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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS – cont'd

Page

TABLE OF CONTENTS – cont'd

TABLE OF AUTHORITIES

Page

WASHINGTON CASES:

FEDERAL CASES:

TABLE OF AUTHORITIES – cont'd

Page

STATUTES, RULES AND OTHER AUTHORITY:

A. ARGUMENT IN REPLY

1. RESPONDENT'S STATEMENT OF THE CASE MISCHARACTERIZES THE RECORD IN TWO IMPORTANT REGARDS: THE STRENGTH OF THE EVIDENCE OF MR. MATHES'S DISTURBED MENTAL STATE AND DR. MUSCATEL'S TESTIMONY ABOUT THE POSSIBILITY OF A DIMINISHED CAPACITY DEFENSE WITH REGARD TO THE SHOOTING CHARGES.

Mr. Mathes's defense at trial was that he did not possess the requisite mental states for the crimes charged against him. RP 761-766. Whether he possessed these mental states was the central issue for the jury to decide. The trial court, however, precluded Mr. Mathes from presenting a diminished capacity defense and the expert testimony of Dr. Kenneth Muscatel on this critical issue. RP 83-87. 107-110, 625-626.

And although respondent relies on the brief testimony of a convenience store clerk and the assertion that Michelle Toste's daughter Stephanie did not describe Mr. Mathes as having an altered mental state to argue otherwise, Brief of Respondent (BOR) at 8, clearly something was wrong with Mr. Mathes. Toste, his long-time girlfriend, and his own father were unambiguous in their testimony that he was not himself that night. Toste described him as not making sense, paranoid, hearing voices, acting irrationally and under the influence of drugs. RP 194-195. Mr. Mathes's

father described him as being "gone" and "not at home." RP 267. The state concedes that this testimony was given, but not its significance. BOR 6-7.

That Mr. Mathes was not himself was consistent with his long history of mental illness, bi-polar disorder, and a substance abuse illness which exacerbated the mental disorder and could have prevented him from forming requisite criminal intents, as Dr. Muscatel testified. RP 78-79. 83-87, 107-110625-626. Dr. Muscatel was clear that even though it would depend on the facts of the case whether Mr. Mathes's capacity was, in fact, sufficiently diminished during the charged incidents, the foundational elements of the diminished capacity defense were present. RP 87. 100.

Respondent focuses, not on this testimony, but instead on the prosecutor's cross-examination during the offer of proof, for its claim that Dr. Muscatel conceded that Mr. Mathes could not assert a diminished capacity defense for the counts involving the officers.[1] BOR 9-10. On redirect, however, Dr. Muscatel clarified that whether Mr. Mathes could assert a diminished capacity defense on these counts depending "on what he did," and that there was a potential for a diminished capacity defense on those counts. RP 100-101.

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[1] Respondent also relies on a report of Richard Yocum which is in the record as part of the Clerk's Papers. BOR 12. Respondent does not cite to consideration of the report in the verbatim report of proceedings and it does not appear that the trial court relied on this report in excluding Mr. Muscatel's testimony or a diminished capacity defense.

Later, Dr. Muscatel agreed that if the gun fired accidentally, then obviously there would not be a diminished capacity defense. RP 628. He reiterated in summing up, however, that whether there was a diminished capacity defense depended on the facts of the case:

> In terms of my overall opinion, I look at my results and it is essentially the same, that the elements of the mental disorder are very significant, and certainly were significant enough that they could have impacted his ability to form the requisite intent.
>
> But the other half of that assessment is going to be based on the facts of the case. And the facts of the case are jumbled enough that I cannot make that characterization for the court.
>
> So I still could not offer an opinion that he couldn't form the requisite intent. Nor could I offer that he could.
>
> Only to say that it seems pretty clear that he was in an impaired mental state. At the time that was pretty significant.

RP 629.

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

a. The trial court relied on the mistaken belief that Atsbeha and ER 401, 402 and 702 require an expert to testify to a reasonable certainty in order to give evidence in support of a diminished capacity defense.

Contrary to the argument of respondent, the trial court was laboring under the mistaken belief that State v. Atsbeha, 142 Wn.2d 904, 16 P.3d 626

(2001), held that an expert supporting a diminished capacity defense had to testify to a reasonable certainty. BOR 13-14; RP 107, 109

> [I]n the Atsbeha case which has been brought up a couple of times, the court says, as a foundational matter, you must have the witness who is testifying in this matter to be able to say that to a reasonable medical certainty the person was unable to form a specific intent, not just reduced perception, overreaction.

RP 107, 109.

The court also concluded that the absence of such certainty made the expert's opinion irrelevant under ER 401, 402 and 702.

> Again, I'm relying on the Atsbeha case and the testimony of Dr. Muscatel. He's not able to offer based on his testimony, I believe, any opinion as to whether or not Mr. Mathes was capable of forming the requisite intent. If he's not able to offer an opinion on then I don't believe it's relevant under 401, 402, and ER 702.

RP 641 (emphasis added).

The state, nevertheless, properly concedes that the test for the admissibility of expert testimony on diminished capacity is determined under ER 702 and the rules of relevance, not under the Edmon factors, from which the requirement that the expert "is able to testify to an opinion to a reasonable medical certainty" was derived. BOR 15; State v. Edmon, 28 Wn. App. 98, 102-103, 621 P.2d 1310 (1981) ; (See AOB 22-25). Thus respondent implicitly concedes that the trial court was mistaken in believing it necessary, as a threshold matter, for the expert to testify to a reasonable certainty. It should have conceded as well that lack of certainty does not

mean an expert's testimony is irrelevant, and that the degree of certainty goes to weight and not admissibility. Instead, respondent relies exclusively on the trial court's conclusion the Dr. Muscatel's lack of opinion on whether Mr. Mathes actually could form the requisite intent rendered his testimony irrelevant as its support for the court's ruling. BOR 19-21.

Respondent provides an extended discussion of the legal authority defining the diminished capacity defense as requiring expert testimony identifying a mental disorder which could have impaired the defendant's ability to form the intent to commit the crime charged and explaining how the disorder affects the capacity to form intent. BOR 16-18 (and cited cases). In applying this authority, however, respondent – like the trial court -- falls back on Dr. Muscatel's lack of an opinion on whether Mr. Mathes's capacity was sufficiently diminished to sustain the defense.

> In the present case, Dr. Muscatel's testimony fell well short of establishing the defense. Two passages from the testimony show the failure. First, when asked directly about the effect of Mathes's disorder on his capacity, Dr. Muscatel said "Would it impair him? Yes. Did it impair him, I don't know." 5RP 627. The doctor speculated that it would impair under given circumstances but failed to make the necessary connection that it did at the time of Mathes's criminal behavior, i.e., failed to connect Mathes's disorders to his mental state at the time of the offense and failed to explain why the disorder "would" impair and under what circumstances that would be the case. Second, the doctor said during the second offer of proof "[s]o I still could not offer the opinion that he couldn't form the requisite intent, nor could I offer that he could." 5RP 628. This admission clearly shows the doctor's inability to

> articulate an opinion as to Mathes's capacity during his crimes – he doesn't know if his capacity was diminished or if it was not.

BOR 19. In this passage, respondent concedes that Dr. Muscatel described circumstances under which Mr. Mathes's mental disorder would impair his ability to form intent: "The doctor speculated that it [his capacity to form intent] would impair under given circumstances. . . ." But concludes that this link was insufficient because Dr. Muscatel can't testify to a reasonable certainty, because "he doesn't know if his capacity was diminished or if it was not."

Dr. Muscatel's ability to describe how the mental disorder would impair Mr. Mathes's capacity to form intent was sufficient to justify the admissibility of his testimony. State v. Mitchell, 102 Wn. App. 21, 997 P.2d 373 (2000). In Mitchell, the court held that testimony to a "reasonable medical certainty" is not required for admission of expert testimony on diminished capacity, and the expert need only testify, as Dr. Muscatel did, that "it could have" resulted in diminished capacity.

> The jury, after hearing all of the evidence, may find probability, where the expert saw only possibility and may thereby conclude that the defendant's capacity was diminished even if the expert did not so concluded. Further, other evidence introduced at trial may provide the jury with more information about defendant's mental state than was available pretrial to the expert.

Mitchell, 102 Wn. App. at 28. The expert's inability to be certain goes to weight not admissibility. See, e.g., State v. Lord, 822 P.2d 177 (1991).

"The jury learns from the expert how the mental mechanism works, and then applies what it learns to all of the facts introduced at trial." Mitchell, at 27. This is what Mr. Mathes asked the trial court to allow Dr. Muscatel and the jury to do. The trial court erred in excluding the evidence because Dr. Muscatel did not testify to a reasonable certainty; this was not a threshold requirement of expert testimony on diminished capacity nor a requirement of relevancy.

b. Dr. Muscatel's offer was sufficient to establish the diminished capacity defense.

Contrary to the state's argument, the facts in Mr. Mathes's case are not analogous to the facts found insufficient to establish the diminished capacity defense in Atsbeha. BOR 13-14. In Atsbeha, the defendant intentionally sold drugs meaning to sell drugs and understanding that he was selling drugs, but sold them while mistakenly believing that he was helping a police officer capture a "main drug dealer" by doing so. The court held that, under these circumstances, a belief by Atsbeha about his relationship with the police officer was not evidence of impairment of his ability to form the intent to deliver the controlled substance. Atsbeha, 142 Wn.2d at 634-635. In fact, the expert testified that Atsbeha likely did have the intent to deliver the drugs, albeit to deliver them to an officer. Atsbeha, at 630-631.

In contrast here, Mr. Mathes's mistaken, evolving, distraught and paranoid beliefs about Toste, her daughter, his father, people he believed were chasing him and the officers at the house were that they presented various dangers to him, and these beliefs impaired his ability to form the intents to commit the charged crimes: intent to inflict great bodily harm, intent to inflict extreme mental distress, intent to place Toste in reasonable fear that a threat to kill would be carried out or intent to assault Toste or Roy Mathes with a deadly weapon. CP 133-188; State v. Ellis, 136 Wm.2d 498, 504, 963 P.2d 843 (1998) (to maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged).

The facts of this case are more analogous to the facts in Ellis, where the defense expert testified that "Defendant Ellis suffered from a borderline personality disorder and intermittent explosive disorder which would result in 'emotional discontrol,' and 'compromise[d] [Ellis's] perceptional process, his decision-making capacity and his ability to properly regulate his behavior.'" Ellis, at 520; Atsbeha, at 915.

Similarly, as Dr. Muscatel testified, there was ample evidence of Mr. Mathes's diminished capacity; he was delusional and paranoid in his thinking. As in Ellis, his perceptual process, decision-making capacity

and ability to regulate his behavior were compromised. The trial court erred in excluding Dr. Muscatel's testimony.

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

a. Respondent misstates the Strickland prejudice test for a claim of ineffective assistance of counsel.

Respondent incorrectly asserts that under Strickland v. Washington, 466 U.S. 668.104 S. Ct. 2053, 80 L. Ed. 2d 674 (1984), "[t]o establish the prejudice prong, the defendant must establish that but for counsel's unprofessional errors, the result of the proceeding would have been different." BOR 22. Strickland holds instead that the defendant shows prejudice if "there is a reasonable probability that, except for counsel's unprofessional errors, the results of the proceedings would have been different." Strickland, 466 U.S. at 687 (emphasis added). Specifically, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, at 695.

Mr. Mathes does not have to show that the result of trial would have been different had counsel requested a voluntary intoxication

instruction, only that there is a reasonable probability – something less than more likely than not – that it did.

b. Mr. Mathes was prejudiced by his counsel's failure to request or support an involuntary intoxication instruction.

Respondent's argument that Mr. Mathes was not prejudiced by his attorney's failure to request a voluntary intoxication instruction is that he was not prejudiced because defense counsel did not argue voluntary intoxication to the jury. BOR 23-28.

This argument misconstrues the issue on appeal. Counsel for Mr. Mathes clearly wanted to present a diminished capacity defense to the jury, but the trial court precluded it by excluding the testimony of Dr. Muscatel. Dr. Mustcatel's testimony and other evidence, however, established a basis for a voluntary intoxication instruction, akin to a diminished capacity defense, which fits the facts of Mr. Mathes's case and could have been raised without expert testimony. Mr. Mathes asserts on appeal that he was prejudiced by this attorney's failure to request a voluntary intoxication instruction so counsel could have argued that voluntary intoxication could be considered in determining whether Mr. Mathes formed or could form the particular intents of the crimes with which he was charged.

Defense counsel presented an offer of proof through Dr. Muscatel. Dr. Muscatel testified about Mr. Mathes's very serious substance abuse illness and that Mr. Mathes was "highly intoxicated" during the incident – sufficiently so that an insanity defense was unavailable. RP 78-83. Dr. Muscatel testified that the role of drug use was extremely significant and that "voluntary intoxication is a form of diminished capacity." RP 83-85.

As a proponent of the diminished capacity defense and Dr. Muscatel's offer of proof and proposed trial testimony based on the offer of proof, defense counsel had every reason to pursue a consistent voluntary intoxication instruction. Mr. Mathes was prejudiced by counsel's failure to do so.

And while respondent tried to minimize the importance of Mr. Mathes's drug use at the time of the incident, to show that counsel was not ineffective for failing to request an involuntary intoxication instruction, the record shows otherwise. BOR 24-25. Toste testified that she saw Mr. Mathes using drugs and that they were affecting his behavior. RP 195, 197, 236. She testified that he admitted he had been using drugs heavily for several months and hallucinating. RP 195, 197, 239-240. And she testified that he wanted her help in obtaining more drugs. RP 199.[2] Had

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[2] At sentencing, Mr. Mathes's family and friends spoke of his starting to drink and take drugs after a recent change of medication and how he was

counsel pursued a voluntary intoxication there almost certainly would have been more testimony about his intoxication. Moreover, respondent's further claim that Mr. Mathes was sober immediately after injecting drugs into his system is not convincing, BOR 24-25. It is likely Mr. Mathes had drugs built up in his system and may have taken additional drugs.

Mr. Mathes was charged with crimes with particular mental states; lay witnesses testified about his significant drug use and his mental impairment during the incident. He should have been able to argue that his intoxication should be taken into consideration in determining whether he had the required particular mental states. RCW 9A.16.090; State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984); Sate v. Gallegos, 65 Wn. App. 230, 238, 838 P.2d 37, review denied, 119 Wn.2d 1024 (1992).

Mr. Mathes was denied the effective assistance of counsel guaranteed by the Sixth Amendment and Article 1, section 22 .

4. MR. MATHES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY DID NOT SEEK TO SUPPRESS HIS STATEMENTS UNDER CrR 3.1.

Mr. Mathes has challenged the effectiveness of his counsel because his trial attorney did not cite CrR 3.1 as grounds for suppressing his statements made in the hospital, while he was closely attended by sheriff's

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not himself at the time of the incident. RP(sentencing) 18, 28, 33.

deputies and after having requested an attorney and not been provided with one. AOB 33-38.

Respondent's argument in response is that the requirements of CrR 3.1 were not triggered in Mr. Mathes's case because (1) his request for an attorney was equivocal and (2) because he re-initiated contact with the police after requesting an attorney. BOR 30-33. The record shows otherwise.

a. Mr. Mathes's request for an attorney was not equivocal.

Respondent's recitation of the facts and the record itself both belie the contention that Mr. Mathes's request for an attorney was equivocal. BOR 30. Although the transcript is somewhat unclear, it appears that Mr. Mathes first asked the deputy who came to his room as he was regaining consciousness if the deputy thought he should get an attorney. RP 52-54. But then, in any event, Mr. Mathes clarified to the deputy that "he should talk to an attorney." RP 54. When Mr. Mathes talked to his parents on the phone, the deputy overheard him reiterate that he thought he should talk to an attorney. RP 54. Again, the record is not entirely clear, but the deputy testified that Mr. Mathes "didn't say he was not requesting to speak – he didn't give me a yes or no answer at that time." RP 54-54. The deputy

continued, however, "But at some point he did request that the nurse call his attorney." RP 55.

This was not equivocal, just as was Mr. Pierce's statement that he was "gonna need a lawyer" was not equivocal in State v. Pierce, 169 Wn. App. 548, 545-546, 280 P.3d 1158, review denied, 175 Wn.2d 1025 (2012). Mr. Mathes did not use "if," "or," "maybe" or "perhaps," the indicators of equivocation noted in Pierce. At this point, CrR 3.1 required the deputy to make "reasonable efforts to contact an attorney." State v. Kirkpatrick, 89 Wn. App. 407, 415-416, 948 P.2d 882 (1997). Moreover, Mr. Mathes's request for help from the nurse showed that he clearly needed assistance to make contact with an attorney. RP 55. It was the responsibility of the deputy to help Mr. Mathes contact his attorney or another attorney if his attorney was not available.

After Mr. Mathes declared his desire to be in contact with counsel, the deputy was duty-bound by CrR 3.1 to use "any other means [in addition to providing access to a phone and appropriate phone numbers] necessary to place the person in communication with a lawyer." More needed to be done, just as providing a phone and the number of the public defender's office was insufficient in Pierce because the office was closed at the time. Pierce, at 548-49. The deputy failed to comply with CrR 3.1.

b. Mr. Mathes did not waive his rights under CrR 3.1 because he did not re-initiate contact with the police before the earliest moment contact with an attorney could have been provided.

With respect to respondent's assertion that Mr. Mathes re-initiated contact with the police and therby waived his rights under CrR 3.1, BOR at 33, respondent ignores the holding of State v. Kirkpatrick, that re-initiation of contact constitutes a waiver only if "the re-initiation occurs before the earliest opportunity to place the defendant in contact with an attorney." Kirkpatrick, 89 Wn. App. at 414; Pierce, at 550 n. 5. Here the earliest opportunity to place Mr. Mathes in contact with an attorney was when he first requested contact and even asked the nurse for the help he needed in making contact. Mr. Mathes did not waive his right to counsel by making statements to the deputies in his hospital room after that time.

c. The error and defense counsel's ineffectiveness in not moving to suppress under CrR 3.1 were not harmless.

The importance of having the cooperation and assistance of the deputies in contacting counsel at the earliest opportunity was critical in Mr. Mathes's case. At that time and throughout his stay in the hospital, Mr. Mathes was forced to be in close proximity with the police. He had no apparent privacy in which to speak with an attorney on the phone; the police made no effort to let him speak in private with his parents or with

the medical staff. RP 54-55. The deputies remained virtually at his side. They were able to keep him in the dark about the facts of his case and about the case the state was mounting against him. See e.g. RP 116-119. His right to meaningful contact with an attorney "immediately after arrest" under CrR 3.1 was essentially Mr. Mathes's only means of protecting his rights during his time in the hospital. Kirkpatrick, 89 Wn. App. at 413-414. The error in failing to comply with CrR 3.1 was not harmless. As a result, Mr. Mathes made statements which were used against him at trial. RP 749-752. His attorney was ineffective for failing to move to suppress these statements under CrR 3.1. See AOB 33-38.

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

a. The prosecutor's argument that "the very fact that he pulled the trigger tells you what his intent was" relieved the state of its burden of proving intent to inflict great bodily harm and was misconduct.

Mr. Mathes challenges the prosecutor's statements in closing and rebuttal arguments to the jury that he was guilty even if he did not intend great bodily injury because he knew it could happen. The prosecutor

noted that Mr. Mathes said that he intended only to hurt himself, and then continued:

> Well, when you go back to your definition of circumstantial evidence, and your common sense based upon the facts of what happened. The fact that the defendant is hiding behind a car and firing. He didn't want to hurt the police then he didn't need to fire.
>
> Simply put, his intent was not to hurt the police, then he didn't have to fire at him.
>
> The very fact that he pulled the trigger tells you what his intent was.

RP 750 (emphasis added). The prosecutor continued:

> Again, can we infer suicide. Maybe, maybe not. Again, can we infer suicide . . . Ultimately, it doesn't matter because suicide doesn't mean you didn't shoot at the deputies. You're still shooting at them. He still knows what happens when you shoot at people. You might hit them and you might kill them.

RP 752. The prosecutor repeated this argument in rebuttal.

> What was his intent? . . . The first is it doesn't matter if it was suicide or not because he pointed the gun at the deputies and he fired and when you point a gun at somebody and you pull the trigger you know what is going to happen. A bullet is going to come out, and you might hit them.

RP 771.

In spite of the express words telling the jurors that they could infer the relevant intent – the intent to inflict great bodily harm – from the fact of pulling the trigger, respondent argues that "the state merely argued the evidence and reasonable inferences therefrom." BOR 36. Further,

respondent doesn't acknowledge that the proper argument that a person can still intend to inflict bodily harm even if they are suicidal, is not the same as the argument that if you fire a gun in order to draw the fire of the police officers, you intend great bodily harm because you might hit them if you do, the argument the prosecutor actually made. BOR 37-38.

Respondent cites an unpublished portion of State v. Weatherwax, __Wn. App. _____ (May 3, 2016), for its statement that proof of firing a weapon at a victim is sufficient proof of intent to kill, and evidence of a "number of shots fired in the direction" of the victims was sufficient to establish the intent to inflict great bodily harm. BOR 34. This citation is not helpful. The state was not asking the jury to find only intent to kill, nor arguing that Mr. Mathes showed his intent to inflict great bodily harm because he fired a number of shots at the deputies. Like the trial prosecutor, respondent here is continuing to argue that the mere fact of firing in the direction of the officers, knowing someone could get hurt, is sufficient to establish intent to inflict great bodily injury. This is not the law. See AOB 40-41.

b. The prosecutor did not ask if Mr. Mathes seemed to care if he had hurt anyone to help the defense, nor did it help the defense.

With regard to the prosecutor's asking Deputy Brittany Gray to comment on whether Mr. Mathes "seemed to care" when he asked if

anyone was hurt, respondent contends, at great length, that it was helpful to the defense. BOR 39-41. According to respondent, "[t]he defense was pleased to have the evidence from which to argue against a finding of intent." BOR 40. But, of course, the reason the prosecutor asked if Mr. Mathes "seemed to care" was to try to undercut any inference that his questions showed genuine concern or the absence of any intent to inflict harm on the deputies. This question, just by being asked, was meant to stir the jurors to consider that questions about whether anyone was hurt might have been asked because Mr. Mathes wanted to know how much trouble he was in or perhaps even in hopes that someone had been killed. It was not asked to aid the defense.

c. The prosecutor's misconduct can be challenged on appeal and it denied Mr. Mathes a fair trial.

As set out in the Opening Brief of Appellant at 41-43, a prosecutor's misstatement of the burden of proof may be considered a manifest constitutional error which can be raised for the first time on appeal, State v. Fleming, 83 Wn. App. 209, 315, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997). And asking Deputy Gray to comment on the sincerity of Mr. Mathes's concern that he had injured someone was flagrant and ill-intentioned. This misconduct should require reversal of Mr. Mathes's convictions.

6. CUMULATIVE ERROR DENIED MR. MATHES A FAIR TRIAL.

For all of the reasons set out in Mr. Mathes's Opening Brief of Appellant at 43-44, the cumulative effect of the many errors in the case should require reversal of his convictions and a remand for retrial.

Respondent argues that the cumulative error doctrine is inapplicable because the evidence at trial was overwhelming and unrebutted; and, further, that allowing Mr. Mathes his diminished capacity and voluntary intoxication instructions would not have helped him because Dr. Muscatel could not give an opinion that Mr. Mathes was unable to form specific intents. BOR 43-45.

This argument instead highlights the overwhelming prejudice to Mr. Mathes of the exclusion of his diminished capacity defense – such that the jurors were unable to give any consideration to the evidence that he was clearly not himself at the time of the incident. It underscores how vital it was that Dr. Muscatel be able to explain to the jurors how Mr. Mathes's mental illness and drug illness diminished his capacity to form the requisite intents of the charged crime. It would have been the jurors' duty to apply this information to the facts of the case. Without it, they had no means of evaluating his actions in light of his unusual and unexplained mental state.

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

Respondent asserts that kidnapping in the first degree and harassment each have an element that the other does not, but concedes that if "the evidence required to support a conviction upon one would have been sufficient to warrant conviction on the other" convictions on both constitute double jeopardy. BOR 45-47 (quoting In re Personal Restraint of Orange, 152 Wn.2d 795, 820-821, 100 P.3d 291 (2004) (emphasis in the original). In fact, if a person commits the kidnapping, he or she would also be guilty of harassment and the evidence required to support a conviction of kidnapping in the first degree would be sufficient to support a harassment conviction.

As the jury was instructed, a person commits the crime of kidnapping in the first degree when they:

--intentionally restrains another person by using or threatening to use deadly force (abducts them);

--with intent to inflict extreme mental distress on the person or a third person.

CP 131-188 (Instructions 22-23).

If a person does these things, they necessarily have

--knowingly threatened to cause bodily injury immediately or in the future to another person; and

--by words or conduct place the person threatened in reasonable fear that the threat will be carried out.

--The threat to cause bodily harm consists of a threat to kill the threatened person or another person.

Id. (Instruction 34).

In arguing to the contrary, respondent – with one exception – focuses on requirements to establish kidnapping in the first degree beyond the requirements to establish harassment. BOR 45-46. The exception is the assertion that harassment requires reasonable fear that the threat will be carried out, while kidnapping does not.[3] BOR at 46. If, however, a person intentionally restrains another person by threatening to use deadly force, they have necessarily put them in reasonable fear that the threat to cause bodily injury will be carried out. Absent a reasonable belief that the threat will be carried out, the victim would not be restrained by a threat of deadly force.

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[3] Respondent also asserts, without citation to authority, that harassment requires a spoken threat. BOR 48. Counsel for Mr. Mathes has found no authority to support this assertion.

Kidnapping and harassment do not each have an element that the other does not have; and, in any event, evidence sufficient to prove kidnapping proves harassment. Here the prosecutor elected Mr. Mathes's harassment as when Mr. Mathes first pulled the gun and threatened to kill Toste. RP 748. The prosecutor argued only that he abducted Toste and obstructed her freedom with the intent to cause her mental distress and that he knew he had caused her distress. RP 743-745. Thus the kidnapping and harassment convictions could have been based on the same act; nothing prevented the jury from relying on the same act. The harassment charge should be reversed and dismissed.

The state charged Mr. Mathes with virtually every possible charge available; he was sentenced to a term of 60 years. CP 201-214. He should not have to serve two lengthy sentences for the same conduct.

8. SENTENCES FOR MR. MATHES'S FIRST DEGREE ASSAULT CONVICTIONS SHOULD BE IMPOSED CONCURRENTLY.

In closing argument, the prosecutor did not claim the state proved that Mr. Mathes fired two separate shots at the two deputies; he argued to the jury only that they knew at least one shot was fired at them. He said that there were at least two shots fired (and not more than five), but one of those two was fired into the corner of the house. RP 751. The other was the one seen by Roy Mathes fired in the direction of the deputies. RP 751.

The prosecutor referred to Mr. Mathes's saying he "emptied his gun," which suggested more than two shots, and then asserted that "he's pointing at the deputies but he's also just randomly firing." RP 751. Thus, while the prosecutor argued that as many as five shots may have been fired in some direction, he conceded that it was known only that at least one shot was fired toward that officers and another into the house. RP 751.

Thus, under the plain language of RCW 9.94A.589(1)(b), Mr. Mathes's convictions for first degree assault of the two deputies were not "arising from separate and distinct criminal conduct." This is because the state proved only that they arose from firing at least one bullet. See AOB at 47-50. The holding and analysis in In re Personal Restraint of Orange, 152 Wn.2d 795, 821, 100 P.3d 291 (2004), does not, as respondent asserts, conflict with this interpretation. See BOR at 49-50.

In Orange, the Court held that "firing the bullet that struck McClure was 'factually attenuated from the subsequent assault occurring when Mr. Orange re-aimed his gun to shoot the fleeing Mr. Walker.'" Orange at 821 (citing the lower court decision in the case, Orange, 110 Wn. App. 1086, 2000 WL 508351 at *6). That is, the first degree murder of McClure and the attempted murder of Walker did not take place at the same time, and "ar[ose] from separate and distinct criminal conduct," not

from the firing of a single bullet. Moreover, in Orange, where convictions for attempted first degree murder and first degree assault did arise from the same shot directed toward the same victim, the court held that the two convictions constitutes double jeopardy; they were the same in fact and in law. Orange. 152 Wn.2d at 820.

Mr. Mathes's first degree assault convictions should be served concurrently as they did not arise from separate and distinct conduct. See AOB 47-50.

B. 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 sentences for first degree assault convictions run concurrently.

DATED this 17th day of June, 2016.

Respectfully submitted,

Rita J. Griffith
RITA J. GRIFFITH
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 17th day of June, 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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Rita J. Griffith June 17, 2016
NAME DATE at Seattle, WA

GRIFFITH LAW OFFICE

June 17, 2016 - 2:06 PM

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