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(Clark County Superior Court No. 15-1-01458-7)

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

STATE OF WASHINGTON

Respondent,

v.

STEPHEN MARK REICHOW,

Appellant.

APPELLANT'S AMENDED OPENING BRIEF

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STEPHEN MARK REICHOW
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I. INTRODUCTION

Studies conducted by psychologists and legal researchers since *Manson v. Braithwaite* have confirmed that eyewitness testimony is often hopelessly unreliable. Eyewitness misidentification is a factor in 75% of DNA exoneration cases. Nevertheless, jurors tend to over rely on eyewitness testimony, even where the identification procedures employed by law enforcement are suggestive.

The trial court was asked to instruct the jury on how to evaluate eyewitness testimony but declined to do so, despite there being two eyewitnesses, Chelsea Sutherland and Jacqueline Olson, both who made eyewitness observations that were presented to the jury.

The right to present a defense is axiomatic in criminal trials. Mr. Reichow was evaluated for ‘diminished capacity,’ and an expert concluded that Mr. Reichow’s capacity to form the intent to commit the crime was impacted by his mental disorder. The court denied defense counsels request to rely on an expert to establish evidence consistent with a diminished capacity defense.

In order for a jury to properly consider the evidence presented they must be properly instructed. In this case, the court's basic concluding the instruction was inappropriate and constitutes reversible error. The jury should have been instructed properly pursuant to the lesser degree instruction and lesser degree concluding instruction.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to provide required instructions to the jury on eyewitness testimony.

2. The trial court erred when it excluded evidence of Mr. Reichow's diminished capacity defense.

3. The trial court erred by instructing the jury using WPIC 151.00.

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court erred by denying Mr. Reichow the opportunity to fairly argue his defense when it failed to provide required instructions to the jury on eyewitness testimony pursuant to WPIC 6.52.

2. Whether Mr. Reichow's Constitutional rights, pursuant to the 6th and 14th Amendments, were violated when the trial court excluded evidence of Mr. Reichow's diminished capacity defense.

3. Whether the trial court erred instructing the jury using WPIC 151.00 versus WPIC 4.11 and 155.00.

IV. STATEMENT OF THE CASE

In the early morning hours of August 2, 2015, Brandon Maulding died as a result of blunt force injuries to his body, face and head. RP 966¹. Earlier, on August 1, 2015, members of Battle Ground law enforcement responded to an area of town where Jacqueline Olson had reported observing a male choking another male while on the ground. RP 183. Ms. Olson also testified she had witnessed one of the individuals walking north in the area to a 'skate park.' RP 177. Ms. Olson's eye witness observations included the description of one of the males as heavy and wearing dark shorts. RP 177. Jacqueline Olson was also able to take law enforcement in the direction of where she saw the male who she witnessed being involved in the altercation. RP 189.

¹ The transcript consists of seven volumes of trial transcripts. Counsel will refer to the trial transcripts using the notation "RP."

Battle Ground law enforcement Officer Archer was able to contact the defendant, Stephen Reichow, near where the victim was found. RP 277-78. Law enforcement observed that Mr. Reichow had what appeared to be blood on his entire body. RP 278. When asked by Officer Archer how the victim was injured Mr. Reichow responded 'I killed him.' RP 279. When Mr. Reichow was transported to Battle Ground Police Department he was interviewed by detectives. RP 295. Mr. Reichow admitted to hanging out with the victim, as well as Anne Tanninen. RP 760. Moreover, Mr. Reichow admitted that he had gone to the river and back with the victim prior to the confrontation. RP 759-60. Mr. Reichow further admitted he had also been hanging out with Anne Tanninen just prior to the confrontation. RP 760. Mr. Reichow reported to detectives that Anne Tanninen had received a 'strange phone call,' from someone about a drug deal and that she, Anne Tanninen had been 'gang stalked.' RP 761. Anne Tanninen testified that she had received a 'strange phone call' about a drug deal and commented that she had been 'gang stalked' for the last 6 years. Mr. Reichow told detectives that the victim had a baseball bat and had started

tapping the bat against his (the victims) shoes. RP 761. Additionally, Mr. Reichow told detectives that the victim was acting strange and at some point, started saying to Mr. Reichow 'hey boy...hey boy' RP 762. Mr. Reichow told law enforcement that the victim's action caused him concern and he took off running to hide from the victim and Anne Tanninen. RP 765. Detective Kelly, who interviewed Mr. Reichow played the recording of that interview for the jury. What the jury heard was that Mr. Reichow was aware of the strange call regarding a drug deal to Anne Tanninen, that Mr. Reichow had concerns that whomever was tracking Anne Tanninen was now tracking him (Mr. Reichow), and that Mr. Reichow thought people had 'been stalking him for years including,' his computers, information about his child's mother, his mother's house. RP 770. Mr. Reichow further told law enforcement that he had been stalked and harassed over the internet for years. RP 762.

Mr. Reichow testified that the victim appeared to be in an 'altered state.' RP 1076. Mr. Reichow further testified that Anne Tanninen accused him (Mr. Reichow) of having something to do with the strange phone call. RP 1077. Mr. Reichow testified that

Anne Tanninen accused him of being a ‘gang stalker.’ RP 1077. Mr. Reichow asserted in his testimony that he was ‘on alert when the strange phone call was going,’ and that he thought maybe he was in ‘a setup kind of situation.’ RP 1080. Mr. Reichow and the victim ended up in an altercation where Mr. Reichow took the bat from the victim. RP 1092. Mr. Reichow struck the victim with the bat saying in his testimony that when he used the bat he was ‘just trying to stop the attack.’ RP 1092. The victim became incapacitated and Mr. Reichow left the baseball bat. RP 1093. Mr. Reichow was later contacted by law enforcement where he was arrested and subsequently charged with the murder of the victim in this case. RP 1094-95.

Mr. Reichow was charged by information with one count of Murder in the First Degree, one count of Murder in the Second Degree, and one count of Felony Murder. CP 5-7. Mr. Reichow submitted to a competency evaluation and report.² CP 22. Mr. Reichow was also evaluated for purposes of diminished capacity by Dr. Nicole Zenger. CP 47-69. Dr. Zenger diagnosed Mr. Reichow as

² The Clerks Papers consist of 328 pages and will be referred to by counsel as ‘CP’

schizophrenic. CP 60. Dr. Zenger based this diagnosis on Mr. Reichow's uncontested history of mental health issues including paranoia manifesting in the Mr. Reichow's belief that he is being 'stalked' and the 'government is watching him.' CP 60. Additionally Mr. Reichow expressed concerns that he was being 'cyberstalked.' CP 60. Dr. Zenger further noted that Mr. Reichow's 'delusional beliefs have dictated much of his actions,' and consume a significant portion of his (Reichow's) time. CP 60. Dr. Zenger further noted that Mr. Reichow 'insists that seemingly innocuous events have been due to the psychological games people play.' CP 61. Dr. Zenger ultimately concluded that Mr. Reichow was suffering from a mental disorder at the time of the alleged offense and the mental disorder impacted his ability to form the intent to commit the crime alleged. CP 69.

V. LAW AND ARGUMENT

- 1. The trial court committed error by requiring a new trial when it failed to instruct the jury on eyewitness testimony. Problems with the reliability of eye witness testimony are widely recognized in jurisprudence but not in the general population.**

A witnesses' recollection of a stranger, viewed under circumstances of emergency or emotional distress, can be easily distorted by the circumstances or by the actions of police. *Manson v. Braithwaite*, 432 U.S. 98, 112 (1977). Problems with eyewitness identification evidence have been widely recognized in the courts and scientific community. *State v. Allen*, 176 Wn.2d 611, 616, 294 P.3d 679, 682 (2013) (C. Johnson, J., lead opinion); Flevaris, Taki V. & Ellie Chapman, *Cross-Racial Misidentification: A Call to Action in Washington State and Beyond*, 38 Seattle U. L. Rev. 861, 866 (2015). In *State v. Allen*, the Washington State Supreme Court had the opportunity to determine whether a defendant was entitled, as a matter of Due Process, to jury instructions proposed by the defense in a case where the victim asserted a 'cross-racial' identification of a perpetrator of a different race than the victim. *State v. Allen*, 176 Wn. 2d 611, 615 at note 1, 294 P.3d 679 (2013).

- a. ***Jury instructions are necessary to educate the jury on the dangers associated with all aspects of eyewitness testimony, not just identification.***

Eyewitness misidentification is the most common cause of wrongful convictions. Jennifer Devenport, et al, *Effectiveness of*

Traditional Safeguards Against Erroneous Conviction Arising from Mistaken Eyewitness Identification, in *Expert Testimony of the Psychology of Eyewitness Identification*, 51 (Brian L. Cutler ed., 2001) (“For several decades now, scholars and social scientists have studied miscarriages of justice occurring in the American legal system and have drawn the same conclusion: mistaken eye witness identifications are the lead cause of wrongful convictions”). Eyewitness identification is erroneous approximately one third of the time. Flearis, 38 Seattle U. L. Rev. at 869 (*citing* Brief for Am. Psychological Ass’n as Amici Curiae Supporting Petitioner at 14-17, *Perry v. New Hampshire*, 132 S. Ct. 716, 181 L.Ed.2d 696 (2012) (explaining that “researchers have conducted a variety of studies of actual witness identifications ... [that] have consistently found that the rate of inaccurate identifications is roughly 33 percent”)); *see also, e.g., Bruce W. Behrman & Sherrie L. Davey, Eyewitness Identification in Actual Criminal Cases: An Archival Analysis*, 25 Law & Hum. Behav. 475, 482 (2001) (study of actual lineups finding that eyewitnesses identified suspects 50% of the time and

mistakenly identified lineup “foils”—unrelated individuals inserted into the lineups—24% of the time)).

Despite the mounting evidence that eyewitness testimony is unreliable, jurors continue to accept it even when the evidence is itself is flawed. Elizabeth F. Loftus, *Eyewitness Testimony* 9 (1979) (“Jurors have been known to accept eyewitness testimony pointing to guilt even when it is far outweighed by evidence of innocence.”). Jurors tend to “over-believe eyewitnesses, have insufficient understanding of the factors that affect memory, and are overly swayed by eyewitness confidence, which is not very diagnostic of accuracy and apt to be inflated by the time the eyewitness reaches the courtroom.” Michael R. Leippe et al., *Timing of Eyewitness Expert Testimony, Jurors’ Need for Cognition, and Case Strength as Determinants of Trial Verdicts*, 89 *J. Applied Psychol.* 524, 524 (2004); see also Tanja Rapus Benton et al., *Eyewitness Memory Is Still Not Common Sense: Comparing Jurors, Judges and Law Enforcement to Eyewitness Experts*, 20 *Applied Cognitive Psychol.* 115, 125 (2006) (jurors agree with experts on eyewitness testimony only 13% of the time). A recent national study found that most

people believe visual memory works just like an accurate video camera recording and is similarly accurate. Daniel J. Simons & Christopher F. Chabris, *What People Believe About How Memory Works: A Representative Survey of the U.S. Population*, 6 PLoS ONE 3 (2011). Jurors share this mindset. Saul M. Kassin & Kimberly A. Barndollar, *The Psychology of Eyewitness Testimony: A Comparison of Experts and Prospective Jurors*, 22 J. Applied Psychol. 1241, 1245 (1992) (survey demonstrating lack of juror knowledge on findings of eyewitness science).

A “defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case.” *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994); U.S. CONST. AMEND. VI; CONST. ART. I, § 22. Cautionary jury instructions are sometimes required when dubious categories of evidence are admitted at trial against a criminal defendant. *See, e.g., State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984) (requiring cautionary instruction if accomplice testimony is to be admitted without sufficient corroboration), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 554, 782, P.2d 1013 (1989); *State v. Renfro*, 96 Wn.2d

902, 906, 639 P.2d 737 (1982) (requiring cautionary instruction if stipulated polygraph evidence is to be admitted).

In *Allen*, a majority of justices suggested that a trial court's refusal to provide an instruction on cross-racial misidentification may be an abuse of discretion when "eyewitness identification is a central issue in a case, there is little evidence corroborating the identification, and the defendant specifically requests the instruction." *State v. Allen* 176 Wn.2d at 634 (Chambers, concurring), *see also, id.* at 632-33 (Madsen, concurring) ("The dissent properly recognizes that cross-examination, expert testimony, and closing argument may not provide sufficient safeguards against cross-racial misidentification because the very nature of the problem is that witnesses believe their identification is accurate."); *id.* at 643 (Wiggins, dissenting) ("I would embrace a version of the rule adopted in other jurisdictions, holding that a court must give the instruction where cross-racial eyewitness identification is a central issue in the case, where there is little corroborating evidence, and where the defendant asks for the instruction"). Mr. Reichow's right to a fair trial was denied when the court failed

instruct the jury on eye witness identification. Prior to *State v. Allen*, proposed jury instructions like WPIC 6.52³, were impermissible instructions because they inappropriately commented on the evidence. *Allen at 624* (citing *State v. Carothers*, 84 Wn. 2d 256, 267-68, 525 P.2d 731 (1974)).

Defense counsel's argument appropriately points out that there are two witnesses, Chelsea Sutherland and Jacqueline Olson, whose testimony was 'eye-witness' in nature. RP 1164. Defense counsel noted that both witnesses' observation, recall, and descriptors of who law enforcement later identified as consistent with the defendant and the victim in this case. RP 1164. The trial

³ WPIC 6.52 Eyewitness Identification Testimony

Eyewitness testimony has been received in this trial on the subject of the identity of the perpetrator of the crime charged. In determining the weight to be given to eyewitness identification testimony, in addition to the factors already given you for evaluating any witness's testimony, you may consider other factors that bear on the accuracy of the identification. These may include:

- The witness's capacity for observation, recall and identification;
- The opportunity of the witness to observe the alleged criminal act and the perpetrator of that act;
- The emotional state of the witness at the time of the observation;
- The witness's ability, following the observation, to provide a description of the perpetrator of the act;
- [The witness's familiarity or lack of familiarity with people of the [perceived] race or ethnicity of the perpetrator of the act;]
- The period of time between the alleged criminal act and the witness's identification;
- The extent to which any outside influences or circumstances may have affected the witness's impressions or recollection; and
- Any other factor relevant to this question.

court described defense proposed ‘eye witness’ pattern instruction as necessary ‘where there is an issue of identification made either at a show up or an in court identification.’ RP 1165. Moreover, the trial court noted that because neither witness, Jacqueline Olson or Chelsea Sutherland, had made an in-court identification or a ‘show up,’ defense proposed instruction was denied.

The trial court’s rejection of the proposed instruction because the facts in the case did not deal specifically with an in-court identification or ‘show up’ misapplies the law and is an abuse of discretion by the trial court. *State ex rel. Carroll v. Junker*, 79 Wn. 2d 12, 26, 482 P.2d 775 (1971); *see Carothers*, 84 Wn. 2d at 267-268. The committee’s adoption of ‘WPIC 6.52’ and both the legal and scientific consensus tends to favor the use of instruction well beyond eye witness identification and show ups as noted by the trial court here, but to all aspects of eye-witnesses identification and testimony.

2. Mr. Reichow’s Constitutionally protected right to present a defense was denied when the trial court excluded evidence of Mr. Reichow’s diminished capacity defense.

The Sixth and Fourteenth Amendments separately and jointly recognize the guarantee to an accused person the right to a meaningful opportunity to present a defense. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citations and internal quotations omitted). Article I, § 22 of the Washington State Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn. 2d 918, 924, 913 P.2d 808 (1996). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide “where the truth lies.” *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95 (1973).

“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 perform the specific intent to commit the crime charged.” *State v. Ellis*, 136 Wn. 2d 498, 521, 963 P.2d 843 (1998) (quoting *State v. Edmon*, 28 Wn. App. 98, 107, 621 P.2d 1310 (1981)). The first time a Washington court addressed the concept of diminished capacity

was in *State v. White*, 60 Wn. 2d 551, 374 P.2d 942 (1962). In distinguishing insanity from a mental defect that fell short of insanity, *State v. White* recognized an accused who has the necessary capacity to premeditate, for instance, may still introduce evidence that he is suffering from a mental disease or defect, which disease or defect substantially reduces the probability that he actually did premeditate with regard to the crime with which he is charged. *State v. White*, 60 Wn. 2d at 588.

The diminished capacity defense involves a mental condition that impaired or interfered with the capacity to form the culpable mental state, as opposed to a condition that resulted in no capacity or ability to form the mental state altogether. There is no meaningful difference between “whether the defendant had the capacity to form the intent versus whether the defendant had an impaired capacity to form intent.” *State v. Johnson*, 150 Wn. App. 663, 671, 208 P.3d 1265 (2009), *review denied*, 167 Wn. 2d 1012, 220 P.3d 208 (2009). “The State must prove actual intent. The defendant is entitled to present evidence that he had a mental disorder that interfered with his ability to form intent. The rest is up to the jury.” *Id.*

In holding it was in error to exclude this expert testimony regarding diminished capacity, the Washington State Supreme Court held the foundational criteria explained in *State v. Edmon*, (commonly referred to as the *Edmon* factors). *Ellis*, 136 Wn.2d at 521-22 (1998). The admissibility of expert testimony concerning diminished capacity defense must be determined pursuant to *ER* 401⁴, *ER* 402⁵, and *ER* 702⁶. *Id.* In the context of diminished capacity, to satisfy *ER* 401, *ER* 401, *ER* 702, expert testimony ‘must have the tendency to make it more probable than not that a defendant suffered a mental disorder, not amounting to insanity, that impaired the defendant’s ability to form the culpable mental state to commit the crime charged.’ *State v. Atsbeha*, 142 Wn. 2d 904, 918, 16 P.3d 626 (2001). In *Ellis*, the defendant suffered from a personality disorder related to impulsive behavior and emotional dysregulation

⁴ *ER* 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence.

⁵ *ER* 402 provides “All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.”

⁶ *ER* 702 provides: ‘If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.’

in reaction to stress. *State v. Ellis*, 136 Wn. 2d at 520-21. To raise a diminished capacity defense, 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*, 142 Wn. 2d 904, 918 (2001).

It is axiomatic in criminal justice context that a defendant has the Constitutionally protected right to present a defense. U.S. CONST. AMEND VI. *Holmes* 547 U.S. at 324, *Ellis*, 136 Wn.2d at 527. Moreover, the WASHINGTON STATE CONSTITUTION provides for the right to present material and relevant testimony. *Article I, § 22*; *State v. Roberts*, 80 Wn. App, 342, 350-51, 908 P.2d 892(1996) (reversing a decision where defendant was unable to present relevant testimony). In this case, the defendant asserted 'self defense,' which places a burden on the defendant to establish facts supporting the affirmative defense claimed. *State v. Allery*, 101 Wn. 2d. 591, 595, 628 P. 2d 312 (1984). The *Allery* court noted that "The jury should be instructed to consider the self-defense issue from the defendant's perspective in light of all he/she knew and had experienced with the victim." *State v. Allery*, 101 Wn. 2d at 595.

Obviously, Mr. Reichow's mental status was at issue in this case, and any relevant evidence should have been presented to the jury. Dr. Zenger was a qualified professional who had relevant evidence to establish Mr. Reichow's proffered defense regarding diminished capacity. More importantly, the jury heard Mr. Reichow's recorded statement to law enforcement. Within that recorded statement, Mr. Reichow made comments about his mental state including the fact that he believed he had been stalked, surveilled, and harassed by the government or other parties. Mr. Reichow's mental state coupled with the facts elicited from Anne Tanninen gave rise for the jury to hear what Mr. Reichow's thoughts meant and what impact those thoughts had on Mr. Reichow's perception of both Anne Tanninen and the victim in the case. To leave those statements out there without any context or explanation likely confused the jury, but more importantly because Mr. Reichow was precluded from arguing diminished capacity, he was not allowed to explain those facts to the jury and how they impacted his ability to form the ability to intend to commit the offense.

3. The trial court erred by instructing the jury using WPIC 151.00 versus WPIC 155.00

Mr. Reichow was charged with three separate offenses; Murder in the Second Degree and Felony Murder being lessor degree offenses. It is important to note that these offenses were not submitted as lessor included offenses, just offenses of a lesser degree. The comments to the jury instructions provide insight and clarity on this issue. The only discussion about a concluding instruction is that one is necessary. RP 1165-66. There is no discussion about which concluding instruction should be used, and the court instructed the jury with the basic WPIC 151.00⁷. CP 219-

⁷ WPIC 151.00 Basic Concluding Instruction

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you. During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory. You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations. If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given. You will be given [the exhibits admitted in evidence,] these instructions [,] and verdict form[s] for recording your verdict. [Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.]

220. However, because Mr. Reichow was charged with a lesser degree of a crime the jury should have been instructed pursuant to ‘WPIC 4.11⁸’ and ‘WPIC 155.00⁹.’ WPIC 4.11 ‘Notes on Use,’ provides,

You must fill in the blank provided in [the] [each] verdict form the words “not guilty” or the word “guilty”, according to the decision you reach. Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict

⁸ WPIC 4.11 Lesser Included Crime or Lesser Degree
The defendant is charged [in count] with(name of charged crime). If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime[s] of(name of lesser crime or crimes). When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more [degrees] [crimes] that person is guilty, he or she shall be convicted only of the lowest [degree] [crime].

⁹ WPIC 155.00 Concluding Instruction—Lesser Degree/Lesser Included/Attempt
When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you. During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory. You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations. If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given. You will be given [the exhibits admitted in evidence,] these instructions, and [two] [three] verdict forms, A and B [and C] [for each defendant]. [Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.]. When completing the verdict forms, you will first consider the crime

[U]se this instruction when the evidence would allow conviction of a lesser included crime, whether that be a lesser degree of the same crime or a lesser included crime with a different name. Along with this instruction, use WPIC 155.00 (Concluding Instruction—Lesser Degree/Lesser Included Crime/Attempted Crime), and the applicable special verdict forms from WPIC180.01, WPIC180.05, and WPIC180.06 180.06. In order to have a complete set of instructions, there must be a separate elements instruction setting out what must be proved to convict a defendant of the lesser included crime or lesser degree.

(emphasis added)

As discussed in *State v. Tamalini*,

of as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words “not guilty” or the word “guilty,” according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A. If you find the defendant guilty on verdict form A, do not use verdict form B [or C]. If you find the defendant not guilty of the crime of , or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of . If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words “not guilty” or the word “guilty”, according to the decision you reach. [If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form B.]

[If you find the defendant guilty on verdict form B, do not use verdict form C. If you find the defendant not guilty of the crime of , or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of . If you unanimously agree on a verdict, you must fill in the blank provided in verdict form C the words “not guilty” or the word “guilty,” according to the decision you reach.]

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

[A]s noted above, the terms "lesser included offense" and "inferior degree offense" have often been used interchangeably. (citations omitted) This confusion of terms is unfortunate because it blurs the difference between the two. The test, as we noted above, for determining if a crime is a lesser included offense is the Workman¹⁰ test. On the other hand, a defendant is entitled to an instruction on an inferior degree offense when (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

134 Wn. 2d 725, 730-35, 953 P. 2d 450 (1998) (citing *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789 (1979) (internal quotations omitted); *State v. Daniels*, 56 Wn. App. 646, 651, 784 P.2d 579, review denied, 114 Wn.2d 1015, 791 P.2d 534 (1990)).

While *Tamalini* dealt with a case where the court considered whether Manslaughter in the first degree and Manslaughter in the second degree were lesser included offenses of Murder in the Second degree, the court's acknowledgement that jury's should be

¹⁰ The *Workman* test references lesser included offenses which are not at issue here and will not be discussed. *State v. Workman*, 90 Wn. 2d 443, 584 P.2d 382 (1972).

instructed in relation to lesser degree of offenses is what applies here.

The 'Comments' section of 'WPIC 4.11' reads,

*[L]esser included crimes and lesser degree crimes. This instruction explains the proper sequence of the jury's decisions when considering a lesser offense. The instruction applies regardless of whether the crime is a lesser degree crime or a lesser included crime. In either instance, the framework for juror decision-making is the same. It is only in other regards that the law distinguishes between lesser degree crimes and lesser included crimes. See *State v. Tamalini*, 134 Wn.2d 725, 730–35, 953 P.2d 450 (1998).*

WPIC 4.11(emphasis added) (citing Tamalini, 134 Wn.2d at 730-35)

In this case, the jury was left with a concluding instruction that could easily be interpreted as requiring them to decide guilty or not guilty on each offense, even though they were not required to. In fact, had the jury been properly instructed it is possible that they could have only convicted of Murder in the second degree or Felony Murder, and not Murder in the first degree. The jury was not properly instructed and the court should reverse the convictions.

VI. CONCLUSION

This Court should reverse Mr. Reichow's conviction and order a new trial. This Court should order that Mr. Reichow be given a new trial and a jury instruction on eyewitness identification be given to the jury. Additionally, this Court should reverse the conviction because Mr. Reichow was not permitted to present evidence in support of a defense which is constitutionally protected. Finally, this Court should reverse the conviction of Mr. Reichow because jury was not properly instructed in relation to lesser degrees of the crimes alleged. If this Court is not persuaded by any one error of the trial court, the cumulative error suffices to warrant a reversal of the conviction and a new trial ordered.

RESPECTFULLY SUBMITTED this 22nd day of November, 2017.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on the 22nd day of November, 2017, a true and correct copy of the foregoing document was served by the method indicated below and addressed to the following:

Anne Mowry Cruser	COA Notification	<input checked="" type="checkbox"/>
Clark County Prosecuting Attorney	U.S. Mail	<input type="checkbox"/>
P.O. Box 5000	Facsimile	<input type="checkbox"/>
Vancouver, WA 98666	Email	<input type="checkbox"/>
Email: anne.cruser@clark.wa.gov		

Stephen M. Reichow	COA Notification	<input type="checkbox"/>
DOC #399068	U.S. Mail	<input checked="" type="checkbox"/>
Washington State Penitentiary	Facsimile	<input type="checkbox"/>
1313 North 13 th Ave.	Email	<input type="checkbox"/>
Walla Walla, WA 99362		

DATED this 22nd day of November, 2017 at Spokane, Washington.

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