

No. 49812-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent

v.

ROMEEN SABAHI, Appellant

APPEAL FROM THE SUPERIOR COURT OF CLARK COUNTY

THE HONORABLE ROBERT LEWIS

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The trial court erred when it entered Finding of Fact 11.

(Appendix: CP 280).

B. The trial court erred when it entered Finding of Fact 12.

(Appendix: CP 280).

C. The trial court erred when it entered Conclusion of Law 6.

(Appendix: CP 281).

D. The trial court erred when it entered Finding of Fact 4.

(Appendix: CP 281).

E. The trial court erred when it entered Finding of Fact 5.

(Appendix: CP 281).

F. The trial court erred when it entered Conclusion of Law 3.

(Appendix: CP 282).

G. The trial court erred when it entered Conclusion of Law 4.

(Appendix: CP 282).

H. The trial court erred when it entered Conclusion of Law 8.

(Appendix: CP 282).

I. The trial court erred when it admitted officer statements because it violated Mr. Sabahi's Fifth Amendment right not to incriminate himself.

- J. The evidence was insufficient to sustain convictions for first degree assault because in a state of delirium, acute psychosis, and toxic encephalopathy, Mr. Sabahi could not form the requisite intent for the crimes.
- K. This Court should decline to impose appellate costs if the State substantially prevails on appeal and submits a cost bill.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. A defendant shall not be compelled in any criminal case to be a witness against himself. U.S. Const. amend. V. Using a totality of the circumstances test, were the statements Mr. Sabahi made in response to officer questioning wrongly admitted because they were involuntary testimonial statements for purposes of the Fifth Amendment?
- B. Is the evidence insufficient to establish intent to commit first degree assault where the defendant provides evidence of the well-documented effects of his prescribed medications Ambien and Halcion, evidence he could not be “awakened” or respond and was diagnosed as suffering from acute psychosis?
- C. Under RAP 14.2 and 15.2, this Court presumes a continued indigency for the appellant. Should this Court decline to

impose appellate costs if the State substantially prevails on appeal and submits a cost bill?

II. STATEMENT OF FACTS

Romeen Sabahi¹ was the third son born to Iranian parents, and the only child born in the United States. RP 305; 307. His older brothers became physicians. He trained and worked as a physician's assistant, practicing first in Southern California and later in Las Vegas, Nevada. RP 308-309; 610.

In 1996, he was attacked and severely beaten. RP 610. His jaw, nose, and teeth were broken and he had complex lacerations which required surgery. He was diagnosed with post-concussive syndrome. CP 21. Because of the attack his cognitive functioning declined and his migraine headaches worsened. RP 668; CP 21.

Eight years later he stopped working because of the disabling headaches. CP 21. He supported himself on a Social Security Disability Income. CP 21. Both of his brothers suggested that he may have Post Traumatic Stress Disorder from the attack, but he did not seek mental health services. CP 21.

¹ Because the victims share the same last name as the appellant, they will be referred to by their first names for the sake of clarity. No disrespect is intended.

Romeen's fiancée passed away in October of 2015, after a three-year battle with a rare type of lung cancer. RP 610. After her death, he moved to Vancouver, Washington, to live with his parents, Ahmad and Minou Sabahi. RP 862. He isolated himself in his room; his parents brought food to him. CP 25. As his physical condition deteriorated and he experienced symptoms of multiple sclerosis, Romeen became increasingly depressed. RP 610; CP 21.

Romeen was prescribed various medications including Ambien for sleep, and Neurontin and Topamax for the headaches. RP 561. He also had a prescription for Halcion. CP 39. His depression worsened and his family believed he was suicidal. RP 611, 752, 863, 866. In the early morning of November 28, 2015, about six weeks after his fiancée's death, Romeen reportedly took Ambien², 46 tablets of .25 mg of Halcion, Norco³, and Tylenol 3. CP 30; RP 798-99, 804. He wanted to die⁴. CP 48.

² Ambien is the brand name for Zolpidem, a hypnotic drug prescribed as a sleep aid. CP21, 40.

Halcion is the brand name for triazolam, a benzodiazepine prescribed as a sleep aid. It is associated with anterograde amnesia, thought problems, slow movements, and abnormal thinking, agitation and aggressive behavior. CP 795; RP 930-31.

³ Norco is a pain medication consisting of acetaminophen and hydrocodone. CP 40.

⁴ Romeen made a second attempt to end his life on 12/11/15 at the county jail. CP 24, 31.

911 Call

At 3:28 a.m. Ahmad, called 911. In English, he told the dispatch operator that Romeen had been very depressed and needed to go to the hospital. He reported that Romeen was out of control, banging his head on the floor and walls. RP 96-97; Exh. 2. Minou, his mother, also speaking English, told the operator that Romeen was screaming. Exh. 2. In the background, Romeen could be heard growling, screaming, and making animal-like roaring and guttural noises. RP 801, 823 Exh. 2. Officers were dispatched to investigate a suicidal male. RP 96.

About 4 minutes and 39 seconds into the recorded call, speaking in Farsi, Romeen was recorded saying "Leave me alone." RP 477. At 5 minutes and 56 seconds, at the urging of the dispatch operator, Minou told Ahmad, in Farsi, they should go into a room. RP 477-478. Shortly thereafter both Minou and Ahmad were heard screaming and crying. Exh. 2. At about 9 minutes and 50 seconds Ahmad called out, in Farsi, "Romeen" in an "endearing" way. Exh. 2; RP 479. The call recorded extended periods of silence followed by thumping noises, crying, words spoken in Farsi and more silence. Exh. 2. The call lasted 16 minutes and 44 seconds, until the police entered the home. Exh. 2.

A Farsi translator listened to the 911 call numerous times, hearing and translating particular words sometimes, but not other times. RP 484. She translated Minou's statement "You killed me" to mean an emotional killing, a disappointment. RP 486, 493-94. In another section of the call she translated the word "killing" as referencing a physical act. RP 494-95.

Arrival of Officers

Police arrived to hear Minou, Romeen's mother, moaning and calling for help. Officers kicked the door in because she could not open it. RP 99. Upon entering, they saw Minou lying on the floor against the wall in the hallway. RP 99-100. She was bloodied and appeared to be in pain. RP 102. Officers found Ahmad on the floor of his bedroom. RP 109. He was bloody, unable to walk, and appeared to be in pain. RP 110. Ahmad told police he thought he had a broken hip. RP 111-112. Minou and Ahmad said Romeen had attacked them. RP 112, 114-115.

About ten feet away from Minou, officers saw Romeen on his knees, with his fists clenched, and breathing heavily. RP 100, 102-04. His forehead was red and he had a bloody nose. RP 198. As they moved to take control of him, he slowly rolled and went headfirst down a steep narrow flight of stairs. RP 103. Two officers

followed him and at the bottom they handcuffed him. He flailed, pulled on the cuffs, grunted, screamed and kicked. RP 104-105, 130, 186. Officers directed him to roll over to his stomach so they could control him. He complied but continued kicking and trying to get up. RP 186.

Over defense objection, the court admitted observations and the recounting of conversation between Officer Skollingsberg and Romeen. RP 190-191. Defense counsel argued that Romeen was in custody and his answers were being introduced as incriminating evidence. RP 191. The court held the questions were not of the type typically considered as custodial interrogation. RP 191. Rather, they were “routine questions designed to determine whether the person involved is all right or needs assistance. And these sorts of questions, along with questions for identification and things of that nature, are not the type of questions that are – require Miranda warnings” RP 191; CP 279-282. The court entered written findings of fact and conclusions of law. CP 279-283. (See Appendix).

The officer asked Romeen if “he was okay” and Romeen indicated the handcuffs hurt. RP 185. He also said, “I can’t breathe...I have asthma.” RP 186. The emergency medical

responders (EMS) checked him and reported it did not appear he was having difficulty with his breathing. RP 204. Later, during a mental health evaluation, Romeen learned that he had told officers he was having an asthma attack. He said that not only did he not have asthma, he had no idea why he would say that he did. CP 32. The officer testified that Romeen was alert, oriented and conscious and did not appear to be confused. RP 190.

Ahmad, Minou and Romeen were transported to the emergency room of the area hospital. RP 426, 434, 704, 729.

Hospital

Ahmad and Minou were diagnosed and treated by a critical care physician. RP 435-436. Minou had a fractured pelvis, bladder injury, and facial contusions. RP 438-440. Ahmad had extensive rib cage, pelvic and facial injuries. RP 439.

Romeen was brought into the hospital in soft restraints. RP 704. Prior to bringing him into the hospital EMS administered Haldol and Ativan to calm him down. RP 704-05. Haldol is an antipsychotic medication. RP 704. The hospital physician ordered more Haldol to be administered at 6:08 am, 6:46 am, 7:45 am, 7:54 am and again at 8:02 am. RP 706-708. At 6:19 am medical staff administered a benzodiazepine for agitation. RP 707. Romeen was

intubated as he was heavily sedated so staff could perform a CT scan. RP 708, 716.

The physician ordered a rapid urine test which indicated the presence of benzodiazepines, opiates and tricyclic antidepressants. RP 712. Romeen was diagnosed with acute toxic encephalopathy⁵, acute respiratory failure, depression with intentional overdose of Halcion, and polysubstance abuse with withdrawal. RP 719. The physician's clinical impression was that Romeen suffered from acute psychosis. RP 718.

That evening, Detective Day spoke with Romeen at the hospital after he had awakened. Romeen was in restraints. RP 234. Over defense objection, Detective Day recounted his conversation with Romeen and his conclusion that Romeen was alert and oriented. RP 241. In making its oral ruling on admissibility of the statements, the court questioned whether the detective asked orientation questions to evaluate Romeen's mental state, a crucial issue at trial. RP 239. The prosecutor said,

..just out of candor, what I was intending to ask Detective Day is: What was the purpose of you asking these preliminary questions? And I anticipate his response would be to determine his lucidity. If the Court believes that's taking it too far, then we can leave that out entirely.

⁵ Toxic encephalopathy is a general term for a diffuse global brain injury, and means there was a toxin that caused the confusion and agitation. RP 714

The court answered:

Yeah. I think it should be left out...Because the implication will be he wanted to talk to him about something else, and -- or that he's going to express an opinion about his lucidity, which I don't think you've qualified him to do that. So the questions he asked, the answers he gave -- those are admissible.

RP 242-243.

The court admitted the statements, reasoning they did not amount to custodial interrogation. CP 282. Despite the admonition about the officer expressing an opinion about lucidity, Officer Day testified as follows:

Q. Okay. Did the defendant appeared (sic) to be alert?

A. Yes, he was.

Q. Did he appear to be oriented?

A. Yes.

Q. ...Did you ask the defendant what day it was?

A. I did.

Q. What was the defendant's response?

A. He said it was the day after Thanksgiving.

Q. Okay. Did you ask the defendant what month it was?

A. Yes.

Q. What was his response?

A. November.

Q. Did you ask the defendant what year it was?

A. I did.

Q. What was his response?

A. 2015.

Q. Did you ask the defendant who was the President of the United States?

A. I did.

Q. What was his response?

A. Obama.

Q. Did you ask the defendant his age?

A. I did.

Q. Did he provide his correct age?

A. He did.

Q. Did you ask the defendant who he was?

A. I did.

Q. Did he give his correct name?

A. Yes, he did.

RP 269-270.

Parent Statements

Prior to trial, Minou and Ahmad gave their statements to police. Minou stated:

I woke up to a growling noise. It was only me, my husband, and my son, Romeen. I went to my son's room and he was making the noise. *I tried to comfort him, but he did not respond.* I went and woke up my husband. My husband went to him and asked what's wrong. Romeen was out of control, throwing everything here and there. Romeen got out of control, fighting with my husband and beating him up. Romeen was punching him badly. I called 911. Romeen came to me and beat me up. Romeen pushed me and punched me in my face. I saw him use the weight to smashed (sic) things in the room. The police came, but I could not get over and open the door.

RP 743-44. (Emphasis added).

A portion of Ahmad's statement was read at trial:

Romeen hit me numerous times with his fists and feet kicking me. I told my wife to call 911, and I got on the phone while Romeen beat me. Romeen then was beating my wife. I could not hear my wife anymore. I thought she was dead. I thought he was going to kill us. RP 750.

Ahmad's affidavit also stated:

"Romeen has a mental condition and takes medication."

"Romeen became more depressed when girlfriend passed away."

"My wife heard 'bang bang' and goes to Romeen's room and see him on the ground roaring like a lion."

He said that he tried to calm Romeen down. RP 752. Ahmad told the mental health evaluator that Romeen had been very depressed and had never been violent or aggressive with either of his parents. CP 25.

At trial, 88-year-old Ahmad said that when he entered Romeen's room, he saw everything was "unusual- messed up and so on. Everything was scattered around, and Romeen sitting on his knees down and head down and making strange noises and banging on the floor, begging (sic) the head, and in black, all in black." RP 312-313.

He believed his son was "*unconscious*" because of his behavior. RP 314. He reached out to rub Romeen's back and "*to try to wake him up*". RP 314. He *tried to make eye contact* by touching his neck. RP 315. He said Romeen "rose like a slowly, like a monster...there was a different person. He looking quite different. Water – sweat was hanging from here and nose watering, and his eyes half open, and tears coming down and crying.... He rose and

then *throwing fists on the wall door...I'm just trying to get his eye contact.* 'Romeen, Romeen, Romeen' ...Then the fist came to me. The fist came to me. He was a monster. *He was not Romeen.*" RP 315-316. Ahmad insisted that Romeen "*was not awakening. He was still all the time and just making noise, that strange noise.*" RP 321.

In her testimony Minou denied that anything happened that night. RP 347-358.

Expert Testimony

1. Dr. Zenger

Dr. Zenger, an expert in diminished capacity evaluation, diagnosed Romeen with a persistent depressive disorder and substance induced delirium. RP 609. Depression is marked by changes in appetite and sleeping, anhedonia, lack of motivation, isolation and suicidal ideation. RP 511.

Delirium is a short term, abrupt change in behavioral and cognitive functioning. RP 612. It is an altered state of consciousness, in which a person cannot focus and becomes disoriented in the sense of misperceiving the environment. It includes cognitive impairments, such as memory loss, changes in perception, such as hallucinations and misinterpretations, and

changes in language. RP 613. The medication Romeen reported that he took and the toxicology results confirmed he had taken medications known to cause delirium. RP 613-14.

Consistent with a state of delirium, she opined that in the early morning of November 28, Romeen was in a hyperactive state, crying, moaning, screaming, making strange noises, and unresponsive to his parents and providing minimal responses to police officers. RP 615-16. It was her opinion that when Ahmad reached out and touched Romeen, Romeen misperceived the event and became aggressive and agitated and began to hit. RP 716. Because Romeen was aggressive with the police, and the medical personnel, not just his parents, it indicated to Dr. Zenger he was indiscriminately aggressive, which undermined the intent to specifically harm his parents. RP 618, 621.

The medications physically affected his brain and body, and impaired the executive functioning of his brain. RP 617. She said that an individual in that state of delirium could not form memories. RP 619. She concluded he was unable “to think logically to understand ... and so, to form any kind of intentions is not there.” RP 620.

2. Toxicologist

Ken Meneely, a private forensic consultant specializing in forensic toxicology, testified that Ambien is known as the “zombie pill.” Prescribed as a sleep aid, users may later discover they engaged in abnormal behaviors while they were in essence sleep-walking. RP 787-88, 792. As an example of the effect of Ambien on some individuals he described a man who drove while naked, stopped in an intersection, got out of his car and walked down the street. When the medication wore off he did not understand why he behaved as he had. RP 792-93.

Meneely described the medication Halcion as having the nickname “traveler’s amnesia.” He stated it was known to not only block the brain from making memories, but several homicide-related incidences involving Halcion had been documented. As a potent medication, it was known to cause aggressive and bizarre behavior, and abnormal thinking. RP 795. The drug is banned in Great Britain. RP 795.

3. Rebuttal Testimony

The State’s expert, Dr. Viljoen, acknowledged the FDA requires insert warnings that Halcion can cause aggressive behavior. RP 950. She testified that the dosage of the medications

taken by Romeen pointed to a high probability of delirium. RP 933. However, her report did not discuss the possibility that Romeen was in a state of delirium, but that his behavior was consistent with intoxication. RP 934, 936.

Dr. Viljoen found that Romeen had a mental disorder of depression and intoxication, but opined he had the “capacity to form the mental state of intent.” RP 938-39. Although Romeen and his parents only speak Farsi to one another (CP 31) she relied on the fact that he could be heard speaking Farsi to them, and his responses to his mother’s words to show orientation. She concluded that he maintained cognitive functioning because he voiced awareness he was dying from the overdose. RP 905-906. She considered the assault of his parents and combativeness with police and medical people as evidence of intentional goal-directed behavior. RP 907.

The State charged Romeen by second amended information with two counts of attempted murder in the second degree (domestic violence) and two counts of assault in the first degree (domestic violence) and gave notice it sought a sentence above the standard range based on the aggravating circumstance of a particularly vulnerable victim. CP 89-91.

The jury found Romeen guilty of two counts of assault in the first degree. RP 1063-64. The jury also found aggravating circumstances of particularly vulnerable victims who were members of the same household. RP 1064. He was sentenced to consecutive sentences of 93 months for each count. CP 263. The court did not impose an exceptional sentence. CP 262. He makes this timely appeal. CP 273. The court found him indigent for appeal. CP 277-278.

III. ARGUMENT

A. The Statements Mr. Sabahi Made While In Police Custody Were Wrongly Admitted In Violation Of His Fifth Amendment Right To Not Incriminate Himself.

1. Testimony of Officer Skollingsberg

Romeen challenges the following findings of fact and conclusions of law made by the court regarding Officer Skollingsberg's testimony:

Finding of Fact 11: At all times, the defendant was alert and oriented.

Finding of Fact 12: The defendant did not appear confused by any of Officer Skollingsberg's questions.

Conclusion of Law 6: The defendant's statements to Officer Skollingsberg are admissible.

(Appendix: CP 280-281).

A threshold issue is whether Romeen's guaranteed constitutional right to not incriminate himself was violated by admission of police officer testimony regarding his lucidity.

The Fifth Amendment, applicable to the States through the Fourteenth Amendment, guarantees that a defendant shall not be compelled in any criminal case to be a witness against himself. U.S. Const. amend. V. The Washington constitutional provision against self-incrimination provides the same guarantee as that provided in the federal constitution. Washington Const. Art. I, § 9. The protection of the constitutional provisions extends to testimonial or communicative evidence. *State v. Moore*, 79 Wn.2d 51, 56, 483 P.2d 630 (1971). Testimonial evidence is a communication "that explicitly or implicitly, relate[s] a factual assertion or disclose[s] information." *Doe v. United States*, 487 U.S. 201, 210, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1998).

When determining whether a self-incriminating statement was compelled or made voluntarily, the Court looks to a totality of the circumstances. *State v. DeLeon*, 185 Wn.2d 478, 486, 374 P.3d 95 (2016). In instances where "a defendant makes self-incriminating statements in exchange for protection from credible

threats of violence while incarcerated, the statements are coerced and involuntary for purposes of the Fifth Amendment.” *DeLeon*, 185 Wn.2d at 486 (quoting *Arizona v Fulminante*, 499 U.S. 279, 287-88, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)).

In *DeLeon*, during the routine booking process, the defendants answered questions from jail staff regarding their past or current gang affiliation. The goal of asking the questions was to provide safe housing and protect inmates from potential rival gang violence. However, the admission to gang involvement, acquired through the administrative process, was then used against the defendants at trial. *DeLeon*, 185 Wn.2d at 487.

The Court emphasized that *asking* the questions did not violate the defendant’s constitutional right against self-incrimination; rather, the violation occurred when the statements, gathered under those circumstances, were used against the defendants at trial. *Id.* at 487. The Court reasoned that statements made in those circumstances, where an inmate being booked at the jail would believe that in order to avoid the real risk of danger, he would need to answer ‘yes’ when asked if there were certain individuals he could not be safely housed with and then provide the information for the Gang Documentation Form. *Id.* at 487. The Court found the

statements could not be considered voluntary and their admission was a violation of the defendants' Fifth Amendment rights. *Id.*

As in *DeLeon*, Officer Skollingsberg asked questions that were reasonably related to keeping Romeen safe, ensuring that his medical needs, if any, were attended to by EMS⁶. (Findings of Fact 5-10; Conclusions of Law 4; Appendix CP 280-281). In the circumstances, it was reasonable to believe that if he needed medical help he would need to answer their questions. The violation occurred not when the questions were asked, but when the State used the testimonial evidence against Romeen at trial to demonstrate that he was "alert and oriented" and therefore, capable of forming the specific intent to cause great bodily harm to his parents. That information was not voluntarily given and should not have been admitted at trial.

2. Testimony by Detective Day

Similarly, the testimony of Detective Day was also wrongly admitted. Romeen challenges the court's findings of fact and conclusions of law:

⁶ Two of the unchallenged conclusions of law state that Romeen was in custody both times officers questioned him. Appendix CP 281, 282. There is no dispute Romeen was in custody.

Finding of Fact 4: The defendant was alert and oriented.

Finding of Fact 5: The defendant did not appear to be confused.

Conclusion of Law 3: Although the defendant was in custody, the questions asked by Detective Day were not designed to elicit an incriminating response.

Conclusion of Law 4: Rather, the purpose of asking these questions was to determine whether the defendant could make any response.

Conclusion of Law 8: The defendant's statements to Detective Day are admissible.

(Appendix: CP 282).

In *United States v. Hinckley*, 672 F.2d 115, 124-125, 217 U.S.App.D.C. 262, 10 Fed. R. Evid. Serv. 577 (1982)⁷, the government argued their questioning of Hinckley was not "custodial interrogation", but rather, background questions not designed to elicit an incriminating response. *Id.* at 123-124. Relying on *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Court stated that by "'incriminating response' we refer to any response- whether inculpatory or exculpatory that the prosecution may seek to introduce at trial." *Id.* at 446 U.S. at 301 n.5.

⁷ overruled in part on other grounds, *Hudson v Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984).

Like Romeen, Hinckley's psychological condition at the time of the crime was the focus of the case. *Id.* at 125. The *Hinckley* court reasoned that where the mental state of an arrestee loomed as a likely issue, *all the questioning, even background information, had an investigatory purpose, including demeanor testimony that the government could use at trial.* *Id.* at 126. (Emphasis added).

The court went further, and noted the "agents were 'prime lay witnesses' on the insanity issue; their testimony was critical; the government needed a foundation for the agents' demeanor testimony based on "the various statements" of the defendant during this period; and medical testimony after the fact may be less persuasive to a jury than immediate, on-the-scene observations by lay witnesses." *Id.* at 125.

Like Skollingsberg's testimony, Detective Day's testimony relied on Romeen's answers to substantiate a demeanor opinion that Romeen was alert and oriented. The State relied on the answers and demeanor opinion to substantiate its theory. Under a totality of the circumstances analysis, Romeen's Fifth Amendment right to not incriminate himself was violated when the court allowed the detective's testimony.

The custodial questioning Day conducted took place over 12 hours after the attack. Day had sufficient information to know or at least reasonably conclude that Romeen's mental state was going to be an issue in a prosecution.

Prior to their entry into the Sabahi home, officers knew there was a suicidal male. Upon entry to the home, it was evident that Romeen was not functioning rationally. He had to be sedated by EMS with an antipsychotic drug (Haldol) and an anxiolytic (Ativan). Detective Day knew that Minou and Ahmad described Romeen as unresponsive to them. (RP 752). The Detective knew that Romeen had a mental condition for which he took medication. (RP 752). He knew that Romeen had been on the floor roaring like an animal. (RP 752). He saw Romeen was physically restrained in the hospital bed.

The purpose of questioning Romeen some 12 hours after the incident was "to determine whether the defendant could make any response." (CP 282, Conclusion of Law 4). The detective was checking for lucidity and the responses and demeanor observation were later used against Romeen at trial. The questions elicited an incriminating response under *Innis*. Admission of the statements

and demeanor observation was a violation of Romeen's Fifth Amendment right to not incriminate himself.

3. The Admission of the Statements In Violation of Romeen's Fifth Amendment Right Was Not Harmless Error.

A reviewing Court applies a harmless error standard to the type of constitutional error claimed here. *Deleon*, 185 Wn.2d at 487. Under the harmless error standard, the conviction must be vacated unless it is beyond a reasonable doubt that the misconduct did not affect the verdict. *Id.* The State bears the burden of showing that constitutional error was harmless. *Id.* at 488.

The Court uses two tests to determine whether constitutional error is harmless: the "contribution test" and the "overwhelming evidence test." *State v. Johnson*, 100 Wn.2d 607, 621, 674 P.2d 145 (1983)(*overruled on other grounds, State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985)). Under the contribution test, an error is harmless if it can be said beyond a reasonable doubt that the error did not contribute to the verdict. *Id.* at 621. Using the overwhelming test, the error is harmless if it can be said beyond a reasonable doubt that the untainted evidence necessarily leads to a finding of guilt. *Id.*

The error here is not harmless under either test. The sole issue at trial was whether Romeen had the capacity and formed the specific intent to cause great bodily harm to his parents. The recounting of the questions and answers, and opinion by the officers that Romeen was alert and oriented directly addressed that critical core issue. As a preliminary matter, neither officer was qualified to render an opinion as to alertness and orientation of an individual who was diagnosed with acute psychosis and acute toxic encephalopathy, and required massive doses of Haldol (antipsychotic). Moreover, “[W]here an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the factfinder and thereby deny the defendant of a fair and impartial trial.” *State v. Carlin*, 698, 701, 700 P.2d 323 (1985)(overruled on other grounds by *City of Seattle v. Heatley*, 70 Wn.App. 573, 854 P.2d 658 (1993)).

Similarly, the untainted evidence was not so overwhelming as to necessarily lead to a guilty verdict. The respective experts all agreed on the toxicity and potency of the medications, and their documented side-effects. His parents described his behavior as odd, bizarre, out of character, and they found him unresponsive, “unconscious” and like he was asleep. It cannot be said that

beyond a reasonable doubt any reasonable jury would have reached the same result if they had not heard the officer's tainted testimony.

The convictions must be reversed and Romeen is entitled to a new trial untainted by such evidence. *DeLeon*, 185 Wn.2d at 489.

B. The Evidence Was Insufficient To Sustain The Convictions Because The State Did Not Prove Intent To Cause Great Bodily Harm Beyond A Reasonable Doubt.

Due process mandates that the prosecution must prove all the essential elements of a charged crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). If a reviewing court finds insufficient evidence to prove an element of the crime, the conviction must be reversed and dismissed. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Romeen argues on appeal, as at trial, that he did not have the capacity to form intent nor he did intend to inflict great bodily harm.

Generally, a crime comprises two parts: (1) the *actus reus* and (2) the *mens rea*. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). The *actus reus* is defined as “[t]he wrongful deed

that comprises the physical components of a crime.” *Id.* (alteration in original). The *mens rea* is “[t]he state of mind that the prosecution...must prove that a defendant had when committing a crime.” *Id.* (alteration in original). The State bears the burden of proving beyond a reasonable doubt that the defendant had the requisite mental state for the crime charged. *State v. James*, 47 Wn.App. 605, 609, 736 P.2d 700 (1987).

The *mens rea* for first degree assault is the specific intent to inflict great bodily harm. RCW 9A.36.011(1). Specific intent is the intent to produce a specific result, rather than intent to do the physical act that produces the result. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009); RCW 9A.08.010(1)(a).

Here, the State was required to prove, beyond a reasonable doubt, that in his state of delirium, Romeen specifically intended to cause great bodily harm to his parents, not simply that he intended to do the physical act that resulted in their injuries. The test for determining sufficiency of evidence is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Even viewing

the evidence in a light most favorable to the State, it did not meet that burden on the element of intent.

Because Romeen raised a defense of diminished capacity, he was required to show that (1) he had a mental disorder which (2) resulted in an inability to form the required specific intent to commit the crimes charged. *State v. Clark*, 187 Wn.2d 641, 661, 389 P.3d 462 (2017) (dissent by J. Gordon McCloud)(Internal citation omitted). The diagnosis of the mental disorder “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.*” *State v. Atsbeha*, 142 Wn.2d 904, 921, 16 P.3d 626 (2001). (Emphasis added).

Here, both parties agreed that Romeen suffered from the mental disorder of depression. Both parties agreed the dosage of the medications he took resulted in a very high probability of delirium; with the defense expert testifying he was in a state of delirium. Both parties agreed that Ambien and Halcion were powerful prescription drugs with documented side effects that included bizarre behavior, abnormal thinking, aggression, agitation, and anterograde amnesia. The emergency room physician diagnosed Romeen with acute psychosis and toxic

encephalopathy. Romeen had a mental disorder and experienced toxic brain injury because of the medication overdose.

Expert testimony is required to establish the existence of the mental disorder and the causal connection between the disorder and the diminished capacity. However, lay witness testimony may supplement expert testimony. *State v. Stumpf*, 64 Wn.App. 522, 526, 827 P.2d 294 (1992).

Of great significance here are the contemporaneous statements of Minou and Ahmad. They saw and experienced first-hand the unexpected, abnormal, and bizarre effects of the medicines. Lay witness testimony is admissible to establish a defendant's mental state if (1) The lay witness had a sufficient acquaintance with the defendant or had sufficient time to observe the defendant; (2) the witness testifies as to the peculiar facts and circumstances on which his conclusion is based and (3) the testimony refers to the defendant's mental condition at or close to the time the witness made his observation and at or close to the time the offense occurred. *Stumpf*, 64 Wn.App. at 526.

Minou described Romeen's behavior as out of control. She saw him hit the walls with his fists and the weight. She heard him make bizarre noises before she even entered the room. She saw

him on the floor growling. He was “unresponsive” when she tried to comfort him.

Ahmad said Romeen’s behavior was bizarre: he banged his head on the floor and sobbed. He made guttural animal noises. Ahmad believed Romeen was “unconscious”. He could not get Romeen to make eye contact with him and described “trying to wake him up”. Their real-time accounts support the facts on which the experts could agree: Romeen’s consciousness had been significantly altered by the overdose of medications. By their account, he was not himself, but, a person under the influence of the dire side effects listed in FDA warnings.⁸

⁸ In 2007, the FDA approved new warnings for zolpidem [Ambien] prescriptions, advising there were reports of people getting out of bed after taking the medication and while fully awake, driving their cars, often with no memory of having done so. Symptoms of an overdose of Ambien alone, or in combination with another CNS-depressant (such as Halcion) includes impairment of consciousness ranging from somnolence to coma. The FDA warns that “sleep driving” and other behaviors, such as preparing and eating food, making phone calls, or having sex have been reported in patients who have taken Halcion. Additionally, the FDA warns that a variety of abnormal and behavior changes have been reported to occur in association with use of Halcion. The changes include decreased inhibition, bizarre behavior, agitation, hallucinations, and depersonalization. See [http://www.fda.gov/ohrms/dockets/ac/08/briefing/2008-4399b1-23%20\(Ambien%20\(zolpidem\)%20Labeling\).pdf?utm_campaign=Google2&utm_source=fdaSearch&utm_medium=website&utm_term=new%20zolpidem%20warnings&utm_content=2](http://www.fda.gov/ohrms/dockets/ac/08/briefing/2008-4399b1-23%20(Ambien%20(zolpidem)%20Labeling).pdf?utm_campaign=Google2&utm_source=fdaSearch&utm_medium=website&utm_term=new%20zolpidem%20warnings&utm_content=2) https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/017892s049lbl.pdf#page=13

Specific criminal intent may be inferred from conduct *only* when it is plainly and logically indicated by the conduct. *State v. Mertens*, 148 Wn.2d 820, 834, 64 P.3d 633 (2003). The State was required to prove beyond a reasonable doubt that Romeen, in his impaired state, intended to cause great bodily harm to his parents

Here, Romeen was in his room, hoping the overdose combination of the drugs he had taken would cause his death. As the night progressed, his behavior and mentation deteriorated. He injured himself, his room, and his property. On his knees, he growled, wept, and was unresponsive to external stimuli.

Romeen did not leave his room and look for his parents. They entered his room. With all good intentions, they tried to “wake” him from his drug-induced delirium. They wanted to make eye contact, to comfort him, to get him to respond to them. His aggressive behavior was indicative of a toxic overdose; he acted aggressively with himself, his parents, the police, and the medical staff. It took numerous injections of Haldol to restore Romeen to his conscious sane mind with his executive functioning intact.

Washington does not punish defendants with diminished capacity. *Eaton*, 168 Wn.2d at 482 n.2. The State did not overcome the established causal connection between his mental

condition and the inability to form the requisite intent. The convictions should be reversed for insufficiency of the evidence and dismissed with prejudice.

C. This Court should decline to impose appellate costs if the State substantially prevails on appeal and submits a cost bill.

Under RAP 14.2, a commissioner or clerk of the appellate court will award costs to the party that substantially prevails on appeal, unless the appellate court directs otherwise in its decision terminating review, or the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs.

Where the trial court has entered an order that a criminal defendant is indigent for purposes of appeal, the finding of indigency remains in effect, pursuant to RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved.

Under RAP 15.2(f), "the appellate court will give a party the benefits of an order of indigency throughout the review *unless* the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent."

Here, the trial court found Romeen qualified for an indigent defense at trial and on appeal. CP 227-228. Under the rules of appellate procedure, this Court presumes continued indigency. Unless Romeen's financial condition were to significantly improve while he is incarcerated this Court should continue to give Romeen the benefits of the order of indigency and deny any cost bill.

IV. CONCLUSION

Based on the foregoing facts and authorities, Romeen respectfully asks this Court to reverse and dismiss his convictions based on an insufficiency of the evidence. In the alternative, he asks the Court to reverse his convictions and remand for a new trial without the testimony of police officers that were in violation of his Fifth Amendment right not to incriminate himself.

Respectfully submitted this 11th day of August 2017.

s/ Marie Trombley
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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the state of Washington, that on August 11, 2017, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Brief of Appellant to the following: Clark County Prosecuting Attorney (at Anne.cruser@Clark.wa.gov and prosecutor@clark.wa.gov) and Romeen Sabahi/DOC#396331, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

s/Marie Trombley
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APPENDIX A

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B

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff,
v.
ROMEEN AHMAD SABAHI,
Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON CrR 3.5
HEARING

No. 15-1-02358-6

THIS MATTER came before the Honorable Robert Lewis for trial by jury on November 14, 2016. Trial concluded on November 22, 2016. The Plaintiff, State of Washington, was represented by Deputy Prosecuting Attorney Abigail Bartlett. The defendant, Romeen Sabahi, was represented by Tonya Rulli.

The State sought to admit statements that were made by the defendant to Vancouver Police Department Officer Gunnar Skollingsberg and to Vancouver Police Department Detective Mike Day. The court conducted hearings with both law enforcement officers, pursuant to CrR 3.5. Following both hearings, the court found the statements made by the defendant to both law enforcement officers were admissible.

The court's findings of fact and conclusions of law are the following:

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I. STATEMENTS TO OFFICER SKOLLINGSBERG

A. FINDINGS OF FACT

1. On November 28, 2015, at approximately 3:38 a.m., Officer Skollingsberg was dispatched to 1112 SE 78th Avenue, in Vancouver, Washington.
2. Officer Skollingsberg encountered the defendant at that residence, following his dispatch.
3. Officer Skollingsberg encountered the defendant at the base of the interior stairs, inside the residence.
4. Officer Skollingsberg put the defendant in handcuffs, at the base of the stairs.
5. After the defendant was in handcuffs, and while he was in this same location, Officer Skollingsberg asked the defendant if he was okay. The defendant said his handcuffs hurt.
6. Officer Skollingsberg said he could not loosen the cuffs. The defendant then said he could not breathe.
7. Officer Skollingsberg asked the defendant why he could not breathe. The defendant said he had asthma.
8. Officer Skollingsberg called for medical to examine the defendant at the scene.
9. After medical determined the defendant was not having an asthma attack, Officer Skollingsberg asked the defendant if he could walk up the stairs. The defendant got up and started to walk up the stairs. He then went limp.
10. The defendant told Officer Skollingsberg that he needed to pee. He then urinated on himself.
11. At all times, the defendant was alert and oriented.
12. The defendant did not appear confused by any of Officer Skollingsberg's questions.

1 13. Officer Skollingsberg never asked the defendant about any of the alleged
2 crimes:

3 14. The defendant never offered any information about the alleged crimes.

4 15. Officer Skollingsberg did not *Mirandize* the defendant.
5

6 **B. CONCLUSIONS OF LAW**

7 1. The court has jurisdiction of the defendant and of the subject matter.
8

9 2. The defendant was in custody when Officer Skollingsberg asked him questions:

10 3. However, the questions asked by Officer Skollingsberg were not custodial
11 interrogation questions.

12 4. Rather, the officer asked the defendant routine questions that were designed to
13 determine whether the defendant was alright and whether he needed any
14 assistance.

15 5. Officer Skollingsberg was not required to *Mirandize* the defendant in order to ask
16 him these routine questions.

17 6. The defendant's statements to Officer Skollingsberg are admissible.
18

19 **II. STATEMENTS TO DETECTIVE DAY**

20 **A. FINDINGS OF FACT**

21 1. On November 28, 2015, at approximately 6:00 p.m., Detective Mike Day spoke
22 to the defendant at Peace Health Hospital, in Vancouver, Washington.

23 2. Detective Day was assigned as a patrol officer for the Vancouver Police
24 Department at this time.

25 3. When Detective Day met with the defendant, the defendant was in a hospital
26 bed, with soft restraints on his wrists and ankles.

27 4. The defendant was alert and oriented.

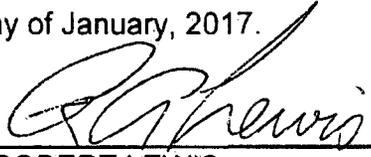
5. The defendant did not appear to be confused.

- 1 6. Detective Day asked the defendant questions such as, his name, his age, what
2 was the date, what was the day, what was the year, and who was the president?
- 3 7. The defendant responded to Detective Day's questions.
- 4 8. Detective Day then *Mirandized* the defendant. The defendant declined to speak
5 to Detective Day after that.
- 6 9. Detective Day ceased questioning the defendant at that point.
- 7
- 8 10. Detective Day never asked the defendant questions about the alleged crimes.
- 9
- 10 11. The defendant never offered any information to Detective Day about the alleged
11 crimes.

12 **B. CONCLUSIONS OF LAW**

- 13 1. The court has jurisdiction of the defendant and of the subject matter.
- 14
- 15 2. The defendant was in custody when Detective Day asked him questions.
- 16 3. Although the defendant was in custody, the questions asked by Detective Day
17 were not designed to elicit an incriminating response.
- 18 4. Rather, the purpose of asking these questions was to determine whether the
19 defendant could make any response.
- 20 5. Detective Day's questions were preliminary questions.
- 21
- 22 6. For this limited purpose, Detective Day's questions were not custodial
23 interrogation.
- 24 7. Consequently, Detective Day was not required to *Mirandize* the defendant before
25 he asked these preliminary questions.
- 26 8. The defendant's statements to Detective Day are admissible.
- 27

DONE in open Court this 6th day of January, 2017.


ROBERT LEWIS
JUDGE OF THE SUPERIOR COURT

Presented by:


Abigail Bartlett, WSBA #36937
Deputy Prosecuting Attorney

Copy received, approved for entry
this 6 day of December, 2016:


Tonya Rulli, WSBA # 51465
Attorney for Defendant

Defendant

MARIE TROMBLEY

August 11, 2017 - 3:58 PM

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