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

STATE OF WASHINGTON,

Respondent,

v.

JOHN GREYSTOKE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 16-1-00183-1

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES iii

I. COUNTERSTATEMENT OF THE ISSUES 1

II. STATEMENT OF THE CASE 3

III. ARGUMENT 14

A. THE TRIAL COURT HONORED GREYSTOKE'S RIGHT TO SELF-REPRESENTATION WITHOUT VIOLATING HIS RIGHT TO PRESENT A DEFENSE BECAUSE GREYSTOKE VOLUNTARY, KNOWINGLY, AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL. 14

B. THE TRIAL COURT DID NOT VIOLATE GREYSTOKE'S RIGHT TO PRESENT A DEFENSE BY EXCLUDING INADMISSIBLE MENTAL HEALTH EVIDENCE. 20

1. The trial court properly excluded Greystoke's mental health evidence because Greystoke failed to provide notice of intent to assert a mental health defense. 22

2. Greystoke failed to present any relevant mental health evidence to support a mental health defense. 24

3. The record shows that Greystoke intended to present evidence of his mental state for mitigation purposes rather than to establish a mental health defense. 28

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C. THE TRIAL COURT'S ANALOGY TO PROFESSIONAL AND COLLEGE FOOTBALL TEAMS, CORPORAL DOMBROWSKI'S STATEMENT, AND THE COURT'S EXCLUSION OF TESTIMONY REGARDING THE REASON FOR GREYSTOKE'S EVICTION WERE NOT COMMENTS ON THE EVIDENCE, AND EVIDENCE OF GUILT WAS OVERWHELMING. 31

D. GREYSTOKE WAS NOT ENTITLED TO AN INSTRUCTION FOR ASSAULT IN THE SECOND DEGREE BECAUSE THERE WAS EVIDENCE OF INTENT TO INFLICT GREAT BODILY HARM.....40

E. THE ORIGINAL PLEA OF NOT GUILTY WAS EFFECTIVE AFTER THE INFORMATION WAS AMENDED TO ADD THE SPECIAL ALLEGATION BECAUSE IT DID NOT CHANGE THE CHARGE OR THE MANNER IN WHICH IT WAS ACCOMPLISHED.....44

F. THE JUDGMENT SHOULD BE AMENDED TO PROHIBIT PAYMENTS FROM SOCIAL SECURITY AND THE $200 COURT FILING FEE SHOULD BE STRICKEN BUT THE DNA FEE SHOULD BE UPHELD BECAUSE THE RECORD DOES NOT SHOW GREYSTOKE'S DNA HAD ALREADY BEEN COLLECTED. 47

1. The trial court should amend the judgment and sentence to prohibit payments from social security disability payments.....47

2. The $200 court filing fee should be stricken but the $100 DNA fee should be upheld because the record does not establish that Greystoke's DNA had already been collected. 48

IV. CONCLUSION 49

CERTIFICATE OF DELIVERY 51

TABLE OF AUTHORITIES

Cases

City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993).... 35, 37

Clay v. Portik, 84 Wn. App. 553, 561, 929 P.2d 1132 (1997)..... 23

In re Estate of Hayes, 185 Wn. App. 567, 591–92,
342 P.3d 1161 (2015)..... 38

In re Rhome, 172 Wn.2d 654, 260 P.3d 874 (2011)..... 14, 15

State v. Atsbeha, 142 Wn.2d 904, 16 P.3d 626 (2001)..... 25, 27

State v. Butler, 165 Wn. App. 820, 835, 269 P.3d 315 (2012)..... 32

State v. Catling, 2 Wn. App.2d 819, 826,
413 P.3d 27 (2018) *review granted*, 422 P.3d 915 (2018)..... 47

State v. Clark, 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017)..... 21, 22, 31

State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002)..... 21

State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001) 35

State v. Descoteaux, supra 94 Wn.2d at 37–38, 614 P.2d 179..... 38

State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991) 21

State v. Dickenson, 48 Wn. App. 457, 468 740 P.2d 312 (1987) 38

State v. Ellis, 136 Wn.2d 498, 528, 963 P.2d 843 (1998)..... 39

State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000) 40, 41

State v. Francisco, 148 Wn. App. 168,
199 P.3d 478, *review denied*, 166 Wn.2d 1027 (2009)..... 32

State v. Fritz, 21 Wn. App. 354, 363, 585 P.2d 173 (1978) 21

State v. Graeber, 46 Wn.2d 602, 605–06, 283 P.2d 974 (1955)..... 46

State v. Hahn, 106 Wn.2d 885, 726 P.2d 25 (1986)..... 16, 20

State v. Huddleston, 80 Wn. App. 916, 922, 912 P.2d 1068 (1996)..... 44

State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1, 4, (WASH 1970) 31

State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010)..... 20

State v. Leach, 36 Wn.2d 641, 646, 219 P.2d 972 (1950) 43

State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006)..... 39

State v. Lewis, 194 Wn. App. 709, 721,

379 P.3d 129, *review denied*, 186 Wn.2d 1025, 385 P.3d 118 (2016) 49

State v. Lundy, 176 Wn. App. 96, 102–03, 308 P.3d 755 (2013) 47

State v. Modica, 136 Wn. App. 434, 149 P.3d 446 (2006)..... 14, 15

State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992)..... 35

State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)..... 41

State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009)..... 16

State v. Ramirez, 426 P.3d 714, 722 (Wash., 2018) 48

State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008)..... 45

State v. Siers, 174 Wn.2d 269, 273–74, 274 P.3d 358 (2012)..... 32

State v. Stoddard, 192 Wn. App. 222, 225, 366 P.3d 474 (2016)..... 47

State v. Swan, 114 Wn.2d 613, 657, 790 P.2d 610 (1990) 31, 32

State v. Thibodeaux, ___ Wn. App. 2d ___, ___ P.3d ___; 2018 WL 6174962

(No. 76818-2-I, November 26, 2018) 49

State v. Thornton, 188 Wn. App. 371, 374, 353 P.3d 642 (2015) 49

Statutes

RCW 10.101.010(3)(a)–(c)..... 48

RCW 10.77.010(15)..... 26

RCW 10.77.030 22

RCW 36.18.020 48

RCW 9A.12.010(1)..... 26

Rules

ER 402 21

RAP 9.1..... 48

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court violated Greystoke's right to a fair trial by permitting Greystoke to represent himself considering Greystoke made the request three times, the court warned Greystoke of the disadvantages of self-representation on multiple occasions, Greystoke affirmed his understanding, and the court reviewed two competency evaluations ensuring Greystoke was competent?
2. Whether the trial court properly excluded Greystoke's mental health evidence because Greystoke never provided notice of a mental health defense, he did not present relevant expert witness evidence, and only intended to offer evidence of his mental state for mitigation?
3. Whether, during jury selection, the court's analogy of professional and college football teams was a comment on the evidence when the court used it to describe the difference between the trial skills of the prosecutor and Greystoke and to make it clear that the jury was not to hold any perceived shortcomings in trial skills against Greystoke?
4. Whether a witness's words "attempted murder" became a comment on the evidence when the court overruled an objection to it although the statement was a reasonable inference from the evidence and evidence of guilt was overwhelming?

5. Whether the court's exclusion of the building maintenance worker's testimony to impeach the victim on a collateral matter was a comment on the evidence?

6. Whether Greystoke was not entitled to an inferior degree instruction of Assault in the Second Degree because the State presented strong evidence showing Greystoke intended to inflict great bodily injury constituting Assault in the First Degree.

7. Whether Greystoke's original plea of not guilty remained effective after the information was amended to include a deadly weapon allegation because the amendment did not change the offense or manner in which it was accomplished and the case was tried on the merits without objection to the absence of a re-arraignment.

8. Whether a trial court may amend the judgment to order that legal financial obligations may not be enforced against the defendant's social security disability payments?

9. Whether the imposition of a DNA fee in the judgment and sentence should be upheld because there was no showing in the record that Greystoke's DNA had already been collected.

10. The State concedes that the $200 criminal filing fee should be stricken from the judgment and sentence.

II. STATEMENT OF THE CASE

The State charged Greystoke with Assault in the First Degree alleging that Greystoke stabbed Adam Gross in the stomach with a knife on April 24, 2016. CP 246, 248–251. On May 20, 2016, defense counsel reported he was seeking evaluations. CP 315. On July 5, 2016, Greystoke sent a letter to the court dated June 28, 2016 stating that he wanted to plead not guilty by reason of insanity. CP 243. On Aug. 12, 2016, the State inquired as to the nature of the defense and defense counsel indicated he needed to talk to his client. CP 314. As of Aug. 26, 2016, the defense represented that evaluations still needed to be completed. CP 313.

Meanwhile, Greystoke wrote numerous letters to the court. Greystoke wrote to the court expressing that he wanted a psychiatric evaluation for the purpose of establishing his mental condition on April 24, 2016. CP 237. In a letter to the court dated Sept. 11, 2016, Mr. Greystoke stated that he would like to represent himself. CP 236.

<u>Greystoke's request to proceed pro se and court's concern regarding competency</u>

At his next court hearing on Nov. 4, 2016, Mr. Greystoke expressed his desire to proceed pro se. RP 14. The trial court expressed concern about Greystoke's competency to proceed to trial and to represent his own legal interests. RP 14–16. For this reason the Court ordered a competency

evaluation although Greystoke's attorney, Mr. Oakley, expressed that he did not have any concerns about Greystoke's competency to proceed to trial. RP 16. Rather, he was contemplating diminished capacity or insanity although Greystoke's records were still being collected and an evaluation had not been done yet. RP 15–16; CP 307. The court took Greystoke's request to proceed pro se under advisement with the intent to get more information about Greystoke's competency before making a decision. RP 19.

Dr. Cadle from Western State Hospital evaluated Greystoke and produced an evaluation report dated Dec. 1, 2016. CP 49. On Dec. 9, 2016, the court reviewed Dr. Cadle's competency evaluation and found that Greystoke was competent to proceed to trial. RP 27, 34. Greystoke indicated he still wanted to proceed pro se. RP 28.

Court's Dec. 9, 2016 colloquy with Greystoke about self-representation

The trial court then discussed with Greystoke the disadvantages of self-representation. RP 29. The court pointed out to Greystoke that he would be held to the same standard as a lawyer and that the rules of evidence would apply at trial. RP 29. Greystoke indicated that he understood. RP 29. The court explained to Greystoke that the rules are very technical and asked Greystoke if he understood that. RP 29. Greystoke replied "Yes." RP 29. The court asked Greystoke if he had any experience with the rules of evidence or ever studied them and Greystoke stated that he had studied the rules of

evidence in a book from Just Detention International. RP 30. The court also pointed out to Greystoke that he was charged with a class A felony and subject to a maximum penalty of life in prison. RP 30. Greystoke affirmed he understood and mentioned that the State made an offer of 9 years. RP 30.

Stand-in defense counsel, Mr. Gasnick, interjected and pointed out that the reasons for Greystoke's request to represent himself gave him concern and that if he were given time he might be able to remedy Greystoke's concerns. RP 30–32.

Decision to pursue a mental health defense

When the parties returned Jan. 6, 2017, Greystoke's defense counsel, Mr. Oakley, informed the court that Greystoke no longer wanted to proceed pro se and that instead was interested in exploring mental health defenses. RP 37. Mr. Oakley intended to have an expert evaluate Greystoke. RP 39.

Deputy Prosecuting Attorney Mr. Johnson inquired whether Greystoke would be going to Western State Hospital to be evaluated for a mental health or an insanity defense (NGRI) and Greystoke's counsel, Mr. Oakley, pointed out that would not occur yet because Greystoke needed his expert to evaluate Greystoke first. RP 38. Mr. Oakley then stated, "If our expert finds a basis for a mental health defense, then you can ask Western State for an evaluation if you want." RP 39.

On Feb. 24, 2017, Mr. Gasnick appeared for Greystoke and explained

the plans that were in place for obtaining a mental health evaluation to explore whether there was a mental health defense. RP 57, 59.

An evaluation report was produced on April 26, 2017 by Dr. Mark R. McClung, M.D., P.C. a board certified psychiatrist. CP 55. On April 28, 2017, Deputy Prosecuting Attorney Mr. Johnson reported that Mr. Gasnick had contacted him to inform the State that Greystoke would not be pursuing a mental health or diminished capacity defense. RP 72.

Greystoke's renewed request to proceed Pro Se or have new counsel

On May 5, 2017, Mr. Gasnick reported to the court that Greystoke no longer wanted Mr. Gasnick to represent him. RP 74. Greystoke stated that he wanted a lawyer that was more knowledgeable and informed about the facts applicable to the charges and that Mr. Gasnick was inadequate despite his extensive 27 years' experience. RP 75. Greystoke also pointed out that he did not see eye-to-eye with Mr. Gasnick. RP 76.

Court's May 5, 2017 colloquy with Greystoke about self-representation

The court inquired whether Greystoke had ever represented himself and Greystoke answered that he had and that he had won his case in which he was faced with a misdemeanor criminal charge. RP 76–77. The court and parties reminded Greystoke that the current charge was a felony, Assault in the First Degree in which had a standard sentence range of 93–123 months and a mandatory minimum of 5 years in prison. RP 77–78. Greystoke pointed

out that he was aware of that. RP 78. The court declined to change counsel for Greystoke considering the nature of the charges, the potential jeopardy Greystoke was facing, and because although Greystoke did not see eye-to-eye with Gasnick, there was not a complete breakdown in communication. RP 78.

Defense counsel's concern regarding competency and need for a second evaluation

Mr. Gasnick then set forth a summary of the representation and direction the defense had taken to pursue a mental health defense. RP 82. Greystoke's competency to proceed to trial would be addressed first because a forensic expert would not proceed with an evaluation to explore mental defenses unless the client was competent. RP 82.

Mr. Gasnick clarified, with his client's authorization, that he and Greystoke "expected that the result of that would result in a mitigation package only, not an actual affirmative defense of mental health based defense." RP 82. Mr. Gasnick expressed his anticipation that he would be applying for another evaluation as he was not satisfied with the first competency evaluation. RP 82–83. On June 2, 2017, the order for competency was entered and a review hearing was set for June 16, 2017. CP 210.

Dr. Yocum, from Western State Hospital, evaluated Greystoke for competency and produced an evaluation report dated June 27, 2017 in which

he found Greystoke to be competent. CP 59–61. On June 30, 2017, the court found Greystoke to be competent to proceed to trial a second time. RP 91, 98; CP 208.

Greystoke's renewed motion to proceed pro se and court's June 30, 2017 colloquy about self-representation

On June 30, 2017, Greystoke again expressed his desire to the court that he wished proceed pro se. RP 91. The court had a discussion again with Greystoke about the disadvantages of proceeding pro se. RP 93.

The court informed Greystoke that he would be held to the same standard as a lawyer and asked Greystoke if he had ever studied law. RP 93. Greystoke indicated that he understood and that he had studied law to some degree although not in a college setting. RP 93. The court asked Greystoke if he had ever represented himself and Greystoke stated that he had. RP 93. The court pointed out to Greystoke that he was facing a serious charge with a maximum penalty of life in prison. RP 93. Greystoke affirmed that he understood. RP 94.

The court then asked Greystoke if he was familiar with the rules of evidence and Greystoke indicated that he is and that he is familiar with the rules of procedure to a fair degree. RP 94. Greystoke clarified that he understood the rules but the needed the texts. RP 94. Greystoke then reaffirmed that he still wished to proceed pro-se. RP 95. The court warned

Greystoke that it would be far better to have a trained lawyer represent him. RP 95. The court pointed out to Greystoke that he would have a significant disadvantage and inquired again if Greystoke, knowing all that, still wanted to proceed pro se. RP 97. Greystoke indicated that he did and he signed a waiver of his right to an attorney. RP 97; CP 209. The court asked Greystoke if he was waiving his right to counsel freely and voluntarily and Greystoke indicated that he was. RP 105. The court warned Greystoke again that he would be held to the same standard as an attorney at trial. RP 105.

Greystoke's motion to have stand-by counsel appointed

On Aug. 4, 2017, Mr. Gasnick informed the court that he noted the matter up on behalf of Greystoke because Greystoke changed his mind about having Mr. Gasnick act as stand-by counsel and was now requesting that he be appointed stand-by counsel to assist him. RP 151–53.

State's motion to amend information to add special deadly weapon allegation

On Aug. 30, 2017, the State filed and provided a copy of its motion to amend the information to include a special deadly weapon allegation to the court and Mr. Greystoke. RP 200; CP 171. State had already provided notice to Greystoke in its plea offer on May 18, 2016 of its intent to amend the information to include the deadly weapon allegation. CP 171–72; RP 200. Mr. Johnson suggested that the parties need not address the motion at the moment, but rather at the next hearing so as to allow Greystoke the full

opportunity to go over the motion. RP 200; CP 298. Mr. Johnson asked for a hearing a week or a week and a half before the Oct. 9 trial date to address motions in limine and the State's motion to amend the information. RP 241–42. Greystoke agreed this could be done on Oct. 3, 2017. RP 242.

On Sept. 8, 2017, Greystoke objected to the State's motion to amend the information to include the "deadly weapon special allegation, armed with a deadly weapon during the commission of the offense." RP 263. The matter was set to be heard on Oct. 3, 2017 along with other motions. RP 264, 286.

Motions in Limine and exclusion of evidence of Greystoke's mental state

On Sept. 25, 2017, the State filed a motion in limine to exclude evidence of Greystoke's mental condition because lay witnesses are not qualified to testify, there was no notice of a mental health defense, and expert testimony regarding Greystoke's mental condition was not relevant to a defense of general denial. CP 167.

On Oct. 3, 2017, the parties argued over jury instructions and the State moved that Greystoke not be permitted to have lay witnesses testify about his mental condition at the time of the charged incident, or introduce a mental health defense or expert testimony relating to such a defense. RP 286–88; CP 296. The State pointed out that Greystoke had given no notice of a mental health defense or any defense other than general denial and moved that only evidence of general denial be permitted. RP 288.

Greystoke responded that the State's motion was ok and did not object, but Greystoke suggested that it was a mitigation issue at sentencing. RP 288–89. Mr. Gasnick interjected and suggested that although provocation may not be a defense, it is a mitigating factor relevant for sentencing under the SRA and Gasnick raised the possibility that a real facts hearing might be necessary as to the mitigating factors. RP 289–90.

Mr. Johnson reiterated that his motion was to keep evidence of such mitigating factors out of the trial because mitigation was not a relevant inquiry for the jury and the jury was not to consider punishment. RP 290–91. Greystoke also objected to the State's motion in limine to exclude expert witnesses testifying about his mental condition and pointed out again that it was mitigation evidence. RP 293. The court pointed out to Greystoke that the jury was not going to get information with regard to what the sentencing model will be. RP 293. Greystoke stated that he understood that. RP 293.

The court granted the State's motions in limine 5, 6, and 7 excluding lay witness testimony of Greystoke's mental condition, evidence of a mental health defense, and expert testimony relating to a mental health defense. RP 287, 293, 294. Greystoke objected claiming that Dr.'s Yocum, Cadle, and McClung said that anxiety is a mitigating factor. RP 293.

> MR. JOHNSON: I have not received that report and anxiety is not a mitigating factor, *it does not rise to the level of diminished capacity or insanity.*

> MR. GASNICK: Well, actually counsel does have the reports form Yocum and Cadle. He may not have the report from McClung.
> THE DEFENDANT: *I didn't say that. I said it was a mitigating factor to my defense*, that at the time of the alleged offense that is information that I wished to be allowed, not that it establishes my mental state at any point. I don't think it should be redacted from per se, the counsel's testimony on my behalf.

RP 294.

Jury Selection and trial Oct. 9, 2017

During jury selection, jurors expressed concern that Greystoke's perceived mental health issues made it difficult be impartial and unbiased towards Greystoke. Juror 59 expressed difficulties with remaining unbiased towards Greystoke and seemed to be concerned about Greystoke's presentation of the evidence. RP 509–10, 517. Juror 34 stated if Greystoke's presentation of the evidence wasn't more defined then he would have a hard time not being prejudicial. RP 510

One juror asked whether competency is determined at any time prior to trial. RP 512. Juror #40 expressed that he didn't think he could maintain the ability analyze the evidence impartially. RP 514–15. Juror #40 was excused. RP 515. Juror #22 stated he could not independently view the evidence and that he didn't think Greystoke would get a fair shake. RP 515–16. Juror #22 was excused. RP 516. Juror #5 expressed concern about Greystoke's mannerisms or experience and whether he would get a fair shake. RP 517.

The court pointed out as follows:

> I mean, I understand it's a difficult question for you folks and that's why we're trying to separate your observations of the individual from the ability to objectively analyze the evidence which is a different thing.

RP 517.

Then the court described the disparity of skills by comparing Greystoke to a college football team and the State to a professional football team. RP 518.

The court stated later: "If there's anybody that cannot do that, that cannot put aside the performance of the attorney[ ]s and simply look at the evidence, then I need to know that. I need to see your hands now." RP 521–22. Juror #59 expressed difficulty with remaining unbiased and Greystoke had him removed for cause. RP 522, 525. The court also excused juror #40 because #40 could not separate their observations and impressions of Greystoke from their evaluation of the evidence. RP 514–15.

The court explained that the purpose of the juror challenges for cause was to obtain an impartial juror panel and that those that showed they could not be fair and unbiased were excused. RP 527.

Sentencing

At sentencing, Greystoke sought an exceptional sentence downward. RP 885. Greystoke asked for leniency after outlining his apology and his

mental health struggles. RP 887. Mr. Gasnick argued that Greystoke's mental health issues had an impact on his actions relative to the offense. RP 888. Mr. Gasnick elaborated in great detail that the mental health evaluations, not amounting to a defense, established a mitigating factor authorizing an exceptional sentence downward. RP 888–92.

III. ARGUMENT

A. THE TRIAL COURT HONORED GREYSTOKE'S RIGHT TO SELF-REPRESENTATION WITHOUT VIOLATING HIS RIGHT TO PRESENT A DEFENSE BECAUSE GREYSTOKE VOLUNTARY, KNOWINGLY, AND INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL.

"The state and federal constitutions guarantee a criminal defendant both the right to counsel and the right to self-representation. *State v. Modica*, 136 Wn. App. 434, 440–41, 149 P.3d 446 (2006) (citing United States Const. amends. VI and XIV; Wash. Const. art. 1, § 22; *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *State v. Luvene*, 127 Wn.2d 690, 698, 903 P.2d 960 (1995)).

"When a defendant who has been found competent to stand trial seeks waiver of counsel, the waiver must be not only voluntary, but knowing and intelligent." *In re Rhome*, 172 Wn.2d 654, 667, 260 P.3d 874 (2011) (citing *State v. Hahn*, 106 Wn.2d 885, 895, 726 P.2d 25 (1986)). "A trial court may consider a defendant's mental health history and status when competency has been questioned, even where the defendant has been found competent to

stand trial." *Id.* at 667 (citing *State v. Kolocotronis*, 73 Wn.2d 92, 99, 436 P.2d 774 (1968)).

"[T]he preferred procedure for determining the validity of a waiver involves the trial court's colloquy with the defendant, conducted on the record. This colloquy should include a discussion about the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of the accused's defense." *Modica*, 136 Wn. App. at 441 (citing *State v. Lillard*, 122 Wn. App. 422, 427–30, 93 P.3d 969 (2004)).

A trial court's decision accepting a defendant's waiver of his or her right to counsel and decision to proceed to trial pro se is reviewed for abuse of discretion. *In re Rhome*, 172 Wn.2d at 667–68 (citing *Hahn*, 106 Wn.2d at 900). "A waiver determination is an ad hoc determination that rests on a judge's evaluation of a defendant's conduct, background, and experience." *Id.* "The court may not, however, consider the defendant's 'skill and judgment.'" *Id.* (citing *Hahn*, 106 Wn.2d at 890 n.2).

> A court abuses its discretion when an "order is manifestly unreasonable or based on untenable grounds." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 339, 858 P.2d 1054 (1993). A discretionary decision "is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wash.App. 786, 793, 905 P.2d 922 (1995)). Moreover, a court "would necessarily abuse its

> discretion if it based its ruling on an erroneous view of the law." *Fisons*, 122 Wash.2d at 339, 858 P.2d 1054.

State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

"The burden of proof is on the defendant asserting that his right to counsel was not competently and intelligently waived." *Hahn*, 106 Wn.2d at 901 (citing *In re Wilken v. Squier*, 50 Wn.2d 58, 61, 309 P.2d 746 (1957); *State v. Jessing*, 44 Wn.2d 458, 461, 268 P.2d 639 (1954)).

Here, Greystoke unequivocally requested the court to allow him to proceed pro se on Nov. 4, 2016, and June 30, 2017. The court had colloquies with Greystoke about the dangers of self-representation on Dec. 9, 2016 (RP 29–30), May 5, 2017 (RP 76–78), and June 30, 2017 (RP 93–95).

Before finally granting Greystoke's request on June 30, 2017, the court had multiple discussions with Greystoke regarding the disadvantages of self-representation. The court informed Greystoke he would be held to the same standard as a lawyer, that the rules of evidence and procedure would apply, and that they were very technical. RP 29. The court reminded Greystoke of the seriousness of the charge and the potential sentence. RP 30, 77–78, 93. Greystoke confirmed that he understood. RP 30, 78, 94.

The court asked if Greystoke was familiar with the rules of evidence or studied them. RP 29–30, 93. Greystoke indicated that he had from a book from Just Detention International (RP 30) and later that he had studied law to

some degree but not in a college setting. RP 93. The court asked Greystoke if he had ever represented himself and Greystoke indicated that he had done so successfully on a misdemeanor charge. RP 76–77. The court reminded Greystoke he was charged with a class A felony with a maximum penalty of life in prison, a standard range of 93–123 months prison, and a mandatory 5 year minimum. RP 30, 77–88, 93. Greystoke affirmed he understood and pointed out that the state had made an offer of 9 years. RP 30, 78, 94.

Additionally, on Nov. 4, 2016, in response to Greystoke's first request to proceed pro se, the court, concerned about Greystoke's ability to represent himself, ordered a competency evaluation to help determine if Greystoke could represent himself.

Dr. Cadle and Dr. Yocum's competency evaluations provide evidence of Greystoke's ability to understand the risks and challenges of self-representation. Greystoke's initial competency evaluation completed by Dr. Cadle revealed that Greystoke had intact cognitive abilities, was fully oriented to person, place, date, and circumstance. RP 47. Greystoke's intelligence was reported to be in the average range and his memory was not impaired and his fund of knowledge was good. RP 47. Greystoke's attention and concentration were also good based on his ability to track conversation, complete a sequential mathematical problem, and spell a common word backwards and forwards. RP 47. Greystoke's abstract reasoning skills were

good and he could adequately explain how pairs of objects were alike and could interpret modern proverbs. RP 47.

Greystoke also demonstrated a factual understanding of the charges against him and the penalties he was facing. RP 48. Greystoke demonstrated a factual understanding of legal proceedings in general and adequately explained courtroom concepts and the adversarial nature of a court. RP 48. He also explained the roles of courtroom professionals, a witness, evidence, probation, and a plea bargain. RP 48.

Cadle's evaluation also documents that Greystoke, graduated from high school in 1985 with a 3.89 G.P.A. and then attended four different colleges to study art but dropped out due to financial issues. CP 44.

Cadle's findings regarding Greystoke's intelligence, awareness, cognitive, attention, concentration, and memory abilities were confirmed in a second competency evaluation by Dr. Yocum dated June 27, 2017. CP 59–61.

The court had this information before it when considering whether to allow Greystoke to proceed pro se. The court actually ordered the initial competency evaluation for that very purpose. Finally, the court warned Greystoke that it would be far better to have a trained lawyer represent him. RP 95. The court pointed out to Greystoke that he would have a significant disadvantage and inquired again if Greystoke, knowing all that, still wanted to proceed pro se. RP 97. Greystoke indicated that he did understand and he

signed a waiver of his right to an attorney. RP 97, CP 209.

Overall, it is clear that Greystoke's request to represent himself was voluntary as he unequivocally made the request himself on the record and in writing. The request was also knowing and intelligent as the court had before it two mental evaluations by licensed psychologists that affirmatively concluded that Greystoke was competent to proceed to trial, rational, aware, and responsive when he was evaluated as of June 13, 2017. CP 59–60. Both competency reports indicate that Greystoke was of average intelligence. The record itself shows that Greystoke was responsive with the court.

Moreover, the court engaged in a detailed colloquy on multiple occasions and warned Greystoke he would be acting against his own interests. Greystoke's affirmation that he understood shows that he made the request with "eyes wide open." *Hahn*, 106 Wn.2d at 895 (citing *State v. Jones*, 99 Wn.2d 735, 664 P.2d 1216 (1983)).

Greystoke argues that the jury was concerned about his competency and raised the issue before the court. The jury, unlike the court, did not have the benefit of reviewing Greystoke's mental health evaluations, of conversing with Greystoke at court for more than a year, and access Greystoke's numerous letters to the court. *See* RP 512 (juror asking whether a competency determination was made pre-trial). The court was in a much better position to assess Greystoke's competency to exercise his right to self-representation.

The record clearly establishes that the trial court carefully examined Greystoke's mental health history and competency to represent himself and ensured that Greystoke's waiver was voluntary, knowing, and intelligent. In fact, the court was in a position where failure to grant Greystoke's request would have been a denial of his constitutional right to represent himself. *See Hahn*, 106 Wn.2d at 901 ("If the trial court had denied Hahn's request, it would have been subject to reversal under the *Faretta* standards." (citing *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975))).

Therefore, the court did not abuse its discretion and did not violate Greystoke's right to a fair trial by granting his request to represent himself.

B. THE TRIAL COURT DID NOT VIOLATE GREYSTOKE'S RIGHT TO PRESENT A DEFENSE BY EXCLUDING INADMISSIBLE MENTAL HEALTH EVIDENCE.

"'The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L.Ed. 2d 297 (1973)). This encompasses a defendant's right to an opportunity to be heard in his defense, including the rights to confront and cross-examine witnesses against him and offer testimony. *State v. Darden*, 145 Wn.2d 612,

620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L Ed. 2d 1019 (1967)).

"There is no right, constitutional or otherwise, to have irrelevant evidence admitted." *Id.* at 624 (citing *State v. Hudlow*, 99 Wn.2d, 1, 15, 659 P.2d 514 (1983); ER 402. A pro se defendant must still comply with the rules of evidence governing its admissibility. *State v. Fritz*, 21 Wn. App. 354, 363, 585 P.2d 173 (1978) (citing *Faretta*, 422 U.S. at 834–35 n. 46); *see also State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991) (citing *State v. Hoff*, 31 Wn. App. 809, 644 P.2d 763 (1982)) (pro se defendant is not entitled to special consideration).

Before the Court examines if the trial court violated a defendant's right to present a defense, the Court must review the trial court evidentiary rulings for abuse of discretion to determine whether the trial court excluded relevant defense evidence. *State v. Clark*, 187 Wn.2d 641, 648–49, 389 P.3d 462 (2017) (citing *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001); *Jones*, 168 Wn.2d at 719). "[T]he reviewing court defers to the trial court's rulings unless "no reasonable person would take the view adopted by the trial court." *Id.* (quoting *Atsbeha*, 142 Wn.2d at 914 (internal quotations omitted)).

Prior to allowing Greystoke to proceed pro se, the court repeatedly warned that he would be held to the same standard as an attorney and that the rules of evidence and procedure would apply and that they were complex. On

multiple occasions, Greystoke confirmed that he understood.

1. The trial court properly excluded Greystoke's mental health evidence because Greystoke failed to provide notice of intent to assert a mental health defense.

In order for a defendant to present evidence of diminished capacity or insanity, the defense must provide notice and also provide the name of a qualified expert who may testify as to the defendant's mental state at the time of the offense, and the contents of their anticipated testimony. *Clark*, 187 Wn.2d at 651 (citing *State v. Harris*, 122 Wn. App. 498, 506, 94 P.3d 379 (2004)); RCW 10.77.030 (requiring pre-trial written notice of intent to assert insanity defense).

"[T]he defense 'must obtain a corroborating expert opinion and disclose that evidence to the prosecution pretrial,' giving the State a reasonable opportunity to decide whether to obtain its own evaluation '[d]epending on the strength of the defense's showing.'" *Id.* at 651 (citing CrR 4.7(b)(1), (b)(2)(viii), (g); *In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 204, 53 P.3d 17 (2002)).

Here, Greystoke gave notice that he *would not* be seeking a mental health defense. RP 72. Dr. McClung's mental evaluation of Greystoke was completed on April 26, 2017. Two days later, the State reported that it had received an email from defense counsel stating that Greystoke would not be seeking any sort of mental health defense. RP 72; *See Clay v. Portik*, 84 Wn.

App. 553, 561, 929 P.2d 1132 (1997) (citing *State v. Peeler*, 7 Wn. App. 270, 274, 499 P.2d 90 (1972)) ("An attorney appearing on behalf of her client is her client's representative and is presumed to speak and act on her behalf.").

On July 14, 2017, Greystoke made comments pointing out that Dr. McClung's report was inconclusive as to whether it supported a mental health defense. RP 129. Greystoke never gave notice after this that he intended to assert diminished capacity or insanity. If he changed his mind since April 28, he did not provide notice to the State or the Court. *See* RP 334.

On Oct. 3, 2017, just before trial on Oct. 9, Greystoke had still not provided notice of which mental health defense he intended to pursue. RP 288–89. The only relevance the mental evaluations were found to have were in regards to mitigation which would be relevant at sentencing. RP 293, 333–34, 756, and 864; CP 237. Furthermore, the court pointed out that it had reviewed the file and that it had not seen anything that would resurrect a mental health defense. RP 334.

Greystoke argues that he repeatedly asserted that his only defense to the charge against him was that he had not formed the requisite intent at the time of the incident as result of his mental illness. Appellant's Br. at 15 (citing RP 11, 37, 59, 293, 334, 756, and 864; CP 237).

This is not quite accurate because it was never clear what mental health defense Greystoke ever asserted pre-trial. On Aug. 12, 2016,

Greystoke first asserted that he wanted to plead not guilty by reason of insanity before a mental health evaluation was ever completed. RP 11. Later on Jan. 6, 2017, the record shows that Greystoke intended to "explore mental health defenses." RP 37. Greystoke's attorney pointed further out that he was not aware which mental health defense was going to be pursued until there was an evaluation. RP 38–39.

Dr. McClung's completed his mental evaluation of Greystoke on April 24, 2017, and two days later Greystoke's attorney announced to the State that there would be no mental health defense. Defense counsel stated that there would be no mental health defense but only mitigation and that Greystoke authorized this. RP 82. *See Portik*, 84 Wn. App. at 561 (citing *Peeler*, 7 Wn. App. at 274) ("An attorney appearing on behalf of her client is her client's representative and is presumed to speak and act on her behalf."). Thereafter, Greystoke did not give pre-trial notice that he intended to assert diminished capacity or insanity.

Therefore, the court properly excluded Greystoke's evidence of his mental state because Greystoke did not provide notice of his mental health defense or any defense other than general denial.

2. Greystoke failed to present any relevant mental health evidence to support a mental health defense.

The State charged Greystoke with Assault in the First Degree: "the

above-named Defendant, with intent to inflict great bodily harm, did assault another person to wit: Adam Gross, with a deadly weapon or by any force or means likely to produce great bodily harm or death." CP 246. "An assault is an intentional touching or striking of another person, with unlawful force that is harmful or offensive." CP 139, 144. Thus, the State had to prove that Greystoke intentionally assaulted Adam Gross and that Greystoke intended to inflict great bodily harm.

The court may exclude expert testimony that is not relevant or helpful to a jury. *State v. Atsbeha*, 142 Wn.2d 904, 921–22, 16 P.3d 626 (2001).

"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." *Atsbeha*, 142 Wn.2d at 914. Further, to be admissible, the expert's proffered testimony must be relevant under ER 401 and the testimony must be helpful to the jury under ER 702. *Id.* at 917.

"Under ER 702, expert testimony will be considered helpful to the trier of fact only if its relevance can be established. '[I]t is not enough that ... a defendant may be diagnosed as suffering from a particular mental [disorder].'" *Id.* at 917–18 (quoting *State v. Greene*, 139 Wn.2d 64, 73–74, 984 P.2d 1024 (1999). "The opinion of an expert concerning a defendant's

mental disorder must reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged." *Id.* at 918 (citing *Greene*, 139 Wn.2d at 74).

The requirements to establish insanity under RCW 9A.12.010(1) are as follows:

> To establish the defense of insanity, it must be shown that:
> (1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:
> (a) He or she was unable to perceive the nature and quality of the act with which he or she is charged; or
> (b) He or she was unable to tell right from wrong with reference to the particular act charged.

Here, Greystoke was evaluated for incompetency as defined under RCW 10.77 by licensed psychologists at Western State Hospital before he was evaluated for any mental health defense because a psychologist would not do an evaluation to explore a mental health defense unless the patient was competent. RP 82. The definition of incompetency under RCW 10.77.010(15) is as follows:

> "Incompetency" means a person lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.

Here, Greystoke was found to be competent by Dr. Christopher Cadle in a report dated Dec. 1, 2016, and again by Dr. Richard Yocum in an evaluation dated June 27, 2017. CP 49, 61. Their evaluations examine

Greystoke's ability to understand the proceedings and assist in his defense. They do not address at all Greystoke's ability to form the intent to assault another and intent to inflict great bodily harm. Additionally, the evaluations also do not offer any opinion on whether Greystoke was unable to perceive the nature and quality of the act or was unable to tell right from wrong. Therefore, Dr. Yocum and Dr. Cadle's testimony would not be relevant to support a defense of diminished capacity or insanity and their testimony was properly deemed inadmissible. *See Atsbeha*, 142 Wn.2d at 917–18.

This is also true regarding Dr. McCLung's report dated April 26, 2017. CP 55. Sometime after Dr. Cadle found Greystoke to be competent, Dr. McClung was then hired to evaluate Greystoke to explore mental health defenses.

Dr. McClung opined that Greystoke, due to his mental disorder, was more likely to react impulsively, dramatically, and aggressively in more stressful situations such as the charged incident. CP 55. However, Dr. McClung offers no opinion on Greystoke's ability to form intent to assault another and intent inflict great bodily injury. Dr. McClung also does not offer any opinion on whether Greystoke was unable to perceive the nature and quality of the act or was unable to tell right from wrong. Therefore, Dr. McClung's testimony was not admissible to support a defense of diminished capacity or insanity.

Greystoke's defense counsel seemed to have recognized this as well because, after receiving Dr. McClung's evaluation, counsel reported that that Greystoke would not be seeking any sort of mental health defense. RP 72. Greystoke's comments also point out that Dr. McClung's report was inconclusive as to whether it supported a mental health defense. RP 129.

Greystoke failed to present any relevant expert testimony that would support a mental health defense. Therefore, the trial court properly excluded Greystoke's evidence of his mental state at the time of the incident.

3. The record shows that Greystoke intended to present evidence of his mental state for mitigation purposes rather than to establish a mental health defense.

Greystoke did not object to the exclusion of his mental health evidence for purposes of presenting a mental health defense. RP 288–89. The record shows Greystoke intended to use his experts to present *mitigation* testimony.

Mr. Greystoke pointed out that the testimony he intended to present by Drs. Yocum, Cadle, and McClung was that his anxiety was a mitigating factor. RP 289–293. When the State pointed out that anxiety did not rise to the level of diminished capacity or insanity, Greystoke responded: "I didn't say that. I said it was a mitigating factor to my defense, that at the time of the alleged offense that is information that I wished to be allowed, not that it establishes my mental state at any point." RP 293–94.

Greystoke stated with consistency that his mental health state was relevant to mitigation. Greystoke finally pointed this out one last time when he stated as follows:

> My defense is no person under mitigation factors and provocation shall be held responsible for defending himself/herself and their belongings, for their home. That's my defense, no culpa. How you see that that's not relevant is up to you, not per se the jury.

RP 355.

Later Greystoke states:

> I said no culpa. I said I was not at fault under the mitigating factors, that I was provoked by theft and other illegal activities in my apartment. That's a mitigating factor during sentencing.

RP 356–57.

When discussing Dr. McClung's evaluation, the State opined that it did not endorse a mental health defense, thus McClung's testimony would not be relevant for a general denial defense. RP 357. Greystoke stated again:

> I'm going to have to disagree and it's up to the court, because I read his report and it's substantiated the mitigating factor of anxiety in the RCW.

RP 357.

Although Greystoke consistently conflated mental health factors for mitigation purposes with a mental health defense, Greystoke consistently made it clear that the mental health testimony he intended to present was for mitigation purposes. Greystoke points out:

> THE DEFENDANT: All I'm seeking is leniency during sentencing. I, you know, I don't know what to say.
> THE COURT: Well, what we're focused on at this point, Mr. Greystoke, is the underlying case in chief of the state and that is to determine whether or not you are guilty of the crime charged. If the jury comes back and says you're guilty, then we move onto the next phase, which is sentencing and the court takes into consideration any mitigating factors at that point. If the jury comes back and says you are not guilty, it's a nonissue.
> THE DEFENDANT: Right.
> THE COURT: Okay?
> THE DEFENDANT: Okay.

RP 358–59.

The State pointed out that mitigation testimony would not be proper for the jury to hear. Mitigation testimony may be appropriate for sentencing especially if the defendant is moving for an exceptional downward sentence. Mr. Gasnick suggested something along similar lines. RP 289–90. Greystoke actually sought mitigation based on his mental health issues at sentencing. RP 887; CP 32. Additionally, Mr. Gasnick spoke at great length at sentencing on behalf of Greystoke for this very purpose. RP 888–92.

Therefore, because Greystoke did not seek to introduce his mental state in evidence to support a mental health defense, the trial court did not prevent Greystoke from presenting his defense by excluding such evidence.

Conclusion

The record shows that Greystoke did not provide notice of a mental health defense and Greystoke did not present relevant admissible evidence to support such a defense. Moreover, Greystoke does not argue that the trial

court abused its discretion by excluding his expert's testimony.

Therefore, the trial court did not violate Greystoke's right to present a defense by excluding inadmissible evidence of diminished capacity, a defense which Greystoke did not intend to present.

C. THE TRIAL COURT'S ANALOGY TO PROFESSIONAL AND COLLEGE FOOTBALL TEAMS, CORPORAL DOMBROWSKI'S STATEMENT, AND THE COURT'S EXCLUSION OF TESTIMONY REGARDING THE REASON FOR GREYSTOKE'S EVICTION WERE NOT COMMENTS ON THE EVIDENCE, AND EVIDENCE OF GUILT WAS OVERWHELMING.

"Article 4, section 16 of the Washington State Constitution prohibits a trial court from commenting on the evidence." *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990). "The purpose of this provision is to prevent a jury from being influenced by knowledge conveyed to it by the trial judge as to the trial judge's opinion of the evidence submitted." *Id.* (citing *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970)).

"In keeping with this purpose, we have consistently held that this constitutional prohibition forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial." *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (WASH 1970) (citing *E.g.*, *State v. Galbreath*, 69 Wn.2d 664, 419 P.2d 800 (1966); *State v.*

Louis, 68 Wn.2d 304, 413 P.2d 7 (1966); *State v. Brown*, 19 Wn.2d 195, 142 P.2d 257 (1943); *State v. Surry*, 23 Wash. 655, 63 P. 557 (1900)).

"We review allegations of constitutional violations de novo." *State v. Siers*, 174 Wn.2d 269, 273–74, 274 P.3d 358 (2012); *State v. Butler*, 165 Wn. App. 820, 835, 269 P.3d 315 (2012) (citing *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006)). The Court reviews the facts and circumstances of each case when determining whether a trial judge's conduct constituted a comment on the evidence. *State v. Francisco*, 148 Wn. App. 168, 179, 199 P.3d 478, *review denied*, 166 Wn.2d 1027 (2009).

"An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question." *Swan*, 114 Wn.2d at 657 (citing *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988); *State v. Ciskie*, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988)).

"The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." *Francisco*, 148 Wn. App. at 179 (citing *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995)).

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1. **The football analogy was a not a comment on the evidence because it was used to emphasize that the jury was to evaluate the evidence impartially despite any perceived disparity between the trial skill levels of Greystoke and the prosecutor.**

Here, Greystoke argues that the court commented on the evidence when it "analogized Mr. Greystoke to a college football team and the State to a more highly skilled, professional national football league team." Appellant's Br. at 23; RP 518. This statement during jury selection is not a comment on the evidence because the court was not conveying its personal attitude towards the merits of the case or the truth value of any testimony.

The context of the conversation with the prospective jurors shows that the court was explaining the need for the jury to fairly and impartially evaluate the evidence presented despite their perceptions of Greystoke's ability to try a case.

> But, just so it's clear, you folks, even though you may, some of you, not necessarily all of you, but some of you have certainly expressed that you might see Mr. Greystoke as disorganized and fumbling, will be able to set that aside and view the evidence that's presented, whether by him, Mr. Greystoke or by the state, you'll be able to view that evidence objectively, fairly and impartially, if anybody disagrees with that proposition, put your hand up, please?

RP 515.

Just before making the complained of analogy, the court pointed out again:

> I mean, I understand it's a difficult question for you folks and that's why we're trying to separate your observations of the individual from the ability to objectively analyze the evidence which is a different thing.

RP 517.

Thus, the football analogy merrily explained what was already brought up by some prospective jurors, that Greystoke was less skilled than an attorney such as the deputy prosecuting attorney.

This analogy did not reveal the court's attitude or personal opinion on the merits of the case or truth value of any testimony. Rather, the court made it very clear and warned the prospective jurors that the jury was not to be rendering a verdict based on the performance of the attorneys, but rather a verdict on the evidence and that even some attorneys perform better than others: "If there's anybody that cannot do that, that cannot put aside the performance of the attorney's and simply look at the evidence, then I need to know that. I need to see your hands now." RP 521–22. Juror #59 expressed difficulty with remaining unbiased and Greystoke had him removed for cause. RP 522, 525. The court also excused juror #40 because #40 could not separate their observations and impressions of Greystoke from their evaluation of the evidence. RP 514–15.

The court ultimately explained that the purpose of the juror challenges for cause was to obtain an impartial juror panel and that those that showed they could not be fair and unbiased were excused. RP 527.

Considering the context and length of this discussion and the resulting

excusal of jurors for cause, there would be no reasonable way to infer that the professional v. college football analogy was an expression on the merits or evidence in the case itself. Rather, the analogy just pointed out that the performances and presentations might not be equally polished.

Therefore, the football analogy was not a comment on the evidence.

2. Officer Dombrowski's explanation of the need to deescalate the situation because an attempted murder had just occurred was not a comment by the court and the court did not adopt the statement as its own by overruling an objection to it because Dombrowski's statement was a reasonable inference based on the evidence.

The trial court has considerable discretion when admitting or excluding evidence. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Witness opinion testimony is typically limited because it invades the jury's exclusive province. *Demery*, 144 Wn.2d at 759. The trial court's admission or rejection of testimony if reviewed for an abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).

Courts look at numerous factors to determine whether witness statements are impermissible opinion testimony, including the "type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact." *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). "[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on

inferences from the evidence is not improper opinion testimony." *Heatley*, 70 Wn. App. at 578.

Here, Port Angeles Police Dept. Corporal Dombrowski testified that when he apprehended Greystoke, he spoke with Greystoke in a particular manner and tried to deescalate the stress of the situation by placing his hand on Greystoke's shoulder. RP 640. When asked why he would need to deescalate the situation, Dombrowski stated, "There was just an attempted murder a few minutes before, so everybody was on high alert and I would only presume that the *suspect* also was on high alert." RP 640 (emphasis added).

Greystoke objected on the basis that the statement implied that Greystoke was a suspect of the attempted murder and that was not pertinent to the charges against him. RP 641. The court overruled the objection.

Greystoke argues that Dombrowski stated he was "working to "deescalate" the situation by placing his hand on Mr. Greystoke's shoulder, *because Mr. Greystoke had just committed "an attempted murder* a few minutes before." Appellant's Br. at 23. This is not an accurate rendition of Dombrowski's testimony. Dombrowski did not say that Mr. Greystoke had just committed an attempted murder a few minutes before. In fact, Dombrowski referred to Greystoke neutrally as a *suspect* without stating his opinion that Greystoke was the actual perpetrator. Therefore, the statement

was not a direct comment on the defendant's guilt or veracity of any witness.

Furthermore, the testimony was based on reasonable inferences from the evidence. For example, the 911 call known to Dombrowski was that there was a stabbing. RP 631. Dombrowski arrived at the scene just minutes later and saw Mr. Gross, the victim, lying on his back with towels over his abdomen. RP 632. Dombrowski lifted the towels to see the injury and saw that the victim had been eviscerated and his intestines were outside his body. RP 633. It was the worst stabbing Dombrowski had seen in his 19 years as an officer. RP 633. The wounds looked fatal to Dombrowski and he didn't think anyone could survive that. RP 638. Then Dombrowski testified that dispatch reported that an individual fitting the description of Greystoke had reported to staff at 2nd and Oak that he had just stabbed a person. RP 639. Clearly, Dombrowski's inference that someone had attempted to murder Gross was based on the evidence. *Heatley*, 70 Wn. App. at 578. Yet, despite everything known to Dombrowski, he still referred to Greystoke as a suspect and did not state his opinion on Greystoke's guilt or innocence. Therefore, the testimony was not improper.

The court, by overruling the objection, did not adopt it as an appropriate characterization, or its own opinion on the evidence and truth or falsity of testimony, or even the court's attitude towards the merits of the case. The statement clearly reflected the officer's own perception of what

was reported to him, what he personally witnessed, and why he was stressed and felt the need to deescalate the situation.

3. The court properly excluded the building maintenance worker's testimony offered to impeach Gross regarding the cause of Greystoke's eviction because the evidence was irrelevant.

"The prevailing, if not universal, rule is that a trial judge has the authority to exclude improper evidence even in the absence of an objection." *In re Estate of Hayes*, 185 Wn. App. 567, 591–92, 342 P.3d 1161 (2015) (citations omitted).

"'A witness or a defendant cannot be impeached upon matters collateral to the principal issues being tried.'" *State v. Dickenson*, 48 Wn. App. 457, 468 740 P.2d 312 (1987) (quoting *State v. Descoteaux*, 94 Wn.2d 31, 37, 614 P.2d 179 (1980), *overruled on other grounds*, *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982)). "[The] court adopts the following test for determining whether or not a fact is a collateral matter: Could the fact upon which error is based have been brought into evidence for a purpose independent of the contradiction?" *Id.* (citing *State v. Hall*, 10 Wn. App. 678, 680, 519 P.2d 1305 (1974); *accord State v. Descoteaux*, supra 94 Wn.2d at 37–38, 614 P.2d 179 (matter is collateral if the evidence is inadmissible for any purpose independent of the contradiction)).

The building maintenance worker's testimony was not admissible in order to contradict Mr. Gross regarding the cause of Greystoke's eviction.

The claim that Greystoke was evicted from his apartment because of Gross's behavior is a collateral matter and not relevant to any defense to the charge. "There is no constitutional right to introduce irrelevant evidence." *State v. Ellis*, 136 Wn.2d 498, 528, 963 P.2d 843 (1998) (citing *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996)).

Therefore, the court properly excluded the building maintenance worker's testimony.

4. The record affirmatively shows that Greystoke suffered no prejudice from the court's football analogy.

"[A] judicial comment in a jury instruction is presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

"In *Guloy*, we held a constitutional error is harmless "if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt". *State v. Lane*, 125 Wn.2d 825, 839, 889 P.2d 929 (1995) (citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)); *see also State v. Levy*, 156 Wn.2d 709, 724 n.2, 132 P.3d 1076 (2006).

Here, the court's comment describing Greystoke's self-representation could not have been prejudicial because the prospective jurors already raised

the issue aware of the disadvantage Greystoke was facing. Jurors that could not remain impartial were excused or removed. Further, the court's comment did not shed light on any opinion regarding credibility, weight or sufficiency of evidence or the court's attitude on the merits of the case.

Finally, the evidence was uncontroverted and overwhelming. Evidence included testimony from the victim, Mr. Gross (RP 565–66), from medical experts on the seriousness of the stabbing wound (RP 677–78, 680, 705–06) eyewitness testimony detailing the seriousness of the stabbing soon after the incident by Corporal Dombrowski (RP 638), and admissions by the defendant to having stabbed Mr. Gross (RP 664) and helping law enforcement recover the knife (RP 642). The untainted evidence necessarily leads to a conclusion of guilt.

Therefore, the court's comment was harmless beyond a reasonable doubt and the conviction should be affirmed.

D. GREYSTOKE WAS NOT ENTITLED TO AN INSTRUCTION FOR ASSAULT IN THE SECOND DEGREE BECAUSE THERE WAS EVIDENCE OF INTENT TO INFLICT GREAT BODILY HARM.

In order for the defendant to be entitled to a lesser degree instruction, "the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (citing *State*

v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990) (lesser included offense instruction); *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997) (inferior degree offense instruction)).

"[T]he appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction. *Fernandez-Medina*, 141 Wn.2d at 455–56 (citing *State v. Cole*, 74 Wn. App. 571, 579, 874 P.2d 878, *review denied*, 125 Wn.2d 1012, 889 P.2d 499 (1994), *overruled on other grounds by Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997)).

"[T]he evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." *Fernandez-Medina*, 141 Wn.2d at 456 (citing *State v. Fowler*, 114 Wash.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)).

Finally, the court "must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given." *Fernandez-Medina*, 141 Wn.2d at 456 (citing *State v. Bright*, 129 Wn.2d 257, 269–70, 916 P.2d 922 (1996)).

Here, there was no dispute that Greystoke stabbed Gross with a knife with a 3 1/2 inch blade. RP 657. Greystoke reported that he stabbed Gross and then showed the officers where he hid the blade. RP 642.

The issue was whether Greystoke acted with intent to inflict great

bodily harm as required to prove Assault in the First Degree. CP 139, 173. The record contains strong evidence that Greystoke intended to inflict great bodily harm by stabbing Gross in the abdomen, effectively eviscerating Gross and leaving him with his intestines spilled out. RP 633.

PAPD Corporal Dombrowski testified that he had not seen so severe a stabbing in his 19 years as an officer with Port Angeles Police Dept. RP 633. Dombrowski believed at the time that the injury would be fatal and he did not believe that a person could survive it. RP 638.

Dr. Heisterkamp testified that the victim's small intestine had been lacerated and eviscerated, and consistent with Dombrowski's concerns, if left untreated was not a survivable injury. RP 677–78, 680. Dr. Masangkay diagnosed Gross's small intestine to have been perforated and found signs of hemorrhage in the part of the intestine that was removed. RP 702–03, 705. Dr. Masangkay opined that such an injury could be fatal. RP 705–706.

The evidence shows that Greystoke applied so much force in the course of stabbing Gross that the knife with the 3 1/2 inch blade penetrated far enough through clothing, skin, fat, and fascia that the knife penetrated the abdominal cavity and lacerated his small intestine and the open wound allowed the intestine to protrude out. RP 678.

Greystoke argues that there was no evidence of intent to inflict great bodily injury because the court put emphasis on a mistake of fact that the

length of the cut was caused by a second step by Greystoke to pull the knife such that the abdominal cavity was opened up sufficiently. RP 807. Greystoke points out that the surgeon testified that she was required to perform an exploratory laparotomy to treat Gross. RP 683. This procedure resulted in a longer wound. RP 607.

Greystoke's argument does not negate evidence of intent to inflict great bodily injury. A jury may reasonably infer intent from the facts. CP 138 (jury instruction on circumstantial evidence); *see State v. Leach*, 36 Wn.2d 641, 646, 219 P.2d 972 (1950) (citing 1 Wharton's Criminal Law (12th ed.) 318, Attempts, § 234; *State v. Temblin*, 124 W. Va. 264, 20 S.E.2d 122 (1942)) (" . . . intent, being a state of mind, may be inferred by the jury from all the facts and circumstances, as is the case in consummated crimes.").

Here, the fact the surgeon was required to perform an exploratory laparotomy procedure is in itself significant evidence of the seriousness of the injury. Furthermore, the court did not disregard the State's argument regarding Greystoke's intent to inflict great bodily harm. Rather, the court adapted the State's argument as a basis for denying the proposed lesser degree instruction: "For all the reasons Mr. Johnson articulated, the court's going to file your proposed instructions, they will not be given to the jury. I will just note *one additional thing*, that I think is significant, independent of what Mr. Johnson's presentation was . . . ." RP 807 (emphasis added).

Thus, the trial court had already adopted the State's arguments and denied the proposed jury instruction. Only after that did the court speak to the length of the wound. Therefore, the court did not depend upon a mistaken fact in coming to its conclusion.

Greystoke's act of stabbing Gross with the knife with so much force that it penetrated deeply enough to lacerate or perforate his intestine, causing hemorrhaging, and ultimately eviscerating Gross is evidence of intent to inflict serious bodily injury. *See State v. Huddleston*, 80 Wn. App. 916, 922, 912 P.2d 1068 (1996) (finding sufficient evidence of intent to inflict great bodily harm where defendant used a knife to stab or attempt to stab several persons in the back, chest or stomach, several wounds were thought to be life-threatening, and one person needed several surgeries to repair the damage).

Thus, there was no evidence of the lesser degree of Assault *to the exclusion* of the Assault in the First degree and the court did not err in refusing to instruct the jury on the lesser degree.

E. THE ORIGINAL PLEA OF NOT GUILTY WAS EFFECTIVE AFTER THE INFORMATION WAS AMENDED TO ADD THE SPECIAL ALLEGATION BECAUSE IT DID NOT CHANGE THE CHARGE OR THE MANNER IN WHICH IT WAS ACCOMPLISHED.

Under the essential elements rule, "[s]entencing enhancements, such as a deadly weapon allegation, must be included in the information." *State v.*

Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (citing *In re Pers. Restraint of Bush*, 95 Wn.2d 551, 554, 627 P.2d 953 (1981)).

"The purpose of the essential elements rule is to provide defendants with notice of the crime charged and to allow defendants to prepare a defense." *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (citing *State v. Campbell*, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995)).

Here, the amended information included the deadly weapon allegation that Greystoke was armed with a deadly weapon during the commission of the crime. CP 173–74; compare to CP 246–47. Greystoke had plenty of notice of the amendment. On May 18, 2016, the State provided notice of its intent include the enhancement in the information in its plea offer to Greystoke and the State provided a copy of the amended information with the special allegation to Greystoke on Aug. 30, 2017. CP 171–72; RP 200.

Therefore, the State did include the special deadly weapon allegation in the information and provided Greystoke with plenty of notice so that he could prepare a defense.

Greystoke argues further that he was never arraigned on the amended information. Greystoke's argument fails because the original plea of not guilty remained in effect.

An original plea of not guilty will remain in effect when an amended information does not change the offense or manner in which it was

accomplished. *State v. Graeber*, 46 Wn.2d 602, 605–06, 283 P.2d 974 (1955). "Further, the right to enter pleas to the amended information [is] waived when, without objection upon that ground, the cause [is] tried on its merits." *Graeber*, 46 Wn.2d at 606 (citing *State v. Garland*, 65 Wash. 666, 669, 118 P. 907 (1911).

Here, the amended information did not change the crime from Assault in the First Degree or the manner in which the crime was committed. CP 246. The original information alleged that Greystoke "did assault another person, to wit: Adam Gross, with a *deadly weapon* or by any force or means likely to produce great bodily harm or death." CP 246 (emphasis added). The State had always alleged the crime of assault in the first degree was committed when Greystoke stabbed Gross with a knife. *See* CP 248–251. The State proved the same at trial and that Greystoke was armed with a deadly weapon, the knife, at the time of the offense. RP 822; CP 123.

Finally, Greystoke never objected on grounds that he was not arraigned on the amended information and the matter proceeded to trial on the charge as alleged in amended information.

Therefore, the original plea of not guilty remained in effect after the filing of the amended information. This Court should decline to reverse the deadly weapon enhancement.

F. THE JUDGMENT SHOULD BE AMENDED TO PROHIBIT PAYMENTS FROM SOCIAL SECURITY AND THE $200 COURT FILING FEE SHOULD BE STRICKEN BUT THE DNA FEE SHOULD BE UPHELD BECAUSE THE RECORD DOES NOT SHOW GREYSTOKE'S DNA HAD ALREADY BEEN COLLECTED.

1. The trial court should amend the judgment and sentence to prohibit payments from social security disability payments.

"[T]he legislature has divested courts of the discretion to consider a defendant's ability to pay when imposing [mandatory legal financial] obligations." *State v. Lundy*, 176 Wn. App. 96, 102–03, 308 P.3d 755 (2013) (citing *State v. Kuster*, 175 Wash.App. 420, 424, 306 P.3d 1022 (2013) ("The $500 victim assessment is mandated by RCW 7.68.035 and the $100 DNA collection fee is mandated by RCW 43.43.7541."); *see also State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016) (pointing out that RCW 7.68.035 and RCW 43.43.7541 respectively mandate restitution and DNA fees regardless of the defendant's ability to pay).

Here, the trial court lacked the discretion to waive the crime victim assessment fee. Therefore, this Court should uphold the imposition of mandatory legal financial obligations. However, under *State v. Catling*, this Court should remand the case for resentencing to enter a directive that LFO's "may not be satisfied out of any funds subject to 42 U.S.C. § 407(a)." 2 Wn. App.2d 819, 826, 413 P.3d 27 (2018) *review granted*, 422 P.3d 915 (2018).

2. The $200 court filing fee should be stricken but the $100 DNA fee should be upheld because the record does not establish that Greystoke's DNA had already been collected.

Amendments to statutes pertaining to discretionary costs imposed on a criminal defendant following conviction apply to defendants whose appeals were pending when the amendments were enacted. *State v. Ramirez*, 426 P.3d 714, 722 (Wash., 2018).

RCW 36.18.020 was amended to prohibit imposition of the $200 court filing on defendants that are indigent as defined in RCW 10.101.010(3)(a)–(c). The State concedes that the $200 court cost should be stricken from the judgment and sentence because the record establishes that Greystoke is indigent. RP 891, 903.

"Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars unless the state has previously collected the offender's DNA as a result of a prior conviction." RCW 43.43.7541.

However, claims of error on direct appeal must be supported by the existing record on review. *See* RAP 9.1. A claim of error based on a factual assertion that the defendant previously has submitted a DNA sample to the state necessarily fails on direct appeal if there is nothing in the record to show the defendant actually has submitted a DNA sample for a qualifying conviction. *State v. Thibodeaux*, ___ Wn. App. 2d ___, ___ P.3d ___; 2018

WL 6174962 (No. 76818-2-I, November 26, 2018); *State v. Lewis*, 194 Wn. App. 709, 721, 379 P.3d 129, *review denied*, 186 Wn.2d 1025, 385 P.3d 118 (2016); *State v. Thornton*, 188 Wn. App. 371, 374, 353 P.3d 642 (2015).

Therefore, absent any showing the Greystoke's DNA had already been collected, this Court should uphold the trial court's imposition of the $100 DNA fee.

IV. CONCLUSION

The trial court honored Greystoke's constitutional right to self-representation without violating his right to a fair trial after carefully evaluating Greystoke's mental capacity and engaging in a detailed colloquy to ensure that Greystoke was waiving his right to counsel voluntarily, knowingly, intelligently, and with eyes wide open as to the disadvantages of self-representation.

The trial court properly exercised its discretion on excluding evidence of Greystoke's mental state because Greystoke did not provide notice of a mental health defense and did not present relevant expert testimony supporting such a defense and the evidence was not relevant for any other purpose.

The trial court did not comment on the evidence during jury selection but did ensure that prospective jurors would not be biased against Greystoke's perceived lack of trial skills and that they would evaluate

evidence in a rational and impartial manner. Further, Dombrowski's statement was not a comment on the evidence by the court and it was based on a reasonable inference from the evidence. Additionally, the court properly excluded testimony from the building maintenance worker offered by Greystoke to impeach the victim on a collateral matter because the evidence would not be relevant for any other purpose.

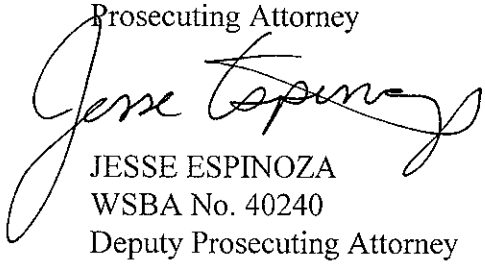
The court properly refused to instruct the jury on the lesser degree offense of Assault in the Second Degree because there was evidence Greystoke intended to inflict great bodily harm.

Finally, the original plea of not guilty remained effective after the information was amended to add the special allegation because the amendment did not change the offense or manner in which it was committed.

Therefore, the State requests the Court to affirm the conviction and remand the case to amend the judgment and sentence as to legal financial obligations.

Respectfully submitted this 17th day of December, 2018.

MARK B. NICHOLS
Prosecuting Attorney



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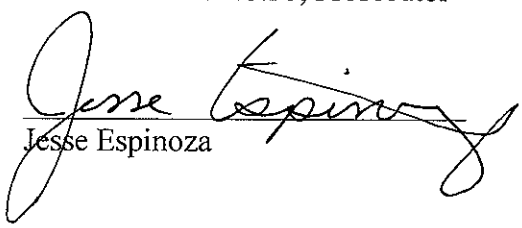
CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Kathleen A. Shea on Dec. 17, 2018.

MARK B. NICHOLS, Prosecutor



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