 10 mg PO QHS." Exh. 17, p. 4. Olanzapine is an atypical antipsychotic medication, approved for use for schizophrenia, bipolar disorder, and depression.³

Three of the seated jurors had revealed during jury selection that they had professional experience in medicine or

³ WebMD, Olanzapine - Uses, Side Effects, and More, <https://www.webmd.com/drugs/2/drug-1644-9274/olanzapine-oral/olanzapine-oral/details> (last visited 3/8/23); Kristina Thomas & Abdolreza Saadabadi, *Olanzapine* (Jan. 2022), found at National Institute of Health, National Library of Medicine, <https://www.ncbi.nlm.nih.gov/books/NBK532903/> (last visited 3/8/23).

related fields that involved mental health treatment. Juror 7 stated in the jury questionnaire that she was a physician at a local hospital. Pretrial Exh. 7⁴; CP 212-13; Juror 9 (numbered Juror 22 in the venire) stated in the questionnaire that she was a registered nurse, employed at Cascade Behavioral Hospital. Pretrial Exh. 7; CP 213. Cascade Behavioral Hospital is a psychiatric hospital and behavioral health treatment center.⁵

Juror 13 (numbered Juror 27 in the venire) stated in the juror questionnaire that she was a licensed clinical social worker employed at Harborview Medical Center, had been “primarily working with patients with severe mental illness for the past 15 years,” and supervised “emergency department social workers and Inpatient Psychiatry.” Pretrial Exh. 7; CP 213.

⁴ The responses to the juror questionnaire were filed as an exhibit by the court post-trial, 3RP 652, but the exhibit is listed in the amended Pre-trial Exhibit List as Exh. 7.

⁵ <https://www.cascadebh.com/>.

The jury retired to deliberate at 1:15 p.m. on March 23. CP 235. At 2:27 p.m., the jury sent a written question to the court, stating, “Can we consider No. 17, Sykes’s medication list? There seems to be antipsychotic meds.” CP 109, 235; 3RP 587. Both parties agreed to the court’s response, which was:

You may consider Exhibit #17 in its entirety. However, your deliberations must be based on the evidence in the case and the law given to you by the court. The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during the trial. You are not permitted to apply highly specialized knowledge during your deliberations that you may have gained as a result of professional or personal experience.

CP 110; 3RP 589-95.

The court’s response was provided to the jury on March 23, 2022, at 3 p.m., and the jury continued to deliberate until 3:47 p.m. CP 235; 3RP 595-96. Deliberations resumed the next day at 9:01 a.m. and the jury submitted its verdict at 9:50

a.m. CP 236. The court received the guilty verdict March 24, 2022, at 10:13 a.m. 3RP 597.

The next day, Sykes filed a motion for mistrial, alleging there was juror misconduct in its recognition of the nature of the drug olanzapine. CP 114-17; 3RP 614. Upon a hearing April 5, 2022, the trial court denied the motion, treating it alternatively as a motion for new trial. CP 198-99; 3RP 622-25.

D. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

RAP 13.4(b) provides that this Court may accept review of a decision of the Court of Appeals that conflicts with a decision of the Supreme Court or involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1), (4). The decision below warrants review under both criteria. It conflicts with this Court's decisions establishing the standard for evaluating a claim of ineffective assistance of counsel. The decision also

endorses consideration of a prior hung jury as relevant to that determination, contrary to the law prohibiting speculation about jury deliberations. Use of that procedural history as evidence of prejudice also is contrary to the public interest because it represents an assumption that may amplify the inherent bias that could well be the cause of that prior result when the victim of a crime is a Black man and there is a claim of self defense.

1. THE COURT OF APPEALS RELIED ON SPECULATION TO FIND INEFFECTIVE ASSISTANCE OF COUNSEL.

The Court of Appeals relied on speculation and did not apply Supreme Court precedent requiring a showing of deficient performance and actual prejudice to establish ineffective assistance of counsel. It concluded that defense counsel's failure to recognize that the drug olanzapine is a psychotropic medication was deficient performance and that the failure to redact the reference to that medication caused actual prejudice to the claim of self defense because of the way

“circumstances converge[d]” in this case. App. A at 4. The list of circumstances, however, provides only a basis upon which to speculate, because there was no colorable claim of self defense and no mental defense was proffered.

To establish constitutionally ineffective assistance, the defendant must affirmatively show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Strickland v. Washington, 466 U.S. 668, 687, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). He must show a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland, 466 U.S. at 694. “The likelihood of a different result must be substantial, not just conceivable.” Harrington v. Richter, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Speculation that a different result might have followed is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006).

The Court of Appeals held that three circumstances converged to make the failure to redact the medication list prejudicial. Two of those circumstances can only produce speculation relating to jury deliberations: the professional background of three jurors, and the fact that two prior trials resulted in mistrials due to jury deadlock. The only circumstance properly considered, Sykes' demeanor and statements during transport to the police station, does not establish that the reference to olanzapine caused actual prejudice and that without it, the result of the trial would have been different. The Court of Appeals reversed based on a belief that Sykes could possibly have been prejudiced, in conflict with this Court's decisions requiring a showing of actual prejudice.

- a. Speculation about the Effect of the Reference to a Psychotropic Drug Does Not Establish Actual Prejudice.

The Court of Appeals held that circumstances converged to make the failure to redact the medication list prejudicial but

the listed circumstances support only speculation, they do not establish actual prejudice singly or in combination, even if all three were properly considered, given the facts in this case.

Even if the jurors believed Sykes was having a “mental health episode” at the time, the Court of Appeals simply speculates that it would affect the jurors’ evaluation of whether the State disproved that Sykes “reasonably believed he was about to be injured,” because there was no evidence that Sykes believed that he was about to be injured, reasonably or not.

Sykes told police that he stabbed Moore because (he believed) Moore had tried to rob Sykes three days earlier. 3RP 350-54, 368, 378-80. Sykes did not say that Moore had threatened Sykes on the bus, or had displayed a weapon or implied that he had a weapon, or even touched Sykes; he claimed Moore had said only, “What are you going to do about it?” and Sykes then pulled out a knife and stabbed Moore. 3RP 378-80.

Sykes' statements to the police that he intentionally stabbed Moore because Moore had allegedly robbed Sykes three days earlier were rational, although not a legal justification for stabbing Moore. Defense counsel verified Sykes' report of the prior incident by police testimony, body camera video, and Harborview records. Exh. 17, 23; 3RP 483-92. There was no evidence that Sykes' perception of reality was affected at the time of the stabbing – Sykes' account of the event immediately afterward corresponds with the video of the stabbing and his reference to the prior incident was corroborated by police and medical reports.

The Court of Appeals identified the difference between the earlier trials and this trial as testimony regarding Sykes' statements and demeanor in the patrol vehicle during transport to the police station, but there is no claim that this evidence was admitted because of any deficiency of defense counsel.

Moreover, evidence of Sykes' unstable mood during transport to the precinct after his arrest establishes no more than

that – at that time his mood was fluctuating. The court states that Detective Peterson testified that Sykes identified himself as God. App. A at 4. But that testimony was that Sykes said, “I’m God. I don’t play that shit. I don’t give a fuck if you like me or not. Bring your case or whatever.” 3RP 400-01. That statement indicates that Sykes had taken retribution into his own hands and was willing to face the consequences. It does not convey that he thought he was a deity, who was beyond the laws of the State. This interpretation is reinforced by Sykes’ later spontaneous statement that Moore “got what he deserved.” 3RP 469. Defense counsel explained that Sykes was “ranting” and made the statements in the car because he was “mad” that he was “beat up” three days before and that Moore “instigated the interaction on the bus.” 3RP 578.

The Court of Appeals in effect inserted a mental defense (an effect on the defendant’s capacity to perceive events or form a requisite mental state) in a case where no mental defense was raised, and then concluded that the mention of the

medication was prejudicial to that defense. There was no testimony that Sykes' mental state was compromised at the time of the stabbing – Sykes did not testify and his statements to the police did not assert that he had been confused. He told police that he intentionally stabbed Moore and explained why. 3RP 350, 353-54, 368. No expert testified that Sykes suffered from any mental disorder that could have affected his mental state. The jury had no basis to conclude that a “mental health episode” was relevant to its verdict and only speculation can support the conclusion that it did.

Illustrating further that any prejudice here is speculative, the jury may have used the evidence of possible mental illness in Sykes' favor as they considered the statements in the patrol car. They might have viewed Sykes more sympathetically and considered it a reason to discount the anger in those statements and to explain his later statement that he did not care if Moore died. 3RP 469. They may have considered it a reason that it

was more likely that Sykes believed he was in danger, even though Sykes was threatening Moore on the bus.

The self-defense standard includes an objective as well as a subjective component: the defendant's subjective belief of actual danger must be reasonable. CP 104-05. The possibility that the defendant was affected by mental illness does not alter the objective portion of the inquiry: that a reasonable person would have perceived that there was actual danger and that the force used was no more than reasonably necessary to repel that threat. State v. Janes, 121 Wn.2d 220, 239, 850 P.2d 495 (1993). The objective portion of the standard is required because without it, "a jury would be forced to evaluate the defendant's actions in the vacuum of the defendant's own subjective perceptions." Id. The court in Janes noted:

"Applying a purely subjective standard in all cases would give free rein to the short-tempered, the pugnacious, and the foolhardy who see threats of harm where the rest of us would not and who blind themselves to opportunities for escape that seem plainly available. These unreasonable people may not be as wicked as (although perhaps more dangerous than) cold-blooded murderers ...

but neither are they, in practical or legal terms, justified in causing death.”

Id. at 240 (quoting *Defending Women*, 88 Mich.L.Rev. 1430, 1435 (1990)). Because the undisputed facts here do not support a conclusion that stabbing an unarmed man in the chest was objectively reasonable, any doubts about Sykes’ subjective motivation were not prejudicial.

Sykes has not established that failure to redact the medication list caused him actual and substantial prejudice.

b. Relying on Jury Deadlock in Prior Trials Is Both Speculative and Contrary to Substantial Public Interest.

One of the three circumstances on which the Court of Appeals relied to find actual prejudice was that two prior trials in this case ended in mistrial due to jury deadlock. App. A at 4. The lack of a unanimous verdict in previous trials does not establish that any difference in the final trial was the cause of

the unanimous verdict and relying on this factor is contrary to the public interest.

As a preliminary matter, the Court of Appeals identified the difference between the earlier trials and this trial as the testimony of Detective Peterson regarding Sykes' behavior in the patrol vehicle, but there is no claim that this evidence was admitted because of any deficiency of defense counsel. If the testimony of Detective Peterson established that Sykes was not in touch with reality when he was being transported to the police station, it is not the reference to olanzapine that is the difference between the trials. The medical records including the reference to olanzapine were admitted in both prior trials. Ex. 17 (first trial); Ex. 16 (second trial). New evidence that was not the result of defense counsel's performance cannot be the basis of a finding that a prior deadlocked jury demonstrates that counsel's performance caused actual prejudice.

It is "purely speculative" why there was a hung jury in a prior trial and the prior result does not establish that any

difference in the new trial that is error was prejudicial. State v. Gill, noted at 200 Wn. App. 1019 (No. 72951-9-I), 2017 WL 3478088 at *12 (2017) (unpublished, cited here for its persuasive value). Cases in which logically inconsistent verdicts have been upheld note that the verdicts may have been the product of mistake, jury lenity, or nullification. State v. Goins, 151 Wn.2d 728, 733, 92 P.3d 181 (2004); *see also* United States v. Geffrard, 87 F.3d 448, 450-52 (11th Cir. 1996) (juror refused to convict because of religious beliefs). In this case each of the two prior juries was deadlocked eleven to one to convict and any of those factors may have caused the deadlock. CP 212.

It is also possible that conscious or unconscious bias played a role in the prior jury deadlocks. The victim in this case, Richard Moore, was a Black man⁶ and a single holdout juror in each case may have been unwilling to convict because

⁶ Exh. 1.

the victim was devalued or because the defendant was claiming that he acted in self defense and stereotypes of a Black man appearing to be threatening or as likely to be violent may have influenced their decision. The possibility that bias may have played a role reinforces the impropriety of relying on that prior jury deliberation as evidence of actual prejudice in the current trial.

The Court of Appeals cited In re Detention of Post for its conclusion that a prior hung jury is significant but in Post, the court emphasized that new evidence that was improperly admitted was on an entirely new topic, was repeatedly and systematically presented, and that an improper inference was argued in closing. 170 Wn.2d 302, 314-15, 241 P.3d 1234 (2010). The court in Post found prejudice based on the scope of the evidence and argument improperly presented, not simply the fact of a prior deadlocked jury.

c. Relying on the Professional Background of Jurors to Establish Prejudice Is Improper Speculation Regarding Jury Deliberations.

A second circumstance on which the Court of Appeals relied to find actual prejudice was the professional background of three jurors: “a hospital social worker, a behavioral health nurse, and a physician.” App. A at 4. Concluding that the background of the jurors was evidence of prejudice can only be based on speculation concerning the effect of their professional experience on their deliberations.

The Court of Appeals concluded that the reference to the medication suggested that Sykes “was suffering from a mental health episode” when he stabbed Moore. App. A at 5. It is unclear what the Court of Appeals meant by “a mental health episode,” so it cannot be more than speculation that it would be relevant to the verdict.

Moreover, jurors educated about mental disorders would have known that a list of medications in a medical record may not be current and certainly does not establish mental

impairment – when Sykes was treated at Harborview, his mental state was characterized as “appropriate,” he had a “reassuring neurological exam,” and he was described as calm, cooperative, alert, and oriented to person, place, time, and situation. Exh. 17, p. 5, 7-8, 11. The jurors also were instructed not to consider specialized knowledge in their deliberations. CP 110; 3RP 589-95. They are presumed to follow the court’s instructions. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013).

d. The Single Mistake Identified in a Course of Aggressive Advocacy Did Not Constitute Constitutionally Deficient Performance.

The analysis of the Court of Appeals also failed to distinguish the two prongs of the Strickland test for ineffective assistance, deficient performance and prejudice, when it concluded that because the reference to olanzapine could have prejudiced Sykes, offering the medication list without redacting it was deficient performance. App. A at 4. There is no

indication in the record that defense counsel had reason to believe that Sykes may have been taking antipsychotic medication and it is clear that defense counsel did not recognize the scientific name of the drug as one used as an antipsychotic, as well as bipolar disorder and depression.⁷ 3RP 587-89.

Although as the trial court noted, many people who are not medical professionals are familiar with the scientific names of some medications,⁸ a knowledge of the scientific names of medications is not a requirement for competent counsel.

Without a reason to investigate the list of medications, the failure to do so is an error only in hindsight.

Trial counsel was an aggressive advocate for Sykes, obtaining and presenting the medical records to corroborate Sykes' report of an attempted robbery and his reported injury to his eye, and presenting evidence of Sykes' report of that robbery through Seattle Police Officer Coleman's testimony

⁷ See footnote 3 supra.

⁸ 3RP 624.

and body-camera video of Sykes reporting it. The object of the medical records was to bring out the injury to Sykes and his report of the robbery incident to hospital staff – that was accomplished through the exhibit and testimony at trial. Exh. 17, p. 1, 3; 3RP 447.

It is difficult to establish deficient performance of counsel “when counsel’s overall performance indicates active and capable advocacy.” Richter, 562 U.S. at 111. The constitutional right to counsel “guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.” Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003). The challenger’s burden is to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Richter, 562 U.S. at 104 (quoting Strickland, 466 U.S. at 687).

“[A]n attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for

what appear to be remote possibilities.” Richter, 562 U.S. at 110. In Richter, the court held that it was not deficient for defense counsel to fail to consult a blood evidence expert in preparing the defense, where a prosecution expert testified at trial about the blood evidence. Id. at 107. The court noted that it was not clear at the time the defense was preparing that the evidence was important – it only became significant when later evidence emerged; reliance on that hindsight to find deficient performance was improper. Id.

It is only hindsight that informs Sykes’ argument on appeal that his attorney should have investigated all of the medications listed in the medical record. Counsel had no reason at the time to believe the medications on the list might be prejudicial and it would be ironic if his appropriately aggressive advocacy in presenting those medical records to establish the prior attempted robbery is used to establish deficient performance.

E. CONCLUSION


The Court of Appeals relied on speculation in reversing this conviction based on ineffective assistance of counsel and that decision should be reversed. The Court of Appeals did not address the issues relating to alleged juror misconduct raised by Sykes on appeal so, upon reversal, the case should be remanded to the Court of Appeals for resolution of those issues.

This document contains 4689 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 24th day of October, 2023.

Respectfully submitted,

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Appendix A

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

DAVID DARRELL SYKES,

Appellant.

No. 84027-4-I

DIVISION ONE

UNPUBLISHED OPINION

BIRK, J. — Because we conclude David Sykes’s criminal conviction was affected by ineffective assistance of counsel, we reverse and remand.¹

I

Evidence showed that on March 26, 2021, Sykes and another individual later identified as Richard Moore physically fought one another on a bus, and Moore was stabbed. After the stabbing, Sykes exited the bus. A sheriff’s deputy located Sykes, who indicated, “Yeah, I did it,” asserting Moore had robbed him. Three days earlier, Sykes had reported to police that two assailants had attempted to rob him. A deputy testified Sykes asserted Moore had been one of the assailants, and that he stabbed Moore in self-defense.

¹ On June 26, 2023, Sykes filed a pro se motion seeking dismissal of the charges against him with prejudice. He does not provide a justification for this relief, and we deny his motion.

On July 28, 2023, Sykes filed a pro se motion seeking reversal of his conviction. In light of our disposition, we deem this motion moot.

To support his self-defense claim, Sykes introduced exhibit 17, a partially redacted medical chart note from March 23, 2021. According to the chart note, Sykes reported he had been assailed by two men attempting to rob him. The exhibit included a medication list, among other medical data. During deliberations, the jury submitted a question asking in part, "Can we consider # 17 Sykes medication list? There seems to be antipsychotic meds." Defense counsel initially was uncertain which listed medication was being referenced, but it later became evident the jury was referring to the drug olanzapine. Based on concern healthcare professionals seated on the jury were applying specialized expertise not admitted in evidence, the trial court instructed the jury:

You may consider Exhibit #17 in its entirety. However, your deliberations must be based on the evidence in the case and the law given to you by the court. The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted during the trial. You are not permitted to apply highly specialized knowledge during your deliberations that you may have gained as a result of professional or personal experience.

The jury returned a guilty verdict.

In a posttrial motion for a mistrial, Sykes's counsel offered several statements attributed to jurors to attempt to show jury misconduct affecting the verdict. A court may consider affidavits of jurors only to the extent they do not attest to matters that inhere in the verdict. Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 272, 796 P.2d 737 (1990). Jurors' statements inhere in the verdict if the facts alleged are linked to the juror's motive, intent, or belief, or describe their effect on the juror. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d

651, 379 P.2d 918 (1962). The proffered juror statements in this case inhered in the verdict except to the extent they established the extrinsic fact that olanzapine is an antipsychotic medication. In addition, in denying the motion, the trial court concluded that knowledge that olanzapine is an antipsychotic is not specialized knowledge. The State maintains the trial court did not abuse its discretion in so concluding.

Sykes asserts his counsel's neglect to redact the medication list was ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel performed deficiently and that the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Review is de novo. State v. Wafford, 199 Wn. App. 32, 41, 397 P.3d 926 (2017). Counsel's performance is deficient if counsel erred so seriously that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). We presume effective representation and require the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Counsel's performance is evaluated based on the entire record. Id. at 335. To show prejudice, the defendant must show counsel's deficient performance deprived the defendant of a fair trial, a trial whose result is reliable. Grier, 171 Wn.2d at 32-33. This showing is made when there is a reasonable probability that,

but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Circumstances converge to make the failure to redact the medication list prejudicial deficient performance in this case. First, three healthcare professionals had disclosed their expertise during jury selection and had been empaneled on the jury: a hospital social worker, a behavioral health nurse, and a physician. Second, Sheriff's Deputy Austin Peterson transported Sykes to the police station in his patrol car. Peterson testified Sykes's demeanor was "unstable" with mood fluctuations "from real highs to real lows" and "almost like a manic laughter to angry yelling." Peterson testified Sykes said, " 'I'm God. I don't play that shit. I don't give a fuck if you like me or not.' " Third, this was Sykes's third trial. The first two had ended in mistrials due to jury deadlock, and the State offered Peterson's patrol car statements only at the third trial. This history is suggestive the patrol car statements were significant to the outcome. In re Det. of Post, 170 Wn.2d 302, 315, 241 P.3d 1234 (2010) (conviction after new evidence in second trial). Fourth, Sykes's defense turned on the jury concluding the State had not disproved that at the time of the assault Sykes "reasonably believ[ed]" he was about to be injured and was "preventing or attempting to prevent an offense" against him.

Offering evidence without redacting its indication that Sykes received antipsychotic medication was deficient performance under these circumstances. Together with Peterson's statements that Sykes identified himself as God, the

reference to the medication suggested Sykes was suffering from a mental health episode at the time of the assault. And together with the defense depending on Sykes's rational use of lawful force, the first two trials ending in deadlock in the absence of Peterson's statements, and the jury's evident focus on the medication list, we are satisfied the trial was prejudicially affected by the failure to redact the medication list. The State does not contend the failure to redact the medication list was a reasonable strategy or tactic, and exhibit 17 was already partially redacted without objection. No party asserts and we do not hold the instruction given during deliberations was error, but it maintained exhibit 17 within the jury's consideration. Relevant to ineffective assistance of counsel, it therefore did not alleviate the prejudice from defense counsel's failure to redact the medication list. Sykes has demonstrated ineffective assistance of counsel.

II

Because the issue is likely to arise in the event of retrial, we address Sykes's contention that the trial court erred by sustaining the State's hearsay objection to certain of Sykes's statements he offered. After Peterson testified to Sykes's unstable demeanor and statement identifying himself as God described above, Sykes sought to elicit on cross-examination statements noted in Peterson's report that Sykes claimed he had been robbed. The court sustained the State's hearsay objection.

Under ER 106, a party may supplement portions of a writing or recorded statement offered by an adverse party with other relevant portions as fairness

requires. State v. Simms, 151 Wn. App. 677, 692, 214 P.3d 919 (2009). When an adverse party has opened the door to a subject at trial, the court may “admit evidence on a topic that would normally be excluded for reasons of policy or undue prejudice when raised by the party who would ordinarily benefit from exclusion.” State v. Rushworth, 12 Wn. App. 2d 466, 473, 458 P.3d 1192 (2020). The trial court ruled that neither principle allowed Sykes to introduce his other statements to Peterson based on the statements the State elicited. We review this ruling for abuse of discretion and find none here. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) (admissibility rulings reviewed for abuse of discretion).

It was tenable for the trial court to conclude the additional statements Sykes sought to offer were not necessary to explain, place in context, or correct a misimpression or unfair implication caused by the statements the State elicited from Peterson. Other law enforcement witnesses who had testified earlier had already related Sykes’s agitation over his having been robbed and then having encountered, he said, the same assailant. Sykes later called a police officer to whom he had reported the attempted robbery three days before. The statements Sykes wished to offer from Peterson were additional to the statements the State elicited, but not explanatory, and would have been cumulative of other evidence robustly represented in the record. Because we affirm the trial court’s ruling that neither ER 106 nor the opening-the-door principle justified admitting the additional statements, we need not reach the question disputed by the parties, whether ER 106 applies to Peterson’s testimony relating Sykes’s statements.

No. 84027-4-1/7

We do not reach Sykes's remaining claims of error.

Reversed and remanded.

Birk, J.

WE CONCUR:

Cohen, J.

Smith, C.J.

Appendix B

Appendix B

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

THE STATE OF WASHINGTON,

Respondent,

v.

DAVID DARRELL SYKES,

Appellant.

No. 84027-4-I

ORDER DENYING MOTION
FOR RECONSIDERATION

The appellant, David Sykes, filed a motion that was received after our opinion was filed, therefore, we treat it as a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.



Judge

KING COUNTY PROSECUTOR'S OFFICE - APPELLATE UNIT

October 24, 2023 - 1:50 PM

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