NO. 31274-7

IN THE COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

JAMES J. LANDIS

APPELLANT,

V.

STATE OF WASHINGTON

RESPONDENT

BRIEF OF RESPONDENT

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3. The Appellant claims the trial court commit error when it disallowed cross examination of Detective Files about statements made by Mary Landis claiming there were other incidents where the defendant's behavior differed from that on the day of the assault.

B. ISSUES PERTAINING TO ASSIGMENTS OF ERROR

1. Was the defendant denied effective assistance of counsel where a diminished capacity defense was unsupported by the evidence and contrary to the defendant's theory of the case?
2. Did the trial court commit error by not instructing the jury on voluntary intoxication where the instruction was mutually exclusive of the asserted defense and not

supported by the defendant's own statements regarding consumption of intoxicants and his lack of impairment?

3. Did the trial court commit error when it disallowed cross examination of Detective Files about statements made by Ms. Landis concerning other unrelated incidents where the evidence was prohibited character evidence offered under the guise of ER 106?

C. STATEMENT OF THE CASE

1. Substantive Facts

The defense theory of the case was the defendant did not assault Mary Landis with the tractor, it was an accident. RP Trial 10/11/12 through 10/17/12 (hereinafter "RPT"), pg. 259. Additionally the defense theory was that the defendant may have intentionally assaulted the law enforcement officer by creating apprehension, but he did not intend to kill them, in part because he was an excellent shot, and wanted the law enforcement officers to kill him. RPT, pg. 260, 261, 262-263.

The defendant's wife, Mary Landis testified at trial. RPT, pg. 264. Ms. Landis was reliant on the defendant for income. RPT, pg. 294. On August 7, she and the defendant had been working in the garden. RPT, pg. 265. Some neighbors showed up and Ms. Landis took them to see their new greenhouse. RP Trial, pg. 266-267. When Ms. Landis returned to the garden, the defendant had run over the irrigation in the garden with his tractor and mower. RPT, pg. 267. Ms. Landis took the keys out of the tractor because she wanted him to calm down. She stated it did not calm the defendant down and he went to the house and retrieved another set of keys.

RPT, pg. 267-270, 297. Ms. Landis tried to stop the defendant from causing more damage, and stood in front of the tractor and tried to calm the defendant down. RPT, pg. 271-272, 288. Ms. Landis was knocked down and then run over by the tractor being driven by the defendant. RPT, pg.276, 290. The defendant then drove the tractor back to the house, leaving Ms. Landis in the garden. RPT, pg. 300-301. Ms. Landis was unable to walk and drug herself to the car and drove to a neighbor's house. RPT, pg. 277-278.

After being injured, Ms. Landis made statements to her neighbor Bobbie Joe Meyers, North Valley Hospital medical staff, and sheriff's deputies. After being transferred to Brewster Hospital to see and orthopedic surgeon, she spoke with Chelan County Detectives. RPT, pg. 272-275, 280, 285, 295.

During her testimony Ms. Landis denied making, or claimed lack of memory about, multiple statements she had made about the incident to her neighbor, medical personnel, and law enforcement. She testified the assault was an accident and that she fell in front of the tractor. RPT 275, 299, 318-319. Prior to Ms. Landis taking the stand the State advised her that it would not be inquiring about PTSD and that it was hearsay. Nonetheless, Ms. Landis repeatedly tried to allege the defendant was suffering PTSD at the time of the

assault. RPT, pg. 307, 311, 313-314. The Court also clarified it was allowing the State to ask leading question in direct examination because Ms. Landis was a clearly adverse witness. RPT, pg. 308, 312-313. The Court found that Ms. Landis sought to answer beyond the scope of the State's questions in an attempt to assert PTSD, and ruled in limine that defense could not inquire of Ms. Landis about PTSD. RPT, pg.313-314. Despite the Court's ruling, Ms. Landis continued to try and insert the topic of PTSD into cross examination. RPT, pg.315, The State objected based on the Court's ruling and that it was self-serving hearsay. RPT, pg.315, 320.

On redirect, Ms. Landis was questioned about a sworn statement she submitted in the divorce proceedings against the defendant in which she describe the assault on August 7, 2010. RPT, pg. 322-325. In the declaration (contrary to her testimony in trial) Ms. Landis indicated the defendant became angrier when she stood in front of the tractor, he put the tractor in gear and bumped her with it, causing her to fall. She scrambled to get out to the way, but was run over, causing a fractured tibia. RPT, pg. 327, 334, 367. Ms. Landis told Ms. Meyers the defendant had threatened to kill her and himself. RPT, pg. 366.

Bobbie Jo Meyers testified that Ms. Landis came to her house around 4:30 pm on August 7, 2010 and was covered in mud and was having difficulty walking. Ms. Landis told Ms. Meyers the defendant had run over her. Ms. Landis did not want Ms. Meyers to take her to the hospital for fear of getting the defendant in trouble. RPT 354, 356. Ms. Meyers asked her husband to move Ms. Landis' car from in front of their house to a place behind a building so it was concealed from view. RPT, pg. 360.

Bill Meyers was contacted by his wife, Bobbie Jo, while she was still at the hospital with Ms. Landis. After learning what had transpired, Mr. Meyers contacted law enforcement. RPT, pg. 370-371.

On August 7, 2010, Deputy Kevin Newport was working night shift with his squad that included Sgt. Tracy Harrison, Deputy Dave Yarnell and Deputy Rob Heyen. RPT, pg. 375-376, 423. When Deputy Newport and Sgt. Harrison checked into service at approximately 6:00 pm they received the pending assault compliant involving Ms. Landis, who was still at North Valley Hospital. Both responded the complaint. Sgt. Harrison arrived at the hospital first. RPT, pg. 376-378, 433.

At the hospital Deputy Newport observed that Ms. Landis' clothing was covered in dirt and dust. Both officers observed injury to Ms. Landis' lower leg. RPT, pg. 379-380, 434. Ms. Landis told Sgt. Harrison that when she came back to the garden after the neighbors had arrived, the defendant had started mowing and was angry about irrigation lines he had run over. Ms. Landis removed the tractor keys so the defendant would not cause more damage. The defendant called her a "stupid bitch" and said he would just get another set of keys from the house. He got another key and returned. Ms. Landis then stood in front of the tractor to keep the defendant from mowing. RPT, pg. 440, 445. The defendant started moving the tractor forward, nudging Ms. Landis and knocked her down. The defendant continued moving forward and ran over Ms. Landis' leg with the tractor. RPT, pg. 441. Ms. Landis told Sgt. Harrison the defendant didn't believe she was injured and demanded she get up. Ms. Landis stated she tried to crawl but had great difficulty. RPT, pg. 446. Ms. Landis was later interviewed by Grant County Detectives after being transferred to the Brewster Hospital. She again relayed the events that occurred and threats made by the defendant. RTP 608-610, 780-785.

After conferring with Sgt. Harrison about the facts they were presented with, the officers felt they were required to respond to the defendant, pursuant to state domestic violence laws. RPT, pg. 381, 450. Ms. Landis expressed concern for the officers' safety if they went to the defendant's residence because the defendant had firearms. RPT, pg. 381-382.

The officers decided to have another officer make phone contact with the defendant to see if he could be persuaded to come out of the house unarmed, while the officers were at a location where they could observe the defendant and the residence. RPT, pg. 384, 450, 452. Deputy Newport parked his vehicle below an embankment that was not visible from the residence and moved on foot up the embankment so he could observe the residence while the phone call was made, and before Sgt. Harrison attempted to make contact with the defendant. RPT, pg.390-391, 453.

Deputy Newport observed the defendant inside the residence pacing between the garage and the downstairs living area of the residence and saw him periodically peer out of the garage door. RPT, pg. 391-392. Sheriff's Dispatcher Pat Stevens then initiated a phone call to the defendant. In the phone call the defendant stated he did not want to talk with the deputies. He

expressed frustration with his wife not contributing financially, and indicated he was aware of potential charges. RPT, pg. 757-762. The officers could not hear the substance of the phone call. RPT, pg. 392. During the phone call, Deputy Newport observed the defendant come outside of the garage, and did not see the defendant holding any weapon. Deputy Newport advised Sgt. Harrison he could move up the driveway of the residence to let the defendant know they were there. Deputy Newport moved on foot across an open field to be nearer to residence. RPT, pg. 394-395, 434. Sgt. Harrison drove approximately half way up the drive way with his overhead take down lights on and stopped. RPT, pg. 397, 454-456.

In the recorded call, the defendant also acknowledged that he saw Sgt. Harrison arrive. The defendant initially indicated he was willing to talk, but then complained that there was a spotlight on him. RPT, pg. 764-765. The defendant then told Dispatcher Stevens “if you want to go down this way, lady, I will go down.” RPT 766.

The officers heard the defendant yelling and then saw the defendant turn and go back inside the garage. Deputy Newport

advised Sgt. Harrison that he need to leave immediately. RPT, pg. 398-400, 420, 456-457.

Sgt. Harrison began backing down the driveway, and within less than 10 seconds the defendant had come back out of the garage armed with a rifle and began firing at Sgt. Harrison and his vehicle. The shots broke the driver's side glass in Sgt. Harrison's vehicle and the glass struck him. Sgt. Harrison felt that if he could not exit the driveway, he would be killed, as his vehicle was being struck repeatedly. Sgt. Harrison was heard yelling on his radio, "shots fired, shots fired". RPT, pg. 400-402, 419, 420, 424, 457, 458, 465, 514-515, 517.

The shots were heard by Dispatcher Stevens and captured on the recorded call. RPT, pg. 766. The defendant returned to the phone and told Dispatcher Stevens "I just shot your stupid deputy." The defendant then said "I know Noah Stewart, and I'm not gonna come see 'em."RPT pg. 767. (Noah Stewart is the County's Jail Administrator. RPT 301.) The defendant then threatened that if he saw his wife he would hunt her down and kill her. RPT pg. 767.

Sgt. Harrison was able to back his vehicle down the driveway to the road and then back further down the roadway until his vehicle was shielded from the line of fire by an embankment.

He stopped his vehicle on the edge of the roadway, close to the embankment. The driver's side of the vehicle was tilted downward toward the embankment. Sgt. Harrison grabbed his rifle, exited his vehicle and took cover in the field at the top of the embankment. RPT, pg., 459-461, 463, 464-465, 519, 537-538, 812 His exterior and interior vehicle lights were off and the rear door windows were tinted. RPT 972, 973.

Deputy Newport was able to return to his own vehicle and back his vehicle even further down the roadway. RPT, pg. 403-404.

Initially the officers were able to maintain radio contact with dispatch but after the shooting began, they were unable to maintain contact. RPT, pg. 393. Deputy Newport continued to attempt radio contact with dispatch using different repeater channels, but was unsuccessful. RPT, pg. 407.

From his location in the field, Sgt. Harrison could hear the defendant somewhere outside the residence. He testified the defendant sounded angry and could make out the defendant yelling "…take me out". The defendant walked rapidly from the area of the residence with a rifle in his hands and passed within 30-60 feet of where Sgt. Harrison was lying. As the defendant moved from the house towards Sgt. Harrison, he was no longer yelling, but

appeared to be talking to himself. RPT, pg. 466 -467, 468, 518, 519, 521, 540, 544-545. The defendant stopped near the top of the embankment and began firing down into Sgt. Harrison's vehicle. The shots into the vehicle caused the lights and horn to begin operating, creating concern for Sgt. Harrison that his position would be illuminated. RPT, pg. 467-469. Deputy Newport heard two separate rounds of shots fired. Sgt. Harrison advised the defendant was shooting into his vehicle. RPT, pg. 408 – 409, 426, 513-514, 515.

After hearing the second round of shots, Deputy Newport continued on foot down the roadway and came upon the Meyers'. RPT 410. After returning home from the hospital that evening, Ms. Meyers had heard gun shots. RPT, pg. 364. By that time it was dark outside. RPT, pg. 372. The Meyers went to advise their neighbor what was happening, and once outside, they saw a Deputy Newport running down the road toward their house. Deputy Newport sought help in calling for assistance because he had no radio service. RPT, pg. 362-364, 370-371. Deputy Newport was able to use Mr. Meyer's fire radio to establish contact and request backup. As Deputy Newport waited approximately 15 minutes for backup, he was unable to re-establish contact with Sgt. Harrison.

RPT, pg. 410. The Meyers went and hid in the woods at the officer's request. RPT, pg. 366.

After the defendant fired at his vehicle, Sgt. Harrison belly crawled backwards further down the slope in hopes of avoiding detection as the defendant passed by him heading rapidly back toward the residence. RPT, pg. 470-471, 519-520. The defendant returned to the residence and turned the lights out. To Sgt. Harrison it appeared the defendant was operating more tactically. RPT, pg. 471, 474, 522, 524. Sgt. Harrison stated it remained very quiet for a while, until he heard what sounded like a slide being operated on a weapon, indicating the defendant had loaded a magazine and chambered a round. RPT, pg. 475. Sgt. Harrison heard the defendant moving toward him, walking and then pausing, before walking again. As the defendant neared Sgt. Harrison's position, Sgt. Harrison decided he would have to shoot. Sgt. Harrison rose up to his knees, could see the silhouette of the defendant, and pointed his rifle at the silhouette. However, when Sgt. Harrison tried to fire his rifle, it did not fire. Sgt. Harrison observed the defendant was within 12 feet of him and was shifting side to side. Sgt. Harrison put down his rifle, pulled his pistol and fired one round at the defendant. RPT, pg. 475-477, 481, 520, 524.

After being shot, the defendant fell to the ground and began yelling “ow, ow, you shot me, you shot me in the hip”. RPT, pg. 477, 521, 545. Sgt. Harrison pulled out his flashlight and illuminated the defendant as he gave the defendant commands to put his arms out away from his body. The defendant immediately complied. Sgt. Harrison recovered a Kimber .45 caliber handgun from underneath the defendant and handcuffed the defendant. RPT, pg. 412, 477-478, 618. The defendant’s handgun was loaded and had a round in the chamber. RPT 618, 412-413.

As the backup officers arrived, Sgt. Harrison communicated to the officers over the radio that the defendant was shot and was down, and that he needed an ambulance. Sgt. Harrison remained with the defendant and kept talking to the defendant as the other officers arrived. The defendant again stated he was shot in the hip and provided some background information. RPT, pg. 411, 478-479.

Deputy Newport and other officers responded to Sgt. Harrison’s location in the field. RPT, pg. 412. Deputy Newport heard defendant murmuring and not really saying anything. Deputy Newport was asked on cross-exam if the defendant seemed like he was on drugs or delusional, and Deputy Newport stated the

defendant seemed like he was in a lot of pain. He said it was possible the defendant was on drugs, based on what Ms. Landis had said earlier. RPT, pg. 424.

After the defendant was transported from the scene, Officers secured the defendant's residence. Just inside the garage door officers located a loaded Rock River Arms AR-15 rifle with a live round in the chamber, an extra loaded magazine, a partially empty box of .223 ammunition, and the defendant's cordless phone, on top of a chest freezer. Leaning against the chest freezer was a loaded Russian made SKS rifle with a round in the chamber. RPT 569-572, 583, 615-616, 834-835, 836-837, 840. The SKS also had a bayonet attached. RP 840-841. Another loaded magazine was found on a desk in the garage, and ammunition and an ammunition belt were found near the freezer. RPT 616.

An open nylon rifle case and .223 ammunition were found on the bed in an upstairs bedroom. RPT 616. The hard plastic case for the Rock River AR-15 was also located in the upstairs bedroom. RPT 842. The upstairs bedroom was not directly accessible from the garage and required travel through the living area of the residence to access the stairs leading up to the bedroom. RPT 842-843. During the time Deputy Newport was observing the defendant

before the shooting started, the defendant did not appear to have gone upstairs. RPT 392-401.

Just outside the garage door, officers recovered at least ten spent .223 casings. RPT 583-615, 809. At top of the embankment where the defendant had been firing down at Sgt. Harrison's vehicle officers recovered an empty 20 round AR-15 magazine, at least thirteen spent .223 casings fired from the defendant's Rock River Arms AR-15, and at least three spent .45 caliber casings fired from the defendant's Kimber .45 caliber handgun. RPT 579-580, 614-615, 617, 653-654, 871.

At the location where the defendant was apprehended and treated by medical staff for transport, officers found articles of the defendant's clothing and another Kimber .45 caliber magazine. RPT 581, 613, 854-855, 863, 868.

After the scene was secured, Grant County Detectives took over the investigation. RPT 607. Detective Kevin Files contacted the defendant at Central Washington Hospital on August 9, 2010. The defendant said "I'm 61 years old; it is a little late to do something stupid like this. I'm in deep doo-doo." RPT 777.

Examination of Sgt. Harrison's vehicle revealed in excess of 36 bullet strikes or defects to the vehicle. RPT 667, 700. These

included shots directed toward the front of the vehicle, including shots through the driver's side view mirror hood, and lights. Shots were also directed toward the driver's side of the vehicle, included shots through driver's door and driver's window that impacted multiple locations within the driver's compartment. RTP 675-700, 850-852. The shot that shattered the driver's side window occurred while Sgt. Harrison was in the driver's seat. RPT 457, 811-814, 850. Several bullet fragments were located in the vehicle, including fragments found lying on the right front floor of the vehicle. RPT 631.

Further examination and disassembly of Sgt. Harrison's vehicle resulted in bullets and bullet fragments being recovered from the driver's side door, the console, inside the passenger quarter panel, the back driver's side door, in the dash mounted radar unit, the steering wheel, and the engine compartment. RPT 602-603, 604, 632. Bullets such as the one that passed through the driver's window and penetrated the center console near the floor where shot at a downward angle from a position higher than the vehicle. RPT 692-698.

The defendant testified he was a Vietnam War veteran and had sustained and ankle injury from shrapnel while riding in a

vehicle that struck a mine, and that he had also been shot. RPT 885. However, on cross exam, the State questioned he defendant about military service records it had obtained. The records were reviewed with the defendant and indicated the only injury listed during service was a sprained ankle from the mine incident and that the defendant was back on duty within four days. RPT 916.

On direct examination the defendant testified he was deployed in October 1968 and returned to the US in September 1969 RTP 885-886. He testified he suffered from PTSD as a result of his service. RPT 885-886. Following his return from service, he worked for defense contractors and then Boeing, until 2000. RPT 886-887. The defendant was permitted to claim he was "rated 70% PTSD by the Veterans Administration with Agent Orange" over the State's objection and without offering any supporting documentation or testimony. RPT 888.

The defendant testified he married Mary Landis in 2004. RPT 889. The defendant stated she had planted over 100 perennials in the garden, but was unable to take care of them due to her physical condition. RPT 890. The defendant said he was extremely stressed out and physically fatigued from building the green house and suggested they till the entire garden under. He

stated Ms. Landis wanted to save the perennials and she was to mark the areas to be saved on August 7. RPT 890. The defendant indicated he may have consumed 3 beers earlier on the day of the incident and that he "wasn't drinking a whole lot then." RPT 899, 917-918. He testified on that morning he had driven to the tavern to meet with friends like he does every day. RPT 917.

He testified that when he ran over Ms. Landis with the tractor, it was an accident. RPT 897-898, 922. On direct, the defendant testified that after Ms. Landis had left in the car, it was several hours later before the police arrived. RPT 900. He indicated he had a few beers and browsed the internet during that time. RPT 900. He testified it was not until he began to converse with the dispatcher that he became very stressed and depressed – because he was concerned Ms. Landis may have been seriously hurt. RPT 900, 929. He claimed he went into a deep depression when he realized she had called the sheriff's department, and he became suicidal. RPT 901. He claimed he did not have the moral capability to do commit suicide, so he decided to have someone else do it. RPT 902-903. On cross, the defendant then claimed he was in a state of depression before the phone call, because he didn't want to be in the garden that day and he and his wife had a

"big ugly conversation before we event went down there about the garden." He testified that argument occurred before he had gone to the tavern that morning. RPT 930-931. He said the argument continued when he got back from the tavern and that it was an ongoing argument due to his wife's inability to take care of the garden. RPT 931. The defendant testified when he made the threat to hunt down and kill his wife, that he was also upset with his wife about money. RPT 932. The defendant stated he kept the SKS in the garage "all the time" and the AR-15 that was kept upstairs. RPT 904.

The defendant stated knew Sgt. Harrison was a police officer when he arrived. RPT 934. He stated that after he told them to turn off the lights, he grabbed his firearm. RPT 935. The defendant said he focused his attention on the car that was "annoying me" and testified he intended to fire at the passenger side only- and that was all he fired at. He testified he "stung it a couple of times." He stated he was aiming to skim down the right side of the vehicle with the "intention to aggravate police officers into completing my intention of taking my life." RPT 905, 936, 952-953. The defendant testified at length that he was an excellent shot, and agreed "without a doubt" that he could have shot the officer or shot into the

driver side area if he had wanted to. RPT 907-908, 959. On cross the defendant admitted he placed last in local NRA shooting events he had attended. RPT 941-943.

The defendant continued to shoot after the vehicle began to move. RPT 937, 952. After Sgt. Harrison backed out of sight, the defendant testified he had a "hunch" the officer may be sitting over the edge of the bank and he decided to go down to the field and "continue to initiate what I had begun." RPT 908-909. The defendant took two clips for the AR-15 with him. RPT 910. The defendant testified after shooting, he went back to his house as fast as he could and grabbed his pistol, then turned out the lights as he returned to the field where Sgt. Harrison was lying. RPT 911.

2. Procedural Facts

On October 8, 2010, the State filed an information alleging that on August 7, 2010 in Count 1 the defendant committed Attempted First Degree Murder against Sgt. Tracy Harrison; and in Count 2 the defendant committed Assault in the Second Degree Domestic Violence against Mary Landis. CP 119-123.

Nearly two years into the case, the defendant changed attorneys, hiring Stephen Graham. CP 118. During entirety of

case, there is no record of defense retaining or formally identifying an expert for the purpose of asserting a diminished capacity defense. See RP 10/9/12 pg. 82. There is, however, record of defendant seeking to obtain a ballistics expert. CP 116, 117

On October 9, 2012, the Court heard pre-trial motions. RP 10/9/12 pg. 4. The Court reviewed the defendant's Trial Brief Regarding the Defense Expert for the defendant's theory of "suicide by cop". (CP 106), the State's Response and Motion to Exclude the Expert (CP 57), the defendant's Response to the State's Motion (CP 57), a transcript for the interview of Gregory Gilbertson, the State's Motions in Limine (CP 82), and the defendant's Motions in Limine (CP 78). RP 10/9/12 pg. 4.

The State sought to introduce evidence of the defendant's prior convictions for DUI and Harassment pursuant to ER 404(b) either as direct evidence or rebuttal. RP 10/9/12 pg. 26; CP 83-84, 93-95. The incident involved the defendant confronting another motorist and running her off the road, then threatening the responding officer, and physically confronting officers during the booking process. CP 93-95. The Court reserved a ruling, dependent on the substance of the defendant's testimony if offered. RP 10/9/12 pg. 30.

The Defense moved in limine to exclude character evidence of the defendant being "hotheaded" or having a temper. RP 10/9/12 pg. 64. Defense indicated its motion pertained to the prior incident involving the threat to law enforcement that was raised by the State. Defense also moved under this motion to prevent testimony from the Meyers' about previous incidents where they could hear from their residence the defendant yelling at Ms. Landis. RP 10/9/12, pg. 65-66, CP 78-81. The court ruled to exclude the prior incidents heard by the Meyers' as character evidence. RP 10/9/12, pg. 66.

The State also moved to exclude self- serving hearsay. RP 10/9/12 pg. 32; CP 86-88. The discussion included statements that may be offered through the defendant's wife. RP 10/9/12 pg. 34. The Court granted the State's motion. RP 10/9/12 pg. 35.

The State's motion to exclude the testimony of Gregory Gilbertson about the phenomena of "suicide by cop" was also granted. RP 10/9/12 pg. 68-78, 85-92; CP 96.

During trial testimony from Detective Kevin Files, the State sought to impeach Ms. Landis with her prior statements that she had denied making or had claimed not to remember during her direct examination. See RPT 310-311. Defense objected on

hearsay grounds. RPT 779-780. A portion of her statement included the following:

> And the guy wasn't -- I'll have to say he wasn't at that time down there, my husband. He was, um, a crazy guy and I didn't know it right away so I tried to stop him from doing more damage and it -- it made him angry and worse. And he ended up, um, um, bumping me with the tractor, not hard, but it was enough to throw me off my feet in the soft dirt, and I was scrambling to get out of the way, and he -- he ran over just the lower leg of one foot while I was getting out of the way.

RPT 780-781. On cross exam, defense sought to ask Detective Files about statements from Ms. Landis about the defendant having "triggers that included mud and grass", despite the fact that Det. Files did not recall any statement about mud and grass triggers, and Defense could not locate this statement in the transcript. RPT 785-786. The State objected on the basis that it was beyond the scope of direct and was self-serving hearsay, and moved to strike the reference to the triggers. The Court sustained the objection. RPT 785, 791.

Defense then asked Det. Files about a statement from Ms. Landis that the "charges were out of hand". The State again objected. RPT 786. The Court sustained the objection. RPT 786-787.

The Defense was then allowed to ask Det. Files if Ms. Landis had said the defendant had PTSD. The Detective indicated she had stated that. The Defense then began asking the question "She indicated, in the subject of PTSD…" The State objected based on the Court's previous rulings. The Court sent the jury out and heard argument. RPT 787-789.

The Defense stated they intended to inquire into statements made by Ms. Landis about other incidents of PTSD where the defendant behaved differently than he did on August 7, 2010. RPT 789. The Court inquired how that was not character evidence. Defense responded that Ms. Landis' use of phrase he was "a crazy guy" when she contacted him on the tractor, really meant PTSD and the defense should be permitted to admit her statements describing PTSD and prior non-conforming incidents. RPT 789-790.

The State again responded the State had not inquired about PTSD, had focused on the incident involving the assault, and had tried to limit Ms. Landis from inserting PTSD into her testimony. RPT 790, 792-793. The State objected to the testimony being self-serving hearsay. The State further requested that if testimony was permitted about Ms. Landis' statements concerning the root causes

of PTSD and of non-conforming incidents by the defendant; that the State should be permitted to offer evidence of the defendant's prior threats and harassment. RPT 790, 792-793. The Court sustained the State's objection and also advised Defense that at some point they would open the door to the State being permitted to bring in evidence that Defense had sought to exclude. RPT 791, 793-794.

The trial was completed and on October 17, 2010. The jury found the defendant guilty of Attempted First Degree Murder and Assault in the Second Degree. The jury also answered the special verdict forms that the defendant and Mary Landis were family or household members, and that the defendant was armed with a firearm. RPT 1152.

D. ARGUMENT

1. The defendant was not denied effective assistance of counsel where defendant claims counsel should have pursued a diminished capacity defense that was unsupported by the evidence and contrary to the defendant's theory of the case.

Our courts strongly presume that trial counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). The burden is on the Defendant to

overcome the strong presumption of competency and to show deficient representation. *McFarland*, 127 Wn.2d at 335. The presumption of effective assistance cannot be rebutted if trial counsel's conduct can be characterized as legitimate trial strategy or tactic. *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986); *State v. Lord*, 117 Wn.2d 829, 885, 822 P.2d 177 (1991).

The defendant must show that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *McFarland*, 127 Wn.2d at 334-35; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct.2052, 80 L.Ed.2d 674, reh'g denied, 467 U.S. 1267, 104 S.Ct.3562, 82 L.Ed2d 864 (1984).

The first prong requires a showing of errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. The second prong requires a showing that counsel's errors were so serious as to deprive the defendant of a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 694, 104

S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Jeffries*, 105 Wn.2d 398, 417-18, 717 P.2d 722 (1986).

A defendant is not denied effective assistance of counsel where the record as a whole shows that he or she received effective representation and a fair trial. *State v. Smith*, 104 Wn.2d 497, 511, 707 P.2d 1306 (1985). Rather, the defendant must make "an affirmative showing of actual prejudice" demonstrating a manifest constitutional error. *McFarland*, 127 Wn.2d at 334, 338, citing, RAP 2.5(a) (3)).

In determining whether defense counsel was deficient, the court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689, *see also, State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995).

Courts are hesitant to find ineffective assistance of counsel based solely on questionable trial tactics and strategies that fail to gain acquittal. *Matter of Richardson*, 100 Wn.2d 669, 675, 675 P.2d 209 (1983); *State v. Sardinia*, 42 Wn.App. 533, 713 P.2d 122 (1986) (counsel not ineffective for failure to call witness that may have implicated defendant in crime); *State v. Woo Won Choi*, 55 Wn. App. 895, 781 P.2d 505 (1989)(counsel was not ineffective for

not raising diminished capacity defense due to intoxication where the defendant explained explicit and detailed recollection of the event and where the defendant's explanation of what his intent was would contradict the defense that he was too drunk to form any intent).

In *State v. Sardinia*, Division Two of the Washington State Court of Appeals discussed the *Strickland* test in the context of prior Washington State authority regarding ineffective assistance claims. *Sardinia*, 42 Wash.App. at 533.

In *Sardinia,* the defendant alleged that trial counsel was ineffective because he failed to call several witnesses. *Sardinia*, 42 Wash.App.at 533. The *Sardinia* court quoted *Strickland* for the principle that no particular set of rules can satisfactorily take account of the variety of circumstances faced by trial counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Sardinia*, 42 Wash.App.at 539 (citing *Strickland*, 466 U.S. 668. The court noted that the Sixth amendment is more protective of the right to counsel than the Washington State Constitution and held that the *Strickland* test should be applied retroactively in Washington. *Sardinia*, 42 Wash.App. at 540.

Regardless, the court found that *Sardinia* was provided with effective assistance of counsel. *Sardinia*, 42 Wash.App at 543. The court noted that trial counsel's decision not to call the witnesses at issue was a strategic decision. *Sardinia*, 42 Wash.App at 543. The court again cited *Strickland* for the principle that "such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel." *Sardinia*, 42 Wash.App at 542 (citing *Strickland*, 466 U.S. at 689). The court reviewed the testimony of the uncalled witnesses in light of the "wide latitude" defense counsel has in making tactical decisions and found that the defendant had not been prejudiced by counsel's decision. *Sardinia*, 42 Wash.App at 542.

Likewise, in *State v. Adams*, 91 Wn.2d 86, 586 P.2d 1168 (1978), the Washington State Supreme Court found that defendant's conviction would not be reversed where the trial tactics at issue constituted an exercise of judgment. In *Adams*, 91 Wn.2d 86, the court declined to adopt a "more objective" standard for a Sixth Amendment ineffective assistance challenge because trial counsel was effective under either standard. *Id.* at 89. *Adams* argued that counsel was ineffective, inter alia, for failing to move to suppress photo and lineup identifications based on the witnesses'

lack of certainty and that the lineups were impermissibly suggestive. *Adams*, 91 Wn.2d at 91.

In the present case, the Appellant has failed to demonstrate that counsel's representation was deficient in any way. Appellant argues that trial counsel was ineffective for not pursuing a diminished capacity defense, even though the facts and testimony did not support the defense.

Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged. *State v. Furman*, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993).

To obtain a diminished capacity instruction the defendant must satisfy the following three requirements: (1) the crime charged must include a particular mental state as an element; (2) the defendant must present evidence of a mental disorder; and (3) expert testimony must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the mental state required for the crime charged. *State v. Atsbeha*, 142 Wn.2d 904, 914, 921, 16 P.3d 626 (2001); *State v. Eakins*, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995); *State v. Griffin*, 100 Wn.2d 417, 418, 670 P.2d 265 (1983); *State v. Guilliot*, 106

Wn. App. 355, 363, 22 P.3d 1266 (2001). If evidence on any element is lacking, the instruction should not be given. *State v. Ager*, 128 Wn.2d 85, 95, 904 P.2d 715 (1995). Moreover, even where a defendant is entitled to a diminished capacity instruction, the failure to request the instruction is not ineffective assistance of counsel per se. *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011, 1015 (2001).

In the present case there was no evidence beyond the defendant's and his wife's assertion that the defendant had been diagnosed with PTSD, or suffered from PTSD at the time of the incident. In the entire two years the case was pending, the defendant failed to come forward with records, documents, or evidence to support the assertion. Despite numerous continuances of the case, no expert was ever identified who could testify about the defendant's alleged PTSD; or that if he did have PTSD that condition was logically and reasonably connected the defendant's inability to form the required mental state on the date in question. The defendant failed to meet elements 2 and 3 and was therefore not entitled to a diminished capacity instruction.

Additionally, the evidence in the case did not support diminished capacity. There was no evidence to support that any

mental condition prevented the defendant from possessing the requisite mental state (intent) necessary to commit the crimes of Assault or Attempted Murder. The evidence in the case, the defendant's statements, his actions, and his testimony all demonstrated the defendant's ability to form intent.

Regarding the Assault in the Second Degree Domestic Violence offense, the defendant claimed it was an accident. Regarding the Attempted Murder offense, the defendant claimed he *intended* to shoot at the police officer and the vehicle in order to engage the officers and force a response. However, he claimed his intent was only to scare them, not kill them. Based on the evidence facing the defendant, a decision was made to present this strategy, rather than the contradictory claim that the defendant lacked the ability to form intent due to a mental condition or intoxication. This decision was not ineffective on the part of trial counsel given the facts available to him.

Similarly there is no basis to support a claim of ineffective assistance of counsel for not arguing a voluntary intoxication defense.

In *Woo Won Choi*, 55 Wn. App. at 905-06, the Court found: that there was evidence of some drinking, to suggest at trial that the

defendant was so out of control that he did not know what he was doing could certainly be considered ill-advised. However, the Court found this theory would have been incompatible with the defendant's very explicit and detailed recollection of the events. Moreover, the defendant explained with specificity what his intent was. The Court found this clearly belied the defendant's claim that he was too drunk to form any intent, and the two defense theories appeared to be mutually exclusive from a trial strategy point of view. Thus, the Court held the failure to raise an intoxication defense could not support a claim of ineffective assistance of counsel. *Woo Won Choi*, 55 Wn. App. at 905-06

In *State v. Byrd*, 30 Wn. App. 794, 798-99, 638 P.2d 601, 604 (1981), the defendant argued that trial counsel owed him the duty of arguing that he was intoxicated and unable to form the necessary intent to act as an accomplice. The Court found that although there is evidence of considerable drinking, there was none that the defendant was out of control of himself at any time. The defendant's detailed recital of the events at trial presented a factual defense of consent but not of intoxication. The Court found the two defenses could well be mutually exclusive from a trial strategy view point in which event trial counsel would be faulted if he had chosen

the defense of intoxication rather than that of consent. *Byrd*, 30 Wn. App. at 798-99

Unlike *Woo Won Choi*, and *Byrd*, there was not evidence of considerable drinking in this case, or evidence of any significant degree of intoxication. But like *Woo Won Choi*, and *Byrd,* the defendant presented a very explicit and detailed recollection of the events, and explained with specificity what his intent actually was. The two defense theories in this case would have been mutually exclusive, and likely further diminished the defendant's credibility with the jury.

The fact that the trial attorney chose not to argue an unsupported and contradictory theory does not equal ineffective assistance. The defense attorney instead chose to argue most strongly against the most serious charge of Attempted First Degree Murder, by arguing the defendant may have committed a lesser crime of assault by shooting toward the officer, but did not commit Attempted Murder. This theory was most consistent with the evidence presented at trial, the defendant's actions, and his own statements.

In seeking to argue ineffective assistance of counsel, Appellant makes arguments that are wildly speculative; including

that the defendant's behavior on August 7 was "…*entirely inconsistent with such a notable background without some intervening mental condition*." , and that the defendant's "…*extreme overreaction could only be categorized as abnormal and the result of some mental condition*." *See Appellant's Brief*, pg. 20, 21.

What Appellant fails to recognize, is that in addition to the defendant's deliberate and calculated actions, the defendant's trial attorney was also faced with the task of preventing the admission of prior acts that the State sought to introduce. The prior acts the State sought to introduce involved prior domestic conflicts with Ms. Landis, and the defendant's assaultive behavior and threats toward a female motorist and the responding police officer.

To try and argue this case meets the *Strickland* test, Appellant engages in pure conjecture that there was an expert who *would* testify not only about the defendant having PTSD, but that this PTSD combined with alcohol and prescription drugs caused "flashbacks", and that these "flashbacks" impaired the defendant's ability to form intent. Going further, Appellant argues that if this hypothetical expert were found, and then testified, the jury would have *agreed* with this hypothetical expert, and therefore created a

reasonable probability, but for counsel's errors, the result of the trial would have been different. *See Appellant's Brief*, pg. 24. [1]

In effect, Appellant now seeks to act as his own expert by arguing "evidence" and making claims about PTSD and diminished capacity that were never part of the case. The specious conclusion that the Appellant's criminal behavior could *only* be due to an unproven mental condition, and therefore trial counsel was ineffective for not asserting it - does not stand up to the actual facts of the case. This speculation and conjecture does not support a claim of ineffective assistance of counsel.

In this case, the defendant was angry with his wife after having argued with her all day. He knocked her down, ran over her leg with the tractor, and then threatened to kill her. He was aware his actions could result in criminal charges, and in the intervening hours between the assault and the arrival of law enforcement, he placed several loaded firearms at the ready near the garage door, awaiting law enforcement's arrival. Although the defendant

[1] Additionally, if the defendant had sought to raise diminished capacity, through the retention of his own expert, and thereby placed his mental state at issue, he would have had to submit to an examination by the State's expert. *State v. Hutchinson*, 135 Wn.2d 863, 878, 959 P.2d 1061, 1069 (1998). It is possible that both of the defendant's trial attorneys did not believe a viable diminished capacity claim would follow from the examination of either a defense or State mental health expert.

admitted to drinking, at no time did he indicate he was impaired or that his marksmanship was affected.

There is *no* reasonable probability that, but for counsel's decision not to put forth the unsupported assertion that the defendant was incapable of forming intent, the result of the trial would have been different. The Appellant has failed to demonstrate that counsel's performance was not based on legitimate strategy or that any allegedly deficient performance prejudiced the Appellant. Because the Appellant cannot demonstrate that counsel's actions were not based on legitimate trial strategy, or that any alleged error affected the outcome of the trial, this court should affirm the Appellant's convictions.

2. A voluntary intoxication instruction was mutually exclusive of the defendant's asserted defense and not supported by the defendant's own statements regarding consumption of intoxicants and his lack of impairment.

WPIC 18.10 states:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted or failed to act with the requisite mental state.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.10 (3d Ed). The general rules governing jury instructions are well settled. Jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. *E.g., State v. Walters*, 162 Wn. App. 74, 82, 255 P.3d 835, 839 (2011).

In a technical sense intoxication is not a "true defense," because a criminal act committed by a person who is voluntarily intoxicated is not justified or excused. Rather, intoxication may raise a reasonable doubt as to a mental state required for conviction of a certain crime. A criminal defendant is entitled to a voluntary intoxication instruction *only* if: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state." *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992)(cited in *Ager*, 128 Wn.2d 85).

For the second element there must be a showing of drug or alcohol consumption and the effect of the consumption on the drinker. *See, e.g., State v. Dana*, 73 Wn.2d 533, 535, 439 P.2d 403

(1968); *State v. Zamora*, 6 Wash.App. 130, 132, 491 P.2d 1342 (1971), *review denied*, 80 Wash.2d 1006 (1972)

The evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged. … Evidence of drinking alone is insufficient to warrant the instruction; instead, there must be 'substantial evidence of the effects of the alcohol on the defendant's mind or body.'" *State v. Gabryschak*, 83 Wn. App. 249, 252, 921 P.2d 549 (1996)(intoxicated and angry man not entitled to instruction where no sign of alcohol's impact on reasoning abilities). *See also State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002)(defendant not entitled to a voluntary intoxication instruction where he did not present sufficient evidence to show his intoxication affected his ability to acquire the required mental state); *State v. Harris*, 122 Wn. App. 547, 552, 90 P.3d 1133 (2004)(same); *State v. Hall*, 104 Wn. App. 56, 60, 14 P.3d 884 (2000)(same); *State v. Priest*, 100 Wn. App. 451, 455, 997 P.2d 452 (2000)(same).

The State has no burden of disproving intoxication, and the jury should not be instructed that it does. *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987). It is sufficient to instruct the jury

that the State must prove the mental state that is an element of the crime charged. *State v. James*, 47 Wn. App. 605, 736 P.2d 700 (1987); *State v. Sam*, 42 Wn. App. 586, 711 P.2d 1114 (1986); *State v. Fuller*, 42 Wn.App. 53, 708 P.2d 413 (1985).

Here the defendant was not entitled to a voluntary intoxication instruction. He did not present "substantial" evidence of drinking or sufficient evidence to show his consumption of intoxications affected his ability to acquire the required mental state. On the contrary, the defendant testified he did not drink much and that his shooting skills were not affected in any way by the intoxicants he had consumed. The Court did not commit error in refusing to give the defendant's proposed instruction on voluntary intoxication.

Even if such an instruction had been supported, such a non-constitutional error is harmless if it did not, within reasonable probability, materially affect the verdict. *E.g., Walters*, 162 Wn. App. at 84(the failure to give the intoxication instruction was harmless where defendant's threat to kick the officer before he did so showed the intoxicated defendant was acting intentionally).

3. The Trial Court did not commit error by limiting admission of statements made by Ms. Landis about other unrelated incidents offered to introduce improper character evidence under the guise of ER 106.

Appellant claims the trial court committed error by not allow cross examination of an impeachment witness (Det. Files) to elicit statements of Ms. Landis describing why his behavior in running her over with the tractor was due to PTSD. Brief of Appellant, pg. 29. For support the Appellant cites to ER 106- Remainder of or Related Writings or Recorded Statements.

The problem is that at trial Defense was not seeking to admit statements elaborating on or explaining Ms. Landis' reference to the defendant's behavior at the time of the assault with the tractor; but was seeking to introduce statements by Ms. Landis about prior unrelated incidents where the defendant did not act in conformity with his behavior at the time of the assault. RPT 789-790. Additionally, both Ms. Landis and the defendant claimed in their testimony the assault with the tractor was an accident, and not an intentional act.

Under the rule of completeness, if a party introduces a statement, an adverse party may require the party to introduce any

other part “which ought in fairness to be considered contemporaneously with it.” ER 106; *State v. Simms*, 151 Wn. App. 677, 692, 214 P.3d 919, 927 (2009) *aff'd,* 171 Wn.2d 244, 250 P.3d 107 (2011)(citing *State v. Larry*, 108 Wn. App. 894, 910, 34 P.3d 241 (2001). However, the trial judge need *only* admit the remaining portions of the statement which are needed to clarify or explain the portion already received. *Simms*, 151 Wn. App. at 692(emphasis added). *See also State v. Hawkins*, 53 Wn. App. 598, 602-03, 769 P.2d 856, 858 (1989)(trial court did not abuse its discretion by admitting an edited version of the tape recording, where there was no showing the other portions were relevant).

In the present case Defensed did not explain how the admission of statements about other un-related incidents explained the statement in question.

A trial court's evidentiary rulings are reviewed for an abuse of discretion. E.g., *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). The trial court has discretion to determine the scope of cross-examination. *State v. McDaniel*, 83 Wn. App. 179, 184-185, 920 P.2d 1218 (1996). A trial court’s rulings on the scope of cross-examination will not be reversed absent a manifest abuse of

discretion—when its decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *McDaniel*, 83 Wn. App. at 185.

In this case, if the Court had permitted admission of other alleged non-conforming incidents of behavior, the Court indicated it may have permitted the State to admit evidence of the defendant's previous threatening and assaultive behavior toward law enforcement.

Any error in excluding statements about un-related, non-conforming behavior was harmless. As stated above, non-constitutional evidentiary error requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial, had the error not occurred. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Even if we assumed error had occurred, the Appellant cannot show a reasonable probability it materially affected the outcome of the trial. Even if statements about the unrelated incidents had been admitted, the defendant still could not have obtained an instruction on diminished capacity. Both the

defendant's trial attorney and his Appellate attorney explicitly recognized Ms. Landis could not provide a basis to assert a diminished capacity defense. See Appellant's Brief, pg. 24; RPT 309. It would require expert testimony *and* that testimony would have had to logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the mental state required for the crime.

Such testimony was lacking in this case. The testimony from Ms. Landis and the defendant (that the assault was an accident) would have contradicted an assertion that the defendant's claimed PTSD prevented him from possessing "intent" to commit the assault.

E. CONCLUSION

The defendant was not denied effective assistance of counsel for the decision not to assert a diminished capacity defense. A diminished capacity defense was unsupported by the evidence and was contrary to the defendant's theory of the case. The Appellant failed to make a showing under the *Strickland* test that his trial counsel was ineffective.

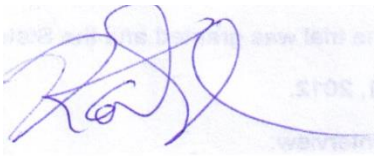
The trial court properly refused to instruct the jury on voluntary intoxication where the instruction was mutually exclusive of the defendant's asserted defense and the instruction was not supported by the facts of case.

The trial court properly limited cross examination that sought to elicit statements made by Ms. Landis about unrelated incidents through an impeachment witness, where the statements were not for the purpose of clarifying admitted statements under ER 106, but were instead simply character evidence.

The Appellant's conviction should be affirmed.

Dated this 30th day of January 2014

Respectfully Submitted by:



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