Supreme Court No. ____
(COA No. 32956-9-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

Robert C.,

Juvenile Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Robert C., petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Robert seeks review of the Court of Appeals decision dated July 26, 2016, as amended on August 23, 2016. A copy of the original decision and the amendment are attached as appendixes.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the State overcame the presumption of incapacity by clear and convincing evidence Robert had sufficient understanding of his legal responsibility and knowledge his actions were wrong, when the State's evidence established only that Robert's maturity was "right on" for a ten-year-old child.

2. Whether defense counsel commits ineffective assistance when counsel does not recognize self-defense applies when the evidence established a child was acting as a reasonable abused child in defending himself from an assault.

D. STATEMENT OF THE CASE

1. Robert is the victim of serious child abuse.

Robert's father was "an extremely negative influence," who "engaged in physically inappropriate contact" with him. RP 29. Robert's mother Tina Collins, stated Robert's "dad beat him on a constant basis. He belittled him. He pretty much abused him in all ways that -- some things we don't even know went on with him and his father." RP 106. Robert's aunt Karissa Ratcliff described Robert's father as "an abusive jerk." RP 139. When the probation officer testified at the capacity hearing, he believed it was "spot on" Robert's anger was a result of the abuse Robert suffered from his family. RP 29.

2. Robert required counseling to help him recover from his abuse.

Robert suffers from post-traumatic stress. RP 33. He engaged in counseling in counseling in Montana and in Yakima. RP 114, 35. He was prescribed Prozac, an anti-depressant that is used to treat serious illnesses including depression, obsessive-compulsive disorder, and panic disorder.[1] RP 114.

[1] Prozac is the common name for Fluoxetine. *See* U.S. National Library of Medicine, PubMed Health, Fluoxetine (2015), available at http://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0010346/.

The trauma Robert suffered as a result of being assaulted by family members makes him aggressive when physically abused or disciplined. RP 107. His mother told the court "using physical abuse against Robert makes him ... aggressive --- more aggressive because he's trying to protect himself." RP 107.

3. Post-traumatic stress caused Robert to have trouble in school.

Robert missed a lot of school and got into trouble when he did attend classes in third grade. RP 106. He was expelled from school in third grade "a month after he started school." RP 107. He had been held back in the third grade. RP 34. While his school work improved while he lived in Montana in the year prior to this incident, there is no record of whether he continued to engage in school upon his return to Washington. RP 108.

4. Robert's home life continued to be abusive when he acted to defend himself.

Robert's mother moved him back to Yakima after a family member died. Robert and his mother moved in with two of his aunts, into a house where did not have a bedroom. RP 143. His older aunt Irene Smith suffered from dementia and called Robert "my baby". RP 81-82.

On September 12, 2014, Robert was watching television with his sister. RP 83. When Aunt Smith tried to take the remote from him, she told the court "I think he thought I was going to hit him, but I wasn't

going to hit him." RP 83. Reacting to his fear of assault, Aunt Smith testified Robert hit and kicked her. RP 83.

Aunt Smith told Robert's mother he needed to respect his "elder." RP 98. Robert was told he was grounded. RP 98-99. Robert reacted by hitting his mother. RP 98-99. His mother then went outside to their smoking area, "not paying attention to what Robert did." RP 100.

Robert went outside to "cool off." RP 101. After a time, he was asked "if he was done." RP 102. He walked over to his family and apologized for being "mouthy." RP 121. He hugged his aunt and his mother. RP 122. His Aunt Smith then told him "he needed to go scrub the toilet with a toothbrush." RP 121. He got mad and told his family that was "child slave labor". RP 121. Aunt Ratcliff told him "you get off your ass." RP 123. She kicked the bucket he was sitting on "out from under him," causing him to fall to the ground. RP 123.

Robert went back into the house to escape from his relatives. RP 123. He did not see his mother again until after the police had arrived. RP 100. Rather than give him quiet time, as advised by Robert's counselors, his Aunt Ratcliff pursued him into the house. RP 124. When she told him his mother did not want him inside, he "sat there and said he wasn't moving. He wasn't doing anything. He was going to sit there." RP 124. He sat on the bed "normal." RP 125.

Robert's aunt's "level of angriness or anger or whatever you want to call it was getting up there." RP 125. She told him "you need to get your fucking ass outside. You are making me mad, and I don't want to get mad at you, so let's go." RP 125. She remembered "getting in his face, and I said, now I'm in your face." RP 126.

Robert told her "the next person that touches me or says anything to me is ... was either going to get their ass beat or get killed." *Id.* At trial, she testified "I honestly don't remember what he was saying." RP 142. Ms. Ratcliff then screamed at him "this was fucking ridiculous and that he needed to get outside." RP 128. She reached out to grab him and he held up the "little paring knife" he had taken from the kitchen drawer. RP 128, RP 134. The police were called and Robert waited in the bedroom for them to arrive. RP 71. He was taken into custody without incident. *Id.*

Although originally released to live with his mother, Robert was eventually held in detention. His mother did not visit him while he was in custody, although she did speak to him twice a week by phone. RP 114.

5. The trial court found Robert had the maturity of an average ten year old, but still found clear and convincing evidence of capacity.

The only witness called at the capacity hearing was a Yakima County probation officer, who had no prior relationship with Robert. He

interviewed Robert's mother and a probation officer in Montana. He testified "I don't know any ten year olds that are mature." RP 31.

The court found Robert's "maturity is right on for a ten year old of his age." RP 46. The court found Robert had capacity. RP 45.

6. Robert was convicted of all charges and sentenced to 15-36 weeks in state confinement.

Robert's trial took less than half a day. He was convicted of two counts of assault in the fourth degree and one count of assault in the second degree against his aunts and mother. RP 168. His lawyer did not ask the court to consider self-defense, despite abundant evidence Robert was defending himself, believing self-defense did not apply to these facts. RP 153. Robert was sentenced to 15-36 weeks, consecutive to 36 days in detention. RP 172.

7. The Court of Appeals initially upheld the trial court's finding of capacity by applying the wrong standard.

In its original opinion, the Court of Appeals misstated the law on capacity, finding the presumption against capacity did not apply to Robert. App. at 9. While the Court amended this incorrect statement of law, it did not explain how its analysis under the proper standard differed from its original analysis. App. at 23. Despite the Court's recognition the wrong standard had been applied to Robert, the Court continued to find the

wrongfulness of the acts to be "intuitively obvious," leading to a finding of capacity for Robert. App at 8.

E. ARGUMENT

1. RECENT DECISIONS OF THE UNITED STATES SUPREME COURT AND THIS COURT WARRANT REVIEW OF WHETHER ROBERT HAD CAPACITY TO COMMIT THE CHARGED ASSAULTS.

This Court last analyzed juvenile capacity in *State v. Ramer*, where it found insufficient evidence to support finding of capacity. 151 Wn.2d 106, 116, 86 P.3d 132 (2004). Since *Ramer*, the United States Supreme Court has issued a series of decisions on what special protections must be provided to juveniles. These decisions incorporate both common sense – what "any parent knows" – and recent developments in brain science supporting the lesser culpability of youth. *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407 (2012). This Court has also analyzed what special protections must be provided to youthful offenders who are adults, recognizing youth diminishes culpability. *State v. O'Dell*, 183 Wn.2d 680, 695, 358 P.3d 359 (2015).

While these standards have not yet been examined in regard to capacity, the United State Supreme Court has extended this analysis beyond issues of punishment. The Supreme Court has also recognized juveniles are entitled to special protections when questioned by the police

and that structures put into place for adults should not always be considered constitutional. *J.D.B. v. North Carolina*, 564 U.S. 261, 281, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011). While the Court of Appeals recognized the sea change which has occurred since capacity was last examined, it declined to apply this analysis to whether the State proved Robert had the capacity to commit the crimes charged. App. at 14-15.

2. REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DECISION IS IN CONFLICT WITH OTHER DECISIONS ISSUED BY THIS COURT AND THE COURTS OF APPEAL.

a. The State failed to overcome the presumption Robert is not capable of committing the crimes charged.

Children under twelve years of age are presumed incapable of committing crimes. RCW 9A.04.050. To overcome the presumption of incapacity, the State must provide clear and convincing evidence the child had sufficient capacity to understand the act and to know that it was wrong. *Ramer*, 151 Wn.2d at 114 (citing *State v. J.P.S.*, 135 Wn.2d 34, 38, 954 P.2d 894 (1998); *State v. Q.D.*, 102 Wn.2d 19, 26, 685 P.2d 557 (1984). Substantial evidence of capacity is required for the State to sustain its burden on appeal. *State v. Q.D.*, 102 at 21, 25–26.

This Court has identified seven factors to consider in determining capacity: (1) the nature of the crime, (2) the child's age and maturity, (3) whether the child evidenced a desire for secrecy, (4) whether the child told

the victim (if any) not to tell, (5) prior conduct similar to that charged, (6) any consequences that attached to that prior conduct, and (7) whether the child had made an acknowledgment that the behavior is wrong and could lead to detention. *Ramer*, 151 Wn.2d at 114-15 (citing *J.P.S.*, 135 Wn.2d at 38–39).

Robert is a ten year old child whose maturity was "right on for a ten year old." RP 46. Robert did not display any desire for secrecy for the acts he committed. RP 46. He did not tell anyone not to tell and did not acknowledge he knew his behavior was wrong. RP 47. All of these factors support the presumption against capacity.

b. Factors the Court of Appeals did not weigh or weighed improperly which favor a finding of incapacity.

i. Factor Two: The presumption against finding capacity is not overcome by the presentation of evidence Robert had the maturity of an average ten year old who has a history of trauma and abuse.

The Court of Appeals found Robert's age and maturity weighed in favor of capacity. App. at 10. This factor was not weighed in favor of the State in the trial court. RP 46. Instead, the trial court found Robert had the maturity of a ten year old. RP 46. This factor should not be considered in favor of capacity. The Court of Appeals analysis is in conflict with RCW 9A.04.050 and precedence from this court. *See, e.g., State v. Erika D.W.*, 85 Wn. App. 601, 605, 934 P.2d 704 (1997). RAP 13.4(b)(1),(2).

Evidence of Robert's past trauma also demonstrates why the State failed to overcome its burden. While the Court determined there was no evidence of Robert's history of abuse, this is contrary to the evidence heard at the capacity hearing. App. at 8-9. At the hearing, the probation officer testified Robert's father was "an extremely negative influence," who "engaged in physically inappropriate contact" with him. RP 29. The officer also stated Robert's anger was the result of the abuse he suffered. RP 29. The trial court heard Robert was treated for his post-traumatic stress at Behavioral Health Services and was given with anti-depressant medication. RP 33, 35.

ii. Factor Three: Evidence Robert did not demonstrate a desire for secrecy supports a finding of incapacity.

Robert did not show a desire for secrecy. This factor weighs in favor of incapacity. *J.P.S.*, 135 Wn.2d at 44.

The Court of Appeals erred in focusing upon statements made to police after his arrest. App. 10-11. This Court has recognized statements made after a child has been told their behavior is wrong are insufficient, standing alone, to overcome the presumption of incapacity. *J.P.S.*, 135 Wn.2d at 44 (citations omitted).

This Court's caution in using post-arrest statements is consistent with the profound changes in how courts consider statement made by

youth. *J.D.B.*, 564 U.S. at 264. The Court of Appeals decision to upon Robert's inconsistent statements to find Robert demonstrated a desire for secrecy is inconsistent with judicial precedent and justifies review. RAP 13.4(1),(2).

iii. Factor Four: Robert did not to tell others to remain silent about his acts.

Robert did not tell his family members not tell anyone about what had happened and continued to sit in his mother's room. Although the Court of Appeals addressed this factor, seemingly in Robert's favor, it specifically declined to weigh it. App. at 11. The decision not to weigh this factor is inconsistent with prior decisions of this Court and warrants review. RAP 13.4(1),(2).

iv. Factor Seven: Robert did not acknowledge he understood he committed a crime.

Robert did not acknowledge his conduct was wrong. An acknowledgement of wrongfulness supports a finding of capacity, but one made after a child has been taught his conduct is wrong is "not particularly probative." *J.P.S.*, 135 Wn.2d at 44. To the contrary, Robert remained sitting on his mother's bed the entire time the police were called to arrest him. RP 71. The trial court addressed this factor finding no evidence to support it. App. at 14. But instead of weighing this factor in Robert's

favor, the Court of Appeals again specifically declined to weight one of the mandated factors. App. at 14.

c. Factors the Court of Appeals found supported a finding of capacity which were not proven by clear and convincing evidence or should have been decided in Robert's favor.

i. Factor One: Robert's experience as a victim of domestic abuse and his reaction to violence perpetrated against him supports the presumption Robert lacks capacity.

Physically abused children who have only seen violence used to solve problems in the home are unaware of other problem-solving methods. *See, e.g.*, Brandt Steele, *Notes on the Lasting Effects of Early Child Abuse*, 10 Child Abuse and Neglect: Int'l J. 283, 285 (1986). Robert lived in a chaotic environment where all of his adult role models appear to have consistently committed assaults against him. The trial court recognized this trauma and its "societal blight." RP 48-49.

Robert, who has suffered a lifetime of physical abuse, retreated into his mother's room to avoid being assaulted again by his family. His aunt had just physically assaulted him by kicking the bucket Robert was sitting on out from under him, knocking him to the ground. RP 123. She assaulted him again after he retreated telling him, "you need to get your fucking ass outside" and "getting in his face." RP 126, RP 128. Robert's reaction to this assault by protecting himself is consistent with science and how people in troubled families act when resolving conflict. RP 107.

Robert does not know or understand any other type of conflict resolution, nor should he be expected to, given the way he has been raised. RP 49.

Abuse and violence is all Robert has ever known. The trial court had substantial evidence at the capacity hearing Robert had been abused throughout his young life. While the Court of Appeals found that children from a young age know it is wrong to hit other people, the court did not address whether this knowledge creates the legal responsibility this court has required for capacity. . More importantly, the court failed to specifically determine that Robert had capacity to commit this offense, notwithstanding his traumatic upbringing and constant exposure to violent acts. *Ramer*, 151 Wn.2d at 115.

ii. Factor Five: Children who suffer from domestic abuse have a diminished capacity.

The Court of Appeals found Robert had engaged in prior similar conduct to the conduct the State charged against him in this case. App. at 11. While the opinion correctly found evidence of his self-protection was only presented at trial, ample evidence was presented at the capacity hearing to understand Robert was the victim of domestic abuse, which the trial court specifically recognized. RP 28-29, 48-49. Social science is consistent in finding many children who have been abused protect themselves from perceived abuse with force. H. Lien Bragg, *Child*

Protection in Families Experiencing Domestic Violence, U.S. Dep't of Health and Human Servs. 10 (2003). The science has shown that children are unable to differentiate between abuse and discipline. *Id.* Robert behaved like a reasonable abused child who has an incomplete ability to understand the world around him. *See, J.D.B.*, 564 U.S. at 273. The record clearly establishes Robert was a victim of domestic abuse, not only historically, but on the day of he was arrested.

iii. Factor Six: The evidence did not establish Robert understood the legal consequences of his actions.

The Court of Appeals found consequences Robert had previously served supported a finding of capacity. App. at 11. While Robert appears to have been involved in some sort of diversion hearing in Montana, the only explanation of the process he was subjected to was that it was some sort of meeting with a probation officer. RP 24. No court hearing appears to have ever occurred. RP 24.

There was no evidence presented that Robert had ever been involved in proceedings in Washington or that he had ever even been to court. Further, the record did not establish Robert was provided with any sort of process which would have helped him understand the legal consequences attached to the assault. *Ramer*, 151 Wn.2d at 115.

d. The presumption against capacity was not overcome and the Court of Appeals decision finding otherwise merits review.

Robert is a victim of domestic violence who acted to protect himself when he was assaulted by family members. Like many other children his age, his escape from abuse was nearly impossible. RP 48-49. When he attempted to disengage, his family continued to goad him, until he finally sought refuge in his mother's room, having no room of his own. When he warned his aunt he would not be assaulted again and brandished a small paring knife, he was arrested and charged with assault.

The capacity hearing conducted by the court did not establish Robert had capacity beyond that of an average ten year old. Review is warranted because this decision is in conflict with other Washington court opinions to address the important question of whether the sea change in how juveniles are viewed by the courts now informs the way very young abused children should be treated. Because the requirements of RAP 13.4(b) are all met, this Court should accept review.

3. REVIEW SHOULD BE GRANTED TO ADDRESS WHETHER IT IS INEFFECTIVE TO FAIL TO RAISE SELF-DEFENSE WHERE THE EVIDENCE ESTABLISHED ROBERT WAS ACTING AS A REASONABLE ABUSED CHILD IN PROTECTING HIMSELF.

The right of effective counsel and the right of review are fundamental to, and implicit in, any meaningful modern concept of

ordered liberty. *State v. A.N.J.*, 168 Wn.2d 91, 96, 225 P.3d 956 (2010). The Court of Appeals recognized defense counsel did not think Robert's actions "really properly fit into a self-defense mode." App. at 16. The record establishes defense counsel did not understand the right to self-defense or how to apply it to an abused child who is attempting to defend himself. The failure to raise this defense constitutes ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 205, 80 L.Ed.2d 674 (1984).

a. A child acts in self-defense when the child has a reasonable belief force is justified.

Reasonable force in self-defense is justified if there is an appearance of imminent danger. *State v. Bradley*, 141 Wn.2d 731, 737, 10 P.3d 358 (2000). Once the issue of self-defense is properly raised, the absence of self-defense becomes an element of the offense which the State must prove beyond a reasonable doubt. *State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977).

Whether the victim's conduct constitutes a threat must be evaluated in light of the defendant's perceptions, based on the entire relationship between the defendant and the victim. *State v. Janes*, 121 W.2d 220, 241-42, 850 P.2d 495 (1993). Where a "reasonable person" standard otherwise applies, courts must determine how a child's age

"would have affected how a reasonable person" would act. *See e.g., J.D.B.*, 564 U.S. at 273; *see also* Marsha L. Levick, Elizabeth-Ann Tierney, *The United States Supreme Court Adopts A Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can A More Reasoned Justice System for Juveniles Be Far Behind?*, 47 Harv. C.R.-C.L. L. Rev. 501, 520 (2012). A child is entitled to defend himself or herself against a parent, even though the parent is engaged in an act of parental discipline. *State v. Graves*, 97 Wn. App. 55, 57, 982 P.2d 627 (1999).

b. Robert was defending himself when he retreated into his mother's room.

Robert is a child who has suffered greatly at the hands of adults. All of his life, he has been abused by his parents. RP 29. While the abuse was more significant when he was living with his father, it did not stop once he moved in with his mother. RP 123. Robert had significant mental health issues which resulted in him becoming "more aggressive because he's trying to protect himself" when he was abused or disciplined by family members. RP 107.

After the first incident with Aunt Smith, Robert attempted to use coping measures to prevent further conflict. RP 101. After calming down, he apologized to his family. RP 121. Instead of appreciating his fragile

mental state, his family became aggressive with him, ordering him to clean the toilets with a toothbrush and assaulting him by kicking the bucket he was sitting on out from under him. RP 123. Robert did not react to this assault, but instead retreated to his mother's bedroom where he could be alone. RP 125. Rather than leave Robert alone as his treatment plan advised, his aunt pursued him saying "you need to get your fucking ass outside." RP 125. Aunt Ratcliff got "in his face." RP 126. Robert told her he would not be assaulted again and when she came at him, he took out the "little paring knife" he was holding. RP 128, RP 134. Robert stayed sitting on the bed until the police came on the bed. RP 71.

c. Defense counsel failed to recognize Robert was acting in self-defense.

When defense counsel presented closing arguments, he focused on whether Robert had completed the act of assault, but did not ask the court to consider self-defense. He recognized Robert "hunkers down" when he is "confronted or attacked" and "sees his dad when he gets disciplined." RP 153. He stated "even without the issue of self-defense coming into this," Robert was not guilty of the assault against Aunt Ratcliff. RP 153. No self-defense claim was raised. RP 153. The court never considered self-defense in its oral findings. *See* RP 156-68. Instead, Robert's attorney only defense was that Robert was guilty of a crime not charged, although

he admitted he could find no support for this defense, stating the law was "clear as mud." RR 151-52.

The failure to raise self-defense in a case is ineffective. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). This was not a strategic decision, but instead a misunderstanding of the law. Trial counsel argued Robert was "out of control that day" and did not see how his actions fell within "self-defense mode." RP 174. The Court of Appeals found this to be a legitimate trial strategy. App. at 20.

To the contrary, using a deadly a deadly weapon to assault another clearly constitutes assault in the second degree. RCW 9A.36.021. Arguing your client was "out of control" does not constitute a defense to this charge. "Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production." WSBA Performance Guidelines for Criminal Defense Representation 24 (2011). A child may protect himself from a guardian's physical force. *See Graves*, 97 Wn. App. at 57. No tactical decision can explain why defense counsel failed to investigate or raise this defense. *See, e.g,. A.N.J.*, 168 Wn.2d at 110. Had counsel argued self-defense, there is a reasonable probability the result of this trial would have been different. The failure to argue self-defense was objectively unreasonable.

d. Review is warranted to address defense counsel's deficient performance.

Understanding and raising the proper defenses is especially critical when an attorney represents a child. Robert lacked the capacity to understand the seriousness of what was happening to him. He lacked the support children need when exposed to the criminal justice system. Even though Robert was only ten, his mother had never visited him while he was being held in custody. RP 114.

No conceivable legitimate tactic can explain why counsel would not raise self-defense. *Reichenbach*, 153 Wn.2d at 130; *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999). The Court's finding to the contrary merits review. RAP 13.4(b).

F. CONCLUSION

Based on the foregoing, petitioner Robert C. respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 23rd day of September 2016.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)

APPENDIX

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FILED
JULY 26, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. R.C.,[†] Appellant.	)	No. 32956-9-III UNPUBLISHED OPINION

SIDDOWAY, J. — R.C. appeals his adjudication of three counts of assault, committed when he was 10 years old, challenging the trial court's finding of capacity and arguing that his lawyer's failure to assert self-defense constituted ineffective assistance of counsel. Because the trial court's finding of capacity was supported by substantial evidence and his lawyer's representation was not deficient, we affirm.

FACTS AND PROCEDURAL BACKGROUND

R.C. was charged with one count of second degree assault and two counts of fourth degree assaults committed in September 2014. At the time of the assaults, R.C. was 10 years and 7 months old. The victim of the second degree assault was R.C.'s aunt.

[†] For purposes of this opinion, the juvenile's initials are used in place of his name.

The victims of the fourth degree assaults were his mother and his great-aunt.

Since children R.C.'s age are presumed to lack the capacity to commit a crime, the first order of business in R.C.'s case was a capacity hearing. The presumption that a 10-year-old child is incapable of committing a crime may be removed by "proof that they have sufficient capacity to understand the act [charged] . . . and to know that it was wrong." RCW 9A.04.050.

The only witness called at R.C.'s capacity hearing was Steven Driscoll, a juvenile probation officer whose job duties include investigating and opining on the capacity of children under the age of 12 who are charged with crimes in Yakima County. Mr. Driscoll learned from R.C.'s mother that he had engaged in physical fights with her from age 5 or 6, which she and Mr. Driscoll attributed to R.C.'s history with his very abusive father. Before 2014, R.C.'s mother had called Yakima police "two or three times" when R.C. assaulted her. Report of Proceedings (RP) at 28. No formal action was taken in those instances, although the officers talked to R.C. about how his behavior could lead to legal issues and jail.

In 2014, R.C.'s mother moved with him to Montana, hoping that getting him away from his father might give R.C. a fresh start. But R.C. assaulted her twice during the several months they lived in Montana before returning to Yakima. Mr. Driscoll spoke with the probation officer assigned to oversee R.C. in Montana. She told Mr. Driscoll that given R.C.'s age, he had been granted diversion in both cases but had faced a definite

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prospect of being sent to a juvenile detention facility on the second occasion, and "he was definitely afraid of it." RP at 25.

Mr. Driscoll learned from R.C.'s mother that he had been diagnosed with post-traumatic stress disorder and oppositional defiant disorder,[1] and was being treated for the disorders with Prozac and counseling. R.C. was also taking melatonin to help him sleep.

From Mr. Driscoll's testimony, his report, and the police reports admitted into evidence, the court found that R.C. had the capacity to understand the acts charged and that they were wrong. The court relied both on aspects of the assaults revealed in the police reports and on R.C.'s history with law enforcement in Yakima and Montana. The court noted that because R.C. "understands what he is doing is wrong" he "might be a kid that could really benefit from some services" available in the juvenile justice system. RP at 40-41.

At the adjudication hearing that took place thereafter, the State called the two

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[1] Oppositional Defiant Disorder is a recurrent pattern of negativistic, defiant, disobedient, and hostile behavior toward authority figures that persists for at least 6 months . . . and is characterized by the frequent occurrence of at least four of the following behaviors: losing temper . . . , arguing with adults . . . , actively defying or refusing to comply with the requests or rules of adults . . . , deliberately doing things that will annoy other people . . . , blaming others for his or her own mistakes or misbehavior . . . , being touchy or easily annoyed by others . . . , being angry and resentful . . . , or being spiteful or vindictive . . . .
AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS § 313.81, at 100 (4th rev. ed. 2000).

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police officers who responded to the September assaults and the three victims. The evidence established that the initial event precipitating R.C.'s assaults was his great-aunt telling him to give her a television remote that he had taken in order to change the channel from the cartoons his three-year-old sister was watching. When his great-aunt reached for the remote, R.C. punched her in her right arm, which was in a sling following surgery. He then raised his legs and kicked her in the stomach as if to push her away.

After suffering the assault, R.C.'s great-aunt told his mother, "[H]e's all yours," and went outside, crying. RP at 86. R.C.'s mother told him it was wrong to hit others, that he needed to respect his elders, and that he was grounded from watching television and could not have the remote. R.C. then punched his mother in the stomach. She ordered R.C. to take a time-out and went outside where she sat down with her sister, who was commiserating with R.C.'s great-aunt. R.C. went to a corner of the yard where he goes to calm down.

After 5 or 10 minutes, R.C. approached his mother, great-aunt and aunt, apologized for being "mouthy," and hugged his mother and great-aunt. RP at 121. But in the conversation that ensued, R.C.'s mother told him he needed to do his homework and his chores, and he again became angry. When his aunt weighed in, telling him he needed to do as he was told, R.C. told her and his mother that he "wasn't going to f—king do anything," at which point his aunt pulled the bucket on which he was sitting out from under him, causing him to fall on the ground, and told him, "[Y]ou get off your ass,

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you get in the house, and you do your chores." RP at 123.

R.C. went into the house, but instead of undertaking chores or homework, he went into his mother's room, where his mother feared he was going to destroy things. His aunt was also afraid that R.C. "was going to do something stupid," so she went inside and told R.C., who was sitting on his mother's bed, that he needed to go outside. Ex. B at 1. When he refused, persistently, the two argued, and his aunt went outside to tell his mother he would not listen.

A few minutes later, R.C.'s aunt tried again to get him to obey. She stood in the doorway of her sister's room and told R.C. to go outside as he was told. She and R.C. yelled and swore at one another, with R.C. saying, at one point, "the next person that touches me or says anything to me is . . . going to get their ass beat or get killed." RP at 127. When R.C.'s aunt finally entered the room and reached for his arm to pull him off the bed, R.C. reached behind his back, where he had a small paring knife, grabbed it, and raised it over his head—according to his aunt, "like he was coming at [her]." RP at 131. She fled the room and called police. She testified that she feared he was going to stab her; that "If I had not moved, I probably would have gotten it right in the side." RP at 133.

At the conclusion of the evidence, the trial court announced it found the evidence "very credible on all three counts." RP at 168. While observing that it is "a very sad case," it found R.C. guilty as charged. *Id.* On the two counts of fourth degree assault, it

Appendix 5

committed him to a total of 36 days of detention—the time he had already served. It committed him to the custody of the Juvenile Rehabilitation Administration for institutional placement for 15 to 36 weeks on the second degree assault, stating "that's appropriate to give him the longest shot he could get there to get the kind of help that he needs." RP at 179.

R.C. appeals.

ANALYSIS

R.C. argues on appeal that the State failed to overcome the presumption that he was incapable of committing a crime. He also argues his trial lawyer provided ineffective assistance of counsel by not asserting self-defense. We address his contentions in turn.

I. Capacity

RCW 9A.04.050 provides that children under the age of eight years are incapable of committing a crime and, relevant here, that

> [c]hildren of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act [charged] . . . and to know that it was wrong.

"The purpose of the presumption is to protect from the criminal justice system those individuals of tender years who are less capable than adults of appreciating the wrongfulness of their behavior." *State v. Q.D.*, 102 Wn.2d 19, 23, 685 P.2d 557 (1984).

The State must overcome the presumption of an 8 to 12 year old's lack of capacity with clear and convincing evidence. *State v. J.P.S.*, 135 Wn.2d 34, 37, 954 P.2d 894 (1998). Clear and convincing evidence exists when the evidence shows the ultimate fact at issue to be highly probable. *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999).

"A capacity determination must be made in reference to the specific act charged." *J.P.S.*, 135 Wn.2d at 37. To have capacity, the child must know the act charged was wrong at the time he committed it. *Id.* at 37-38. "A 'sense of moral guilt alone, in the absence of knowledge of legal responsibility, is not sufficient,' although actual knowledge of the legal consequences is not necessary." *State v. Ramer*, 151 Wn.2d 106, 115, 86 P.3d 132 (2004) (quoting 43 C.J.S. *Infants* § 197 (1978)). Courts consider seven factors to determine whether a child knew the act charged was wrong:

> (1) the nature of the crime; (2) the child's age and maturity; (3) whether the child showed a desire for secrecy; (4) whether the child admonished the victim not to tell; (5) prior conduct similar to that charged; (6) any consequences that attached to the conduct; and (7) acknowledgment that the behavior was wrong and could lead to detention.

J.P.S., 135 Wn.2d at 38-39.

Where, as here, the trial court finds a child has capacity to commit a crime, we review the record to determine whether substantial clear and convincing evidence was presented from which the trial court could reasonably find that the statutory presumption was overcome. *Ramer*, 151 Wn.2d at 112-13. "Substantial evidence exists where there is

a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding" at issue. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

We track the seven factors in our review.

Nature of the crime. The nature of the crime is relevant to determining the child's ability to understand that the conduct was wrong. "The more intuitively obvious the wrongfulness of the conduct, the more likely it is that a child is aware that some form of societal consequences will attach to the act." *State v. Linares*, 75 Wn. App. 404, 414-15 n.12, 880 P.2d 550 (1994). Courts recognize that children are less likely to understand the wrongfulness of a crime that is sexual in nature because "young children have little, if any, instruction regarding prohibitions on sexual conduct." *J.P.S.*, 135 Wn.2d at 43. By contrast, because most children "are taught very young not to steal or set fires or injure other people," they are more likely to understand that those actions are wrong. *Id.*

The crimes charged in this case are assaults, the wrongfulness of which is intuitively obvious. Children are almost always taught from a very young age that hitting someone is wrong. The same is true of threatening to injure someone with a weapon. This factor weighs in favor of finding capacity.

Age and maturity. R.C. committed the assaults when he was 10 years and 7 months old. R.C. and amici argue that R.C.'s past history of abuse and mental health disorders show that he is not as mature as an average 10-year-old child, but there is no

evidence to that effect in the record. *Cf. State v. J.F.*, 87 Wn. App. 787, 792, 943 P.2d 303 (1997) (notwithstanding mother's testimony that child's attention deficit disorder caused him to act impulsively, court found it to have no bearing absent evidence that the disorder caused him to function at a lower cognitive level). It sometimes is contended that childhood adversity ages a child beyond his years.

Alternatively, R.C. argues the court found his maturity was "right on for a 10 year old," RP at 46; RCW 9A.04.050 presumes that a 10-year-old child lacks capacity; ergo, he lacks capacity. The problem with this circular argument is that when we review the seven factors to determine whether, because a child has sufficient capacity to understand the act and know that it was wrong, the presumption does not apply.

Properly analyzed, the "age and maturity" factor recognizes, in part, that the closer a child is to being 12 years old, the more likely he has the capacity to understand the wrongfulness of his actions. *See Q.D.*, 102 Wn.2d at 27 ("the defendant was less than 3 months from the age at which capacity is presumed to exist"); *Linares*, 75 Wn. App. at 415-16 (capacity was supported by the fact that child was "11 years old at the time of the incident, the upper end of the age range in which a child is presumed incapable of committing a crime); *State v. K.R.L.*, 67 Wn. App. 721, 726, 840 P.2d 210 (1992) ("Here, we have a child of very tender years—only two months over 8 years."). Yet if a child's maturity is demonstrably lower than that of most children his age, even a child nearing 12 years of age may be found to lack capacity. *See J.P.S.*, 135 Wn.2d at 39 (11-year-old

child was developmentally disabled, "tested at the level of a first grader[,] and had limited cognitive skills").

No evidence was presented that R.C. is intellectually or developmentally disabled. In fact, Mr. Driscoll's report included R.C.'s mother's report that "[R.C.] received all A's and B's for grades." Ex. A at 1.

The fact that R.C. was in the upper end of the 8 to 12 age range, had good grades, the fact that he was self-aware enough to attempt to calm himself down, and the absence of any evidence that he lacked the cognitive ability to understand what an average 10-year-and-7-month-old child understands, all bear on this factor. While not strong support for a finding of capacity, this factor weighs in favor of finding capacity.

Desire for secrecy. A child's desire to keep his actions secret suggests he knows the act charged was wrong, supporting a finding of capacity. *Q.D.*, 102 Wn.2d at 27; *J.P.S.*, 135 Wn.2d at 43. Lying about what happened evidences a desire for secrecy. *Linares*, 75 Wn. App. at 417.

R.C. points out that he remained in his mother's room and complied when asked to come out and speak with police. He argues that no evidence was offered that he desired secrecy. But evidence offered at the capacity hearing suggests that when he spoke with police officers, he was both inconsistent and dishonest. He told one officer that he never hit his great-aunt, rather, she hit him; that he merely pushed his foot against his mother's stomach; and that he only walked toward his aunt with a mechanical pencil in his hand.

He told another officer that he *did* hit his great-aunt; that she would probably bruise, given her thin skin; but that he did it in self-defense after she slapped him in the face.

Mr. Driscoll's capacity report notes that on earlier occasions when R.C. assaulted his mother, he asked her not to call police out of fear he would be taken to jail.

R.C.'s history of asking his mother not to call police, together with evidence that when police were called in September 2014, he lied, demonstrate a desire for secrecy and a corresponding knowledge that his acts were wrong. The factor weighs in favor of finding capacity.

Asking the victim not to tell. A child's request that the victim not tell about the act charged shows the child understands his actions were wrong. *See Q.D.*, 102 Wn.2d at 27.

The State argues that R.C. did not want the police to be called following the September 2014 assaults, but it does not cite to support in the record. We find no evidence that R.C. asked family members not to call police on that occasion, but given the precipitous events, he might not have had the opportunity.

We have already mentioned prior occasions on which R.C. asked his mother not to call police and will not double count that evidence under this factor. This factor does not weigh in favor, or against, finding capacity.

Prior conduct & consequences (factors 5 and 6 combined). Evidence that the child has engaged in prior similar conduct and suffered consequences indicates the child knew the conduct was wrong, and supports a finding of capacity. *See Q.D.*, 102 Wn.2d at

26-27.

Mr. Driscoll cited prior experience and consequences as the principal reasons for concluding that R.C. had the capacity to understand the acts charged and that they were wrong. The court, too, treated these factors as significant.

Mr. Driscoll's report summarizes R.C.'s prior conduct and consequences as of September 2014:

> [R.C.] has a long history of assaulting his mother, since she took custody of him when he was 8 years old. His mother has stated the police have come to the house at least 3 times due to him beating her up, and that the officers would sit him down and talk to him about his behavior and how it could lead to legal issues and/or jail. The mother reported [R.C.] would always eventually state he was sorry and say he didn't want to do it and would make sure it wouldn't happen again.
>
> . . . While in Montana, [R.C.] assaulted his mother twice, with the first time resulting in law enforcement involvement. [R.C.] was cited for the assault and entered into a Diversion-type program with Jefferson County Probation services of Montana. After the second assault, [R.C.]'s Diversion Supervision was extended, and he narrowly avoided Pine Hills Correctional Institute according to his Probation Officer in Montana.
>
> Both [R.C.]'s mother and his Probation Officer from Montana have stated that [R.C.] is well aware of the difference between right and wrong, and has an even better grasp of the potential consequences of assaultive behavior. His mother has stated that [R.C.] said he was, "scared shitless" of going to jail in Montana after his second assault occurred.

Ex. A at 3.

In addressing these factors, R.C. cites his mother's opinion that when he hits family members, it is self-protective because he cannot distinguish between abuse and

discipline. Br. of Appellant at 20-21. But this evidence (which was in the context of hitting in response to *physical* punishment) was only presented at the trial, not at the capacity hearing.

He and amici also contend the evidence of his prior similar conduct and consequences was not specific enough to be clear and convincing evidence. We disagree. The court was presented with evidence that by the time of the capacity hearing, R.C. had dealt with law enforcement for assaulting his mother on at least five occasions; that while living in Montana, he suffered the consequence of diversion with county probation services; and that multiple police officers had told him his behavior was wrong and could lead to legal issues or jail. The court was presented with evidence that R.C. was receiving regular counseling for oppositional defiant disorder at Behavioral Health Services of Yakima. This is an extraordinary history of opportunities from which a 10-year-old child with average or better than average cognitive ability could learn what constitutes assault and that it is wrong. This factor weighs strongly in favor of finding capacity.

Acknowledgment that behavior is wrong. A child's acknowledgement that his conduct was wrong at the time he engaged in it is evidence of understanding and supports a finding of capacity. *J.P.S.*, 135 Wn.2d at 44. An acknowledgment *after* a child has been taught that his conduct was wrong "is not particularly probative of whether the child understood conduct was wrong at the time it occurred." *Id.* It is verbal acknowledgement

of wrongdoing that courts consider under this factor. *See Ramer*, 151 Wn.2d at 116 (considering child's comment that conduct was "kind of sort of wrong"); *J.P.S.*, 135 Wn.2d at 44 (considering child's statement that conduct was "bad").

At R.C.'s adjudication hearing, there was some testimony that he apologized after the assaults on his great-aunt and mother, but that evidence was not presented in the capacity hearing. In announcing its finding of capacity, the trial court identified as relevant to this factor only actions and statements from which one might infer that R.C. knew his assaults were wrong: his being "scared shitless" of going to jail, his trying to calm himself down after the first two assaults, and his lying to police officers about what had happened. RP at 47.

Having considered that evidence in connection with other factors, we do not count it again here. This factor does not weigh for or against a finding of capacity.

Considering all seven factors, the State presented substantial clear and convincing evidence from which the trial court could reasonably find that it overcame the presumption that R.C. lacked the capacity to commit assault.

R.C. and amici nonetheless argue that a child's impulsivity, susceptibility to outside pressures, and capacity for growth and change—qualities that distinguish children from adults—should cause us to modify the seven-factor inquiry or should inform the inquiry in a way they contend it did not in R.C.'s case. They cite to *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L. Ed. 2d 797 (1979), *Eddings v. Oklahoma*, 455 U.S. 104,

102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004), *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011), and *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

None of the cases cited has any direct application to the issue of capacity to commit a crime.[2] All discuss current or then-current knowledge about the juvenile brain. We see no reason why the science they discuss could not have been presented in R.C.'s capacity hearing to the extent it was relevant. We have no reason to believe that a superior court judge assigned to juvenile court would not have some knowledge of the science. But its relevance would have been limited to the issue in the capacity hearing: whether R.C. had the capacity to understand the acts charged and know that they were wrong. Where a juvenile has that capacity, our legislature intends that the crimes charged

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[2] *Bellotti* considered whether a minor has capacity to consent to an abortion without parental consent and is not instructive on the issue at hand. *Yarborough* considered, and *J.D.B.* held, that a person's status as a juvenile should inform whether a reasonable person would have felt free to leave in the court's analysis of whether the juvenile was in custody. The reasonable person standard is not at issue in a capacity hearing, and to the extent it is, the court includes that in the analysis in its consideration of the child's age and maturity. *Eddings*, *Roper*, *Graham*, and *Miller* all addressed the imposition of life sentences or the death penalty on juveniles, and found that because juveniles are less mature, more susceptible to influence, and their character is less fixed than adults, their youth should be a mitigating factor in sentencing. While these cases recognize a distinction between juveniles and adults, none relate to a juvenile's capacity to commit a crime.

be adjudicated in the juvenile justice system.

And the juvenile justice system itself reflects the legislature's recognition that a child's criminal act must be addressed differently than the criminal act of an adult. "[T]he fundamental difference between juvenile courts and adult courts" is that, "unlike wholly punitive adult courts, juvenile courts remain[ ] rehabilitative." *State v. Saenz*, 175 Wn.2d 167, 172-73, 283 P.3d 1094, *aff'd*, 175 Wn.2d 167, 283 P.3d 1094 (2012). *Saenz* summarizes a number of respects in which Washington law responds to the fact that juvenile brains, and therefore the juvenile justice response, must be different.

The longstanding seven-factor analysis of capacity remains viable and supports R.C.'s capacity.

II. Ineffective assistance of counsel

R.C.'s other assignment of error is to his trial lawyer's failure to assert self-defense at trial, which he argues amounts to ineffective assistance of counsel. Not only did R.C.'s trial lawyer *not* assert self-defense, he stated at the time of the disposition:

> I'm not trying to justify [R.C.'s] actions[,] because he was out of control that day. I don't think his actions really properly fit into a self-defense mode.

RP at 174. He did argue that "where mitigation is ever something that should be considered, this is the ultimate case for that." *Id.*

"The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel."

State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court held that a defendant's claim that his lawyer's performance was so defective as to require reversal has two components:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

The claim of ineffective assistance of counsel fails if the defendant fails to prove either prong. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Because ineffective assistance of counsel is an issue of constitutional magnitude, it may be raised for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).[3]

Courts engage in a strong presumption that counsel performed effectively. *Strickland*, 466 U.S. at 689. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the

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[3] While a constitutional error must be manifest in order to fall within RAP 2.5(a)(3)'s exception to the issue preservation requirement, a defendant's demonstration of the second *Strickland* prong satisfies the requirement that the error be manifest. An error is manifest if it actually prejudices the defendant. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). "'Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.'" *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999) (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

proceedings below. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

It is a defense to a charge of assault that the force used was lawful. The use of force is lawful "[w]henever used by a party about to be injured . . . in case the force is not more than is necessary." RCW 9A.16.020(3). The reasonable self-defense standard incorporates both objective and subjective considerations: "the subjective portion requires the jury to stand in the defendant's shoes and consider all the facts and circumstances known to the defendant, while the objective portion requires the jury to determine what a reasonably prudent person similarly situated would do." *State v. Woods*, 138 Wn. App. 191, 198, 156 P.3d 309 (2007) (citing *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993)). Only after the defendant raises credible evidence tending to prove self-defense does the burden shift to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Graves*, 97 Wn. App. 55, 61-62, 982 P.2d 627 (1999).

R.C. did not testify. His mother testified that "[u]sing physical abuse against [R.C.] makes him . . . aggressive—more aggressive because he's trying to protect himself"—which is why, she added, "I try not to use physical violence to get after him." RP at 107. There is no evidence that R.C.'s mother used any physical discipline before he struck her in the September 2014 incident.

R.C.'s great-aunt testified that when R.C. hit and kicked her, "I think he thought I was going to hit him," adding, "but I wasn't going to hit him." RP at 84.

R.C. does not identify any evidence to which his trial lawyer could have pointed in support of argument that R.C. subjectively believed, or a reasonable child would have objectively believed, that he was about to be injured by his great-aunt, mother, and aunt, and responded with *necessary* force.

There was ample evidence that all three women were verbally disciplining R.C. before each assault, that his aunt was yelling and swearing at him, and that she pulled the bucket out from under him—conduct that the trial court recognized was counterproductive and contributed to the escalating situation. But contrary to R.C.'s argument that his great-aunt, mother, and aunt were to blame for all that happened, the trial court attributed the women's conduct to frustration with a damaged and difficult child. It said of R.C.'s great-aunt, "She had had enough. She didn't know how to handle [him]. And this seems to be a common problem where he gets out of control." RP at 158. The court found that it was at the point when R.C.'s mother "just [couldn't] deal with him anymore," that his aunt stepped in, but it described R.C.'s aunt as also "pretty much at the end of her rope," and found that "[e]verybody is reacting because everybody's frustrated and concerned, and they just don't know what to do." RP at 162. The court explicitly found all three women to be credible. From its oral ruling, it is clear that it found their conduct—while unfortunate in some cases—to be understandable. It told the three women at the conclusion of the hearing that, "I got a pretty good picture of what you've been going through with your testimony, and I know that you all care for [R.C.] a lot." RP at 173.

The trial court was aware that R.C. did not assault only women in his family. Evidence was presented that he was expelled from the third grade for "punching a police officer and the vice principal." RP at 107.

When R.C.'s trial lawyer told the court, "I'm not trying to justify his actions[,] because he was out of control that day. I don't think his actions really properly fit into a self-defense mode," we can see from the record that he was reasonably anticipating how the trial court was likely to view the evidence. RP at 174. So he relied instead on an argument that merely raising a knife, without making a forward thrust, does not amount to assault.

To commit assault, "[t]he defendant's conduct must go beyond mere threats; there must be some physical action that, under all the circumstances, creates a reasonable apprehension that physical injury is imminent." 13A SETH A. FINE & DOUGLAS J. ENDE, WASHINGTON PRACTICE: CRIMINAL LAW WITH SENTENCING FORMS § 305, at 42 (2d ed. 1998) (citing *State v. Maurer*, 34 Wn. App. 573, 580, 663 P.2d 152 (1983)). Yet "the State need not show a thrusting or pointing of a weapon if other evidence, considered in light of the facts of the incident, raise[s] a factual issue that a defendant's conduct amounts to 'violence begun.'" *Maurer*, 34 Wn. App. at 574-75.

In the end, the trial court found conduct sufficient to be "violence begun." That a defense strategy "ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance

analysis." *Grier*, 171 Wn.2d at 43. Since R.C.'s trial lawyer's defense theory was a legitimate trial strategy, his performance was not deficient.

Having found no deficient representation, we need not address the issue of prejudice.

Affirmed.

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

Siddoway, J.

WE CONCUR:

Fearing, C.J.

Lawrence-Berrey, J.

FILED
AUGUST 23, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. R.C.,[†] Appellant.	)	No. 32956-9-III ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION

THE COURT has considered Appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of July 26, 2016, is hereby denied.

IT IS FURTHER ORDERED the opinion filed July 26, 2016, is amended as follows:

The last sentence of the first full paragraph on page 9 that reads:

[†] For purposes of this order, the juvenile's initials are used in place of his name.

The problem with this circular argument is that when we review the seven factors to determine whether, because a child has sufficient capacity to understand the act and know that it was wrong, the presumption does not apply.

shall be amended to read:

The problem with this circular argument is that we review the seven factors to determine whether, because a child has sufficient capacity to understand the act and know that it was wrong, the presumption has been overcome.

PANEL: Judges Fearing, Siddoway, Lawrence-Berrey

FOR THE COURT:

George Fearing

GEORGE B. FEARING, Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT C., Juvenile Petitioner.	)))))))))	COA NO. 32956-9-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23rd DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVID TREFRY [David.Trefry@co.yakima.wa.us] ATTORNEY AT LAW PO BOX 4846 SPOKANE, WA 99220-0846	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
[X] ROBERT C. 1307 S 14TH AVE YAKIMA, WA 98902	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF SEPTEMBER, 2016.

X_____

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Comments:

No Comments were entered.

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