Supreme Court No. 91096-1
(COA No. 69726-9-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KIER GARDNER,

Appellant.

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

PETITION FOR REVIEW

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A. INTRODUCTION

Kier Gardner was the victim of a brutal attack that left him with severe head wounds. When he refused medical attention, he was restrained by law enforcement and brought to a hospital for treatment against his will. His continued resistance at the hospital resulted in two assault charges. The subsequent trial included several errors that violated Mr. Gardner's right to a fair trial as well as other constitutional rights. Because Mr. Gardner's appeal involves significant questions of law under both the United States and Washington Constitutions, this Court should accept review.

B. IDENTITY OF PETITIONER AND DECISION BELOW

Kier Gardner, petitioner here and appellant below, asks this Court to accept review pursuant to RAP 13.4(b) of the Court of Appeals decision terminating review dated November 3, 2014, a copy of which is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Was Mr. Gardner's right to due process violated where the trial court ruled the State did not have to disclose evidence that could

have been used to demonstrate a key witness's untruthfulness, particularly where her credibility was a crucial issue at trial?

2. The Sixth and Fourteenth Amendments are violated where a trial court bars a defendant from presenting evidence that supports his theory of defense. The refusal to admit even minimally-relevant evidence violates a defendant's rights unless the State can establish the relevance is substantially outweighed by potential prejudice to the fairness of process. Did the trial court violate Mr. Gardner's constitutional rights by excluding evidence relevant to Mr. Gardner's defense that his actions were not volitional? Did the trial court violate Mr. Gardner's right to silence when it required him to testify in support of his defense? Did the trial court violate Mr. Gardner's constitutional rights by forcing him to choose between his right to present a defense and his right to silence?

D. STATEMENT OF THE CASE

On July 28, 2012, emergency personnel and law enforcement responded to a report of a fight among a large group of males. RP 214-15, 221. Kier Gardner was hit in the back of his head with a baseball bat while being jumped by a group of unidentified men. RP 4, 101-02, 110-11; Ex. 1. Law enforcement located Mr. Gardner in a bathroom,

where he was trying to tend to his serious head wound and other injuries, which included a laceration on his face and abrasions on his shoulder and cheek. RP 217. Despite his substantial injuries, Mr. Gardner refused medical attention. RP 217. When he could not be convinced to go to the hospital, police "put [Mr. Gardner] in handcuffs and escorted him out of the house" based on "the obvious injury and the insistence of the EMT that he be seen at the hospital." RP 218.

Mr. Gardner provided inconsistent and nonsensical accounts of how he received the injuries. RP 224-25, 226-27 (hit by a car, assaulted at a party, and fell off skateboard). Mr. Gardner's fiancé, Charitie Wells, came to see Mr. Gardner in the emergency room. RP 101, 102-03. When Mr. Gardner tried to leave the hospital, Ms. Wells placed herself between Mr. Gardner and the door to prevent him from exiting. RP 19, 29, 105, 113. According to Ms. Wells, when Mr. Gardner nudged her out of the way in an attempt to leave the room, she fell over her twisted left foot and ended up on the ground.[1] RP 105, 106-07, 113, 115-16, 119. Deputy Robert Ellsworth, who just

[1] Ms. Wells explained her left foot muscle has been twisted since birth such that her left foot is turned slightly inward and she has difficulty with balance. RP 208.

happened to be nearby, testified that he observed Mr. Gardner throw Ms. Wells to the ground. RP 19.

Deputy Ellsworth called for another police officer to respond to the emergency room. RP 20. About 30 minutes later, Sergeant Claudia Murphy and Deputy Ellsworth placed Mr. Gardner under arrest for fourth degree assault and handcuffed him on a hospital gurney. RP 21-22, 133-37. According to Deputy Ellsworth and Sergeant Murphy, Mr. Gardner kicked Sergeant Murphy as she was reading his *Miranda* rights. RP 24, 35-36, 141-43.

Mr. Gardner was charged with assault in the fourth degree against Charitie Wells and assault in the third against Sergeant Murphy. CP 4. The morning of trial, the State asked the court to review documents in camera to determine whether it was required to disclose them to Mr. Gardner. RP 3-4. These documents showed the untruthfulness of Sergeant Murphy, establishing that she had previously made false statements under oath. CP 59-60. Although Sergeant Murphy was the alleged victim of the third-degree assault charge against Mr. Gardner and a State's witness on both charges, the trial court found the evidence immaterial and determined that Mr. Gardner was not entitled to review it. RP 4-5. As a direct result, Mr. Gardner

and his trial counsel were unaware of Officer Murphy's history of lying under oath. *See* RP 3-5. Sergeant Murphy's testimony at Mr. Gardner's trial, which contradicted testimony offered by other witnesses in multiple instances, is addressed in greater detail in the argument section below.

Mr. Gardner's defense was that the wound to his head rendered him unaware of his actions and thus he could not act with the volition required to convict him of either assault. RP 4-5, 10-12, 175, 185-86, 239-41. Multiple witnesses testified about the nature and gravity of Mr. Gardner's injury, as well as his illogical resistance to treatment. RP 81-84, 104-05, 110-11, 113, 217. Mr. Gardner proposed a jury instruction, which stated: "The State must prove a certain minimal mental element of volition to establish criminal liability. In other words, a person must be aware of their actions and voluntarily choose to take that action." CP 8; RP 11-12. Mr. Gardner argued that it was within the jury's common knowledge that severe head trauma could cause an individual to lose volitional control and the jury could assess Mr. Gardner's condition based on his behavior. RP 9-12. The trial court ruled that Mr. Gardner would need to testify for the defense to argue lack of intent. RP 13-16, 179-80.

Mr. Gardner testified only after the trial court ruled he could not present his defense unless he testified. RP 182-84, 185, 190-92, 193. Mr. Gardner explained, "I just remember getting jumped, that's all I remember. I don't remember much about it. I just can remember getting jumped." RP 194. He did not remember interacting with Sergeant Murphy or Deputy Ellsworth. RP 193-94. He recalled waking up in jail and asking his cellmate where he was, and then asking the guard and his mother why he was in jail. RP 195.

The trial court precluded Mr. Gardner from presenting other relevant evidence, including the testimony of the nurse who treated Mr. Gardner at the jail. RP 172-73, 182-87. Nurse Connie Magana would have testified about the prescriptions and treatment provided to Mr. Gardner for his extensive head injury, as well as Mr. Gardner's lack of recollection when he regained consciousness. RP 172-74, 182-84.

Despite Mr. Gardner's testimony and the other evidence at trial, the court refused to provide Mr. Gardner's proposed jury instruction on volition. RP 239-43. Mr. Gardner was found guilty of both counts of assault. CP 28, 31.

E. ARGUMENT

1. The trial court violated Mr. Gardner's due process rights when it concluded that evidence of Sergeant Murphy's untruthfulness was immaterial.

The trial court's failure to disclose evidence the defense could use to impeach Sergeant Murphy, a key State witness whose credibility was at issue, violated Mr. Gardner's constitutional right to due process. This Court reviews de novo the legal question whether the evidence regarding Sergeant Murphy's prior untruthfulness constitutes material impeachment evidence. *State v. Mullen*, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011).

a. The failure to disclose material, exculpatory evidence violates a defendant's constitutional right to due process.

Under the Fourteenth Amendment's due process clause, criminal prosecutions "must comport with prevailing notions of fundamental fairness," and a defendant must have a meaningful opportunity to present a complete defense. U.S. Const. amend. XIV; *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). Fundamental fairness requires that the government preserve and disclose to the defense favorable evidence that is material to guilt

or punishment. *Trombetta*, 467 U.S. at 480, 485-88; *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

Impeachment evidence is included within the material required to be disclosed. *State v. Benn*, 120 Wn.2d 631, 650, 845 P.2d 289 (1993) (quoting *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985)). "Such evidence is 'evidence favorable to an accused,' . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676 (quoting *Brady*, 373 U.S. at 87). "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within th[e] general rule [of Brady]." *Id.* at 677.

"This may often require county prosecutors to disclose evidence that tends to negate the guilt of the accused, including impeachment evidence related to the credibility of parties who testify against the accused at trial . . . ." *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 447-48, 219 P.3d 675 (2009) (Johnson, J. dissenting). Thus, the rule requiring disclosure encompasses evidence for misconduct or untruthfulness related to an officer who is a material witness at trial. *See id.* (Johnson, J. dissenting) (citing *United States v.*

Bland, 517 F.3d 930, 934 (7th Cir. 2008) (internal investigation of police officer for misconduct should be disclosed but held not material on facts of case); *United States v. Holt*, 486 F.3d 997, 1001 (7th Cir. 2007) (police officer's reputation for untruthfulness is admissible at trial)).

If the undisclosed evidence "is material in the sense that its suppression undermines confidence in the outcome of the trial," a constitutional error occurs and any resulting conviction must be reversed. *Bagley*, 473 U.S. at 678.

b. The trial court's ruling prevented the disclosure of material impeachment evidence.

Despite these requirements to ensure the accused receives a fair trial, the trial court ruled that the State need not disclose Sergeant Murphy's history of untruthfulness and inaccurate testimony to Mr. Gardner. RP 4, 5. Sergeant Murphy was a key witness for the State, and thus a material aspect of its case against Mr. Gardner. She was the alleged victim of the third-degree assault charge and the arresting officer on the misdemeanor assault charge relating to Charitie Wells.

The right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable.

United States v. Abel, 469 U.S. 45, 50, 105 S. Ct. 465, 468, 83 L. Ed. 2d 450 (1984); *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974). But here, the trial court's ruling deprived Mr. Gardner of the opportunity to cross-examine Sergeant Murphy on her prior untruthfulness under oath.

Mr. Gardner had a constitutional right to review the impeachment evidence. The trial court's ruling preventing the disclosure improperly limited Mr. Gardner's ability to impeach and effectively cross-examine the State's key witness.

c. The due process violation requires reversal of Mr. Gardner's conviction.

As discussed, a "new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" *Bagley*, 473 U.S. at 677 (quoting *Brady*, 405 U.S. at 154). "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

Here, the undisclosed evidence was particularly relevant in light of the conflicts between Sergeant Murphy's testimony and that of other witnesses. Sergeant Murphy testified that she spoke with Mr. Gardner's mother on the telephone and learned Ms. Wells was in a relationship with Mr. Gardner. RP 160-61. However, both Ms. Wells and Mr. Gardner's mother testified they did not relay this information to Sergeant Murphy. RP 206-08, 236. This conflict in the evidence bears striking similarity to the contested statements Sergeant Murphy made in the undisclosed materials. There, Sergeant Murphy stated under oath she was at a residence on "an unrelated matter" when in fact she was at the residence for the specific purpose of the suspected controlled substances that formed the basis for the warrant – an entirely related purpose. CP 59-60.

Moreover, Sergeant Murphy's testimony describing Mr. Gardner's kick differed from that of Officer Ellsworth and the hospital security officer. Her testimony contradicted the other eyewitnesses regarding where she was positioned and whether Mr. Gardner was lying down or sitting. RP 22-24, 35-36, 46, 52-56, 136-37, 140-41. The jury reasonably would have been concerned about Sergeant Murphy's

credibility if the defense had been provided the opportunity to bring evidence of her untruthfulness to light.

Mr. Gardner did not have access to the impeachment evidence the court suppressed. Mr. Gardner was thus unable to present extrinsic evidence impeaching Sergeant Murphy's credibility. The lack of disclosure was material. In light of the violation of his constitutional right to due process, Mr. Gardner's convictions for assault should be reversed. *See Bagley*, 473 U.S. at 677.

2. The trial court violated Mr. Gardner's constitutional rights to present a defense and not to testify.

The trial court violated Mr. Gardner's due process rights to a fair trial, the right to present a defense, and the right to not testify when it denied his proposed instruction on volitional act, precluded him from calling the jail nurse as a witness, and required Mr. Gardner to testify before he could argue lack of intent or present evidence related to that defense.

a. An accused is guaranteed a meaningful opportunity to present a complete defense.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319,

324, 126 S. Ct 1727, 164 L. Ed. 2d 503 (2006); *Davis*, 415 U.S. at 318. Article 1, section 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996). An accused must receive the opportunity to present his version of the facts to the jury. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). "[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

Although an accused is entitled to present only relevant evidence, relevance is a low threshold. "To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality)." *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987) (citing 5 K. Tegland, *Wash. Practice* § 82, at 168 (2d ed. 1982)). Relevant evidence includes facts that present direct or circumstantial evidence of any element of a claim or defense. ER 401;

Rice, 48 Wn. App. at 12. "Evidence tending to establish a party's theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible." *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999).

So long as a defendant's evidence is minimally relevant, "the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Jones*, 168 Wn.2d at 720 (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). Even then, "[r]elevant information can be withheld only 'if the State's interest outweighs the defendant's need.'" *Id.*

Although the trial court has discretion to determine whether evidence is admissible, an accused's inability to present relevant evidence implicates the fundamental fairness of the proceedings and the error must be analyzed as a due process violation. *Jones*, 168 Wn.2d at 720; *Maupin*, 128 Wn.2d at 924.

b. Mr. Gardner's constitutional right to present the defense of lack of volitional act was violated when the court denied the proposed instruction and ruled he could not call witnesses in support of that defense.

Mr. Gardner's primary defense was that he lacked volition to commit the assaults. Every crime must contain an actus reus and a

mens rea. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). Actus reus is the "wrongful deed that comprises the physical components of a crime" while mens rea refers to the state of mind the prosecution must prove an accused had when committing the crime. *Id.* at 481. Inherent in the actus reus component is willed movement, a volitional act. *Id.* at 482-83. Thus the "State must prove a certain minimal mental element of volition to establish the actus reus." *State v. Edwards*, 171 Wn. App. 379, 388, 294 P.3d 708 (2012).

"Where an individual has taken no volitional action she is not generally subject to criminal liability as punishment would not serve to further any of the legitimate goals of the criminal law." *Eaton*, 168 Wn.2d at 481-82. "We do not punish those who do not have the capacity to choose. Where the individual has not voluntarily acted, punishment will not deter the consequences." *Id.* at 482. Where "a person is in fact unconscious at the time he commits an act which would otherwise be criminal, he is not responsible therefor [sic]. The absence of consciousness . . . excludes the possibility of a voluntary act without which there can be no criminal liability." *State v. Utter*, 4 Wn. App. 137, 142, 479 P.2d 946 (1971) (first alteration in original).

To be clear, lack of volitional control based on unconsciousness is distinct from a diminished capacity defense. *See State v. Deer*, 175 Wn.2d 725, 733-34, 287 P.3d 539 (2012) (noting lack of conscious action is an affirmative defense similar to but distinct from diminished capacity); *Utter*, 4 Wn. App. at 139, 141 (same). A lack of willed movement need not be premised on a claim of mental disease, such as is necessary to assert a diminished capacity defense. *Deer*, 175 Wn.2d at 734; *Utter*, 4 Wn. App. at 141. Mr. Gardner made plain his defense was based on his lack of willed movement after his head injuries, not a mental disorder. *E.g.*, RP 4-5, 10-12, 175, 185-86, 239-41; CP 8.

An accused is entitled to argue lack of conscious action. *Deer*, 175 Wn.2d at 741. "The issue of whether or not the appellant was in an unconscious or automatistic state at the time he allegedly committed the criminal acts charged is a question of fact" for the jury to determine. *Utter*, 4 Wn. App. at 143. "[A] defendant must be allowed to argue that her actions were involuntary, thus excusing her from criminal liability." *Deer*, 175 Wn.2d at 741.

Nonetheless, the trial court excluded Nurse Magana, a defense witness who would have testified as to the nature of Mr. Gardner's injuries and the treatment required for those injuries. RP 172-73, 182-

87. The evidence should have been admitted as relevant to Mr. Gardner's defense. The court ruled only that the evidence was not relevant and the State did not argue the evidence was "so prejudicial as to disrupt the fairness of the fact-finding process at trial." In fact, any such argument would have been without merit. Moreover, because it was highly probative, "no state interest can be compelling enough to preclude its introduction." *Jones*, 168 Wn.2d at 720-21 (quoting *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983)).

c. By tying Mr. Gardner's ability to argue his defense to his taking the witness stand, the trial court violated his constitutional rights to silence and to due process.

Under the Fifth Amendment to the United States Constitution and article I, section 9, no person shall be compelled to serve as a witness against himself in a criminal case. "At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

Here, Mr. Gardner invoked his right to silence, declining to testify at trial. However, the trial court ruled that he could not present evidence of his involuntary act defense unless he testified. In fact, the court ruled that the content of Mr. Gardner's testimony was not critical, but he had to assume the witness stand. Compelling Mr. Gardner to be

a witness at his own trial violated his constitutional right to silence. RP 179-80 (Gardner does not wish to testify but court states it "is not concerned with the content of his testimony. But for any of this to be relevant, it would require his first taking the stand and testifying."); RP 182-88 (Gardner invokes Fifth Amendment right; court abides by prior ruling and denies motion for continuance; Gardner changes mind and decides to testify).

Moreover, pitting his constitutional right to silence against his right to present a defense violated due process. *See* U.S. Const. amend. XIV; Const. art. I, § 3; *Simmons v. United States*, 390 U.S. 377, 394, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); *McGautha v. California*, 402 U.S. 183, 212-13, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1971) .

d. The errors require reversal of the conviction.

Due process demands an accused be permitted to present evidence that is relevant and of consequence to his theory of the case. *Jones*, 168 Wn.2d at 720; *Maupin*, 128 Wn.2d at 924; *Rice*, 48 Wn. App. at 12. Because the court's exclusion of relevant evidence denied Mr. Gardner's Sixth Amendment right to present a defense, compelled him to testify in his own defense, and violated his right to a fair trial, the errors require reversal of his conviction unless the State can prove

beyond a reasonable doubt that they "did not contribute to the verdict obtained." *Chapman v California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

The State cannot meet its burden in this case. Evidence that Mr. Gardner lacked an ability to control his conduct was compelling. There was no reasonable explanation for Mr. Gardner's entrenched refusal of medical care, particularly in light of the severity of his injuries. RP 81-82, 104-05, 110-11, 113, 177-78; Ex. 1. Further, the court found the evidence so compelling it imposed a sentence below the standard range. CP 32, 39. Finally, as set forth above, discrepancies in the evidence weakened the State's case.

In *Maupin*, our Supreme Court reversed a murder conviction where the trial court erroneously excluded evidence of a witness who saw the victim with someone other than the defendant on the day of the alleged crime. 128 Wn.2d at 928, 930. Though the excluded evidence would not have necessarily resulted in an acquittal, it "casts substantial doubt on the State's version of the crime." *Id.* at 930. Thus it was "impossible to conclude a reasonable jury would have reached the same result beyond a reasonable doubt." *Id.*

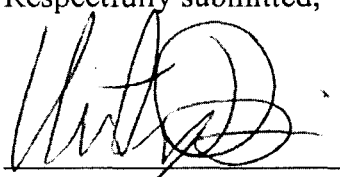
To reverse the convictions, this Court need not find that Mr. Gardner's version of events is "airtight." *Jones*, 168 Wn.2d at 724. A reasonable jury hearing the excluded evidence may have reached a different result. *See id.* Accordingly, the error was not harmless and requires reversal of Mr. Gardner's convictions with remand for a new trial. *Id.*; *Maupin*, 128 Wn.2d at 924.

F. CONCLUSION

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

DATED this 3rd day of December, 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KIER KEANDE GARDNER, Appellant.	)	No. 69726-9-I DIVISION ONE UNPUBLISHED OPINION FILED: November 3, 2014

SCHINDLER, J. — A jury convicted Kier Keande Gardner of assault in the fourth degree of Charitie Wells and assault in the third degree of Bellingham Police Department Sergeant Claudia Murphy. Gardner contends the trial court (1) violated his right to due process by excluding impeachment evidence concerning Sergeant Murphy, (2) violated his right to present the affirmative defense that he lacked the volition to commit the charged crimes, and (3) violated his right against self-incrimination. We affirm.

FACTS

In the early morning hours of July 28, 2012, Bellingham Police Department Officer Jacob Esparza and Officer Michael Shannon responded to a 911 call reporting a group of men fighting. A woman told the officers that a man injured in the fight was in her apartment. The man, later identified as Kier Keande Gardner, had "a wound on the back of his head" but refused to go to the hospital. The officers handcuffed Gardner so emergency medical technicians (EMTs) could take him to St. Joseph Hospital.

Gardner called his girlfriend Charitie Wells from the hospital. Wells arrived at the hospital at around 2:30 a.m.

At approximately 3:10 a.m., Whatcom County Corrections Officer Robert Ellsworth heard "raised voices" from one of the hospital emergency rooms. Through the window of the door, Corrections Officer Ellsworth watched as Gardner grabbed Wells and threw her on the ground. When Gardner "opened the door and came out," Officer Ellsworth told him to go back inside. Officer Ellsworth said Wells was on the floor "on all fours." Officer Ellsworth asked Wells "if she was okay and if she wanted to press charges." Wells slowly got up and said, "No." Corrections Officer Ellsworth asked the hospital staff to contact security and call the Bellingham Police Department.

Bellingham Police Department Sergeant Claudia Murphy arrived at the hospital approximately 10 minutes later. Sergeant Murphy spoke to Corrections Officer Ellsworth and then went to talk to Wells. Wells was on her cell phone talking to Gardner's mother Marilyn Gardner. Wells said Marilyn wanted to talk to Sergeant Murphy and handed her the phone. Sergeant Murphy had a brief conversation with Gardner's mother.

Corrections Officer Ellsworth helped Sergeant Murphy place Gardner under arrest for the assault of Wells. Sergeant Murphy handcuffed Gardner while Gardner sat on a gurney. As Sergeant Murphy began reading Gardner his Miranda[1] rights, Gardner said, "Shut up, bitch," then kicked Sergeant Murphy in the face, knocking off her glasses.

The State charged Gardner with assault in the fourth degree of Wells and assault in the third degree of Sergeant Murphy. Gardner entered a plea of not guilty. The defense asserted that as a result of his head injury, Gardner did not have the intent to commit the charged crimes.

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Before trial, the State asked the court to conduct an in camera review of a 2009 search warrant application submitted by Sergeant Murphy, police reports, and a letter from the Whatcom County Prosecutor. After conducting the in camera review, the court ruled the information submitted by the State was not material to the pending case and the State did not have an obligation to disclose the information to the defense.

During pretrial motions, the State argued that in order to establish the affirmative defense of diminished capacity, the defense must present expert testimony.

> It came to my attention that there was a diminished capacity defense and that is based on a theory that the defendant has a head injury.
>
> . . . [I]n order to present a diminished capacity defense the defense must present an expert witness that can establish with some certainty that an injury would have created a diminished capacity for the specific intent of the crime.

The defense attorney stated the defense did not intend to call "a mental health expert" on diminished capacity. The defense argued it was "within the common knowledge of everyone" that a head injury "can make people not think clearly," and that as a result, Gardner "may not have been able to form the requisite intent."

> We have not prepared a mental health expert to come in and discuss diminished capacity. We believe it is within the common knowledge of everyone that an injury to the back of the head such as Mr. Gardner had received prior to his hospitalization is within the general knowledge of everyone that that can make people not think clearly, and that as a result he may not have been able to form the requisite intent to assault these people. We don't believe that we need to bring in an expert to tell us what we think is within everyone's general knowledge.

The court ruled an expert was necessary to establish the head injury prevented Gardner from forming the intent to commit the charged crimes.

> You're saying that a person receives an injury to the back of the head and the jury can, without expert testimony, actually by speculation, guess or conjecture, say, oh, well, the State's failed to prove. The initial burden is on the defense to bring the defense forward, not by speculation or conjecture. . . .

> I'm not willing to say it's just common knowledge when you get hit in the back of the head you're not able to form intent.

Defense counsel stated Gardner was not asserting a diminished capacity defense and, therefore, an expert was not necessary. Defense counsel argued Gardner could show he did not have the intent to commit the crimes through cross-examination of the State's witnesses about Gardner's behavior.

> Your Honor, whether the defendant testifies or not, I believe that I can get in through cross-examination of all the officers who witnessed his action prior to his hospitalization, the severity of the injury and his behavior that they observed.

The court agreed witnesses could testify about what they observed but could not testify about Gardner's intent.

> Well, you can do that. . . . The fact that he was doing this or doing that, those are observations that are admissible, but you're not going to be able to ask those witnesses what did he intend.

The court ruled that "within the confines of the evidence," the defense could argue the State did not prove Gardner had the intent to commit the charged crimes. The court also ruled that if the defense did not present expert testimony, only Gardner could testify as to his intent. The defense attorney stated the evidence would "make it clear" that Gardner did not have the intent to commit the crimes.

> [DEFENSE COUNSEL:] I guess I hadn't thought this through as a diminished capacity defense per se, that I was actually going to ask or try to prove that he lacked the capacity to form a requisite intent. I believe that the evidence will make it clear that he did not have the capacity to know what he was doing. . . .
>
> THE COURT: Intent is an element of the crime and you can argue intent from the evidence. But diminished capacity is one that requires expert opinion. . . .
>
> . . . .
>
> . . . But intent is always an element and you can argue intent within the confines of the evidence that was presented.
>
> [DEFENSE COUNSEL]: That is all I was expecting to do.
>
> [THE PROSECUTOR]: I just wanted to say I appreciate the court's

> ruling on that. There was a CAT [(computerized axial tomography)] scan that was taken and it's my understanding that there was no brain swelling. That's why we need an expert in these kinds of situations if there's going to be a diminished capacity defense.
>
> THE COURT: It's not diminished capacity. He is arguing that he wishes to argue that the defendant did not intend to do what he did.
>
> [THE PROSECUTOR]: Right. So I guess what we[']re left with - -
>
> THE COURT: That's only going to come in through his testimony, quite frankly, if there's no expert.

The State called Wells, Sergeant Murphy, emergency room nurse Allison Shahan, Corrections Officer Ellsworth, and hospital Security Officer David Smit to testify at trial.

Wells denied Gardner assaulted her. Wells testified that when she tried to stop Gardner from leaving the hospital room, he "moved me out of the way." Wells said she tripped over her foot and fell. Wells testified she was crying because she "feared that they were going to try and charge him."

Nurse Shahan testified Gardner was initially reluctant to cooperate and answer questions about his injury.

> [H]e gave us several different names so I knew he wasn't, he didn't want to give his name. And then I heard that he tripped on the stairs, he fell skateboarding, he was ice skating, and there was so many different things that he told me about how he was hurt.

Nurse Shahan testified that she saw Gardner arguing with Wells and Wells crying. Nurse Shahan said that she told Wells she would have to go out to the waiting room if "they couldn't keep it together." Nurse Shahan testified that 15 minutes later, she saw Gardner throw Wells "full force" against the window of the hospital door.

> I saw her hit the glass on the door so that - - the doors are just normal size doors but they have a window from probably chest height to the top so you can see, it's a good size pane of glass and she had hit full force into the door and he was behind her and then they both went down on the floor.

Nurse Shahan testified that when she spoke to Wells a few minutes later, Wells was

"upset that [Gardner] had tackled her."

On cross-examination, nurse Shahan said that Gardner had bruises on his face, the bruise on one cheek was "pretty swollen," and he had "a laceration over his eyebrow." Nurse Shahan testified that "sleepiness, nausea, vomiting, [and] confusion" could be associated with head injuries. On redirect, Shahan testified that Gardner was not sleepy, nauseous, vomiting, or confused.

Corrections Officer Ellsworth testified that while he was standing in the hallway outside the hospital emergency rooms, he heard raised voices before he "saw a female put her back up against the door. . . . I saw a male approach her, push her up against the door, grab her by her upper torso and kind of throw her to the ground."

Corrections Officer Ellsworth testified that Gardner had "a good-size bandage" on his head "from the top of the scalp to middle of the ear, bottom of the ear." Officer Ellsworth said Gardner showed signs of intoxication, like "slurred speech," and was not cooperative. Officer Ellsworth testified that when Gardner was sitting on the gurney with his legs out in front of him, he lifted "his leg straight up" and struck Sergeant Murphy "in the head or the face" with a "very high kick."

Hospital Security Officer Smit was standing at the foot of the hospital bed while Sergeant Murphy placed Gardner under arrest. Smit testified that Gardner was in a seated position on the gurney when he saw Gardner's "leg come up and strike Sergeant Murphy in the face." Smit testified the kick "was pretty high. It would take a lot of effort to make a kick like that." Smit said Gardner "leaned back, way back to make the kick."

Sergeant Murphy testified that after she arrived at the hospital, she spoke to Corrections Officer Ellsworth, nurse Shahan, and Wells. Sergeant Murphy said that she briefly spoke to Gardner's mother Marilyn on the phone.

Sergeant Murphy testified that Wells "was going between upset and getting very, very frustrated with me because she kept insisting that nothing had occurred." Sergeant Murphy said that Wells told her Gardner was "just angry and drunk."

Sergeant Murphy testified that after placing Gardner under arrest, she was "standing immediately behind him . . . where his shoulders were." Sergeant Murphy testified that as she was reading Miranda rights to Gardner from a card, "out of my peripheral vision I saw a very fast flurry of motion," and "the next thing . . . I felt [was] my entire head exploding on impact . . . . [M]y glasses were completely smashed."

At the conclusion of the State's case, defense counsel stated the defense intended to call two of the officers who responded to the 911 call, Officer Vodopich and Officer Shannon, and a nurse from the jail, Connie Magana, to establish the affirmative defense of lack of volition. Defense counsel said the two officers would testify about Gardner's injury, his behavior, and his insistence that he did not need medical treatment to show "he was not thinking clearly." Defense counsel said jail nurse Magana would testify about "the medications that Mr. Gardner received while he was in the hospital for a possible concussion treatment and the treatment of the staples, and that the staples were removed, and that he questioned why he was at the jail and what he had done to get there."

The State argued the offer of proof concerning the testimony of the jail nurse about a "possible concussion" did not show Gardner did not have the intent to commit the charged crimes. "I don't think the defense is tying together why a concussion could or would cause any sort of inability to form the intent to commit the crime."

The next day, defense counsel argued he did not need an expert to show whether Gardner "actually understood and knew what he was doing at the time." Defense

counsel told the court that in addition to Officer Shannon, the defense planned to call another officer who responded to the 911 call, Officer Esparza, and jail nurse Magana. Defense counsel stated Gardner "wishes to invoke his Fifth Amendment right and not testify at all."

The court ruled the testimony of jail nurse Magana was not relevant absent either the testimony of an expert or Gardner's testimony that he did not have the intent to commit the crimes.

> To the extent that the issue is one of putting forward a defense of diminished capacity, I agree with the State that an expert is required in order to establish the diminished capacity defense. And that is lacking in this case.
>
> With regard to the issue of intent, which the defense is putting forward, the condition of the defendant pre-hospital and his condition post-incident is irrelevant and incompetent for purposes of establishing whether or not at the time he possessed the intent to commit the act or acts that he is alleged to have done.
>
> The determination of whether or not the defendant knew what he was doing is something that the police officer as well as the jail personnel are not competent to testify about as to whether or not he knew what he was doing. Taking his condition pre-hospital or post-hospital, and then asking the jury to then speculate on what his intent was at the time, they're not competent to do that and it's speculation, conjecture or guess.
>
> So I abide by my earlier ruling that the defense has failed to establish the relevance of the testimony of these two witnesses and I will not permit that.
>
> . . . .
>
> . . . I understand your position but I say its speculation or guess or conjecture without the requisite testimony of either an expert and/or testimony from the defendant.

Following the court's ruling, defense counsel asked for a continuance to obtain an expert. The court denied the request for a continuance. Thereafter, defense counsel told the court Gardner had decided to testify.

Gardner testified that he remembered only "bits and pieces" of what happened at the hospital. Gardner said he did not remember interacting with Sergeant Murphy and

"vaguely" remembered why he was at the hospital. Gardner testified, "I just remember getting jumped, that's all I remember." Gardner said he remembered waking up in jail and asking why he was there.

On cross-examination, Gardner testified he remembered seeing Wells at the hospital. "I just remember her showing up. I really don't remember - - I know she was there, that's pretty much all I can remember." Gardner also testified that it was possible he accidentally kicked Sergeant Murphy.

Q You said that you do not recall meeting Sergeant Murphy?
A No, sir, I don't recall meeting her.
Q So your testimony is that you didn't accidentally kick her; is that right?
A Um, I'm not saying - - there's a possibility I could have accidentally kicked her, I don't remember, sir.
Q Your testimony is you didn't mistakingly [sic] kick her?
A What do you mean?
Q By mistake.
A It's a possibility I could have.
Q Possibility you could have done it on purpose, too?
A No, that's no possibility.
Q How is that if you don't remember?
A I guess you have a point there.

The defense also called Officer Esparza and Officer Shannon. Officer Esparza testified that Gardner "had a cut on the back of his head." The court admitted into evidence a photograph of the wound. Officer Esparza said that because Gardner refused to go to the hospital, officers handcuffed him for his own safety before the EMTs took him to the hospital for treatment. On redirect, Officer Esparza testified that Gardner was able to answer Officer Shannon's questions, "like name, date of birth, stuff like that."

Officer Shannon testified Gardner "literally push[ed] the EMTs away from him every time they approached him." Officer Shannon said Gardner did not want to go to the hospital and that "[b]ased on the obvious injury and the insistence of the EMT that he

be seen at the hospital, I, with another officer, put him in handcuffs and escorted him out of the house." Officer Shannon testified Gardner had "a large laceration on the back of his head. There was another laceration I believe on his face and abrasion on his shoulder."

On cross-examination, Officer Shannon testified he is a former certified EMT. Officer Shannon said he checked Gardner's pupils to confirm that they were "equal in size and reactive to light" because that can be an "outward indication of brain trauma or brain injury." Officer Shannon testified Gardner "was speaking clearly and coherently. . . . He wasn't mumbling or slurring in speech." Officer Shannon said, "Based on my training as an EMT I didn't see anything that presented as an immediate danger of an internal head injury."

The defense recalled Gardner. Gardner testified that he had a concussion, that his head wound was closed with staples, and that he first became aware of his injury when he saw "the nurses here at the jail and they told me."

At the conclusion of the evidence, the defense proposed giving a jury instruction on the affirmative defense of volition.[2] The court refused to give the instruction. The court ruled that in the light most favorable to the defense, the evidence showed that Gardner "had no knowledge, no recollection of what occurred." The court stated, "[N]ot having a memory of not kicking somebody is not the same as not having the volition to do it."

The jury found Gardner guilty as charged. The court imposed an exceptional

[2] The instruction on volition proposed by the defense states, "The State must prove a certain minimal element of volition to establish criminal liability. In other words, a person must be aware of their actions and voluntarily chose [sic] to take that action."

sentence below the standard range.[3]

ANALYSIS

Impeachment Evidence

Gardner argues the trial court erred by ruling the State did not have to disclose material impeachment evidence regarding Sergeant Murphy. Gardner asserts he is entitled to reversal under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). To prove a Brady violation, the defendant must establish the State, either willfully or inadvertently, suppressed material or exculpatory impeachment evidence. State v. Mullen, 171 Wn.2d 881, 895, 259 P.3d 158 (2011).

In Brady, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Brady, 373 U.S. at 87; see also State v. Benn, 120 Wn.2d 631, 649, 845 P.2d 289 (1993). In addition to exculpatory evidence, the use of evidence "to impeach the Government's witnesses by showing bias or interest . . . falls within the Brady rule." United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). However, reversal is required only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682; In re Pers. Restraint of Gentry, 137 Wn.2d 378, 396, 972 P.2d 1250, 1260 (1999).

> The constitutional error . . . in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination. As discussed above, such suppression

[3] The court's findings in support of the exceptional sentence state, in pertinent part:

1. That the defendant had a severe head injury.
2. That the court believed that he had no memory of the assault.
3. That the defendant acted with intent at the time of the assault.
4. That a sentence of 30 months is a sufficient sentence with the facts of this case.

> of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with "our overriding concern with the justice of the finding of guilt," . . . a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.

Bagley, 473 U.S. at 678[4] (quoting United States v. Agurs, 427 U.S. 97, 112, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)).

Here, the State submitted for in camera review information concerning a 2009 case involving Sergeant Murphy. In 2009, a police officer from another jurisdiction contacted Sergeant Murphy to ask for her help. The police officer told Sergeant Murphy that her daughter's roommates were selling marijuana out of the apartment but her daughter did not want to be identified as an informant. Sergeant Murphy talked to the daughter and then went to the apartment, ostensibly concerning vehicle prowls in the neighborhood. After the daughter invited Sergeant Murphy into the apartment, Sergeant Murphy saw a bud of marijuana on the floor. In support of a warrant to search the apartment, Sergeant Murphy testified she was in the area on an "unrelated matter" and the daughter let her into the apartment to talk about vehicle prowls. The Whatcom County Prosecutor describes Sergeant Murphy's testimony as "not accurate or truthful," and states that as a result, the charges against the roommate were dismissed.

We conclude the failure to disclose the information submitted for in camera review did not undermine the confidence in the outcome in this case. Further, if disclosed, the result of the proceedings would not have been different or changed the outcome of the trial.

Sergeant Murphy was the victim of the charge of assault in the third degree and her testimony was limited. The undisputed evidence established that Gardner kicked

[4] Emphasis added.

Sergeant Murphy in the face with force, knocking off her glasses. Nonetheless, Gardner claims her credibility was "particularly relevant in light of the conflict between Sergeant Murphy's testimony and that of Ms. Wells and Mr. Gardner's mother." The defense points to conflicting testimony about whether Sergeant Murphy learned that Wells and Gardner were dating during the telephone conversation with Gardner's mother. But by the time of trial, the fact that Gardner and Wells were dating was not in dispute. Wells testified that Gardner was her fiancé.

Gardner also argues the court's ruling limited his ability to cross-examine Sergeant Murphy. A criminal defendant has the right to cross-examine adverse witnesses. U.S. CONST. amend. VI; Douglas v. Alabama, 380 U.S. 415, 418, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). In determining whether an error infringing a defendant's right to cross-examine was harmless, we consider "the importance of the witness' testimony, whether the evidence was cumulative, the extent of corroborating and contradicting testimony, the extent of cross-examination otherwise permitted and the strength of the State's case." State v. Buss, 76 Wn. App. 780, 789, 887 P.2d 920 (1995), overruled on other grounds by State v. Martin, 137 Wn.2d 774, 975 P.2d 1020 (1999).

Here, the dispute at trial was whether Gardner assaulted Wells and whether he had the intent to commit the assaults. Sergeant Murphy did not see Gardner assault Wells and did not testify about the assault of Wells. Two other witnesses, Corrections Officer Ellsworth and emergency room nurse Shahan, testified about Gardner's assault of Wells.

Sergeant Murphy's testimony about how Gardner kicked her differed slightly from the testimony of Corrections Officer Ellsworth and the hospital security officer. Sergeant

Murphy described it as "a donkey kick backwards and then up." Corrections Officer Ellsworth testified that it was a "very high" kick. Hospital Security Officer Smit testified the kick "was pretty high. It would take a lot of effort to make a kick like that," and Gardner "leaned back, way back to make the kick." But because there is no dispute Gardner kicked Sergeant Murphy in the face with force, the discrepancy is not significant.

Right to Present a Defense

Next, Gardner contends the court violated his right to present a defense by excluding the testimony of jail nurse Magana, denying his request for a continuance to obtain an expert witness, and denying his proposed jury instruction on volition.

The Sixth Amendment is violated "where a defendant is effectively barred from presenting a defense due to the exclusion of evidence." State v. Martin, 169 Wn. App. 620, 628-29, 281 P.3d 315 (2012); U.S. CONST. amend. VI. A defendant has a constitutional right to present testimony of witnesses to establish a defense. State v. Cheatam, 150 Wn.2d 626, 648, 81 P.3d 830 (2003).

But the defendant does not have a right to introduce irrelevant or inadmissible evidence. State v. Ellis, 136 Wn.2d 498, 528, 963 P.2d 843 (1998). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. This court reviews a trial court's evidentiary ruling for an abuse of discretion and "will not disturb that decision unless no reasonable person would adopt the trial court's view." Martin, 169 Wn. App. at 628.

Gardner asserts the court abused its discretion by excluding jail nurse Magana's testimony because it is common knowledge that a concussion may impact a person's

ability to act with volition.[5] The trial court ruled that absent medical testimony connecting the testimony of the jail nurse of a possible concussion and the need for treatment to Gardner's mental state during the commission of the charged crimes, the testimony was not relevant and speculative. The court ruled, in pertinent part:

> That post-event he was given medications, that requires medical testimony to make a connection between the medications and the effect of those medications, if any, upon him post-event. If the purpose of that evidence is to say that the need for those medications is an indication of his mental state at the time of the event, then that requires medical testimony. So it's not relevant.
>
> . . . .
>
> . . . The fact of a concussion on the defendant's thought process is a medical issue and requires medical testimony.
>
> [DEFENSE COUNSEL]: I will not ask her about what this concussion may or may not have caused him to do.
>
> THE COURT: That's what you're going to want the jury to assume. You want the jury to assume that the concussion does have an effect on his mental state. You can't do that without expert testimony.

The court did not abuse its discretion in ruling that absent testimony establishing a connection between Gardner's head injury and his ability to act with volition, the testimony of the jail nurse was not relevant and speculative.

Gardner also argues the court violated his right to present a defense by refusing to give his proposed jury instruction on volition.

The defendant is entitled to have the court instruct the jury on its theory of the case if evidence supports the instruction. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). A defendant is not entitled to an instruction that is not supported by the evidence. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

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[5] Neither of the cases Gardner cites support his argument. See State v. Deer, 175 Wn.2d 725, 733, 287 P.3d 539 (2012) (holding lack of volition is an affirmative defense); State v. Utter, 4 Wn. App. 137, 144, 479 P.2d 946 (1971) (affirming refusal of instruction on volition).

Here, the trial court refused to give the proposed instruction on volition. The court ruled, in pertinent part:

> [T]he facts of this case, in the light most favorable to the defense, is that the defendant had no knowledge, no recollection of what occurred. But the testimony of the defendant and the facts through the State is that he said, you know, I could have kicked. I mean, not having a memory of not kicking somebody is not the same as not having the volition to do it.
>
> If there had been expert testimony that, for example, theoretically part of his brain was injured which controlled his reactions, his muscle control and reactions, and a doctor could say with this injury a person will kick and flail around, kind of like when people come out of a coma, they're not consciously doing that, they're not doing it intentionally but it's just a muscle reaction, then you get your volition instruction. But here there isn't any evidence other than a loss of memory of the event that he did not choose that course of action and take it.

Lack of volition is an affirmative defense that the defendant must prove by a preponderance of the evidence. State v. Deer, 175 Wn.2d 725, 733, 287 P.3d 539 (2012). The court reviews the denial of a proposed instruction based on the evidence at trial for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). To determine if the evidence supports giving the proposed jury instruction, the court views the evidence in the light most favorable to the defendant. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

The decision in State v. Utter, 4 Wn. App. 137, 479 P.2d 946 (1971), is analogous. In Utter, the State charged the defendant with manslaughter of his son. The defendant testified that as a result of his "warfare training," he reacted violently to people approaching him unexpectedly from behind. Utter, 4 Wn. App. at 138-39. An expert witness testified about "conditioned response," or "an act or a pattern of activity occurring so rapidly, so uniformly as to be automatic in response to a certain stimulus." Utter, 4

Wn. App. at 139.[6]

On appeal, the court held there was insufficient evidence of lack of volition "to present the issue of defendant's unconscious or automatistic state at the time of the act to the jury." Utter, 4 Wn. App. at 143. The court concluded, "There is no evidence, circumstantial or otherwise from which the jury could determine or reasonably infer what happened in the room at the time of the stabbing; the jury could only speculate on the existence of the triggering stimulus." Utter, 4 Wn. App. at 143.

Here, as in Utter, Gardner presented no evidence that his head injury caused an involuntary or unconscious action. The court did not err in refusing to instruct the jury on lack of volition. We note that during closing, defense counsel argued the evidence showed Gardner lacked the intent to commit the charged crimes.

Gardner also contends the court violated his right to present a defense by denying his motion for a continuance to obtain an expert witness. This court reviews a decision to deny a continuance for abuse of discretion. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). "In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." Downing, 151 Wn.2d at 273.

Before and during trial, the defense consistently took the position that expert testimony was not necessary to establish lack of volition. The defense first asked for a continuance to obtain an expert toward the end of the trial, right before calling witnesses to testify in the defense case. The court did not abuse its discretion in denying the motion for a continuance at the end of trial.

[6] Internal quotation marks omitted.

Right against Self-Incrimination

Gardner argues the court compelled him to testify in violation of his right against self-incrimination. The Fifth Amendment to the United States Constitution and article I, section 9 of our state constitution provide that a criminal defendant may not be compelled to give testimony against himself. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). "The right against self-incrimination is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind or speak his guilt." State v. Mendes, 180 Wn.2d 188, 195, 322 P.3d 791 (2014).

As a general rule, the right against self-incrimination at trial prohibits the State from forcing the defendant to testify. Mendes, 180 Wn.2d at 195. " 'The use of the word "compelled" connotes that the accused must be forced to testify against his will, that the testimony is exacted under compulsion and over his objection.' " State v. Van Auken, 77 Wn.2d 136, 138, 460 P.2d 277 (1969) (quoting State v. Jeane, 35 Wn.2d 423, 433, 213 P.2d 633 (1950)).

Under federal and state law, a defendant's tactical decision to either remain silent or present a defense does not violate the right against self-incrimination. Williams v. Florida, 399 U.S. 78, 83-84, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970); Mendes, 180 Wn.2d at 195. In Williams, the Court held:

> The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. . . . That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.

Williams, 399 U.S. at 83-84.

In Mendes, the Washington Supreme Court held the defendant's tactical decision to testify did not violate his right against self-incrimination. Mendes, 180 Wn.2d at 196.

> The State argues that like many defendants before him, Mendes had to make the tactical decision, in consultation with his attorney, whether or not to take the stand in his defense. We agree. Our case law has consistently held that a defendant is not "compelled" to testify in violation of their constitutional rights in a situation like this case. No one forced Mendes to testify in a constitutional sense. The record establishes that in consultation with his attorney, Mendes chose to take the stand. Although defendants are regularly faced with the dilemma of a choice between complete silence and presenting a defense, it has never been thought of as a violation of the privilege against compelled self-incrimination.

Mendes, 180 Wn.2d at 196. See also Van Auken, 77 Wn.2d at 138 (defendant's choice to take stand to contradict State's evidence was not compelled testimony).

Gardner relies heavily on a statement the court made following an objection during opening statement. The court stated, "As I indicated at side bar, the court is not concerned with the content of [Gardner's] testimony." Because opening statement was not transcribed, the context is not clear. However, the next day, the court ruled that testimony from either an expert or Gardner could establish the effect of the head injury. "I understand your position but I say it's speculation or guess or conjecture without the requisite testimony of either an expert and/or testimony from the defendant."[7]

Here, as in Mendes, the court did not "compel" Gardner to testify in violation of his right against self-incrimination. The record shows that after consultation with his attorney, Gardner made a tactical decision about whether to testify in support of his

[7] Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), is distinguishable. In Simmons, the court held that where a defendant testifies in support of a motion to suppress, the court may not admit that testimony at trial. Simmons, 390 U.S. at 394 ("In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.").

affirmative defense.[8]

We affirm the convictions of assault in the fourth degree and assault in the third degree.

WE CONCUR:

[8] In his statement of additional authority, Gardner cites State v. Finley, 97 Wn. App. 129, 982 P.2d 681 (1999), for the proposition that a defendant may exercise his right to remain silent and rely on the State's evidence to support a voluntary intoxication defense. But here, there was no evidence showing how the injury affected his ability to act with volition. Gardner also argues the court erred in admitting evidence of his two prior convictions. Gardner asserts his 2003 false statement conviction is inadmissible because it was more than 7 years old at the time of trial. But ER 609(b) provides that evidence of a conviction of a crime of dishonesty is inadmissible "if a period of more than 10 years has elapsed since the date of the conviction." (Emphasis added.) Gardner also argues his 2010 first degree theft conviction is not a crime of dishonesty. Theft is a crime of dishonesty admissible under ER 609(a)(2). State v. Ray, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991). Gardner's other arguments do not inform the court of "the nature and occurrence of [the] alleged errors." RAP 10.10(c).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69726-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Kimberly Thulin, DPA
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Date: December 3, 2014