No. 44633-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH LESTER
Appellant.

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

BRIEF OF APPELLANT

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1. The Court vitiated Joseph Lester's Sixth Amendment right to confront witnesses.

2. The trial court erred in admitting hearsay statements.

3. Mr. Lester was denied his Sixth Amendment right to the effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Confrontation Clause of the Sixth Amendment bars the admission of testimonial statements unless the declaring witness is subject to cross-examination under oath. In short, this protection prevents the State from offering the testimony of helpful witnesses without first subjecting those witnesses to cross-examination. Did the admission of several testimonial statements of Keisha Lewis den Mr. Lester his right to confront witnesses?

2. ER 804(b) permits admission of a hearsay statement if at the time it is made, the statement is "so far" contrary to the declarant's penal interest that the person would not have made it without a belief in its truth and it is corroborated by other evidence. Statements which, while admitting potential liability, attempt to minimize or deflect that liability are not admissible under the rule. The court admitted a

statement by Keisha Lewis regarding a prior incident in which Ms. Lewis stabbed Mr. Lester. In her statement made in the days after assault contradicting her statement to police, Ms. Lewis claimed she had acted in self-defense. Did the trial court err in finding her statement deflecting blame for stabbing Mr. Lester, and which lacked corroboration, was admissible as a statement against penal interest?

3. The Sixth Amendment guarantees the right to the effective assistance of counsel. The Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense beyond a reasonable doubt. Where a defense negates an element of an offense, due process requires the State prove the absence of the defense beyond a reasonable doubt. A defendant's diminished capacity negates the mens rea element of an offense. Based upon an instruction proposed by defense counsel, the court did not instruct the jury the State bore burden of proving the absence of diminished capacity beyond a reasonable doubt. Was Mr. Lester denied the effective assistance of counsel where counsel proposed the instruction relieving the State of its burden of proof?

C. STATEMENT OF THE CASE

Mr. Lester's relationship with Keisha Lewis was often tumultuous. RP 609-12. Mr. Lester described prior incidents in which Ms. Lewis had thrown knives at him or otherwise attempted to harm him. *Id.* In one incident, several weeks prior to the charged event, Ms. Lewis stabbed Mr. Lester in the leg. RP 622-23. When police questioned Ms. Lewis she claimed a third person had stabbed Mr. Lester. RP 49-96. While the police did not believe Ms. Lewis's claim they did not pursue the matter further as Mr. Lester was uninterested in doing so. RP 538. Mr. Lester testified that prior fight began when he refused to drive Ms. Lewis to her drug dealer's house, and that Ms. Lewis attacked him with a knife. RP 622-23.

A few weeks later, Ms. Lewis, her mother Sandra Barnes, and friend Latasha Taylor were returning from a trip to Ms. Lewis's dealer's house where Ms. Lewis purchased Percocet. RP 234-35. During the drive home, Ms. Lewis received a call from Mr. Lester. RP 238-39. Realizing that Ms. Lewis was high, and knowing she was also pregnant, Mr. Lester became angry about her drug use. *Id.*

Shortly after the three women arrived at Ms. Barnes's home Mr. Lester and his daughter arrived. RP 195. Upon arriving at the house,

Mr. Lester went into Ms. Lewis's room. RP 196-97. A brief time later, Mr. Lester came out the room and walked out the house with his daughter and Ms. Lewis followed. *Id.* Ms. Taylor testified she saw Mr. Lester and Ms. Lewis sitting on the hood of Mr. Lester's car talking. RP 251.

As Mr. Lester placed his daughter in the car he noticed Ms. Lewis behind him with a knife. RP 678. Mr. Lester does not clearly recall what happened next, but Ms. Lewis was stabbed several times. *Id.*

George Ganyon, a neighbor, was walking to his mailbox when he heard Ms. Lewis scream "he's killing me" as she passed him on her way back into the house. RP 274. Mr. Ganyon apparently did not find this remarkable and continued to his mailbox. RP 277.

Back in the house Ms. Lewis fell to the floor where she died.

The State charged Mr. Lester with one count of first degree intentional murder and one count of second degree felony murder. CP 183-84. The State also alleged each offense was committed with a deadly weapon, Mr. Lester was aware Ms. Lewis was pregnant, and that the offenses occurred in the presence of their minor child. *Id.*

At trial, Mr. Lester presented expert testimony from Dr. Vincent Gollogly that he suffered from Post-Traumatic Stress Disorder and Major Depressive Disorder. RP 31. Dr. Gollogly concluded Mr. Lester lacked the ability to form the requisite intent for the offenses. RP 49.

The jury did not reach a verdict on the charge of first degree murder, but convicted Mr. Lester of the lesser offense of second degree intentional murder. CP 375-76. The jury also convicted Mr. Lester of second degree felony murder as charged in Count II. CP 378.

To avoid a double jeopardy vioaltion, the court entered judgment only on Count I. CP 531.

D. ARGUMENT

1. The admission of testimonial statements of a nontestifying witness violated Mr. Lester's Sixth Amendment right to confrontation and violated the rules of evidence.

Over Mr. Lester's objection, the trial court admitted testimony of Ms. Taylor that Ms. Lewis claimed to have acted in self-defense when she stabbed Mr. Lester. RP 85, 220. The court concluded the statement was admissible under ER 804 as a statement against Ms. Lewis's penal interest. RP 85. Again over Mr. Lester's objection, the court also allowed Ms. Barnes to testify that a few days prior to her death, Ms. Lewis claimed to be afraid of Mr. Lester. RP 75-76, 185.

a. *The Sixth Amendment does not allow the admission of testimonial statements made by a witness who does not testify.*

The Sixth Amendment's Confrontation Clause dictates the procedure by which the prosecution must prove its case and it is rooted in long-standing common law tradition. *Crawford v. Washington*, 541 U.S. 36, 43-50, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); U.S. Const. amend. VI; Const. Art. I, § 22. The requirements of confrontation are live testimony, by the declaring witness, under oath, with the opportunity for cross-examination. If an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness. *Bullcoming v. New Mexico*, _ U.S. _, 131 S. Ct. 2705, 2713, 180 L. Ed. 2d 610 (2011). This is so regardless of whether a statement falls within a firmly rooted hearsay exception. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (noting business records have historically been admissible not because they fall within a hearsay exception, but because they are not testimonial).

The "principal evil" at which the Confrontation Clause is directed is the use of an *ex parte* statement made for the purpose of

establishing or proving some fact. *Crawford*, 541 U.S. at 50-51. While the Court has thus far declined to provide a complete definition of the term "testimonial," it has endorsed a broader definition which includes "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *State v. Mason*, 160 Wn.2d 910, 918, 162 P.3d 396 (2007) *cert. denied*, 553 U.S. 1035 (2008) (quoting *Crawford* 541 U.S. at 51-52). So too, a statements the purpose of which "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

> That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.

Michigan v. Bryant _ U.S. _, 131 S. Ct. 1143 179 L. Ed. 2d 93 (2011).

> Thus the Court has recognized:
>
> The text of the [Sixth] Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former the defendant *may* call the latter. Contrary to respondent's assertion, there is not a third category of

> witnesses, helpful to the prosecution, but somehow immune from confrontation.

Melendez-Diaz, 557 U.S. at 313-14.

The statements of Ms. Lewis offered here fall within this nonexistent third class.

b. *Ms. Lewis's claim of self-defense with regard to her prior assault of Mr. Lester was not a statement against penal interest and was in fact testimonial.*

ER 804(b) provides in part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> (3) . . . . A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement

Statements which seek to minimize the declarant's liability are not truly against the declarant's penal interest. *State v. St. Pierre*, 111 Wn.2d 105, 116, 759 P.2d 383 (1988).

> A statement conceding a minor role to declarant and attributing to another the major responsibility resembles more an attempt to foist blame on the other while minimizing the declarant's responsibility, and thus the

> statement as a whole advances far more than it impairs the interest of the declarant . . . .

State v. Whelchel, 115 Wn.2d 708, 719-20, 801 P.2d 948 (1990) (quoting 4 D. Louisell & C. Mueller, *Federal Evidence* § 489, at 1141 (1980)). The Court applied that rule in *St. Pierre,* concluding a codefendant's statement was not against his penal interest even where it admitted the declarant's participation in the crime, because "[r]ather than exposing himself to greater criminal liability, Webb was seeking to diminish that liability." 111 Wn.2d at 117-18.

Here, as with the statements in *Whelchel* and *St. Pierre*, Ms. Lewis's claim of self-defense was plainly self-serving and made with exculpatory intent. The plain purpose of the statement was to deflect blame from herself and place it instead on Mr. Lester. In fact, by statute, self-defense is defined as a "lawful" act. RCW 9A.16.020. A claim of engaging in lawful behavior cannot be considered against one's penal interest. As an attempt to "foist" blame on Mr. Lester while minimizing her own role, the statement was made in furtherance of Ms. Lewis's interests and could not reasonably be deemed against Ms. Lewis's penal interest. *Whelchel*, 115 Wn.2d. at 721; *St. Pierre*, 111 Wn.2d at 117-18.

Further, because this is a criminal case the court had to also find "corroborating circumstances clearly indicate the trustworthiness of the

statement." ER 804(b)(3). Statements made by participants in a crime which inculpate another, even while inculpating the declarant, are inherently less reliable, "due to the [declarant's] motivation to implicate [another] and exonerate himself." *Whelchel*, 115 Wn.2d at 717. Beyond that, the trial court did not identify a single corroborating fact that even suggested the trustworthiness of Ms. Lewis's claim much less "clearly indicate" that. In fact the opposite is true.

Police officers who responded to the hospital did not observe anything that led them to believe Ms. Lewis had been choked; they did not observe any marks or see injuries. Ms. Lewis initially told police that a another person had stabbed Mr. Lester. RP 491. Officers did not believe Ms. Lewis's claim. RP 538. Ms. Lewis did not first claim she had acted in self-defense until the day following her assault of Mr. Lester. RP 221 Ms. Lewis's self-serving claims lack any corroboration, and thus, even if they were actually against her penal interest, were not admissible under ER 804.

Finally, if the statements were truly against Ms. Lewis's penal interest, the State must then concede that a reasonable person would understand that the statement was "potentially relevant to later criminal prosecution." *See Mason*, 160 Wn.2d at 918. The admission of Ms. Lewis's testimonial statements violated Mr. Lester's right to

confrontation. *Bullcoming*, 131 S. Ct. at 2713. The court erred in admitting the statement.

c. *Ms. Lewis's statement claiming fear of Mr. Lewis was testimonial.*

When the State offers an out-of-court statement, the burden is on the State to prove the statement is not testimonial. *State v. Alvarez-Abrego*, 154 Wn. App. 351, 364, 225 P.3d 396 (2010). The State did not meet its burden here.

Initially, the State argued the statements were admissible as evidence of Ms. Lewis's claimed fear of Mr. Lester, a fact arguably made relevant by Mr. Lester's assertion of self-defense. *See, e.g.*, *State v. Parr*, 93 Wn.2d 95, 103, 606 P.2d 263 (1980). However, the statements were admitted without limitation and the State used them accordingly in its closing argument. The State pointed to the statements by Mr. Lewis as evidence of not only her claimed fear, but also as evidence of Mr. Lester's intent to murder her. Because the statements were offered as evidence of past acts as opposed to Ms. Lewis's state of mind they were testimonial. *Davis*, 547 U.S. at 822.

d. *The Court must reverse Mr. Lester's conviction.*

An error resulting in the denial of a constitutional right, such as a fair trial, requires reversal unless the State proves beyond a

reasonable doubt the misconduct 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). Following a confrontation violation, this analysis requires a court to assess whether it is possible the factfinder relied on the testimonial statement when reaching a verdict. *United States v. Alvarado-Valdez*, 521 F.3d 337, 342 (5th Cir. 2008); s*ee also, Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt"). The State cannot meet the standard here.

While a witness saw Mr. Lester and Ms. Lewis minutes before and shortly after Ms. Lewis was stabbed, no witness saw the actual events. Mr. Lester testified that as he placed his daughter in the car, Ms. Lewis came behind him wielding a knife. Mr. Lester defended himself and turned the knife on her. Mr. Lester testified Ms. Lewis had previously assaulted him with knives, including the instance a few weeks prior to the current events. Mr. Lester testified to these events before the jury and was subject to cross-examination. By contrast, the State was able to elicit Ms. Lewis's explanation of prior events,

particularly her foisting the blame onto Mr. Lester, without subjecting her to confrontation. It is certainly possible that a juror relied on that claim in reaching a verdict. Thus, the State cannot show the confrontation violation was harmless beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 684.

Even if this Court determines the admission of Ms. Lewis's statement did not violate the Confrontation Clause, reversal is nonetheless required. The erroneous admission of evidence requires reversal if the error, within reasonable probability, materially affected the outcome. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). This Court makes that assessment by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Again, permitting the State to present its theory regarding Ms. Lewis's past assaults without the opportunity to subject that allegation to cross-examination caused substantial prejudice. Ms. Lewis's unchallenged testimony was in large measure the whole of the State's argument against Mr. Lester's claim of self-defense. It is reasonably

possible that evidence had an effect on the outcome of this case. Thus, reversal is required.

2. Trial counsel's proposal of an instruction which misstates the State's burden of proof deprived Mr. Lester of a fair trial.

a. *Mr. Lester had the right to the effective assistance of counsel.*

The Sixth Amendment guarantees the right to the effective assistance of counsel in a criminal proceeding. *See Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S. Ct. 236, 87 L. Ed. 2d 268 (1942)). The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466

U.S. at 687; *McMann*, 397 U.S. at 771. A person is denied the effective assistance of counsel where the record demonstrates the "counsel's performance was deficient" and that deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

Defense counsel provided deficient performance by proposing an instruction on diminished capacity that relieved the State of its burden of proving each element of the crimes. Specifically, defense counsel requested the court instruct the jury that:

> Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to formulate premeditation of specific intent to kill Keisha Lewis as charged in Count I , or to formulate the specific intent to assault Keisha Lewis in Count II.

CP 309. The trial court gave that instruction. CP 363 (Instruction 32). Defense counsel's action deprived Mr. Lester of the effective assistance of counsel.

b. *Due process requires the State prove each element of the offense.*

In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530

U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970).

> *Mullaney* [*v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)] . . . held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

Patterson v. New York, 432 U.S. 197, 215, 97 S. Ct. 2319, 52 L. Ed.2d 281(1977). Thus, in addition to the statutory elements of an offense, the State must disprove a defense where (1) the statute indicates the Legislature's intent to treat the absence of a defense as "one of the elements included in the definition of the offense of which the defendant is charged;" or (2) the defense negates an essential ingredient of the crime. *State v. McCullum*, 98 Wn.2d 484, 491-93, 656 P.2d 1064 (1983); *see also State v. Deer*, 175 Wn. 2d 725, 734, 287 P.3d 539 (2012) ("when a defense 'negates' an element of the charged offense . . . due process requires the State to bear the burden of disproving the defense") *cert. denied*, 133 S. Ct. 991 (2013)

The Supreme Court found "[t]he Legislature's silence on the burden of proof of self-defense, in contrast to its specificity on . . .

other defenses, is a strong indication that the Legislature did not intend to require a defendant to prove self-defense." *State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984) (contrasting various statutory defenses which specifically place burden on defense). Similar to self-defense, the Legislature has not placed the burden of proving diminished capacity on the defense, and is thus a strong indication the burden is on the State. *McCullum*, 98 Wn.2d at 492; *Acosta* 101Wn.2d at 615-16.

That conclusion gains further support from the fact that diminished capacity negates the mens rea element of the offenses. Diminished capacity is a mental condition, not amounting to insanity, which prevents the defendant from possessing the requisite mental state to commit the crime charged. *State v. Furman*, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993). The defendant's burden of production requires him to provide the jury evidence of a diagnosis which is capable of forensic application to help the trier of fact assess the defendant's mental state at the time of the crime, and which reasonably relates to the impairment of the ability to form the culpable mental state to commit the crime charged. *State v. Atsbeha*, 142 Wn.2d 904, 918, 16 P.3d 626 (2001). "Diminished capacity . . . negates one of the elements

of the alleged crime." *State v. Nuss*, 52 Wn. App. 735, 739, 763 P.2d 1249 (1988); *see also State v. Gough*, 52 Wn. App, 619, 622, 768 P.2d 1028 (1989) (diminished capacity differs from insanity because diminished capacity "allows a defendant to undermine a specific element of the offense").

Thus, if a defendant meets his burden of production he has necessarily presented the jury evidence which negates the mens rea element of the offense. The legislative silence as to the burden of proof together with the fact that diminished capacity negates an essential element of the offense, requires the burden be on the State to disprove diminished capacity beyond a reasonable doubt.

c. *By proposing an instruction which relieved the State of its burden of proof defense counsel provided ineffective assistance*.

i. Counsel's performance was deficient

The diminished capacity instruction provided to the jury, as proposed by defense, told the jury only that the "evidence of mental illness or disorder may be taken into consideration." CP 309, 363. Far from informing the jury the State had the burden to disprove the defense, the instruction allowed the jury to disregard the evidence altogether regardless of the nature of the proof offered.

First, "no reported decision has clearly addressed the burden of proof for diminished capacity outside the context of intoxication." S. Fine and D. Ende, *13B Washington Practice*, Criminal Law, §3205, n. 3 (1998). Several Washington cases have concluded such an instruction like those provided in this case properly inform the jury of the State's burden of proof where the diminished capacity results from intoxication. *See, e.g.*, *State v. James*, 47 Wn. App. 605, 608-09, 736 P.2d 700 (1987). Other cases have extended that reasoning to cases which have not involved intoxication. *State v. Marchi*, 158 Wash. App. 823, 836, 243 P.3d 556 (2010), *review denied*, 171 Wash.2d 1020 (2011).

These decisions have erroneously reasoned that, unlike self-defense, diminished capacity or intoxication does not "add an additional element to the charged offense." *James* 47 Wn. App. at 608-09; *State v. Fuller*, 42 Wn. App. 53, 55, 708 P.2d 413 (1985). *Marchi* recognized diminished capacity negates the mens rea of the crime. 158 Wn. App. at 835. Yet equating the defense to intoxication, the court concluded the jury need not be instructed that the State carries the burden of disproving the defense. *Id.* The court concluded self-defense

is different because it is a legal act which "adds an additional element." *Id.* at 835-36.

That circuitous logic is possible only because these opinions do not engage in the analysis set out in *McCullum* and *Acosta*. While self-defense is defined as a legal act, the necessity of a specific instruction on the burden of prove exists because the lawfulness of the act negates the mens rea of the crime. The Supreme Court has repeatedly said that burden is on the state because the lawfulness of self-defense negates the "unlawfulness" of the mens rea. *Acosta* 101 at 615-16.

"As a general rule, every crime must contain two elements: (1) an actus reus and (2) a mens rea." *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). "At common law it was said that 'to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will.'" *Id.* at 481 (citing William Blackstone, 5 *Commentaries* at 21). Thus, an act committed without the requisite mens rea is every bit as lawful as an act committed in self-defense. For example a person who accidentally causes the death of another, without even criminal negligence, has not committed a crime because he lacks even the lowest level of mens rea which the law deems criminally culpable.

Self-defense "adds an additional element" only because it negates another. *Acosta* 101 at 615-16. Self-defense is only "lawful" because it negates the mens rea of the crime. *Id.* Similarly diminished capacity negates an element. *Marchi*, 158 Wn. App. at 562; *Nuss*, 52 Wn. App. at 739. Therefore, diminished capacity "add[s] an additional element" in precisely the same manner as self-defense. The jury must be specifically instructed on the State's burden to disprove the defense beyond a reasonable doubt.

The court's instruction relieved the State of that burden of proof. Because defense counsel proposed the instruction, counsel's performance was deficient.

ii. Counsel's deficient performance prejudiced Mr. Lester.

Mr. Lester presented evidence that his diminished capacity prevented him from forming the requisite intent to kill or assault Ms. Lewis. However, by proposing the erroneous jury instruction defense counsel permitted the jury to simply ignore that evidence even though it negated the mens rea of the offenses. A proper instruction would have required the State prove Mr. Lester's capacity to form the intent was not sufficiently diminished. Instead, under the instruction proposed by

the defense, it was enough for the State to merely cast doubt or, in fact, do nothing at all.

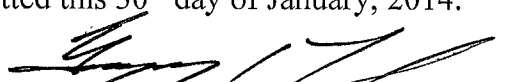
While the State offered some evidence to rebut the claim, it was far from overwhelming, consisting of an expert opinion drawn after a 75 minute interview with Mr. Lester. RP 1056, 1083. Moreover, that expert framed his inquiry broadly as whether Mr. Lester was capable of acting in a goal-directed manner. RP 1062-63. That is not the same as determining whether, in light of his mental condition at the time of the event, he was able to formulate the requisite legal intent. The instruction proposed by the defense permitted the jury to reject or ignore diminished capacity even in the absence of proof beyond a reasonable doubt. Thus, counsel's deficient performance prejudiced Mr. Lester.

Mr. Lester is entitled to a new trial.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Lester's convictions.

Respectfully submitted this 30th day of January, 2014.



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

STATE OF WASHINGTON, Respondent, v. JOSEPH LESTER, Appellant.	)	NO. 44633-2-II

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