Supreme Court No. 96966-3
Court of Appeals No. 77013-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP SCHLOREDT,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Philip Schloredt, the petitioner, was found guilty of arson. The Court of Appeals affirmed. Mr. Schloredt asks this Court to review the Court of Appeals' decision terminating review.[1]

B. ISSUES

1. As part the constitutional right to present a defense, defendants have a right to present relevant evidence. The trial court excluded relevant *observation testimony* from *lay witnesses* about Mr. Schloredt's behavior around the time of the fire. This including testimony that Mr. Schloredt was not taking his medications. The excluded evidence was highly probative as to whether Mr. Schloredt acted *maliciously* in causing the fire, an essential element. Subsequent rulings forbade Mr. Schloredt from rebutting evidence suggesting malice. In affirming the exclusion of the evidence, did the Court of Appeals misapply this Court's opinion in State v. Clark, 187 Wn.2d 641, 389 P.3d 462 (2017), which held that *opinion testimony* from an *expert witness* on a defendant's mental state is inadmissible unless diminished capacity is pleaded? RAP 13.4(b)(1), (3), (4).

[1] A copy of the unpublished opinion, dated December 24, 2018, and the order denying Mr. Schloredt's motion for reconsideration, dated February 15, 2019, are in the appendix.

2. This Court has held that, like other constitutional issues, a claimed violation of the right to present a defense is reviewed de novo. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Nevertheless, the Court of Appeals is divided. Some apply de novo review. Others apply an abuse of discretion standard in reviewing if relevant evidence was unconstitutionally excluded. Still others hold there is no constitutional violation if a trial court does not abuse its discretion in applying the rules of evidence. Should this Court grant review to settle the issue? RAP 13.4(b)(1), (2).

3. Jury instructions are the law of the case and the prosecution assumes any added burden set forth in the instructions. Under the jury instructions, the prosecution was required to prove that the fire caused by Mr. Schloredt "was manifestly dangerous to human life, including firefighters." The fire was quickly extinguished and no firefighters were present. Did the prosecution fail to prove that the short-lived fire was manifestly dangerous to firefighters when no firefighter was endangered? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

Philip Schloredt, who was in his mid-50s, shared a home with his mother, Susan Schloredt.[2] RP 1131. Mr. Schloredt has suffered from mental illness since childhood. RP 1401-06; CP 23-24. He has been diagnosed with schizophrenia or schizoaffective disorder. RP 231, 243, 1376, 1405; CP 24, 80. His younger sister, Stephanie Schloredt, has observed her brother's mental illness since they were teenagers. RP 1403-05; CP 507.

In the month leading up to the charged incident, Mr. Schloredt was not taking his prescribed medication. CP 24. He exhibited odd behaviors and made suicidal statements. CP 24. His mother wanted him to be evaluated by mental health professionals. CP 24.

One afternoon, Mr. Schloredt became very upset at his mother and his sister, who was visiting. RP 1224, 1137. Mr. Schloredt's mother called mental health services, later referred to at trial as "crisis" services, to get help for her son. RP 1144. When told that no one was available, she called 911. RP 1154, 1193, 1195.

Mr. Schloredt decided to leave so he could cool down. RP 1242. He started to leave in his pickup truck, but stopped to retrieve some

[2] A more detailed statement of the case can be found in Mr. Schloredt's opening brief. Br. of App. at 5-12.

cigarettes along with a container of gasoline. RP 1228. To save some money, he planned to take the gasoline to his other vehicle, a Mitsubishi Eclipse, which was parked elsewhere. RP 1185, 1228, 1242.

As Mr. Schloredt was in the process of retrieving the container and moving it to his truck, two police officers arrived in separate vehicles. RP 824; 1053-56; Exs. 5, 10.[3] The information the officers received was about a man expressing suicidal ideation. RP 856, 1071. The officer who arrived first activated his lights and blocked off the road with his vehicle. Exs. 5, 10. As both officers pulled up, some of the gasoline from the container Mr. Schloredt was holding spilled out on the road and Mr. Schloredt put the container down. RP 1057, 1188; Ex. 10.

Mr. Schloredt testified he felt that his family was trying to have him arrested or committed. RP 1248. He decided he would punish his family by lighting himself on fire. RP 1244, 1249. Seconds after the police arrived, he lit the container on fire. RP 1244; Ex. 10. Intending to pour the flaming liquid on his head, Philip picked up the container, but he instinctively came to his senses, realizing this was a "really stupid" idea. RP 1245. Instead of killing himself, he threw the container over the hood

[3] These are video recordings of the incident from the two police vehicles. RP 851, 1065-66.

of his truck, which happened to be in the direction of the police vehicles. Ex. 10.

The container bounced off the top of the truck and landed on its bed, spreading flames onto one of the officer's nearby vehicle and the street. Exs. 5, 10. Using fire extinguishers from their vehicles, the officers quickly put out the fire. RP 829-31, 1060-62; Exs. 5, 10. Some nearby people also used a water hose to help extinguish the fire, which had spread to a couple of other vehicles. RP 946, 1061; Ex. 10.

Mr. Schloredt left on foot. RP 1247-48. He was found in some blackberry bushes on a hill between a golf course and railyard. RP 77, 802-03, 877. He peacefully submitted to the police and was arrested. RP 807-08, 811, 890.

The prosecutor charged Mr. Schloredt with one count of first degree arson. CP 1. At trial, Mr. Schloredt presented a defense of general denial, contending that the prosecution would not prove beyond a reasonable doubt that he acted maliciously in causing the fire. CP 143; RP 486, 752, 1312-20.

Because Mr. Schloredt did not assert a diminished capacity defense, the prosecution successfully moved to exclude evidence related to Mr. Schloredt's mental health diagnoses. RP 556-57; CP 144. This ruling extended to lay testimony from Mr. Schloredt and his family members,

which would have shown that Mr. Schloredt was not taking his medications and that his mother had been trying to get her son help from mental health services. RP 737-40.

After barring Mr. Schloredt from eliciting evidence relevant to his mental state, the court ruled defense counsel violated that ruling during opening statements by representing that Mr. Schloredt had made statements of self-harm and was suicidal. CP 155; RP 998-1002. Based on the theory that counsel was advancing an unpleaded diminished capacity defense, the prosecution was permitted to elicit evidence that Mr. Schloredt had set his mother's couch on fire before. CP 155; RP 998-1002. The court refused to reconsider its earlier rulings. RP 1002-04.

Based on Mr. Schloredt's testimony that he had lit the container with the intent to kill himself, the court permitted the prosecution to play a recorded jail call made six days after Mr. Schloredt's arrest for the purpose of rebutting Mr. Schloredt's testimony about his mental state. RP 1273-76; Ex. 15. In the call, the caller told Mr. Schloredt that his "best bet is to act insane." Ex. 14, p. 8; Ex. 15. So that the jury would not be misled into thinking Mr. Schloredt actually had no mental health problems, the defense asked the court to now permit evidence that Phillip was diagnosed with schizoaffective disorder, that he was prescribed medications, and that

he was not taking these medications around the time of the fire. RP 1276-77. The court refused. RP 1277.

The jury convicted Mr. Schloredt as charged. The Court of Appeals affirmed the conviction.

D. ARGUMENT

1. The trial court's exclusion of relevant evidence tending to rebut the prosecution's claim that Mr. Schloredt acted with malice in causing the fire deprived Mr. Schloredt of his right to present a complete defense.

a. Using the wrong standard of review and misapplying this Court's opinion in *Clark*, the Court of Appeals ruled the trial court properly excluded relevant observational testimony from lay witnesses.

To prove Mr. Schloredt guilty of arson, the prosecution had to prove beyond a reasonable doubt that he "maliciously" caused the fire. RCW 9A.48.020. "'Malice' and 'maliciously' shall import an evil intent, wish, or design to vex, annoy, or injure another person." RCW 9A.04.110(12).

Mr. Schloredt's defense was that the prosecution would be unable to prove that he acted with malice in causing the fire. RP 752, 1312-20. In support of his defense, Mr. Schloredt sought to elicit testimony from his mother and sister about his behavior around the time of the incident. As defense counsel explained below, this included Mr. Schloredt's "behaviors" of "not taking medication that would appear to [his mother

and sister] to be prescribed or a legitimate medication." RP 560. Although Mr. Schloredt was not seeking to elicit evidence of any mental health diagnoses or the nature of the medications, the trial court excluded this evidence. RP 737. The court forbade Mr. Schloredt from testifying that he was not taking his medications around the time of the incident. RP 1219. The court also excluded evidence that Mr. Schloredt's mother was seeking to get mental health treatment for her son. RP 739-40.

The trial court ruled the evidence was irrelevant because Mr. Schloredt had not pleaded the defense of diminished capacity. RP 557, 737. "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. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). Expert testimony is required for a diminished capacity defense. State v. Eakins, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995).

The court's rulings violated Mr. Schloredt's constitutional right to present a complete defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. VI; Const. art. I, § 22. That right includes the right to present relevant evidence. Jones, 168 Wn.2d at 720. If the evidence is relevant, a court may exclude the evidence only if the prosecution meets its burden to show unfair prejudice that disrupts the

fairness of the trial. Id. The prosecution's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the prosecution's interest outweighs the defendant's need can otherwise relevant information be withheld. Id. If the evidence is highly probative, the Sixth Amendment and article I, § 22 require admission regardless of any countervailing state interest. Id.

This Court has distinguished "diminished capacity evidence" "from observation testimony about relevant facts tending to rebut the State's mens rea evidence." State v. Clark, 187 Wn.2d 641, 651, 389 P.3d 462 (2017). Whether or not diminished capacity is pleaded, "relevant observation testimony tending to rebut any element of the State's case, including mens rea, is generally admissible." Id. at 653. Similarly, the United States Supreme Court has recognized that "observation evidence" or testimony about what a defendant did or said is relevant to show what was on the defendant's mind during the act at issue. Clark v. Arizona, 548 U.S. 735, 757, 126 S. Ct. 2709, 165 L. Ed. 2d 842 (2006).

Accordingly, evidence about Mr. Schloredt's behavior around the time of the incident was relevant in evaluating whether Mr. Schloredt acted maliciously when he caused the fire. This behavior included that Mr. Schloredt was not taking his medications and that his behavior caused his family to believe Mr. Schloredt was mentally ill and suicidal. This

evidence supported Mr. Schloredt's claim that he did not maliciously cause the fire. Rather, this evidence showed it was part of a suicide attempt that he abandoned and that the wall of fire he caused was not "an evil intent, wish, or design to vex, annoy, or injure" the police. RCW 9A.04.110(12) (definition of malice).

Still, the Court of Appeals' affirmed the trial court's exclusion of the evidence on the grounds that the evidence was not relevant. Slip. op at 8. In doing so, the Court of Appeals made two mistakes. First, the court incorrectly applied an abuse of discretion standard in evaluating relevancy. And second, the court misapplied this Court's opinion in State v. Clark, 187 Wn.2d 641, 389 P.3d 462 (2017).

This Court has applied *de novo* review to claimed violations of the constitutional right to present a defense, including in evaluating whether the excluded evidence was relevant. Jones, 168 Wn.2d 719; State v. Lee, 188 Wn.2d 473, 488-93, 396 P.3d 316 (2017); State v. Darden, 145 Wn.2d 612, 621-23, 41 P.3d 1189 (2002). Notwithstanding this precedent, the Court of Appeals in this case applied the deferential abuse of discretion standard in evaluating whether the excluded evidence was relevant. Slip. op at 6-8. Because the Court of Appeals is bound to follow this Court's precedent, the Court of Appeals erred by applying an abuse of discretion standard. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

As for Clark, a case involving a premeditated murder prosecution, there the defendant tried to introduce *expert testimony* about his intellectual deficits. Clark, 187 Wn.2d 644. The trial court excluded this evidence, but permitted observation testimony from lay witnesses tending to show the defendant had intellectual deficits, including that that he participated in special education and received Social Security disability benefits. Id. at 646. This Court affirmed, reasoning that because the defendant "purposefully did not assert or plead diminished capacity and the proposed expert testimony was not relevant to any other purpose, it was properly excluded." Id. at 645.

The Court of Appeals improperly extended Clark to exclude observation testimony from lay witnesses. In affirming the exclusion of evidence that Mr. Schloredt was not taking his medications and that his family had sought help from mental health services, the Court of Appeals reasoned the trial court "correctly perceived that allowing observational testimony that [Mr.] Schloredt behaved differently when he was not taking prescribed mediation would have been a 'back doorway' into expert diagnosis." Slip op. at 8 (emphasis added). But such evidence is relevant if it comes in the form of observation evidence. Clark, 187 Wn.2d at 649-50. And the idea was not merely to imply that Mr. Schloredt had been diagnosed with a mental disorder. Rather, it was to show that Mr.

Schloredt was acting strangely and that what had happened was a failed suicide attempt, not a malicious act against the police. The evidence was also relevant to provide the jury a complete picture of the events. See State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615 (1995) (evidence may be admissible as *res gestae* to provide a complete picture for the jury and to explain the context of events close in time and place).

Applying de novo review, the excluded evidence was more than minimally relevant. Because admission of this relevant evidence was not "so prejudicial as to disrupt the fairness of the fact-finding process at trial," Jones, 168 Wn.2d at 720, Mr. Schloredt's constitutional right to present a defense was violated.

b. Review is warranted to clarify the limits of *Clark* and to settle the conflict on the proper standard of review to apply to claimed violations of the right to present a defense.

Notwithstanding the facts of Clark and language in the decision stating that observational testimony from lay witnesses relevant to *mens rea* remains admissible, both the trial court and the Court of Appeals read the decision to exclude such evidence unless diminished capacity is pleaded. This conflict is significant and merits this Court's review. RAP 13.4(b)(1). Whether such lay observation testimony is properly excluded without violating a defendant's right to present a defense is a significant

constitutional question. RAP 13.4(b)(3). And because the issue will recur, the issue is a matter of substantial public importance. RAP 13.4(b)(4).

Review is also warranted to settle a conflict on the proper standard of review to apply to claimed violations of the right to present a defense. Notwithstanding that this Court said in Jones that review is *de novo*, there is rampant conflict on the issue. Some Court of Appeals decisions properly apply de novo review. State v. Benavides, No. 50617-3-II, 2019 WL 1125676, at *2 (Wash. Ct. App. Mar. 12, 2019) (unpublished) ("We apply the de novo standard of review here, as the Jones court and other courts have done where a constitutional claim is made."). But some cases incorrectly hold that if there was no abuse of discretion in making an evidentiary ruling, the inquiry ends and there has been no constitutional violation. State v. Blair, 3 Wn. App. 2d 343, 350-51, 415 P.3d 1232 (2018). Still other cases hold the constitutional claim must be examined not through the lens of evidentiary rules, but by asking whether there has been an abuse of discretion in excluding "minimally relevant" evidence. State v. Horn, 3 Wn. App. 2d 302, 311-12, 415 P.3d 1225 (2018). In this case, the Court of Appeals applied an abuse discretion standard and deferred to the trial court's view on whether the evidence was relevant. Slip. op. at 6-8. Review is warranted to provide guidance and resolve the conflict. RAP 13.4(b)(1), (2).

2. The prosecution failed to prove that the fire was manifestly dangerous to a firefighter, as required by the jury instructions. Applying the law of the case doctrine, the Court of Appeals should have reversed the conviction.

a. The law of the case doctrine required the prosecution to prove that the fire was manifestly dangerous to human life, *including firefighters*. The evidence was insufficient to prove this additional requirement.

Due process demands the State prove all the elements of a criminal offense beyond a reasonable doubt. In re Winship, 397 U.S. 361, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. When a Washington court conducts a sufficiency of the evidence review, the law of the case doctrine applies. State v. Johnson, 188 Wn.2d 742, 756, 762, 399 P.3d 507 (2017). Under this doctrine, jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). This means that the prosecution assumes the burden of proving the requirements as set forth in the jury instructions, including any additional or unnecessary requirement. Id.

Under the first degree arson statute, "A person is guilty of arson in the first degree if he or she knowingly and maliciously . . . [c]auses a fire or explosion which is manifestly dangerous to any human life, including firefighters." RCW 9A.48.020(1)(a) (emphasis added).

The "including firefighters" language expresses an intent that firefighters not be excluded from the breadth of the statute even though

they are trained to combat fires. State v. Levage, 23 Wn. App. 33, 34-35, 594 P.2d 949 (1979). As the pattern to-convict instruction on first degree arson recognize, the "including firefighters" language need not be given in every case. The pattern instructions put this language in brackets. 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 80.02 (4th Ed). These "brackets signify that the enclosed language may or may not be appropriate for a particular case." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 0.10 (4th Ed).

Here, the jury received a to-convict instruction requiring the jury to find beyond a reasonable doubt that "the fire or explosion was manifestly dangerous to human life, including fire fighters." CP 191. There was no evidence any firefighter was endangered by the fire caused by Mr. Schloredt.

If an unnecessary requirement is included in a to-convict instruction without objection, the State assumes the burden of proving the added requirement. Hickman, 135 Wn.2d at 102-03. Firefighters qualify as a type of "human life." The language "including fire fighters" imposed an unnecessary requirement. Therefore, to convict Phillip of first degree arson, the prosecution bore the burden of proving not merely that the fire was "manifestly dangerous to human life," but that it was manifestly dangerous to *a firefighter*.

A hypothetical reinforces this interpretation. Suppose one is told to buy fruit, *including tomatoes*. If the person returns with apples and oranges, but no tomatoes, the request has not been fulfilled. In contrast, suppose one is told instead to buy *any* fruit, including tomatoes. Now, the person has the choice to buy or not buy tomatoes.

The instruction in this case mirrored the first factual hypothetical because, unlike the statute, the to-convict instruction did not use the word "any." "'Any' means 'every' and 'all.'" State v. Westling, 145 Wn.2d 607, 611, 40 P.3d 669 (2002). Thus, the language of the to-convict instruction required proof that the fire be manifestly dangerous not simply to "human life" in general, but to a firefighter as well.

The Court of Appeals agreed there was no evidence a firefighter was endangered by the fire because it was quickly put out by the police. The court further agreed that the prosecution bore the burden of proving the elements as set out in the jury instructions. Slip. op. at 13-14.

Nevertheless, the Court of Appeals concluded that "instructions as given did not require proof that the fire was dangerous to a particular firefighter." Slip. op at 14. The court reasoned the "most natural interpretation of the instruction is that the fire must be manifestly dangerous to human beings as opposed to occurring in a setting where no person is nearby." Slip. op at 14.

But this reading is true regardless of whether the "including firefighters" language is included. Causing a dangerous fire or explosion on a deserted island would not satisfy the requirement the manifestly dangerous to human life requirement. This reasoning does not justify the court's conclusion that the language at issue added nothing

The Court of Appeals also reasoned that "[f]irefighters as a group are specifically mentioned to dispel any notion that firefighters, who are trained to fight fire, are not endangered by it." Slip. op. at 14. This may be why *the statute* includes the language. It may also be a good reason to provide the jury a separate instruction (in a case involving firefighters) to this effect. But it does not follow that the "including firefighters" language did not alter the burden of proof once inserted into the to-convict instruction.

b. Review is warranted to provide guidance on how juries should be instructed in first degree arson cases.

The Court of Appeals failed to grapple with the issue. The court's interpretation of the to-convict instruction renders the "including firefighters" language superfluous. See State v. K.L.B., 180 Wn.2d 735, 742, 328 P.3d 886 (2014) (in interpreting statutory language, court will not interpret language to be superfluous). As shown by the hypothetical involving fruit, the court's interpretation would be tenable if, like the

statute, the instruction had used the word "any" before the phrase "human life, including firefighters." The to-convict instruction, however, did not say "any human life." It said, "manifestly dangerous to human life, including firefighters." Accordingly, the Court of Appeals should have reversed because the evidence did not prove that the fire was manifestly dangerous to a firefighter.

The Court should grant review on this issue because it is a matter of substantial public interest. RAP 13.4(b)(4). Given the pattern instructions, the issue will likely recur. Reviewing the issue will also give the Court an opportunity to provide guidance on appropriate jury instructions in first degree arson cases.

E. CONCLUSION

For the foregoing reasons, Mr. Schloredt respectfully requests this Court grant his petition for discretionary review.

Respectfully submitted this 18th day of March, 2019.

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project (#91052)
Attorney for Appellant

Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. PHILLIP LINCH SCHLOREDT, Appellant.	)	No. 77013-6-I DIVISION ONE UNPUBLISHED OPINION FILED: December 24, 2018

BECKER, J. —Appellant Phillip Schloredt lit a container full of gasoline and threw it in the direction of a police officer. The officer's car and several nearby vehicles were set aflame. A jury convicted Schloredt of first degree arson. He appeals his conviction on a number of grounds, including that the trial court improperly excluded layperson testimony regarding Schloredt's mental illness. We affirm.

FACTS

The alleged arson occurred on September 21, 2015. Seattle Police Officers John Paquette and James Norton responded to a 9-1-1 call at the home where appellant Phillip Schloredt lived with his mother. The call was from Schloredt's mother. She said that her son, 56 years old at the time of trial, had a history of mental illness and was declaring that he was going to kill himself. She requested that someone come to her house to take Schloredt to a hospital.

When the officers arrived at the scene, Schloredt's gray truck was parked in the middle of the street along with other vehicles that were blocking traffic. Schloredt was dragging a container full of gasoline towards his truck. Officer Paquette testified that when he got out of his police car, he saw flames shoot up and the container landed in the bed of the pickup truck with the flaming liquid splashing onto the hood of the patrol car. The flames engulfed the truck, Officer Paquette's car, and several other cars parked on the street. The officers' dash-cam video, which captured the dramatic scene, was shown to the jury at trial. Using their fire extinguishers, and aided by a neighbor with a garden hose, the officers were able to extinguish the blaze. In the chaos, Schloredt ran away. A short time later, officers found him hiding not far away in a blackberry thicket and arrested him.

The State charged Schloredt with arson in the first degree, RCW 9A.48.020(1)(a). This charge required the State to prove that Schloredt "knowingly and maliciously" caused a fire or explosion which was "manifestly dangerous to any human life, including firefighters." RCW 9A.48.020(1)(a).

Before trial, Schloredt moved to be found incompetent. Schloredt was evaluated and diagnosed with an unspecified schizophrenia spectrum and other disorders. At the time, Schloredt was taking antipsychotic medication and an antidepressant. The evaluator concluded that Schloredt was competent to stand trial and the trial court agreed.

Schloredt's defense was a general denial. He did not assert a defense of diminished capacity and he did not plan to present expert testimony regarding his mental state.

The trial in March 2017 lasted four days. The jury deliberated for two hours before convicting Schloredt as charged. His sentence of 108 months was within the standard range.

ANALYSIS

Rebutting Proof of Malice

Schloredt contends the trial court improperly excluded key evidence offered to rebut the State's proof of malice.

The term "malice" imports "an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty." RCW 9A.04.110(12). The dash-cam video was the primary evidence the State relied on to prove malice. The jury also heard the recording of a call Schloredt made from jail on the night of the fire to his friend, Louie Gaddini. In the call, Schloredt began by asking, "Was that awesome or what?" When Gaddini suggested that Schloredt would be charged with arson, Schloredt answered that he would also be charged with assaulting a police officer. Gaddini told Schloredt that he burned a police car, to which Schloredt responded, "Did I? Sweet. That's good."

To rebut the evidence of malice, Schloredt wished to present testimony by his mother and sister that he was mentally ill and that he had not been taking his prescribed medications at the time of the incident. The State successfully moved in limine to exclude such evidence as irrelevant because Schloredt was not asserting a diminished capacity defense.

A diminished capacity defense "allows a defendant to undermine a specific element of the offense, a culpable mental state, by showing that a given mental disorder had a specific effect by which his ability to entertain that mental state was diminished." State v. Clark, 187 Wn.2d 641, 650, 389 P.3d 462 (2017). Clark, a decision issued only a few weeks before Schloredt's trial, was the principal authority considered by the trial court on the State's motion to exclude. Clark holds that expert opinion testimony will not be admitted to prove what is functionally a diminished capacity defense unless that defense is affirmatively pleaded.

The defendant in Clark had killed the victim with a single gunshot to the head. Charged with premeditated murder, he claimed the shooting was an accident. Thus, as in the present case, the primary disputed issue was the defendant's level of intent. Clark, 187 Wn.2d at 645. Although Clark did not assert diminished capacity as a defense, he sought to present an expert witness who would testify that he scored at the very bottom in standardized intelligence tests. The trial court excluded the expert testimony as irrelevant and confusing to the jury. The court did, however, rule that the defendant could elicit relevant observation testimony by lay witnesses concerning his intellectual deficits,

including that he had been enrolled in special education, received Social Security disability benefits and was generally considered as "slow" by people who knew him. Clark, 187 Wn.2d at 646.

On appeal, the Supreme Court approved the trial court's ruling. It was clear the purpose for offering the expert's testimony was to establish diminished capacity, i.e., that Clark's intellectual deficits "impaired his ability to understand and assess the risks of his behavior, thereby reducing the likelihood that Clark acted with a culpable mental state" when he shot the victim. Clark, 187 Wn.2d at 651.

> We do not question the principle that a criminal defendant has the constitutional right to present evidence in his or her own defense, and relevant observation testimony tending to rebut any element of the State's case, including mens rea, is generally admissible. However, expert opinion testimony that a defendant has a mental disorder that impaired the defendant's ability to form a culpable mental state is, by definition, evidence of diminished capacity. And where, as here, the defense does not plead diminished capacity, such testimony is properly excluded.

Clark, 187 Wn.2d at 653.

Here, the trial court applied Clark when ruling on the State's motion in limine. The court ruled that Schloredt's mother and sister could testify to their observations of Schloredt's behavior, but as lay witnesses they could not testify about his mental health diagnoses or history, and they could not say he was refusing to take prescribed medications for his mental illness. Medication, the court ruled, "is a back doorway of getting into diagnosis." Schloredt argues that the court's ruling excluded "highly probative" evidence from which the jury could have found that he did not act maliciously.

Evidentiary rulings are reviewed for abuse of discretion. If relevant defense evidence is excluded, we review as a matter of law whether the exclusion violated the constitutional right to present a defense. Clark, 187 Wn.2d at 648-49.

Schloredt did not formally assert a diminished capacity defense. Unlike the defendant in Clark, he did not even try to offer expert testimony about his mental state. He is correct that offering evidence to raise a reasonable doubt on the essential element of malice is not equivalent to a claim that he lacked the capacity to act maliciously. Testimony by lay witnesses who observed what the defendant did and heard what he said is potentially relevant to a mens rea issue if it shows what in fact was on the defendant's mind when he committed the act at issue. Clark v. Arizona, 548 U.S. 735, 757, 126 S. Ct. 2709, 165 L. Ed. 2d 842 (2006). Nevertheless, we conclude the line drawn by the trial court did not impinge upon Schloredt's constitutional right to challenge the State's proof of malice.

As the trial proceeded, the court permitted a substantial amount of evidence that Schloredt's family members believed he was in a mental health crisis of some kind. Officer Norton testified on cross-examination that he was dispatched for a possible suicidal person and that Schloredt's mother told him her son was suicidal. Officer Paquette testified similarly on cross-examination. Schloredt's mother testified about Schloredt's erratic behavior earlier that day, which led her to call "the professionals at the crisis center" to get help. She testified that when she called 9-1-1, she asked the dispatcher to send "the order

for someone to take him to a hospital." Schloredt's sister testified that earlier in the day, she attempted to take the lock off Schloredt's door "so the crisis health people could come take him into the hospital for evaluation."

Schloredt himself testified on direct examination that before the fire he made statements about wanting to kill himself. Pressed by the prosecutor on cross-examination, he admitted that he was angry at his mother and sister, that he intentionally parked his truck in the middle of the street, that he went back to get the container of gas while carrying a lighter, and that when he saw the officer approaching he lit the container on fire. But when the prosecutor asked him to admit that he threw the flaming gas container at the officer, he denied it. "That's not what happened at all." He testified that when he lit the fire, he had "this vision of punishing my mother and sister by pouring this gasoline on my head and letting them watch it burn." But when he felt how hot the fire was, he had a "moment of clarity . . . where I decided whatever I was doing was insane, you know, and that I should be doing something else. . . . I decided this is really stupid. This is going to be a really bad, really painful ordeal. . . . I flicked it, but just barely flicked it away from me and Mom like this, and it flew over, flew and landed, what, 10 feet. It didn't even go 10 feet." "And the only thing I did was try to kill myself with that gasoline and that's the goddamn truth, I swear to God." He said, "This whole thing was to punish them. The reason for the fire was for one reason, to punish them for not being my family."

Schloredt testified about what was on his mind and presented the observations of his behavior by his mother and sister to support his position that

he did not set the fire maliciously. Schloredt was able to argue in closing that his behavior was not rational and that it was the result of a personal crisis for which his family believed he needed professional help. The trial court properly excluded evidence of a specific diagnosis of mental illness, which would have been hearsay without an expert witness. The court correctly perceived that allowing observational testimony that Schloredt behaved differently when he was not taking prescribed medication would have been a "back doorway" into expert diagnosis.

The trial court's reasoning is equally applicable to Schloredt's alternative argument that the excluded evidence was admissible as res gestae, to complete the story of the crime. See State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615 (1995). There was extensive testimony about the events leading up to the fire from which the jury could deduce that Schloredt's act was one of a troubled individual. He fails to show that nonexpert testimony about schizophrenia and prescription medication was necessary to give the jury a more complete picture.

We conclude the excluded evidence was not relevant to rebutting the State's proof of the element of malice. The trial court's ruling was not an abuse of discretion.

Admission of Phone Conversation

Six days after the incident, the jail recorded a telephone call between Schloredt and his friend Gaddini. Gaddini talked to Schloredt about bail and sentencing guidelines, and he told Schloredt of a friend's suggestion that Schloredt's best defense would be to act insane. After Schloredt testified, the

court permitted the prosecutor to introduce, for rebuttal, a redacted excerpt of the recording for the stated purpose of showing that Schloredt's testimony about his mental health was feigned or exaggerated. In the excerpt, references to Gaddini's friend were redacted. As the jury heard it, Gaddini himself advised Schloredt "to act insane":

SCHLOREDT: Hey, Louie.
[GADDINI]: Hey- Hey Phil.
SCHLOREDT: How are you? (Unintelligible.)
[GADDINI]: Phil?
SCHLOREDT: Yeah.
[GADDINI]: What's goin' on buddy?

There is a gap for redacted conversations.

[GADDINI]: . . . Your best bet is to act insane.
SCHLOREDT: Yeah.
[GADDINI]: You know what I mean?
SCHLOREDT: Yeah.
[GADDINI]: That you're retarded and you know, blah, blah, blah. That's the best bet you could do. You blacked out. You're a former drug addict and shit like that.
SCHLOREDT: Yeah.

Schloredt then testified on redirect that the advice to "act crazy" was "stating the obvious" in view of the fact that he had a "history of crisis" since he was 19 years old and was "diagnosed with a significant illness."

Schloredt contends that the trial court erred in playing the recording notwithstanding his objection that it was hearsay. He argues that the recording was several levels of hearsay, in that Gaddini, who was not testifying, was relaying advice from his friend, a third party who also was not testifying.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted.

ER 801(c). Gaddini's advice to Schloredt was not offered to prove that Schloredt's best defense was to act insane. It was offered to show that Schloredt heard a suggestion that his best defense was to act insane and that he agreed with it. Because Gaddini's part of the conversation was not offered for the truth of the matter asserted, Schloredt's hearsay objection was not well taken.

Schloredt also argued that by playing the recorded call with its suggestion that Schloredt was faking a mental illness, the prosecutor opened the door to the previously excluded evidence that he had a long-standing diagnosis of schizophrenia and was not taking the medication prescribed for it. Noting again that Schloredt had not raised an affirmative defense, the trial court declined to admit the requested evidence. Schloredt contends this ruling was part of a pattern of allowing the State to introduce evidence that he acted maliciously while unfairly preventing him from introducing relevant evidence in response.

Whether a party has opened the door to the admission of otherwise inadmissible evidence is within a trial court's discretion. State v. Wafford, 199 Wn. App. 32, 34, 397 P.3d 926, review denied, 189 Wn.2d 1014, 402 P.3d 822 (2017). We find no abuse of discretion. Schloredt was able to make his point that he had mental issues, albeit unspecified ones. For the reasons already discussed, the trial court had a tenable basis for excluding nonexpert testimony about Schloredt's diagnosis and his medication.

Prior Act of Burning

About two weeks before the charged arson, Schloredt had an argument with his mother about his storage of excess construction materials at the house. When she walked out instead of continuing to listen to him, Schloredt set the living room couch on fire. His mother easily put out the fire, but called 911 for assistance. During motions in limine, the trial court provisionally granted Schloredt's motion to exclude evidence of this incident under ER 404(b).

Schloredt's opening statement initiated his theme that he was suffering a personal crisis on the day in question. He said the evidence would show that he was threatening suicide and severe self-harm.

On the second day of trial, the State moved for permission to introduce evidence about the previous couch-burning incident, arguing that Schloredt opened the door to it in his opening statement. The trial court granted the motion. The State elicited testimony about the couch-burning from the responding officer and from Schloredt's mother.

Schloredt contends the court abused its discretion in allowing this testimony. We disagree. His opening statement suggested, without expressly saying so, that he was so debilitated by personal crisis that he was not capable of forming malicious intent. This is the essence of diminished capacity, a defense that has to be pleaded affirmatively and supported by expert testimony. Because Schloredt did not plead diminished capacity, the State was unprepared to offer expert testimony about his mental state. It was fair to allow the State to

rebut the implied defense with evidence that might otherwise have been excluded.

And in any event, admission of the couch-burning incident was permissible under ER 404(b) as proof of Schloredt's intent. "Evidence of prior misconduct is generally admissible to show intent and the absence of accident when a defendant admits doing the act, but claims that he did not have the requisite state of mind to commit the charged offense." State v. Hernandez, 99 Wn. App. 312, 322, 997 P.2d 923 (1999), review denied, 140 Wn.2d 1015, 5 P.3d 8 (2000). The court found the couch-burning incident was relevant to the issue whether Schloredt acted with malice when he threw the burning gasoline. This was a proper purpose.

"Even when ER 404(b) evidence is admitted for a proper purpose and is relevant to a material issue in the case, the trial court must still weigh the probative value against its prejudicial effect." State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995). Unfair prejudice is prejudice that is more likely to arouse an emotional response than a rational decision by the jury and suggests a decision on an improper basis. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Schloredt contends that the trial court erred in concluding that the probative value clearly outweighed the potential prejudice. We disagree.

Schloredt's mental state was the disputed element. Schloredt's trial strategy as revealed in his opening statement was to argue that his actions were driven by irrational thinking, not by malice. Evidence that he had recently set a fire to vex his mother when he was angry with her was probative of the State's

theory that he acted maliciously when he directed the flames at the officers. The court instructed the jury to consider the incident only as evidence of malice. The evidence did not suggest making a decision on an improper basis. We find no abuse of discretion.

Sufficiency of Evidence

Due process requires that the State prove every element of a crime beyond a reasonable doubt. State v. Johnson, 188 Wn.2d 742, 750, 399 P.3d 507 (2017). When a jury instruction is not objected to, it becomes the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Thus, the State assumes the burden of proving otherwise unnecessary elements that are included without objection as part of the jury instructions. Hickman, 135 Wn.2d at 102.

> Jury instruction 9 set forth the following elements to convict Schloredt:
>
> (1) That on or about September 21, 2015, the defendant caused a fire or explosion;
> (2) That the fire or explosion was manifestly dangerous to human life, *including fire fighters*;
> (3) That defendant acted knowingly and maliciously; and
> (4) That the acts occurred in the State of Washington.

CP 191 (emphasis added). This language closely follows the statutory definition found in RCW 9.A.48.020(1) and the pattern jury instruction. 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 80.01. However, in the pattern jury instruction, "including fire fighters" is enclosed in brackets, indicating that the language does not need to be used in every situation. In this case, the phrase "including fire fighters" may have been unnecessary, but under

Hickman, the State had the burden of proving the second element with that phrase included.

There was evidence that Schloredt's fire could have presented a danger to firefighters if the officers had not quickly extinguished it before firefighters arrived. Still, it is undisputed that no firefighters were involved in putting out the fire. Schloredt contends that because the fire was not manifestly dangerous to any particular firefighter, the evidence was insufficient to prove the second element and the charge must be dismissed with prejudice.

The instruction as given did not require proof that the fire was dangerous to a particular firefighter. The most natural interpretation of the instruction is that the fire must be manifestly dangerous to human beings as opposed to occurring in a setting where no person is nearby. Firefighters as a group are specifically mentioned to dispel any notion that firefighters, who are trained to fight fire, are not endangered by it. We reject Schloredt's challenge to the sufficiency of the evidence.

Affirmed.

Becker, J.

WE CONCUR:

Mann, ACT.

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

STATE OF WASHINGTON, Respondent, v. PHILLIP LINCH SCHLOREDT, Appellant.	)	No. 77013-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Phillip Schloredt has filed a motion for reconsideration of the opinion filed in the above matter on December 24, 2018. Respondent State of Washington has not filed an answer to appellant's motion. The court has determined that appellant's motion for reconsideration should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

FOR THE COURT:

Becker, J.

Judge Pro Tem

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. 77013-6-I**, 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 or residence address as listed on ACORDS:

☒ respondent Gavriel Jacobs, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[gavriel.jacobs@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: March 18, 2019

WASHINGTON APPELLATE PROJECT

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