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Division II  
State of Washington  
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IN THE COURT OF APPEALS OF  
THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON

Respondent

vs.

KEITH ROBERSON

Appellant

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ON APPEAL FROM THE SUPERIOR COURT FOR CLALLUM COUNTY  
The Honorable Christopher Melly  
Superior Court No. 16-1-00058-3

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APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. Appellant assigns error to the prosecutor's improper closing argument.
2. Appellant assigns error to the prosecutor's improper cross-examination of him.
3. Appellant assigns error to his conviction on Count II upon insufficient evidence.
4. Appellant assigns error to the court's failure to grant an exceptional sentence due to his mental illness.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the prosecutor commit misconduct during her closing argument by arguing that appellant had no right to claim self-defense because he had created the need for self-defense? (Assignment of Error 1)
2. Did the prosecutor improperly cross-examine Mr. Roberson by asking him whether another witness was lying during his testimony? (Assignment of Error 2)
3. Was there sufficient evidence that Mr. Roberson had intentionally assaulted Michael Walters when he spent approximately an hour in his presence asking for Walters to summon the police to his aid, while holding a gun? (Assignment of Error 3)
4. Where there was evidence that Mr. Roberson's behavior on the night of the incident was caused in part due to his underlying mental health issues, even in conjunction with his voluntary use of methamphetamine, did the trial court err in failing to impose a downward exceptional sentence?

III. STATEMENT OF THE CASE

A. Procedural History

Keith Roberson was charged by an information filed February 22, 2016 with assault in the first degree, RCW 9A.36.011 (a), (Count I) and

assault in the second degree, RCW 9A.36.021(c), (Count II). The state alleged he was armed with a firearm on both counts, pursuant to RCW 9.94A.825. CP 159.

The case proceeded to trial on January 9, 2017 before the Honorable Christopher Melly and a jury.<sup>1</sup> The jury returned a verdict of not guilty of assault in the first degree on Count I, but convicted Mr. Robertson of the lesser offense of assault in the second degree on this count. CP 60, 62. The jury convicted Mr. Roberson on Count II as charged. CP 58. The jury returned special verdicts of “yes” on the firearm enhancements on both counts. CP 57, 59. At the sentencing hearing held on June 7, 2107, the court sentenced Mr. Roberson to 84 months in custody. Seventy-two months of this sentence represented the two firearm enhancements, which ran consecutively to each other. RP 655 CP 7 *et. seq.* Mr. Roberson filed a timely notice of appeal. CP 6.

B. Testimony from 3.5 hearing

Ralph Edgington was a Clallum County sheriff who was called out to the scene. When he first arrived at the scene, Keith Roberson was looking around frantically. RP 52. He was concerned for his safety. RP 54.

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<sup>1</sup> The VRP is numbered consecutively, and is in one volume.

Trial proceedings began Jan. 9, 2017 and starts at page 102 of the transcript.  
Trial proceedings began Jan. 9, 2017 and starts at page 102 of the transcript.

The sentencing hearing, held June 7, 2017, begins at page 631. A supplemental VRP has the in-court playback of three exhibits (911 Calls) and the deposition of Mike Walters, which was played for the jury. This will be referred to as RP Supp. \_\_\_\_.

Edgington knew Keith Roberson from a previous contact, or contacts. He heard someone yelling, but could not tell what was being said. He recognized Mr. Roberson's voice. RP 43.

Mr. Roberson was in a carport when Edgington spotted him. He was armed with a firearm, but did not point it at the deputy. He agreed to put his gun down. RP 44. When Mr. Roberson saw some other police behind Edgington, he started to reach for the gun, but did not pick it up. RP 45.

Edgington tried to calm Roberson down, and to convince him that the police were there to help him. RP 47. Roberson told Edgington he thought the police were going to hurt him. He asked Edgington, "What did I do wrong, don't hurt me, please don't do this, why are you doing this." He started sobbing. RP 54. A second deputy, Mark Millett, said he looked like a scared puppy, shaking and nervous. It was clear to Millett that Roberson was afraid of something. RP 65-66.

Edgington put Roberson in a patrol car and then to the hospital for a mental health evaluation. RP 47, 56. The reason he was taken to the hospital is the police had concerns about his mental health. Roberson was afraid and thought someone was chasing him. RP 56-57. He was given an advice of rights at the hospital. RP 48. Roberson asked the officer not to hurt him, and asked why he was being guarded. Edgington told him they were at the hospital so that they could see if there was a physical reason why Roberson thought people were chasing him. RP 59.

Roberson was crying and rocking back and forth on the exam table. Then he started praying and asking for forgiveness. RP 59. Edgington asked him to tell why people were chasing him. RP 50. The court found that any statements made at the hospital were admissible. RP 77.

C. Trial Testimony

Sherrie Elkhart lives on Barr Road in Clallum County, RP 252.

Her closest neighbor was Louie Ricklick. RP 253. The Elkharts had an alarm system that went off on the night of the incident. She and her husband went outside to look and thought they saw Israel Lundstrom and Jennifer Cox. RP 255. Cox and Lundstrom were panicked about something, but she could not tell what about. Lundstrom and Cox left and headed back to the van they were living in. RP 256, 270-71.

Elkhart had been calling the police on Cox and Lundstrom to drive them off the street. RP 257. There had been constant suspicious traffic at Cox's trailer. Ms. Elkhart suspected there was drug activity going on there. RP 268. She did not see Israel and Cox again that night. RP 258.

Ms. Elkhart went back to sleep but was awakened by a gunshot. She called their neighbor, Louie Ricklick. He told them to call 911, because there was someone at his back door. RP 259. Ms. Elkhart's husband then called 911. RP 259.

They heard someone “wailing” for help, but she did not recognize the voice. RP 260. She never saw Mr. Roberson that night. RP 261. The court admitted without objection the tapes of her 911 call and that of her husband, Michael Elkhart. RP 262. It took a long time for the police to come but during the wait, she kept hearing someone screaming for help. RP 263. The cries for help were constant. RP 266. The screaming for help did not stop until the police arrived. RP 272.

Michael Elkhart and his wife were getting ready to go to bed when they heard their sensor go off. He went outside to look. He saw Israel Lundstrom and a woman, Jennifer Cox. Lundstrom rented a house down the road. RP 274-275.

When he talked with Lundstrom, Lundstrom was talking excitedly, at “about 100 MPH.” RP 290. Lundstrom and Cox hung out at Cox’s mother’s. There was a lot of short-term traffic there. Elkhart could tell it was drug trafficking. RP 292.

The police were called and came to the end of the road where there was a van parked by his neighbor’s gate. RP 277. The van was towed away, and he and his wife went to bed. RP 278.

They were awakened by the noise of a gate by his neighbor’s, and then a gunshot. It was the gate by Louie Ricklick’s property. RP 278.

Mr. Elkhart went out his front door and called 911. He heard a voice calling for help. RP 279. He went in the direction of Ricklick’s house because there had been a burglary there two years earlier. He had

his phone, a small flashlight, but no firearm. RP 279. He heard the sound of the voice was coming from another neighbor's house, Mike Walters' house, beyond Louis Ricklick's house. RP 280. The voice that was yelling for help was a male voice. RP 294. The calling for help went on for a long time. RP 296.

Elkhart did not see anything amiss at Ricklick's place. RP 295. But he did see someone dressed in black in Mike Walters' carport. This man was at Walter's back door. Walters was also at his back door. RP 281. Walters was yelling, "get out of here, get out of here." RP 281, 298.

Michael Elkhart did not say anything to the man in black. RP 282. He was about 40-50 feet from the carport. RP 283. He did not come as close as 15 feet. RP 524. The man in black pointed his gun and fired at him. RP 283. The man who fired was firing at Elkhart's flashlight. The man who shot did not say anything threatening to him before he fired. RP 297. There was no second shot fired at him. RP 299.

After the shot, Elkhart took cover behind the fence. RP 285. The next day he showed the police where he had been standing. RP 284. They found a hole in the fence. RP 289. The bullet had come within 8-10 feet of him, based on the hole in the fence. RP 297.

Mr. Elkhart had never met Keith Roberson. He had no quarrel with him. RP 290. He did not know what was going on in the carport between Walters and Roberson. He did not hear Roberson threatening Walters. Instead, Roberson was yelling for help, "call 911." RP 298.

Deputy Paul Federline was called to South Barr Road due to a disturbance. RP 236. He found a van parked at the very end of the road, near at gate where it dead-ends. RP 236. When he checked the van, it was unoccupied. RP 239.

He went in to the woods to look for the van's owner. He knew who the owner was, and told him to come out of the woods. He did not hear anyone or see anyone in the woods. RP 241. He waited and no one came out. Since the van was blocking the road and the gate , he impounded it and it was towed. RP 241.

He spoke with a man named Israel Lundstrom, who gave him an evasive and convoluted story about Mr. Roberson fleeing in his van. RP 243. He did not speak with Ms. Cox, who was hiding in the trailer on the property where the call had come from. RP 244, 245.

Destiny Walters Spencer lived with her grandfather, Michael Walters, on South Barr Road. She awoke to hear a man screaming for help at the back door of their house. RP 428. She called 911. The man tried to come into the house, but her grandfather stopped him from coming in and stayed at the back door to make sure he did not get inside. While he was there, she heard two gunshots. RP 430. Her phone call to 911 was admitted as Ex. 4. RP 435; Supp. RP 25-70.

The man outside wanted them to call 911, and also asked her grandfather to take him out to the highway or to the police. He was crying the whole time he was at the back door. RP 439.

During the 911 call between Walters and the dispatcher, Walters told the dispatcher a black man was on his carport, who told him he was being chased through the woods. The man on the carport, Mr. Roberson, looked like he was really scared. RP Supp. 25-26. He was crying and sobbing and did not sound stable. RP Supp. 28-29.

Roberson asked to speak with the dispatcher, who tried to talk with him. RP Supp. 35-36; 45. Roberson kept asking for help. RP Supp. 40, 46. The dispatcher told him he would have to give up the gun when the police arrived. RP Supp. 46. Roberson reiterated to Walters that he wanted the police there because people were chasing him. RP Supp. 55. He kept asking when the police would arrive. RP Supp. 55, 56, 57.

When Deputy Edgington arrived, Mr. Roberson asked to see him. RP Supp. 59-60. He said he would put his gun down when he could see Edgington. RP Supp. 60-61. Roberson kept asking why somebody would want to hurt him. RP Supp. 61. The dispatcher later told Walters that Roberson was known to the police and had drug and mental problems. RP Supp. 66.

Mike Walters testified about the events of the 911 call by deposition, Ex. 23. His residence in February of 2016 was a double-wide mobile home on South Barr Road. RP Supp. 78. He heard a pounding on the door, and thought it might be one of his granddaughter's friends. No one was at the front door, and then he saw the backdoor open and Mr. Roberson was there. RP Supp. 80. Roberson told him he needed to call

the police because Roberson needed help. RP Supp. 81-82, 104. Walters went to get his cell phone to call 911 and then went back out the door where Roberson was. RP Supp. 83. Roberson told him that people were chasing him through the woods. RP Supp. 83, 104. Several minutes into the call, he realized Roberson was armed. RP Supp. 84. Roberson was mostly pointing the gun in the direction of his neighbor's, Mr. Ricklick, but also pointed the gun at Walters. RP Supp. 84-85. Walters asked him not to point the gun at him. RP Supp. 85. Over the course of their interaction, Roberson pointed the gun at him several times. RP Supp. 86.

Roberson started to get more agitated, and fired a shot in the direction of the neighbor's house. The gun was not pointed into the air, nor directly into the ground. RP Supp. 87. Walters told him to stop shooting. RP Supp. 88. That was about the time the neighbor, Mike Elkhart, came by with a flashlight. RP Supp. 89. Both Roberson and Walters told Elkhart to go away. RP Supp. 90. Several minutes later Roberson fired again in the direction of Louie's (Ricklick) house. RP Supp. 91, 105. He did not fire at Mr. Walters. RP Supp. 111.

Walters did not flee inside his mobile home because he could not move very fast due to ailments, and also thought Roberson could just fire through the door if he did. RP Supp. 92.

Roberson was pacing back and forth, and screaming for help over and over again. RP Supp. 93.<sup>2</sup> About 40 minutes into the incident, Roberson said that he did not want to die, but he did not want to go out alone. RP Supp. 93. That statement frightened Walters. RP Supp. 94.

The dispatcher connected Walters with Ralph Edgington, one of the deputies who was on the way. Walters told him to come in with his lights on so that Mr. Roberson would know they were the police. RP Supp. 96.

It took about an hour from the beginning of the incident before the police arrived. RP Supp. 98. When the deputies arrived, Roberson put his gun down on a dryer that was in the carport. As he did so, Walters went inside his house and locked the door. RP Supp. 97. A few minutes later, he was told that Mr. Roberson had been “contained.” RP Supp. 98.

Walters had never met or crossed paths with Roberson before. RP Supp. 101. Roberson did not ask for money or property. He just wanted Walters to summon the police. RP Supp. 107. Roberson got progressively more agitated as the time wore on while they were awaiting the arrival of the police. RP Supp. 108. Roberson grew more and more afraid, and Walters tried to calm him down. RP Supp. 108. Once Roberson recognized Ralph Edgington, he started to calm down. RP Supp. 110, 113.

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<sup>2</sup> The transcriber notes that yelling in the background and dog barking were going on more or less continuously during this phone call. RP Supp, generally.

Ralph Edgington was one of several officers who responded to a prowler with a gun call. After meeting off scene with other officers, they made a tactical plan. Since Edgington knew Mr. Roberson, he tried to talk with him. RP 333-335.

When he first saw Roberson, he had a gun in his hand and was looking around frantically and crying out. RP 335. He was not pointing the gun at the officer. RP 335. Edgington shone his flashlight on himself so that Roberson could see who he was. RP 336. Roberson eventually put his gun down on a laundry machine that was in the carport. RP 337-38. Edgington tried to reassure him that the police were not going to hurt him, because Roberson thought someone was after him. RP 339.

Roberson was taken to the hospital ER. RP 340. To the officer, it seemed like he was under the influence of some drug. RP 341.

Mark Millet was another of the deputies who responded to the prowler call. RP 344. Deputy Edgerton was the lead person, and was trying to calm Mr. Roberson down. Millet also illuminated himself with his flashlight so that Roberson would see they were in fact police officers. RP 346, 350. Mr. Roberson did not point his gun at the police. RP 350. Edgerton succeeded in getting Mr. Roberson to put his gun down, and Millet was able to pick it up. RP 347.

After presenting additional exhibits showing the scene via forensic mapping, the state rested. RP 445. Mr. Roberson's motion to dismiss count I, the first degree assault charge, was denied. RP 459, 461.

At the time of trial, Keith Roberson was 56 years old and an unemployed landscaper. RP 468. His wife had recently passed away. RP 468. He became homeless and used methamphetamine. RP 469. He had been doing well until his wife died. RP 496.

On the night of the incident, he had used methamphetamine. RP 470. He went to Barr Road with Jennifer Cox to do the methamphetamine. A car pulled up behind his, Cox jumped out, taking all the methamphetamine, and a man with brass knuckles and a dagger attached came up to his van. He drew a picture of the weapon for the jury. RP 474-475.

He fled down the road in his van until he came to a dead end, left his van and fled into a wooded area, where he hid. He fled because he thought the man with the brass knuckles was going to kill him. RP 477. He saw a "searching flashlight" while he was in the woods. RP 480. He ran to a house and knocked but no one answered, so he went to a second house, which turned out to be Michael Walters' house. He asked them to call 911 for him because he was being chased through the woods. RP 481. He was very afraid. RP 481. Walters got his phone to call the police and then stood in the doorway. RP 481-82. He did not point the gun at Walters or intend to assault him. RP 482. He did not threaten him or intend to shoot him. RP 482. He just wanted help because he was very afraid. He did fire a "warning shot." RP 483. He wanted someone to hear

the shot so that they would call the police for him. RP 484. He did not intend to hurt Michael Elkhart, and had never met him. RP 484.

Mr. Roberson had been in the Army National Guard and had handgun training with a .44 caliber, which was a larger gun than the one he had on the night of the incident. RP 484. He was not trying to hit anyone when he fired the shot. RP 485. He was a good enough shot that if he had intended to hit anyone, he would have. RP 491.

His van had been towed when he fled to the woods, so he began to mistrust the police. RP 486. That is why he asked them to show themselves to him. RP 487. He finally recognized Deputy Edgerton. RP 488. He laid down his gun, and cooperated with the arrest process. RP 489. He had not heard Deputy Federline calling to him when he was in the woods about towing his van. RP 498.

He remembered Mr. Walters asking him to put his gun away, but he did not do that. RP 500. He also remembered Walters asking him not to point the gun at him. RP 500. He was not pointing the gun at Walters, but he was yelling at him for help. RP 500. Over objection, the prosecutor asked him several times to speculate whether Walters was “just making that up for 911”. RP 500-501. He denied shooting at Mr. Elkhart. RP 504. He thought the person with the flashlight was possibly the same person who had been searching in the woods with the flashlight. RP 507. No one came to attack him while he was in the carport. RP 509. He remembered Mr. Walters saying, “please don’t shoot.” RP 509. He was not able to

communicate with the dispatcher even when the phone was given to him. RP 511-12, 521. He did not fire at Mr. Elkhart when he fired a “warning shot” at the fence. RP 514.

D. Sentencing Hearing

Mr. Roberson requested a downward exceptional sentence based on RCW 9.94A.535 (1)(e).<sup>3</sup> He provided a psychological assessment prepared by Dr. Ken Muscatel which concluded as follows:

I have concluded that Mr. Roberson did likely have symptoms of a significant mental disturbance at the time of the incident, and those factors likely affected his behavior, thinking, judgment and emotional responses at that time. Thus it is appropriate for the court to consider these as mitigating factors in determining the sentence. These opinions are offered on a more probable than not basis.

CP 34, *et seq.* RP 637-640. Defense counsel asked for the two firearm enhancements to be run concurrently. He noted that the recent case of *State v. Houston–Sconiers, infra*, had loosened the strait-jacket on trial courts regarding exceptional sentences and firearm enhancements, at least where juveniles were concerned. He analogized Mr. Roberson’s mental illness to the undeveloped cognitive ability of juveniles which was recognized by the *Houston–Sconiers* court as the foundation of its holding. RP 642-644.

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<sup>3</sup> RCW 9.94A.535 provides in pertinent part as follows:

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

...

(e)The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded

The trial court concluded that although the statutory mitigating circumstance set out in RCW 9.94A.535 (e) might apply, to the extent that Mr. Roberson's behavior was attributable to the use of drugs, rather than the underlying mental illness documented in Dr. Muscatel's report, it did not. RP 653-654. The court imposed a sentence at the low end of the standard range, 84 months. RP 665. The court also declined to reach an exceptional sentence by reducing the portion of the sentence attributable to the two underlying assault charges as well. RP 665.

#### IV. ARGUMENT AND AUTHORITY

- A. The prosecutor committed misconduct during closing argument by arguing that Mr. Roberson had no right to assert self-defense because he had created the need for it.

When arguing for a conviction on Count I, the alleged assault in the first degree on Mr. Elkhart, the prosecutor argued that Mr. Roberson had no right to assert self-defense:

So, my argument is how can someone argue self-defense when they create the situation. When he essentially through his own behavior, brings someone into the area of danger, and when they come, he shoots at them. RP 577.

Defense counsel immediately objected on the basis that this was an invocation of the "aggressor" instruction,<sup>4</sup> and no such instruction had been requested or given. RP 578. A colloquy ensued out of the presence

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<sup>4</sup> WPIC 16.04:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

of the jury, RP 578–583, after which the court instructed the jury to disregard the prosecutor’s argument. RP 583.

In *State v. Davenport*, 100 Wn.2d. 757, 657 P.2d 1213 (1984), the prosecutor argued that Davenport was guilty as an accomplice in a burglary case despite not entering the building because he was an accomplice to those who had entered. No instruction had been given to the jury discussing accomplice liability. An immediate objection was made and overruled. Defendant also moved for a mistrial, which was denied. The jury returned a verdict of guilty the next day after retiring for the night.

The Supreme Court reversed the conviction, holding that the argument was not invited by defense counsel’s argument, and was improper given that the jury had not been instructed on accomplice liability. The court also concluded that the error was not harmless. As the court noted, “the prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury.” *Davenport* at 763. There was a reasonable probability that the misconduct may have affected the verdict:

In conclusion, we hold that the prosecutor's comments in rebuttal constituted improper argument amounting to a serious trial irregularity. The record clearly supports our holding that the jury considered the improper arguments and may have been prejudiced by it. Therefore, we reverse the petitioner's conviction and remand for a new trial.

*Davenport* at 765.

Although the court did sustain the objection here, and instruct the jury to disregard the prosecutor's argument, there was a reasonable probability that the argument affected the outcome on Count I. The jury was instructed that a person could exercise the right of self-defense even if mistaken about the actual need for it. CP 83<sup>5</sup>. The prosecutor's argument struck at the heart of the assertion of self-defense and its effects could not be undone by the court's attempt to correct the damage.<sup>6</sup>

B. The prosecutor's improper cross-examination of Mr. Roberson denied him a fair trial on Count II.

Mr. Roberson testified that he had not pointed his gun at Mr. Walters during their long wait for the police to arrive. Walters testified during his deposition that Mr. Roberson had pointed the gun at him on several occasions. Over a defense objection, the prosecutor asked Mr. Roberson several times if Walters was "just making this up for 911." RP 501-502.<sup>7</sup> This was improper cross-examination requiring a new trial.

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<sup>5</sup> The jury was instructed in accordance with WPIC 17.04 as follows:

A person is entitled to act on appearances in defending himself, if he believes in good faith and on reasonable grounds that he is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

<sup>6</sup> Justice Jackson had observed in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453, 93 L.Ed.790, 69 S. Ct. 716, 723 (1949):

"The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

Another court, in discussing the effect of a "corrective" instruction on prosecutorial misconduct during argument, pungently observed "If you throw a skunk in the jury box, you can't instruct the jury not to smell it." *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962), quoted in *United States v. Garza*, 608 F.2d 659, 666 (5th Cir. 1979).

<sup>7</sup> A. [Mr. Roberson] He was -- that's all, don't point the gun at me, don't point the gun -- I wasn't -- I had no reason -- I had no -- this man's saving my life. I had no reason to

A prosecutor commits misconduct when his or her cross-examination seeks to compel a witness' opinion as to whether another witness is telling the truth. *State v. Jerrels*, 83 Wn. App 503, 507, 925 P.2d 209 (1996); *State v. Suarez-Bravo*, 72 Wash.App. 359, 366, 864 P.2d 426 (1994); *State v. Padilla*, 69 Wash.App. 295, 299, 846 P.2d 564 (1993). Such questioning invades the jury's province and is unfair and misleading. *State v. Casteneda-Perez*, 61 Wn. App. 354, 362, 810 P.2d 74 (1991).

In *Suarez-Bravo, supra*, the prosecutor repeatedly asked the defendant if another witness was lying about his testimony. The court noted that such cross-examination was misconduct and invaded the province of the jury. Despite the lack of any objection to the line of questioning, the court reversed, finding there was a substantial likelihood that the misconduct affected the outcome of the trial. 72 Wn. App at 366-67 .

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point the gun at him, I didn't want anything from him but help. I just wanted him to help me.

Q. So he was just making that up for 911?

A. Yes –

MR. ANDERSON: Objection as to the motives of the witness.

THE COURT: Overruled.

THE WITNESS: I never pointed the gun at him.

BY MS. KING Q. So -- A. No reason –

MS. KING: Okay, so I don't know -- the objection was over -- I said –

MR. ANDERSON: Overruled.

BY MS. KING Q. So Mr. Walters was just making that up for 911 when he said don't point it at me is what you're saying?

A. That's what I'm saying.

In *State v. Padilla, supra*, the prosecutor, this time over an adequate objection, repeatedly asked the defendant if a police witness who implicated him was lying. The court held that this was misconduct, and that there was a substantial likelihood that this misconduct had affected the verdict in the case. 69 Wn. App. at 301. The conviction was reversed.

In *State v. Stover*, 67 Wn. App. 228, 834 P.2d 671 (1992) the prosecutor again cross-examined the defendants in a way that required them to characterize non-law enforcement witnesses as liars. The state argued that the rule against such cross-examination was limited to instances where the other witnesses were police officers, such as in *State v. Casteneda-Perez*, 61 Wn. App. 354, 362, 810 P.2d 74 (1991). The Court of Appeals rejected this distinction and found the cross-examination was misconduct. It did not reverse, however, since no objection had been made to the line of questioning. 67 Wn. App. at 232.

In *State v. Neidigh*, 78 Wn. App. 71, 895 P.2d 423 (1995), the prosecutor asked the defendant to speculate whether an informant was lying about her testimony, and also asked whether prosecution witnesses were conspiring to get the defendant convicted. The court again held this was an improper tactic, but did not reverse since no objection had been made. *Neidigh* at 77.

In *State v Casteneda–Perez*, *supra*, the prosecutor asked the defendant on cross–examination on multiple occasions about whether police officers were lying about their testimony concerning a drug transaction. On one occasion, defense counsel objected and was overruled. On the other two occasions, no objection was made. Noting that under a long line of Washington cases, such cross–examination was improper,<sup>8</sup> the Court of Appeals held that the cross –examination was improper because it required the defendant to offer an opinion about another witnesses’ credibility. The court did not reverse, however, because the error was not constitutional in nature, and was harmless error under the non-constitutional harmless error test.

Defense counsel in the present case did object to the beginning of this line of questions, and the form of the objection adequately alerted the trial court to the basis for the objection. Since the questioning was clearly misconduct under the long line of Washington authority noted above, the only question for this court is whether there is a substantial likelihood that the misconduct affected the verdict on Count II.

Mr. Roberson had testified that he had not aimed his gun at Mr. Walters during their long wait for the police to arrive. Mr. Roberson did not make any directly threatening comments to Mr. Walters. He had no

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<sup>8</sup> “Washington cases have held generally that weighing the credibility of a witness is the province of the jury and have not allowed witnesses to express their opinions on whether or not another witness is telling the truth. *State v. Swenson*, 62 Wash.2d 259, 283, 382 P.2d 614 (1963); *State v. Fitzgerald*, 39 Wash.App. 652, 657, 694 P.2d 1117 (1985); *State v. Maule*, 35 Wash.App. 287, 297, 667 P.2d 96 (1983).” *State v. Casteneda–Perez* at 360.

quarrel with him and did not even know him. He had no reason to point the gun at Walters, whom he was looking to for help to get the police there as fast as possible. His intent during the interaction with Walters was clearly an important issue for the jury to determine, especially given the unmistakable evidence of his erratic behavior and his continual calls for help. The prosecutor's improper questioning, which required Mr. Roberson to characterize the sympathetic Mr. Walters as a liar, had a substantial likelihood of affecting Mr. Roberson's credibility and hence the outcome of the case. This court should hold that the questioning was improper and reverse the conviction on Count II and remand for a new trial.

C. There was insufficient evidence of specific intent to sustain a conviction of assault in the second degree on Count II.

In order to sustain a conviction, the state must prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The standard of review when a challenge to the sufficiency of the evidence is made on appeal is whether a rational trier of fact could have found all of the elements of the crime beyond a reasonable doubt, giving the benefit of the inferences from the evidence to the non-moving party, the state. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Hoffman*, 116 Wn. 2d 51, 82, 804 P.2d 577 (1991); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

The second-degree assault charged in Count II regarding Mr. Walters was not based on a battery, but on the intentional creation of apprehension. To prove a second-degree assault against Michael Walters, the state had to prove that Mr. Roberson intended to create apprehension and fear of bodily injury. Instructions 8 and 9, CP 74-75.<sup>9</sup> The jury was also instructed on the definition of intent, Instruction 15, CP 81,<sup>10</sup> which required it to find that Mr. Roberson acted with the objective or purpose to accomplish a result that constituted a crime in order to convict.

The specific intent to cause fear and apprehension is an element of second degree assault. *State v. Byrd*, 125 Wn. 2d 707, 713, 887 P.2d 396 (1995); *State v. Austin*, 59 Wn. App. 186, 193, 796 P.2d 746 (1990).

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<sup>9</sup> Instruction 9 read as follows:

An assault is an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted. An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Instruction 8 read as follows:

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 17<sup>th</sup> of February, 2016, the defendant assaulted Michael Walters with a deadly weapon; and
- (2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

<sup>10</sup> Instruction 15 read as follows:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

Specific intent means the intent to produce a specific result. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

While there was sufficient evidence from which a jury could conclude that Mr. Walters was in fact subjectively afraid of bodily injury, there was not sufficient evidence that Mr. Roberson acted with the specific intent to create such an apprehension. He did not fire his gun at Mr. Walters. He did not use it to demand entry into Mr. Walters' house, or to demand property from him. He did not verbally threaten Mr. Walters with his gun. Instead, he waited impatiently for the police to arrive, and kept requesting that Mr. Walters call the police for help to protect him against the people he thought were pursuing him. While his activities clearly made Mr. Walters uncomfortable, it was not his intention to create fear in Mr. Walters, the man he was looking to for help in his crisis. He was not acting with the objective to accomplish a result that constituted a crime. There was simply insufficient evidence of hostile specific intent to support a conviction for Count II. This court should reverse the conviction, and dismiss Count II, and remand for sentencing if Count I is not reversed on the basis argued in Section A of the brief.

D. The trial court erred in not imposing an exceptional sentence. A court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a

preponderance of the evidence. RCW 9.94A.535. Among the list of statutory mitigating circumstances is subsection (e):

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered. *State v. Grayson*, 154 Wn 2d 333, 342, 111 P.3d 1183 (2005). Failure to consider an exceptional sentence is reversible error. *State v. Grayson*, 154 Wn.2d at 342. A court reviews the trial court's consideration of a request for a mitigated exceptional sentence for an abuse of discretion. *State v. Grayson*, at 341-42. When a defendant requests an exceptional sentence, this court may review whether the trial court refused to exercise discretion at all or relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. Garcia-Martinez* 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

To qualify for a downward departure under RCW 9.94A.535(1)(e), the record must establish not only the existence of the mental condition, but also a connection between the condition and significant impairment of the defendant's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of the law. *State v. Schloredt* , 97 Wn. App. 789, 802, 987 P.2d 647

(1999). However, the statute does not require that the defendant show that his mental capacity precluded him from committing the charged crime or from forming the intent to commit a specific intent crime. In other words, the mental impairment does not have to rise to the level of being a defense to the crime. *State v. Jeannotte*, 133 Wn. 2d 847, 851, 947 P.2d 1192 (1997); *State v. Hutsell*, 120 Wn. 2d 913, 921, 845 P.2d 1325 (1993).

In the present case, Mr. Roberson provided to the court a report from a qualified expert who had reviewed the police reports from the case and also interviewed appellant. Dr. Muscatel concluded that although Mr. Roberson's methamphetamine use played a role in the events of the evening, his underlying mental illness contributed as well. While this may not have furnished him with a complete defense to the offenses, there was sufficient evidence of mental illness to qualify as a mitigating factor under RCW 9.94A.535 (e).

Other parts of the record also supported the conclusion that Mr. Roberson was suffering from mental illness. The police took him to the hospital for that very reason. RP 56-57. The 911 dispatcher also alluded to the fact that the police had knowledge that Mr. Roberson had mental health issues, during his conversation with Mr. Walters. RP Supp. 66. The fact that methamphetamine was also involved did not prevent the trial

court from using this mitigating circumstance as a basis for an exceptional sentence.

The trial court appeared to be operating under the assumption that as long as *some part* of Mr. Roberson's behavior was attributable to his use of methamphetamine, there was no basis for an exceptional sentence. RP 653-54. This is a mistaken reading of the statute. The fact that methamphetamine was *also* involved did not prevent the trial court from considering his mental health problems alone as a basis for an exceptional sentence.

In *State v. Houston–Sconiers*, 188 Wn. 2d 1, 391 P.3d 409 (2017) the court held that a defendant's youth was a factor that had to be considered by courts in sentencing under the Eighth Amendment to the United States Constitution. This was true even if the defendant had been sentenced as an adult by the trial court. The court's discretion was unconstrained by the firearm enhancement statutes, so that a court had full discretion to depart from the sentencing guidelines "and any otherwise mandatory sentence enhancements." 188 Wn. 2d at 34.

Defense counsel argued below that Mr. Roberson's mental illness at the time of the offense reduced his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law in the same way that youth mitigated the conduct

in *Houston–Sconiers*. RP 642. The trial court did not appear to address this argument.

Because it appears that the trial court believed it could not grant an exceptional sentence based on RCW 9.94A.535 (1)(e) where the record indicated both that Mr. Roberson had a mental illness and was under the influence of methamphetamine, and because it apparently did not consider whether an adult’s mental illness was mitigating in the way that juvenile mental development was held to be mitigating in *Houston–Sconiers*, it abused its discretion in not considering and granting an exceptional sentence. This court should reverse and remand for a new sentencing hearing.

## V. CONCLUSION

The prosecutor’s closing argument denied Mr. Roberson a fair trial on Count I, due to her invocation of a variation of an “aggressor” instruction. The prosecutor’s cross–examination of Mr. Roberson denied him a fair trial on Count II, because she improperly forced him to call one of the complaining witnesses a liar. The court should reverse his convictions and grant a new trial on each count.

The evidence was insufficient to convict on Count II. Although there was an adequate showing that Mr. Walters, the alleged victim, was subjectively afraid due to Mr. Roberson’s actions, there was insufficient evidence that Mr. Roberson specifically intended to create fear in Mr.

Walters by waiting outside his house for nearly an hour for the police to arrive. The court should reverse and dismiss Count II.

The trial court erred in not considering and not granting an exceptional sentence under RCW 9.94A.535, based on Mr. Roberson's documented mental health issues, which significantly impaired his ability to conform his conduct to the requirements of the law or to appreciate the wrongfulness of his conduct. The court was not barred from considering this mitigating factor simply because a mental health defense had not been raised at trial, nor because Mr. Roberson's use of methamphetamine may have played a part in his actions. This court should reverse and remand for a new sentencing hearing.

Dated this 3<sup>rd</sup> day of MAY, 2018

LAW OFFICE OF MARK W. MUENSTER



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Mark W. Muenster, WSBA 11228  
Attorney for Appellant Keith Roberson

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

STATE OF WASHINGTON,	)	
	)	
Respondent	)	
	)	
vs.	)	NO. 50414—6-II
KEITH ROBERSON	)	CERTIFICATE OF
	)	SERVICE
	)	FOR Opening Brief
Appellant.	)	
_____	)	

I hereby certify that I caused to be served a copy of: Appellant's Opening Brief on Keith Roberson at the address shown, by depositing the same in the mail of the United States at Vancouver, Washington, on the 3rd day of May, 2018 with postage fully prepaid. Service on the prosecutor was made via the court's portal.

DATED this 3<sup>rd</sup> day of May, 2018



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Mark W. Muenster

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