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**COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN CRUTE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Shelly K. Speir

No. 16-1-00941-9

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly exercised its discretion in excluding Dr. Trowbridge's testimony on diminished capacity, where the evidence was not helpful to the trier of fact in assessing defendant's mental state at the time of incident?
2. Whether the trial court erred in failing to instruct the jury regarding defendant's knowledge that the assault victim(s) were police officers performing their official duties, when the Washington Supreme Court specifically held in *Brown* that knowledge is not a required element of third degree assault?
3. Whether the State presented sufficient evidence to prove that defendant knew the officers were real police officers performing their official duties for purposes of the obstructing charge, where the evidence established the officers verbally identified themselves as police officers and wore uniforms further identifying them as such, and defendant acknowledged they were the police?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On March 4, 2016, the Pierce County Prosecuting Attorney's Office charged BRIAN ANTHONY CRUTE (hereinafter "defendant") with one count of Assault in the Third Degree and one count of Obstructing a Law Enforcement Officer. CP 1-2. On July 14, 2016, the State filed an amended information which added an additional count of Assault in the Third Degree. CP 23-24. Prior to trial, defendant asserted a diminished capacity defense. CP 130-132. Defendant subsequently underwent a forensic evaluation pursuant to RCW 10.77.060 to determine his capacity to have the requisite mental state for the crimes charged. CP 5-10, 32-45, 46-57. After the evaluation, licensed psychologist Dr. Phyllis Knopp offered the following opinion:

Overall, throughout the evening [of the alleged incident], Mr. Crute repeatedly acted in ways that suggested an objective or a means to accomplish a purpose for behaviors occurring at or around the same time as the instant offense. Because of his ability to do so in these instances, it stands to reason that he would have such capacity for the alleged action. **Therefore, it is Dr. Knopp's opinion that Mr. Crute did have the capacity to form the requisite mental state of intent. Given his capacity to form the mental state of intent, it stands to reason that he also had the capacity to form the requisite mental state of willful.** It will be up to the trier of fact to determine if he intended to assault the officer or obstruct a law enforcement officer.

RP 43-44, 55-56 (emphasis in original).

The case proceeded to trial on March 6, 2017, before the Honorable Shelly Speir. RP<sup>1</sup> 1, 3. The parties initially addressed motions in limine, including the State's motion to exclude the testimony of defense expert Dr. Brett Trowbridge. RP 24-39; CP 14-22, 59-60. Relying on the Washington Supreme Court's decision in *State v. Atsbeha*, 142 Wn.2d 904, 16 P.3d 626 (2001), the State argued that to maintain a diminished capacity defense, defendant was required to produce expert testimony demonstrating that a mental disorder impaired defendant's ability to form the culpable mental state to commit the crimes charged. RP 26. The State represented that after defendant's forensic evaluation by Dr. Knopp, defendant obtained a further evaluation by Dr. Brett Trowbridge, who in his evaluation indicated as follows:

“It appears to me Mr. Crute suffers from schizophrenia and from PTSD...At this point, I do not have sufficient information to be able to state within reasonable [scientific] certainty Mr. Crute's mental illness/intoxication diminished his capacity to form the requisite intent for the crimes charged at the time of the alleged incident.”

RP 25-26 (quoting Dr. Trowbridge's evaluation).<sup>2</sup> *See also*, RP 32-33. Dr. Trowbridge apparently indicated that it seemed “possible” defendant's

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<sup>1</sup> The verbatim report of proceedings is contained in six (6) consecutively paginated volumes and will be referred to as “RP” herein.

<sup>2</sup> It does not appear that Dr. Trowbridge's evaluation was filed with the court. Dr. Trowbridge did not testify at the motion hearing.

mental condition or intoxication diminished his capacity, but he could not form an opinion to that effect. RP 26.

The State argued that because Dr. Trowbridge could not offer an opinion as to whether defendant's mental disorder impacted his ability to form the requisite mental state of mind, his testimony was not helpful to the trier of fact and therefore was irrelevant and inadmissible. RP 26-28. *See also*, RP 33-36. Defendant responded by arguing that under *State v. Mitchell*,<sup>3</sup> Dr. Trowbridge's testimony was admissible because he stated that a diminished capacity defense was a realistic possibility, and "where the expert is able to say possibility, the jury is able to find the probability." RP 30-31. *See also*, RP 28-33, 36-38.

The court granted the State's motion to exclude Dr. Trowbridge's testimony, ruling as follows:

I briefly reviewed the *Mitchell* case cited by the defense. However, I think that in the *State v Astbeha* case is what applies here. It's the supreme court's most recent holding, I think, on this standard. Under that decision, "In order to satisfy ER 401, 402 and 702, the Court has to find that the expert's testimony has the tendency to make it more probable than not that the defendant suffered a mental disorder not amounting to insanity that impaired the defendant's ability to form a culpable mental state to commit the crime charged."

**So the key language there would be more probable than not, and I do not believe that an opinion that something**

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<sup>3</sup> 102 Wn. App. 21, 997 P.2d 373 (2000).

**is possible rises to that level. I don't think that an expert not having enough information rises to the level that we need here.**

So I am going to grant the State's motion. I'm going to exclude the testimony of Dr. Trowbridge.

RP 38 (emphasis added). Defendant did not offer other expert testimony.

*See* RP 28, 39, 43.

The State called multiple Tacoma police officers, firefighters, and paramedics as witnesses during trial. CP 133. Defendant testified on his own behalf. RP 270; CP 133. He called no other witnesses. RP 308; CP 133. The jury subsequently found defendant guilty of one count of Assault in the Third Degree and one count of Obstructing a Law Enforcement Officer. RP 391; CP 95-97. The court imposed a standard range sentence of 51 months on the felony assault charge and 364 days on the obstructing charge. CP 100-113, 114-118; RP 441-43. Defendant timely appealed. CP 123.

## 2. FACTS

On February 28, 2016, at approximately 5:30 p.m., Tacoma Police Officers Waddell and Koskovich were dispatched to East 68th and “E” Street in Tacoma for a welfare check.<sup>4</sup> RP 100-01, 146. When they arrived at the location, they observed an adult male, later identified as defendant, in the middle of the street. RP 102-03, 148, 217-18. Defendant was

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<sup>4</sup> A welfare check is contact with a citizen who may or may not need help. RP 56.

shirtless, sweating profusely, and he was running around in the street acting “erratic.” RP 103, 148, 173. The officers stopped their fully marked patrol vehicle and activated its overhead lights. RP 105, 150. Officer Waddell exited the vehicle, verbally identified himself as a police officer, and asked to speak with defendant. RP 103, 151. Defendant responded by walking away and saying they were not the police. RP 104-05, 151. As he walked away defendant’s muscles were flexed and his fists were clenched, and he looked around as if searching for an escape route. RP 106, 108. Meanwhile, Officer Koskovich drove past defendant so that defendant was in between both officers. RP 105-06.

Officer Waddell continued to follow defendant and verbally convinced him to turn around and place his hands behind his back. RP 106, 152. Defendant complied and went to his knees as requested. RP 106, 152. As Officer Waddell reached for his wrist restraints, defendant suddenly bolted to his feet and ran. RP 109. Both officers, who were wearing uniforms identifying them as police officers, chased after defendant on foot. RP 104, 109-11, 149. Defendant stopped running, faced Officer Koskovich, and threw multiple punches directly at the officer’s head. RP 110, 153-56. Officer Koskovich was able to take evasive action and duck to avoid being hit. RP 110, 153-56. In response, Officer Waddell successfully deployed his taser and defendant fell to the

ground. RP 112-14, 160. The officers then attempted to gain control of defendant's arms, but defendant started resisting. RP 113-14, 160-61. According to Officer Koskovich, this behavior continued "[a] long time. Not one or two minutes...[but rather] 20, 30, 40 minutes throughout the entire incident." RP 161.

Tacoma Police Sergeant Jagodinski responded to assist and observed Officers Waddell and Koskovich struggling with defendant on the pavement. RP 55-56. Defendant was actively flailing and moving erratically as if trying to escape. RP 56. Both officers struggled to control defendant's arms and upper body as defendant kicked at them and tried to pull away. RP 57, 59, 114. Sgt. Jagodinski, who was also in full police uniform, reached forward and attempted to pull defendant's arm behind his back to handcuff him, but he was unsuccessful. RP 58-59, 63, 114. Officers repeatedly told defendant to "stop resisting," "stop fighting," and "just relax." RP 116. Officers had to give another taser application in order to secure defendant in handcuffs. RP 64-65, 114-15. Even after handcuffed, defendant continued to physically resist, thrash from side to side, and kick his feet. RP 65, 116.

Tacoma Officers Gutierrez and Haberzettl arrived on scene to assist and attempted to hold defendant's legs in place while the other three officers attempted to hold down defendant's torso. RP 65-66, 117, 225.

Both officers were also wearing standard police uniforms. RP 66, 122, 227. At this point all five officers were attempting to gain control over defendant's movements. RP 118. The fire department and medics arrived and attempted to treat defendant. RP 66-67, 197. According to Sgt.

Jagodinski,

Well, during this time, we'd been talking to [defendant] for quite some time. He told us repeatedly he had a bomb underneath him. And he told us repeatedly that he needed the police. We informed him numerous times that we were the police. And we informed him numerous times there was not a bomb underneath him.

And finally [defendant] seemed to calm down after he's been handcuffed and the five of us were sitting on him for a while and the medical personnel had shown up. So he started talking to the fire department personnel a little bit and he acknowledged that we were the police.

RP 68.

Every officer on scene assisted in lifting defendant onto a gurney. RP 73-74, 259. Officers attempted to roll defendant onto his back so that he could be medically treated, but this proved difficult as defendant "started struggling...wildly again, struggling and trying to kick [the officers], flailing around, and so much strength that it appeared he was actively trying to stand up with all five [officers] and then the medical personnel...and run away." RP 69, 122. Defendant proceeded to spit at the officers, attempted to bite them, and even bit through the cables of the

heart monitor as medics attempted to place sensors on him. RP 71-72, 118-19, 201, 261-62. Five police officers and four firefighters assisted in holding down defendant. RP 69, 123. Still defendant resisted and kicked his legs, landing “one good strike” to Officer Gutierrez. RP 69, 72-73, 120-21. Officers were unable to turn defendant over onto his back without defendant actively kicking and trying to bite them. RP 74. They placed a spit hood over defendant’s head to deter the spitting, but defendant chewed a hole in the hood and it had to be reapplied. RP 75, 79, 120, 203.

After defendant kicked Officer Gutierrez and no other control techniques seemed to be working, Sgt. Jagodinski deployed his taser. RP 76-80. However, this had no effect on defendant’s actions. *Id.* Officers were finally able to get defendant onto his back and immediately strapped him down to the gurney, but they still had to hold defendant down due to his behavior. RP 80.

Paramedics tried to ask defendant simple questions to assess and treat him, but defendant only yelled and thrashed around in response. RP 201, 258. The medics were concerned defendant was experiencing “excited delirium” which is often caused by drug use. RP 261-63. They attempted to sedate defendant through his nostril but were unable to give a full dosage because of defendant’s movements, and defendant also blew the sedative out of his nose. RP 202, 256. However, medics were able to

sedate defendant enough to get an IV established and administer more sedation. RP 256.

Defendant was taken to the hospital, where he continued to actively thrash, kick, and bite. RP 124. Multiple officers and hospital security staff were utilized to move defendant onto a hospital bed. RP 123-24. Defendant was “combative” throughout the incident. RP 199, 206.

At trial, defendant testified that the officers never identified themselves as police, and when first contacted and told to stop, defendant thought he was being robbed. RP 273-76, 282. However, defendant admitted the officers told him to stop resisting and were trying to handcuff him, and he acknowledged they “might have been in uniform.” RP 280-82. Defendant also testified, “I was asking for, you know, for him to call some more [police] because they weren’t actually doing their duty of what I would call, you know, a police officer.” RP 281. Defendant admitted that he was yelling but otherwise was trying “in the most compliant way” to get the officers and responders off of him. RP 294-95.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED  
ITS DISCRETION IN EXCLUDING DR.  
TROWBRIDGE'S IRRELEVANT TESTIMONY  
ON DIMINISHED CAPACITY.

Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to present a defense. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). That right, however, is not absolute. *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996); *Maupin*, 128 Wn.2d at 924-25. The right to present a defense does not extend to irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Relevant evidence is “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 be without the evidence.” ER 401. Evidence which is not relevant is not admissible. ER 402.

“Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged.” *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). *See also, State v. Thomas*, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004) (diminished capacity is available

as a defense when either specific intent or knowledge is an element of the crime charged). “To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged.” *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001) (citing *State v. Ellis*, 136 Wn.2d 498, 521, 963 P.2d 843 (1998)). The fact that a defendant may be diagnosed as suffering from a particular mental disorder is insufficient to support a diminished capacity defense. *Atsbeha*, 142 Wn.2d at 921. Rather, any expert testimony “concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state” at the time of the crime. *Id.* at 918.

The admissibility of such expert testimony is determined under Evidence Rules (ER) 401, 402, and 702. *Atsbeha*, 142 Wn.2d at 921; *State v. Greene*, 139 Wn.2d 64, 73 n. 3, 984 P.2d 1024 (1999). For expert testimony to be admissible under ER 702, that testimony must be helpful to the trier of fact.<sup>5</sup> *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 169, 288 P.3d 1140 (2012). Expert testimony is only helpful if it is relevant. *In*

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<sup>5</sup> 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.”

*re Morris*, 176 Wn.2d at 169. To be relevant, expert testimony must have the tendency to make a fact of consequence to the trial's outcome more or less probable. ER 401; *Atsbeha*, 142 Wn.2d at 918; *see also Greene*, 139 Wn.2d at 73-79 (expert testimony on diminished capacity and insanity not helpful to trier of fact under ER 702 where evidence could not reliably connect symptoms to defendant's mental capacity).

A trial court's decision to admit or exclude evidence, including expert testimony offered to establish a diminished capacity defense, is reviewed for abuse of discretion. *State v. Franklin*, 180 Wn.2d 371, 377 n. 2, 325 P.3d 159 (2014); *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014); *Atsbeha*, 142 Wn.2d at 921. "An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court." *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). On review, the court may affirm the trial court on any grounds established by the pleadings and supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004); *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

Here, defendant claims the trial court abused its discretion in excluding the expert testimony of Dr. Trowbridge on the issue of defendant's diminished capacity. *See* Brief of Appellant at 2 (Assignment of Error No. 1), 10-16. He argues that under *State v. Mitchell*, 102 Wn.

App. 21, 997 P.3d 373 (2000), the testimony was admissible because Dr. Trowbridge “would have testified that Crute suffered from schizophrenia...explained the delusions that Crute experienced...[and] testified that it was a ‘realistic possibility’ that Crute’s mental illness actually caused him to have diminished capacity that night.” Brf. of App. at 14-15.

Defendant’s claim fails for several reasons. First, defendant overstates Dr. Trowbridge’s findings (or at least the findings communicated to the court as part of defendant’s offer of proof). During the preliminary motion hearing on the issue, defendant neither submitted Dr. Trowbridge’s evaluation for the court’s consideration nor did he offer Dr. Trowbridge’s testimony in a pretrial hearing. Defendant’s only offer of proof was an apparent quote from Dr. Trowbridge’s evaluation in which he 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 charges 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, [in] my opinion a diminished capacity defense is a realistic possibility.”

RP 32-33.

As the proponent of the evidence, defendant bears the burden of establishing relevance and materiality. *State v. Starbuck*, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015); *State v. Hilton*, 164 Wn. App. 81, 99, 261 P.3d 683 (2011). There is nothing in the record to indicate that Dr. Trowbridge found that defendant suffered a psychotic episode or mental disorder *at time of incident*, that he experienced delusions, or that his mental disorder caused or was capable of causing such delusions. In other words, Dr. Trowbridge's findings did not offer a causal connection between defendant's mental condition and the asserted inability to form the required mental state to commit the crimes charged. See *Atsbeha*, 142 Wn.2d at 918; *Thomas*, 123 Wn. App. at 779. Defendant's offer of proof was insufficient to meet the requirements of admissibility under *Atsbeha* and ER 401, 402, and 702.

In *Atsbeha*, the Washington Supreme Court articulated the appropriate standard for a criminal defendant to be entitled to a diminished capacity defense:

To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged. Admissibility of such testimony is determined under ER 401, ER 402 and ER 702. Under ER 702, expert testimony will be considered helpful to the trier of fact only if its relevance can be established.

...

It is not enough that a defendant may be diagnosed as suffering from a particular mental disorder. The diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime. The opinion 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.

*Atsbeha*, 142 Wn.2d at 921.

The trial court in this case appropriately applied *Atsbeha* and found that under the rules of evidence, Dr. Trowbridge's testimony must have the tendency to make it *more probable than not* that defendant suffered a mental disorder, not amounting to insanity, that impaired his ability to form the culpable mental state to commit the crimes charged. RP 38 (emphasis added). See *Atsbeha*, 142 Wn.2d at 918. The court found, "So the key language there would be more probable than not...I don't think that an expert not having enough information rises to the level that we need here." RP 38.

The court properly exercised its discretion in excluding Dr. Trowbridge's testimony. It was not enough that Dr. Trowbridge concluded that defendant suffers from schizophrenia and PTSD. For his testimony to be admissible, that diagnosis had to be capable of forensic application in order to help that trier of fact assess defendant's mental state at time of the incident. *Atsbeha*, 142 Wn.2d at 921. Because Dr. Trowbridge admitted

he had insufficient information to offer an opinion with reasonable certainty, provided no explanation as to the causal connection between defendant's mental disorder and diminished capacity, and because he attributed the possibility of diminished capacity to either defendant's mental illness *or* intoxication, he could not "reasonably relate [defendant's mental disorder] to impairment of the ability to form the culpable mental state." *Atsbeha*, 142 Wn.2d at 918.

Defendant appears to rely on *Mitchell* to argue that Dr. Trowbridge's opinion that a diminished capacity defense was a "realistic possibility" rendered his testimony admissible. *See* Brf. of App. at 15-16. Defendant's reliance on *Mitchell* is misplaced.

In *Mitchell*, the defendant was charged with third degree assault of a police officer and fourth degree assault of a twelve-year-old boy. 102 Wn. App. at 23. In a pretrial hearing, an expert witness testified with "reasonable medical certainty" that *at the time of the incident* the defendant suffered from a severe mental disorder – paranoid schizophrenia – and the disorder "would have the potential to interfere with his knowledge" that the individuals he assaulted were police officers.<sup>6</sup> *Id.* at

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<sup>6</sup> The *Mitchell* court cited *State v. Allen*, 67 Wn. App. 824, 826-28, 840 P.2d 905 (1992), for the proposition that the State must prove the defendant knew the assault victim was a police officer performing official duties at the time. *See Mitchell*, 102 Wn. App. at 26. However, as discussed in the following section, *Allen* was abrogated by the Washington Supreme Court in *State v. Brown*, 140 Wn.2d 456, 466-68, 998 P.2d 321 (2000).

24, 26 (emphasis added). The expert witness “could not, however, say with reasonable certainty that Mitchell’s mental disorder actually caused his capacity to be diminished at the time of the incident. He could only say that it was possible.” *Id.* at 26.

The trial court excluded the testimony, because the expert could not state that the defendant actually experienced delusions at the time incident (and thus could not state that the defendant’s disorder actually affected his conduct). *Mitchell*, 102 Wn. App. at 27-28. Division I reversed the trial court, finding that “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.* at 27. The expert “knew Mitchell was a paranoid schizophrenic; that he was suffering from the disorder when he assaulted the plainclothes officers who were trying to arrest him; and that the disorder is capable of causing delusions.” 102 Wn. App. at 28. The court found that given this testimony, the jury should have been allowed to determine whether the defendant was experiencing delusions at the time of his arrest. *Id.* at 28.

Here, in contrast, the record does not indicate that Dr. Trowbridge made the same findings as the expert in *Mitchell*. Although, according to the State, Dr. Trowbridge offered an opinion that defendant suffers from

schizophrenia and PTSD,<sup>7</sup> there is nothing in the record that indicates Dr. Trowbridge believed defendant was suffering from either disorder at the time of incident. *Compare with, Mitchell*, 102 Wn. App. at 24 (expert concluded with “reasonable medical certainty” that Mitchell suffered from a mental disorder at the time of the incident). And, there is nothing in the record that indicates Dr. Trowbridge concluded that defendant’s mental disorder(s) had the potential of diminishing his capacity to act with the requisite mental state. In other words, according to the available record, Dr. Trowbridge did not express an opinion about the connection between schizophrenia and/or PTSD and defendant’s ability to act intentionally. *Compare with, Mitchell*, 102 Wn. App. at 24 (expert concluded the mental disorder “would have the potential to interfere with [Mitchell’s] knowledge”).

Unlike the expert in *Mitchell*, Dr. Trowbridge did not state, based on reasonable medical certainty, that defendant suffers from a mental disorder that impairs his ability to form the culpable mental state. Rather, Dr. Trowbridge indicated that he had insufficient information to state with reasonable scientific certainty that defendant’s mental disorder(s) diminished his capacity to form the requisite intent for the crimes charged.

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<sup>7</sup> RP 25.

RP 25-26, 32-33. The fact that Dr. Trowbridge opined a diminished capacity defense was a “realistic possibility” did not render his testimony admissible, because he linked that possibility to either defendant’s mental illness *or* his drug use. *See* RP 32-33 (referencing defendant’s “mental illness *or intoxication*” and concluding that “[g]iven that the police themselves felt that he was either *on drugs or* mentally ill...a diminished capacity defense is a realistic possibility”) (emphasis added). This opinion was therefore too speculative to be helpful to the trier of fact and as such was not admissible. *See* ER 702 (opinion not admissible if not helpful to trier of fact); *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991) (conclusory or speculative expert opinions lacking an adequate foundation are not admissible).

Again, it is not enough that defendant may be diagnosed as suffering from schizophrenia and/or PTSD. That diagnosis “must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess [] defendant’s mental state at the time of the crime.” *Atsbeha*, 142 Wn.2d at 921. Under the facts of this case, Dr. Trowbridge’s diagnosis was not capable of such forensic application. According to defendant’s offer of proof, Dr. Trowbridge did not express an opinion that defendant suffers from a mental disorder that impairs his ability to form the mental state necessary to commit third degree assault or obstructing a

law enforcement officer. He instead expressed an opinion that, based on incomplete information, *either* defendant's mental disorder *or* drug use made a diminished capacity defense a "possibility." *Mitchell* therefore does not support defendant's argument, and under *Atsbeha*, Dr.

Trowbridge's testimony was not admissible. *See also, State v. Thomas*, 123 Wn. App. 771, 779-82, 98 P.3d 1258 (2004) (distinguishing *Mitchell* and concluding that expert testimony on diminished capacity was not admissible where the expert could not testify based on reasonable medical certainty that the defendant suffered from a mental disorder that impairs her ability to form the culpable mental state).

The trial court's decision to exclude Dr. Trowbridge's diminished capacity testimony was not an abuse of discretion. The evidence was not helpful to the trier of fact in assessing defendant's mental state at the time of the crime and his right to present a defense was not violated. This Court should therefore affirm defendant's convictions.

2. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THIRD DEGREE ASSAULT.

Each element of a charged crime must be proved by competent evidence beyond a reasonable doubt. RCW 9A.04.100(1). A jury instruction that relieves the State of its burden to prove every element of a charged crime requires reversal unless the missing element is supported by

uncontroverted evidence. *State v. Brown*, 147 Wn.2d 330, 339-341, 58 P.3d 889 (2002) (adopting *Neder v. United States*, 527 U.S. 1, 9, 15, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). “[W]here a to-convict instruction omits an essential element of a charged crime, it is constitutionally defective and the remedy is a new trial unless the State can demonstrate that the omission was harmless beyond a reasonable doubt.” *State v. Kirwin*, 166 Wn. App. 659, 669, 271 P.3d 310 (2012) (citing *Brown* at 339; *State v. Cronin*, 142 Wn.2d 568, 580, 14 P.3d 752 (2000)).

To convict defendant of third degree assault, the State was required to prove beyond a reasonable doubt that defendant assaulted “a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.” RCW 9A.36.031(1)(g). Here, the trial court instructed the jury on third degree assault based on Washington Pattern Jury Instruction – Criminal (WPIC) 35.23.02.<sup>8</sup> Jury Instruction No. 8 stated,

To convict the defendant of the crime of assault in the third degree, as charged in Count I, each of the following elements of the crime must be prove beyond a reasonable doubt:

(1) That on or about the 28th day of February 2016, the defendant assaulted Ryan Koskovich;

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<sup>8</sup> Compare CP 71-93 (Instruction Nos. 8-9) with 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 35.23.02, at 525-27 (4th ed. 2016) (WPIC).

(2) That at the time of the assault, Ryan Koskovich was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and

(3) That any of these acts occurred in the State of Washington.

CP 71-93 (Instruction No. 8).<sup>9</sup> *See also*, CP 71-93 (Instruction No. 10) (definition of assault).

Relying on *State v. Filbeck*, 89 Wn. App. 113, 952 P.2d 189 (1997), defendant now claims 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.” Brf. of App. at 2 (Assignment of Error No. 2) and 17. In *Filbeck*, the court held that knowledge that the victim is a law enforcement officer engaged in performing official duties is an element of third degree assault. 89 Wn. App. at 115-17. The *Filbeck* court relied on *State v. Allen*, 67 Wn. App. 824, 840 P.2d 905 (1992), in reaching its decision. *Id.* at 116-17.

The Washington Supreme Court, however, expressly abrogated *Allen* in *State v. Brown*, 140 Wn.2d 456, 466-68, 998 P.2d 321 (2000). According to *Brown*,

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<sup>9</sup> Aside from the name of the law enforcement officer, Instruction No. 9 mirrors Instruction No. 8. *See* CP 71-93. The jury found defendant guilty of assault in the third degree as charged in Count I (Instruction No. 8) and not guilty of assault in the third degree as charged in Count III (Instruction No. 9). CP 95-97.

Under the plain meaning of RCW 9A.36.031(1)(g), knowledge that the victim was a police officer in the performance of official duties is not an element of the crime of third degree assault. The State was not required to prove such knowledge on the part of Petitioner... Under that section the State needed only to prove a criminal defendant committed an assault against another person and that the other person was a law enforcement officer performing official duties at the time of the assault. But the State need not prove the defendant knew these facts at the time of the assault.

The statement in *Allen* that “[i]n addition to an intent to commit an act which constitutes an assault, ... [RCW 9A.36.031(1)(g) ] requires knowledge or intent that the person assaulted was a law enforcement officer engaged in performing his official duties” is not well reasoned. **We conclude it is not a correct statement of the law.**

***Brown***, 140 Wn.2d at 467-68 (emphasis added).

Here, the trial court did not err in failing to instruct the jury that “knowledge” was a required element of third degree assault. Under ***Brown***, knowledge is not an implied element of the crime. Defendant’s claim of instructional error accordingly fails, and his conviction should be affirmed.

3. VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE SUPPORTS THAT DEFENDANT KNEW THE LAW ENFORCEMENT OFFICERS WERE DISCHARGING OFFICIAL DUTIES AT THE TIME OF THE INCIDENT.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is sufficient to support a conviction when, viewing the evidence in the light most favorable to the State, any rational fact finder could find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are

considered equally reliable. *Id.* at 201; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering the evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence presented. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014); *State v. Martinez*, 123 Wn. App. 841, 845, 99 P.3d 418 (2004). Therefore, when the State has produced sufficient evidence of all the elements of a crime, the decision of the trier of fact should be upheld. Sufficiency of the evidence is reviewed de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

Defendant claims “[t]here 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.” Brf. of App. at 2 (Assignment of Error No. 3). *See also*, Brf. of App. at 17-18. As argued in the preceding section, under *Brown*, 140 Wn.2d 456, the State was not required to prove defendant’s knowledge for purposes of the assault in the

third degree charge. Defendant's sufficiency of the evidence claim for that charge accordingly fails.<sup>10</sup>

A person is guilty of obstructing a law enforcement officer "if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." RCW 9A.76.020(1). "Willfully means to purposefully act with knowledge that this action will hinder, delay, or obstruct a law enforcement officer in the discharge of the officer's official duties." *State v. Ware*, 111 Wn. App. 738, 743, 46 P.3d 280 (2002) (internal quotation omitted). *See also*, WPIC 120.02.01. Jury Instruction No. 17 defined "willfully" in exactly the same terms. CP 71-93.

Defendant ran from police, threw multiple punches at Officer Koskovich's head, and continuously resisted, flailed, kicked, spit, and attempted to bite officers as they, for an extended period of time, attempted to control his movements in order to apply handcuffs and provide aid. RP 55-75, 109-22, 153-56, 160-61. Officers repeatedly told defendant to "stop resisting," "stop fighting," and "just relax." RP 116. It

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<sup>10</sup> Sufficient evidence supports that defendant assaulted Officer Koskovich. *See* RP 110 (defendant threw multiple punches directly at Officer Koskovich's head), 153-56 (defendant ran at Officer Koskovich and started throwing punches at the officer's head; the officer was able to take evasive action; defendant had the ability to actually make contact with the officer's head). Officer Koskovich was on duty, in full police uniform, and discharging his official duties at the time of the assault. RP 144-56. *See* RCW 9A.36.031(1)(g); WPIC 35.23.02.

took five police officers to attempt to control defendant's movements. RP 118. From these facts, a reasonable juror could determine that defendant purposefully acted with knowledge that his actions would hinder, delay, or obstruct a law enforcement officer in the discharge of his official duties.

Defendant argues "[t]he officers and firefighters uniformly testified that Crute was delusional...and that he did not believe the officers were real police," and therefore the State failed to prove defendant "knew the officers were law enforcement officers engaged in their official duties." Brf. of App. at 18. However, this Court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Homan*, 181 Wn.2d at 106; *Martinez*, 123 Wn. App. at 845. A reasonable juror could have inferred that defendant purposefully acted with knowledge that he was obstructing a police officer from the evidence that: (1) all five officers were wearing standard police uniforms identifying them as police (RP 58-59, 66, 104, 122, 149, 227); (2) Officers Waddell and Koskovich drove a patrol vehicle that said "TACOMA POLICE" (RP 105, 150); (3) the officers informed defendant numerous times that they were police officers (RP 68, 103, 151); and (4) defendant acknowledged at the scene that they were the police (RP 68).

Thus, sufficient evidence supports that defendant willfully hindered, delayed, or obstructed a law enforcement officer discharging the

officer's official duties, and defendant knew the law enforcement officer was discharging official duties at the time. This Court should affirm defendant's convictions.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's convictions.

DATED: May 24, 2018.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



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BRITTA HALVERSON  
Deputy Prosecuting Attorney  
WSB # 44108

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.23.18 Therun Ka  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**May 24, 2018 - 4:23 PM**

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