NO. 48401-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES CHARLES MATHES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00301-1

BRIEF OF RESPONDENT

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	Rita Joan Griffith 4616 25th Avenue NE # 453 Seattle, Wa 98105-4523 Email: griff1984@comcast.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 2, 2016, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

James Charles Mathes was charged by first amended information filed in Kitsap County Superior Court with two counts of first degree assault with firearm and law enforcement victim special allegations, two counts of second degree assault (in the alternative, same victims as first degree assaults) with firearm and law enforcement victim special allegations, first degree kidnapping with domestic violence and firearm special allegations, unlawful imprisonment (alternative to kidnapping, same victim) with domestic violence and firearm special allegations, assault in the second degree on Michelle Toste with domestic violence and firearm special allegations, assault second degree on Roy Mathes with domestic violence and firearm special allegations, felony violation of a court order with domestic violence and firearm special allegations, felony harassment with domestic violence and firearm special allegations, and unlawful possession of a firearm. CP 92-103.

At trial, lesser included offense instructions were given as to the first degree assault counts (second degree assault lesser includes at CP 147

and CP 153). And, a lesser included offense instruction on unlawful imprisonment was given with respect to the kidnapping count. CP 158. The jury found Mathes guilty on all the greater offenses as charged and answered all special allegations in the affirmative. CP 189-200. With the exception of the court order violation and harassment counts, which were sentenced below the standard range, Mathes received a standard range sentence totaling 720 months. CP 205. This included consecutive sentencing on the two first degree assault convictions. Id. Mathes timely filed a notice of appeal. CP 215.

Pretrial, a CrR 3.5 hearing was conducted. 1RP 30. Mathes had been shot by deputies during the incident and was hospitalized. Six deputies testified about statements made by Mathes while being transported to or while in the hospital. 1RP 33-72; 1RP 114-120. The trial court ruled that one statement made after a request to speak to an attorney was inadmissible (1RP 130) but that all other statements were subsequent to advisement of rights and were not responses to interrogation and were therefore admissible Id. No reference to CrR 3.1 is found in the CrR 3.5 hearing.

Among the issues litigated was the defense offer of the testimony of Kenneth Muscatel, Ph.D. in an attempt to establish a diminished capacity defense. Dr. Muscatel twice present offers of proof regarding

that defense, once pretrial and once near the close of the evidence. Each time, the trial court ruled that the testimony failed to meet Mathes's burden in asserting the defense. 1RP 107-110; 5RP 641.

B. FACTS

Space considerations require a brief summary of important substantive facts from the point of view of the primary victims; a more detailed account is found as warranted by the arguments.

Victim Michelle Toste had known Mathes for eight years. 2RP 188. She had a romantic relationship with him and they have a child in common. 2RP 188-89. On December 30, 2013, Mathes called Ms. Toste at about eight o'clock and wanted to see her. 2RP 190. Ms. Toste was aware of a no contact order prohibiting Mathes from contacting her. 2RP 191. He picked her up and the two went to his mother's house. 2RP 192. The two "messed around" and then talked. 2RP 194.

Mathes decided that Ms.Toste was lying to him about another man and pulled a gun from beneath the mattress. 2RP 195. He pointed the gun at her and led her to another room. 2RP 196. She was scared. Id. He wanted more drugs so she called her daughter hoping to hint that she needed help. 2RP 198-99. She could not say much on the phone because he had a gun to her head. 2RP 201. She was not free to leave and was suffering an anxiety attack. Id. Her daughter came to them at around 5:00 in the morning and Ms. Toste was able to whisper that Mathes had a gun.

2RP 202-03.

Eventually, they leave the house and travel in his car to get coffee and she tried to get the attention of the coffee people without success. 2RP 207-08. She could not directly ask for help because Mathes threatened to shoot her and anyone else present. Id. She believed him. Id. They then drove around and Mathes kept the gun between his legs. 2RP 209. Mathes fired the weapon and advised Ms. Toste that that could be her head. Id. Mathes drove around at high speed further scaring Ms. Toste. 2RP 215. Eventually, they return to Mathes's mother's house. Id. Its now about 12:00 noon. 2RP 216.

Soon, Mathes's father, Roy Mathes, arrived. 2RP 216. Inside, Mathes put the gun to his father's head. 2RP 217. Then, Ms. Toste's daughter, Stephanie, came to the house. 2RP 219. While Stephanie was there, Mathes forced Ms. Toste to sit in his lap with the gun in her back. 2RP 220. Mathes wanted Stephanie to get $20,000 so he could flee to Mexico. Id. Soon the 911 operator calls the house. 2RP 221. She told 911 that she was okay because Mathes had the call on speaker. 2RP 222.

The 911 operator advised that law enforcement was outside. 2RP 223. The four walk outside while Mathes askes Ms. Toste to get in the car. 2RP 223-24. Roy Mathes testified that he said that he, Roy, should move his car or "he's going to shoot her right on the spot." 2RP 269. She saw uniformed police outside and Mathes got in the car. 2RP 227. Then,

"Jim gets out of his car and fires at the cops." 2RP 229. He fired the gun three or four times and Ms. Toste and her daughter ran. 2RP 230. Ms. Toste heard law enforcement return fire. 2RP 231. Ms. Toste saw Mathes on the ground having been shot and Mathes called out to his father "I love you pops, that bitch deserved what she got." 2RP 236.

Law enforcement had approached the house with caution, ther being no cover on approach to the house. 3RP 349-50; 352. When the people came out of the house, they were commanded to show their hands. 3RP 354. The two victim deputies, Herron and Lont, were together in the driveway. 3RP 355. Then, "all of a sudden, he stands up out of the car and he immediately turns towards us after getting out of the car and takes that traditional two-handed shooting stance and he's got something metallic in his hand and he's right over the car, right pointed towards us." 3RP 358. Deputy Herron was "absolutely convinced" that Mathes was going to shoot them. 3RP 359.

1. **Mathes's Mental State**

The defense offered the testimony of Kenneth Muscatel, Ph.D. The state responded with a report from Richard Yocum, Ph.D., a psychologist from Western State Hospital. CP 58.

(a) Lay Witnesses

Victim Michelle Toste described Mathes as not himself. RP. He was not making sense when he phoned her in the evening. 2RP 191. They

drove to Mathes's mother's house without incident. 2RP 193. There, Mathes's crimes began when he pulled a gun when Ms. Toste denied that she was having an affair with someone else. 2RP 194-95.

Ms. Toste believed he was under the influence of drugs. Id. She had seen him shoot drugs into his arm. 2RP 213. She thought it was heroin and that it affected his subsequent behavior. 2RP 237. He held the gun to her and moved her to the living room because he was hearing things. 2RP 196.

After holding Ms. Toste at gun-point for hours while they drove around, they went to Mathes's house. 2RP 214. When asked if he seemed rational at this point, she said he seemed nervous and paranoid. Id.

Later, at Mathes's mother's house, Mathes held the gun to his father's head. Id. Ms. Toste said that when this all happened Mathes was acting different. 2RP 239. She said it wasn't Jim and he was paranoid and may have been hallucinating. 2RP 239-40. When asked if she thought he knew what he was doing, she said she didn't know. 2RP 240.

Mathes's father, Roy Mathes, testified to events when he arrived at the house. 2RP 264. Mathes stuck a gun in his side. 2RP 265. They went in the house and Mathes pulled out the gun and pointed it at his father. 2RP 266. They sat down and Roy looked in Mathes's eyes and "there was nobody home there … He was gone." 2RP 267.

The defense called Janelle Jones. 5RP 668. She was working at a

convenience store on the date of the incident. 5RP 669. She saw Mathes in her store that day. 5RP 670. She came to work at around 12:30 that day. Id. Mathes purchased cigarettes and two Icies. 5RP 671. Jones had known Mathes as a regular customer for over a year. Id. Mathes was "just normal, happy, joking around." Id. He didn't seem to be under the influence of anything and acted "just normal." 5RP 674. Mathes did not seem stressed or paranoid. 5RP 675. Mathes was able to complete the store transaction and appropriately drive away. 5RP 676.

Ms. Toste's daughter, Stephanie Vierra, testified to contact with Mathes at his home (2RP 286) and at his mother's house just before the shooting. 2RP 288. She made no mention of any odd or delusional behavior by Mathes when she saw him. Similarly, several deputies who were assigned to guard Mathes while he was in the hospital, who had conversations with him and observed his behavior at the hospital, made no remark about disorganized, delusional or otherwise odd behavior by Mathes.

(b) Expert Witnesses

Pretrial, the defense made the first of two offers of proof from Dr. Muscatel. 1RP 76. He concluded that Mathes had a chronic mental disorder and a very serious substance abuse problem. Id. The doctor noted a history of diagnoses that included post-traumatic stress and schizophrenic disorder but found the first to be circumstantial and found

no evidence of schizophrenia. Id. He believed that bipolar disorder is the most accurate reflection of Mathes's mental difficulties. Id.

Mathes was "certainly not psychotic in his presentation to me." 1RP 80. On testing, Mathes was "really making a strong presentation that he has problems, which of course meant I was going to interpret these results with caution." Id. Testing showed antisocial behavior and an aggressive attitude. Id.

Dr. Muscatel viewed his job regarding diminished capacity as "were they capable of intention, intending to engage in this kind of behavior." Id. Diminished capacity here may be the difference between "intent to assault versus an intent to defend oneself." 1RP 85. "But it's a difficult line to cross, and there has to be a lot of evidence for that." Id. This difficult line to cross was the crux of the matter:

> And thus, while his behavior was clearly intentional in the general sense, the question is whether he could have formed the intent to assault as opposed to engage in a bizarre version of self-defense. That's the only way that I think diminished capacity could possibly apply in this matter.

1RP 87. And, "The question in this case is whether that prevented him from forming the requisite intent. *That I could not answer for the court.*" 1RP 88-89 (emphasis added).

When presented with the information that Janelle Jones had testified to, Dr. Muscatel believed that that was useful information that suggested that the highly disorganized, highly agitated, confused state

were not present at that time just before the shooting. 1RP 91. Further, Jones' observations were inconsistent with Mathes's self-description. 1RP 92.

With regard to counts 1, 2, 3, and 4 the doctor admitted that he could not establish diminished capacity; the behavior on those counts appearing to be intentional conduct. Id. Regarding counts 5 and 6, kidnapping and unlawful imprisonment, there were "at least some foundational elements." 1RP 93. On count 7, assault on Ms. Toste, there are "foundational elements" and similarly on count 8, assault on his father. Id. Regarding count 9, violation of no-contact order, the doctor admitted that diminished capacity was not a defense and on count 10, harassment, the foundational elements were weaker; all you have to do is know you are saying the words and "I think that I would not be able to indicate diminished capacity in that regard." 1RP 94. The doctor took no position on count 11, unlawful possession of a firearm.

Thus, Dr. Muscatel agreed that his opinions were limited to counts 5, kidnapping first degree, 6, unlawful imprisonment, 7, assault second degree, and 8, assault second degree. 1RP 95. The doctor admitted that acting in self-defense is generally intentional behavior. Id. The doctor surmised about how a delusional urge to defend one's self, as opposed to being aggressive and hostile, "could raise at least the argument of diminished capacity." 1RP 96. Further, the doctor conceded that some of

Mathes's behaviors were inconsistent with defending himself. 1RP 97. The doctor also conceded that even if Mathes believed he was defending himself that would merely "raise the possibility of a diminished capacity." 1RP 98.

When Dr. Muscatel was asked whether the assaults and kidnapping were intentional acts done in a delusional world, he responded "[p]otentially, yes." The doctor was asked "you would not be able to give an opinion in terms of his ability to form intent, is that right?" 1RP 99. He responded "correct." Id. And, again, he was asked "In terms of those counts, 5, 6, 7 and 8, if I asked you, do you have an opinion if the defendant was able to form intent, your testimony would be you don't have an opinion?" He responded "[t]hat I don't know, correct." Id.

The defense presented Dr. Muscatel in a second offer of proof near the end of trial. 5RP 625. He had been provided a transcript of Ms. Toste's testimony. 5RP 625. He opined that Toste's testimony reinforced his previous testimony that Mathes has a mental disorder. 5RP 626. He was asked directly whether the disorder would impair Mathes's ability to form the culpable mental state. 5RP 626-27. The doctor said "would it impair him? Yes. Did it impair him? *I don't know*." 5RP 627 (emphasis added). The doctor maintained his original testimony that he would find no diminished capacity with regard to the shootout with police. 5RP 628. At bottom, Dr. Muscatel said that his opinion from his earlier testimony

had not changed. Id. "So I still could not offer the opinion that he couldn't form the requisite intent, nor could I offer that he could." Id.

Appended to the state's briefing on the diminished capacity issue is the report of Richard Yocum, Ph.D., a licensed psychologist employed at Western State Hospital. CP 58. Dr. Yocum's 15 page report details his contact with Mathes and his opinions regarding this incident and whether or not Mathes's capacity was diminished. This doctor concluded that"[m]y review of the available information fails to establish that Mr. Mathes' capacity to act intentionally or knowingly was impaired with respect to the alleged offenses." CP 78. Dr. Yocum found that Mathes's own description of the events supported his conclusion, saying "[i]n Mr. Mathes' account he provided numerous instances of acting in a manner that suggests he possessed the capacity to form intent and act in a goal directed manner to achieve a result." CFP 72. The doctor's forensic application of his opinions was tied to the appropriate legal standard by his reference to "*State v. Atsbeha,* (2001) 142 Wn.2d 904." CP 71.

III. ARGUMENT

A. THE OPINIONS OF MATHES'S EXPERT WITNESS ON DIMINISHED CAPACITY WERE INSUFFICIENT TO ESTABLISH THE DEFENSE AND WERE THEREFORE NOT HELPFUL TO THE TRIER OF FACT AND PROPERLY EXCLUDED.

Mathes argues that the trial court erred by excluding the testimony of Dr. Muscatel regarding the defense of diminished capacity. He claims that the trial court erred in excluding that testimony because the doctor did not testify to a reasonable degree of medical certainty. Brief at 22. This claim is without merit because Dr. Muscatel's offer was insufficient to support a diminished capacity defense whether by a reasonable medical or psychological certainty and the trial court so found.

First, the assertion that the trial court excluded the testimony because not offered to a reasonable degree of medical certain is simply incorrect. The trial court did mention that the first offer of proof omitted testimony that Dr. Muscatel held his opinions to a reasonable degree of medical certainty.[1] 1RP 109. However, the trial court was abundantly clear that its ruling was based on the Supreme Court's analysis in *State v. Atsbeha,* 142 Wn.2d 904, 16 P.3d 626 (2001). 1RP 110. The trial court found the *Atsbeha* case analogous to the case before the court. Id. The

[1] In his second offer, Dr. Muscatel testified that his opinion was based upon reasonable psychological certainty "since I'm a psychologist." 5RP 627.

evidence suggested that Mathes was influenced by delusion and mental incapacity "to some extent." Id. But, "he clearly acted with intent." Id. Moreover, "[h]e may have believed that his intentional acts were lawful, but that's not sufficient for diminished capacity." Id. In that manner, the trial court excluded the diminished capacity defense; not as a result of the failure of an arguably unnecessary flourish about the level of certainty.

Following the defense second offer of proof, the trial court affirmed its prior ruling. 5RP 641. The judge again relied on *Atsbeha, supra.* Id. Of Dr. Muscatel, "[h]e's not able to offer based on his testimony, I believe, any opinion as to whether or not Mr. Mathes was forming the requisite intent." Further, "[i]f he's not able to offer an opinion on that, I don't believe it's relevant under 401, 402 and ER 702." Id. The trial court, then, excluded the testimony based on its appraisal of controlling authority and its findings that the doctor's testimony was insufficient under the rules of evidence that apply, not on any of the criteria from *State v. Edmund,* 28 Wn.App. 98, 621 P.2d 1310 (1981), *rev denied* 95 Wn.2d 1019 (1981).

This properly constituted and correct ruling is subject to an abuse of discretion standard of review. *State v. Ellis,* 136 Wn.2d 498, 523, 963 P.2d 843 (1998). Thus Judge Hull's ruling must be affirmed unless no reasonable person would view the evidence as he did. Id.

1. Due Process.

In *State v. Ellis, supra,* the test for admissibility of expert testimony on the issue of a defendant's capacity changed. The test moved from the ten so-called *Edmund* factors to an evidence rule approach. Thus rather than reviewing the ten factors a trial court should determine admissibility "under ER 702 and application of ER 401 and 402." 136 Wn.2d at 523. Then, assuming admissibility under those rules, the trier of fact is allowed to exercise its role in deciding the weight and value of that evidence. Id. at 521.

Due process, the defendant's right to maintain a defense, is implicated in considering admissibility of evidence on this mental health defense. *See Rock v. Arkansas,* 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). But the *Ellis* Court cited the United States Supreme Court's pronouncement that the Due Process Clause does not grant an accused an absolute right to introduce all relevant evidence. 136 Wn.2d at 519, *citing Montana v. Egelhoff,* 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996). In particular, "[t]he accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Id. (second bracket in original). Without expressly so stating, the *Ellis* court concluded that its evidence rule based test comports with Due Process; proper application of the

evidence rules on the question of admissibility does not offend the defendant's constitutional right to present a defense. *See also Daubert v. Merell Dow Pharmaceuticals, Inc,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) (applying the same test, ER 401, 402, and 702, in deciding the admissibility of all scientific evidence). However, under the somewhat unique circumstances in *Ellis*, application of the *Edmun* test, and the trial court ruling thereon, was questionable with regard to the defendant's right to assert a defense. Id. Herein, the trial court's proper reliance on *State v. Atsbeha, supra,* and the test from *Ellis* used there, should raise no Due Process concerns.

2. The Diminished Capacity Defense.

Admissibility concerns aside, it must be noted that neither *Ellis* nor subsequent cases following it, changed the substance of the diminished capacity defense. The *Ellis* Court's formulation is that "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 specific intent to commit the crime charged." 136 Wn.2d at 521, *accord State v. Atsbeha,* 142 Wn.2d 904, 914, 16 P.3d 626 (2001). Another formulation is that "[d]iminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to

commit the crime charged." *State v. Bottrell,* 103 Wn.App. 706, 712, 14 P.3d 164 (2000) *rev denied* 143 Wn.2d 1020 (2001), *citing State v. Warden,* 133 Wn2d 559, 564, 947 P.2d 708 (1997). Further, "[w]hen specific intent or knowledge is an element of the crime charged, a defendant is entitled to present evidence showing an inability to form the specific intent or knowledge at the time of the crime." Id., *citing Edmun, supra.*

Again, in *State v. Johnson,* 150 Wn.App. 663, 670, 208 P.3d 1265 (2009) *rev denied* 167 Wn.2d 1012 (2009), the court said "[t]he diminished capacity defense allows a defendant to undermine a specific element of the offense, a culpable mental state, by showing that a mental disorder rendered him incapable of having the required level of culpability." *Citing State v. Gough,* 53 Wn.App. 619, 622, 768 P.2d 1028 (1989) *rev denied* 112 Wn.2d 1026 (1989). Although pre-Ellis, and citing *Edmund,* the *Gough* Court thoroughly provided the law on point

> Diminished capacity arises out of a mental disorder, usually not amounting to insanity, that is demonstrated to have a specific effect on one's capacity to achieve the level of culpability required for a given crime. Evidence of such a condition is admissible only if it tends logically and by reasonable inference to prove that a defendant was incapable of having the required level of culpability. Existence of a mental disorder is not enough, standing alone, to raise an inference that diminished capacity exists, nor is conclusory testimony that the disorder caused a diminution of capacity. The testimony must explain the connection between the disorder and the diminution of capacity.

53 Wn.App. at 622 (internal citation omitted), *accord State v. Atsbeha,*

supra. The propositions there asserted have not changed under *Ellis*. It is still the case that the mere assertion of a mental disorder is alone insufficient. Even under a test focused on relevance and the helpfulness of the evidence to the trier of fact, proffered evidence should allow a logical and reasonable inference proving the defendant incapable of forming the necessary intent. Moreover, testimony that does not demonstrate a connection between the disorder and the diminution of capacity simply is not testimony about diminished capacity and is thus irrelevant to the task; else it would be a defense that the defendant simply has a mental disorder. *State v. Stumpf*, 64 Wash.App. 522, 528, 827 P.2d 294 (1992) ("[t]o support a diminished capacity instruction, there must not only be substantial evidence of the mental disorder, but the evidence must also explain *the connection between* the disorder and the diminution of capacity." (emphasis added)).

The law of diminished capacity and considerations controlling its admissibility under the evidence rules require a demonstrable link between that particular illness and the failure to have the requisite culpable mental state. Thus the *Ellis* formulation requires proof that the defendant was in fact "impaired." Or, as in *Bottrell,* "prevents" the defendant from forming intent, the evidence needing to prove "inability" to form the requisite intent. Or, again, in *Johnson* the mental problem must render the

defendant "incapable" of having the required culpable mental state.

In the present case, Dr. Muscatel's testimony fell well short of establishing the defense. Two passages from his testimony show this failure. First, when asked directly about the effect of Mathes's disorders on his capacity, Dr. Muscatel said "Would it impair him? Yes. Did it impair him? I don't know." 5RP 627 (emphasis added). 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 offenses 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.

Under the *Ellis* test, then, the testimony was not relevant, a doctor's testimony that he does not know the answer to the question has no tendency to make any fact of consequence more or less probable. ER 401. And, admission of such irrelevant evidence would not be helpful to the trier of fact. ER 702. In fact these two rules act together in this

analysis:

> Under ER 702, expert testimony will be considered helpful to the trier of fact only if its relevance can be established. "[I]t is not enough that ... a defendant may be diagnosed as suffering from a particular mental [disorder]. The diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime." The opinion of an expert concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged.

*State v. Atsbeha, supra, (*internal citation omitted) *citing State v. Green,* 139 Wn.2d 64, 984 P.2d 1024 (1999), *reversed sub nomine, Greene v. Lambert,* 288 F.3d 1081 (9th Cir. 2002) (affirming the United Staes District Court's granting of habeas corpus relief). The trial court's reliance on *Atsbeha* includes the reasoning of that case; reasoning that clearly militates against admissibility.

Significant in this record, the doctor decidedly could not render an opinion of diminished capacity on a significant portion of Mathes's criminal behavior even as he tried but failed to establish it on other offenses. The doctor conceded that his testimony about the potential of diminished capacity applied to counts 5, 6, 7, and 8 only. He could not render a capacity opinion regarding the rest of the crimes. Count 5 was kidnapping first degree with Ms. Toste as the victim. Count 6 was unlawful imprisonment with Ms. Toste as the victim (essentially an alternative to count 5). Count 7 was assault second degree again with Ms.

Toste as the victim, with the state electing among the many possible assaults on her that this was at the mother's home right before the shootout with police. 5RP 747. And count 8 was second degree assault on his father, Roy Mathes, again at the mother's house just before the shootout. So, according to Dr. Muscatel, Mathes may have lacked capacity early in the event on the night he abducted Ms. Toste and may have lacked capacity much later at his mother's house when he committed second degree assaults against Ms. Toste and his father. But moments later he had capacity when he intentionally leveled his gun at and fired upon the police. Absent any testimony as to how Mathes's capacity could be so evanescent, this testimony lacks credibility and relevance. Without some expert explanation, the jury would have been confused and misled, being only able to speculate as to how this might occur. ER 403.

There is no doubt in this record that Dr. Muscatel is a qualified expert who offered scientific testimony. But his opinions completely failed to provide the court with the necessary connection between Mathes's mental problems and his capacity during his crime spree; there is no "forensic application" of his science to Mathes's particular state of mind at the time of his offenses. Dr. Muscatel's testimony was properly excluded.

B. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST A VOLUNTARY INTOXICATION INSTRUCTION BECAUSE THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THAT INSTRUCTION.

Mathes next claims that he received ineffective assistance of counsel because defense counsel failed to request a jury instruction on voluntary intoxication. This claim is without merit because evidence that Mathes was intoxicated is not substantial or capable of establishing that intoxication affected his ability to form intent.

A claim of ineffective assistance is reviewed de novo. *State v. White,* 80 Wn.App. 406, 410, 907 P.2d 310 (1995). A defendant asserting ineffective assistance must show both deficient performance by counsel and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687. 104 S. Ct. 2053, 80 L. Ed. 2d 674 (1984). The S*trickland* test is highly deferential and the defendant must overcome the strong presumption that counsel's performance was reasonable. *State v. Breitung,* 173 Wn.2d 393, 400-401, 267 P.3d 1012 (2011). Legitimate trial strategy does not prove deficient performance. Id. To establish the prejudice prong, the defendant must establish that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland* 466 U.S. at 694. If the defendant fails to establish either prong of the test, her claim fails. *State v. Hendrickson,* 129 Wn.2d 61, 78 917 P.2d 563 (1996).

Mathes argues that his counsel hamstrung his arguments to the jury by not availing himself of a voluntary intoxication instruction where "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." Brief at 28. The state respectfully disagrees. Regarding kidnaping, the defense argued that Mathes did not inflict extreme mental distress on Ms. Toste. 5RP 761. This, said the defense, is evidenced by the fact that the two had sex twice during that night and by the fact that he took her for coffee at her usual coffee outlet. Id. Further, the argument is based on her lack of credibility in asserting that he drove at 100 miles per hour without stopping during a three hour time period. Id. The argument includes the testimony of Ms. Jones at the Highway Market that at that point Mathes seemed "normal to her." 5RP 762. Finally, the argument relies on alleged testimony of Ms. Toste that she was not in fact abducted: "I suggest to you, ladies and gentlemen, that she was not abducted." Id.

Thus regarding kidnapping, the defense made no reference to the use of, or impairment by the use of, intoxicants. In fact, save for a reference to the element of intent at the outset, the defense made no argument about Mathes's intent regarding kidnapping. And, similarly, there is no mention of intent or intoxication with respect to the crime of

harassment. 5RP 762-63. The defense argued that Ms. Toste had opportunity to flee the situation and did not fail to flee because she was threatened by Mathes. Id. Again, no mention of intent or intoxication.

On first degree assault, the defense again relied on arguments unrelated to intoxication. The defense does question the intent to inflict great bodily harm. 5RP 764. However, in arguing against that finding the defense points out that his father, Roy Mathes, saw but one round fired by Mathes and that shot was fired in the air. 5RP 763. Further, the defense relied on Mathes's hospital question to the police as to whether anyone was hurt. 5RP 764. Then, the main thrust of the defense is argued--"suicide by cop." Id. Finally, the defense notes that Deputy Herron seems mistaken by his testimony that he engaged in a second round of firing at Mathes and that Trooper Green was mistaken as to the contents of an exhibit envelope during his testimony. Id. Once again, there is no mention of intoxication and certainly not that intoxication undercut Mathes's intent.

The defense did not argue drug use because it was not supported by the evidence. Mathes argues here that "drug and alcohol abuse was extremely significant because Mathes was intoxicated during the incident." Brief at 28. But the state can find no reference to alcohol use in the record. And, there is only one reference to Mathes using drugs, when

Ms. Toste saw him shoot up once early on in the incident. 2RP 213. Early on, when he pulls the gun from beneath the mattress, she testified that he was under the influence "at that time." 2RP 195. But then we can reasonably infer that Mathes was out of drugs; he asked Ms. Toste to get more. 2RP 198. By 2 o'clock in the morning, he is having Ms. Toste seek more drugs from Hannah, her daughter's best friend. 2RP 199 (phone call around 2 a.m., 2RP 251). There are no facts establishing drug intoxication after 2 a.m. and the shooting incident is more than 10 hours away.

The defense in fact elicited the testimony of the store clerk, Ms. Jones, who made no notice that Mathes was intoxicated at a time very near to the time of the shooting. Ms. Toste made no mention of getting more drugs and Mathes using them. His father did not say that Mathes seemed intoxicated. The record simply does not provide substantial evidence that supports an assertion that Mathes was intoxicated when he assaulted Ms. Toste, Roy Mathes, and the deputies.

Voluntary intoxication is often referred to as a defense in the cases but provides only that such may be considered on the issue of intent:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

RCW 9A.16.090. In order to receive an instruction, the defense must

show that "(1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking [or drug use], and (3) the defendant presents evidence that the drinking [or drug use] affected [the defendant's] ability to acquire the required mental state." *State v. Everybodytalksabout,* 145 Wn.2d 456, 479, 39 P.3d 294 (2002). The defense has the burden to produce sufficient evidence of intoxication to put the matter in issue in seeking the instruction. *See State v. Carter,* 31 Wn.App. 572, 575, 643 p.2d 916 (1982). "Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth or correctness of the matter." *Pacific Topsoils, Inc. v. Washington State Dept. of Ecology*, 157 Wn.App. 629, 238 P.3d 1201 (2010); *see also State v. Paul,* 64 Wn.App. 801, 806, 828 P.2d 594 ("substantial evidence has been described as evidence sufficient to persuade a fair-minded person of the truth of the declared premise."). "[T]he evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." *State v. Gabryschak*, 83 Wash.App. 249, 252-53, 921 P.2d 549 (1996).

These principles were applied in *State v. Kruger,* 116 Wn.App. 685, 67 P.3d 1147 (2003) *rev denied* 150 Wn.2d 1024 (2003). Kruger's conviction was reversed because his counsel failed to request a voluntary intoxication instruction. Id. at 695. Kruger was in fact "drunk." The

court found "ample evidence of his level of intoxication on both his mind and body, e.g., his "blackout," vomiting at the station, slurred speech, and imperviousness to pepper spray." Id. at 692. Moreover, "every witness testified to Mr. Kruger's level of intoxication." Id. at 693. Significantly, the *Kruger* Court ruled without reference to the closing arguments of counsel. Id. at 695 (Brown, J. dissenting).

In the present case, we have seen that defense counsel did not argue intoxication in closing. This is easily understood by the lack of substantial evidence that for the large part of this case Mathes was not in fact intoxicated. On this record, at least 10 hours had passed since Mathes used drugs. And, contrary to *Kruger,* most witnesses failed to remark that he was intoxicated, including his own father. And, finally, the witness called by the defense, Ms. Jones, who observed Mathes close to the time of the shooting, said nothing about intoxication. This is not evidence sufficient to persuade a fair-minded juror of the truth of the premises that Mathes was intoxicated. Moreover, there was certainly no evidence adduced that proved a logical and reasonable connection between intoxication and an alleged failure of Mathes to form intent.

Kruger should have gotten the instruction because he was demonstrably drunk. In *State v. Hackett,* 64 Wn.App. 780, 827 P.2d 1013 (1992), the defendant should have gotten the instruction because he was

demonstrably intoxicated on drugs--cocaine. When contacted by police, "Hackett's hand was shaking, his limbs and lips were blue, his general appearance was unkempt, and he looked forward almost the entire time, never looking directly toward Shaw." Id. at 781-82. A forensic toxicologist opined that "Hackett's levels of the cocaine and cocaine metabolites alone were consistent with a lethal level." Id. at 783. Another expert testified that his substantial cocaine use had caused him to hallucinate and that he had no memory of the incident that got him arrested. Id. at 783-84. There is no such testimony in this case. Mathes used once late in the night or in the early morning hours long before the shooting.

Substantial evidence does not support a voluntary intoxication instruction. There is insufficient proof that Mathes was in fact intoxicated. No evidence supports the necessary connection between intoxication and a failure to form intent. The trial court would have been in error in giving such an instruction. Trial counsel did not err in failing to request one. Mathes's ineffective assistance claim fails. Further given the overwhelming weight of evidence against Mathes, if counsel was deficient, his error caused no substantial prejudice. *See* argument section E, *infra* at 43.

C. THE COURT RULE RIGHT TO COUNSEL WAS NOT VIOLATED WHERE MATHES WAS REPEATEDLY ADVISED OF HIS RIGHTS, HAD UNFETTERED USE OF A TELEPHONE AND THE ASSISTANCE OF MEDICAL STAFF AND TOLD THE POLICE THAT HE HAD AN ATTORNEY.

Mathes next claims that counsel was ineffective because he did not raise CrR 3.1 as an argument to suppress statements made by Mathes while he was in the hospital. This claim is without merit because the Mathes was freely able to use a hospital telephone and because Mathes advised law enforcement that he already had an attorney.

The right to counsel under CrR 3.1 is not compelled by either the state or federal constitutions. *State v. Tempelton,* 148 Wn.2d 193, 211-12, 50 P.3d 632 (2002). The rule is procedural, flowing from our Supreme Court's statutorily granted rule making authority. Id. at 217. The rule provides a right to counsel immediately upon arrest, unlike the constitutional provisions which demand the provision of counsel upon custody and interrogation (Fifth Amendment) or the initiation of judicial proceedings (Sixth Amendment). Id. at 218-19; *see also State v, Jaquez,* 105 Wn.App. 699, 714, 20 P.3d 1035 (2001). Thus a defendant must be advised of the right to counsel "immediately after arrest." The purposes of the rule is to "provide a meaningful opportunity to contact a lawyer." *Jaquez* 105 Wn.App at 715 *quoting State v. Kirkpatrick,* 89 Wash.App.

407, 413–14, 948 P.2d 882 (1997).

For CrR 3.1 to apply a defendant must unequivocally request an attorney. *State v. Pierce,* 169 Wn.App. 533, 545, 280 P.3d 1158 (2012) *rev denied* 175 Wn.2d 1025 (2012). Thereafter, the police are not bound to actually connect an arrestee with counsel; the rule is satisfied if the police make "reasonable efforts" to contact counsel. *State v. Kirkpatrick,* 89 Wn.App. 407, 414, 948 P.2d 882 (1997) *rev denied* 135 Wn.2d 1012 (1998). Thus as a threshold matter, Mathes must show an unequivocal request for counsel.

Here, according to the testimony in the CrR 3.5 hearing, Mathes first asked the deputy in his hospital room if he should get an attorney. 1RP 54. He was again advised of his rights. Id. Then, he said that he thought he should talk to an attorney. Id. Following this exchange, Mathes, who had unfettered use of a telephone, called his father and mother. Id. On the question of speaking to an attorney "he didn't give a yes or no answer at that time." 1RP 54-55. Then, Mathes requested that a nurse call his attorney. Id. at 55. Another deputy testified that she read Miranda warnings, Mathes said he wanted to speak to an attorney "but then proceeded to go ahead and make an unsolicited statement to me." 1RP 116. The deputy inquired as to who his attorney was. 1RP 117. Mathes answered that he only shot because he saw no other way and that

he didn't want to hurt anyone. Id. at 118. Then Mathes said that he had said too much and "should wait for my attorney." Id. at 119 (emphasis added). The deputy asked if he had been in contact with his attorney and he said his attorney's office was closed and his dad would get ahold of his attorney on Monday (the statements made were on Friday). Id.

On this record, then, Mathes was equivocal about wanting the deputies to contact an attorney for him. When one deputy asked directly, she got no answer. Mathes then repeatedly referred to "his' attorney, clearly implying to the officers that he already had one. This is further shown by his discussion with his father about getting in touch with his attorney. Further, he clearly had access to a telephone that the police did not need to provide because the hospital did and nothing in the record reflects that the deputies guarding him restricted his phone use in any way. And, Mathes could and did seek assistance from medical staff in contacting "his" attorney. The question thus becomes whether the deputies had a CrR 3.1 duty to provide him contact with an attorney where Mathes knew of his right to one by multiple advisements of his rights, he evinced understanding of the right by asserting that he should talk to his attorney, he had unfettered access to a telephone allowing unfettered communication with his family and anyone else he desired to call, and when the deputies inquired, he made it clear that he already had an

attorney.

Since the CrR 3.1 right to counsel is not grounded on the demands of the constitutions, a violation of the rule need not be shown harmless beyond a reasonable doubt but, rather, the harmless error standard that requires a showing of prejudice when "within reasonable probabilities [if] the error [had] not occurred, the outcome of the trial would have been materially affected." *Templeton,* 148 Wn.2d at 220 (brackets by the court), *accord State v. Jaquez, supra* at 716. Where the arrestee has been advised of her right to counsel "right now" and the arrestee fails to request counsel, the rule is satisfied. Id. at 221. Moreover,

> "Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly." In ruling on suppression a court should consider: (1) the effectiveness of the less severe sanctions; (2) the impact of suppression on the evidence at trial and the outcome; (3) the extent to which the objecting party will be surprised or prejudiced by the evidence; and (4) whether the violation was willful or in bad faith. Suppression is a harsh remedy to be used sparingly only where justice so requires and not where error is harmless.

Id. (internal citation omitted). Further,

> Additionally, three factors are significant when considering if there was error: (1) no harm resulted from the officers' violation of CrR 3.1(c)(2) because no statement was made by Kirkpatrick at the officers' initiation, insistence, or suggestion before Kirkpatrick waived his right to counsel by initiating conversation; (2) Kirkpatrick did invoke his right to counsel, which demonstrated his intelligence and his knowledge and understanding of the right; and (3) the advice of counsel to invoke his rights, which the majority says he was denied, would have been redundant since that is precisely what he did.

State v. Kirkpatrick, 89 Wn.App. 407, 417, 948 P.2d 882 (1997) (Bridgewater, J. concurring). Here, the facts show no bad faith by the deputies and show that Mathes understood his rights. He invoked his need to speak with "his" attorney but choose not to invoke his equally clearly advised right to remain silent.

In *State v. Mullins,* 158 Wn.App. 360, 241 P.3d 456 (2010) *rev denied* 117 Wn.2d 1006 (2011), Mullins, having been arrested for murder, "who previously had invoked his right to counsel, voluntarily made a series of incriminating statements in [the presence of arresting officers]" during the booking process. Id. at 362. He claimed that those statements should have been suppressed because he was not immediately placed in contact with counsel. Id. An arrestee may waive his CrR 3.1 right by "voluntarily initiating communication with police." Id. at 366. Such waiver of a court rule right nonetheless must be knowing, intelligent and voluntary. *See e.g., Kirkpatrick, supra* at 415-16. Under the circumstances of *Mullins*, the court held that "[d]espite the reminders from the detectives that he had requested an attorney and could wait quietly in the adjoining room, Mullins began to talk and thus waived his rights under CrR 3.1." Similarly, in the present case, Mathes was repeatedly reminded of his rights by attending officers, clearly understood those rights, and continued to talk, thus waiving his CrR 3.1 right.

Under these circumstances, defense counsel was not ineffective for not raising a non-constitutional claim that was not supported by the record. Deficient performance is not established. Furthermore, given that the defense used Mathes's hospital bed remarks to his benefit and given the overwhelming weight of the evidence against him, prejudice cannot be shown. *See* argument regarding weight of the evidence *infra* at 43.

D. THE CLAIMS OF MISCONDUCT WERE NOT PRESERVED, WERE NOT MISCONDUCT, AND, EVEN IF IMPROPER, WERE NOT PREJUDICIAL.

Mathes next claims that there was prosecutorial misconduct in arguing that shooting at police officers shows intent to cause great bodily harm and in eliciting testimony about the defendant's credibility. These claims are without merit because the evidence argued does tend to prove the intent of Mathes and not that knowledge is a substitute for intent and because eliciting testimony of a defendant's demeanor when he had asked a deputy a question is not a comment on credibility.

1. Closing Argument

To prevail on a claim of prosecutorial misconduct during closing argument, a defendant must prove that the prosecutor's remarks were both improper and prejudicial. *State v. Allen*, 182 Wash.2d 364, 272–73, 341 P.3d 268 (2015), *citing State v. Thorgerson*, 172 Wash.2d 438, 442, 258

P.3d 43 (2011)). Failure to object to alleged improper remarks constitutes waiver of the error unless the remarks were so flagrant and ill-intentioned that they cause an enduring and resulting prejudice that could not be cured by an instruction to the jury. *Thorgerson*, 172 Wash.2d at 443. To avoid waiver, a defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012), *quoting Thorgerson*, 172 Wn.2d at 455.

The effect of a prosecutor's alleged improper conduct is to be viewed in the context of the trial as a whole—the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Monday*, 171 Wash.2d 667, 675, 257 P.3d 551 (2015) A prosecutor is entitled to point out the improbability or lack of evidentiary support for the defense theory of the case. *State v. Russell*, 125 Wash.2d 24, 87, 882 P.2d 747 (1994). A prosecutor has wide latitude to comment on the evidence introduced at trial and to draw reasonable inferences from the evidence. *Thorgerson*, 172 Wash.2d at 448. The "mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense." *State v. Jackson*, 150 Wash.App. 877, 885–86, 209 P.3d 553

(2009). An attorney may argue a reasonable interpretation of the law, but "[a] prosecuting attorney commits misconduct by misstating the law." *In re Pers. Restraint of Cross*, 180 Wash.2d 664, 726, 327 P.3d 660 (2014).

First, Mathes lodged no objection during the state's closing argument. He must, therefore, show that the state's arguments were flagrant and ill-intentioned and that there is a substantial probability that the argument had a prejudicial effect on the jury. But here the state merely argued the evidence and reasonable inferences therefrom. Moreover, there was no need for a curative instruction because there was no misconduct to cure. Even so, a curative instruction here would have merely been an iteration of instructions already given—that the arguments of counsel are not evidence and that the jury is to take the law as instructed by the court.

The argument complained of, taken in the context of the all the evidence and arguments, went to a primary element the state had to prove in the case—Mathes's intent when he shot at the police. The prosecutor asked the rhetorical question "Did he have intent to inflict great bodily harm?" 5RP 748-49. The argument noted that Mathes was "hiding behind the car, reaching over the top, and firing at them." 5RP 749. Thus "the defendant intended great bodily harm." Id. These remarks prefaced the next, "when you pull the trigger on a gun, you know what the result

is." Id. This remark prefaced in turn the argument that "the trigger wasn't accidently pulled" and the reaching over the car with the gun and pointing it at the officers was similarly not accidental. Id. The prosecutor then addressed what Mathes had said about not wanting to hurt anyone by noting that "then he didn't have to pull the trigger." 5RP 750. And, "the very fact that he pulled the trigger tells you what his intent was." Id.

So it can be seen that the prosecutor's closing addressed the evidence in the case and addressed the potential for a defense argument of accident. The "you know what the result is" language is merely a truism about pulling triggers on loaded guns, not an attempt to lower the standard of culpability from intent to knowledge. In his rebuttal, the prosecutor was put to the task of rebutting the defense argument that Mathes intended suicide by cop. The state maintained that pointing and firing the weapon proves intent. 5RP 771. And the prosecutor made no argument concerning proof of knowledge being sufficient instead of intent. Rather, he notes other evidence that established intent like that Mathes wanted to go out with guns a blazing and that Mathes was trying to flee as evidenced by his command that his father should move his car and that Ms. Toste should get in Mathes's car. Id. at 773. Counsel's argument aptly met the defense argument. Moreover, the prosecutor's argument that you know what's going to happen, what the risks are, when you fire a gun at another

is a correct statement of the law; one thing that will happen is that you will prove intent as an element of first degree assault.

The Court of Appeals recently supplied a holding that appears to have been written for the present issue

> "Proof that a defendant fired a weapon at a victim is, of course, sufficient to justify a finding of intent to kill." State v. Hoffman, 116 Wash.2d 51, 84–85, 804 P.2d 577 (1991). Evidence of the number of shots fired in the direction of Mr. Stromberg and Ms. Smith sufficed to establish the required intent to inflict great bodily harm."

State v. Weatherwax, ___ Wn.App. ___, ___P.3d ___ (May 3, 2016). The quote simply needs to replace the victims in *Weatherwax* with the names of the deputies in this case to be a rather perfect fit. Further, that holding is a particular application of the more general rule that "intent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability.'" *State v. Vasquez*, 178 Wn.2d 1, 8, 309 P.3d 318 (2013), *quoting State v. Woods*, 63 Wn.App. 588, 591, 821 P.2d 1235 (1991). Herein, and in accord with these principles, the state argued that Mathes's behavior with the gun proved his intent to do great bodily harm. It is but icing on the intent cake at that point to argue that Mathes knew what would or could happen when he fires a loaded gun at someone. Of course he knew that and in doing the act he clearly proved his intent as a matter of law. There, was no misconduct in arguing these issues. Even if a

highly technical parsing of the argument focusing exclusively on the argument that Mathes knew what would happen if he fired a gun seems close, given the law on the point it is clearly not ill-intentioned. Mathes did not preserve this issue for review.

1. **Comment on Credibility**

Mathes claims that the state elicited a comment on his credibility when the prosecutor asked a police witness whether Mathes seemed genuine when he asked if anyone had been injured by his actions.

First, there was no objection. Mathes has failed to preserve this issue. RAP 2.5; *see State v. Klok,* 99Wn.App. 81, 992 P.2d 1039 (2000) *rev denied* 141 Wn.2d 1005 (2000) (prosecutor comment on defendant's demeanor during closing not constitutional error and not preserved because of failure to object). Moreover, it can be seen that the failure to object in this context was for tactical reasons. The defense could not have been dismayed by the testimony that Mathes was concerned about the safety of others involved in this incident. It fit well with the assertion of suicide by cop as a defense. Thus,

> One of the reasons for placing the burden on the defense to object in the course of argument is that the defendant and defense counsel are the persons most acutely attuned to perceive the possible prejudice of the prosecutor's remarks. The absence of an objection in this case indicates that the comment, at the time it was made, did not strike Klok or his attorney as being unfair or untrue.

Klok, 99Wn.App. at 86. Had the jury believed Mathes's hospital bed concerns were extant at the time of the incident, the defense would have been a leg up in its attempt to persuade the jury that Mathes did not intend to inflict substantial bodily harm on the deputies. And so the defense argued:

> Now, when you look at all of the testimony as it relates to that particular issue, whether he intended to inflict great bodily harm, think of the statements made while Mr. Mathes is in the hospital to Deputy Adams and Deputy Gray. The statements he made while he was there, did I hurt anybody? I certainly didn't want to, especially I didn't want to hurt the police.

5RP 764. The defense was pleased to have that evidence from which to argue against a finding of intent. And evidence as to Mathes's demeanor when he made the remark could well have bolstered that argument.

Further, the usefulness of this evidence to the defense is underlined by the cross examination of Deputy Adams

> Q. Deputy, isn't it true that Mr. Mathes brought up more than a couple times about his concern about anybody got hurt?
> A. Yes.
> Q. There was a number of times during a period of time you were there, correct?
> A. That's correct.
> Q. Didn't he also tell you that his intention was to hurt himself, not anybody else, especially the police? If you look on your report, the paragraph in the middle.

A. That's correct, he did. He said he did what he did because he wanted to get hurt himself, not hurt a cop.

4RP 504-05. Again, asking the question about Mathes's demeanor when he asked the question played into the defense hand. The defense knew it wanted this evidence and thus would not have objected to the state's demeanor question for tactical reasons. Moreover, the use of these statements by the defense was to its advantage on the defense theory of the case and thus was in no way prejudicial to Mathes. The defense failed to preserve this issue for good reason and it should not be reviewed.

The question asked, whether Mathes seemed to care whether others were hurt, went to his demeanor in making the statement, not to his credibility. *See State v. Barry*, 183 Wn.2d 297, 309, 352 P.3d 161 (2015) ("We also hold that demeanor is not inherently testimonial and that a generic reference to the defendant's "actions-demeanor" therefore does not implicate the Fifth Amendment."). Mathes's questions about others were just that, questions. Linguistically speaking it is odd to ask whether a question is true or false. Here, the state sought to establish his demeanor while he was asking the question. *See Barry*, 183 Wn.2d at 311 ("while facial expressions and body language might reveal someone's "state of mind" in the most general sense, they do not communicate specific "factual assertions" or "thought.""). Mathes's questions were admissible

and the jury considered the weight to be given that evidence in light of the defense theory of the case.

The jury was of course charged regarding its role in assessing the value and weight of the evidence. CP 133 (WPIC 1.02). Since the complained of remarks were questions about what happened in the incident, the jury would know that Mathes had no opportunity to observe the answer or to accurately observe the events and the low quality of his memory is exposed in the asking. In order for the jury to assess the weight and value to be given, it needed to know "the manner of the witness while testifying." This is equally important whether the witness is *sub judice* or not. The state's question could not, then, have gone to the truth or falsity of Mathes's questions, since questions are neither true nor false, but instead went to his manner or demeanor in the asking.

This situation, then, does not rise to the level of a bad faith seeking of an opinion on Mathes's credibility. Arguably, the question did not even call for an opinion but rather asked the witness to recount her observations. See *State v. Demery*, 144 Wn.2d 753, 760 30 P.3d 1278 (2001) (defining opinion testimony as testimony based on one's belief or idea rather than direct knowledge of facts in issue). Further, the deputy stopped short of giving an opinion, instead indicating that it was difficult to say whether he cared but that he was certainly interested. 3RP 492.

When there is no objection and the question asked cannot be characterized as flagrant and ill-intentioned, Mathes has the burden of showing

> a constitutional error and [showing] how the alleged error actually affected [his] rights at trial. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review.

State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Here, as argued above, evidence of Mathes worrying about other people being hurt actually enured to the benefit of the defense. No actual prejudice can be found. If the state's question was misconduct, there also was no prejudice. This claim fails.

E. THE TRIAL WAS NOT FUNDAMENTALLY UNFAIR AND OVERWHELMING UNTAINTED EVIDENCE SUPPORTED EACH CONVICTION.

Mathes next claims that cumulative error prejudiced his right to a fair trial. This claim is without merit because no reversible errors obtain and any error that might be found did not result in prejudice to Mathes in light of the overwhelming evidence against him.

Mathes must show that his trial was "fundamentally unfair" because of cumulative error. *State v. Emery,* 174 Wn.2d 741, 766, 278 P.3d 653 (2012). This he cannot do. Moreover, the cumulative error doctrine is inapplicable when the evidence is overwhelming against the defendant. *In re Cross,* 180 Wn.2d 664, 690, 327 P.3d 660 (2014). Here,

the state's case was essentially unrebutted. There was little or no challenge of the evidence establishing each count. There was no contesting that he unlawfully possessed a firearm, used it to assault and kidnap Ms. Toste while in her presence in violation of a no-contact order, used it to assault his father, and used it to fire upon the deputies. The testimony that he threatened to kill Ms. Toste is similarly unrebutted. The one witness called by the defense served only to establish his lack of diminished capacity and lack of intoxication a short time before he committed all the assaults mentioned.

Moreover, the evidence remains overwhelming even if arguably tainted evidence is withdrawn from the analysis. *See, e.g., State v. Keodara,*191 Wn.App. 305, 317-18, 364 P.3d 777 (2015) (in considering the harmlessness of constitutional error, reviewing court determines whether untainted evidence overwhelmingly established guilt). Remove Mathes's hospital bed statements, and the testimony of the witnesses still overwhelmingly, and without rebuttal, supports conviction on each count. Remove the prosecutor's question about Mathes's question and there is no effect on the evidence of guilt. Remove the hospital remarks and you remove what was likely Mathes's best argument. Allow a voluntary intoxication instruction and the evidence is still insufficient to allow a finding that intoxication affected his intent. Finally, allow Dr. Muscatel to

testify and his testimony will still include that he cannot given an opinion that Mathes was in fact unable to form intent or an opinion on how his mental health problems caused that inability.

There was overwhelming unrebutted evidence against Mathes. Thus the cumulative error doctrine does not apply. There were no errors here that made his trial fundamentally unfair. He is not entitled to a new trial based on cumulative error.

F. NO DOUBLE JEOPARDY VIOLATION OCCURS WHERE THE TWO CRIMES ARE NOT THE SAME IN LAW OR IN FACT.

Mathes next claims that his convictions for first degree kidnapping and harassment violate double jeopardy and should merge for sentencing. This claim fails because the two offenses are not the same in law or fact.

The elements of kidnapping first degree were given in instruction 24: (1) that Mathes "intentionally abducted Michelle Toste"; (2) that Mathes "abducted that person with intent to inflict extreme mental distress on that person or a third person"; and (3) that the acts occurred in Washington. CP 157; *See* RCW 9A.40.020(1). Instruction 23 provided that "'Abduct' means to restrain a person using or threatening to use deadly force." "Restraint or restrain means to restrict another person's movements without consent and without legal authority in a manner that interferes substantially with that person's liberty." CP 156.

The elements of harassment were given in instruction 36: (1) that Mathes "knowingly threatened to kill Michelle Toste immediately or in the future"; (2) "that the words or conduct of [Mathes] placed Michelle Toste in reasonable fear that the threat to kill would be carried out"; (3) "that [Mathes] acted without lawful authority"; and, (4) that the acts occurred in Washington. CP 169; *see* RCW 9A.46.020. A "*Petrich* instruction" was given regarding harassment. CP 168. Harassment is not a lesser included offense of kidnapping. Kidnapping requires abduction while harassment does not. Harassment does not even require the immediate presence of the actor while an abduction is highly unlikely by telephone. Kidnapping may include a threat of deadly force but there is no requirement of reasonable fear as with harassment. Moreover, kidnapping requires that the abduction be with intent to inflict emotional distress but no such intent element appears in harassment. One crime requires such specific intent while the other requires that the actor simply knows he said the words. These crimes are simply not the same in law.

The double jeopardy clauses of the United State and Washington constitutions provide coextensive protection. *State v. Gocken,* 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). The provisions protect citizens from a second prosecution after acquittal, a second prosecution after conviction, and multiple punishments for the same offense. Id. at 100. Mathes claims that the third protection was violated in this case. The test of *Blockburger*

v. United States, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932), is used to determine whether or not the legislature has authorized multiple punishment for the same criminal act. Under *Blockburger*, the two crimes are not the same offense if each crime requires proof of an element not found in the other offense. 284 U.S. at 304. As the comparison above shows, kidnapping first degree and harassment have elements that are substantially different from one another. Simply put, kidnapping requires abduction with intent (as charged here) to inflict emotional distress while harassment does not. And, as shown, harassment requires reasonable fear while kidnapping does not. The two crimes are therefore not the same under *Blockburger* and convictions for both offenses do not offend double jeopardy.

But double jeopardy may be offended if the evidence proving one crime also proved the second crime; the question being whether the two crimes are the same "in fact." *In re the Personal Restraint of Orange,* 152 Wn.2d 795, 820-21, 100P.3d 291 (2004). In *Orange,* defendant was charged with attempted first degree murder and first degree assault from a single shot fired at the same victim. The *Orange* Court reviewed the *Blockburger* "same elements" test and held that it entails a situation where "*the evidence required* to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other." Id. at 820 (emphasis by the court), *citing State v. Reiff,* 14 Wn.

664, 667, 45 P. 318 (1896). By this test, the Court held there was a double jeopardy violation, saying that "[t]he two crimes were based on the same shot directed at the same victim, and the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault." 152 Wn.2d at 820.

In the present case, the two offenses do not dovetail as they did in *Orange*. Displaying the firearm is sufficient to establish the kidnapping element of threatened use of deadly force. However, no display of a firearm was necessary to establish the threat to kill that is an essential element of harassment. Absent the spoken threat necessary for harassment, kidnapping can still be proven. Proving harassment, then, does not serve to prove an element of kidnapping. Conversely, harassment could occur by the threat to kill without the display of deadly force, the gun, used to establish the element of kidnapping. Either way, the two crimes are and were subject to independent proof; proving one does not prove the other even though in this event the proof may overlap. The offenses are not the same in fact or in law and convictions for both does not offend double jeopardy.

G. BECAUSE THERE WERE SEPARATE VICTIMS TO EACH COUNT OF ASSAULT FIRST DEGREE, SENTENCES FOR THOSE TWO CONVICTIONS WERE PROPERLY RUN CONSECUTIVE TO EACH OTHER.

Mathes next argues that his two convictions for first degree assault were not separate and distinct and therefore that his sentences for those two convictions should have run concurrently, not consecutively. This claim has no merit as there were two separate victims of Mathes's two first degree assault convictions.

First, Mathes makes much of his father's testimony that he, the father, saw only one shot fired by Mathes. But the state argued that Mathes in fact said that he "emptied his gun," and that what Roy Mathes said "can't possibly be true" as at least one other shot went into a nearby house. 5RP 751. It is simply incorrect to assert that the state conceded that only one shot was fired. Brief at 47-48. Roy Mathes's testimony must of course be viewed with caution as his obvious bias in favor of his son may have led him to minimize his son's behavior. Suffice it to note that there was substantial evidence in the record that Mathes fired more than one shot. And, also contrary to Mathes's position, the prosecution argued that "at least two shots were fired, maximum of five shots." 5RP 751. Thus Mathes's reliance on the one shot analysis in the cases is misplaced. Moreover, in *Orange*, there was not need to parse disputed testimony because the state had expressly charged both assault and attempted murder

from the same shot.

> Under former 9.94A.400(1)(b) (1990) [now RCW 9.94A.589 (b)(1)], "[w]henever a person is convicted of two or more serious violent offenses ... arising from separate and distinct criminal conduct," the sentences "shall be served consecutively to each other." Offenses arise from separate and distinct conduct when they involve separate victims. Because the offenses in counts one and two involved different victims, McClure and Walker, the court properly ordered Orange to serve the sentences consecutively.

Orange 152 Wn.2d at 821(internal citation omitted). Thus, how ever a dictionary defines the word "separate" or the word "distinct," the two victims, Deputies Herron and Lont, were separate and distinct victims being themselves individual and not the same as each other. Mathes's serious violent convictions for assaulting each one of these separate victims properly resulted in consecutive sentences.

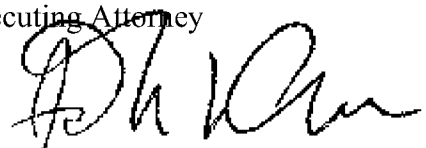
IV. CONCLUSION

For the foregoing reasons, Mathes's conviction and sentence should be affirmed.

DATED June 2, 2016.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney



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