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

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STATE OF WASHINGTON, Respondent

v.

ROMEEN AHMAD SABAHI, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-02358-6

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court properly admitted Sabahi's statements to police officers because he made the statements voluntarily and they were not obtained in violation of *Miranda*.**
- II. The evidence was sufficient to prove Sabahi's intent to inflict great bodily injury upon his parents.**
- III. Should the State substantially prevail it will not seek appellate costs.**

### STATEMENT OF THE CASE

#### A. PROCEDURAL HISTORY

Romeen Sabahi was charged by a second amended information with two counts of Attempted Murder in the Second Degree and two counts of Assault in the First Degree for an incident on or about November 28, 2015 in which he attacked his parents, Ahmad Sabahi and Minou Sabahi, at the home the three shared.<sup>1</sup> CP 89-91. Each count also contained the special allegation of domestic violence and the aggravator that the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance. CP 89-81.

Two separate CrR 3.5 hearings were held before the trial judge, the Honorable Robert Lewis, to determine the admissibility of Sabahi's

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<sup>1</sup> The State intends to refer to the defendant, Romeen Sabahi, as Sabahi and his parents, the victims, by their first names. No disrespect is intended.

statements to the police. The first hearing concerned statements that Sabahi made to Officer Gunnar Skollingsberg, who was one of the first officers on the scene. RP 182-191. The second hearing concerned statements that Sabahi made to Detective Mike Day when Det. Day visited Sabahi at the hospital that same day, though over 12 hours since the incident. RP 232-242. In both instances the trial court found Sabahi's statements admissible at trial. CP 279-283; RP 191, 241.

The case proceeded to a jury trial at which Sabahi presented a defense of diminished capacity. CP 205, 256; RP 1019-1020, 1036-1047. The jury found Sabahi guilty of the two counts of Assault in the First Degree to include the special allegations of domestic violence and the vulnerable victim aggravators. CP 226-27, 229-230. The jury acquitted Sabahi of the two counts of Attempted Murder in the Second Degree. CP 225, 228.

Despite the finding of the aggravators, the trial court sentenced Sabahi to standard range sentences of 93 months on each count to run consecutively<sup>2</sup> for a total of 186 months confinement. CP 260-272; RP 1093-96. Sabahi filed a timely notice of appeal. CP 273-74.

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<sup>2</sup> By operation of statute, RCW 9.94A.589(b), which instructs the court to run "serious violent offenses" consecutively.

B. STATEMENT OF FACTS

On November 28, 2015, between about 3:30 AM and 4:00 AM, Sabahi, a muscular man, brutally attacked his then 87 year old parents, Minou and Ahmad, at the home that the three shared. RP 117, 198, 217, 309, 347, 369, 374, 452; Ex. 2. When police arrived at the home they heard Minou crying, moaning, and requesting help from inside the house. RP 99; Ex. 2. The police broke down the door to gain entry. RP 99-100, 136-38. Minou was discovered just inside the doorway lying on the floor. RP 99-100, 114, 137. She was covered in blood, she looked beaten about the face, and her night clothes were all torn up. RP 99-100, 102, 137. Ahmad was discovered at the top of a stairway attempting to drag himself back inside from a balcony. RP 109, 112, 139-140. He was bloody, had contusions on his face, and was unable to walk. RP 110, 112, 140, 142. Both parents were disabled, crying, and moaning in pain throughout their contact with police on the scene. RP 102, 114, 116, 140. Sabahi was located about eight feet to the right of Minou on his knees, with his fists clenched and breathing like he had just done something really strenuous. RP 100, 125, 137.

Minou reported to the police and emergency and medical personnel that Sabahi had hit her and her husband with “hundreds of punches,” had hit them with a large weight, and threw her to the floor. RP

114-15, 127-28, 371-72, 529-530. These statements were consistent with a written statement that she provided to Det. Day<sup>3</sup> at the hospital in which she alleged that Sabahi repeatedly punched her and her husband, pushed her, and smashed things with a weight. RP 743-44, 755.<sup>4</sup> A kettlebell weight<sup>5</sup> was observed by police in the middle of the hallway towards Sabahi's bedroom. RP 116-17, 121, 127, 132; Ex. 5. The method of infliction of some of Minuo's and Ahmad's injuries was consistent with a heavier blunt object and not consistent with fists or a slip and fall. RP 457-58.

Ahmad reported to police and emergency and medical personnel that Sabahi assaulted him by hitting him with fists—"[i]t felt like I was hit a hundred times,"—with a kettlebell weight, and that he was thrown from the bedroom into the bathroom and back again by Sabahi. RP 375-76, 388-89, 435-36, 464-66. These statements were consistent with a written statement that he provided to Det. Day<sup>6</sup> in which he alleged that Sabahi hit him numerous times with fists, was kicking him, and beat his wife to the

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<sup>3</sup> Minou was unable to write out the statement herself so she dictated the statement to Det. Day and signed off on it after Det. Day read the statement back to her to make sure it was true and accurate. RP 738-740.

<sup>4</sup> Minou essentially testified at trial that nothing happened on the morning in question, that she lacked memory of most things that morning, and that "[t]o some extent" Sabahi was not acting like himself. RP 346-351, 354-59.

<sup>5</sup> A kettlebell resembles a large steel ball with a handle. RP 116; Ex. 5.

<sup>6</sup> Ahmad was unable to write out the statement himself so he dictated the statement to Det. Day and signed off on it after Det. Day read the statement back to him to make sure it was true and accurate. RP 741-742.

point that Ahmad thought she was dead.<sup>7</sup> RP 750, 755; Ex. 76. Ahmad told Det. Day that he thought that Sabahi was going to kill them and also that Sabahi's recent behavior had been increasingly violent. RP 750, 753.

As a result of Sabahi's attack Minou was admitted to ER as a trauma patient and suffered internal bleeding, which required a blood transfusion, multiple pelvic fractures, and a sacral fracture. RP 434-38, 452. Similarly, as a result of Sabahi's attack Ahmad was admitted to the ER in serious condition and suffered multiple broken ribs, which were broken into multiple pieces, extensive facial bruising, had air escaping from his lungs, and a large part of his pelvic bone was broken off. RP 427, 429-431, 454.

Just before the attack began, Ahmad placed a 911 call seeking help for his son. Ex. 2. The 911 call was recorded and captures when the call for help turned into a brutal and prolonged assault against Sabahi's parents and concludes when the police arrive. Ex. 2.<sup>8</sup> Over the duration of the call

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<sup>7</sup> Ahmad testified at trial that he observed Sabahi banging his fists and banging his head onto the floor, sweating, crying, and acting like a different person. RP 312-16, 330-31, 335-36. He also testified that Sabahi hit him several times with his fists, but did not kick him or use a weight. RP 317-320, 322-23, 328-29. As to other details or the surrounding circumstances, Ahmad claimed to have no memory. RP 325-330, 337, 340.

<sup>8</sup> There is no substitute for listening to the call and the State will ensure the exhibit is available for review. Ex. 2. Objectively, and based on undisputed facts of the case, the 911 call captures a brutal and prolonged assault on defenseless victims who are screaming and crying in pain.

both English and Farsi,<sup>9</sup> which the Sabahis' speak amongst themselves, are overheard. Ex. 2. At first, Ahmad was seeking help for Sabahi because he was concerned Sabahi was trying to kill himself. Ex. 2. Ahmad tells the 911 operator that Sabahi is out of control and banging on the walls. Next, Minou gets on the phone to give additional information to the 911 operator. Ex. 2. While Minou is on the phone Sabahi is overheard saying "leave me alone." RP 477; Ex. 2. Shortly thereafter, the screaming becomes closer and louder and the attack begins. The recording of the attack lasts about 8 minutes long and contains, amongst undifferentiated sounds of an assault, the screams of Sabahi, Minou, and Ahmad as well as thumping noises, Minou crying and wailing, and Sabahi growling and roaring. Ex. 2.

Importantly, during the call, including during the attack, multiple words or parts of discourse are heard some of which are spoken in Farsi. RP 477-484; Ex. 2. For example, at one point during the attack Sabahi screams repeatedly in English "you're dead." Ex. 2. At another point, Minou says "[y]ou killed your dad. Romeen. Crazy. Romeen. You killed your dad." RP 480-81; Ex. 2. To these remarks Sabahi responds "always .

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<sup>9</sup> The State utilized a Farsi translator to translate some of the Farsi portions of the 911. This translator testified at trial. RP 472-496.

. . my dad.”<sup>10</sup> RP 481, 489-490, 493; Ex. 2. Later during the attack Minou, in between screaming, says “[y]ou already killed me” and “[h]e killed me” to which Sabahi responds “I killed my dad as well.” RP 482-83.

### *1. Contact with Sabahi*

As mentioned above, after police made entry into the Sabahi home they observed Sabahi on his knees facing Minou with his fists clenched and breathing like he had just done something really strenuous. RP 100, 125, 137. Faced with the police, he discontinued any attempt to resume his attack. RP 103, 125-26, 137, 195-96. Instead, he looked up at the officers then rolled to his left and slowly went head first, perhaps by crawling, down a flight of carpeted stairs that were located next to him. RP 103-04, 125-26, 137-39, 195-97. Officers immediately followed Sabahi down the stairs and placed him into handcuffs. RP 104-05, 133, 139, 197, 208-09. Sabahi was cooperative for the handcuffing. RP 130-31, 197. After the handcuffing, Sabahi became agitated and combative by trying to pull apart the handcuffs and while doing so was grunting like he was lifting weights. RP 104-105, 130-31.

At this point, Ofc. Skollingsberg was alone with Sabahi. RP 197. He observed that Sabahi was sweaty and breathing heavily, and began

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<sup>10</sup> There is a word or two in Farsi in between “always” and “my dad” that are unclear. RP 481, 489-490, 493.

groaning or moaning. RP 198, 209. Ofc. Skollingsberg asked Sabahi if he was injured because he wanted to see if Sabahi required medical aid. RP 199. Sabahi replied that his handcuffs hurt.<sup>11</sup> RP 199. Ofc. Skollingsberg checked the cuffs and told Sabahi that he would not be loosening them. RP 199. Sabahi remarked that he could not breathe. RP 199. After Ofc. Skollingsberg asked Sabahi why he was having trouble breathing; Sabahi said that he had asthma. RP 199. Ofc. Skollingsberg then rolled Sabahi onto his side into a “recovery position” so that he would be in a better position to breathe and called for medical personnel to come check on Sabahi. RP 199-200.

Ofc. Skollingsberg observed Sabahi interact with medical personnel and noticed that he was cooperative with them. RP 200, 204. Medical informed Sabahi that he was not having an asthma attack, which led to him getting very agitated and he began screaming and kicking his legs. RP 204, 210. Ofc. Skollingsberg ordered Sabahi to “move back onto your stomach” and he complied. RP 204-06. While on his stomach Sabahi continued to scream and moan loudly and struggled with his handcuffs by pulling against them. RP 206. Due to Sabahi’s combativeness, Ofc. Skollingsberg requested a second officer. RP 206. Sabahi was asked if he

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<sup>11</sup> Though Sabahi was speaking to his parents in Farsi before the police arrived, he conversed with the police and medical personnel entirely in English.

would stand up and walk up the stairs. RP 207. Sabahi then stood up and began walking up the stairs as asked. RP 207, 210. As he was going up the stairs, Sabahi “went deadweight,” said he had “to pee,” and then urinated on himself. RP 207-08, 210.

Medical, in the form of firefighter paramedic Shane Orem, once again made contact with Sabahi, this time at the top of the stairs. RP 379, 390. Orem observed that Sabahi was alert and was able to answer questions, though he was upset and crying. RP 379-381, 390. He answered correctly with his name, his location, and his age and birthdate. RP 379-381, 390, 392. Sabahi, however, would not answer any questions from Orem about what had happened. RP 381, 392. Instead, he would cry and shake his head and repeat “I am sorry.” RP 381, 396-97. Orem would later observe Sabahi when he was with AMR preparing for transport. RP 382. Orem noticed that Sabahi was able to answer AMR’s questions appropriately and provided them with his name. RP 382.

Nonetheless, while at times Sabahi was fairly cooperative with Orem and appeared to be in the process of calming down he got more agitated when Orem again tried to bring up what had happened. RP 383-84. At one point, just prior to transport, Orem watched as Sabahi tried to pull out of his handcuffs and then yelled and roared as he struggled with

them, which drew some blood. RP 383, 393. Finally, Sabahi was medically restrained,<sup>12</sup> placed in soft restraints, and transported to the hospital. RP 383-84, 393. That said, Orem did not consider Sabahi “undirectable” or uncontrollable. RP 384-85.

At the hospital, at about 2:00 PM, psychiatric nurse practitioner Della Reese Ramirez made contact with Sabahi. RP 543, 552. During this interaction Sabahi was alert, oriented, and cooperative. RP 558-560, 589-590. At that time Sabahi’s chief complaint was agitation. RP 554-55. Sabahi reported to Ramirez that he had not been sleeping well so he had been taking Ambien to help him and then got a prescription of Halcion online. RP 557. Sabahi further reported that on the night or morning in question that he remembered impulsively taking a bunch of Halcion but denied he did so to overdose or kill himself. RP 557-58, 562-63. In fact, he denied even having suicidal thoughts, problems with anxiety, or experiencing most of the symptoms typical of depression. RP 560, 562, 585-87, 589-590. He reported that was not taking any other drugs and remarked that he had not taken his prescribed Ambien for the last two months. RP 558, 561. Following Sabahi’s self-reporting and evaluating what had reportedly taken place, Ramirez concluded that Sabahi had an

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<sup>12</sup> Haldol was administered to calm Sabahi. RP 394-95. He was administered additional doses of Haldol and lorazepam at the hospital for the same reason. RP 706-08, 712.

adjustment disorder with mixed emotions<sup>13</sup> and would benefit from inpatient hospitalization to help with grieving<sup>14</sup> and anger management. RP 592, 597-98.

In discussing his “social history” with Ramirez, Sabahi remarked that growing up his father never liked him and that they did not get along, but that his mother is nice and sweet. RP 584-85.

Finally, at about 6:00 PM, Det. Day contacted Sabahi in his hospital room. RP 269, 284. This was about twelve hours after Det. Day had originally seen Sabahi at the hospital where he observed Sabahi restrained, having emotional outbursts, and being combative with hospital staff. RP 284-88. Det. Day testified to his contact with Sabahi as follows:

[STATE]: Okay. Did the defendant appeared [sic] to be alert?

[DET. DAY]: Yes, he was.

[STATE]: Did he appear to be oriented?

[DET. DAY]: Yes.

[STATE]: Okay. I want to ask you about questions you asked the defendant. Did you ask the defendant what day it was?

[DET. DAY]: I did.

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<sup>13</sup> This diagnosis reflected Ramirez’s opinion that, despite Sabahi’s reports to the contrary, he was in fact dealing to some extent with anxiety and depression. RP 592. This conclusion was consistent with Sabahi’s family members’ observations of his recent behavior. RP 863-66; Ex. 76.

<sup>14</sup> Sabahi’s long-term girlfriend had recently passed away, which resulted in him moving back in with his parents. RP 585, 592-93, 862.

[STATE]: What was the defendant's response?  
[DET. DAY]: He said it was the day after Thanksgiving.  
[STATE]: Okay. Did you ask the defendant what month it was?  
[DET. DAY]: Yes.  
[STATE]: What was his response?  
[DET. DAY]: November.  
[STATE]: Did you ask the defendant what year it was?  
[DET. DAY]: I did.  
[STATE]: What was his response?  
[DET. DAY]: 2015.  
[STATE]: Did you ask the defendant who was the President of the United States?  
[DET. DAY]: I did.  
[STATE]: What was his response?  
[DET. DAY]: Obama.  
[STATE]: Did you ask the defendant his age?  
[DET. DAY]: I did.  
[STATE]: Did he provide his correct age?  
[DET. DAY]: He did.  
[STATE]: Did you ask the defendant who he was?  
[DET. DAY]: I did.  
[STATE]: Did he give his correct name?  
[DET. DAY]: Yes, he did.

RP 269-270. After Det. Day posed the above series of questions he advised Sabahi of his *Miranda* rights and Sabahi declined to answer any questions about the attack. RP 235.

## 2. *The Experts*<sup>15</sup>

That Sabahi was intoxicated by the consumption of a drug or drugs at the time of the crimes was an undisputed fact at trial. RP 900, 922.

What drugs he took and how much he took were not established by the evidence presented.<sup>16</sup> Nonetheless, the relevant diagnoses of Sabahi at the hospital, and upon which the experts relied on forming their own opinions and diagnoses regarding Sabahi's mental disorder, included depression with intentional overdose of Halcion, polysubstance abuse with withdrawal, and acute toxic encephalopathy.<sup>17</sup> RP 713-14, 937.

Dr. Nicole Zenger testified for the defense. She evaluated Sabahi for diminished capacity. RP 606-07. She reviewed and relied on the police

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<sup>15</sup> Sabahi cites Dr. Simone Viljoen's very comprehensive evaluation of Sabahi for diminished capacity for many statements of fact. *See* Br. of App. at 3-4. Dr. Viljoen's evaluation was not admitted into evidence for the jury's consideration. CP 237-39.

<sup>16</sup> Sabahi writes that on the morning in question "Romeen reportedly took Ambien, 46 tablets of .25 mg of Halcion, Norco, and Tylenol 3." Br. of App. at 4. There is little evidence that this claim is true and even less if only considering the actual evidence presented at trial. Sabahi self-reported this claim to Dr. Viljoen. CP 30. But as noted above, Dr. Viljoen's evaluation was not before the jury. Otherwise, defense expert Ken Meneely testified as to "what was reported" and relayed the amount and types of drugs Sabahi ingested, though he could not identify where this information came from and suggested it might have even come from defense counsel. RP 797-799; 804-06. Either way, the evidence was properly admitted to explain the basis of his opinion, not for the truth of the matter asserted. RP 800; *State v. Hamilton*, 196 Wn.App. 461, 477, 383 P.3d 1062 (2016). Moreover, even Meneely testified that a fatal dose of Halcion is 40 pills, that based on the "reported" drug use he would expect death or coma, and acknowledged that Sabahi did not have his stomach pumped nor was an "antidote" given to him. RP 797, 807-08, 812. When this information is combined with the fact that a detective who searched Sabahi's home did not find a prescription bottle for Halcion, Norco, Tylenol 3, Ambien, or in those drugs' alternative names (brand or generic) and that Sabahi's blood screen was negative for Tylenol 3, Sabahi's accounting of the drugs he took should be viewed with skepticism. RP 695-96, 712-713, 720, 727-28.

<sup>17</sup> A general term for an altered mental status or confusion, which can include agitation, brought about by a toxin. RP 714

reports generated, Sabahi's medical records, and a letter prepared by Meneely, *supra* FN 16. RP 606-07, 614-15. She also met with Sabahi. RP 608. While Dr. Zenger did listen to the 911 call and reviewed transcripts made of the call, she formed her opinion as to whether Sabahi had diminished capacity prior to hearing the call or reviewing the transcripts and claimed that reviewing them did not change her opinion. RP 608, 621-23, 629-631, 649-650.

Dr. Zenger diagnosed Sabahi, at the time of attack, with "persistent depressive disorder as well as delirium that was substance induced." RP 609. Dr. Zenger opined that Sabahi was experiencing hallucinations or illusions, suffering from "delirium," and that he did not understand what was going on at the time of the attack. RP 616-18. She continued by claiming that the above conclusions were evidenced by Sabahi acting similarly combative with his parents, the police, and medical staff, i.e., that his behavior was indiscriminate. RP 617-18, 620-21. Dr. Zenger further opined that the evidence suggested Sabahi was unable to act "with any kind of goal-oriented behavior." RP 620. Ultimately, Dr. Zenger concluded that Sabahi "did not have the ability to inform [sic] the specific intent to commit" the alleged crimes. RP 619-620.

Dr. Zenger was crossed at length about how her conclusions could be squared with Sabahi's cooperative (at times) and goal-directed behavior observed by Ofc. Skollingsberg and medical personnel along with his ability to answer questions appropriately and follow directions, which were noted by the same. RP 632-35, 659-661.

Dr. Simone Viljoen testified for the State. She also evaluated Sabahi for diminished capacity. RP 886, 890. Prior to forming her opinions, Dr. Viljoen reviewed all of the police reports, Sabahi's medical records, Minou and Ahmad's medical records, Dr. Zenger's report, Meneely's letter, the 911 call, and a translation of the 911 call. RP 892, 896-97. Dr. Viljoen also met with Sabahi and spent about three hours with him. RP 898, 918.

Dr. Viljoen diagnosed Sabahi, at the time of the attack, with sedative, hypnotic or anxiolytic intoxication, opioid intoxication, and major depressive, unspecified recurrent episode. RP 900. Dr. Viljoen also opined that Sabahi "did not have diminished capacity." RP 891, 900, 919-922, 938-39. Regarding the 911 call, Dr. Viljoen noted:

Mr. Sabahi was speaking to his parents in Farsi, which is the language that they spoke at home, which is why we needed a translation. He -- what that shows to me is that he is oriented to his parents, that they're there. He understands that he's talking to his parents. He knows who they are. He knows who he is. His parents speak to him, and he

responds appropriately. So, you know, there's a number of statements that are evidence of being oriented to self and others, which is some of the things that we look for in whether someone has the capacity at the time for the mental state is if they're actually aware of, you know, who they are, who the people are around them.

RP 903-04; 920-21. As Dr. Viljoen further explained Sabahi's speaking Farsi was significant because aside from demonstrating his awareness of his surroundings it also:

demonstrated his ability to maintain a higher level of cognition, so being able to maintain his dual languages. So sometimes, if someone is, you know, not in -- like, in a delirium, for example, will lose one of their languages. So if someone is primarily Spanish-speaking and they become very delirious, they lose their ability to speak English, and so they will only respond in Spanish

RP 904.

Regarding the police reports, Dr. Viljoen relayed a number of examples of Sabahi (1) engaging in goal directed, intentional behavior, (2) showing awareness of self, (3) being able to comply with commands, and (4) responding appropriately at times to questions, which all helped her form her opinion that Sabahi had the capacity to intend to commit the alleged crimes. RP 906-911, 920-21, 926, 935. Dr. Viljoen found the same examples in the reports from responding medical personnel. RP 912-913. For example, Dr. Viljoen explained:

He's willing to answer most questions appropriately, including his name and his date of birth, so, again, that comes back to he understands who he is. He knows what his name is, when he was born. Those are sometimes things that people who are completely, you know, out of it, have trouble coming up with. . . . It shows that he understands that he's being interviewed by a medical professional, and he's answering questions.

RP 912.

On the other hand, Dr. Viljoen did not rely very much on reports about contact with Sabahi once he got to the hospital. RP 913. Because of the quantity and quality of the medications Sabahi was given to calm him down she opined that his "level of functioning at the hospital is not necessarily indicative or showing actually how he was functioning at the time of the actual event." RP 913. Thus, Sabahi's presentation that evening at 6:00 PM (during his contact with Det. Day) was only consistent with someone no longer intoxicated and did not inform as to Sabahi's mental state at the time of the crime. RP 914, 917.

Ultimately, Dr. Viljoen concluded that "although [Sabahi] was depressed, agitated, possibly intoxicated, he was still able to act in a purposeful, goal-directed manner. He was still able to decide what he's going to do and then do it." RP 920. More specifically, Sabahi had the capacity to act intentionally with regard to the charged crimes. RP 921-22.

## ARGUMENT

### I. **The trial court properly admitted Sabahi's statements to police officers because he made the statements voluntarily and they were not obtained in violation of Miranda.**

#### *a. Voluntariness*<sup>18</sup>

The standard of review of a trial court's conclusion of voluntariness is "whether there is substantial evidence in the record from which the trial court could have found that the confession was voluntary by a preponderance of the evidence." *State v. Rafay*, 168 Wn.App. 735, 757-58, 285 P.3d 83 (2012) (quoting *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997)).

The test for determining voluntariness is whether "under the totality of the circumstances, the confession was coerced," i.e., whether the "[d]efendant's will was overborne." *Broadaway*, 133 Wn.2d at 132 (citing *State v. Rupe*, 101 Wn.2d 664, 678-69, 683 P.2d 571 (1984)). Consequently, "coercive police activity is a necessary predicate to the finding that a confession is not voluntary." *State v. Unga*, 165 Wn.2d 95, 101, 196 P.3d 645 (2008) (quoting *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986)). For example, when a

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<sup>18</sup> At trial Sabahi argued that the statements he made to Ofc. Skollingsberg regarding his handcuffs and his trouble breathing were the result of custodial interrogation. RP 190. Sabahi has abandoned that argument, does not challenge the associated conclusions of law, and now argues that they were made involuntarily. Br. of App. at 17-20. The State argued at trial that there was no interrogation and that the statements were made voluntarily. RP 189-190.

defendant is “forced to choose between making incriminating statements and facing physical violence” his or her incriminating statements are considered not voluntary and not admissible against him or her. *State v. DeLeon*, 185 Wn.2d 478, 480, 374 P.3d 95 (2016). Notably, however, “a voluntary in-custody statement does not become the product of an ‘in-custody interrogation’ simply because an officer in the course of [the defendant]’s narration, asks the defendant to explain or clarify something he has already said voluntarily.” *State v. Godsey*, 131 Wn.App. 278, 285, 127 P.3d 11 (2006) (quotation and citation omitted).

The causal connection between the police activity and the defendant’s statements “is not merely ‘but for’ causation; the court does ‘not ask whether the confession would have been made in the absence of the interrogation.’” *Unga*, 165 Wn.2d at 102 (quoting *Miller v. Fenton*, 796 F.2d 598, 604 (3d Cir.1986)). Instead, “[t]he question is whether the interrogating officer’s statements were so manipulative or coercive that they deprived the suspect of his ability to make an unconstrained, autonomous decision to confess.” *Id.* (alterations omitted) (quoting *Miller*, 796 F.2d at 605).

Here, Sabahi claims that his statement to Ofc. Skollingsberg that his handcuffs were too tight was involuntary and the product of coercive police conduct and analogizes his situation with the one faced by the

defendants in *DeLeon, supra*. Br. of App. at 19-20. In *DeLeon*, the defendants were at the jail after being arrested for their involvement in a gang-related drive-by shooting and asked by police in booking to make an explicitly inculpatory statement regarding their gang affiliation or say nothing and face a very real risk of violence once booked.<sup>19</sup>

This case is distinguishable. First, Sabahi was not asked to make an explicitly inculpatory statement. Second, his choice was not between making such a statement and facing a real risk of violence or real risk to his health; rather it was between appropriately responding to a question about his well-being or not complaining about the tightness of his handcuffs.<sup>20</sup> Sabahi had no injuries requiring medical treatment let alone emergency medical treatment. RP 198, 380. Thus, he was not faced with a choice comparable to defendants in *DeLeon*. Moreover, there was no coercive police conduct—he was asked one simple question. That question of whether he was okay or whether he was injured was posed to Sabahi seconds after he was first observed by officers pitching himself, in some manner, down a flight of stairs. RP 185. This was an appropriate question asked for a proper purpose. Conclusion of Law #4. Furthermore, substantial evidence supported each Finding of Fact.

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<sup>19</sup> This risk was not merely theoretical as apparently they were informed about this very real safety risk. *DeLeon*, 185 Wn.2d at 487.

<sup>20</sup> His handcuffs were checked and not loosened. RP 185-86, 199.

Finally, Sabahi's statement that his handcuffs were too tight was the only statement he made in response to a question by Ofc. Skollingsberg. RP 185-86. After Ofc. Skollingsberg checked his cuffs and declined to loosen them Sabahi spontaneously volunteered that he had trouble breathing, that this trouble breathing was the result of asthma,<sup>21</sup> and that he had to urinate. Accordingly, any and all statements Sabahi made to Ofc. Skollingsberg were voluntary, none were coerced, and all properly admitted. Even if, however, Sabahi's statement that his handcuffs were too tight was admitted in error, any error was harmless beyond a reasonable doubt because said statement was only one minor piece of evidence amongst many that Sabahi had the capability of responding appropriately and had awareness of what was going on. *See* Section II, *infra*; *In re Cross*, 180 Wn.2d 664, 681, 688, 327 P.3d 660 (2014) (explicating constitutional harmless error test).

*b. Miranda*

The standard of review of a trial court's conclusion of "whether officers are engaged in 'interrogation' for *Miranda* purposes" is that reviewing courts "defer to the trial court's findings of fact but review it's

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<sup>21</sup> As noted above, "a voluntary in-custody statement does not become the product of an 'in-custody interrogation' simply because an officer in the course of appellant's narration, asks the defendant to explain or clarify something he has already said voluntarily." *Godsey*, 131 Wn.App. at 285 (quotation and citation omitted).

legal conclusions from those findings *de novo*.” *In re Cross*, 180 Wn.2d at 681 (citations omitted).

As a threshold matter, questioning, interviewing, or discussing a matter with a defendant is not an “interrogation” absent “some degree of compulsion” above and beyond “that inherent in custody.” *State v. Birnel*, 89 Wn.App. 459, 467, 949 P.2d 433 (1998)<sup>22</sup> (citing *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995)); *State v. Richmond*, 65 Wn.App. 541, 545, 828 P.2d 1180 (1992) (citation omitted). Similarly, said questioning does not constitute an “interrogation” unless the police ask questions or engage in actions “*other than those normally attendant to arrest and custody*[ ] that the police should know are reasonably likely to elicit an incriminating response from the suspect. *Rhode Island v. Innis*, 446 U.S. 291, 299-302, 100 S.Ct. 1682, 64 L.Ed.2d 29 (1980) (emphasis added). Thus, courts have recognized a “routine question exception,” to the *Miranda* rule, which allows, for example, some preliminary background and biographical questions since these types of “questions rarely elicit an incriminating response and do not involve the ‘compelling pressures which [ ] undermine the individual’s will to resist and compel him to speak where he would not otherwise do so freely.’” *State v. Denney*, 152 Wn.App. 665, 671, 218 P.3d 633 (2009) (*overruled on other*

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<sup>22</sup> overruled on other grounds by *State v. Studd*, 137 Wn.2d 533, 549, 973 P.2d 1049 (1999).

grounds by *In re Cross*, 180 Wn.2d at 681 n.8) (citing *U.S. v. Booth*, 669 F.2d 1231, 1237 (9th Cir.1981)); *State v. Bradley*, 105 Wn.2d 898, 904, 719 P.2d 546 (1986).

Here, Sabahi appears to claim that his statements to Det. Day were offered in violation of the *Miranda* rule since, he argues that Det. Day's questions were likely, or meant to illicit an incriminating response. Br. of App. at 20-23.<sup>23</sup> He also analogizes this case to *United States v. Hinckley*, 672 F.2d 115, 124-125, (1982) where the questioning of the defendant, to include preliminary and background questions, was held to be "interrogation."

This case is distinguishable. First, the interactions between law enforcement and the respective defendant are not all similar. In *Hinckley*, the defendant was in police custody—not at a hospital—read his *Miranda* warnings and invoked. After his invocation, multiple officers (Secret Service and FBI) asked him 25 minutes of "background" questions to include his life up until his arrival in Washington where the crime took place, his travel patterns, his medical problems, and his psychiatric treatment. Moreover, after the defendant stopped the "background interview" and renewed his request for an attorney, another FBI agent

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<sup>23</sup> The exact nature of Sabahi's claim is unclear since he does not challenge the conclusions of law that Det. Day's questions were "preliminary questions," and "not custodial interrogation," and that Det. Day "was not required to *Mirandize* the defendant before asking these preliminary questions." Conclusions of Law #5, #6, #7.

entered the room and resumed questioning the defendant to include inquiring about an item found in his wallet. Here, on the other hand, Det. Day simply asked Sabahi some preliminary questions—his name, age, the date, who was the president—to try ascertain whether Sabahi was capable of knowingly, voluntarily, and intelligently waiving his *Miranda* rights and speaking to him about the incident. RP 234 In fact, once Det. Day determined that Sabahi was alert and oriented he read Sabahi his *Miranda* rights and Sabahi invoked. As the trial court noted, “the un rebutted testimony in this case, the undisputed testimony in this case, is that the purpose of the questioning -- the questioning that’s going to be brought up before the jury is not to elicit an incriminating response but to determine whether the person sitting there can make any response or whether they’re in a position to even question.” RP 241

Consequently, the statements Sabahi made to Det. Day were properly admitted. They were not reasonably likely to elicit an incriminating response and in questioning Sabahi there was no “degree of compulsion” above and beyond “that inherent in custody.” *Birnel*, 89 Wn.App. at 467. While at that point Det. Day knew that Sabahi’s crime likely involved a mental health component, there is no evidence he asked the questions he did improperly or outside the scope of the “routine question” exception.

Nonetheless, even if the statements were improperly admitted any error was harmless beyond a reasonable doubt because the statements themselves were not incriminating nor was Sabahi's ability to answer them correctly. *In re Cross*, 180 Wn.2d at 681, 688. In other words, these statements were more irrelevant than incriminating as Dr. Viljoen specifically testified that statements Sabahi provided to Det. Day *did not* inform her opinion as to his ability to form the requisite intent. RP 916-17. Instead, Sabahi's answers only showed that was he was no longer intoxicated at the time he made them. RP 917. Recognizing the relative lack of importance of this testimony, neither attorney discussed these statements in closing argument. *See* RP 994-1057. Thus, any error in admitting the statements was harmless.

**II. The evidence was sufficient to prove Sabahi's intent to inflict great bodily injury upon his parents.**

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at

201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness and weight of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). The standard remains the same for expert witnesses as the weight to be given an expert's conclusions is generally left to the jury and not reweighed upon appeal. *State v. Lord*, 117 Wn.2d 829, 854, 822 P.2d 177 (1991) (citing cases); *State v. Sanders*, 66 Wn.App. 380, 388, 832 P.2d 1326 (1992) (noting that juries retain the "responsibility for determining what weight should be given the expert's testimony") (citations omitted); *State v. Hightower*, 36 Wn.App. 536, 545, 676 P.2d 1016 (1984) (remarking that where a trial is a "battle of experts" what remains is "factual dispute for the jury to determine"); *see also State v. Moyle*, 176 Wn.App. 1028, 2013 WL 5337261 at 3 (recognizing where a defense expert opines that the defendant suffered from diminished capacity and the State's expert testified to the opposite that the jury's credibility determination in favor of the State's expert will not be reevaluated or reweighed); Unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities. GR 14.1.

Furthermore, “specifics regarding date, time, place, and circumstance are factors regarding credibility . . .” and, thus, matters a jury best resolves. *State v. Hayes*, 81 Wn.App. 425, 437, 914 P.2d 788 (1996) *rev. denied* 130 Wn.2d 1013 (1996). Moreover, the “specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In order to determine whether the necessary quantum of proof exists, the reviewing court “need not be convinced of the defendant’s guilt beyond a reasonable doubt but only that substantial evidence supports the State’s case.” *State v. Gallagher*, 112 Wn.App. 601, 613, 51 P.3d 100 (2002) (citations omitted).

Here, the State presented substantial evidence that Sabahi acted with specific intent to inflict great bodily harm upon his parents. First, Dr. Viljoen’s provided a comprehensive and persuasive explanation to the jury regarding Sabahi’s state of mind, his ability to form the requisite intent, and, importantly, how the other evidence supported her opinion. In finding Sabahi guilty of two counts of Assault in the First Degree, and acquitting him of the counts of Attempted Murder, the jury quite plainly carefully weighed the evidence regarding intent before reaching their verdicts and, necessarily, accorded Dr. Viljoen’s opinions more weight than those of the defense experts. This court should not reweigh that decision.

Moreover, the following evidence contemporaneous to the crime established that Sabahi acted with the required intent: (1) he conversed with parents in Farsi during the attack indicating he knew with whom he was talking; (2) during the attack when Minou says “[y]ou already killed me” Sabahi responds “I killed my dad as well”;<sup>24</sup> (3) when police arrive rather than indiscriminately attacking them, Sabahi flees or throws himself down the stairs; (4) Sabahi does not attack the officers, instead he is cooperative when handcuffed; (5) when asked if he is okay, Sabahi complains about the handcuffs in English; (6) Sabahi, aware of himself, explains he is having trouble breathing and needs to urinate; (7) Sabahi follows commands to move onto his stomach, to stand up, and to walk up the stairs; (8) Sabahi is able to give his correct name, his age, his birthdate, and where he is located; (9) the attack occurs for approximately 8 minutes and in multiple rooms where Sabahi evinces goal oriented behavior by delivering strikes to multiple victims by punching and using a weight rather than by flailing about; (10) refuses to discuss the incident with Orem (paramedic firefighter) but will answer his other questions; and (11) repeats to Orem that he is “sorry.” Furthermore, there was no evidence that Sabahi was suffering from hallucinations. RP 941, 947. Rather this situation was not much different from alcohol fueled attacks about which

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<sup>24</sup> RP 482-83.

people are more familiar. *See* RP 939-940 (Dr. Viljoen explains how benzodiazepine works in a very similar way to alcohol). Sabahi was intoxicated, but he had the ability to form the necessary intent, and did in fact form the intent necessary for his convictions to stand; sufficient evidence supports his convictions.

**III. Should the State prevail it will not seek appellate costs.**

The State will not seek appellate costs if it prevails.

**CONCLUSION**

For the reasons argued above, this Court should affirm the trial court's ruling admitting Sabahi's statements and affirm his convictions.

DATED this 11 day of December, 2017.

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