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No. 50366-2-II

**Court of Appeals, Div. II,  
of the State of Washington**

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State of Washington,

Respondent,

v.

Brian A. Crute,

Appellant.

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**Brief of Appellant**

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## **1. Introduction**

Brian Crute was charged and convicted of assaulting a law enforcement officer and obstructing an officer, as the result of a series of unfortunate events on the night of February 28, 2016. Crute suffers from schizophrenia. He has paranoid delusions. That night, he was troubled by delusions and went out for a walk. Someone called 911, and officers were dispatched to do a welfare check.

The officers immediately exercised their authority and ordered Crute to stop, to get on his knees, put his hands behind his back, lay down on the ground, instead of approaching him as helpers and asking how he was or whether he needed assistance. The officers' aggressive approach combined with Crute's delusions to cause the encounter to spiral out of control, ending with Crute being held to the ground by nine officers and firefighters and being struck with a taser five to seven times within a half-hour period.

Crute's mother said it well at sentencing: "My child, a wellness check, is possibly going to jail for 55 months. It's why African-Americans don't call the police to check on them because they know that it usually ends up with someone in the hospital or going to jail or worse yet, dead." Crute needed mental health assistance. He was not committing any crime before the officers

showed up and mishandled the encounter. The trial court made things worse by excluding any evidence of Crute's mental illness. This Court should reverse.

## **2. Assignments of Error**

### **Assignments of Error**

1. The trial court abused its discretion in excluding expert testimony from Dr. Trowbridge on the issue of diminished capacity.
2. The trial court erred in failing to instruct the jury on the required element of third degree assault of knowledge that the victim was a law enforcement officer engaged in their official duties (Instructions #7 and #8).
3. There was insufficient evidence to prove beyond a reasonable doubt that Crute had the required knowledge that the officers were real law enforcement officers engaged in their official duties, for both the assault and obstruction charges.

### **Issues Pertaining to Assignments of Error**

1. Expert testimony on the defense of diminished capacity is admissible if it explains the mental defect and how that defect could lead to diminished capacity. It is not necessary for the expert to conclude that the defendant actually had diminished capacity, as long as the jury can apply the opinion to the facts. Dr. Trowbridge would have explained Crute's mental defect and how it could have possibly led to diminished capacity. Did the trial court abuse its discretion in excluding his testimony? (assignment of error 1)

2. Evidence is insufficient if a rational trier of fact could not find an element of the crime beyond a reasonable doubt. Both crimes charged require proof that the defendant knew that the victims were law enforcement officers engaged in their official duties. Here, the officers uniformly testified that Crute was delusional and did not believe they were real officers. Was the evidence insufficient? (assignments of error 2 and 3)

### **3. Statement of the Case**

#### **3.1 Brian Crute suffers from severe mental illness.**

Brian Crute has been diagnosed with schizophrenia. 1 RP 25, 31; 5 RP 398; 6 RP 406. He sees and hears things that are not real. 6 RP 406, 435. He has paranoid delusions that people are secretly conspiring to do him harm. 6 RP 406.

At sentencing, Crute's mother related a brief history of Crute's mental issues. "Brian, at the age of seven or eight, lost his father, his birthfather Conrad Crute. From that point on, he has suffered mental illness. We started out by going to Group Health to get help, but they looked at him just like the prosecutor's looking at him: Well, he doesn't appear to need any help, so after two sessions, they dismissed it and told me I just needed to find a male mentor for him and he would be all right. Well, he wasn't all right." 6 RP 417.

"His mind functions and at times it's very clear and fluid, but other times it's not." 6 RP 418. "You look at him and you want to think, oh, he looks pretty normal. And at times he is

very normal. At times he is -- he can go to the genius range with his creativity, if you were able to listen to his music. And it's just like many other people who live in those two worlds. We've had a number of hugely successful people who have lived in the world of mental illness, but yet functioned on occasions. And on other occasions, they're like a child just cuddled up and they can't do anything." 6 RP 418-19.

"So it's a combination. It's not only schizophrenia. It's anxiety. It's bipolar. It's depression. Depressed because I'm this bright smart person and I can't get out and do all of these things. I can write my music, but I don't know how all the steps for producing it. That's who Brian is. ... Brian can be successful." 6 RP 419-20. "As you look out, he has the help of many, many in the community; the church, his step-dad, his sister, and all of my friends who are back there, his aunties who are back there, that we're all ready and able to support him." 6 RP 418.

"We all know that jail does not help those who are mentally ill. I'd say if you've ever had someone who is mentally ill can then you understand that you are not cured. It is a life long sentence. And jail exacerbates mental illness; it does not heal it." 6 RP 418.

### **3.2 Crute was walking in his neighborhood when he was approached by Tacoma Police officers for a welfare check.**

Crute was troubled by hallucinations on the night of February 28, 2016. 6 RP 428-29. He went walking through his neighborhood, headed toward McDonalds for some food. 3 RP 272, 296. Someone called 911 to report Crute's activities as suspicious or erratic, and police were dispatched for a welfare check. 2 RP 82, 101, 146-47, 176.

Officers Waddell and Koskovich were the first to contact Crute. 2 RP 102, 148. Waddell exited the patrol vehicle and said, "Hello, Tacoma Police, I need to speak with you." 2 RP 103-04. Crute did not see the patrol vehicle or recognize the officers' uniforms. 3 RP 273. He only saw someone dressed in black telling him to stop. *Id.* He thought that he was being robbed. 3 RP 274. Crute did not speak to the officers, and continued walking. 2 RP 104; 3 RP 273.

Officer Waddell followed, trying to speak with Crute. 2 RP 105. Crute continued walking, shouting back that he did not believe they were police. 2 RP 105. Officer Koskovich activated the patrol vehicle's emergency lights and drove to the other side of Crute. 2 RP 105-06. Officer Koskovich exited the vehicle, identified himself as police, and ordered Crute to get on the ground. 2 RP 150. Crute continued walking and saying they

were not police as the officers tried to close in on him from both sides. 2 RP 132, 151, 175.

The officers' focus throughout the encounter was to force Crute to stop so they could detain him. 2 RP 152 (“[O]ur attempt was to get him on the ground so that we could eventually detain him and figure out what’s going on.”), 175 (“it was attempt to detain him, yes. He was not free to leave.”). The officers never asked Crute his name, how he was doing, or if he needed help. 2 RP 174; 3 RP 275-76, 292. They did not tell Crute why they wanted to speak to him. 3 RP 276.

### **3.3 The officers’ aggressive approach combined with Crute’s paranoid delusions to place Crute in fear for his life, quickly escalating the “welfare check” into a violent confrontation.**

Having been cornered by the officers, Crute searched for an escape route. 2 RP 106. Waddell tried to convince Crute to kneel and place his hands behind his back. *Id.* Crute, still believing the officers were robbers, gave in and complied, thinking that it was just best to let the robbery happen. 3 RP 275. Waddell attempted to place handcuffs on Crute and told him to lay down on the ground. 2 RP 109; 3 RP 275. Crute’s deluded mind concluded that his robbers actually planned to shoot him the back of his head. 3 RP 275. He jumped up, freed his hands, and ran away at full speed. 2 RP 109; 3 RP 275.

At this point, the testimony diverged. Crute either ran away and was chased by Koskovich, 2 RP 109-10 (Waddell's testimony), 3 RP 277 (Crute's testimony) or he charged directly at Koskovich, 2 RP 153 (Koskovich's testimony). The officers testified that Crute threw three punches at Koskovich's head, all of which Koskovich was able to duck. 2 RP 110, 153-57. Crute testified that he ran away and put his hands above his head to show he had no weapon. 3 RP 277. Waddell deployed his taser, and Crute fell to the ground. 2 RP 111, 113, 160; 3 RP 277.

Waddell and Koskovich got on top of Crute and attempted to gain control of his arms. 2 RP 113-14. Crute was thrashing his body and kicking, trying to escape. 2 RP 56, 59, 114. Sergeant Jagodinski arrived and attempted to assist the officers to gain control and put Crute in handcuffs. 2 RP 114. Waddell applied the taser a total of four times before the officers succeeded in placing the handcuffs. 2 RP 144-15, 139.

The officers requested medical aid for Crute. 2 RP 65. Crute continued to struggle as the officers waited for the medics to arrive. 2 RP 65. Two more officers, Gutierrez and Haberzettl, arrived. 2 RP 65. The first three officers restrained Crute's torso, while the other two attempted to restrain his legs. 2 RP 66. Crute repeatedly told the officers that there was a bomb underneath him and asked for someone to call the real police.

2 RP 68; 3 RP 199, 232-33, 257, 281-82. Crute felt his life was in danger. 3 RP 285.

Four firefighters/medics arrived and attempted to check Crute's health after the taser strikes. 2 RP 69. Crute resisted any treatment. 2 RP 69. The medics attempted to calm him and obtain consent for treatment, but ultimately concluded that Crute was mentally incompetent to give consent or understand the situation he was in. 3 RP 200-01, 213, 240. For the next 30 minutes or so, Crute struggled wildly as the nine officers and firefighters attempted to keep him restrained while they transferred him to a gurney and into an ambulance for transport to the hospital. *See* 2 RP 69-75, 120-21, 161. Officer Jagodinski applied the taser three more times. 2 RP 76-79, 94.

**3.4 In a pre-trial motion in limine, the trial court excluded all testimony relating to mental disease or defect.**

Prior to trial, the State moved to exclude expert testimony from Dr. Brett Trowbridge on the issue of diminished capacity. 1 RP 24; CP 59. Dr. Trowbridge would have testified that Crute suffers from ongoing mental illness: "schizophrenia not otherwise specified." 1 RP 30. He would have offered testimony explaining the delusions that Crute appeared to be suffering that night. 1 RP 30-31. He would have refuted another expert's opinion that Crute did not have diminished capacity. 1 RP 32.

Dr. Trowbridge's report stated, "At this point I don't have sufficient information to be able to state within reasonable scientific certainty that Mr. Crute's mental illness or intoxication diminished his capacity to form the requisite intent for the crimes charged at the time of the alleged incident, but it seems possible. And it's consistent with Greater Lakes' previous findings. Given that the police themselves felt that he was either on drugs or mentally ill, my opinion a diminished capacity defense is a realistic possibility." 1 RP 32-33.

The trial court excluded Dr. Trowbridge's testimony on the grounds that Dr. Trowbridge's opinion did not state that it was "more probable than not" that Crute's mental illness impaired his ability to form the mental state to commit the crimes charged. 1 RP 38.

The State then moved to exclude any testimony relating to mental disease or defect, because without expert testimony it would only confuse the jury. 1 RP 39. The trial court granted the motion. *Id.*

### **3.5 Crute was convicted of Assault 3 and Obstructing an officer.**

The jury found Crute guilty of Assault in the Third Degree against Officer Koskovich and of Obstructing a Law Enforcement Officer. CP 95-96. Crute was sentenced to 51 months for the felony Assault and 364 days on the Obstructing

misdemeanor. 6 RP 442-43; CP 106, 114. Crute was ordered to undergo mental health and substance abuse evaluations and to comply with all recommended treatment. 6 RP 443; CP 108.

#### **4. Argument**

This was an unfortunate incident that should never have occurred. But for the officers' insensitive treatment of an individual they could tell was mentally impaired, on what was supposed to be a welfare check, the encounter never would have escalated into violence. These crimes never should have been charged.

To make matters worse, the trial court abused its discretion in excluding all testimony related to Crute's mental illness or diminished capacity. The jury was left with no way to understand the delusional statements made by Crute that night or in his testimony at trial. They could only conclude that Crute was a bad liar trying to cover for his intentional acts toward the officers. Dr. Trowbridge's testimony would have been helpful to the jury, enabling them to evaluate whether Crute's acts were truly intentional or whether he did not have the capacity to intentionally assault or knowingly obstruct the officers. This Court should reverse the convictions and the trial court's pre-trial order excluding Dr. Trowbridge and remand for a new trial.

Alternatively, this Court should reverse the convictions on the grounds that the State failed to prove that Crute had the necessary intent to commit the crimes charged. The officers and firefighters uniformly testified that Crute was delusional, that he thought there was a bomb underneath him, and that he did not believe the officers were real police. Even viewing the evidence favorably to the State, the State's own witnesses testified that Crute did not know that they were police. Without that knowledge, Crute could not have intentionally assaulted an officer or knowingly obstructed an officer, because he did not know they were officers. This Court should reverse the convictions and dismiss the charges.

**4.1 The trial court abused its discretion in excluding all evidence of mental disease or diminished capacity.**

Admissibility of expert testimony is reviewed for abuse of discretion. *State v. Astbeha*, 142 Wn.2d 904, 913, 16 P.3d 626 (2001). To maintain a diminished capacity defense, the defendant must produce expert testimony establishing a mental disorder that could cause an inability to form the requisite intent for the crime charged. *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998). The expert's opinion must be helpful to the trier of fact in assessing the defendant's mental state at the time

of the crime. *State v. Mitchell*, 102 Wn. App. 21, 27, 997 P.2d 373 (2000).

An opinion is helpful if it explains how the mental disorder relates to the asserted incapacity to form the requisite mental state. *Mitchell*, 102 Wn. App. at 27 (citing *State v. Green*, 139 Wn.2d 64, 74, 984 P.2d 1024 (1999)). “Under this standard, it is not necessary that the expert be able to state an opinion that the mental disorder actually did produce the asserted impairment at the time in question—only that it could have, and if so, how that disorder operates.” *Id.* The jury can then consider the expert testimony together with other evidence of the defendant’s conduct to determine whether the defendant more likely than not had diminished capacity at the time of the incident. *Id.*

“The jury learns from the expert how the mental mechanism operates, and then applies what it has learned to all the facts introduced at trial.” *Mitchell*, 102 Wn. App. at 27. It is the exclusive role of the jury to determine how much weight to give the expert’s testimony. *Ellis*, 136 Wn.2d at 523. “The jury, after hearing all the evidence, may find probability where the expert saw only possibility, and may thereby conclude that the defendant’s capacity was diminished.” *Mitchell*, 102 Wn. App. at 28.

In *Ellis*, the Washington Supreme Court did away with the previously prevailing *Edmon* factors for admissibility of diminished capacity expert testimony and held that such testimony should be evaluated under ER 702 and ER 401 and 402. *Ellis*, 136 Wn.2d at 523. This liberalized the admissibility of expert testimony on diminished capacity. The court clarified in *Green* that the testimony must be helpful to the jury: “The diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant’s mental state at the time of the crime.” *Green*, 139 Wn.2d at 74. In other words, as this Court then explained in *Mitchell*, an expert’s testimony is admissible so long as it explains how the mental disorder operates in a way that could cause diminished capacity. *Mitchell*, 102 Wn. App. at 27.

Shortly after *Mitchell*, our Supreme Court decided *Astbeha*. The court re-iterated the *Ellis* standard of evaluating expert testimony under ER 401, 402, and 702. *Astbeha*, 142 Wn.2d at 917. Under these rules, all relevant evidence is admissible. *Id.*; ER 402. “Relevant evidence’ means evidence having **any tendency** to make the existence of any fact ... more probable or less probable than it would be without the evidence.” *Id.* (quoting ER 401) (emphasis added). Expert testimony is helpful to the trier of fact under ER 702 if it is relevant. *Id.* at 917-18. The court explained that, to be relevant, an expert’s

opinion on diminished capacity must “reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged.” *Id.* at 918.

In *Astbeha*, the relevant mental state for the crime was “intent to deliver.” *Astbeha*, 142 Wn.2d at 918. The expert testified that the defendant would have been able to respond to a request to buy something and give it to another person. *Id.* at 919. She further testified, “I think his intent was to deliver to the police officer.” *Id.* The court held that the trial court had not abused its discretion in excluding the expert’s testimony because the expert testified that the defendant’s capacity was **not impaired**. *Id.* Thus, the expert’s testimony was not relevant or helpful because it did not tend to make the fact of impairment any more likely. *Id.*

However, *Astbeha* does not require the same result here. *Astbeha* is entirely consistent with *Mitchell*. Both cases recognize the same standard: Under ER 401, 402, and 702, an expert’s testimony on diminished capacity must have the tendency to make it more probable (or less probable) that the defendant’s mental illness impaired the defendant’s ability to form the requisite mental state to commit the crime.

Here, Dr. Trowbridge would have testified that Crute suffered from schizophrenia. He would have explained the delusions that Crute experienced. He would have testified that it

was a “realistic possibility” that Crute’s mental illness actually caused him to have diminished capacity that night. 1 RP 32-33.

Under the standard of *Mitchell* and *Astbeha*, this testimony is admissible because it is helpful to the jury. It establishes Crute’s mental illness. It explains the mechanisms by which Crute’s capacity could have been impaired. It provides the jury with a framework from which to evaluate Crute’s behavior that night. It “reasonably relates” to diminished capacity and, if believed by the jury, makes it more probable that Crute actually suffered diminished capacity. Dr. Trowbridge’s testimony was relevant and helpful to the jury under ER 401, 402, and 702. It was unreasonable and an abuse of discretion for the trial court to exclude his testimony through a pre-trial motion in limine. *See Mitchell*, 102 Wn. App. at 28 (reversing exclusion of expert testimony on strikingly similar facts and noting, “excluding expert testimony on the basis of a motion in limine may be especially risky”).

*Mitchell* was decided on almost identical facts to this case. Mitchell had been charged with two counts of third degree assault of a police officer. *Mitchell*, 102 Wn. App. at 26. In a pre-trial hearing, Mitchell’s expert, Dr. Muscatel, testified that Mitchell suffered from paranoid schizophrenia, a disorder capable of diminishing his capacity to know that the individuals he was dealing with were actually police officers. *Id.* However,

Dr. Muscatel did not have sufficient information to form an opinion as to whether Mitchell was actually suffering such delusions that night. *Id.* at 26, 28. Instead, he simply testified that it was possible. *Id.* at 26. The trial court acknowledged that Dr. Muscatel's testimony could help the jury understand "an otherwise bizarre incident," but excluded the testimony for fear that it would invite the jury to speculate unless Dr. Muscatel could also offer an opinion that Mitchell's capacity was actually diminished that night. *Id.* at 27. This Court reversed, holding that a jury must be allowed to determine whether Mitchell was experiencing delusions even if Dr. Muscatel could only say that it was possible. *Id.* at 28. The jury, considering all of the evidence in the case, could reasonably find probability where the expert only saw possibility. *Id.* This Court reversed and remanded for a new trial. *Id.*

The result should be no different here. This Court should reverse the convictions and remand for a new trial. This Court should instruct that the jury be allowed to hear the testimony of Dr. Trowbridge and consider Crute's diminished capacity defense.

#### **4.2 The State failed to prove Crute's intent beyond a reasonable doubt.**

Whether evidence is sufficient is a question of constitutional law reviewed de novo. *State v. Batson*, 194 Wn. App. 326, 329, 377 P.3d 238 (2016). Evidence is sufficient when any rational trier of fact could find beyond a reasonable doubt the essential elements of the crime. *Id.* The court treats as true all of the State's evidence and all reasonable inferences that can be drawn from it. *Id.*

Crute was charged with Assault in the Third Degree based on assault of a law enforcement officer who was performing his or her official duties at the time of the assault, under RCW 9A.36.031(1)(g). He was also charged with Obstructing a Law Enforcement Officer under RCW 9A.76.020(1). Both crimes require knowledge that the alleged victim was a law enforcement officer who was performing his or her official duties. *See State v. Filbeck*, 89 Wn. App. 113, 117, 952 P.2d 189 (1997) (Assault of a law enforcement officer); CP 89 (to-convict instruction for obstructing). To the extent the trial court failed to instruct the jury on the required element of knowledge on the assault charge, that was constitutional error that can be raised for the first time on appeal. *See Filbeck*, 89 Wn. App. at 115.

The State failed to prove beyond a reasonable doubt that Crute knew the officers were law enforcement officers engaged in their official duties. The officers and firefighters uniformly testified that Crute was delusional, that he thought there was a bomb underneath him, and that he did not believe the officers were real police. Even viewing the evidence favorably to the State, the State's own witnesses testified that Crute did not know that they were police. Without that knowledge, Crute could not have intentionally assaulted an officer or knowingly obstructed an officer, because he did not know they were officers. This Court should reverse the convictions and dismiss the charges.

## **5. Conclusion**

The trial court abused its discretion in excluding the expert testimony of Dr. Trowbridge, which would have been relevant and helpful to the jury under ER 401, 402, and 702. The State also failed to prove beyond a reasonable doubt that Crute knew that he was dealing with law enforcement officers engaged in their official duties.

This Court should reverse the convictions and remand for a new trial. The jury should be permitted to hear Dr. Trowbridge's testimony and consider the diminished capacity defense. The jury should be properly instructed on the defense

and on the required element of knowledge that the victims were law enforcement officers engaged in their official duties.

Respectfully submitted this 29<sup>th</sup> day of March, 2018.

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## Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on March 29, 2018 (at about 5:30pm), I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

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## Transmittal Information

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