Supreme Court No. 92719-7
(COA No. 45789-0-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BOBBY JERRELL SMITH II,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Bobby J. Smith, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Smith seeks review of the Court of Appeals decision dated December 8, 2015, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Mr. Smith shot an intruder in his home who threatened him with a knife. Mr. Smith was honorably discharged from the United States Navy after suffering a breakdown following stressful experiences in a submarine, was 58-years old, had no criminal record, and lived largely in seclusion with his developmentally disabled daughter. He consistently explained he acted in self-defense, but was charged murder. The trial court limited the evidence he could elicit about his state of mind at the time of the incident because it applied the wrong standard of self-defense. The Court of Appeals agreed the trial court was "misguided" in its understanding of the law of self-defense when prohibiting Mr. Smith from offering evidence of his state of mind, but

held that his right to present a defense would only be violated if he had been "prevented" from presenting his theory of defense, not merely if he was limited in doing so. Should this Court grant review to determine whether prohibiting a person from presenting persuasive evidence relevant to his defense violates the right to present a defense under the Sixth and Fourteenth Amendments and article I, sections 3, 21, and 22?

2. Over objection, the court admitted a detective's out-of-court statements lying about the forensic findings inculpating Mr. Smith and stating his belief that Mr. Smith's story was forensically impossible. The court refused to limit the jury's use of this evidence. Was Mr. Smith denied his right to a fair trial by jury under the Sixth and Fourteenth Amendments when the State relied on admittedly false opinion testimony from a detective and the court rejected the request for a limiting instruction?

3. The court's exercise of its sentencing discretion is a critical component of the fairness of the criminal justice system and its appearance of fairness. The sentencing judge believed her lacked authority to impose a sentence below the standard range because he would have to disregard the jury's verdict. When the jury's verdict did not address the appropriate sentence that should follow a conviction

and the defendant's extraordinary personal circumstances distinguished his blameworthiness from typical offenders, should this Court grant review due to the substantial public interest in having sentencing judges exercise their discretion to provide fair sentences based on an accurate understanding of the sentencing scheme?

D. STATEMENT OF THE CASE

In 2011, 58-year-old B.J. Smith lived with his developmentally disabled daughter and they kept to themselves. 10/14/13RP 42. Mr. Smith was honorably discharged from the Navy after suffering from post-traumatic stress disorder (PTSD) that left him with severe nightmares and an inability to handle stressful situations. 10/10/13RP 40, 54; 10/14/13RP 39; CP 114.

Mr. Smith's neighbor Robert Fowler moved in a few months before this incident. 10/14/13RP 42. Mr. Fowler told Mr. Smith he had been in prison five times, once for assaulting a girlfriend with a machete and another time for armed robbery. *Id.* at 44. He also claimed he killed people by cutting their throats while in the Army in Vietnam. *Id.* at 43. Close in time to the incident, Mr. Fowler had been arrested when he stabbed his own mattress because he imagined there was an intruder inside it. Ex. 59 at 3; 10/14/13RP 46. Mr. Smith suspected Mr.

Fowler was delusional and offered to get him help from the Veteran's Administration where Mr. Smith received aid for PTSD. Ex. 59 at 3-4. Mr. Smith grew "more and more afraid" of Mr. Fowler and warned him "do not come over any more" because Mr. Smith had "bad PTSD" and Mr. Fowler's visits were "stressin' me out." Ex. 59 at 3, 7.

On June 20, 2011, Mr. Fowler knocked forcefully on Mr. Smith's door, asking for beer and $20. Ex. 59 at 7, 13. Mr. Smith told him he could not come in, but Mr. Fowler begged and Mr. Smith relented. 10/14/13RP 51. Once inside, Mr. Fowler told Mr. Smith, "you have the money, I know you do. You're rich." Ex. 59 at 7. When Mr. Smith refused, Mr. Fowler grabbed a knife resting on a table and said, "Now give me money or I'll cut your throat." *Id.* Mr. Smith had a concealed weapons permit and was carrying a gun under his clothes. Ex. 59 at 10; 10/14/13RP 50. He pulled out his gun, but Mr. Fowler said, "I'm not scared of that! And he kept comin' toward" Mr. Smith. Ex. 59 at 7; 10/14/13RP 53.

Afraid for his life, Mr. Smith fired the gun. Ex. 59 at 14-15. Mr. Smith thought he missed because he saw Mr. Fowler continue moving while holding the knife. Ex. 59 at 15-16. Mr. Smith fired again but thought he only "nicked" Mr. Fowler, who turned and started moving

upstairs where Mr. Smith's daughter was asleep. Ex. 59 at 16. Mr. Smith said, "there's no way you're getting to my daughter," and fired three more shots. Ex. 59 at 17-19. He "never saw any of my rounds hit" Mr. Fowler until the last shot. Ex. 59 at 19-20, 22, 29. Throughout the incident Mr. Fowler had the knife in his hand, causing Mr. Smith to be "afraid for my life and my daughter's life." Ex. 59 at 29. Mr. Smith had been taught in the military that when facing a threat of deadly force, to shoot until the threat ended, stopping the situation. Ex. 59 at 17, 54-55.

The entire incident was "very quick"; it was "a few seconds of absolute terror" and "a complete blur" to Mr. Smith. 10/14/13RP 53-54. Mr. Smith immediately called 911 and waited for police. *Id.* at 57. He consistently described this incident to several police officers in multiple recorded interviews. Ex. 59, Ex. 95A, Ex. 103.

Mr. Smith was charged with first degree intentional murder. CP 94. Forensic pathologist Daniel Selove found five bullets entered Mr. Fowler's body, some exiting and reentering the body, which caused his death. 10/10/13RP 152. Mr. Fowler appeared to have been hit first in his shoulder, non-fatally, and then in his chest, ear, and head, with bullets traveling different paths in his body. 10/10/13RP 153, 155-58, 175. It was likely that two bullets fired close in time caused most

injuries and Dr. Selove thought that the direction of the blood loss indicated he was lying down when the last two bullets were fired. 10/10/13RP 165, 171-72.

The State theorized that Mr. Fowler could not have been holding a knife as Mr. Smith said because there appeared to be blood on Mr. Fowler's hand and yet his blood was not on the knife. 10/14/13RP 10, 123. There was some DNA on the knife, but the partial profile could not exclude either Mr. Smith or Mr. Fowler, and the knife was taken from Mr. Smith's home. 10/10/13RP 88-89. Detective Kevin Spencer said it was "scientifically" impossible for Mr. Fowler to have been holding the knife as Mr. Smith described; and this opinion was admitted over Mr. Smith's objection. Ex. 100 at 15-17; 10/2/13RP 2-4, 7.

The jury convicted Mr. Smith of second degree murder as a lesser included offense. CP 21. Mr. Smith asked the court for an exceptional sentence below the standard range because he was defending himself against a threatening intruder in his own home, as well as his lack of predisposition, as shown by his lack of criminal history, honorable military service, and age. 1/14/14RP 22-26. Several community members spoke on his behalf and the Department of Corrections agreed Mr. Smith should receive a sentence below the

standard range. 1/14/14RP 26-30; CP 117-18. The court refused because it felt it would disregard the jury's verdict to impose a sentence less than the standard range. 1/14/14RP 37, 40.

E. ARGUMENT

1. This Court should grant review because the trial court prohibited evidence important to Mr. Smith's self-defense based on a "misguided" legal standard, and this limitation on Mr. Smith's right to meaningfully present a defense violated his rights under the Sixth and Fourteenth Amendments

a. Excluding evidence relevant to the theory of defense, based on a misunderstanding of the law, is a deprivation of the right to present a defense and receive a fair trial.

It is a "well-settled principle in Washington" that the jury must view self-defense from the conditions as they appeared to the defendant. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The prosecution bears the burden of disproving, beyond a reasonable doubt, that the defendant reasonably believed force was necessary to defend himself against imminent bodily harm. *Id.* at 473. Self-defense has subjective and objective components: the jury "must place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances the defendant knew when the act occurred." *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

Despite the well-settled nature of this legal standard, the trial court accepted the State's "misguided" argument that there is no subjective component to self-defense and Mr. Smith's explanation of his state of mind should be redacted from the lengthy statement he gave to the police. Slip op. at 8. The prosecution moved to limit evidence about Mr. Smith's personal experiences and mental state, claiming this information was irrelevant and misleading, because it insisted that the legal standard for self-defense asks only what a "reasonable person" would do. 9/19/13RP 59; CP 126-28. The premise of the prosecution's argument was that there is no "subjective standard to self-defense." only the "reasonable person" test and it would mislead the jury to suggest otherwise. 10/7/13RP 21. The trial court accepted this incorrect statement of the law as true and granted the State's request to exclude evidence explaining Mr. Smith' state of mind.

Based on the State's incorrect explanation of the law, the court redacted a significant portion of Mr. Smith's interview with Detective Spencer and prohibited Mr. Smith from explaining how PTSD affected his actions. 10/7/13RP 18-19. The excised portion of Mr. Smith's statement to Detective Spencer included Mr. Smith's explanation of how he felt during the incident. Ex. 95A at 19.

The court refused to admit Mr. Smith's explanation that this incident was "closely related" to an experience in the Navy where he was similarly "faced with imminent death" during a submarine incident. *Id.* In the redacted portion of the interview, Mr. Smith said his PTSD arose from a near death experience while serving on a submarine in the Navy, which he saw as "closely related" to this incident. Ex. 95A at 19. He felt he was *Id.* He also explained how he followed his military training during the incident, having been trained to stop a lethal threat and he believed this training controlled his response to the intruder's menacing behavior in his home. Ex. 95A at 26-27.

The Court of Appeals agreed the State argued for and the trial court applied the wrong legal standard when barring this evidence, but it found no constitutional violation and employed an "evidentiary harmless error" test for which Mr. Smith bore the burden of proof, rather than the constitutional test.

b. The Court of Appeals held that limiting an accused person's right to present a defense is only error if the defendant was completely prevented from presenting a defense.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *State v. Franklin*, 180 Wn.2d 371, 378,

325 P.3d 159 (2014) (quoting *Chambers v. Mississippi*, 410 U.S. 284. 302, 93 S.Ct. 1038. 35 L.Ed.2d 297 (1973)); U.S. Const. amends. VI, XIV; Const. art. I, § 22. The right to a fair trial includes the right to present a defense -- "at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

The Sixth and Fourteenth Amendment right to present a defense prohibits a judge from limiting the defendant's elicitation of relevant evidence about the incident. *State v Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). Evidence relevant to a theory of defense may be barred only where it is of a character that undermines the fairness of the trial, because "[t]he threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The State bears the burden of showing that the precluded evidence is "so prejudicial as to disrupt the fact-finding process at trial." *Jones*, 168 Wn.2d at 720 (quoting *Darden*, 145 Wn.2d at 622). For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." *Id.*

Evidence of Mr. Smith's state of mind at the time of the incident was far from irrelevant; it was central to the case. Based on its misapprehension of the governing legal standard for self-defense, the court excluded evidence of Mr. Smith's state of mind. The Court of Appeals ruled that the trial court erred, but this error was not a violation of the right to present a defense because Mr. Smith was only "limited" in the evidence he could use to present his defense, not actually prevented from presenting this theory of defense. Slip op. at 10-11.

An essential component of procedural fairness is the opportunity to offer evidence central to the theory of defense. *Crane v. Kentucky*, 476 U.S. 683, 691, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). In *Crane*, the defendant lost a pretrial suppression motion in which he argued that his confession was coerced. *Id.* at 684–85. His confession was central to the case, although not the only evidence inculpating him. *Id.* The court granted the State's motion limiting the type of evidence the defendant could elicit to cast doubt on the validity of the confession. *Id.* at 686. The defense was allowed to argue and elicit evidence that the confession should not be credited because of its inconsistencies, but not because it was obtained by coercion. *Id.* at 685-86. The Supreme Court ordered a new trial, because the court below had misunderstood the

legal arguments available to the defense which denied the accused person his fundamental constitutional right to "a meaningful opportunity to present a complete defense." *Id.* at 687. *Crane* stands for the principle that an accused person must be allowed to present a relevant theory of defense in a meaningful manner.

The core of the case was whether Mr. Smith acted in self-defense. This was the primary contested issue. Relying on the wrong legal standard, the court prohibited Mr. Smith from using the most persuasive evidence of his state of mind, which is a critical component of self-defense. While Mr. Smith was able to testify about his state of mind several years later, at trial, his more immediate statements close in time to the incident would be far more persuasive to the jury.

Excluding the most persuasive source of exculpatory evidence deprived Mr. Smith of his basic right to present a defense. The Court of Appeals narrowed the right to present a defense by the Court of Appeals to mean that limitations may occur also long as the defendant is not completely prevented from offering a theory of defense. This rule is incorrect and conflicts with rulings from this Court and the United States Supreme Court. The court's ruling denied Mr. Smith his right to "put before a jury evidence that might influence the determination of

guilt." *Ritchie*, 480 U.S. at 56. The jury was required to view the evidence from Mr. Smith's perspective to determine whether Mr. Smith acted in self-defense, yet the court excluded relevant, material evidence that explained Mr. Smith's subjective perspective.

c. The court further undermined the fairness of the trial by admitting evidence of the detective's opinion based on admittedly false science about whether self-defense was plausible.

Over defense objection, the court refused to redact portions of the detective's interview with Mr. Smith where the detective overstated his credentials as a forensic scientist, lied about his knowledge of blood evidence, and said that "forensically" Mr. Smith's explanation of events was not possible. Ex. 100 at 15, 17, 21-22. The detective also used the recorded interview to press Mr. Smith to change his story, implying that Mr. Smith was not telling the truth because the facts did not support his story. Ex. 100 at 17; *State v. Black*, 109 Wn.2d 336, 349, 745 P.2d 12 (1987).

Witnesses are generally barred from giving opinions about the accused person's credibility, guilt, or strength of the evidence. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Police officers carry an "aura of reliability" when testifying. *Id.* at 595. Opinions

voiced by police officers are "especially prone to influence" jurors. *State v. Demery*, 144 Wn.2d 753, 772, 30 P.3d 1278 (2001) (Sanders, J., dissenting); *see also State v. Barr*, 123 Wn.App. 373, 384, 98 P.3d 518 (2004) ("the opinion of a government official, especially a police officer, may influence a jury").

In *State v. Ish*, 170 Wn.2d 189, 199, 241 P.3d 389 (2010), this Court recognized the improper vouching that occurs when the State asks witnesses about their promises to testify truthfully. It has the potential to prejudice the defendant by placing the prestige of the State behind [the witness's] testimony." *Id.* at 199.

Here, the Court of Appeals ruled the detective was allowed to give his opinion criticizing Mr. Smith's explanation of events as not forensically possible because it was a ploy or ruse to get Mr. Smith to change his story. But the defense asked for a limiting instruction that you prevent the jurors from using the detective's interrogation comments for their truth and the court refused. The detective's out-of-court discussion with Mr. Smith about the detective's forensic opinions were admitted for their truth even though the detective was giving incorrect information about his forensic knowledge and undermining the credibility of Mr. Smith's explanation of events.

A limiting instruction is required, when requested, if evidence is admissible but the jury should not be free to use it for any purpose. *State v. Gresham*, 173 Wn.2d 405, 420, 423, 269 P.3d 207 (2012). Court's instructions, not counsel's argument, are the necessary mechanism for conveying the law to the jury. *In re Detention of Pouncy*, 168 Wn.2d 382, 392, 229 P.3d 678 (2010) ("lawyers have a hard enough time convincing jurors of facts without also having to convince them what the applicable law is.").

Furthermore, due process of law prohibits the prosecution from relying on false testimony. In *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), the Supreme Court held that a State may not present false testimony, or fail to correct testimony when the State later discovers it to be false. U.S. Const. amend. 14; Const. art. I, § 3. The court violated these principles by refusing to limit the jury's use of improper opinion testimony and false forensic science. Because this error directly affected the jury's deliberations on the critical issue of whether Mr. Smith acted in lawful self-defense, it requires a new trial.

This Court should grant review to determine whether a limiting instruction is necessary if the State offers a detective's statements as

substantive evidence even when those statements are false, or constitute opinions about the defendant's truthfulness, in the context of trying to trick the defendant into inculpating himself.

2. The trial court refused to impose an exceptional sentence below the standard range even though the probation officer agreed it was appropriate for a decorated veteran without criminal history who was defending himself in his own home.

a. This Court should grant review because the trial judge categorically refused to impose an exceptional sentence for the impermissible reason that the jury's verdict required a standard range sentence.

After an extensive presentence investigation, the Department of Corrections agreed that Mr. Smith should receive a sentence below the standard range. But the court concluded it lacked authority to deviate from the standard range because the jury had not found Mr. Smith acted in self-defense, which constitutes an inaccurate understanding of its legal authority.

A sentencing court has authority to impose a sentence below the standard range based on an unsuccessful defense presented to the jury. *State v. Jeannotte*, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997). Even when a particular defense did not satisfy the jury as a legal excuse, the circumstances of the case may "justify distinguishing the conduct" in

this case from conduct in typical cases and authorize a sentence less than the standard range. *Id.* Authority to deviate from the standard range occurs when factors "distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime." *State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993) (citing with approval, David Boerner, *Sentencing in Washington*, § 9-23 (1985)).

Mr. Smith was defending himself against an armed intruder in his own home. This circumstance alone distinguishes Mr. Smith's blameworthiness from the typical instance of intentional murder. In addition, Mr. Smith faced this situation as a physically disabled man, prone to extreme anxiety, and concerned for the safety of his disabled child. Ex. 95A at 6-8, 14. He had reason to fear Mr. Fowler who had told Mr. Smith of his violent past. 10/14/13RP 43-47, 92. His intent and state of mind also distinguish Mr. Smith's blameworthiness from others convicted of the same offense.

The jury was not asked to make any findings on the appropriate punishment for Mr. Smith. Its verdict did not signal any belief in the length of incarceration the case merited. *See, e.g.*, CP 26 (court's

instruction to jury: "You have nothing whatsoever to do with any punishment that may be imposed").

The Department of Corrections suggested an exceptional sentence less than the standard range of 72 months as a reasonable term of punishment that held Mr. Smith responsible but accounted for these mitigating circumstances. CP 118. It premised this recommendation upon extensive review of the case and its experience with the criminal justice system. *Id.*

When a judge misunderstands the extent of his sentencing discretion, this misinterpretation of the law is a fundamental defect undermining the validity of the sentence imposed. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007); *see State v. Miller*, 181 Wn.App. 201, 216, 324 P.3d 791 (2014). When a judge relies on "an impermissible basis for refusing to impose an exceptional sentence," it has misapplied the law and a new sentencing hearing is required. *State v. Khanteechit*, 101 Wn.App. 137, 138, 5 P.3d 727 (2000); RCW 9.94A.585.

The court claimed it could not "second guess the jury" which had rejected self-defense. 1/14/14RP 37. It called the request for an exceptional sentence as "being asked to disregard the finding of the

jury." 1/14/14RP 40. This is a substantial misunderstanding of the judge's sentencing authority for which this Court should grant review.

b. This Court should grant review because trial courts should be informed they have authority to impose a lesser sentence based on substantial mitigating evidence.

In *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015), this Court held that a sentencing judge must "meaningfully consider" a legally available mitigating factor presented to it. In *O'Dell*, the judge believed she was prohibited from imposing an exceptional sentence based on the defendant's claim that his young age diminished his ability to appreciate the wrongfulness of his conduct. "This failure to exercise discretion is itself an abuse of discretion subject to reversal." *Id.* at 367.

The court did not exercise its discretion when it rejected the DOC and defense recommendations for an exceptional sentence on the basis that it would be disregarding the verdict to do so. The jury passed no judgment on the appropriate sentence or decide whether Mr. Smith's conduct was as blameworthy as other cases. The jury's verdict did not speak to the relevant criteria for assessing the appropriateness of an exceptional sentence below the standard range and constitutes a legally incorrect basis to reject an exceptional sentence.

The circumstances of the case are extraordinary. The unplanned shooting, provoked by an unpredictable, aggressive neighbor in his own home, and exacerbated by his feelings of vulnerability from his PTSD and his daughter's special needs, substantially distinguished Mr. Smith's acts from others convicted of the same offense. The court did not understand or apply its lawful discretion. Substantial public interest favors review to ensure judges impose serious sentences only upon on an accurate understanding of their sentencing authority.

F. CONCLUSION

Based on the foregoing, Petitioner Bobby Smith respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 7th day of January 2016.

Respectfully submitted,

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

December 8, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BOBBY JERREL SMITH, II, a/k/a B.J. SMITH, Appellant.	No. 45789-0-II UNPUBLISHED OPINION

JOHANSON, C.J. — A jury found Bobby Jerrel Smith II guilty of second degree murder of his neighbor, Robert Fowler. Smith appeals his conviction and sentence, arguing that (1) the trial court violated his constitutional right to present a defense when it permitted the State to redact portions of Smith's recorded police interview, (2) the trial court erred by admitting a detective's "opinion" statements, and (3) the trial court abused its discretion by refusing to impose a sentence below the standard range. We hold that (1) any error associated with the redacted interview was harmless, (2) the trial court properly admitted the detective's statements as investigatory tactics and interrogation techniques, and (3) the trial court properly exercised its discretion under the Sentencing Reform Act of 1981 (SRA) (ch. 9.94A RCW). We affirm the conviction and sentence.

FACTS

I. BACKGROUND

In June 2011, Port Angeles Detective Kevin Spencer responded to a reported shooting. Detective Spencer found Smith outside his home and observed a deceased male, later identified as Fowler, inside the residence. There was a large knife beside Fowler's right arm, blood on Smith's clothing, and five bullet cartridge casings. Bethany Smith, Smith's daughter, was home during the shooting. She had heard an argument between her father and another man, followed by gunshots. Bethany[1] also told police that she heard someone say, "I'm sorry, I'm sorry, please don't."[2] Report of Proceedings (RP) (Oct. 8, 2013) at 73.

Smith willingly accompanied Detective Jason Viada to the police station. Smith told Viada he had known Fowler for approximately two months and that Fowler often came to Smith's home. The two men were neighbors and had become friends, frequently sharing beer and discussing their respective military experiences.

Smith became increasingly concerned about Fowler's erratic behavior and Smith started to carry a gun. Fowler's frequent visits were "stressin' [him] out" because Smith is a disabled veteran and he suffers from post-traumatic stress disorder (PTSD). Ex. 59 at 3. Smith also told Detective Viada he had experienced other situations involving feelings of imminent death in his past.

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[1] Intending no disrespect, we refer to Bethany Smith by her first name for clarity.

[2] Bethany's testimony was inconsistent regarding whether she heard these words, but the trial court permitted the State to elicit testimony that she initially told police she had heard this statement, ruling that Bethany's original account fell within the excited utterance exception to the hearsay rule.

Smith recounted the events as follows. Smith described Fowler the day of the shooting as "frighteningly delusional" and possibly under the influence of marijuana when Fowler came to Smith's home and demanded money. RP (Oct. 9, 2013) at 28. Fowler became angry and threatened to "cut [Smith's] throat" when Smith refused to loan him money. RP (Oct. 9, 2013) at 22, 28. Smith feared for his life and for his daughter's life when Fowler grabbed a knife from a nearby table.

Fowler came toward him with the knife in his hand notwithstanding Smith's warning that he was armed with a gun. Fowler said, "'I'm gonna get you, you son of a bitch.'" RP (Oct. 8, 2013) at 98-99. Smith fired shots at Fowler. Fowler continued to advance after the first two shots, threatening to kill Smith. When Fowler started to go upstairs, Smith was "just shooting." RP (Oct. 9, 2013) at 21. At some point Fowler fell, and Smith shot Fowler in the head at close range in a downward angle. Detective Spencer also conducted a lengthy interview with Smith, which like Detective Viada's was recorded and transcribed.

II. PROCEDURE

The State charged Smith with first degree premeditated murder. Before trial, Smith asserted a theory of self-defense and declined to submit any diminished capacity defense based on his PTSD. The State moved in limine to redact portions of Smith's lengthy interview with Detective Spencer where Smith discussed the impact of his PTSD and his experiences in the military.[3] The State planned to play a video recording of the interview and argued that Smith's

[3] During this exchange, the trial court asked Smith whether he would be calling an expert witness to discuss his PTSD diagnosis. Smith told the court that he did not plan on doing so because his PTSD was a "generic description" and he was not going to rely on a diminished capacity defense. RP (Oct. 7, 2013 9:13 AM) at 12.

statements in the proposed redacted portion were irrelevant and likely to confuse the jury. Smith opposed the State's motion, arguing that the law required the jury to view the reasonableness of Smith's response during the incident through the eyes of a reasonable person who suffered from PTSD.

In the challenged portion of Detective Spencer's interview of Smith, Smith explained that he had served in the Navy and that he had been diagnosed with PTSD. Smith recalled events during his Navy career in which he experienced a fear of "imminent death." Ex. 95A at 18. He and Detective Spencer discussed similarities between the fear Smith felt during those events and that which he experienced during the altercation with Fowler.

The State reminded the court that its goal was not to redact every mention of Smith's PTSD; it felt simply that Smith's past experiences in the military had no bearing on his conduct during the shooting incident. Satisfied that the fact that Smith suffered from PTSD was mentioned elsewhere in Detective Spencer's interview and also on the tape of Detective Viada's interview and would therefore be heard by the jury, the court granted the State's motion, ruling that the portion of the interview the State sought to redact contained largely irrelevant material in part because Smith was "not relying on PTSD." RP (Oct. 7, 2013) at 22.

Smith also objected to the inclusion of other aspects of the interview with Detective Spencer. Specifically, Smith challenged Detective Spencer's suggestion that the blood evidence undermined Smith's self-defense claim because Detective Spencer was not an expert in this field and Smith requested a limiting instruction. The trial court declined to provide a limiting instruction but opined that Smith was free to cross-examine Detective Spencer.

The State's theory was that Smith had become increasingly paranoid and had developed an obsession with the possibility of intruders and the potential threat to his daughter. The State argued that Smith was paranoid about the danger that Fowler allegedly posed. The State called several forensic science experts, each of whom had assisted with the investigation.[4] During its case-in-chief, the State relied principally on this forensic science to demonstrate that Smith's self-defense theory was untenable.

The forensic scientists' testimony uniformly stated that, considering his injuries, had Fowler been holding the knife in his hand during his death, blood and deoxyribonucleic acid (DNA) would have been found on the knife. But no blood was found on the knife.

Kristopher Kern, a blood stain expert, observed "transfer stains" on Fowler's right hand. RP (Oct. 9, 2013) at 51. Kern testified that transfer stains occur when something with a wet blood source comes into contact with a "non-bloody" object and that the knife handle would have had blood stains if it had come into contact with a bloody hand. RP (Oct. 9, 2013) at 52. James Luthy and Mariah Low, other forensic scientists, generally agreed with these opinions.

Low found a miniscule amount of DNA from more than one person on the knife, but she could not identify a match with certainty. Low explained, however, that if someone bleeding as profusely as Fowler was had touched the knife, she would have expected to find a significant amount of DNA. Dr. Daniel Selove, a forensic pathologist, testified that the second or third shot would have rendered Fowler's legs paralyzed and would likely have caused him to lose

[4] Each of the State's forensic science witnesses were certified as experts in their individual fields and were employed by the Washington State Patrol Crime Lab.

consciousness. Fowler had been lying down at the time of the final shot, which caused instant death.

The State also called Karla Pennington, Fowler's significant other, and Terry Stevens, Pennington's brother. Pennington recalled that Fowler and Smith were friends and that Fowler was in a good mood and was happy on the day of the shooting. Stevens echoed Pennington's testimony. He spoke with Fowler on the telephone less than 30 minutes before Fowler's death and described Fowler as having been happy and laughing. Furthermore, Pennington explained that Stevens owed her and Fowler a sum of money and Fowler knew that Stevens planned to pay them back on the day of the incident.

Smith's testimony largely followed his initial statements to detectives. Smith let Fowler into his home when he knocked on the door, but maintained that he feared for his life when Fowler threatened to cut his throat with a knife. Smith mentioned that he suffered from PTSD several times before the jury.

The jury found Smith guilty of the lesser included offense of second degree murder. Smith requested a sentence below the standard range because of his "imperfect self-defense," his lack of criminal history, and his military service. RP (Jan. 14, 2014) at 24.

In response, the court said in part,

> Like I indicated to you before there was no threat at that point, absolutely none and you made the decision to terminate the life. . . . So, you know, I believe by mitigating the sentence I'm being asked to disregard the finding of the jury *and I'm not inclined to do so based upon the testimony that was before me.*

RP (Jan. 14, 2014) at 40 (emphasis added). The court sentenced Smith to the low end of the standard range. Smith appeals.

ANALYSIS

I. REDACTED INTERVIEW

Smith contends that the trial court's decision to redact portions of his interview with Detective Spencer denied him his constitutional right to a fair trial by violating his right to present a defense. Smith also argues that the trial court's redaction ruling was based on an erroneous interpretation of the self-defense standard. Even assuming, without deciding, that the trial court erred by excluding relevant evidence, we hold that any error was harmless and that the trial court did not violate Smith's right to present a defense.

A. EXCLUSION OF EVIDENCE

Smith's argument is most fairly characterized as a challenge to the trial court's discretionary ruling to admit or exclude evidence because the Sixth Amendment does not transform all evidentiary errors into errors of constitutional magnitude. *State v. Barry*, 183 Wn.2d 297, 300, 352 P.3d 161 (2015). The trial court's decision to admit or exclude evidence is reviewed for abuse of discretion.[5] *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). "There is an abuse of discretion when the trial court's decision is manifestly unreasonable or based upon untenable grounds or reasons," such as the misconstruction of a rule. *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997) (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). We also consider whether a reasonable judge would rule as the trial judge did. *Gunderson*, 181 Wn.2d at 922.

[5] To be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Where error is from violation of an evidentiary rule rather than a constitutional mandate, we do not apply the more stringent "'harmless error beyond a reasonable doubt'" standard. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) (quoting *Bourgeois*, 133 Wn.2d at 403). Instead, we apply "'the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *Thomas*, 150 Wn.2d at 871 (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

Here, Smith argues that the trial court erred by redacting a portion of his interview in part because the trial court was persuaded by the State's argument that admitting this evidence would mislead the jury by suggesting there is a subjective element involved in a claim of self-defense. Smith recognizes, correctly, that the State's assertion there is no subjective component associated with a claim of self-defense is misguided. Our courts have long held that self-defense involves both subjective and objective elements.[6] *State v. Read*, 147 Wn.2d 238, 242-43, 53 P.3d 26 (2002).

But even if this mistaken understanding of the law was the foundation of the trial court's decision to exclude relevant and otherwise admissible evidence, Smith's contention fails because any error is harmless. Any error is harmless because the trial court allowed Smith to submit evidence to support the subjective component of his self-defense theory. Smith testified to support

[6] A defendant is entitled to have the jury instructed on self-defense if there is some evidence to support the theory. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). Self-defense has three elements: (1) the defendant subjectively feared that he was in imminent danger of great bodily harm, (2) the defendant's belief was objectively reasonable, and (3) the defendant exercised no greater force than was reasonably necessary. *State v. Werner*, 170 Wn.2d 333, 337-38, 241 P.3d 410 (2010). Self-defense involves both subjective and objective elements. *State v. Read*, 147 Wn.2d 238, 242-43, 53 P.3d 26 (2002). The subjective element considers the defendant's acts "in light of all the facts and circumstances the defendant knew when the act occurred." *Read*, 147 Wn.2d at 243. The objective elements consider "what a reasonable person would have done if placed in the defendant's situation." *Read*, 147 Wn.2d at 243.

his claim of self-defense, mentioning that he suffered from PTSD several times before the jury. No ruling prevented Smith from presenting additional evidence regarding his PTSD; Smith could have testified about the connection between his military near death experiences and how he felt the day of the shooting.

The jury heard Smith describe his PTSD and his past experience with fear of imminent death in his interview with Detective Viada, which, unlike Detective Spencer's interview, was not redacted. Detective Spencer also referenced the stress Smith must have felt during the shooting incident based on Smith's having faced "imminent death situations before." Ex. 95A at 84. Any prejudice resulting from excluding some evidence related to Smith's PTSD is slight because of the other PTSD evidence admitted. Smith did present his subjective perspective to the jury.

In addition, the evidence that Smith did not act in self-defense was strong. The forensic scientists' testimony uniformly stated that if Fowler had the knife in his hand during his death, blood and DNA would have been found on the knife. But no blood was found on the knife.

Dr. Selove explained that Fowler would have been incapacitated after the third of five total shots and Smith himself admitted that even when he realized Fowler was severely wounded and "pretty bad off," that he would not stop shooting until Fowler stopped moving. RP (Oct. 14, 2013) at 85. At some point, Smith shot Fowler in the head at close range in a downward angle. And the jury was properly instructed on all elements of a self-defense claim. Accordingly, Smith cannot demonstrate that the outcome of his trial would have been materially affected had the alleged error not occurred. We hold that Smith's argument fails.

B. RIGHT TO PRESENT A DEFENSE

In a closely-related argument, Smith claims he was denied his right to present his self-defense theory because of the court's exclusion of some of the PTSD evidence. For many of the same reasons discussed above, we disagree; Smith was not denied his right to present his self-defense theory. Thus, any error does not rise to a constitutional magnitude.

We review a claim of a denial of Sixth Amendment rights de novo. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). "'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). The United States and Washington Constitutions guarantee the right to present a defense. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A defendant's right to an opportunity to be heard in his defense is basic in our system of jurisprudence. *Chambers*, 410 U.S. at 294.

Here, the trial court's ruling did not *prevent* Smith from presenting his defense. The trial court did not attempt to otherwise restrict Smith's presentation of his self-defense theory. The State asserted that it would not object to other testimony concerning Smith's PTSD. Smith testified about suffering from PTSD. And many of the redacted statements were cumulative. Moreover, Smith requested, and the trial court provided, a legally adequate self-defense instruction that included both the subjective and objective elements of a self-defense claim.

Accordingly, the trial court's ruling limited the evidence Smith could use to support his theory, but it did not *prevent* Smith from presenting his self-defense claim. In the context of the

evidence presented, we cannot say that Smith was denied his constitutional right to a fair trial. We hold that Smith's constitutional right to present a defense was not violated.

II. IMPERMISSIBLE OPINION ON GUILT

Smith next argues that the trial court erred by admitting impermissible opinions on guilt made by Detective Spencer during his interview with Smith. Specifically, Smith challenges Detective Spencer's statements that scientific evidence "goes against" Smith's statements and Detective Spencer's stated opinion that blood would have been on the knife due to the scientific properties of blood if Fowler was holding the knife as Smith claimed. Ex. 95A at 75. Smith contends these statements were impermissible opinions because (1) Detective Spencer implied that Smith's account of the events was incredible and (2) Detective Spencer lacked the expertise to offer scientific conclusions. We hold that the statements do not constitute impermissible opinions on guilt because they were deliberately used as interrogation tactics during a pretrial interview of Smith.

We review a trial court's decision to admit or exclude a law enforcement officer's statements during an interrogation for an abuse of discretion. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001) (plurality opinion); *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009) ("'Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant because it invad[es] the exclusive province of the [jury].'" (internal quotation marks omitted) (alterations in original) (quoting *Demery*, 144 Wn.2d at 759)). Neither a lay nor an expert witness "'may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.'" *King*, 167 Wn.2d at 331 (quoting *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). Admitting

impermissible opinion testimony regarding the defendant's guilt may be reversible error because it violates a defendant's constitutional right to a jury trial, including the independent determination of the facts by the jury. *Demery*, 144 Wn.2d at 759.

But our courts have held that statements made during a pretrial interview and accompanying testimony at trial that assists in providing context to those statements are not the types of statements that carry a special aura of reliability usurping the province of the jury. *Demery*, 144 Wn.2d at 763-65; *State v. Notaro*, 161 Wn. App. 654, 669, 255 P.3d 774 (2011). Instead, such trial testimony is an account of tactical interrogation statements designed to challenge a defendant's initial story and is not opinion testimony. *Demery*, 144 Wn.2d at 763-65.

Smith contends that Detective Spencer's statements were impermissible opinions on guilt, particularly those statements regarding the properties of blood, because he was not an expert. For instance during the interrogation of Smith, Detective Spencer told Smith that the scientific evidence "goes against" Smith's statements and "it's very clear [Fowler] did not have the knife in his hand in the beginning." Ex. 95A at 75-76. Detective Spencer opined that blood would have been on the knife due to the scientific properties of blood if Fowler was holding the knife as Smith claimed. Detective Spencer then discussed differences in the properties of blood between humans and animals.

Here, the trial court declined to redact these statements, but emphasized that Smith would be able to cross-examine Detective Spencer on issues including his expertise and the basis of his opinion. When Smith did so, Detective Spencer explained that he knew that it was not necessarily true that there was no proof that Fowler touched the knife. Detective Spencer explained that he had been using a ruse to see whether Smith would change his story.

These are precisely the types of statements considered tactical interrogation statements and therefore not considered impermissible opinion testimony. *Demery*, 144 Wn.2d at 763-65. As in *Notaro*, Detective Spencer's trial testimony about his interrogation statements clarified for the jury that he was not expressing his personal belief on Smith's veracity or his individual opinion on guilt. 161 Wn. App. at 669-70. Accordingly, we hold that the trial court did not err by admitting impermissible opinion testimony and we reject Smith's claim.

III. EXCEPTIONAL SENTENCE

Smith argues that the trial court's refusal to consider an exceptional sentence below the standard range based on his "failed defense" constitutes reversible error. Br. of Appellant at 35. Because the trial court properly exercised its discretion in sentencing Smith, his argument fails.

The SRA provides that certain "failed defenses" may constitute mitigating factors supporting an exceptional sentence below the standard range. These "failed defense" mitigating circumstances include self-defense, duress, mental conditions not amounting to insanity, and entrapment. RCW 9.94A.535(1)(c). Where a defendant has requested a sentence below the standard range, review is limited to circumstances where the court has refused to exercise discretion or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). A court refuses to exercise its discretion if it declines categorically to impose an exceptional sentence below the standard range under any circumstances. *Garcia-Martinez*, 88 Wn. App. at 330.

Here, the sentencing court stated that it "believe[d] by mitigating the sentence [it was] being asked to disregard the finding of the jury and [it *was*] *not inclined to do so based upon the*

testimony that was before [it]." RP (Jan. 14, 2013) at 40 (emphasis added). Sentencing courts cannot categorically refuse to consider imposing an exceptional sentence based on a failed defense merely because a jury rejected the same. *State v. Jeannotte*, 133 Wn.2d 847, 855, 947 P.2d 1192 (1997). But the sentencing court here stated that it was not inclined to impose such an exceptional sentenced *based on the testimony it heard*. Read in context, the court exercised its discretion based on the circumstances presented. It did not categorically refuse to consider an exceptional sentence nor did the court mistakenly believe that it could not do so. Therefore, we hold that the trial court did not misconstrue its sentencing authority.

Accordingly, we affirm Smith's conviction and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, C.J.
JOHANSON, C.J.

We concur:

Worswick, J.
WORSWICK, J.

Melnick, J.
MELNICK, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 45789-0-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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Clallam County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: January 7, 2016

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