NO. 48401-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES MATHES,

Appellant.

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

The Honorable Kevin D. Hull, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding the testimony of Dr. Kenneth Muscatel in support of a diminished capacity defense.

2. The trial court erred in denying Mr. Mathes a diminished capacity defense.

3. Mr. Mathes did not receive the effective assistance of counsel guaranteed to him by the state and federal constitutions where his trial counsel failed to request a voluntary intoxication instruction.

4. Mr. Mathes did not receive the effective assistance of counsel guaranteed to him by the state and federal constitutions where his trial counsel failed to request suppression of his custodial statements under CrR 3.1.

5. The prosecutor's misconduct in arguing that Mr. Mathes could be found guilty of <u>first</u> degree assault based solely on his assaulting officers with a firearm denied him a fair trial.

6. The prosecutor committed misconduct in asking a state law enforcement officer witness to comment on Mr. Mathes's credibility, and this also denied him a fair trial.

7. Cumulative error denied Mr. Mathes a fair trial.

8. Convicting Mr. Mathes of both kidnapping in the first degree and harassment violated his rights against double jeopardy under the state and federal constitutions.

9. The trial court erred in finding that Mr. Mathes's two first degree assault convictions were "separate and distinct" criminal conduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in excluding the expert testimony of Dr. Muscatel and thereby deny Mr. Mathes his right to present a diminished capacity defense where the court mistakenly read State v. Atsbeha, 142 Wn.2d 904, 16 P.3d 626 (2001), as requiring Dr. Muscatel to testify to a reasonable medical certainty?

2. Was Mr. Mathes denied the effective assistance of counsel (a) where his ability to form criminal intent was the issue at trial even though the defense expert on diminished capacity was not allowed to testify, (b) where lay witnesses testified about his impairment from drug use, (c) where no one tried to downplay the drug use, and (d) where his attorney never asked for a voluntary intoxication instruction?

3. Was Mr. Mathes denied the effective assistance of counsel where his attorney never challenged the admissibility of his statements under CrR 3.1 even though Mathes was taken into custody and guarded for a number of days in the hospital by sheriff's deputies without the state

providing him access to an attorney, and his statements were used against him at trial?

4. Was Mr. Mathes denied a fair trial by the prosecutor's misconduct (a) in arguing to the jurors that they could find intent to inflict great bodily harm from the mere fact that he fired his gun knowing that a deputy might get hit and (b) in eliciting an opinion from a state's witness implying that he might not have cared if he hurt anyone?

5. Did the cumulative impact of the prosecutorial misconduct or the trial errors deny Mr. Mathes a fair trial?

6. Did the entry of convictions for both first degree kidnapping and harassment violate the prohibition for double jeopardy where he could not have committed kidnapping without having committed harassment and the jury was not precluded from using the same evidence for conviction of both?

7. Under the plain terms of RCW 0.94A.589, can one shot fired in the direction of two deputies not support consecutive sentences because one shot fired cannot be "separate and distinct" conduct?

C. STATEMENT OF THE CASE

1. Overview: Mathes's mental state during the incident.

The eleven charges which the Kitsap County Prosecutor's Office filed against James Mathes arose out of an on-going domestic incident

between Mathes and his girlfriend Michelle Toste which ended with Mathes being shot three times by deputies of the Kitsap County Sheriff's Office during which gunfire was exchanged. CP 92-104; RP 572.

The trial court excluded a proposed defense expert witness, Dr. Kenneth Muscatel, who would have testified, in support of a diminished capacity instruction, that Mathes had a long history of mental illness which could have prevented him from forming the requisite intent to commit some of the alleged crimes. RP 83-87, 107-110, 625-626, 64[1]; CP 18-31. The jury nevertheless heard Toste describe Mathes as not himself and not making sense during the incident and as paranoid, hearing voices and under the influence of drugs while she was with him. RP 194-195. Mathes's father, another of the alleged victims and a state's witness, described looking into his son's eyes and finding that "there was nobody at home. He was gone." RP 267.

The issues for the jury, according to defense counsel during closing argument, remained whether Mathes was not guilty of harassment and guilty only of lesser included offenses for the most serious charges: in the counts involving alleged assaults on the police officers, assault in the second degree rather than the first degree; and in the kidnapping count

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[1] The verbatim report of proceedings is designated as follows: the five-volume, consecutively-numbered report of proceedings is cited as "RP ___," and all other volumes are cited by date, e.g. "RP(6/12/14) ___. "

involving Toste, unlawful imprisonment instead of kidnapping. RP 767. Defense counsel's argument asked the jury in each instance to find that Mathes did not have the requisite mental state for the greater crime. RP 761-766.

Defense counsel did not ask for a voluntary intoxication instruction to support this argument. CP 118-129, 130.

The jury convicted of the greater offenses which were charged alternately with lesser-included offenses, and all other charges, as well as all special allegations (armed with a firearm, crime against law enforcement, domestic violence). CP 189-200; 201-214. The court imposed a sentence of 720 months of confinement. CP 201-214.

A timely Notice of Appeal followed. CP 215.

2. Dr. Muscatel's rejected offer of proof on diminished capacity

Dr. Kenneth Muscatel testified pretrial that James Mathes had a chronic mental disorder consistent with bi-polar disorder and a very serious substance abuse illness which exacerbated the mental disorder. RP 78-79. According to Dr. Muscatel, because Mathes was "highly intoxicated" during the incident, legal insanity was statutorily precluded as a defense even though Mathes suffered from the kinds of psychotic and disorganized thinking associated with such a defense. RP 83.

Dr. Muscatel testified further, however, that there was ample foundation for concluding that Mathes had a diminished capacity which would keep him from being able to form a requisite intent of a crime. RP 86. Mathes was delusional, paranoid in his thinking; he thought that his girlfriend was engaged in inappropriate behavior and that she and some drug dealers were monitoring and following him with drones. RP 86-87. He might have been engaged in some bizarre version of self-defense rather than forming the intent to assault. RP 88. According to Dr. Muscatel, it would depend on the facts of the case whether his capacity was sufficiently diminished, but that the foundational elements of the defense were present. RP 87, 101.

Dr. Muscatel noted that the degree and role of drug and alcohol abuse was extremely significant, and specifically testified that "voluntary intoxication is a form of diminished capacity." RP 83-85.

In reliance on the authority of State v. Atsbeha, 142 Wn.2d 904, 16 P.3d 626 (2001), the trial court excluded Dr. Muscatel's testimony because Dr. Muscatel was unable to testify to a reasonable psychological certainty that Mathes could not form the required intent.[2] RP 107-110.

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[2] Although defense counsel asked that findings of fact and conclusions of law be entered and the trial prosecutor indicated that he had provided copies of proposed findings and conclusions, RP 111-112, no findings and conclusions appear in the superior court file for the diminished capacity

After Michelle Toste appeared as a witness at trial, defense counsel made a further offer of proof. Dr. Muscatel testified for the offer that there were clear indications of mental disease at the time of the incident sufficient to cause impairment of his ability to form intent. RP 624-625. He reiterated that Mathes was most acutely affected by drugs. RP 632.

The trial court declined to reconsider because Dr. Muscatel could not testify with reasonable medical certainty that Mathes's capacity to form a requisite intent was in fact diminished. RP 641.

3. CrR 3.5 testimony

Mr. Mathes made statements to the Kitsap County Sheriff's deputies who tended to him at the scene after he was shot. RP 31. The deputies testified at the CrR 3.5 hearing that all of his statements were volunteered and not made in response to any questions by them or others. RP 35, 39-41, 69-71.

Other deputies testified about statements made by Mathes at the hospital as they sat next to him in his room to guard him. RP 35, 45. Mathes made statements to these officers after being read his Miranda warnings. RP 45-46, 52, 54, 58-60, 62, 114-116, 118-120. With one exception, the officers said these statements were not made in response to questioning. RP 45, 60, 116, 120. The trial court suppressed the one

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ruling or the CrR 3.5 ruling.

statement because it was made after Mathes requested an attorney. RP 120, 130.

Neither the parties nor the trial court addressed the fact that Mathes was not provided with counsel or provided with the number of the public defender's office or other attorneys during his days in the hospital even after he asked to speak to an attorney. RP 55, 62, 116. He even asked the nurse to call his attorney. RP 55-56. After several requests to speak to an attorney to different deputies, Mathes indicated that he had probably said too much and should wait until he spoke with an attorney, but that the attorney's office was closed until Monday. RP 119.

4. Trial testimony of the lay witnesses

a. Mathes's irrationality

On the evening of December 30, 2013, Mathes called Toste and asked her to get a babysitter for their five-year-old son and Toste's eleven-year-old son so that he could spend the evening with her. RP 189-190. Toste was surprised at the babysitter request since Mathes always wanted to see his son. RP 191. There was a no-contact order in place prohibiting Mathes from calling or seeing Toste, which they did not observe. RP 191, 240. Toste said she talked to Mathes because she loved him. RP 191.

After a number of phone calls, Toste told Mathes that her cousin would babysit the boys. RP 192, 241. Mathes picked Toste up and took

her to his mother's house. RP 193. Toste soon realized that Mathes was not himself that evening. RP 191, 195. They had sex, but Mathes then pulled a gun from under the mattress when she denied "cheating" on him. RP 194. Toste described Mathes's drug use that evening and admission that he had been using drugs heavily for several months. RP 195, 197, 213. She thought he was using heroin and it was affecting his behavior. RP 236. He made wild accusations – that Toste had married someone else, that she was pregnant and that Toste's twenty-one-year-old daughter was using drugs. RP 198. Mathes was hearing things and peppering Toste with questions. RP 196, 198. At one point he demanded that she give her sons away to strangers. RP 205-206. On cross-examination, Toste summarized that Mathes was hallucinating during the evening and that he was different. "It just wasn't Jim." RP 239-240.

According to Toste, Mathes held a gun to her head and would not let her leave throughout the night, although they had sex together once again. RP 201, 248.

b. Toste's calls for help

Mathes also wanted Toste to obtain drugs that evening. RP 199. So Toste used that request as an excuse to call Hannah Caulder, her daughter's best friend, who was living with Toste at the time; she upset Hannah by asking her if she knew where to get drugs. RP 199, 305. Toste

also called her daughter Stephanie and asked her to get drugs using drug terms Stephanie didn't understand; Toste also said "bang, bang" into the phone to suggest the gun, but this confused and alarmed Stephanie.[3] RP 200, 278-279, 279. As a result of these phone calls, Hannah went to Stephanie's house and there were a number of telephone calls between them, Toste and other relatives throughout the night. RP At around 5:00 or 5:30 in the morning, Stephanie went to Mathes's mother's house and Toste was able to whisper to her as Stephanie was leaving, that Mathes had a gun. RP 202-204.

Stephanie and Hannah confirmed, in their testimony, the confusing phone calls from Toste during the night, their attempts to call her and to discover when she would return home. RP 277-285, 304-307. At some point, they spoke with Toste's sister, who called the police. RP 286.

c. Speeding along winding back roads

Early in the morning, Mathes and Toste left the house. RP 206. At Toste's request, Mathes stopped at the coffee shop Toste frequented every day, but she was unable to communicate her situation to anyone there. RP 206-208. They stopped for gas at another time during the evening. RP 208-209. According to Toste, they drove around on winding roads for three hours at 100 miles per hour; Mathes had the gun between

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[3] First names are used where it makes the narrative clearer.

his legs and, at one point, fired a shot out the window. RP 212-213, 215. During this time, Mathes thought Toste's (non-existent) husband was following them and was extraordinarily nervous and paranoid. RP 214. They stopped at Mathes's house so that Toste could look for her supposed wedding ring and then returned to Mathes's mother's house. RP 215.

d. Gathering at Mathes's mother's house and confrontation with the police

Mathes's father, Roy Mathes, arrived shortly after Mathes and Toste returned to his mother's house. RP 216-217, 265. Mathes pointed the gun at his father and asked him if <u>he</u> was having an affair with Toste. RP 217-218, 265. According to Roy Mathes, he "swatted" the gun away twice when Mathes pointed it at him, and Mathes pointed the gun in the air and sat down. RP 266. It was then that Roy Mathes looked into his son's eyes and found "nobody at home." RP 267.

Toste's daughter Stephanie arrived a short time later. RP 219. Hannah drove Stephanie to the house, but remained parked outside. RP 288, 308, 311-312. Mathes asked Stephanie if she could get money because he wanted $20,000 in order to go to Mexico. RP 219-220.

The phone rang, but Stephanie did not answer because she could see that the call was from 911. RP 221, 289. When CENCOM (911) called again on the landline, Mathes answered and put the phone on

"speaker." RP 221, 290. Although Toste said she was okay and denied there was a gun, Mathes learned that the sheriff's deputies were outside and they all left the house. RP 222-224, 290-291, 268.

Toste testified that Mathes told her to get in the car, but that the deputies who were outside commanded that she not get in the car. RP 224, 228. Mathes started to get in the car and Toste had opened the passenger door when the deputies began telling her not to get in the car. RP 227-228. Toste watched Mathes get in the car, and then get out and fire, she thought, at the police over the top of the car. RP 229-230. She could hear the officers firing too. RP 231. She and Stephanie ran across to a neighbor's carport. RP 230231. After the shooting stopped, the deputies ordered them to lie on the ground. RP 231. She could see Mathes on the ground holding his arm where he had been shot. RP 235. According to Toste, Mathes said to his father who had also come outside, "I love you Pops, but that bitch deserved what she got." RP 235.

On the 911 tape, which was played for the jury, RP 223, the 911 dispatcher can be heard asking everyone to step outside, Mathes commanding Toste to get in the car and the sheriff's deputies commanding that Mathes get out of the car. RP(911 call) 3. The gunshots were also captured on the call, as well as a female voice saying "Oh, my God" and the officers commanding people to get on the ground. RP(911 call) 3.

Stephanie confirmed that she could see the police coming over the yard when they left the house, that she heard the officers shout at her mother not to get in the car, that all of a sudden she heard shooting, that she pushed her mother and they ran to the carport and that she saw Mathes's hands over the top of the car. RP 291-292. She confirmed that she knew Mathes was using drugs that evening. RP 295.

Hannah confirmed that she heard Mathes tell Toste to get in the car and the police tell her not to. RP 312. She could not see who shot first because she was hiding in her car. RP 312.

Roy Mathes was parked in the driveway behind Mathes's car; Mathes told him to move his car or he would shoot Toste. RP 269. Roy got in his car and saw the women running beside his car and his son pointing the gun at Toste. RP 269-270. He yelled, "Jim don't." RP 269. Mathe stopped and went to the front of the car, put his hands down and fired over the car. RP 270. He fired 30 degrees up in the air; Roy could see the flame clearly. RP 270, 275. The house was on a hill and the police were fifteen to twenty feet below. RP 272. There was a thunder of shots and Mathes fell. RP 272. Roy was convinced that his son would die. RP 272-273.

5. Law enforcement witnesses

a. Gunfire

Deputy Benjamin Herrin was the first Kitsap County Sheriff deputy on the scene. RP 334-337, 342. Deputies Custis Lont, Steven Argyle and Stoner[4] and Lieutenant John VanGesen arrived soon after Herrin. RP 342, 391. Herrin and other deputies reported that the call originated with Port Orchard police as an investigation of a violation of a protection order. RP 338. Because the address was outside Port Orchard on the Bethel Burley Road, the investigation was transferred to the Sheriff's Office. RP 338-340, 412-413. The officers were provided information that a gun was involved. RP 340-341.

The deputies described Mathes's mother's house as being at the end of a steep driveway that curved first to the left and then turned 180 degrees to the right up to the front of the house. RP 348, 414. There were two cars parked in the drive -- Mathes's closest to the house and Roy Mathes's behind. RP 265, 443. Deputies Herrin and Lont approached the house from the driveway; Lt. VanGesen followed once he determined that there was no other access to the front of the house. RP 393, 436. Deputy Argyle went to the back of the house via another driveway, and Deputy Stoner took a position behind Herrin and Lont. RP 652.

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[4] Deputy Stoner did not provide his first name when called as a witness.

First, the officers had CENCOM or 911 call into the house to establish contact with the people inside. RP 343. CENCOM directed them to come outside with their hands showing and speak to law enforcement. RP 344, 393. Mathes, Toste, Roy Mathes and Stephanie left the house, walked down the sidewalk and past the garage to the cars in the driveway. RP 353. Herrin and Lont stepped out of the treeline into the driveway and announced themselves as sheriff's officers. RP 355, 444.

Although accounts differed in specifics, all agreed that a very short time later there was an exchange of gunfire and Mathes was struck three times. RP 357364, 394-395, 448-449. No officers were hit by bullets. Herrin believed that all of the people who came out of the house went to the driver's side of the car, the side opposite to where he and Lont were. RP 356, 379-380. Lont testified that the women walked directly across to the carport in the neighbor's yard. RP 445. On cross- examination Lont agreed, however, that a photograph of the car showed that the passenger door was slightly open, which was consistent with the testimony of Toste, Stephanie, Hannah and Roy that Toste went to the passenger side and was commanded by the deputies not to get in the car. RP 228-229, 269, 291-292, 312, 465. Deputy Argyle, who was behind the house, heard the command not to get into the car and gunshots. RP 417

Herrin testified that he saw Mathes get out of the car and assume a two-handed stance with something metallic in his hand. RP 357. Herrin was convinced Mathes had a gun and did not wait to fire the rifle he had taken with him from his patrol car. RP 341, 358. Herrin fired twenty shots. RP 537. He testified that he fired again when he saw Mathes on his hands and knees, but no other witness recalled more than one volley of gunfire. RP 364, 455. Deputy Argyle, who was behind the house, reported hearing about fifteen shots in three seconds and that there was no second round of shooting. RP 420, 469. Mathes was then handcuffed, checked for weapons, taken by deputies to the medics waiting below and transported to the hospital. RP 365-368, 400, 417-418, 455, 483-484.

Deputy Lont testified that Mathes stopped at his car, opened the driver's side door, knelt down and appeared to "fumble" with something, stand up, point a handgun at them over the roof of the car and fire. RP 446-449. Lont returned fire shooting six rounds from his handgun. RP 449, 537. Deputy Stoner was at the bottom of the driveway on the driver's side of the car, when he saw Mathes leave the driver's side, and fire over the top of the car; Stoner lost his balance and when he regained it, he saw Herrin and Lont next to Mathes on the ground. RP 656-661.

b. The Washington State Patrol investigation

Because the incident involved shooting by officers, the

Washington State Patrol conducted the investigation. RP 367, 403, 527-531. Detectives Rodney Green and Krista Hedstrom testified that they took possession of the weapons of the sheriff's officers at the scene and determined that only Deputies Herrin and Lont fired theirs. RP 600-606, 537-539. Det. Green collected other evidence – bullet casings, a magazine for bullets, a hand gun with dirt in the barrel, clothing and medical supplies -- and prepared maps and diagrams to show where the evidence was found, including bullet defects on the ground and in the corner of the attached garage of the house. RP 531-533, 540-541. One bullet strike was traced, through the use of trajectory rods, to Mathes's gun, and the bullet hole in the corner of the garage appeared to have been shot from the area of Mathes's car. RP 569, 579-583. Numerous bullets from the deputy's guns were found in the car. RP 579, 593. Mathes sustained a through and through wound to his forearm. RP 572.

c. Mathes's statements to officers at the hospital

The officers who provided security by sitting in a room with Mathes at the hospital testified about statements he made while they were present. Deputy Brittany Gray, who was assigned to the hospital at a time when Mathes was just waking from being unconscious for several days, testified that he asked if he had hurt anyone and said that he had fired shots which put him in his current position. RP 488-489, 492, 494. When

Gray testified that Mathes then asked a nurse if anyone was hurt, the prosecutor asked Gray if Mathes seemed to care if anyone was hurt. RP 492. Gray testified that it was "difficult for her to say."

Gray testified that she overheard him talking to his parents, and reported him as saying to his father, something like "Did you figure out about Shelly (Toste)? Did you try to get her set right with the police? Right about the situation. Wise to find out if she were going to tell the truth about the whole thing and she was the only answer about clearing him on the deal." RP 493.

Deputy Eric Adams reported Mathes as saying that it was important for him to know if he'd hurt anyone and that it was an accident – that he wanted to get hurt himself. RP 501. Adams testified that Mathes said he had not expected to live and went out guns ablazing. RP 502. He testified that Mathes said he called his girlfriend to confront her about cheating and she denied it and he asked her over to figure it out. RP 502. According to Adams, Mathes also said that when 911 called to say the police were on the way because a gun was mentioned, he loaded his gun and decided to go out guns ablazing and that he emptied his gun. RP 503. Mathes remained concerned throughout Adams's shift about whether anyone was hurt; he said remembered lying on the ground and that he was glad his girlfriend got away and wasn't hurt. RP 504.

6. Defense witness

Janelle Jones, the only defense witness, testified that Mathes came into the Highway Market, a convenience store where she worked, at about 12:30 p.m. RP 668-670. Mathes bought cigarettes and two "icies" and he and Jones talked for a few minutes; Mathes seemed happy and normal. RP 671. Jones recalled that later the road was closed and she learned that Mathes had been involved in a shooting. RP 672-673.

7. Evidentiary stipulations

The parties stipulated that for Counts IX (felony violation of a no contact order) and XI (unlawful possession of a firearm), Mr. Mathes had two prior convictions for violation of a court order. CP 85-88; 89-91;RP 261-262. The parties further stipulated that for Count IX there also existed a no contact order issued by the Kitsap County District Court that prohibited Mathes from contacting Toste, directly or indirectly. CP 115-117; RP 651

8. Closing arguments

The prosecutor argued that Mathes intended to inflict mental distress on Toste and therefore he was guilty of kidnapping and not unlawful imprisonment. RP 744-745. Specially, the prosecutor argued that kidnapping described "what he knew" and what he was doing. RP 745.

With regard to the first degree assault charges where Deputies Herrin and Lont were the alleged victims, the state essentially conceded that it had not proved that more than one shot was fired <u>at the deputies</u>. The prosecutor told the jurors that they knew at least two shots were fired and one went into the house. RP 751. The prosecutor conceded that Roy Mathes saw only one shot. RP 751. The prosecutor argued that the difference between assault in the first and second degrees, with respect to these charges, was the intent to inflict great bodily injury. RP 749. According to the prosecutor, if Mathes did not want to hurt the police, as he claimed, he didn't have to fire and that the fact that he pulled the trigger showed his intent. RP 750.

The prosecutor further argued that Mathes was using some sort of a substance which made him paranoid, but that the shooting was not an accident. RP 751-752. According to the prosecutor, even if Mathes was suicidal that did not mean that he did not shoot at the officers; and that, whether or not he wanted to kill them, he knew that he might hit and kill them. RP 752.

In rebuttal closing argument, the prosecutor reiterated that same argument that it did not matter whether Mathes was suicidal or not because he pointed the gun at the deputies and fired. RP 771. And if you

do this, you know that a bullet will come out and you might hit someone. RP 771.

9. Sentencing

The family and friends who asked the court for leniency for Mr. Mathes at sentencing described him as a man who had been "clean and sober" for eight or nine years, and a man who had sought help for his mental problems when he started deteriorating. RP(sentencing) 18, 26-29, 35, 36. They spoke of his having a new doctor who changed his medication and how that medication had not worked. RP(sentencing) 18, 28 Mathes had started drinking and taking drugs after this medication was changed. RP(sentencing) They described him as a good father and friend who was helpful and generous to others. RP(sentencing) 18-19, 22, 29, 30, 32-34. They insisted that at the time of the incident Mathes was not himself. RP(sentencing) 18, 33.

The prosecutor noted that all but one of Mathes's prior convictions had washed out, confirming that he had spent a number of years without criminal behavior prior to the incident which led to the charges. RP(sentencing) 3.

D. ARGUMENT

I. THE TRIAL COURT ERRED IN EXCLUDING THE TESTIMONY OF DR. KENNETH MUSCATEL AND THEREBY DENYING MR. MATHES HIS RIGHT TO PRESENT A DIMINISHED CAPACITY DEFENSE.

The trial court, relying on its mistaken reading of State v. Atsbeha, 142 Wn.2d 904, 16 P.3d 626 (2001), excluded expert testimony on diminished capacity by Dr. Kenneth Muscatel because Dr. Muscatel did not testify to a reasonable medical certainty in his offer of proof. RP 107-110, 624-625. This denied Mathes his state and federal constitutional right to present a defense.

a. Atsbeha did not hold that an expert witness on diminished capacity had to testify to a reasonable medical certainty as the trial court mistakenly believed it did.

Dr. Muscatel testified in a defense offer of proof that there was ample foundational evidence that Mathes suffered from the kind of mental disorder which could have diminished his capacity and prevented him from forming the requisite intent to commit charged crimes. RP 86-87, 101. According to Dr. Muscatel, however, it would depend on the facts of the case whether his capacity was sufficiently diminished. RP 87, 101. Because the trial court mistakenly interpreted Atsbeha as requiring an expert to testify to a reasonable medical certainty and Dr. Muscatel did not do so, the court ruled his testimony inadmissible. RP 107-110, 641. The

appellate court in Atsbeha did not hold that testimony to a reasonable medical certainty was required.

The trial court, in Atsbeha, relied on the nine foundational factors set out in State v. Edmon, 28 Wn. App. 98, 102-103, 621 P.2d 1310 (1981), to determine the admissibility of proffered expert testimony on diminished capacity in that case. One of the nine Edmon factors is that "the expert personally examines and diagnoses the defendant and is able to testify to an opinion with reasonable medical certainty.[5] Id (emphasis

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[5] 1. The defendant lacked the ability to form a specific intent due to a mental disorder not amounting to insanity.
"2. The expert is qualified to testify on the subject.
"3. The expert personally examines and diagnoses the defendant and is able to testify to an opinion with reasonable medical certainty.
"4. The expert's testimony is based on substantial supporting evidence in the record relating to the defendant and the case, or there must be an offer to prove such evidence. The supporting evidence must accurately reflect the record and cannot consist solely of uncertain estimates or speculation.
"5. The cause of the inability to form a specific intent must be a mental disorder, not emotions like jealousy, fear, anger, and hatred.
"6. The mental disorder must be causally connected to a lack of specific intent, not just reduced perception, overreaction or other irrelevant mental states.
"7. The inability to form a specific intent must occur at a time relevant to the offense.
"8. The mental disorder must substantially reduce the probability that the defendant formed the alleged intent.
"9. The lack of specific intent may not be inferred from evidence of the mental disorder, and it is insufficient to only give conclusory testimony that a mental disorder caused an inability to form specific intent. The opinion must contain an explanation of how the mental disorder had this effect." (Citations omitted.)

added). Edmon, however, was effectively overruled in State v. Ellis, 136 Wn.2d 498, 521, 963 P.2d 843 (1998), after the trial court's ruling in Atsbeha, but before the appellate decision in the case.

Ellis held, in that capital case at least, that the admissibility of expert testimony should be determined under ER 401, ER 402, and ER 702 and not the Edmon factors:

> The question of admissibility of the testimony of defense experts is better determined under ER 702, 401 and 402. (citations omitted). If at trial the court allows any such testimony, its weight and value would then be determined by the trier of fact, the jury, under proper instructions, including an instruction such as WPIC 6.51.

Ellis, 136 Wn.2d at 521.

The Washington Supreme Court, in Atsbeha, applied Ellis retroactively, using ER 702, 401 and 402, not the Edmon factors for its analysis. Atsbeha, at 916-918. The Atsbeha Court upheld the trial court's exclusion of the expert testimony because it did not meet the criteria of the evidentiary rules, not because of the failure to meet the Edmon factors. Atsbeha, at 916-918. The testimony was deemed not relevant because the expert testified that it was likely that the defendant could form the intent required to commit the crime – intent to deliver a controlled substance. Id., at 919.

The trial court erred in relying on what it believed to be a holding in Atsbeha – that a diminished capacity expert must testify to a reasonable medical certainty – to deny Mathes his diminished capacity defense. The Atsbeha Court did not rely on the Edmon factor that the expert must testify to a reasonable medical certainty. Id.

b. Dr. Muscatel's testimony was admissible under ER 702, 401 and 402.

Unlike the expert in Atsbeha, Dr. Muscatel testified that Mathes's mental disorder could have prevented him from forming relevant criminal intents. His specialized testimony would have been helpful to the jurors in evaluating the evidence and determining facts very much in issue, whether Mathes had the capacity to form the required criminal intents of crimes with which he was charged. This is the very purpose of expert testimony as set out in ER 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The evidence was relevant because it had a tendency to make a fact of consequence more or less probable under ER 401, and admissible under ER 402 because it was relevant.

As held in Ellis, the expert testimony should be allowed as a matter

of fundamental fairness and due process so that the trier of fact could determine the weight of testimony:

> Their [expert witnesses'] testimony should be allowed at trial under ER 702. They would be subject to cross-examination as they were as "hostile witnesses" in the pre-trial proceeding on the motion in limine. The trier of fact -- the jury -- can then determine what weight, if any, it will give to their testimony. This is fundamentally fair and consistent with due process.

Ellis, 136 Wn.2d at 5220523.

c. Exclusion of Dr. Muscatel's testimony denied Mathes his state and federal constitutional right to present witnesses in his own defense and, at the least, was an abuse of discretion and reversible error.

In Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1079 (1967). (1967), the Court held that the right to offer evidence in one's own behalf is a fundamental component of due process of law.

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies . . . This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. at 19; see also United States v. Nixon, 418 U.S. 683, 709, 94 S. Ct. 2637, 41 L. Ed. 2d 231 (1974).

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in Compulsory Process of Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690, 90 L. Ed. 2d 636, 106 S. Ct. 2142 (1986) (citations omitted) (quoting California v. Trometta,

> 467 U.S. 479, 485, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984). . . . . "[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, [evidentiary rules] may not be applied mechanistically to defeat the ends of justice." Chambers, 410 U.S. [284,] 302 [1973)].

Greene v. Lambert, 288 F.3d 1081, 1090-1091 (9th Cir. 2002).

While the right to present a defense does not include the right to present irrelevant evidence, Ellis, at 518-519, where the relevant evidence is excluded the error is fundamental. Id. at 523. Constitutional error is presumptively prejudicial and the state bears the burden of proving harmlessness beyond a reasonable doubt. State v. Coristine, 177 Wn.2d 370, 405, 300 P.3d 440 (2013).

Even under the abuse of discretion standard, however, the trial court commits reversible error where it relies on the wrong factors in determining the admissibility of evidence.

> Admissibility of evidence lies within the sound discretion of the trial court . . . . Under the circumstances of this case, a pre-trial proceeding in a capital case, the abuse of discretion rule must be applied in order to achieve a fundamentally fair result. In excluding the expert testimony on diminished capacity in the State's motion in limine, the court unreasonably and prematurely concluded the foundation for admissibility had not been satisfied. The court should have considered admissibility under ER 702 and application of ER 401 and ER 402.

Ellis, 136 Wn.2d at 523.

In Atsbeha, the trial court did not have legal authority holding that the Edmon factors no longer applied. By the time of the decision in this

case, however, Ellis had been decided. The exclusion of expert testimony on the trial defense -- particularly in cases such as Mathes's -- where he was facing a sentence of 60 years in prison, virtually a sentence of life without the possibility of parole – denied him a defense and the ability to present relevant evidence in his own behalf. Mathes's convictions should be reversed for the trial court's error and remanded for retrial where he can present his diminished capacity defense.

II. MATHES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS TRIAL ATTORNEY FAILED TO REQUEST A VOLUNTARY INTOXICATION INSTRUCTION.

a. Dr. Muscatel's offer of proof and the trial testimony supported the giving of a voluntary intoxication instruction.

Defense counsel arranged for Mathes to be evaluated by Dr. Kenneth Muscatel and made an offer of proof through Dr. Muscatel in support of a diminished capacity defense. Even after Dr. Muscatel's testimony was excluded by the trial court, defense counsel's argument to the jury remained that Mathes lacked the intent to commit the greater crimes of first degree assault and kidnapping and the crime of harassment. RP 767.

Dr. Muscatel made it very clear in his offer-of-proof testimony that drug and alcohol abuse was extremely significant because Mathes was

intoxicated during the incident, RP 83, because drugs and alcohol can impact the ability of an individual to form intent, and because voluntary intoxication is a form of diminished capacity. RP 85.

The testimony of Toste and other lay witnesses supported the conclusion that Mathes was under the influence. RP 195, 199, 213, 239, 295. Toste testified that she saw him injecting drugs; she described his behavior and reported that Mathes said he had been using drugs for the past several months. RP 213. Defense counsel elicited the testimony about his drug use. RP 239, 295

Nevertheless, defense counsel failed to request a voluntary intoxication instruction. Under the circumstances of the case, defense counsel's failure to request a voluntary intoxication instruction was ineffective.

By statute, RCW 9A.16.090, voluntary intoxication does not make an act less criminal, but "whenever the actual existence of any particular mental state is necessary to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state." Through this statute, the legislature has made voluntary intoxication relevant to the determination of whether an accused acted with a particular mental state. State v. Rice, 102 Wn.2d 120, 123, 683 P.2s 199 (1984); State v. Fuller, 42 Wn. App. 53m 55, 708

P.2d 413 (1985). When evidence of voluntary intoxication is put before the jury, the proper way to deal with the issue is a voluntary intoxication instruction, similar to the language of the statute. WPIC 18.10; State v. Coates, 107 Wn.2d 882, 891-892, 735 P.2d 64 (1987).

A defendant requesting a voluntary intoxication instruction need not call an expert or any witness to support it. State v. Gabryschak, 83 Wn. App. 249, 250, 921 P.2d 549 (1996). No expert is necessary because the effects of drug and alcohol use are a matter of common knowledge. State v. Kruger, 116 Wn. App. 685, 692, 67 P.3d 1147 (2003).

The instruction is appropriate where there is: (1) evidence that a charged crime has a particular mental state; (2) substantial evidence of drug use; and (3) evidence that the drugs or alcohol affected the ability to form intent. State v. Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37, review denied, 119 Wn.2d 1024 (1992). There must be evidence not just of drug use, but that the use had an effect on the defendant's mind or body. Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 179, 817 P.2d 861 (1991).

Here all of the requirements for the instruction were met: Mathes was charged with crimes with particular intents, there was substantial evidence that he was intoxicated and there was substantial evidence that the drugs affected his mind. Mathes was entitled to a voluntary intoxication instruction and his attorney should have asked for one.

b. Defense counsel's failure to request a voluntary intoxication instruction constituted ineffective assistance of counsel.

Defense counsel's failure to request a voluntary intoxication instruction where warranted, can constitute ineffective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 223, 743 P.3d 816 (1987); State v. Kruger, 116 Wn. App. at 693-695.

All defendants have the right to effective assistance of counsel. State v. Adams. 91 Wn.2d 86, 89-90, 586 P.2d 1168 (1978). Under Strickland v. Washington, 466 U.S. 668, 687. 104 S. Ct. 2053, 80 L. Ed. 2d 674 (1984), to make a claim of ineffective assistance of counsel, appellant must show deficient performance and prejudice. Counsel's performance is deficient if it falls below "a minimum objective standard of reasonable attorney conduct." Strickland, 466 U.S. at 687. The defendant is prejudiced if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." Id. The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Id, at 695.

In Kruger, where the charge against the defendant arose from an incident in which he "head-butted" a police officer, the court held that counsel's performance was deficient where intent was the focus of trial, where all of the witnesses testified about the level of the defendant's

intoxication and no one downplayed the evidence of intoxication. Kruger, at 694. The court noted that, in fact, the trial court would have committed reversible error for denying a voluntary intoxication instruction. Id. (Citing State v. Rice, supra).

In deciding that Kruger had been prejudiced the court noted that the issue of the defendant's intoxication was before the jury, but without the instruction, defense counsel was unable to argue that the intoxication was relevant to Kruger's lack of intent. Id.

Here, as in Kruger, defense counsel's performance was deficient for failing to request a voluntary intoxication instruction. Counsel requested a diminished capacity instruction based on the opinion of Dr. Muscatel. Dr. Muscatel testified that voluntary intoxication was a significant component of diminished capacity it Mathes's case. Mathes's intent was his defense. As in Kruger Mathes was prejudiced by counsel's inability to effectively argue that voluntary intoxication should be considered in determining whether Mathes formed or could form the particular intents of the crimes with which he was charged.

Mathes's convictions should be reversed and dismissed because he was denied his state and federal constitutional rights under the Sixth Amendment and Article 1, section 22 of the Washington constitution to the effective assistance of counsel.

III. MATHES RECEIVED INEFFECTRIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY DID NOT SEEK, UNDER CrR 3.1, TO SUPPRESS HIS STATEMENTS MADE TO THE POLICE AFTER HE REQUESTED AN ATTORNEY.

Although it was undisputed that Mr. Mathes was in custody when he made statements to the deputies who guarded him at the hospital, some after he had requested an attorney and not been provided with one, trial counsel did not cite CrR 3.1 as a basis for suppressing these statements. RP 123-124. Neither did the trial court address CrR 3.1 in ruling that the statements were admissible. This was error.

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." Since this right is fundamental right, it applies to the states through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Article 1, section 22 of the Washington Constitution also provides that "in all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel." Thus, under both the Washington and United States Constitutions, a criminal defendant is entitled to the

assistance of counsel at all critical stages in the litigation. Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); State v. Heddrick, 166 Wn.2d 898, 909-910, 215 P.3d 201 (2009). The right to counsel attaches the moment an individual becomes "accused" within the meaning of the Constitution. Massiah v. United States, 377 U.S. 201, 206 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

In Washington State an accused not only has a right to an attorney, but also the right to immediate access to one. See e.g., Criminal Rule (CrR) 3.1.

The purposes of CrR 3.1 are different from the purposes of Miranda[6] warnings: Miranda is designed to prevent the State from using presumptively coerced and involuntary statements against criminal defendants; CrR 3.1 is designed to give a defendant a meaningful opportunity to contact an attorney. State v. Mullins, 158 Wn. App. 360, 241 P.3d 456 (2010), rev. denied, 171 Wn.2d 1006, 249 P.3d 183 (2011).

Criminal Rule 3.1(b)(1) reads:

> The right to a lawyer shall accrue as soon as feasible after the defendant is taken into custody, appears before a

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

> committing magistrate, or is formally charged, whichever occurs earliest. (Emphasis added).

CrR 3.1(c)(1) states:

> At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer.

It is undisputed that Mathes was taken into custody the moment he was placed in handcuffs at the scene. RP 123. The requirements of CrR 3.1 were triggered at least by the time he was taken into custody and was conscious after being treated at the hospital, and certainly by the time he requested an attorney.

In State v. Kirkpatrick, 89 Wn. App. 407, 415-416, 948 P.2d 882 (1997), the court held that "the State had not shown reasonable efforts to contact an attorney" at "the earliest opportunity" where they drove Kirkpatrick for four hours and he initiated contact and confessed during the drive. In State v. Jaquez, 105 Wn. App. 699, 717, 20 P.3d 1035 (1998), the court held that the state had not provided timely access to an attorney where the defendant had to wait while other officers drove the victim to his location for an attempted show-up identification.

CrR 3.1 requires the state to provide an accused with an attorney and the immediate means to communicate with one. "Although the rule

does not require the officers to actually connect the accused with an attorney, it does require reasonable efforts to do so." State v. Kirkpatrick, 89 Wn. App. at 414; State v. Pierce, 169 Wn. App. 533, 548, 280 P.3d 1158, 1167, cert. denied, 175 Wn.2d 1025, 291 P.3d 253 (2012). No such efforts were made here. Even after Mathes asked for an attorney and asked for the nurse to call his attorney, the attending deputies did nothing to facilitate contact for Mathes. He was not provided with either a telephone book or the number of the public defender. City of Seattle v. Carpenito, 32 Wn. App. 809, 649 P.2d 861 (1982). There were no attempts made to telephone an attorney on his behalf. City of Bellevue v. Ohlson, 60 Wn. App. 485, 487, 803 P.2d 1346 (1991).

Even though Mathes tried, at one point, to contact an attorney, that attorney was unavailable for the weekend, and the deputy did nothing to facilitate earlier contact. RP 119. This was inadequate as it was in Pierce, where the court held that providing a phone and number of the public defender's office which was closed for the day was insufficient to provide access to counsel. Pierce, supra.

Had the deputies provided access to an attorney when Mathes first regained consciousness, the attorney would have told him not to make any statements to law enforcement. See e.g., Kirkpatrick, 89 Wn.App. at 414 ("the officers made no effort to contact an attorney when Kirkpatrick first

requested one . . . Had they done so, we presume a lawyer would have told Kirkpatrick to remain silent: '[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.' Watts v. Indiana, 338 U.S. 49, 59, 69 S.Ct. 1357, 1358, 93 L.Ed. 1801 (1949) (Jackson, J., concurring)"). The attorney would also have been able to clarify with Mathes that no deputy had been injured and explained other aspects of his situation.

Even though Mathes made statements after being read his Miranda rights, this does not cure the state's failure to comply with CrR 3.1. Kirkpatrick, 89 Wn.App. 407 at 414 ("A defendant does not waive a CrR 3.1(c)(2) violation by reinitiating contact with the police unless the reinitiation occurs before the earliest opportunity to place the defendant in contact with an attorney"); Pierce, 169 Wn. App. at 550, fn.5 ("The earliest opportunity to place Pierce in contact with an attorney was when he was booked into jail. His reinitiating contact with the police five hours later therefore does not cure this violation of CrR 3.1(c)(2).")

The courts review the violation under a harmless error analysis. State v. Jaquez, 105 Wn. App. 699, 716, 20 P.3d 1035, 1043 (2001). Here, it cannot be argued that the error was harmless. The statements included statements by Mathes that he fired shots, that he was suicidal and that he intended to go out with guns ablazing; they included statements to

his parents about talking to Toste. RP 54. 493, 501-502. The prosecutor relied on these statements in closing argument to convince the jury that Mathes intended to inflict great bodily harm. RP 749-752.

Under these circumstances, defense counsel was deficient for not moving to suppress under CrR 3.1, and Mathes was prejudiced by the admission of Mathes's statements. Kirkpatrick, supra; Strickland v. Washington, 466 U.S. 668, 687. There was a "reasonable probability" that counsel's performance prejudiced the outcome. Id, at 695. Mathes's convictions should be reversed and remanded for retrial with instructions to suppress his statements under CrR 3.1

IV. THE PROSECUTOR'S MISCONDUCT IN ARGUING TO THE JURY THAT MATHES COULD BE CONVICTED OF FIRST DEGREE ASSAULT BASED SOLELY ON HIS ASSAULTING THE OFFICERS WITH A FIREARM AND IN ELICITING A COMMENT ON MATHES'S CREDIBILITY DENIED HIM A FAIR TRIAL.

The prosecutor committed misconduct during trial: (a) in arguing to the jury in closing and closing rebuttal arguments that Mathes could be found guilty of assault in the first degree simply because he pulled the trigger or simply if he knew that he might hit the deputies, whether or not he meant to kill them, RP 750, 752, 771, and (b) by asking Deputy Brittany Gray if Mathes "seemed to care if anybody was hurt" when he asked over and over if anyone had been hurt. RP 492. In the first

instance, the prosecutor relieved that state of its burden of proving intent to commit great bodily harm and essentially told the jury they could convict of first degree assault if they found only the elements of second degree assault or found knowledge rather than intent as Mathes's mental state. In the second instance that prosecutor improperly asked a witness to comment on the credibility of the defendant. This conduct was flagrant and ill-intentioned and denied Mathes a fair trial.

a. The prosecutor improperly argued that the state did not need to prove intent to inflict great bodily harm.

The prosecutor properly told the jurors the difference between first and second degree assault was the intent to inflict great bodily injury, but then undercut this by telling them that if Mathes did not want to hurt the police he did not have to fire at them and the fact that he pulled the trigger showed his intent. RP 750. He told the jurors that, whether or not Mathes wanted to kill the officers, he knew that he might hit and kill them. RP 752. In other words, even if he did not intend to inflict great bodily injury Mathes was guilty because he knew that this could happen. The prosecutor repeated this in rebuttal closing argument – that because Mathes pointed the gun at the officers, knowing a bullet would come out and that he might hit someone, this was enough to establish first degree assault. RP 771. This argument misstated the law and effectively told the

jurors that they could convict Mathes of first degree assault if he committed second degree assault.

As properly instructed, to convict Mathes of first degree assault, the state had to prove that he assaulted Deputies Herrin and Lont with a firearm and with the intent to inflict great bodily harm;[7] and to convict him of second degree assault the state had to prove only that he assaulted the deputies with a deadly weapon. CP 131-188 (Instructions 8 and 15). By arguing that by merely firing his revolver, Mathes was guilty of first degree assault, the prosecutor relieved the state of the burden of proving the intent element of first degree assault. Since the deadly weapon in the case was a firearm, the prosecutor's argument allowed the jury to convict Mathes of first degree assault if they found he was guilty of second degree assault.

Moreover, as the court properly instructed the jury "[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime. CP 131-188 (Instruction 11). Intent is distinct from knowledge, which is established when "[a] person is aware of a fact, facts or circumstances or result described by a statute defining an offense"; or "has information which would lead a

[7] Although the instruction for assault in the first degree included that alternative of inflicting great bodily harm, neither of the deputies was injured.

reasonable person in the same situation to believe that facts exist which facts are described by statute as defining a crime." RCW 9A.08.010 (b). By arguing that Mathes knew he might hit someone, the prosecutor told jurors that they could convict him of intending a result if he acted only with knowledge.

These arguments misstated the law and relieved the state of its burden of proof. An argument which misstates the burden of proof is misconduct and may be considered manifest constitutional error which can be raised for the first time on appeal. State v. Fleming, 83 Wn. App. 209, 315, 216, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

When a prosecutor fails to act in the interest of justice, he or she commits misconduct. This denies the accused a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1935) (the remarks of the prosecutor are reversible error if they impermissibly prejudice the defendant). Where there is a "substantial likelihood" that a prosecutor's misconduct affected the jury's verdict, the defendant is deprived of the fair trial he is guaranteed by the Fourteenth Amendment. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988).

Here there is a substantial likelihood that the pervasive error on one of the essential issues for the jury to decide affected the verdict. There was,

at best, conflicting evidence about whether Mathes intended to harm the deputies or whether his intent was to commit suicide. The prosecutor's argument falsely told the jurors that they need not resolve these issues, but find Mathes guilty because he fired his revolver. It is likely that the prosecutor's misconduct was deliberate and therefore "flagrant and ill-intentioned," because the prosecutor's misstatements were about basic aspects of criminal liability. Where the prosecutor's misconduct is flagrant and ill-intentioned and it is unlikely the prejudice could be cured, failure to object does not waive the issue on appeal. In re Glassmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2004). The prosecutor's misconduct in closing argument denied Mathes a fair trial.

b. The prosecutor improperly elicited a comment on Mathes's credibility.

Multiple incidents of a prosecutor's misconduct that, when combined, materially affect the verdict, deny the accused a fair trial and require a new trial. State v. Case, 49 Wn.2d 66, 73-74, 298 P.2d 500 (1956); State v. Henderson, 100 Wn. App. 794, 805, 998 P.2d 907 (2000).

Here, the prosecutor not only committed misconduct in closing arguments, but also asked Deputy Brittany Gray to comment on Mathes's sincerity when he asked if anyone was hurt. RP 492. After Gray testified that, while she was guarding Mathes in the hospital, he seemed genuinely

interested in knowing if anyone had been hurt. RP 492. To try to make sure that the jury did not take this as more than Mathes's wondering how much trouble he was in or perhaps even that he was hoping someone had been hurt, the prosecutor asked, as a follow-up, if Mathes "seemed to care" if anyone was hurt. RP 492. Gray answered that it difficult for her to say, but he definitely was interested in whether anyone was hurt. RP 492. This was misconduct.

It is misconduct to ask one witness to comment on the credibility of another witness. State v. Casteneda-Perez, 61 Wn. App. 354, 364, 810 P.2d 74 (1991). And here the prosecutor's question was clearly flagrant and ill-intentioned and could not have been cured by an instruction. The jury heard that Mathes perhaps did not care if he had injured anyone, and no instruction by the court would remove that information.

The misconduct in eliciting information about whether Mathes cared if anyone was hurt, especially together with the misconduct in closing argument, should require reversal of his convictions. Case, supra; Henderson, supra.

V. CUMULATIVE ERROR DENIED MATHES A FAIR TRIAL.

The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or

would independently warrant reversal. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d.297 (1973); Parle v. Runnels, 505 F.3d 922 (9th Cir., 2007). The combined effects of error may require a new trial even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996).

Even though the trial court's exclusion of Dr. Muscatel's testimony, the ineffective assistance of trial counsel in failing to request a voluntary intoxication instruction or suppression under CrR 3.1, and the prosecutor's misconduct each individually should require reversal of Mathes's convictions, these combined errors certainly require reversal and remand for a new trial.

VI. MATHES'S CONVICTIONS FOR BOTH FIRST DEGREE KIDNAPPING AND HARASSMENT VIOLATED HIS RIGHT AGAINT DOUBLE JEOPARDY; AT LEAST THE TWO CONVICTIONS SHOULD MERGE.

The jury was instructed that "[a] person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to inflict extreme mental distress on the person or a

third person." CP 131-188 (Instruction 22). "Abduct" was defined as "to restrain a person by using or threatening to use deadly force." Id. (Instrution 23). The jury was instructed that "[a] person commits the crime of harassment when he or she, without lawful authority, knowingly threatens to cause bodily injury immediately or in the future to another person and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out and the threat to cause bodily harm consists of a threat to kill the threatened person or another person." Id. (Instruction 34). Instruction 35 informed the court that the state was relying on one single act to constitute the crime. Id.

In closing, the prosecutor elected Mathes's act of harassment as when he first pulled the gun and threatened to kill Toste. RP 748. The prosecutor, however, did not elect an act for the kidnapping charge; the prosecutor argued only that Mathes abducted and obstructed her freedom with the intent to cause her mental distress and that he knew he had caused distress. RP 743-745. Thus the kidnapping and harassment could have been based on the same act – Mathes's pulling out the gun and threatening to kill Toste. Since harassment and kidnapping in the first degree do not each have an element that other does not have, and one cannot commit

kidnapping in the first degree without committing harassment, convictions for each violates the prohibition against double jeopardy.

The Fifth Amendment to the United States Constitution assures that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." Similarly, article 1, section 9 of the Washington Constitution guarantees that "[n]o person shall be ... twice put in jeopardy for the same offense." These provisions afford persons a constitutional guaranty against multiple punishments for the same offense.

Where, as here, the legislature did not expressly authorize multiple punishment for either crime, the court looks to see if the two crimes are the same in law and fact. State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 563 (2005). Crimes are same in law if proof of one necessarily proves the other. This is test is met for kidnapping in the first degree and harassment.

If the state proves that a person intentionally abducts another person, since "abduct" means "to restrain a person by using or threatening to use deadly force," the state has proven that the person has "knowingly threatened to cause great bodily injury immediately or in the future to another person and when he or she by words or conduct places the person threatened in reasonable fear that the threat will be carried out and the threat to cause bodily harm consists of a threat to kill the threatened person or another person."

The crimes are the same in fact because they are based on the same evidence. Louis, 155 Wn.2d at 569. For while the state elected an act for the harassment, it did not elect an act for the kidnapping. When Mathes first pulled the gun and threatened to kill Toste is the logical time to find that he kidnapped her. Nothing prevented the jury from relying on this act. Under these facts, conviction for both kidnapping and harassment violates Mathes's protection against double jeopardy. The harassment conviction should be reversed and dismissed.

VII. THE SENTENCES FOR MR. MATHES'S FIRST DEGREE ASSAULT CONVICTIONS SHOULD BE IMPOSED CONCURRENTLY RATHER THAN CONSECUTIVELY.

The trial court imposed Mathes's two first degree assault convictions to run consecutively under RCW 9.94A. 589 (1) (b), which provides that:

> Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct . . . sentences imposed . . . shall be served consecutively to each other. . .

(emphasis added).

Under the plain language of the statute it was error to impose the sentences consecutively in Mathes's case. The first degree assaults where the deputies were the alleged victims did not rise from "separate and distinct" conduct. The prosecutor conceded in closing argument that the

state did not prove that Mathes fired more than one shot in the direction of the two deputies. RP 751. The prosecutor argued that the jurors knew at least two shots were fired, one of them into the house. RP 751. He conceded, in argument, that Roy Mathes saw only one shot. RP 751.

Admittedly, the prevailing authority is that when offenses do not constitute "the same criminal conduct" they are not considered "separate and distinct" criminal conduct under RCW 9.94A.589. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). And crimes with separate victims are expressly not "the same criminal conduct" under the RCW 9.94A.589(1)(a), State v. Cubias, 155 Wn.2d 549, 120 P.3d 929 (2008).

Nevertheless, in this case the conduct was not "separate and distinct" because the state argued only that at least one shot was fired at the deputies. RP 751. And in Lessley, Cubias, and other cases relied on in Cubias, there was not just one shot fired. In Cubias, the defendant fired shots at all three of the victims. In In re Personal Restraint of Orange, 152 Wn.2d 795, 821, 100 P.3d 209 (2004), the defendant drove into a gas station and fired at least eleven shots. In State v. Wilson. 125 Wn.2d 212, 883 P.2d 320 (1994), the defendant fired several bullets into a tavern. Lessley involved a burglary which was held to be complete prior to two kidnappings of separate victims.

While one shot can support two convictions, <u>State v. Price</u>, 103 Wn. App. 845, 851, 14 P.3d 841 (2000), <u>review denied</u>, 143 Wn.2d 1014 (2001), one shot fired cannot be characterized as "separate and distinct criminal conduct."

The legislature chose to use two different qualifying descriptions in .589(1) (a) and (b) – "same criminal conduct" and "separate and distinct." "Same criminal conduct" is defined to include instances in which there are separate victims. "Separate and distinct" is undefined; it is not a term of art and should be given its plain meaning. Firing one shot is the antithesis of "separate and distinct." Random House Webster's Dictionary (2001) defines "separate," when used as an adjective, as meaning "not shared, individual," and "distinct" as meaning "not the same, different in nature or quality, dissimilar."

Where a statute's language is plain, it does not require construction. <u>State v. Wilson</u>, 125 Wn.2d 212, 217, 883 P.2d 320 (1994); <u>State v. Silva</u>, 106 Wn. App. 586, 591, 24 P.3d 477, 480 (2001) (when reading a statute, courts will not construe language that is clear and unambiguous, but will instead give effect to the plain language). Courts, when interpreting a criminal statute in particular, will give it a literal and strict interpretation; courts assume the legislature "means exactly what it says." <u>State v. Delgado</u>, 148 Wn.2d 723, 727-728, 63 P.3d 792, 795

(2003), quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)).

This Court should hold that Mr. Mathes's two first degree assault convictions, under the facts of the case, cannot be considered separate and distinct conduct and the sentences should run concurrently. The plain language of the statute should require such a holding under the facts of the case.

F. CONCLUSION

Appellant respectfully submits that his convictions, with the exception of the violation of a no contact order and unlawful possession of a firearm, should be reversed and remanded for retrial. At a retrial, he should be permitted to offer expert testimony on diminished capacity and his statements to the police at the hospital should be suppressed. In any case, his harassment conviction should be reversed and dismissed and his first degree assault convictions run concurrently.

DATED this 27th day of April, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 27th day of April, 2016, I caused a true and correct copy of the Opening Brief of Appellant to be served on Respondent via e-file to her office and to Appellant via first class mail.

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