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

State of Washington,

Respondent,

v.

Brian A. Crute,

Appellant.

Reply Brief of Appellant

Kevin Hochhalter
Attorney for Appellant

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008
kevin@olympicappeals.com
WSBA # 43124

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1. Introduction

This was an unfortunate incident that should never have occurred. Were it not 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 should never 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. 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 because the evidence was insufficient 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, Crute did not know that they were police or that they were discharging official duties when they attempted to restrain him. Without that knowledge, Crute could not have intentionally assaulted an officer or willingly obstructed an officer. This Court should reverse the convictions and dismiss the charges.

2. Reply Argument

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

Crute's opening brief argued that the trial court abused its discretion in excluding the testimony of Dr. Trowbridge and any other evidence of mental disease or diminished capacity. Br. of App. at 11-16. Crute argued that Dr. Trowbridge's testimony was relevant and helpful to the jury under ER 401, 402, and 702. Br. of App. at 13-15 (citing *State v. Atsbeha*,¹ 142 Wn.2d 904, 16 P.3d 626 (2001); *State v. Mitchell*, 102 Wn. App. 21, 997 P.2d 373 (2000)). Dr. Trowbridge's testimony would have explained Crute's schizophrenia and delusions and the mechanism by which this mental illness could have impaired

¹ Crute's opening brief inadvertently misspelled *Atsbeha* as "Astbeha," following the spelling in the VRP. *E.g.*, 1 RP 34. This brief corrects the spelling to match the reported opinion.

Crute's capacity to form the intent to commit the crimes charged. Br. of App. at 14-15.

Just as the expert testimony in *Mitchell*, Dr. Trowbridge's testimony was admissible because it was relevant—that is, it had the tendency to make the existence of a fact of consequence more probable than it would have been without his testimony. Br. of App. at 13, 15-16; ER 401. An expert is not required to testify that the defendant's diminished capacity was “more probable than not,” so long as the expert's testimony is helpful to the jury in making that ultimate determination after hearing **all** of the evidence. Br. of App. at 16; *Mitchell*, 102 Wn. App. at 28. This Court should reverse the convictions and remand for a new trial, with instruction that the jury be allowed to hear the testimony of Dr. Trowbridge and consider Crute's diminished capacity defense.

Crute's offer of proof of Dr. Trowbridge's expected testimony sufficiently demonstrated that the testimony was admissible under ER 401, 402, and 702, as articulated in *Atsbeha*, *Mitchell*, and *State v. Greene*, 139 Wn.2d 64, 984 P.2d 1024 (1999). Each of these cases follows the Evidence Rules, with no change to the standard those rules provide. Under ER 402, “relevant evidence is admissible.” ER 402; *Atsbeha*, 142 Wn.2d at 917. Under ER 702, expert opinion testimony is admissible if it “will assist the trier of fact to understand the

evidence or to determine a fact in issue.” ER 702; *Atsbeha*, 142 Wn.2d at 917. Expert testimony meets this standard if it is relevant. *Atsbeha*, 142 Wn.2d at 917-18; *Greene*, 139 Wn.2d at 73; *Mitchell*, 102 Wn. App. at 27.

“ ‘Relevant evidence’ means 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; *Atsbeha*, 142 Wn.2d at 917. Under this standard, expert testimony on diminished capacity is relevant—and therefore helpful to the jury and admissible at trial—if it is “capable of forensic application in order to help the trier of fact assess the defendant’s mental state at the time of the crime.” *Atsbeha*, 142 Wn.2d at 918; *Greene*, 139 Wn.2d at 73-74; *Mitchell*, 102 Wn. App. at 27. In other words, expert testimony “is helpful if it explains how the mental disorder relates to the asserted impairment of capacity.” *Mitchell*, 102 Wn. App. at 27 (citing *Greene*, 139 Wn.2d at 74).

Given such testimony, a jury can consider the expert opinion along with other testimony about the defendant’s behavior at the time of the incident to determine whether it was more probable than not that the defendant had diminished capacity at the time of the incident. *Mitchell*, 102 Wn. App. at 27. “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.” *Id.* “It is the jury’s responsibility to make ultimate determinations regarding issues of fact.” *Id.*

The State and the trial court rely heavily on a misinterpretation of a quote from the *Atsbeha* opinion. The opinion reads, “To satisfy either rule of evidence, [the expert’s] testimony must have the tendency to make it more probable than not that defendant suffered [diminished capacity].” *Atsbeha*, 142 Wn.2d at 918. Both the State and the trial court hang their reasoning on the phrase “more probable than not,” and assert that an expert’s testimony is only admissible if the expert states an opinion on the ultimate fact that the evidence meets the standard of proof “more probable than not.” In doing so, the State and the trial court seek to usurp the role of the jury to make determinations of ultimate fact.

The evidence rules do not allow this, and *Atsbeha* does not require it. The entirety of the *Atsbeha* opinion makes clear that the admissibility of expert testimony on diminished capacity is governed solely by the Rules of Evidence, not by any judicially constructed supplement. *E.g.*, *Atsbeha*, 142 Wn.2d at 916-17 (rejecting the judicially-constructed *Edmon* factors in favor of ER 401, 402, and 702). Evidence Rule 401 is clear in stating that “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” is relevant, and therefore admissible. ER 401 (emphasis added). The trial court’s role is only to determine whether the expert’s testimony makes the ultimate fact of diminished capacity more probable than it would be without the expert’s testimony. Determining whether the ultimate fact of diminished capacity has been established under the required standard of proof, “more probable than not,” is the exclusive role of the jury. The trial court abused its discretion when it usurped the role of the jury in finding that Dr. Trowbridge’s testimony did not rise to the level of “more probable than not.” *See* 1 RP 38.

Under ER 704, an expert is permitted, **but never required**, to testify to an ultimate issue of fact. ER 704 (“Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact”). Indeed, before the adoption of ER 704, expert witnesses were **forbidden** from stating opinions on ultimate issues of fact. The concern was that jurors would be unduly swayed by the expert and would simply adopt the expert’s conclusion as their own, abandoning their role to determine ultimate issues of fact. The State’s position would flip this on its head and now **require** an expert to testify to an ultimate issue of fact in order to even be heard by the jury at all. That would be an absurd interpretation of the rules of evidence.

The record reflects that Dr. Trowbridge would have provided testimony that would have been helpful to the jury, and therefore relevant and admissible. He 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 the night of the incident. 1 RP 30-31 (“Dr. Trowbridge is going to be able to explain for the jury those actions”).

Dr. Trowbridge would have refuted the State’s expert’s opinion that Crute was able to form intent. 1 RP 32. In doing so, he necessarily would have explained the connection between the mental illness and the possibility that Crute’s capacity to form the requisite mental state was impaired. *See* 1 RP 37 (“Dr. Trowbridge is definitely able to explain to the jury how psychosis is going to act out or explain how psychosis is going to determine whether or not [Crute believed that the officers were real police]. He’s going to explain that whole interaction. The jury needs to know what does hallucinations mean. Dr. Trowbridge is able to explain that to [them].”). Dr. Trowbridge would have testified, as stated in his report, that such a connection was a “realistic possibility” consistent with Crute’s documented mental health history and the officers’ descriptions of Crute’s behavior the night of the incident. 1 RP 32-33.

Dr. Trowbridge's testimony would have met the requirements of ER 401, 402, and 702. By explaining not only the mental disorder that Crute suffered but also how that disorder could have led to the delusions that Crute appeared to be suffering the night of the incident and how such delusions could have diminished Crute's capacity to form the requisite mental states for the crimes charged, Dr. Trowbridge's testimony would have been helpful to the jury in examining all of the evidence before it and determining whether it was more probable than not that Crute suffered from diminished capacity that night. Dr. Trowbridge's testimony was helpful, relevant, and admissible. The trial court abused its discretion in excluding the testimony.

The State attempts to distinguish *Mitchell* based on the same misreading of the record addressed above—that is, on the erroneous belief that Dr. Trowbridge would not express an opinion that Crute was suffering from delusions on the night of the incident and that he would not demonstrate the potential that the delusions could diminish Crute's capacity to form the requisite mental state. The State is wrong. Dr. Trowbridge's testimony would have touched upon all of the points required under *Atsbeha* and *Mitchell* in order to be helpful to the jury under the Rules of Evidence. He would have testified that Crute suffered a mental illness. He would have explained how that

mental illness could have caused delusions on the night of the incident. He would have explained how those delusions could have diminished Crute's capacity to form the requisite mental states for the crimes charged.

Just as in *Mitchell*, the jury, "after hearing all of the evidence, [could have found] probability where the expert saw only possibility, and [could] thereby conclude that the defendant's capacity was diminished even if the expert did not so conclude." *Mitchell*, 102 Wn. App. at 28. *Mitchell* is a near-perfect parallel to this case, and the result here should be the same. This Court should reverse the convictions and remand for a new trial, with instruction to allow the jury to hear the testimony of Dr. Trowbridge and consider Crute's diminished capacity defense.

2.2 The State failed to prove Crute's intent beyond a reasonable doubt.

Crute's brief argued in the alternative that even if his expert was properly excluded, the State failed to prove beyond a reasonable doubt that Crute had the requisite mental state for the crimes charged. Br. of App. at 17-18.

2.2.1 The holding in *Brown* that the State does not need to prove knowledge that the assault victim is a law enforcement officer is both incorrect and harmful and should be overturned.

In *State v. Brown*, 140 Wn.2d 456, 998 P.2d 321 (2000), the Washington Supreme Court held in a 6-3 decision that knowledge that the assault victim is a law enforcement officer is not a required element of assault in the third degree under RCW 9A.36.031(1)(g). *Brown*, 140 Wn.2d at 470.² The result of *Brown* is that an ordinary assault can be elevated from a misdemeanor to a class C felony on the fortuitous event that the assault victim happened to be a law enforcement officer, even if there was no way for the assailant to have known the victim was an officer. *Brown* makes the status of the victim a strict liability element of the crime. This result is incorrect and harmful and should be overturned.

The supreme court will overturn prior precedent upon a clear showing that the prior decision is both incorrect and harmful. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108

² Crute's counsel has no record that his research into the interpretation of the statute revealed this holding in *Brown*. Westlaw indicated no negative treatment of *State v. Filbeck*, 89 Wn. App. 113, 952 P.2d 189 (1997), upon which Crute's opening argument relied. Because *Filbeck* was sufficient to support Crute's argument, counsel did not review *State v. Allen*, 67 Wn. App. 824, 840 P.2d 905 (1992), and therefore did not discover that it had been overruled by *Brown*.

(2016). The question is whether the prior decision is so problematic that it must be rejected. *Id.*

Justice Madsen's concurrence in *Brown* demonstrated both the incorrectness and harm in the majority opinion:

As a result of today's opinion, an assailant who commits an otherwise misdemeanor assault on a person he believes to be his or her compatriot in crime, may nevertheless be convicted of a felony if the victim is per chance an undercover law enforcement officer. From a deterrent and retributive perspective, I believe this is illogical and unjust.

Brown, 140 Wn.2d at 471 (Madsen, J., concurring).

The purpose of the legislature in classifying assault of an officer as assault in the third degree is easily discerned:

These statutes have a twofold purpose: to reflect the societal gravity associated with assaulting a public officer and, by providing an enhanced deterrent against such assault, to accord to public officers and their functions a protection greater than that which the law of assault otherwise provides to private citizens and their private activities. Consonant with these purposes, the accused's knowledge that his victim had an official status or function is invariably recognized by the States as an essential element of the offense.

Brown, 140 Wn.2d at 471-72 (Madsen, J., concurring).

Without a knowledge requirement, the crime of assaulting an officer cannot further the retributive and deterrent goals of the criminal law. *Id.* at 473 (Madsen, J., concurring). "I cannot

understand why an individual who commits an assault on a person he does not know to be an official is any more blameworthy than one who commits an assault punishable under [a lesser assault statute] and is thus any more deserving of the greater punishment for an offense of a higher class.” *Id.* (Madsen, J., concurring).

First, without knowledge of the officer’s status, an assailant is no more blameworthy, and therefore a greater level of retribution is not justified and serves no purpose. Second, the statute cannot have any greater deterrent effect on future assaults of officers if it does not distinguish between those who knowingly assault officers and those who believe they are assaulting an ordinary citizen. *Id.* at 474 (Madsen, J., concurring). This is contrary to the legislature’s intent to heighten the punishment for attacks against law enforcement and to deter such attacks. *Id.* (Madsen, J., concurring).

The majority decision in *Brown* is incorrect as a matter of statutory interpretation. It is also harmful as it unjustifiably transforms a misdemeanor assault into a felony, based not on the culpability of the defendant’s actions but on a circumstantial fact that was not known to the defendant at the time of the assault. The *Brown* majority’s interpretation of the statute should be overruled.

The State failed to present any evidence that Crute actually knew that Officer Koskovich was a law enforcement officer at the time of the alleged assault. By the officers' own testimony, Crute did not believe they were officers. Because the trial court failed to instruct the jury on the required element of knowledge and because the evidence was insufficient to prove this element beyond a reasonable doubt, this Court should reverse the conviction and dismiss the charge.

2.2.2 The State has not provided any authority that it is not required to prove knowledge as an element of obstructing an officer.

The State's response does not present any authority that it is not required to prove knowledge as an element of the charge of obstructing an officer. "The crime of obstructing an officer has four essential elements: 1) an action or inaction that hinders, delays, or obstructs the officers; 2) while the officers are in the midst of their official duties; 3) the defendant knows the officers are discharging a public duty; 4) the action or inaction is done knowingly." *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1053 (2009). The jury instructions in this case were consistent with these elements, specifically including as a separate element, "That the defendant knew that the law enforcement officer was discharging official duties at the time." CP 89.

The State's evidence is insufficient to prove beyond a reasonable doubt that Crute knew that the officers were discharging official duties at the time. Over the course of Crute's struggles against the officers, Crute told the officers repeatedly that there was a bomb underneath him and that he needed the police to assist him. 2 RP 68; 3 RP 232-33, 257, 263. If Crute knew the officers were real police discharging official duties, he would not have been asking for other police to come.

Viewing the evidence most favorably to the State, at some point Crute calmed slightly and acknowledged that the officers were the police. 2 RP 68. However, Crute still did not believe that the officers were actually discharging their official duties. He believed they had gone rogue:

Q. Did you cry out for someone to call the police at any point during this excruciating pain?

A. Later when more, when more police showed, you know. But I was asking for, you know, for him to call some more because **they weren't actually doing their duty** of what I would call, you know, a police officer. So they might have been in uniform, but I'm like, well, you know, some police call some more backup, so we could **get these, you know, these, these, these terrorists, you know, these terrorists with badges away from, you know, away from me, you know, because they weren't doing nothing to -- nothing but causing bodily harm to me.**

3 RP 281-82 (emphasis added). There is no testimony that Crute ever came to understand that the officers were acting as

anything other than thugs. The evidence was insufficient to prove beyond a reasonable doubt that Crute knew that the officers were discharging official duties that night. This Court should reverse the conviction of obstructing an officer and dismiss the charge.

3. 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 25th day of June, 2018.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

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I certify, under penalty of perjury under the laws of the State of Washington, that on June 25, 2018, 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.

Britta Ann Halverson
Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue S., Room 946
Tacoma, WA 98402-2102
pcpatcecf@co.pierce.wa.us
bhalver@co.pierce.wa.us

DATED this 25th day of June, 2018.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

OLYMPIC APPEALS PLLC

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LACEY, WA, 98503-5608

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