90974-1

Supreme Court No. _____
Court of Appeals No. 31274-7-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JAMES J. LANDIS,

Defendant/Petitioner.

PETITION FOR REVIEW

DAVID N. GASCH
WSBA No. 18270
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Defendant/Petitioner

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I. IDENTITY OF PETITIONER.

Petitioner, James J. Landis, asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II.

II. COURT OF APPEALS DECISION.

Petitioner seeks review of the Court of Appeals unpublished opinion filed September 30, 2014, affirming his conviction and sentence. A copy of the opinion is attached as Appendix A.

III. ISSUES PRESENTED FOR REVIEW.

1. Was Mr. Landis denied his constitutional right to effective assistance of counsel, when his attorney failed to pursue a defense of diminished capacity?

2. Was Mr. Landis entitled to a voluntary intoxication jury instruction where the crime charged included a mental state and there was substantial evidence to support the giving of the instruction?

3. After the prosecutor elicited handpicked portions of a recorded statement from Detective Files where Mrs. Landis stated her husband was acting crazy, did the trial court abuse its discretion in not allowing Mr. Landis to elicit on cross examination the remainder of Mrs. Landis' statement where she explained how and why the crazy behavior was due to PTSD?

IV. STATEMENT OF THE CASE.

James Landis is a Vietnam veteran who served from January 1968 until September 1969. RP 884-86. In October 1968, he was injured by a land mine and also from being shot. At the end of his deployment he suffered from post-traumatic stress disorder (PTSD). RP 885-86. When he returned to the United States he worked for Martin Marietta as a missile mechanic, then Rockwell International, and eventually the Boeing Company as a flight line mechanic, and later as a supervisor. RP 886. He left Boeing around 2000 due to his PTSD disability. At the time of this incident he was rated 70 percent PTSD disabled by the Veterans Administration. RP 888.

On August 7, 2010, Mr. Landis was taking two doses of time-release morphine daily for pain from his war injuries as well as Celexa for depression. On the morning of this particular day, in addition to his usual medications, he had gone to the tavern and consumed three beers. He continued to drink beer after he returned home around noon. RP 435-39, 889, 899.

Sometime that afternoon both Mr. Landis and his wife became upset with one another following an episode that started when he accidently tangled up a garden irrigation line in the brush hog he was using with his garden tractor and ran over some of his wife's perennials. RP 265-267, 440, 891-97. Mrs. Landis, who had also been drinking, tried to stop her husband from doing any more mowing. Mr. Landis somehow ran over his wife's ankle with

the tractor during this disagreement and she ended up going to the hospital. RP 270-74, 440, 447.

Mrs. Landis told the neighbors that Mr. Landis had run over her leg with the tractor. The neighbors called the sheriff about 6:30 p.m. RP 355, 370-71. When the sheriff's deputies showed up at the hospital, she gave a similar story. RP 379. 440. At trial she testified it was an accident. RP 318-19.

Mr. Landis said Mr. Landis was upset due to PTSD. (RP 267, 786-88) Mrs. Landis told the Sgt. Harrison she did not want them to go to the house because Mr. Landis had weapons and she was afraid someone might get hurt due to Mr. Landis' PTSD. RP 357, 381. She also told the police Mr. Landis was a marksman and an excellent shot. RP 358. Sgt. Harrison testified Mrs. Landis told him she was worried about a potential shoot out with law enforcement as a result of the effects of Mr. Landis consuming alcohol along with his medication combined with his PTSD. RP 448.

Despite Mrs. Landis' pleadings, Deputy Newport and Sgt. Harrison decided to drive to the Landis residence. They traveled in separate cars. RP 385. After they arrived at the Landis residence around dusk they parked out of sight on the road. They could see lights on inside the house and Mr. Landis pacing back and forth. They had the dispatcher call Mr. Landis on the telephone and ask him to come outside and talk to them. RP 385-91, 451-54.

Patricia Stevens, a dispatcher at the sheriff's office, called Mr. Landis and asked him to come outside and talk to the sheriff deputies. RP 753-54. Mr. Landis declined to do that at first. He rambled on for some time that his wife has been getting in his face, that "she was living off of me from the day that I met her, and she has not worked a day and contributed ten cents to this relationship." RP 756-61. He then became abusive, calling her a bitch, as well as his wife, and threatening to kill both his wife and Ms. Stevens. RP 766-71.

Meanwhile, Deputy Newport had gotten out of his car and climbed up an embankment where he could watch the house but remain out of sight. RP 389-90. Eventually, Mr. Landis came outside and stood by the garage with his hands up. Sgt. Harrison drove into the driveway, turned on his overhead "take-down" lights, and got out of his patrol car. Mr. Landis immediately became angry and yelled at Harrison to turn off the lights. Mr. Landis then walked back inside his garage. RP 394-98. Seeing this turn of events, Deputy Newport told Sgt. Harrison to get out of the driveway and that he (Newport) was leaving. RP 399.

Mr. Landis came back outside within about ten seconds with a rifle. Deputy Newport was already running back to his car and Sgt. Harrison was backing his car out the driveway. RP 400-01. Mr. Landis began firing shots at Harrison's patrol car. Harrison heard glass breaking. He stopped his car as soon as he was out of the line of fire, turned off his car and lights, got out and

crawled up the embankment to a position where he could see the house. RP 457-60. Deputy Newport radioed dispatch to send more officers. RP 406. By now, it was completely dark outside. RP 408.

From where he was hiding in the field, Harrison could hear Mr. Landis yelling and crying. Mr. Landis was saying his wife's name and yelling, "Come take me out." A few minutes later Mr. Landis came walking straight from the house holding a rifle and muttering to himself. RP 464-66. Mr. Landis passed within 30-60 feet of where Harrison was hiding. Mr. Landis walked to the top of the embankment and started shooting at Harrison's empty patrol car. RP 467. The numerous shots fired into the empty patrol car caused the headlights or wig-wag lights to start flashing on and off and the horn to start honking. RP 469.

Mr. Landis went back inside the house and turned off the lights. 470-74. After a period of quiet, Harrison heard sirens approaching and then footsteps quite close to his position. Harrison decided to shoot Mr. Landis. He shot Mr. Landis in the hip and ordered Mr. Landis to put his arms out away from his body. Mr. Landis complied and was handcuffed by Harrison. RP 475-78. Deputy Newport and other officers arrived a few minutes later. RP 411.

Deputy Newport testified that after Mr. Landis was shot he was delusional and not making sense. Newport thought he was possibly under the

influence of drugs. RP 424-25. Mr. Landis was taken away in an ambulance. RP 414.

In preparation for trial, Mr. Landis' lawyer had begun laying the groundwork for presenting a diminished capacity defense. He had asked for and received several continuances to contact an expert witness to set up such a defense. RP 82. At some point Mr. Landis retained a different lawyer, Stephen Graham. Mr. Graham abandoned this diminished capacity defense in favor of a "suicide by cop" defense. RP 80-82. In support of this defense Graham proposed calling Professor Gilbertson as a witness to testify as an expert on the theory of "suicide by cop." CP 106.

The State filed a motion in limine to exclude such expert testimony arguing that the theory of "suicide by cop" does not meet the Frye standard and that Professor Gilbertson does not qualify as an expert. CP 96-105. The Court agreed and excluded the testimony of Professor Gilbertson. RP 86-92. The Court noted that Professor Gilbertson had never met Mr. Landis and therefore knows nothing about Mr. Landis' frame of mind. RP 90-92. Moreover, the trial court observed, as Professor Gilbertson had noted, that a defense of "suicide by cop" even if successful does not negate a person's intent to kill law enforcement, even when the person wishes to be killed in the confrontation. RP 91.

During the trial Mrs. Landis testified on direct examination that her husband's crazy behavior resulting in her being injured was due to his PTSD. RP 267. Following her testimony the State moved to prohibit the defense from inquiring further about Mr. Landis' PTSD. RP 307. The Court granted the motion and did not allow the defense to cross examination Mrs. Landis about her husband's PTSD. RP 312-14.

Later the State elicited testimony from Detective Files on direct examination about portions of a recorded statement where Mrs. Landis stated her husband was "a crazy guy" during the garden tractor incident. RP 781. During cross-examination the State objected to any further inquiry about the remainder of Mrs. Landis' statement where she explained how and why the crazy behavior was due to PTSD. The trial court sustained the objection. RP 789-91.

Despite these attempts to bring in evidence of PTSD, defense counsel continually objected to evidence of Mr. Landis being under the influence of drugs and alcohol. RP 435-39.

The Court denied the defense request for a jury instruction on voluntary intoxication. The Court said it would not be fair to offer the instruction now, since the state would have the burden of proving the absence of the defense and the evidence was now closed. The Court also said voluntary intoxication was not Mr. Landis' defense, and there was no mention

or evidence of intoxication affecting Mr. Landis' mental state. RP 1009-1011, 1019-20. Mr. Landis objected and took exception to not giving the instruction. RP 1026.

Mr. Landis was convicted of attempted first degree murder, second degree assault, and harassment. RP 1152. This appeal followed. CP 1-2.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)), and involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)).

1. Mr. Landis was denied his constitutional right to effective assistance of counsel, when his attorney failed to pursue a defense of diminished capacity.

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x). *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). In *Strickland*, the Court established a two-part test for ineffective assistance of counsel. First, the defendant must show deficient performance. In this

assessment, the appellate court will presume the defendant was properly represented. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

Deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). However, the presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.").

Second, the defendant must show prejudice--"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003), citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

The defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id., citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. Courts look to the facts of the individual case to see if the *Strickland* test has been met. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001). Appellate review on this issue is de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

The failure of defense counsel to present a diminished capacity defense where the facts support such a defense has been held to satisfy both prongs of the *Strickland* test. *Tilton*, 149 Wash. 2d at 784, 72 P.3d 735 (citing *Thomas*, 109 Wash. 2d at 226-29, 743 P.2d 816). A diminished capacity defense requires evidence of a mental condition, which prevents the defendant from forming the requisite intent necessary to commit the crime charged. *State v. Warden,* 133 Wn.2d 559, 564, 947 P.2d 708 (1997). An intoxication defense allows consideration of the effect of voluntary intoxication by alcohol or drugs on the defendant's ability to form the requisite mental state. *State v. Coates,* 107 Wn.2d 882, 889, 735 P.2d 64 (1987).

Here, there was sufficient evidence of diminished capacity by PTSD and voluntary intoxication for the jury to find that it prevented Mr. Landis from forming the requisite intent necessary to commit the crime charged. Attempted first degree murder requires "premeditated intent." RCW 9A.32.030(1)(a). The State bears the burden of proving beyond a reasonable

doubt that the defendant had this requisite mental state. *State v. Bottrell*, 103 Wash. App. 706, 712, 14 P.3d 164, (2000) (citing *State v. James,* 47 Wn. App. 605, 609, 736 P.2d 700 (1987). When specific intent or knowledge is an element of the crime, a defendant is entitled to present evidence showing an inability to form the specific intent or knowledge at the time of the crime. *Id.* (citing *State v. Edmon,* 28 Wn. App. 98, 102-04, 621 P.2d 1310, *review denied,* 95 Wn.2d 1019 (1981); *State v. Martin* 14 Wn. App. 74, 75, 538 P.2d 873 (1975), *review denied,* 86 Wn.2d 1009 (1976)).

Washington case law acknowledges that PTSD is recognized within the scientific and psychiatric communities and can affect the intent of the actor resulting in diminished capacity. *Bottrell*, 103 Wash. App. at 715, 14 P.3d 164 (citing *State v. Janes,* 121 Wn.2d 220, 233-36, 850 P.2d 495 (1993) (battered woman and battered child syndromes are a subset of PTSD and are admissible to show how severe abuse affects the battered person's perceptions and reactions)); see also, *State v. Riker,* 123 Wn.2d 351, 869 P.2d 43 (1994). Other cases that acknowledge the link and the defense are: *Warden,* 133 Wn.2d at 564, 947 P.2d 708; *State v. Hamlet,* 133 Wn.2d 314, 944 P.2d 1026 (1997).

Here, it was made clear at trial that Mr. Landis suffered from PTSD, despite erroneous rulings by the trial court trying to keep such evidence out (discussed *infra*). Mr. Landis testified he left Boeing around 2000 due to his

PTSD disability and that he was rated 70 percent PTSD disabled by the Veterans Administration. RP 888. Mrs. Landis told the police Mr. Landis suffered from PTSD when she was interviewed in the hospital following the tractor incident. RP 786-88. She also mentioned it in her testimony. RP 267.

Likewise, there is ample evidence of diminished capacity due to the combination of the PTSD, the medications and the alcohol consumed that day. The testimony revealed Mr. Landis was taking two doses of time-release morphine daily for pain from his war injuries as well as Celexa for depression. On the morning of this incident he had gone to the tavern and consumed three beers and continued to drink beer after he returned home around noon. RP 435-39, 889, 899. Sgt. Harrison testified Mrs. Landis told him she was worried about a potential shoot out with law enforcement as a result of the effects of Mr. Landis consuming alcohol along with his medication combined with his PTSD. RP 448.

The actual behavior exhibited by Mr. Landis that day further substantiates this defense and is consistent with the various symptoms of PTSD discussed above. Mr. Landis is not a career criminal. He is an honorable war veteran with an impressive employment history. He worked for Martin Marietta as a missile mechanic, then Rockwell International, and eventually the Boeing Company as a flight line mechanic, and later as a supervisor. RP

886. His behavior on the date of this incident was entirely inconsistent with such a notable background absent some intervening mental condition.

Starting with the tractor episode and the way events escalated thereafter, it was evident that Mr. Landis' behavior was abnormal. This was first demonstrated by the confrontation with his wife over a seemingly trivial matter, his exaggerated reaction, her resulting injury and his apparent refusal to help her (see RP 354-57, 783). Mr. Landis later became further upset when the sheriff deputies arrived at the house and Sgt. Harrison turned on his "take-down" lights. Mr. Landis immediately became angry and yelled at Harrison to turn off the lights. Mr. Landis then went into his garage and came back outside in about ten seconds with a rifle. This type of extreme overreaction could only be categorized as abnormal and the result of some mental condition.

Mr. Landis also behaved strangely when the dispatcher, Patricia Stevens, called Mr. Landis and asked him to come outside and talk to the sheriff deputies. Mr. Landis declined to do that at first. He rambled on for some time that his wife has been getting in his face, that "she was living off of me from the day that I met her, and she has not worked a day and contributed ten cents to this relationship." RP 756-61. He then became abusive, calling her a bitch, as well as his wife, and threatening to kill both his wife and Ms. Stevens. RP 766-71.

Mr. Landis exhibited even more extreme abnormal behavior when he began firing shots at Harrison's patrol car as Harrison was trying to leave. Later, when Harrison was hiding in the field, he could hear Mr. Landis yelling and crying. Mr. Landis was saying his wife's name and yelling, "Come take me out." A few minutes later Mr. Landis came walking straight from the house holding a rifle and muttering to himself. RP 464-66. He then walked to the top of the embankment and fired enough rounds at Harrison's empty patrol car to cause the headlights or wig-wag lights to start flashing on and off and the horn to start honking. RP 469.

Finally, Deputy Newport testified that after Mr. Landis was shot he was delusional and not making sense. Newport thought he was possibly under the influence of drugs. RP 424-25. Consequently, there was a plethora of evidence available for defense counsel to present and argue diminished capacity. Defense counsel's performance was clearly deficient in failing to pursue this defense.

"Suicide by cop" was not a viable defense in this case.

Even though Mr. Landis' former lawyer had begun laying the groundwork for presenting a diminished capacity defense, Mr. Graham abandoned this defense in favor of a "suicide by cop" defense. At a pretrial hearing he told the Court, "[O]ur defense is that Mr. Landis *did* act with

intent, just that his intent wasn't to kill, his intent was to -- his intent was to take his own life." RP 85 (emphasis added).

But as the trial court and Professor Gilbertson noted, a defense of "suicide by cop" even if successful does not negate a person's intent to kill law enforcement, even when the person wishes to be killed in the confrontation. RP 91, CP 102; James Garbarino, Lost Boys: Pathways from Childhood Aggression and Sadness to Youth Violence, 8 Va. J. Soc. Pol'y & L. 129, 137 (2000); Rahi Azizi, When Individuals Seek Death at the Hands of the Police: The Legal and Policy Implications of Suicide by Cop and Why Police Officers Should Use Nonlethal Force in Dealing with Suicidal Suspects, 41 Golden Gate U. L. Rev. 183, 211 (2011). In other words, a "suicide by cop" defense did not offer any defense at all to the charges against Mr. Landis, since it would not negate the requisite intent necessary to commit the crimes charged. There is no strategic objective in presenting a defense that is not a defense. Therefore, defense counsel's performance was clearly deficient in pursuing this defense.

There is a reasonable likelihood that the jury would have agreed with a doctor's diagnosis of PTSD, thus creating a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Therefore, Mr. Landis was denied effective assistance of counsel by his attorney failing to pursue and present a defense of diminished capacity.

2. Mr. Landis was entitled to a voluntary intoxication jury instruction because the crime charged included a mental state and there was substantial evidence to support the giving of the instruction.

At some point defense counsel apparently realized the futility of his "suicide by cop" defense and that diminished capacity was the only feasible defense. At the close of the evidence he requested a voluntary intoxication instruction. The Court denied the defense request for a jury instruction on voluntary intoxication. The Court said it would not be fair to offer the instruction now, since the state would have the burden of proving the absence of the defense and the evidence was now closed. The Court also said voluntary intoxication was not Mr. Landis' defense, and there was no mention or evidence of intoxication affecting Mr. Landis' mental state. RP 1009-1011, 1019-20. Mr. Landis objected and took exception to not giving the instruction. RP 1026.

RCW 9A.16.090 is the law at issue:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state.

Diminished capacity from intoxication is not a true "defense." *Coates*, 107 Wn.2d at 891-92, 735 P.2d 64. Rather, "[e]vidence of intoxication may bear upon whether the defendant acted with the requisite mental state; but the

proper way to deal with the issue is to instruct the jury that it may consider evidence of the defendant's intoxication in deciding whether the defendant acted with the requisite mental state." *Id.* (citing WPIC 18.10).

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking [or drug use], and (3) there is evidence that the drinking [and/or drugs] affected the defendant's ability to form the requisite intent or mental state. *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). In other words, the evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." *State v. Kruger*, 116 Wn.App. 685, 691-92, 67 P.3d 1147 (2003) (citing *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996)).

Attempted first degree murder requires "premeditated intent." RCW 9A.32.030(1)(a). When specific intent or knowledge is an element of the crime charged, a defendant is entitled to present evidence showing an inability to form the specific intent or knowledge at the time of the crime. *Bottrell*, 103 Wash. App. at 712, 14 P.3d 164. The record reflects substantial evidence of Mr. Landis' level of intoxication on the date of this incident. The testimony revealed Mr. Landis was taking two doses of time-release morphine daily for pain from his war injuries as well as Celexa for depression. On the morning of

this incident he had gone to the tavern and consumed three beers and continued to drink beer after he returned home around noon. RP 435-39, 889, 899.

The actual behavior exhibited by Mr. Landis as set forth in the previous issue further substantiates this defense. Based on this evidence, Mr. Landis was entitled to the instruction. The trial court was incorrect in its finding that there was no mention or evidence of intoxication affecting Mr. Landis' mental state.

The Court was also incorrect in denying the instruction because voluntary intoxication was not Mr. Landis' defense. While it is true that defense counsel stated at a pretrial hearing that his defense would be "suicide by cop," there is no authority that prohibits him from abandoning that defense in favor of a better one. The only requirement is that the evidence supports the giving of the instruction. Clearly it did.

Similarly, the Court was incorrect in denying the instruction because it would not be fair to offer the instruction now, since the state would have the burden of proving the absence of the defense and the evidence was now closed. The State always has the burden of proving the defendant acted with the necessary culpable mental state. *Coates*, 107 Wash. 2d at 890, 735 P.2d 64. Generally, evidence of intoxication is relevant to this question, but it is inaccurate to think of intoxication as forming some element that the State

must negate, just as it would be erroneous to hold that the State has the burden of proving or disproving circumstantial evidence. *Id.*

3. After the prosecutor elicited handpicked portions of a recorded statement from Detective Files where Mrs. Landis stated her husband was acting crazy, the trial court abused its discretion in not allowing Mr. Landis to elicit on cross examination the remainder of Mrs. Landis' statement where she explained how and why the crazy behavior was due to PTSD.

The State elicited testimony from Detective Files on direct examination about portions of a recorded statement where Mrs. Landis stated her husband was "a crazy guy" during the garden tractor incident. RP 781. During cross-examination the State objected to any further inquiry about the remainder of Mrs. Landis' statement where she explained how and why the crazy behavior was due to PTSD. The trial court sustained the objection. RP 789-91.

ER 106 (Rule of Completeness) provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it." *State v. Larry,* 108 Wn. App. 894, 909-10, 34 P.3d 241 (2001). Once the trial court determines that a statement is relevant, the court must determine whether the statement 1) explains the admitted

evidence, 2) places the admitted evidence in context, 3) avoids misleading the trier of fact, and 4) ensures fair and impartial understanding of the evidence. *Larry,* 108 Wn. App. at 910, 34 P.3d 241.

Here, all four of these criteria are satisfied. The prosecutor clearly handpicked portions of the recorded statement out of context. Defense counsel's attempted inquiry about the remainder of Mrs. Landis' statement would have explained how and why the crazy behavior she mentioned was due to PTSD. It was unfair and misleading to the jury to not allow Mr. Landis the opportunity to clarify the statement. Therefore, the trial court abused its discretion under ER 106.

VI. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted October 29, 2014,

s/David N. Gasch, WSBA No. 18270
Attorney for Petitioner

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on October 29, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the petition for review:

James J. Landis
#361654
1830 Eagle Crest Way
Clallam Bay, WA 98326

E-mail: sfieldlarson@co.okanogan.wa.us
Karl F. Sloan
Okanogan County Prosecutor
P. O. Box 1130
Okanogan WA 98840-1130

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

September 30, 2014

Karl F Sloan
Okanogan County Prosecuting Attorney
P.O. Box 1130
Okanogan, WA 98840-1130

David N. Gasch
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005

CASE # 312747
State of Washington v. James Joel Landis
OKANOGAN COUNTY SUPERIOR COURT No. 101001733

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:mk
Attach.
c: **E-mail** – Hon. Christopher Culp
c: James Joel Landis #361654
Clallam Bay Correction Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

FILED
SEPT. 30, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JAMES JOEL LANDIS, Appellant.	)	No. 31274-7-III UNPUBLISHED OPINION

BROWN, J. – James Joel Landis appeals his conviction for the attempted first degree murder of Sergeant Tracy Harrison, second degree assault of his wife, Mary Landis, and harassment–threat to kill Ms. Landis and/or Pat Stevens, a sheriff's office dispatcher. He contends (1) his counsel was ineffective for not pursuing a diminished capacity defense, and the trial court erred in (2) denying his request for a voluntary intoxication instruction, and (3) limiting certain cross-examination. We reject his contentions and affirm.

FACTS

Because evidence sufficiency is uncontested and the appeal issues are mainly legal, we summarize the facts. The State's evidence is strong, including multiple incriminating statements from Ms. Landis about Mr. Landis' assault and harassment, the

recording and transcript of the dispatcher's call to Mr. Landis, Mr. Landis' admissions, and many witnesses and exhibits detailing the shooting. Mr. Landis initially claimed diminished capacity. After changing lawyers, he asserted a PTSD-based "suicide by cop" defense at trial, claiming lack of intent to murder, assault, or harass.

On August 7, 2010, the Landises were working in their garden. Mr. Landis became angry when he damaged the irrigation system while operating a tractor. Ms. Landis attempted to calm him by taking the tractor key and standing in front of the tractor. Mr. Landis used another key to start the tractor and ran over Ms. Landis, breaking her leg. Ms. Landis drove to a neighbor's house, then went to a hospital by ambulance. There, deputies took her statement. Ms. Landis told Sergeant Harrison she did not want police going to her house because she was afraid someone might get shot as a result of Mr. Landis' PTSD, his medications, and his alcohol consumption. Earlier in the day, Mr. Landis had taken one or two time-release morphine capsules and depression medication, and had been drinking.

The sergeant and Deputy Kevin Newport drove separately to the Landis property to investigate. Deputy Newport took cover in a concealed position, while Sergeant Harrison drove up to talk to Mr. Landis. The dispatcher called Mr. Landis to persuade him to come out, but he refused. Instead, Mr. Landis fired multiple shots at the sergeant causing him to retreat in his bullet riddled car and take cover. After the initial shooting, Mr. Landis told the dispatcher who had heard the shots, "I just shot your stupid deputy." Report of Proceedings (RP) at 767. Mr. Landis threatened the dispatcher, then pursued

Sergeant Harrison. Mr. Landis shot into the unoccupied patrol car and approached Sergeant Harrison, who shot Mr. Landis to end the confrontation. Before he shot Mr. Landis, the sergeant could hear Mr. Landis yelling, "Come take me out." RP at 466.

Ms. Landis became an adverse State's witness. During Detective Kevin Files' testimony, a portion of Ms. Landis' statement, stating her husband was "a crazy guy," was used to impeach her. RP at 780-81. Defense counsel attempted to elicit more of Ms. Landis' prior statement from Detective Files, asking if Ms. Landis had mentioned that Mr. Landis had PTSD. After an affirmative response, the court sustained an objection to the line of questioning. On direct testimony, Ms. Landis' testimony was peppered with unsolicited references to Mr. Landis' PTSD without objection.

Mr. Landis testified he was an injured Vietnam war veteran "rated 70 percent PTSD by the Veterans Administration, with Agent Orange." RP at 888. Mr. Landis related he was deeply depressed and suicidal the day of the incident. He fired with the "intention to aggravate police officers into completing my intention of taking my life." RP at 905. Mr. Landis testified he was an excellent shot and could have shot Sergeant Harrison, if he had desired; Mr. Landis later argued this showed a lack of intent to murder with the evidence showing, at best, an uncharged assault. He argued the alleged assault on Ms. Landis was an accident. Finally, Mr. Landis argued any harassment was not serious or intended and should be judged in light of his PTSD.

The jury found Mr. Landis guilty as charged. He appealed.

ANALYSIS

A. Ineffective Assistance Claim

The issue is whether Mr. Landis was denied effective assistance of counsel when his counsel did not pursue a diminished capacity or voluntary intoxication defense. He contends sufficient evidence established diminished capacity and voluntary intoxication.

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish this defense, a defendant must show:

> (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland*, 466 U.S. at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693.

We strongly presume counsel's representation was effective. *McFarland*, 127 Wn.2d at 335. Deficient performance is not shown by matters relating to trial strategy or tactics, and courts are hesitant to find ineffective assistance of counsel where those tactics are unsuccessful. *See State v. Sardinia*, 42 Wn. App. 533, 542, 713 P.2d 122 (1986) (giving defense counsel wide latitude in making tactical decisions). However, the record must include some support for the trial tactics used. *See State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 61 (1996).

The *Strickland* tests may be satisfied by the failure of defense counsel to present a diminished capacity defense where the facts support the defense. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 819 (1987). Failure to request a diminished capacity instruction does not constitute ineffective assistance of counsel per se. *State v. Cienfuegos*, 144 Wn.2d 222, 229-30, 25 P.3d 1011 (2001) (where defense counsel was able to argue his case theory). To show diminished capacity, a defendant must show the crime charged includes a particular mental state as an element, present evidence of a mental disorder, and supply "expert testimony demonstrating the defendant suffered from a mental condition that impaired his . . . ability to form the requisite . . . intent." *State v. Eakins*, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995); *State v. Atsbeha*, 142 Wn.2d 904, 921, 16 P.3d 626 (2001). PTSD can affect a defendant's intent resulting in diminished capacity. *State v. Bottrell*, 103 Wn. App. 706, 715, 14 P.3d 164 (2000).

Here, the choice of defense was strategic and Mr. Landis' defense counsel chose fitting tactics; this is not deficient performance. Mr. Landis initially explored diminished capacity, but the pretrial record shows he was having difficulty securing supporting expert testimony and the defense was thus not well-founded. Mr. Landis' PTSD suicide by cop defense was well grounded by the evidence and was directed at undermining the intent element in the attempted first degree murder charge. Defense counsel argued Mr. Landis might be responsible for an uncharged assault on Sergeant Harrison but not attempted murder. Defense counsel was able to argue his case theory without clouding the intent issue with diminished capacity.

Regarding voluntary intoxication, in *State v. Byrd*, 30 Wn. App. 794, 638 P.2d 601 (1981), the defendant argued defense counsel should have argued voluntary intoxication negated the necessary intent to act as an accomplice. *Id.* at 798. The court found evidence of considerable drinking but failed to find evidence the defendant was not in control of himself, as the defendant ably recalled the events in detail. *Id.* Here, Mr. Landis' anger was apparent, but he was still able to specifically explain his intentions and clearly recall the day's events. Mr. Landis testified his marksmanship skills remained unaffected and could have shot Sergeant Harrison if he had desired, indicating his ability to control himself during these events.

In sum, we conclude Mr. Landis fails to show defective assistance of counsel. Given this conclusion, we do not discuss Mr. Landis' failure to show prejudice.

B. Voluntary Intoxication

The issue is whether the trial court erred in not providing the jury with a voluntary intoxication instruction.

"Decisions rejecting jury instructions are reviewed for an abuse of discretion." *State v. Priest*, 100 Wn. App. 451, 454, 997 P.2d 452 (2000). While the State must prove a defendant acted with the necessary intent, intoxication is not an element the State has to negate. *State v. Coates*, 107 Wn.2d 882, 890, 735 P.2d 64 (1987). Defendants are entitled to voluntary intoxication instructions "*only* if: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his . . .

ability to acquire the required mental state." *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992) (emphasis added). Evidence of drinking alone is insufficient; what is required is "substantial evidence of the effects of the alcohol on the defendant's mind or body." *State v. Gabryschak*, 83 Wn. App. 249, 253, 921 P.2d 549 (1996).

In *Gabryschak*, the court denied the defendant's request for a voluntary intoxication instruction. *Id.* at 252. No evidence showed intoxication affected the defendant's ability to form the requisite mental state. *Id.* at 253-54. The court found the evidence showed the defendant understood the police's requests, was aware he was under arrest, and knew he was going to jail. *Id.* at 254-55. No testimony indicated the defendant was disoriented or unable to feel pain. *Id.* at 255, *see also Byrd*, 30 Wn. App. at 798 (no intoxication where defendant gave a detailed recital of the events at trial).

Mr. Landis argues substantial evidence of consumption and the effects of intoxicants warranted an intoxication instruction. But he did not testify he was intoxicated or unaware of his actions. Instead, Mr. Landis gave detailed recollections about the trial events, including his shooting intent and how he felt he could accurately aim and shoot as a marksman. Mr. Landis needed to establish his clear mind to support his lack of intent defense. Considering the conflict with his chosen defense, Mr. Landis cannot show prejudice. Notwithstanding the trial court's reasoning about Mr. Landis' lack of diligence in raising the defense, the record does not support a voluntary intoxication instruction. Given this analysis, we conclude Mr. Landis' counsel was not ineffective by failing to pursue a voluntary intoxication defense.

C. Limitation on Cross-Examination

The issue is whether the trial court erred in not allowing Mr. Landis to cross-examine the State's witness about Ms. Landis' "crazy guy" statement. Citing ER 106 (Rule of Completeness) and arguing the trial court's decision was unfair and misleading to the jury, Mr. Landis contends the trial court abused its discretion when it denied Mr. Landis the opportunity to cross-examine on the remainder of Ms. Landis' statement to explain the crazy behavior was due to PTSD.

We do not reverse rulings regarding the scope of cross-examination absent a manifest abuse of discretion, meaning a decision is manifestly unreasonable or based on untenable grounds or reasons. *State v. McDaniel*, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996). We review evidence admissibility decisions for an abuse of discretion. *State v. Simms*, 151 Wn. App. 677, 692, 214 P.3d 919 (2009). The rule of completeness provides when a party introduces a statement, an adverse party may require the party to introduce any other part "which ought in fairness to be considered contemporaneously with it." ER 106. But "the trial judge need only admit the remaining portions of the statement which are needed to clarify or explain the portion already received." *State v. Larry*, 108 Wn. App. 894, 910, 34 P.3d 241 (2001).

The State attempted impeachment by contradicting Ms. Landis' trial testimony by having Detective Files read her statement describing her husband as a "crazy guy." Consistent with the PTSD defense, Mr. Landis' counsel cross-examined Detective Files, attempting to show Mr. Landis' normal behavior as character evidence. In light of

earlier unchallenged rulings favoring the defense regarding limiting character evidence and considering the already well-developed record about Mr. Landis' PTSD, the trial court did not abuse its discretion in limiting cumulative inquiry. Mr. Landis does not show how admitting the remaining portions of Ms. Landis' statement would clarify or explain evidence already received. The State limited its inquiries to the narrow temporal scope of when Mr. Landis was on the tractor. Defense counsel was permitted to ask whether Ms. Landis told Detective Files her husband suffered from PTSD. Mr. Landis was able to and did argue his case theory based on the existing PTSD evidence.

Moreover, any error was harmless. Evidentiary errors "require[] reversal only if the error, within reasonable probability, materially affected the outcome of the trial." *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993).

Given this record, we cannot conclude the outcome was materially affected by limiting cross-examination or that the trial court abused its discretion in its ruling.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Siddoway, C.J.

Fearing, J.