NO. 98846-3

THE SUPREME COURT OF

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SANTIAGO ALBERTO SANTOS,

Appellant.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW BY YAKIMA COUNTY

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A. **INTRODUCTION.**

From the Court of Appeals procedural statement:

Santos was convicted of the lesser offense of first-degree manslaughter and second degree felony murder. The trial court vacated the manslaughter conviction and sentenced Santos on the conviction of second-degree murder. The jury also returned special verdicts finding that Santos committed the crimes while armed with a deadly weapon. The jury also found two aggravating circumstances: (1) Santos's conduct manifested deliberate cruelty to the victim, and (2) the crime involved a destructive and foreseeable impact on persons other than the victim.

The State of Washington sought an exceptional sentence upward. The trial court found substantial and compelling reasons to justify an exceptional sentence above the standard range. The trial court increased Santiago Santos's sentence by ten years. In total, the trial court sentenced Santos to 398 months in prison.

Petitioner filed a direct appeal, COA #30466-3-III, the Court of Appeals heard oral argument and issued its opinion upholding Santos' conviction and finding upholding the jury's determination that two aggravators had been proven beyond a reasonable doubt. That opinion was contained two dissents, one by the Judge Fearing regarding sufficiency of the evidence presented by the State supporting the

destructive and foreseeable impact on others aggravator.

Chief Judge Pennell dissented stating that theoretically the court could use a vagueness analysis when considering a challenge to an aggravator. She opined it was theoretically possible but found the two aggravators charged in this case would survive such a challenge.

The majority on issue, VIII, Chief Judge Pennell and Judge Siddoway wrote that the State presented the jury with sufficient evidence to prove destructive and foreseeable impact on others aggravator beyond a reasonable doubt. (Slip 51-53):

> Because the jury was presented with sufficient evidence that Santiago Santos was on notice that children lived at Manuel Jaime's house (and therefore likely would be present at the time of the murder) and because the murder was witnessed by a third party who described his observations at trial and subjected his demeanor to the jury's scrutiny, the enhancement under RCW 9.94A.535(3)(r) must be affirmed. (Slip 52-53)

Judge Fearing wrote in his dissent "…no evidence established, beyond a reasonable doubt, a lasting destructive impact on Andrew or others." (Slip at 38-41)

Santos moved the Court of Appeals for reconsideration, which was denied on June 18, 2020. This Motion for Discretionary Review under RAP 13.5(b)(2) followed.

ISSUES PRESENTED BY PETITION

1. Review should be granted to decide whether due process required the trial court to instruct the jury that the State bore the burden of disproving Mr. Santos' defense of diminished capacity beyond a reasonable doubt where this defense negated an essential element of the offense.
2. Review should be granted to decide whether the trial court's refusal to instruct the jury on self-defense was appropriate where "some evidence" supported Mr. Santos's claim of self-defense.
3. Review should be granted to decide whether statutory aggravating factors, which are "elements" of a criminal offense, must comply with the due process prohibition against vague laws. A dissenting judge would have held yes.
4. Review should be granted to decide whether the evidence was sufficient to prove the two aggravators found by the jury. A dissenting judge would have held the evidence was insufficient to prove the "destructive and foreseeable impact" aggravator.

ANSWER TO ISSUES PRESENTED BY PETITION

1. The Court of Appeals opinion does not merit review. Petitioner has not met the standards set forth in RAP 13.4, which set forth basis for review by this court.

B. **STATEMENT OF THE CASE**

The State set forth extensive facts in its opening brief. Those facts are included with this answer and can be found in Appendix A of this document. The opinion of the Court of Appeals also set forth a very long set of facts and procedure covering nearly eighteen pages of the fifth-three-page opinion. That can be found in Appendix B

PROCEDURE

The Court of Appeals set forth an extensive recitation of the

procedural history of this case. The State shall merely refer this court to that information rather than repeating it in this answer.

ARGUMENT

This case does not meet any basis set forth in RAP 13.4(b) which states:

(b) Considerations Governing Acceptance of Review. **A petition for review will be accepted by the Supreme Court only**: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. (Emphasis added)

Issue 1. The court properly instructed the jury. The State does not bear the burden of disproving diminished capacity beyond a reasonable doubt. The actions of the trial court do not warrant review by this court under RAP 13.4.

All three jurists who signed Santos's opinion stated:

> "Santiago Santos cites no authority that extends the negates analysis to the defense of diminished capacity. Instead, this court rejected the analysis in State v. James, 47 Wn. App. 605, 736 P.2d 700 (1987) and State v. Marchi, 158 Wn. App. 823, 243 P.3d 556 (2010), review denied. 171 Wn.2d 1020,253 P.3d 393 (2011)

Of note, Santos relied upon State v. Imokawa 4 Wn.App. 2d 545, 422 P.3d 502 (2018) in the Court of Appeals stating it supported his theory regarding the "negates defense." Now after that case was reversed by this court, State v. Imokawa, 194 Wn.2d 391, 450 P.3d 159 (2019) he now says this reversal supports his argument that the trial court erred when it did not require the State to prove beyond a reasonable doubt that the diminished capacity defense.

A recent unpublished opinion to which the State would direct this court, pursuant to GR 14.19(a) to consider as nonbinding authority and accord State v. Arntsen, 76912-0-I (January 6, 2020) (WACA) such persuasive value as this court deems appropriate addressed this issue.

In Arntsen the issue raised was the defense of diminished capacity. "Arntsen requested the jury be instructed jury be instructed that it was the State's burden to disprove his defense of diminished capacity beyond a reasonable doubt." The trial court denied that request, Arntsen appealed that determination.

On Appeal "Arntsen argues that the jury instructions given by the court did not correctly allocate the burden of proof to the government." Division I of the Court of Appeals disagreed discussing State v. Marchi, 158 Wn.App. 823, 833, 243 P.3d 556 (2010) and as here addressing

Arntsen[‘s] argue[ment] that Marchi is no longer good law after the Supreme Court's decision in State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014), and Division Two of this court's decision in State v. Imokawa. 4 Wn.App. 2d 545, 422 P.3d 502 (2018). Imokawa, however, was more recently reversed. State v. Imokawa, 194 Wn.2d 391, 450 P.3d 159 (2019).” Stating “[n]either W.R., nor Imokawa support Arntsen's position.” The Arntsen Court further addressed this court’s ruling in Imokawa:

> The Supreme Court disagreed, and held:
>
> > The trial court did not need to explicitly instruct the jury that the State has the burden to prove absence of superseding intervening cause because, as instructed, proximate cause and presence of a superseding intervening cause are mutually exclusive. This means proof of proximate cause beyond a reasonable doubt necessarily proves absence of a superseding intervening cause. Imokawa, 194 Wn.2d at 402.
>
> The Court concluded that where "the jury is instructed as to the statutory elements of a crime, that the State bears the burden of proving all elements beyond a reasonable doubt, and that the defendant has no burden of proof, the instructions as a whole are constitutionally adequate and do not violate due process." Imokawa, 194 Wn.2d at 403-04.
>
> Similar to Imokawa, the State did not have the burden to disprove Arntsen's diminished capacity. The jury was instructed that the State had the burden to prove each of the elements of the crimes, including intent, beyond a reasonable doubt. The jury was also instructed that it could consider Arntsen's mental illness or disorder when deciding if the State proved that he acted with the

> requisite intent. The jury's finding that Arntsen had the requisite intent demonstrates that the jury did not find the evidence of diminished capacity persuasive enough to show that he lacked the requisite intent.
>
> The trial court did not err in declining to instruct the jury that the State had the burden of disproving diminished capacity.

The Court of Appeals stated "[w]e follow the teaching of State v. Marchi. Santiago Santos's trial court properly allocated the State's burden of proof in the "to convict" elements… Accordingly, the trial court's jury instructions did not relieve the State of its burden to prove beyond a reasonable doubt that Santos acted intentionally when he stabbed Manuel Jaime to death." (Slip at 22)

This court need look no further than its previous analysis in Imokawa and State v. Marchi, 158 Wn.App. 823, 833, 243 P.3d 556 (2010 to determine this issue does not meet any of the criterion of RAP 13.4 and therefore, does not merit review.

Santos cites this court's grant in State v. Knapp, 195 Wn.2d 1014, 461 P.3d 1197 (2020). Alleging the defense of consent is "a related issue" to diminished capacity. Brief at 10-11. This court's analysis has been consistent that if that which the State is required to prove is an element or as with Knapp, a defense "negates" an element which makes the crime impossible to have been committed then the State has duty to prove the lack of consent, the defense, beyond a reasonable doubt. As analyzed

above diminished capacity does not negate an element, it does not, as does consent, make the crime impossible to commit. That is not true regarding the diminished capacity defense.

2. Self Defense.

Here again the ruling by the Court of Appeals does not meet any criterion set forth in RAP 13.4. Santos' claim is that this court must accept review because the lower court's ruling "…is in conflict with well-established principles governing when a trial court must instruct on self-defense RAP 13.4(b)(1),(2) and that clarifying that a lack of a specific memory by ***this*** defendant which, according to Santos is the reason he was not allowed to claim self-defense, is of substantial public interest.

While the ability to present this alleged defense in Santos' trial was of great import to he and his case, it is not an issue of "substantial public interest." This type of defense is fact specific. The evidence presented to the jury was not merely that Santos could not remember how or who, if anyone, had struck him in the head. The was the most information that was presented which could even remotely be considered as a legal basis for Santos to act as he did. And that one small fact when considered in context with the horrific nature of the murder clearly allowed the trial court to determine that even the minimal amount of evidence which must be presented to a jury to allow this defense had not been proffered.

The Court of Appeal did not, as Santos claims "... reasoned that because Mr. Santos could specifically recall the events, his lack of memory meant there was not some evidence to support a conclusion that he acted in self-defense." The Court of Appeals set forth a very lengthy recitation of the facts of this case. That is a synopsis of hundreds of pages of testimony and the discussion of one specific fact does not somehow mean the Court of Appeals ignored all of the other facts and evidence presented or not presented. That court is tasked to review the entire record. What the court stated regarding this defense was:

> In determining whether the evidence suffices to support a jury instruction on an affirmative defense, the court must view the evidence in the light most favorable to the defendant. State v. O'Dell, 183 Wn.2d 680, 687-88, 358 P.3d 359 (2015). This standard has both subjective and objective elements. State v. Walker, 136 Wn.2d 767, 772 (1998).
>
> The subjective element requires the trial court to place itself in the shoes of the defendant and view the defendant's acts in light of all the facts and circumstances known to the defendant. State v. Walker, 136 Wn.2d at 772. The objective element requires the trial court to determine what a reasonably prudent person similarly situated would have done. State v. Walker, 136 Wn.2d at 772.
>
> Santiago Santos contends that the evidence presented satisfied the low threshold for self-defense instructions. He concedes an incomplete memory of being inside Manuel Jaime's residence, but he argues that the trial court could have inferred he subjectively feared imminent, serious injury due to his delusions. Santiago Santos produced no evidence demonstrating that he reasonably believed he was in imminent danger

> of death or great personal injury, let alone in immediate threat by conduct of Manuel Jaime. Santos testified he thought someone hit him on the back of the head, though he did not remember who hit him or any other details. Santos could not recall whether he and Manuel Jaime were involved in any sort of altercation on the night of the murder. He simply woke up with pain and claimed he had a lump on the back of his head.

Santos failed in the trail court, the Court of Appeals and finally in this court to explain how his stabbing someone 59 or more times could be self-defense where when he was stabbing the victim 59 times, he stopped and used the bathroom, washed his hands then went back to stabbing the victim while taunting the victim with statements such as "you're dying slowly. I told you I was going to do this." PR 383 and I'm going to come back for your family."

Even if Santos had stated unequivocally Jaime hit him in the head the *totality* of the evidence considered in best light for the defendant would not have resulted in there being sufficient evidence to allow the trial court to grant the giving of the self-defense instruction. See the extensive facts set forth in Appendices A, B, and C.

3. Statutory aggravators are not elements of the offense and thus are not amenable to a void for vagueness challenge.

Santos claims this court should review this allegation because "a dissenting judge would have held yes" the aggravators charged in this case were ripe for review under a void for vagueness challenge.

Santos does not address the majority opinion which relies on well established case law which in no manner or means would warrant review under RAP 13.4.

Judge Pennell, the dissenting jurist, did not state that the two aggravators charged in this case could be challenged for vagueness what she actually stated was:

> … I disagree with the majority's aggravating factors analysis. Contrary to the majority and our prior decision in State v. DeVore, 2 Wn. App. 2d 651, 413 P.3d 58 (2018), I believe Washington's sentencing guidelines are theoretically amenable to a vagueness challenge. Nevertheless, the challenge here fails on the merits.

The Chief Judge the proceeds to explain that while theoretically there could be a challenge to aggravators neither of the aggravators that were before this jury were in fact void, negating Santos' allegation.

Again, this court is tasked to review matters which were before the trial court or the Court of Appeals, not theoretically matters when a motion such as this is presented to the court.

Judge Pennell's analysis of this theoretical vagueness challenge of these two aggravators states:

> According to Mr. Santos, the foregoing definition did not provide the jury with a sufficient framework for assessing the applicability of a deliberate cruelty aggravator. Specifically, the jury was not advised of the types of harm inherent to or typical of murder. Thus, he claims that the jury's assessment of the aggravator was standardless and

> arbitrary. I disagree. The crime of murder is well understood in American culture. No guesswork or speculation is required to determine that stabbing someone 59 times is excessive and therefore more violent or egregious than a standard homicide. Cf. Johnson, 135 S. Ct. at 2557 (holding statute asking courts to determine whether a normally nonviolent crime nevertheless generally creates a serious risk of injury denies fair notice and is too standardless to survive a vagueness challenge). As applied to Mr. Santos's case, RCW 9.94A.535(3)(a) is not impermissibly vague.
> …
> The trial court did not provide an instruction defining destructive and foreseeable impact; nevertheless, that factor withstands Mr. Santos's vagueness challenge. The facts at trial made clear the jury was asked two things by RCW 9.94A.535(3)(r):
> 1. Was Mr. Santos on notice that third parties (such as the children who lived with the victim, Manuel Jaime) might have witnessed his criminal conduct?
> 2. Did witnessing the murder cause a third person to suffer a destructive impact?
> These two questions are precise and readily answerable in a nonarbitrary manner. A person of reasonable understanding would not have to guess that murdering someone in the presence of a child could result in an enhanced sentence under RCW 9.94A.535(3)(r). Mr. Santos's vagueness challenge therefore fails. (Slip at 51)

In the last four months all three Divisions of the Court of Appeals have ruled similarly.

> State v. Bennett, 35297-8-III (WACA) 06/25/2020: "Baldwin remains good law and applies here. Bennett cannot assert vagueness challenge to RCW 9.94A.535(3)(a), (b).
>
> Even assuming Bennett can make his vagueness challenges, he makes no showing that the deliberate cruelty and victim vulnerability factors are vague as applied to his conduct.

State v. Haller, 52713-8-II (WACA) 07/21/2020: “Like the sentencing guidelines at issue in *Baldwin,* RCW 9.94A.660 does not fix the penalty for the crimes charged. Rather, it sets the criteria for when a person is eligible for a DOSA and permits the sentencing court to use its discretion in determining whether such an alternative is appropriate. Under *Baldwin,* the vagueness doctrine does not apply to RCW 9.94A.660, and Haller's argument fails.

State v. Engberg, 79082-0-I (WACA) 04/20/2020: “Engberg fails to address multiple recent opinions by this court that have provided guidance on this issue. We decline to overrule our recent precedent. The State correctly points out that this court has expressed that *Baldwin* is still good law as to the proposition that aggravators are not subject to vagueness challenges. *See State v. Brush*, 5 Wn.App.2d 40, 56-63, 425 P.3d 545 (2018); *See also State v. DeVore*, 2 Wn.App.2d 651, 660-65, 413 P.3d 58 (2018).

Brush explicitly states, "[w]e hold that *Baldwin* remains good law. Accordingly, we apply *Baldwin* and hold that Brush cannot assert a vagueness challenge to RCW 9.94A.535(3)(h)(i)." 5 Wn.App.2d at 63. *Brush* is directly on point, providing a thorough analysis of the defendant's vagueness challenge to RCW 9.94A525(3)(h)(i) in light of *Blakely,* Engberg's briefing fails to acknowledge *Brush,* He does not offer the necessary support to confront his constitutional challenge or provide argument as to why we should not adhere to precedent. For these reasons, Engberg's argument is not well taken and, in reviewing *Brush,* we do not find any reason to doubt our decision there. As such, the court's denial of Engberg's pretrial motion challenging the aggravator as void for vagueness was proper.”

State v. Hernandez, 79943-6-I (WACA) 07/20/2020: “As discussed above, because this statute simply guides a sentencing court in deciding whether to impose this requirement, it is not subject to a vagueness challenge. We affirm.”

There is no basis for this allegation to be reviewed by this court. All three divisions are clearly in agreement that this question is not reviewable using a void for vagueness analysis. This court should not grant review of well-reasoned law because one jurist opines that aggravators are "theoretically" reviewable under a challenge for vagueness.

4. Sufficient evidence was presented prove both charged aggravators beyond a reasonable doubt.

In this motion Santos again asserts without citation to any case from this, any other state or federal authority, that the State must present evidence from other homicides in order to prove this particularly heinous act was more heinous than others there is nothing which can substitute for the Court of Appeals opinion:

> Santiago Santos stabbed Manuel Jaime in the chest, the flanks, the back, and the head 59 times. Santos then taunted Jaime as he helplessly bled to death. Santos left Jaime barely alive but in pain until he died at the hospital. Thus, the State proved the existence of "deliberate cruelty" beyond a reasonable doubt.
>
> **Santiago Santos argues, *without citation to authority*, that the State needed to introduce testimony or documentary evidence setting forth facts of other murder cases showing other homicides to be significantly less egregious**. This court does not review errors not briefed or supported with citation to authority. RAP 10.3; Valente v. Bailey, 74 Wn.2d 857, 858, 447 P.2d

> 589 (1968); Meeks v. Meeks, 61 Wn.2d 697, 698, 379 P.2d 982 (1963); Avellaneda v. State, 167 Wn. App. 474, 485 n.5, 273 P.3d 477 (2012). (Emphasis added.)

Santos' one citation to authority regarding the necessity for the State to prove his crime was "atypical if the ordinary offense" is one footnote from a case addressing the *trial court's ability* to impose and exceptional sentence, State v. Suleiman, 158 Wn.2d 280, 294 n.5, 143 P.3d 795 (2006). Suleiman is factually and legally distinguishable. Suleiman argued that the trial court did not have the legal ability to impose an exceptional sentence, that Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), mandates this type of action must be plead and proven to a jury, just as was done in Santos' case. Sulieman does not support Santos allegation:

> …the trial court had to make additional factual findings above and beyond the admitted facts in order to support an exceptional sentence based on victim vulnerability. Because those facts were not found by a jury beyond a reasonable doubt, Suleiman's exceptional sentence violates the Sixth Amendment under *Blakely.* even so, the United States Supreme Court recently concluded that *Blakely* errors can be subject to harmless error analysis. Washington v. Recuenco, ___ U.S. ___, 126 S.Ct. 2546, 165 L.Ed. 2d 466 (2006). We therefore remand to the Court of Appeals for determination of whether the *Blakely* error in this case was harmless. Suleiman, supra at 284.

Here the State presented evidence to the **jury** upon which that jury made a determination, beyond a reasonable doubt, that the State's

evidence supported the charged aggravators. Suleiman's case in fact supports the actions of the State and supports the verdict a JURY must find these facts and not the court and so found in Santos' trial.

As Division III stated in State v. Bennett unpublished opinion to which the State would direct this court, pursuant to GR 14.19(a) to consider as nonbinding authority and accord such persuasive value as this court deems appropriate:

> Bennett also contends the State was required to provide the jury with comparative facts of other murder cases to prove the murder was atypical to other murders. His assertion is unsupported by any authority and lacks merit. His cited cases State v. Suleiman, 158 Wn.2d 280, 294 n.5, 143 P.3d 795 (2006) and State v. Faagata, 147 Wn.App. 236, 249-51, 193 P.3d 1132 (2008), *rev'd on other grounds by* State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010), merely reiterate the principle that post-*Blakely* it is the jury's role to determine atypicality. The cases do not require the State to present comparative evidence. (Footnote omitted.)

Santos' claims the Court of Appeals opinion conflicts with State v. Webb, 162 Wn. App. 195, 252 P.3d 424 (2011), it does not. Once again quoting directly from the majority "Webb is inapt because the facts in Webb differ materially from those here." The Court then states:

> … Unlike Webb, the jury in Mr. Santos's case was provided evidence relevant to whether a third person exhibited an observable destructive impact subsequent to the commission of the crime. The third party at issue in Mr. Santos's case—the boy who observed the murder—testified at trial. The jury was

> able to observe the boy's demeanor during his testimony and discern for itself whether there was a destructive impact. Although the boy was not asked to articulate his specific feelings of trauma, deference to the jury's verdict is nevertheless appropriate.
>
> Because the jury was presented with sufficient evidence that Santiago Santos was on notice that children lived at Manuel Jaime's house (and therefore likely would be present at the time of the murder) and because the murder was witnessed by a third party who described his observations at trial and subjected his demeanor to the jury's scrutiny, the enhancement under RCW 9.94A.535(3)(r) must be affirmed.

D. CONCLUSION

The Court of Appeals opinion does not merit review by this court. Santos has not presented this court with anything which would meet the exacting standards set forth in RAP 13.4. This court should deny review.

Respectfully submitted this 1st day of September 2020,

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APPENDIX A

Pre-trial the court conducted a CrR 3.5 hearing to determine if

anything Santos said would be admissible. The State wanted to introduce two unsolicited statements in rebuttal. RP 58-59. Two officers were called regarding two sets of unsolicited statements made by Santos.

Officer Arraj testified that he read Santos his Miranda rights twice at the crime scene. This was done twice because Santos indicated that he did not understand after the first reading. The officer asked him questions, but Santos never responded. RP 26, 28-9.

After arriving at the Grandview police department Officer Arraj took pictures of the defendant. Officer Arraj forgot the camera he used to take the pictures in the cell Santos was in. After Officer Arraj realized his mistake he returned to the cell. As he approached the cell he observed Santos had placed the camera in the cuffing port. Santos spontaneously stated, "you forgot something." The officer stated nothing to Santos prior to the statement. After he retrieved the camera, the officer determined that the "SD" card that had been inside the camera and contained all the pictures that had been taken was missing. A search of Santos' cell did not turn up the card. RP 31-32

Det. Fairchild testified that on the morning of the murder he served a search warrant on Santos. It was served at about 3:00 AM. RP 48. Santos was read his Miranda rights again and was eventually served with a search warrant for his DNA. This warrant had been telephonically

approved by a judge. RP 48

From the argument of the second part of the hearing, the statement the State wanted to be able to introduce, only in rebuttal if Santos testified, was an unsolicited statement to Det. Fairchild. When Santos was given a copy of the DNA search warrant Santos stated "I don't see no judge's signature on the warrant." RP 60. The State wanted to introduce this on rebuttal to show that is was very astute of Santos to make this statement. The warrant served on him was "telephonically" approved which is why there was no actual judge's signature. RP 59.

The court ruled that the unsolicited statement about the officer forgetting the camera was admissible as well as the statement "I don't see no signature of no judge on this." RP 64. The court indicated that this too was an unsolicited statement and could be used by the State.

The Court ruled, "Again, if they're unsolicited and there's no interrogation ongoing, voluntary statements, statements not in response to any question are certainly admissible. There is a long line of cases in the State of Washington to that fact… So the court would find those were unsolicited statements made by the defendant in this particular case and would be admissible not in the state's case in chief, but only on rebuttal." RP 64-66

Angel Flores was twelve years old at the time his uncle, his tio,

was murdered. RP 391. He was 16 at the time of his testimony. RP 378. He and six other members of his family were spending some time together, having a sleep over. RP 379-80. They were playing outside, they ate their dinner and then they watched some TV. RP 381.

Mr. Flores testified that he recognized Santos from having seen him at his home on a prior occasion and on that date he had heard Santos speak. RP 381. Mr. Flores testified that his uncle was the only adult home after Mr. Flores' mother left at about 6:00-6:30 PM.

Mr. Flores fell asleep while the others were still watching TV and was awakened later by "…this loud sound like something fall to the ground." He then heard his uncle crying and heard arguing. RP 382 He testified he heard Santos saying "…you're dying slowly. I told you I was going to do this." Santos was heard saying that he was doing what he was doing because Mr. Jaime owed Santos something, Mr. Flores did not know what was owed. RP 382-3.

Mr. Flores testified that Santiago Santos "…used the restroom right next to the room we were sleeping in. When he came back he said, "I'm going to come back for your family." Mr. Flores further testified that Santos stated the name "Fajardo…he said it when he was talking about what he owed him." RP 382. He testified he heard Santiago say "you're dying slowly." RP 384.

Mr. Flores testified that when he heard these last statements he panicked...[he] woke up the children...[w]e tried to open the window but it was frozen. RP 384. He was then remined by his sister that his phone was in his backpack which was in the room with him and the other children. He retrieved the phone, that he was frightened, and he called 911. He told 911 there was someone who was harming his uncle and that they needed to send help. RP 385.

Mr. Flores testified he heard the police arrive, that the officers announced they were from Grandview Police Department and the officers told him and the children to stay in the room. RP 386-7 He further testified that before he was removed from the house he overheard officers questioning his uncle. He heard his uncle say "Santiago." RP 387-8

On cross examination Mr. Flores testified that when he was initially interviewed by Det. Fairchild he identified the attacker as "Santos". RP 398. He testified that in a previous statement he said he heard Santos retrieving a knife from the knife drawer in the kitchen and start cutting his tio. Mr. Flores testified that Santos was one of his uncle's best friends. RP 400-1. He reiterated that he heard his uncle crying and that he heard Santos state that Fajardo had told him, Santos, to do something. RP 401-2

Mr. Flores confirmed that later he remembered more of what

Santos said on the night of the murder. Mr. Flores told investigators at this later interview that Santos had said that what he was doing to Mr. Jaime was payback…that he was going to get [Mr. Jaimie] back as well as his family and friends…that Santos would do to them what he was doing to Mr. Jaime. RP 405. He testified that he heard his uncle open the door for Santos. RP 406.

On redirect Mr. Flores testified that Identification 115 (later admitted as an exhibit) was a picture of the knife drawer in the kitchen and that it was partially open. He also testified that Identification 100 (later admitted as an exhibit) depicted his grandmother's Bible with a knife on top. He did not recognize the knife. He stated the Bible is located in the living room. RP 407, 408-9.

A recording of the 911 call was played for the jury. RP 420. Prior to that, the court and the parties discussed the content of the 911 call and determined that a transcript would be admitted of the call, Exhibit 195. They edited the transcript due to a possible prejudicial statement to indicate:

> THE COURT: It reads, there's this guy at my house. He's, uh, he's -- unintelligible -- he's killing my tio. Does that work?
> MR. SMITH: Yes.
> MR. RAMM: Yes. RP 418

The next State's witness was Mr. Stritzke, Washington State Patrol

crime laboratory forensic scientist assigned to the DNA unit. He analyzed samples taken from several items, one was the shirt taken from Santos and the other was the knife found hidden in the closet on top of the Bibles. He testified "[m]y conclusion was the DNA profiles obtained from the red-brown staining on the blade of the knife and the shirt match the DNA profile for Manuel Jaime. The estimated probability of selecting an unrelated individual at random from the U. S. population with a matching profile is 1 in 15 quintillion." RP 438.

Officer Arraj was one of the first officers on scene after they received a call from dispatch indicating they were needed at Mr. Jaimie's residence located at 635 E. Second Street in Grandview. When he initially arrived, he observed Mr. Jaime down in the doorway with extensive wounds. Mr. Jaime asked for help and was bleeding. The officer determined that he needed to find the suspect, who had been reported by the 911 caller. The officer went to the front of the house and shined his flashlight into the home and onto Santos, whom the officer had observed. When Santos was illuminated by the officer's flashlight he laid down on the floor of the bedroom. In order to effectuate the arrest of Santos, Officer Arraj had to return to the location of Mr. Jaime and had to go through the big puddle of blood that had accumulated around Mr. Jaime as he lay mortally injured on the floor of his home. RP 444-45.

Officer Arraj went into one of the bedrooms in this home and found the defendant lying face down with his hands behind his head. Santos was handcuffed and escorted from the home and into a police vehicle. RP 445-6. This officer estimated that Santos was 6'3-6'4" tall and weighed between 230-240 lbs. RP 448.

Once Santos was secure the officer went back to Mr. Jaime. Officer Arraj testified "He was on the floor. He was bleeding extensively from dozens of stab wounds. He had a couple of right-puncture wounds to his chest. I could hear sucking sounds. He had a large incision in his abdomen so his intestines had come out partially. He was pleading with me saying, you know, "let's go; let's go; let's go." RP 448. He testified that he did not believe Mr. Jaime would survive his wounds. He questioned Mr. Jaime as to who had stabbed him, the response was "Santiago." Officer Arraj wanted there to be no confusion so he asked "Santiago, who's in the house?" Mr. Jaime stated "yes." Officer Arraj continued to question Mr. Jaime but, "At this point he was just basically pleading with me saying, you know, "let's go, let's go, let's go." RP 448.

Officers were trying to stop the bleeding at the scene. They tried using a large abdomen pack which is a very large gauze bandage. "I put it on the abdomen area where he had multiple stab wounds and his intestines are coming out. Unfortunately, he has dozens of other wounds that he was

bleeding from. So, I was unable to effectively control the bleeding." RP 449-50. This officer testified that he observed blood on the knives in the kitchen. RP 451

While securing the rest of the residence this officer discovered seven children in one of the bedrooms. He told the children to stay in that room until he returned. RP 446. This officer went back into the home and made contact with the seven children. He determined that he would "play a game" with the children which involved the children shutting their eyes for the longest time. The officer did this in order that the children could be removed from the home without seeing the "puddle of blood". RP 451-2 When this officer observed Santos he observed that he had blood on his hands, his clothing and boots. The clothing was collected and samples of the blood was taken for analysis. RP 451. The officer took photographs of the defendant while they were still in the cell. He accidentally left the camera in the cell. When he realized this error, he returned to the cell to retrieve the camera. When he arrived at the cell Santos had the camera and asked the officer if he had forgotten something. The officer checked the camera and the storage card that contained all of the pictures had been removed and could not be found. RP 453-4

This patrol officer testified that at the time he was interacting with Santos he did not appear to be intoxicated. RP 471-2.

On cross examination Santos inquired of this officer regarding collection of evidence: "Well, did you collect the pair of underwear that he had on at any time? The pair of underwear, the last pair of underwear he was wearing, that pair, it was never collected as evidence, right?" This officer stated that he personally did not collect the underwear. RP 465

Officer Chilson had direct contact with Santos on the day of the murder. RP 523. He stated that Santos appeared to be steady on his feet and from the distance he was from Santos he did not smell the odor of intoxicants. RP 525-5.

Joel Byam - deputy chief of operations for Yakima County Fire District 5, at the time also a volunteer fire fighter for the City of Grandview, was one of the treating EMT's who had first contact with Mr. Jaime. Mr. Byam entered Mr. Jaime's home and began to assess his patient. That Mr. Jaime was struggling to breath. He testified Mr. Jaime "…had a lot of open wounds. It was hard to figure out where to start as far as how we triage a patient because of the amount of wounds and the amount of blood loss and open wounds." RP 534-5. Mr. Jaime was pronounced dead at 3:52 AM. RP 536

Detective Fairchild was asked on more than one occasion during cross examination by trial counsel for Santos how many pairs of underwear Santos was wearing at the time he murdered Mr. Jaime. Santos

even asked in the same series of questions why this detective did not ask for testing to be done on Santos' inner most pair of underwear after he was informed that Mr. Jaime had ketamine in his system at the time of his death. RP 568.

Dr. Jeffrey Reynolds, forensic pathologist, testified regarding the autopsy performed on Mr. Jaime. He testified that he found "[a] surprising number of stab wounds." He counted 59 stab wounds and in addition there were several smaller superficial injuries that were not counted. He testified these wounds were almost entirely found above the waist. He stated that there were no defensive wounds, which he found surprising. RP 579-80. He also stated that "[m]ost of them were the back and the sides of the chest and significantly none in the region of the heart." RP 580. One of the wounds found on Mr. Jaime's abdomen was so severe that "[s]ome internal organs were out." RP 581. He also noted that of the 59 stab wounds, not one had injured the victim's heart. RP 583. Dr. Reynolds was shown the knife that was seized from the scene of the murder and he opined that the injuries he observed on Mr. Jaime could have been produced by that weapon because it only had one sharp edge, was not serrated and did not have a hilt like a hunting. RP 589.

Dr. Reynolds testified that the results of the toxicology testing helped to explain one of the particular things in this murder, the lack of

defensive wounds. He testified that if a person was on ketamine "…it is like your brain is over here and the rest of your body is over here, and they're not talking to each other much." RP 605. The doctor opined that if you are being stabbed 59 times a person would usually try to stop it. When Dr. Reynolds was informed that Mr. Jaime had ketamine in his system he testified "[y]our motor skills, you're pretty useless. I mean, when we saw that in this report, it absolutely explained why we have no defensive wounds on the hands, the forearms or the wrists. You could keep stabbing and he's not going to react." RP 605-6

Dr. Reynolds testified that the cause of death was that Mr. Jaime had bled to death. RP 605. Reynolds also testified that the effects of ketamine could be overcome by pain. If a person has been given ketamine and then they are hurt, "…you're going to wake them up. Pain can override the drug." RP 605.

Officer Travis Shepard was with the City of Yakima Police Department at the time of trial and was a Sargent for Grandview at the time of this murder. He was assigned to the LEAD Drug Task Force. He was working the victim as a confidential informant (CI) at the time of his murder. He had known Mr. Jaime for about eight years. He testified that Mr. Jaime was not "working off" charges but was working as an informant to make money. RP 619-20, 628. One of the targets whom Mr. Jaime had

worked while he was a CI was an individual named "Fajardo." RP 623, 646-7. Officer Shepard testified that Mr. Jaime actually made a hand to hand purchase of methamphetamine from Mr. Fajardo. RP 660-61.

This officer testified that when he had contact with Santos on the night of this murder, he did not smell the odor of intoxicants about Santos. RP 663.

Stacey Redhead is a Washington State Patrol crime laboratory forensic scientist fingerprint expert. She analyzed the knife that was found at the scene and determined that there was a fingerprint on the knife. She compared that print to the victim's prints and the defendant's prints and determined the print belonged to Santos. RP 674-5.

Mrs. Maria Mendez is Mr. Jaime's mother. At the time of his death she was in Texas because her brother had died of cancer. She testified that her son Manuel had never been married, that at the time of his murder he did not have a girlfriend but that he had had a girlfriend in the past. RP 680, 683-4. Mrs. Mendez did not recognize the knife found hidden in the closet on top of the Bibles. RP 691-2. She also testified that Manuel did not have any knives nor any other weapons. RP 685.

Mrs. Mendez and Manuel's sister, Alma Guillen, testified that Manuel knew Fajardo and that Alma had gone to school with Fajardo. RP 689-90, 697. Mrs. Mendez testified the Bibles that were found up on the

closet shelf belonged to her and Manuel and that they were kept in the living room. RP 690-1.

The State moved early in this case to preclude the defendant from questioning witnesses about the effects and use of ketamine by the homosexual community. The State accurately stated there was no evidence of homosexuality in the case.

Santos' response was:

> The drug itself is a very unusual drug. Dr. Reynolds will testify to that. He'll testify to the fact that it was used as anesthesia in humans but has some very negative side effects. It is used commonly as a street drug in the gay male population. This incident began in the bedroom. There's no question about that…All we're saying is this drug can be used in this particular manner, and this incident began in the bedroom. Nobody knows what the relationship was as between Mr. Santos and Mr. Jamie, what they were doing in the bedroom.
>
> THE COURT: Do you know of anybody that's going to provide testimony as to if they had a relationship or anything of that nature?
>
> MR. SMITH: Yes. Angel Flores will testify that they were best friends or is one of his best friends. This is the kind of thing that people don't broadcast, frankly. So, I don't think it's unfair in this case for this jury to know that this drug is commonly used in that capacity.
> …
> THE COURT: Well, now we're getting into the issue of whether or not the relevance or the prejudicial effect of it outweighs any potential relevance of the evidence in this case. What is the potential relevance of a homosexual relationship in determining the facts in this case?

Santos went on to try and explain the need for this testimony because his expert, Dr. Bernard, would opine that an attack or something of a sexual nature could have caused Santos, because of his alleged mental illness, to react violently. RP 89.

The court was still troubled with how any testimony regarding homosexuality or the use of this drug was relevant:

> THE COURT: Why is it relevant to this particular case? Unless there's evidence that shows a nexus between that and homosexual activity that would prompt this response, again, we're making a quantum leap from this is a drug that's used by the gay community and motivation for what took place on November 15th. RP 91.

Santos again explained that the murder started in the bedroom and that no one knew how long they had been in that room. The court again: "Is this a drug that is always used or substantially used by the homosexual community?" RP 92 Santos stated that ketamine is a street drug that has multiple uses…the research is that it is used by male homosexuals simply to either enhance or make more tolerable the sexual act." RP 92.

The court then made inquiry that this drug was used for other purposes and Santos responded "[l]ots, just recreation and, like I say, to reach to some other state. It's used for -- why he was using it, I don't know." RP 92. After which the trial court ruled:

> THE COURT: Well, at this point in time the court is going to grant the motion to exclude reference to homosexual

> activity unless there's evidence that would show a nexus between that activity and the incident that occurred that night. RP 92

Santos' renewed his motion to allow inquiry into "…the unusual properties of this drug Ketamine and specifically that it is known to be used in the homosexual population to enhance or tolerate sexual activity." RP 703. The State objected stating there was no evidence suggesting homosexual activity, even Santos's expert made no mention of any sexual advances, Santos may have been hit on the back of the head but there was no indication of even that and therefore the court should once again deny the motion. The court: "I denied the request before because I just don't see any nexus between the evidence that's been presented thus far and this evidence. Without that nexus I can't find that it's relevant or material. So, I will continue my ruling that I will deny evidence of that nature at this time. (The totality of these motions and the testimony from the defense expert is contained in Appendix A attached to this brief.)

Chris Johnston from the Washington State toxicology lab did testify that he found ketamine in Mr. Jaime's blood. The level was in excess of 1 milligram per liter of blood in the blood, and norketamine a metabolite of ketamine was found also and this drug is sometimes used recreationally as a street drug. RP 709. He testified the effects "[b]asically it kind of almost like severs the connection between the head

and the body. The head and the body have a hard time communicating back and forth. The head doesn't feel the pain of the body." RP 713. He testified the location from which the blood sample was taken might result in a test result higher than in the person's actual system. RP 715-6.

Trevor Allen, forensic scientist, Washington State Patrol crime lab assisted the local agencies in documenting the crime scene. He has training in blood spatter, blood staining, and crime scene analysis. RP 721-22. He testified extensively regarding the locations of the blood found throughout Mr. Jaime's home, noting there was blood, blood cast off, blood spatter, blood that had dripped and pooled throughout many areas of the home. In the bedroom identified as Mr. Jaime's, there was castoff on the ceiling as well as blood spatter on the walls. RP 795, 803. His opinion was the bloodletting event started in bedroom two, continued down the hallway. RP 795. He identified blood that had dripped in and around a kitchen drawer that contained utensils such as knives. RP 800. Mr. Allen testified he found "…diluted blood stains along the sink." RP 736-7, 784-5. He stated when there were diluted blood stains in a sink it indicated someone has cleaned up. RP 796-7. He testified the blood stains in the kitchen, through the dining room were low and then got lower. He testified it appeared the bleeder stopped in the kitchen near the utensil rack RP 801. The blood trail ended in the living room where a large pool was

found. RP 795-6.

Mrs. Maria Santos testified on behalf of her son, the defendant. She testified that she lived in the house which was just down the street from Mr. Jaime's home and that her son Santiago lived there with her. She testified that they moved to California when Santos was in the eighth grade. RP 848-9, 850. They live in California until Mrs. Santos moved back to Washington. Santiago Santos was 18 at the time but did not move back to this State until he was 25 which was in November or December of 2013. RP 849. (This crime occurred on November 14, 2014. CP 000006)

Mrs. Santos was questioned regarding Santiago's actions, about his conduct in the home during this initial period of time that the family lived in Grandview. RP 850-53. She testified that her son did not like to have people over and that he would put sheets over the windows, that Santiago told her that people were out to harm him, that he had a tumor in his head, internal bleeding and was suffering from STD's which he had gotten from his girlfriend. RP 853, 855, 858-59. She testified that Santiago did not maintain his relationship with the girlfriend who had infected him with the sexually transmitted disease (STD). RP 859. She testified that he had worked in the orchards with the apples and at the time of this murder he was working at a warehouse in Prosser. RP 855. And that his drinking was "just normal."

On cross examination she testified that her son had obtained a certification to be a certified medical assistant. RP 862. She stated that he would drink and that he would drink at work. RP 864. She testified that she heard Santiago talking to himself in his room on numerous occasions. She also stated that he had a cellphone and that he talked on the phone a lot. RP 866. She testified that "Andrea" was the girlfriend who had given Santiago the STD and that this was the girlfriend who would come over to her home. RP 866.

The defendant took the stand and testified as to his life and what he recalled happening on the night of Manuel Jaime's murder. RP 880-914. Santos stated he did not know who killed Mr. Jaime or why he was killed. RP 881. He agreed with his attorney that he had been diagnosed as having "acute paranoid schizophrenia." RP 881. He did not agree that he felt people were out to get him but "… the world is a dangerous place…I'm always attentive to my safety." RP 881. He refuted his attorneys' statement people were out to harm him stating "I don't believe people are but I'm attentive of such things." RP 881. He recounted that he did not sit endlessly in his home with all of the windows covered and the lights off. RP 882. His statement regarding his mother's claim that he sat in this room talking to himself he was just "thinking" and that "[p]eople would think and just theorize on their own. It doesn't mean that one's talking to

themselves they're in a crazed state. People think all the time. It does not mean that they're crazy. It's just thoughts. It's no different than talking. It's just thoughts." RP 883.

His explanation of his need to go to the clinic was that at the time he did believe that he had a tumor in his head, but he was wrong. And that the reason that he had thought he was bleeding internally was that in the past he had violent fights and been shot with large rubber bullets and that had caused bleeding that had some residual effect. RP 883-84.

During direct examination Santos said he understood why he was being asked questions about to his past, that it was to determine if he was being deceptive, he said he was being honest with his answers. RP 884.

Santos described what appeared to be a fairly normal life from childhood to the time of the murder. RP 895-6. That he generally got good grades but that he nearly failed to get his diploma from high school because [t]hat's how much we kind of partied on the side…partying a lot affected my grades." RP 897. He recounted that he had taken courses after high school and had obtained a certificate that allowed him to work in the medical field but he had never used that certificate. RP 897-8. He recounted that when he moved back from California he lived with his mother and sisters and got a job working in the orchards and eventually he got a job that he liked working in the wine industry. RP 899-901. His

mother had testified that she did not know how he got to work but Santos clarified that he got rides from his cousin Abel who worked in the same plant or a plant near his and that they would ride together. RP 900-01.

Santos stated he went out into public and had a social life, he would "…go to bars and places, dance places and stuff like that to go socialize, casinos and stuff like that." RP 901. Santos testified on the night of the murder he was out drinking at a bar in Prosser and he had consumed several drinks he compared to Long Island iced tea, eight beers and four or five shots and he has lost count of how much he had to drink. Stating "I'm able to drink a lot before I get really drunk. At the time I was still consciously aware of how many drinks I was consuming. However, I didn't keep count. I just keep drinking and drinking and drinking. And that "[s]ometimes I do blackout. Sometimes it just kind of hits me out of nowhere. RP 902-3. He once again confirmed that he was being social, "I was at the bar and just kind of commingling around there." When asked where he had gone next he testified "I don't recall that. It's kind of like an amnesia, sir. Like I could have easily known that but kind of the hits to the head, kind of like blacked out that area." RP 903.

He had no recollection of how he arrived back in his neighborhood. He testified that when he got into the neighborhood Mr. Jaime "…popped out the side and said hello." Jaime invited him into his

home. RP 889-90, 904. He did not remember much from inside the home testifying during direct examination he had "…blacked out from a bunch of it." He denied the bloody knife with his fingerprint on it was his and that he was ambidextrous. RP 890.

When asked if he had an argument with Mr. Jaime he testified, "No. I haven't had a dispute with him my entire life. I know that's true. Something could have happened. I don't know what it is… I haven't been angry with him either, which is kind of a strange thing." RP 892. Santos testified he believed he had been struck in the head that night, but he very specifically testified he could not state Mr. Jaime had hit him. RP 891.

Santos testified there could have been a third person present who had killed Mr. Jaime and further stated it was possible Mr. Jaime was protecting Mr. Santos from this third person. RP 891. Or that Santos was protecting Mr. Jaime from this other attacker. RP 892. Santos had a limited memory of what actually happened but remembered some of the struggle that occurred. He testified Mr. Jaime did not owe him anything, that "I don't even know that he did drugs". Santos specifically testified he did not take drugs in Mr. Jaime's bedroom and testified that drugs "… were not part of this encounter." RP 893.

Santos stated he did not recall making a statement about "Fajardo" and he did not know that person. Santos admitted he had seen children

playing in the yard and knew children lived in the home where the murder occurred. RP 906

Santos is 6'3" tall and weighed, at the time of trial, around 235 pounds RP 907.

When asked if he knew how his fingerprint got on the knife he testified "If I had it in my hand it would be on there." And would have been in his hand to defend himself. RP 908.

Santos testified he knew Manual Jamie, had been in the home before, and knew Mr. Jaime from the time he was a child:

> Q. Let me ask you this. Manuel Jaime's house, where it was down from your house, had you been there before?
> A. Yes.
> Q. How long ago?
> A. Passing by when I was a child.
> Q. How would you describe Manuel Jaime and your relationship?
> A. A good person with good morals that I knew of since I was a kid, since I was a kid.
> Q. He was a good person with good morals?
> A. Yeah. RP 908-9.

Santos testified on redirect that he knew that Angel Flores lived in the same home the murder occurred in and that he knew other children were living there and he had seen them playing there. He testified "[t]hey stayed there and lived there. It's obvious. It's obvious." that they lived there. RP 911

The defense called one expert to address Santos' ability to form the

intent to commit the crimes he was charged with. Dr. Philip Barnard tested Santos and concluded he was delusional. RP 938. He diagnosed Santos with delusional disorder and a personality disorder with schizoid paranoia and avoidant features. RP 948-50.

The State called Dr. Fanto, a licensed clinical psychologist employed by the Washington State Office of Forensic Mental Health Services as a forensic evaluator. Dr Fanto opined that based on his interview, the report issued by Dr. Bernard, the police reports and testing done with Santos that at the time of this murder Santos was not suffering from any sort of mental illness. RP 969-74. Dr. Fanto took into account Santos' actions on the night of the murder in assessing whether Santos suffered a mental health issue which would have precluded him from forming intent on the night of this murder. "My opinion was that he had the capacity to form the specific mental element of the crime charged…Premeditation, intent to kill." RP 976.

Dr. Fanto testified Santos' actions on the night of the murder were goal directed behavior. Santos formed a plan to go out and go drinking, he picked places and on that night at locations in more than one town, he got from one location to the other, he paid for his drinks, his no direct route home had to be thought about, it was not a rote linear action. All of which the doctor testified was Santos "…engaging in purposeful, goal-directed

behavior." RP 979 Dr. Fanto testified the statements made by Santos while and/or during his attack on Mr. Jaime which were overheard by Angel Flores were also indicative of a person capable of forming intent. RP 980. The doctor stated that the act of Santos hiding the knife was yet another act that showed he was capable of forming intent. RP 980-1. Dr. Fanto testified that Santos' actions of dropping to the ground when observed by the police, removing the memory card from the camera and disposing of it were important because Santos was "…not presenting with any level of impairment. The behavior is then purposeful…" RP 989-90.

Dr. Bernard took the stand to rebut the testimony of Dr. Fanto. He opined there could have been another act that might have provoked Santos' psychotic response to the alleged action of Mr. Jaime. He interpreted the fact Santos was wearing four pairs of underwear when he murdered Mr. Jaime as Santos being in fear of being approached sexually by another person, the underwear was "protective gear." RP 963-4.

Santos argued he should be allowed to present the defense of diminished capacity. This was based almost exclusively on the testimony Santos thought he had been struck in the back of the head and the opinion of Dr. Bernard that such a strike could provoke a delusional response. That Santos believed he was under attack and had to defend himself. RP 21-22. The court ultimately allowed Santos to argue diminished capacity, the jury

was instructed on diminished capacity. The court determined that the State did not bear the burden to disprove the defense. RP 1052, 1064-66.

Santos further argued this possible blow to his head was a legal basis to argue self-defense. The trial court ruled: "The court finds that there simply is speculation at this point in time as to whether or not there is any evidence in his case that the defendant under circumstances which amounts to the fact that he was trying to defend his life against the victim in this case that would justify the instruction. More importantly, the court finds that there is no evidence that Mr. Santos has produced any evidence that would suggest that he was in reasonable apprehension of great bodily harm such that it would allow him to engage in self-defense of this nature. I mean, there is just simply no evidence that he was in great apprehension of serious physical harm." RP 1050

During the discussion about jury instructions Santos proposed the elements instruction include an element that the State must disprove diminished capacity beyond a reasonable doubt. The court ruled as follows:

> THE COURT: No. It's the Lester case and State vs. Marchi. It was a Division II case decided in September of 2010. The Lester case was decided in February 2015 also by Division II.
>
> The court finds that the reasoning expressed by Division II seems to be appropriate and makes sense to the court. They held that the state does not bear the burden of

disproving the defendant's diminished capacity defense. The court went on to hold that the state has an obligation to prove each and every element of the crime charged.

In this particular circumstance, both first degree murder, second degree murder, second degree assault require that the state prove beyond a reasonable doubt that the defendant had the requisite intent to commit those crimes. The jury can consider the defense of diminished capacity when dealing with the issue of whether or not the state has proved beyond a reasonable doubt the intent requirement. They have the obligation basically to consider whether or not there was diminished capacity and evidence of diminished capacity to the extent that the defendant could not have developed intent.

In this court's opinion, it seems logical that the state already has the burden to prove intent. The defense in this case is raising the defense of diminished capacity, which goes to the very issue of intent and whether or not it creates a reasonable doubt. So, again, I don't believe the state has to go to the extent they have to disprove diminished capacity because they have the obligation to prove beyond a reasonable doubt that there was intent. RP 1064-5

APPENDIX B

FACTS

Santiago Santos appeals his conviction and sentence for the November 15, 2015, killing of Manuel Jaime. Santos then lived with his mother in a Grandview house located on the same street as the residence of Manuel Jaime. In November 2015, Santos worked the night shift at a Prosser warehouse.

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Because Santiago Santos claims diminished capacity, we recount some of his history and characteristics. According to Maria Santos, Santiago's mother, Santiago lived a different life. Santiago did not desire company, and he disliked sunlight to the extent he placed sheets over the home's windows. Sometimes Maria heard Santiago, alone in his bedroom, talking and laughing. Santiago occasionally told his mother that others sought to injure him, he housed a tumor in his head, he suffered internal bleeding, and he contracted a sexually transmitted disease from his girlfriend.

Medical records introduced as exhibits at trial showed that, in June 2014, Santiago Santos told medical providers: "'I think I have contracted a brain tumor. I am having pain inside my head.'" Ex. 206 at 8 (some capitalization omitted). The treating physician apparently questioned the self-diagnosis because the physician only diagnosed a headache and prescribed pain medication. In early July 2014, Santos returned to the hospital, where he informed medical providers that he engaged in intercourse with a female without protection and that he wanted treatment for symptoms resulting from a sexually transmitted disease. Records, however, list no diagnosis of a sexually transmitted disease. In August 2014, Santos went to the emergency room and complained of severe pain in his spleen. The emergency room physician diagnosed Santos with gastritis.

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For two years before his death on November 15, 2014, Manuel Jaime, with a criminal record, worked for money as a confidential informant for a drug task force. The task force had recently employed Jaime to conduct a controlled buy of narcotics from an individual named "Fajardo." 7 Report of Proceedings (RP) at 623, 646-47. The buy led to Fajardo's arrest and prosecution.

We begin the facts of the slaying of Manuel Jaime from the perspective of ear witness, twelve-year-old Andrew Fernandez, a pseudonym. On November 14, 2014, Andrew, five siblings, and one cousin enjoyed a sleepover at Andrew's Grandview home. Andrew lived

at the residence with his mother, grandmother, and uncle, Manuel Jaime. That evening, Andrew's mother worked a night shift, and his grandmother visited Texas.

Appellant Santiago Santos had seen, before November 14, 2015, children playing in Manuel Jaime's yard. He knew Andrew Fernandez and other children lived in the home. Santos testified at trial:

They stayed there and lived there. It's obvious. It's obvious.
9 RP at 910.

Andrew Fernandez fell asleep around 9:00 p.m. and awoke shortly before 3:00 a.m. Andrew heard a loud thump as if something fell to the ground. He then heard his uncle, Manuel Jaime, crying. While Jaime sobbed, Andrew heard a voice, which he recognized as Santiago Santos's voice, say "you're dying slowly. I told you I was going

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to do this." 5 RP at 383. Andrew knew Santos from earlier contact. Santos told Jaime that Jaime owed him something, while Santos mentioned the name "Fajardo." 5 RP at 383.

Andrew Fernandez panicked, awoke the other sleeping children in the room, and tried to open the bedroom window. The window would not open. Minutes later, a frightened Fernandez retrieved his phone from his backpack and called law enforcement. Fernandez told the 911 operator that someone was harming his uncle, and he asked for help.

According to Andrew Fernandez, Santiago Santos used the residence's restroom next door to the room in which the children had slept. Santos returned to the room in which Manuel Jaime lay, and remarked: "I'm going to come back for your family."
5 RP at 383.

When officers arrived at the Grandview residence, they found Manuel Jaime lying near the front doorway of the home and bleeding profusely. While fearing the culprit might flee from the residence, Grandview Police Officer John Arraj circled the house and observed a man, later identified as Santiago Santos, through a bedroom window. Officer Arraj illuminated Santos with his flashlight, and Santos immediately drooped to the floor. Arraj returned to the residence's doorway, entered the abode, and hurried past a bloody

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Jaime. Arraj found Santos lying face down with his fingers interlaced behind his head. Officer Arraj secured Santos in handcuffs and escorted him from the home.

Officer John Arraj swept the house for more victims and found the seven children inside a bedroom. Officer Arraj instructed the youths to

stay inside the bedroom, and he closed the door. Officer Arraj and other officers then provided medical aid to Manuel Jaime. Jaime suffered from numerous stab wounds, puncture wounds to his chest, and a large incision in his abdomen. Officers heard sucking noises. Jaime pled with officers: "let's go; let's go; let's go." 5 RP at 448. Officer Arraj concluded that Jaime would likely die from blood loss, so Arraj asked Jaime who stabbed him. Jaime replied: "Santiago." 5 RP at 449. Officer Arraj asked a second time, and Jaime answered again: "Santiago." 5 RP at 449. Officer Arraj questioned: "Santiago who's in the house?" 5 RP at 449. Jaime responded yes. 5 RP at 449. Andrew Fernandez overheard the officers questioning his uncle Manuel Jaime, and the twelve-year-old heard his uncle say "Santiago." 5 RP at 387-88. Medics transported Jaime to the hospital, where he perished less than one hour later.

Grandview Police Officer Jose Martin assisted at the crime scene. In a bedroom closet, Officer Martin found a bloody folding knife located on top of a stack of books.

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Officer John Arraj transported Santiago Santos to the Grandview Police Department. He collected Santos's clothing and took photographs of Santos while in his cell. Santos wore four sets of underwear. Santos bore blood on his hands, clothing, and boots. Officer Travis Shepard assisted Officer Arraj in evidence gathering and found blood on Santos's arms and shoulders. The officers took blood swabs from various parts of Santos's body.

After leaving the jail cell, Officer John Arraj realized he mistakenly left the camera in the jail cell. When Arraj returned to the cell, he found the camera placed in the cuffing port of the cell. Santiago Santos remarked to Arraj: "you left something behind." 5 RP at 453. Officer Arraj discovered the camera's memory card missing and the photos of Santos deleted. During his contact with Santos, Officer Arraj never smelled intoxicants.

Police officers took the children sleeping at the Grandview home with Andrew Fernandez to the Grandview police station. Alma Guillen, Manuel Jaime's sister and Andrew Fernandez's aunt, retrieved her ten-year-old daughter and the six other children from the station. She found her daughter in tears, distraught, and fearful. According to Guillen, her daughter, the daughter's cousins, and Guillen herself thereafter "had problems" returning to the Grandview home.

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Later during the morning of November 15, 2014, officers served a warrant on Santiago Santos in order to swab his mouth for DNA.

Detective Mitchell Fairchild audio and video recorded the interaction. Officers also sought to interview Santos.

Before questioning Santiago Santos, Detective Mitchell Fairchild read Santos the Miranda warnings. In reply, Santos requested an attorney. Officers ceased all questioning of Santos and served the warrant. Detective Fairchild read the DNA search warrant in its entirety to Santos. The warrant read, in part, that the DNA evidence was "material to the prosecution of homicide the result of the death of Manuel Ezequiel Jaime." Ex. 208 at 1. Fairchild asked Santos if Santos understood the warrant. Santos sat silent. Fairchild requested that Santos swab the inside of a cheek. Santos remained momentarily quiet. Then Santos commented: "I don't see no signature of no judge on this." Ex. 208 at 2. Detective Fairchild explained that he had garnered the warrant telephonically. After a colloquy concerning the validity of the warrant, Santos swabbed his mouth.

Jeffrey Reynolds, a forensic pathologist, performed an autopsy on Manuel Jaime. Dr. Reynolds counted 59 stab wounds and an unspecified number of smaller superficial injuries. Nearly all wounds were above the waist, with most being on Jaime's back and sides of the chest. A severe wound to Jaime's abdomen exposed some internal organs. To his surprise, Reynolds found no defensive wounds. Dr. Reynolds concluded that

Jaime bled to death. The autopsy also revealed that Manuel Jaime had more than one milligram per liter of ketamine in his system at the time of death.

Law enforcement sent the blood stained knife found in the Grandview residence to the Washington State Patrol Crime Laboratory, where forensic testing revealed a fingerprint matching Santiago Santos's print. The testing also detected the presence of Manuel Jaime's blood. The laboratory also confirmed the presence of Manuel Jaime's DNA on Santos's shirt. The laboratory never completed a DNA analysis of the buccal swabs from Santos's mouth.

Law enforcement officers interviewed Andrew Fernandez on the day of the slaying. Officers also interviewed Andrew on another unidentified day. By the time of the later interview, Andrew had calmed down. Still, a school counselor attended the interview with Andrew to provide him support.

PROCEDURE

The State of Washington charged Santiago Santos with murder in the first degree and, in the alternative, murder in the second degree. The

trial court ordered a competency evaluation of Santos and later conducted a competency hearing. The court entered an order finding Santos competent.

The trial court conducted a CrR 3.5 hearing to determine the admissibility of two statements made by Santiago Santos while in custody: (1) Santos's statement to Officer

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John Arraj that "you left something behind," 2 RP at 30, in reference to the camera; and (2) Santos's observation to Detective Mitchell Fairchild that "I don't see no signature of no judge on this [warrant]." 2 RP at 66; Ex. 208 at 2. The State sought to introduce the statements only in rebuttal if Santos testified. The State contended that officers did not solicit the statements and the statements showed Santos's mental acuity in the event Santos asserted diminished capacity when attacking Manuel Jaime. Defense counsel advocated suppression of Santos's second statement because Santos earlier invoked his right to an attorney, but law enforcement continued to question him.

The trial court denied suppression of Santiago Santos's statement about Officer John Arraj leaving behind the camera because no police questioning prompted Santos's remark. The court also denied suppression of the comment of the absence of a judge's signature on the warrant because the remark did not respond to any question.

Before trial, the State moved in limine to exclude any reference to homosexual conduct or advances between Manuel Jaime and Santiago Santos. Because the autopsy of Jaime found ketamine in his system, defense counsel sought to present testimony that the gay male population uses ketamine to enhance sexual pleasure. Defense counsel explained that the evidence would show that the stabbing began in Manuel Jaime's bedroom and, according to Andrew Fernandez, Santiago Santos and Jaime were best friends. Santos's counsel further explained that a defense expert would testify that a

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sexual advance by Jaime may have provoked a violent response by Santos, while in a delusional state. The trial court granted the State's motion to exclude reference to homosexual activity unless the defense presented evidence of homosexual activity related to the killing of Manuel Jaime.

During trial, then sixteen-year-old Andrew Fernandez testified to what he heard during the early morning hours on November 15, 2014. Fernandez avowed that he recognized Santiago Santos's voice from Santos's previous visits to the home. Fernandez also recalled seeing Santos on November 14, 2014 at a Safeway grocery store.

The State played for the jury Andrew Fernandez's 911 call. Before playing the audio, the court and the parties discussed the content of the call and determined that a transcript would also be admitted. The State also played the video of the interaction between Detective Mitchell Fairchild and Santiago Santos concerning the warrant for the DNA swab. The trial court admitted the transcript of the duo's conversation as an exhibit during the State's rebuttal.

Forensic Pathologist Jeffrey Reynolds testified about his autopsy on Manuel Jaime. When the prosecution showed Dr. Reynolds the murder weapon, Reynolds opined that the injuries he observed on Jaime were consistent with the design of the knife since the knife had only one sharp edge, lacked any serrations, and lacked a hilt.

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During trial, Dr. Jeffrey Reynolds mentioned ketamine's presence in Manuel Jaime's blood. Dr. Reynolds explained that, when a person uses ketamine, his brain and body do not communicate to each other. Ketamine renders a person's motor skills useless. The finding of ketamine explained the lack of defensive wounds because of Jaime's inability to react to the stabbing.

Before defense Forensic Toxicologist Chris Johnston took the stand, defense counsel renewed a request to ask Johnston about the unusual properties of ketamine and its purported use in the homosexual population to enhance or tolerate sexual activity. The trial court confirmed its earlier ruling excluding the evidence.

Toxicologist Chris Johnston testified to some of the effects of ketamine on a person. Medical professionals employ the sedative drug during surgery. Others use ketamine recreationally for relaxation and hallucinogenic effects. According to Johnston, the drug severs the connection between the head and the body such that the head does not register pain from the body.Santiago Santos testified at trial on his behalf. Santos denied knowledge of who killed Manuel Jaime or the purpose of Jaime's murder. Santos claimed a diagnosis of "acute paranoid schizophrenia." 9 RP at 881. He characterized the world as a dangerous place. He rejected a belief that others sought to harm him, but admitted that he carefully guards his safety. Santos refuted his mother's testimony that he blanketed the windows at

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home to block all light. Santos testified that he blocked the sunlight only after he contracted a sexually transmitted disease in 2013. When asked about his mother's testimony that he sat in his room and talked to himself, Santos explained:

> Thinking is different. People would think and just theorize on their own. It doesn't mean one's talking to themselves they're in a mentally crazed state. People think all the time. It doesn't mean that they're crazy. It's just thoughts. It's no different than talking. It's just thoughts.

9 RP at 883.

Santiago Santos testified that he once believed he suffered from a brain tumor because his head felt radioactivity from the sun, but he conceded to his error in the diagnosis. Santos believed he was bleeding internally because he engaged in violent fights and had been shot with large rubber bullets. Santiago Santos testified about his life from childhood to the time of the murder. In 2012, he moved from California to Grandview and worked in the apple orchards before working in the wine industry as a forklift operator. Sometimes after finishing a shift, Santos and his cousin frequented bars, dance places, and casinos.

Santiago Santos testified that, on the night of Manuel Jaime's death, Santos imbibed at a bar in Prosser, where he consumed blue-colored Long Island iced teas, eight beers, and four or five shots of liquor. When asked whether the bar continued serving him after he consumed all of those drinks, Santos responded:

I'm able to drink a lot before I get really drunk. At the time I was still consciously aware of how many drinks I was consuming. However, I didn't keep count. I just keep drinking and drinking and drinking.9 RP at 902. Santos did not remember where he went after leaving the tavern. Nevertheless, he remembered walking past Manuel Jaime's home and Jaime's opening of a side door and inviting him inside. Santos knew Jaime since childhood, and the two never had a dispute.

Santiago Santos did not remember events that occurred inside Manuel Jaime's home. Santos declared:

> Something could have happened. I don't know what that is. It's a strange thing. I'm trying to figure out what happened myself.

9 RP at 891.

Santiago Santos testified to being struck in the back of the head.

The testimony did not identify the time or place of the blow, but one might conclude that Santos believed someone hit him while he was inside Manuel Jaime's home. Nevertheless, Santos did not know if Jaime struck the blow. Santos believed someone hit him because he awoke on some unidentified morning with pain. Santos testified that Jaime did not owe him anything and he did not know that Jaime used drugs.

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Santiago Santos denied knowing a person named "Fajardo," and he did not recall ever uttering Fajardo's name. 9 RP at 906. Santos denied carrying a knife and refuted that the bloody knife introduced into evidence belonged to him.

Clinical Psychologist Dr. Philip Barnard served as Santiago Santos's expert in discerning Santos's ability to form the intent to commit the crimes charged. Based on Dr. Barnard's evaluation of Santos, Barnard diagnosed Santos with delusional disorder and alcohol/cannabis abuse disorder. Dr. Barnard also diagnosed a mixed personality disorder with schizoid paranoia and avoidant features. Barnard opined that, as a result of Santos's diminished capacity, Santos could not form the intent necessary to commit the charged offenses. Dr. Barnard avowed:

> I believe that he has been afraid of being attacked, followed, attacked. When he entered the house, Mr. Jamie's [sic] house, that he was struck from behind. So it's like his delusional belief came to fruition and that it happened. I think that drove him into a psychotic rage, which was assisted with the disinhibiting factor of the extreme alcohol use so that he stabbed Mr. Jamie [sic] several times trying to defend himself.

9 RP at 950.

Dr. Philip Barnard conceded that another act might have provoked Santiago Santos's psychotic response. Dr. Barnard noted that Santos wore four pairs of boxer shorts at the time of his arrest, "which means to my interpretation that there was some

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fear of being approached sexually by another individual. He was using [the shorts] as protective gear." 9 RP at 964.

The State called Dr. Robert Fanto, a licensed clinical psychologist employed by the Washington State Office of Forensic Mental Health Services, to rebut the opinions of Dr. Philip Barnard. Dr. Fanto opined that, based on his testing and interview of Santiago Santos, and review of

the testing materials and the report issued by Dr. Barnard, and the police reports and medical records, Santos did not suffer from any mental illness at the time of the murder. Fanto testified:

> My opinion was that he had the capacity to form the specific mental element of the crime charged.
> . . . .
> Premeditation, intent to kill.

9 RP at 976. Dr. Fanto commented that, on the night of the murder, Santos engaged in purposeful goal-oriented behavior that suggested he suffered from no major impairments.Based primarily on Dr. Philip Barnard's testimony, Santiago Santos requested the trial court to instruct the jury on his defense of diminished capacity. The court found that evidence supported instructing the jury on the defense. The trial court gave the following jury instruction:

> Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form the intent to accomplish a result that constitutes a crime.

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Clerk's Papers (CP) at 121.

Because the trial court instructed the jury on the defense of diminished capacity, Santiago Santos also requested a jury instruction that imposed on the State the burden to disprove beyond a reasonable doubt the defense. Santos argued that any diminished capacity negated the intent element of murder in the first and second degrees. The trial court ruled that the State did not bear the burden to disprove the defense, although the State needed to prove intent. Thus, the court denied Santos's proposed jury instruction.

The trial court delivered a to-convict instruction on first degree murder:

> To convict the defendant of the crime of . . . murder in the first degree as charged in count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about November 15, 2014 the defendant acted with the intent to cause the death of Manuel Ezequiel Jaime;
> (2) That the intent to cause the death was

premeditated;
(3) That Manuel Ezequiel Jaime died as a result of defendant's acts; and
(4) That the acts occurred in the State of Washington.
If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 124.

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The trial court delivered a to-convict instruction on second degree murder:

To convict the defendant of the crime of murder in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
(1) That on or about November 15, 2014 Santiago Santos acted with intent to cause the death of Manuel Jaime;
(2) That Manuel Jaime died as a result of defendant's acts; and
(3) That any of these acts occurred in the State of Washington.
If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
On the other hand, if after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 127.

Santiago Santos also asked the trial court to instruct the jury on self-defense. The trial court refused because of a lack of evidence that Santos experienced a reasonable apprehension of being attacked.

At the State's request, the trial court asked the jury to consider the

presence of two aggravating factors during the slaying of Manuel Jaime: (1) Santiago Santos engaged in deliberate cruelty and (2) the killing caused a foreseeable and destructive impact on persons other than Jaime. Santos objected, based on insufficient evidence, to the giving of the special verdict forms for the aggravating factors.

The jury convicted Santiago Santos of the lesser offense of first degree manslaughter, rather than first degree murder. The jury also convicted Santos of second

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degree felony murder. The trial court vacated the manslaughter conviction and sentenced Santiago Santos on the conviction of second degree murder. The jury returned special verdicts finding that Santiago Santos committed the crimes while armed with a deadly weapon. The jury also found two aggravating circumstances: (1) Santos's conduct manifested deliberate cruelty to the victim, and (2) the crime involved a destructive and foreseeable impact on persons other than the victim.

The State of Washington sought an exceptional sentence upward. The trial court found substantial and compelling reasons to justify an exceptional sentence above the standard range. The trial court increased Santiago Santos's sentence by ten years. In total, the trial court sentenced Santos to 398 months in prison. The trial court found Santos indigent at the time of sentencing, but the court imposed a $200 criminal filing fee and a $100 DNA collection fee. The trial court also ordered that interest accrue on all legal financial obligations. The trial court directed Santos to pay the costs of community custody. The trial court imposed $11,510.79 in restitution and a $500 crime penalty assessment.

DECLARATION OF SERVICE

I, David B. Trefry, state that on September 1, 2020, I emailed a copy of the State's Answer to: Gregory Charles Link and Richard Wayne Lechich at wapofficemail@washapp.org

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of September 2020 at Spokane, Washington.

s/ David B. Trefry

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