NO. 32956-9-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

Robert C.,

Juvenile Appellant.

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

APPELLANT'S REPLY BRIEF

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

A. ARGUMENT IN REPLY

Robert C. is a ten year old boy who has been the victim of abuse his entire life. The extreme abuse that Robert has suffered at the hands of his family members has caused him to suffer severe emotional trauma, and his reaction when he is assaults by family members is to defend himself. He lacked the capacity to commit the crimes charged and was acting in self-defense when confronted by further abuse by his family members. Defense counsels failure to raise self-defense constituted ineffective assistance of counsel.

1. Robert lacked the capacity to commit the crimes charged.

The law presumes children under twelve lack the capacity to commit a crime. *State v. Erika D.W.*, 85 Wn. App. 601, 605, 934 P.2d 704 (1997). The law reflects the assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. *J.D.B. v. N. Carolina*, --- U.S. ---, 131 S. Ct. 2394, 2403, 180 L. Ed. 2d 310 (U.S. 2011).

While the State is correct that Washington has not addressed juvenile capacity issues in some time, juvenile brain development and its impact on criminality has been the subject of significant analysis

since Washington's Supreme Court last analyzed capacity.[1] The United States Supreme Court has analyzed the impact of youth in a number of other cases relating to culpability. *Miller v. Alabama*, --- U.S. ---, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Washington's Supreme Court has likewise addressed the issue. *State v. O'Dell*, 183 Wn.2d 680, 358 P.3d 359 (2015). Washington has also analyzed the importance of communication with juveniles and how ineffective assistance can impact juvenile defendants. *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010).

Capacity must be addressed within this jurisprudence, which requires the court to address how the lack of experience, perspective and judgment impacts a child's decision making process and makes them more vulnerable and susceptible to outside pressures than adults. *J.D.B.*, 131 S.Ct. at 2403. Understanding that a "reasonable" child will not act the same way as an adult "generates commonsense conclusions about behavior and perception," informing the decision making process

[1] Washington's Supreme Court last analyzed capacity in *State v. Ramer*, where it found insufficient evidence to support finding of capacity. *State v. Ramer*, 151 Wn.2d 106, 116, 86 P.3d 132 (2004).

of the juvenile court. *See Id.*, at 2402 (*quoting Yarborough v. Alvarado*, 541 U.S. 652, 674, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004) (Breyer, J., dissenting)).

Robert lacked the capacity to commit the crimes charged. At best, he had the capacity of a ten year old boy. The only witness who testified admitted he did not know "any ten year olds who are mature." RP 31. The court found Robert's "maturity is right on for a ten year old of his age." RP 46. This is insufficient for a finding of capacity.

None of the other evidence the court heard supported a conclusion Robert had greater capacity than that of a ten year old. The court heard Robert suffers from a long history of abuse which has caused extreme emotional distress requiring treatment and medication. RP 29. His response to the actions of his relatives was consistent with this diagnosis, rather than the indication of criminal intent the court is required to find. *See State v. Ramer*, 151 Wn.2d 106, 116, 86 P.3d 132, 136 (2004). (No capacity for an eleven year old charged with two counts of first degree rape of child who admitted the conduct was "bad").

The nature of the crime requires the court to find Robert lacks capacity. Robert has learned there are no consequences to the adult who

assault him. Where children have not been taught to appreciate the wrongfulness of their conduct, a higher degree of proof is required to show the child understands the illegality of what they are doing. *See e.g., Ramer*, 151 Wn.2d at 115. His reaction to being yelled at by Ms. Smith over the remote and to being verbally and physically assaulted by Ms. Ratcliff is consistent with how children who have suffered from physical abuse behave. RP 107; Nancy Wright, Eric Wright, *SOS (Safeguard Our Survival): Understanding and Alleviating the Lethal Legacy of Survival-Threatening Child Abuse*, 16 Am. U. J. Gender Soc. Pol'y & L. 1, 43 (2007) ("After repeated beatings and threats, the children believe their lives are in 'mortal danger'").

While the State argues Robert displayed a desire for secrecy, there is no evidence this is true. State's Brief 12. This factor is generally applied where a child commits an act in secrecy or tells a victim or another not to tell about a crime, which is not something that happened here. *State v. Linares*, 75 Wn. App. 404, 417, 880 P.2d 550 (1994), as amended on denial of reconsideration (Sept. 26, 1994) Robert did not try to hide his acts or do anything in secret. To the contrary, Robert told his aunt not to assault him again before he acted and he never left the room where he had fled to in order to avoid his

aunt. RP 71. Instead, Robert merely stayed where he was in his mother's bedroom. This is not an indication of a desire for secrecy. Robert did not tell anyone not to tell on him, instead staying in his mother's room.

The State also argues he had two prior diversions in Montana. State's Brief at 14. There was no evidence of what these diversions entailed and this court should find there is insufficient evidence of what process Robert was afforded or what consequences he may have received to give credit to this. *See* RP 24-26.

This Court must presume a child whose maturity is "right on for a ten year old" is unable to form the capacity to commit a crime and that it is legally insufficient to find otherwise. RCW 9A.04.050. No evidence at the capacity hearing rebutted this presumption. Robert is a victim of domestic violence, whose reaction to being assaulted by family members is to protect himself. The State failed to establish by clear and convincing evidence that this ten year old child had capacity to commit these crimes. This Court should reverse and dismiss these charges. *State v. James P.S.*, 85 Wn. App. 586, 594, 934 P.2d 698 (1997) *aff'd sub nom. State v. J.P.S.*, 135 Wn.2d 34, 954 P.2d 894 (1998).

2. The State's brief fails to recognize the substantial record of physical and mental abuse Robert suffered on September 12, 2014.

There is no question Robert is the victim of sustained abuse as a child at the hands of family members. RP 122. He suffers from post-traumatic stress. RP 107. When family members become physical with Robert, he reacts by "trying to protect himself." RP 107.

The State makes the argument several times that "there is not one single piece of evidence which points to any of these three victims having been an abuser." State's Reply at 20. This ignores the substantial record of physical and mental abuse Robert was subjected to on September 12, 2014.

a. Robert was physically abused.

Robert's abuse by family members is well documented in the record. He had been beaten and belittled on a "constant basis." RP 106. At Robert's capacity hearing, the State's only witness testified it was "spot on" that Robert's anger resulted from the abuse he suffered from his family. RP 29.

This abuse was ongoing and occurred on September 12, 2014 as well. The Court need only look to Ms. Smith's statement that Robert's reaction to her was because he believed he had to protect himself from

being hit by her. RP 84. She told the court that Robert "thought I was going to hit him." *Id*. Robert's reactions to this belief were reasonable.

Further evidence of Robert's physical abuse by family members is clear from the record. Mr. Radcliff testified that she told Robert to "get off your ass" and then *kicked the bucket he was sitting on out from under him*, causing him to fall to the ground. RP 123.

Rather than allow Robert the space his therapists said he needed to cool down, Ms. Radcliff pursued him into his mother's bedroom, where he just sat on the bed "normal." RP 125. Ms. Radcliff testified her level of anger was "getting up there" and told Robert he needed to "get his fucking ass outside". *Id*. She then threatened him with further physical abuse, telling him "let's go." *Id*. She got "in his face." RP 126.

It wasn't until after he had suffered this physical abuse that Robert acted in a far more reasonable way than most physically abused children would, by warning her to stay away from him. RP 126. Instead of letting him cool down as the therapists had advised, Ms. Radcliffe reached for him, which was finally when Robert displayed the "little paring knife." RP 128, 134. He used no more force than was necessary to avoid being assaulted again by Ms. Radcliff.

b. Robert was emotionally abused.

Moreover, Robert suffered significant emotional abuse on September 12, 2014, like he has his entire life. Emotional abuse, has been called "the most elusive and damaging of all types of maltreatment for a child" and represents "the core issue and most destructive factor across all types of child abuse and neglect." Sana Loue, *Redefining the Emotional and Psychological Abuse and Maltreatment of Children Legal Implications*, 26 J. Legal Med. 311, 311 (2005). Psychological abuse is the most prevalent type of child abuse. U.S. Dep't of Health & Human Servs., *Fourth National Incidence Study of Child Abuse and Neglect* 3-15 (2010).[2] Emotional abuse has a more extensive and destructive impact on the development of children than any other type of abuse. Jessica Dixon Weaver, *The Principle of Subsidiarity Applied: Reforming the Legal Framework to Capture the Psychological Abuse of Children*, 18 Va. J. Soc. Pol'y & L. 247, 247. (2011).

No child should be ordered to "scrub the toilet with a toothbrush," especially one who has suffered a lifetime of physical and emotional abuse. RP 122. And a child who refuses such a demand

[2] The Dep't of Health and Human Services estimates that 4.1 per 1000 children are emotionally abused. 15.9 per 1000 are emotionally neglected. *Id.*

should not have the bucket he was sitting on pulled out from under him. RP 123. His reaction, which was to go inside the house where he could avoid further assaultive behavior, is as reasonable as anyone could expect from an emotionally and physically abused child like Robert. RP 123-24.

Rather than provide comfort to her child, Robert's mother abandoned him, telling Ms. Radcliff that "she didn't want to see him. She didn't want anything to do with him. She was done." RP 124. Social science may describe Robert's reaction to his mother's abandonment as abandoned child syndrome. *See generally,* Arthur Henley, *"The Abandoned Child." Deviancy and the Family*, 199-208 (1973). Even if not a syndrome, Robert's abandonment by his mother to Ms. Radcliff, who had just sworn at him and belittled him by pulling out the bucket he was seated upon, was abusive and an additional example of emotional abuse Robert was subjected to on September 12. Given Robert's delicate nature because of the abuse he has suffered his entire life, Robert's mother's abandonment to an aunt who had just physically assault him is additional evidence of Robert's need to protect himself.

3. Defense counsel's failure to understand self-defense constituted ineffective assistance because it fell below an objectively reasonable standard and prejudiced Robert's defense.

Robert's trial lawyer did not choose to defend Robert by arguing self-defense, but instead told the court that self-defense did not apply. RP 153. This falls below an objective standard of reasonableness. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

"Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production." WSBA, *Performance Guidelines for Criminal Defense Representation* 24 (2011). A child may protect himself from a guardian's physical force. *See State v. Graves, 97 Wn. App. 55, 57, 982 P.2d 627 (1999)* (juvenile entitled to raise claim of self-defense to father's discipline). No tactical decision can explain why defense counsel would fail to investigate or raise this defense. *See, e.g,. A.N.J.*, 168 Wn.2d at 110. Even if it were tactical, there is "no conceivable legitimate tactic" to explain why counsel would not raise a legitimate self-defense claim. *See State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999).

Had the court been asked to consider self-defense, it is likely Robert would have been acquitted. The court highlighted many facts related to self-defense in her findings. The court recognized Robert suffers "blow-back" from some "horrible abuse that he suffered as a child." RP 156. When his aunt ordered him to "go clean the toilet with a toothbrush", this "obviously made him quite angry." RP 161. He was made angrier when Ms. Ratcliff knocked the bucket he was sitting upon out from under him, then saying "get off your ass and go do your chores." RP 162. The court found Robert did not display the knife until Ms. Ratcliff "grabbed his arm to pull him out of the room." RP 164. The court also found Robert warned her not to further assault him when this 10 year old boy told her not to get in his face. RP 165.

The failure to argue self-defense falls below an objective standard of effective assistance of counsel. No strategy can explain why defense counsel failed to argue this defense. Defense counsel's statement that he thought it did not apply demonstrates it was not a tactical decision but rather a failure to understand the legal standards. Had defense counsel argued self-defense, there is a reasonable probability Robert would have been acquitted. Counsel's ineffective assistance entitles Robert to a new trial.

4. The State failed to address the impact of youth on self-defense, which requires the court to analyze to analyze how Robert's age would have affected the reasonableness of his actions.

The State fails to analyze how Robert's youthfulness impacts the right to self-defense, instead choosing to address the issue from the perspective of an adult. Where a "reasonable person" standard otherwise applies, courts must determine how a child's age "would have affected how a reasonable person" would act. *See e.g.*, *J.D.B.*, 131 S.Ct. at 2403. Washington recognizes the impact on youthfulness and how it can mitigates upon responsibility in the legal system. *See, O'Dell*, 358 P.3d at 360 (2015).

A child's age will affect how a reasonable person perceives their circumstances. This Court must analyze the nature of the crime from the point of view of a ten year old boy, who lacks, experience, perspective, and judgment to recognize and avoid choices detrimental to him. *See J.D.B.*, 131 S.Ct. at 2403 (A "reasonable child" has an incomplete ability to understand the world around himself). Because "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them," evaluating a juvenile's subjective belief that a threat exists against the standard of a reasonable adult person does not

adequately assess a juvenile's culpability in a self-defense context. Marsha L. Levick, Elizabeth-Ann Tierney, *The United States Supreme Court Adopts A Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can A More Reasoned Justice System for Juveniles Be Far Behind?*, 47 Harv. C.R.-C.L. L. Rev. 501, 521 (2012) *quoting J.D.B.*, 131 S.Ct. at 2403.

Reasonable force in self-defense is justified if there is an appearance of imminent danger. *State v. Bradley*, 141 Wn.2d 731, 737, 10 P.3d 358 (2000). The evidence of self-defense must be assessed from the standpoint of what a reasonably prudent person would have done under the circumstances as they appeared to the defendant. *State v. Janes*, 121 W.2d 220, 238, 850 P.2d 495 (1993), *citing State v. Allery*, 101 Wn.2d 591, 594, 682 P.2d 312 (1984). When a child is acting in self-defense, the court must adopt the "reasonable juvenile standard" to the child's actions. *J.D.B.*, 131 S.Ct. at 2403.

This Court must address what a reasonable for a ten year old boy to perceive as his need for self-defense when he has been assaulted by his family members. Robert's conduct under the circumstances is remarkable in its restraint. Robert retreats on multiple occasions, only to be harassed further by his family. When he saw no other option

rather than to retreat to his mother's bedroom and to take a small paring knife in order to keep his aunt away from him, he acted reasonably and in self-defense. Both Washington and the United States Supreme Court have made clear that youthfulness matters and this court should apply *J.B.D.'s* "reasonable child" standard to the facts in this case.

B. CONCLUSION

The State failed to establish by clear and convincing evidence Robert had the capacity to commit the crimes charged. The failure to establish capacity requires dismissal.

Defense counsel committed ineffective assistance in failing to allege self-defense, prejudicing Robert's right to a fair trial. Should the court not dismiss this matter, Robert requests a new trial where he may be defended by competent counsel.

DATED this 17th day of November 2015.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 32956-9-III
v.	)	
	)	
ROBERT C.,	)	
	)	
Juvenile Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVID TREFRY	( )	U.S. MAIL
[David.Trefry@co.yakima.wa.us]	( )	HAND DELIVERY
YAKIMA CO PROSECUTOR'S OFFICE	(X)	AGREED E-SERVICE
128 N 2ND STREET, ROOM 211		VIA COA PORTAL
YAKIMA, WA 98901-2639		

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF NOVEMBER, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710