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NO. 51776-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD WHITE,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David L. Edwards, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state presented insufficient evidence to prove the essential elements of arson in the first degree.
2. The state infringed on Mr. White's Due Process rights when it offered testimony identifying him as the suspect seen on video in exhibits 28 and 29 where that testimony was admitted into evidence without the state providing necessary foundation as to how the witness was able to identify the person as Mr. White.
3. The state violated Mr. White's right to a fair trial when it offered testimony that constitutes an improper opinion on his guilt by having a witness identify him as the suspect seen in exhibits 28 and 29 based solely on his "gait" and "posture" without providing any foundation as to how those features are identifiable or distinguishable from any other person.
4. Mr. White assigns error to finding of fact on bench trial #8 where his mother "believed" the gait of the person in the surveillance video "resembled" Mr. White because there is insufficient foundational evidence in the record to admit her testimony under ER 701.

5. Mr. White assigns error to finding of fact on bench trial #5 where the trial court indicates that Mr. Nostrant knows Mr. White.
6. Mr. White assigns error to finding of fact on bench trial #10 indicating Mr. White is depicted in exhibit 28.
7. Mr. White assigns error to finding of fact on bench trial #10 indicating Mr. White is depicted in exhibit 29.
8. Mr. White assigns error to finding of fact on bench trial #11 indicating Mr. White intentionally started the June fire.
9. Mr. White assigns error to finding of fact on bench trial #12 indicating Mr. White intentionally started the October fire.
10. Mr. White assigns error to finding of fact on bench trial #13 indicating Mr. White intentionally started the fires with willful disregard.
11. Mr. White assigns error to the trial court's conclusions of law on bench trial #2 that Mr. White acted intentionally.
12. Mr. White assigns error to the trial court's conclusions of law on bench trial #3 that Mr. White is guilty of Arson.
13. Mr. White assigns error to the trial court's conclusions

of law on bench trial #4 that Mr. White is guilty of Arson.

14. Mr. White's due process right to a fair trial were violated by trial counsel's failure to request an expert to determine diminished capacity based on Mr. White's schizoaffective disorder and confusion which constituted ineffective assistance of counsel.

15. Mr. White was denied effective assistance of counsel where his attorney did not argue mental health as a mitigating factor against imposing an exceptional sentence.

Issues Presented on Appeal

1. Did the state violate Mr. White's Due Process rights when it offered testimony from a person who never met Mr. White who purportedly identified Mr. White as the suspect seen in exhibits 28 and 29 without laying the proper foundation to demonstrate how a witness who did not know Mr. White was able to identify him?

2. Did the State violate Mr. White's right to a fair trial when it offered an improper opinion on guilt from Mr. White's mother who testified that the suspect had the same "gait" and "posture" as her son but she was did not specify how

those features were distinguishable from any other person?

3. Did the trial court err in relying on Ms. Patterson's improper opinion testimony that she "believed" the gait of the person in the surveillance video "resembled" that of Mr.

White when the state failed to lay the proper foundation for Ms. Patterson's opinion under ER 701?

4. Did the trial court err in entering conclusions of law on guilt based on erroneously admitted opinion evidence?

5. Did the trial court err in concluding that Mr. White is guilty of Arson in the First Degree beyond a reasonable doubt when the finding is not supported by evidence beyond a reasonable doubt?

6. Was counsel ineffective for failing to investigate and present a diminished capacity defense where the defendant's mother, the prosecutor and the defense attorney all agreed that Mr. White suffers from schizo-affective disorder?

7. Was counsel ineffective for failing to argue mental health as a mitigating factor against an exceptional sentence above the standard range?

B. STATEMENT OF THE CASE

a. Substantive Facts

Ronald White, Marlene Patterson's son, has schizoaffective disorder: "as you know, he is Schizo-affective disorder, and he is paranoid and often confused." RP 39 (2-13-18)¹; RP 16-17 (4-16-18) (Prosecutor speaking: "I think Mr. Kupka would stipulate to this and I will certainly stipulate to this - that the defendant is a mentally ill person as defined by 71.24.025, and that this influenced the offense").The court agreed. RP 16-17. The presentence report repeatedly acknowledges that Mr. White was diagnosed with schizo-affective disorder in 2002 and according to Mr. White, his criminal activity is associated with his mental illness. CP 30-38.

Mr. White is homeless and had been for several months leading up to his arrest in this case. RP 38. Before the incidents giving rise to this case, Ms. Patterson lived in a house located at 910 North Thornton Street in Aberdeen, Washington. RP 35-36. North Thornton Street ends in a dead end next to Ms. Patterson's home, but the public sidewalk continues as a stairwell for foot traffic down to 6th street below. RP 37, 79.

¹ The trial court sustained the state's objection to Ms. Patterson making this statement.

On June 29, 2017, an unusual sound roused Ms. Patterson from her sleep. RP 41. She walked to the front door and observed flashing red lights outside in her driveway and smoke coming through the crack above her door. RP 42. Ms. Patterson called 911 and gathered some belongings before exiting the house safely through a back door. RP 43.

Based on the burn patterns, investigators believed the possible source of the fire in Ms. Patterson's home originated underneath the wooden deck on the front porch. RP 101, 105-106. However, fire investigators could not locate an ignition source and the cause of the fire was officially reported as "undetermined." RP 111. The fire caused damage to the front porch, roof, door, and one side of Ms. Patterson's home. RP 23-24.

At 5:10 am on October 16, 911 dispatch received a call reporting another fire at Ms. Patterson's home. RP 25. The fire department arrived to find the house fully engulfed in flames. RP 25-26. Firefighters were eventually able to extinguish the fire but the home was a total loss. RP 27. The fire department stated the cause of the June fire was "undetermined" and not electrical. RP 110, 133. The fire department did not find any evidence of use of

an accelerant, but believed the October fire was intentionally set based on a lack of other evidence and based on viewing the person in the videos in the area when the fires began. RP 126-31, 134. The fire department never found the sources of ignition for either fire. RP 110, 134. The fire department did not know the cause of the October fire or its origins. RP 135-37.

Thomas Nostrant is Ms. Patterson's neighbor. RP 72. Mr. Nostrant has a surveillance camera attached to the corner of his home that captures his property in addition to Ms. Patterson's garage doors and the sidewalk leading to the dead end at the intersection of North Thornton and 6th streets. RP 72-73; CP 40. The camera captures only one of two views of access to his and Ms. Patterson's home. RP 89. Anyone can access these properties from a different direction "by walking up North Jeffries, driving east on west 7th, and then south on Thornton Street." RP 89. Investigators were able to acquire video footage from this camera from both June 29 and October 16, 2017. Exs. 28, 29.

Exhibit 28 relates to the fire from June 19. RP 77. In the video, a hooded figure climbs the stairs that lead from 6th Street to North Thornton Street at 10:31 pm. CP 40; Ex. 28. The video

depicts a figure approaching Ms. Patterson's home and leaving back down the stairs four minutes later, after which a fire erupts near Ms. Patterson's porch. CP 40; Ex. 28. The person is not visible during the interim four minutes. RP 80; CP 40; Ex. 28.

Exhibit 29 relates to the fire from October 16. RP 84-85. In this video, a hooded figure climbs the same stairs depicted in Exhibit 28 at 2:55 am. CP 41; Ex. 29. The figure walks towards Ms. Patterson's house, goes off screen, and then left down the stairs again at 3:02 am. CP 41; Ex. 29. At some point after 3:02 am, a fire starts in the garage of Ms. Patterson's home. CP 41; RP 122.

Mr. Nostrant never met Mr. White but identified the person in the video as Mr. White based on his alleged review of a video clip from June 19, 2017 at about 5:00 pm that no longer existed at the time of trial and was never reviewed by the state or the police and was not disclosed to the state until the day before trial. RP 75, 91-92. According to Mr. Nostrant, this video showed Mr. White's face and depicted him wearing the same clothing as the person seen in the surveillance footage from the fires. RP 80.

Two days after the October fire, officers located Mr. White in Aberdeen and took a photograph of him wearing clothing similar to

that worn by the person depicted in the surveillance video. Ex. 2, 28 and 29; RP 149. Mr. White was ultimately arrested for both fires. CP 1-2.

The house next to Ms. Patterson's house was vacant in June 2017. RP 52-53. Ms. Patterson realized that people from the abandoned home were throwing socks (not Mr. White's) into her yard. RP 53. Ms. Patterson never saw the illegal occupants but did see the socks. RP 53-54. Ms. Patterson knew the socks were not her son's because she did regularly his laundry and prepared warm meals for him. RP 47-48. "I have always helped my son, and I still want to help him." RP 48. Mr. White visited his mother at times, more than once daily and she managed his finances because he was unable. RP 49.

Ms. Patterson allowed Mr. White to move thoroughly around the outside of her home and left his clothing in a dry container outside. RP 40. Because Mr. White was homeless, Ms. Patterson allowed him to sleep on her porch but at times put up a note asking him not to call out her name, knock on the door or ring the doorbell, or linger on the porch smoking. RP 40. The note was not always on the front door but at times because Mr. White ".wouldn't manage

himself well there.” RP 57. At times Mr. White would ring the door bell and knock excessively or repeatedly call Ms. Patterson’s name. RP 58.

b. Procedural Facts

The state charged Mr. White with two counts of Arson in the First Degree as domestic violence offenses based on his alleged setting fires to his mother’s home. CP 1-2. Mr. White elected a bench trial. CP 16. The key issue at trial was the identity of the person seen on the video footage marked as exhibits 28 and 29. RP 173.

c. Exhibits - Insufficient Foundation Challenge

The state offered multiple pieces of evidence in an attempt to prove the person seen in the videos was Mr. White. First, the state presented testimony from Mr. Nostrant identifying the person in the videos as Mr. White. RP 80-81. Mr. White objected to the admission of this testimony on foundational grounds but was overruled. RP 81. Second, Mr. White’s mother testified that the person seen in the videos had a similar “gait” and “posture” to her son and she “believed” the gait of person in video “resembled” Mr. White. RP 140.

Mr. White raised a foundation objection to this line of questioning but was again overruled. RP 141. Finally, the state offered a photograph the police took of Mr. White two days after the second fire. Ex. 2; RP 150. This photograph depicts Mr. White wearing clothing that is similar in appearance to the clothing worn by the person seen in the Exhibits 28 and 29 videos. RP 150.

The trial court ultimately found Mr. White guilty on both counts of Arson in the First Degree. CP 43. The trial court also found that both counts were domestic violence offenses. CP 43. Mr. White filed a timely notice of appeal. CP 70.

C. ARGUMENT

1. THE STATE FAILED TO PROVE THAT MR. WHITE COMMITTED ARSON IN THE FIRST DEGREE

Under both the federal and state constitutions, due process requires that the state prove every element of a crime beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Johnson*, 188 Wn.2d 742, 750, 399 P.3d 507 (2017); *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Evidence suffices if a rational trier of fact could find each element of

the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). Both direct and indirect evidence may support a verdict. *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986).

This Court views the evidence in the light most favorable to the state to determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Johnson*, 188 Wn.2d at 751 (*quoting, Green*, 94 Wn.2d at 221 (*plurality opinion*)). Nevertheless, inferences based on circumstantial evidence must be reasonable and cannot be based on speculation. *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

To prove Mr. White guilty of first degree arson, the state must prove that he knowingly caused the fire. A person acts “knowingly” when the person “is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or ... has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.” RCW 9A.08.010(1)(b). RCW 9A.08.010(1)(b) permits the trier of fact to infer knowledge if the

defendant had information that would lead a reasonable person in the same situation to believe that facts exist defining the offense. *State v. Shipp*, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980).

In White's case the state did not present evidence beyond a reasonable doubt that he started either fire. The fire department was unable to determine the ignition source or location where either fire started, and only assumed the person in the video started the fires because they could not find an electrical source for the fires. RP 27, 110, 126-37. The evidence was limited testimony that the person in the videos resembled White's gait and because the fire department could not find the source or location of the fires they assumed it was set intentionally.

This court does review the evidence in the light most favorable to the state and considers circumstantial evidence as well as direct evidence, but here under this standard and the due process clause, there was insufficient evidence to establish beyond a reasonable doubt that Mr. White twice set fire to the house. *Johnson*, 188 Wn.2d at 751; *Vasquez*, 178 Wn.2d at 16. Reversal and remand for dismissal with prejudice is required.

2. MR. WHITE WAS DENIED HIS
CONSTITUTIONAL RIGHT TO
EFFECTIVE ASSISTANCE OF
COUNSEL

The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, cert. denied, 549 U.S. 1022 (2006); *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. Amend. VI; Wash. Const. art. I, § 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that: (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defendant. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required.

State v. Hawkins, 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *Grier*, 171 Wn.2d at 33; (*citing State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999)).

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one element, a reviewing court

need not consider both *Strickland* prongs. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

a. Diminished Capacity

Diminished capacity is an affirmative defense that can negate the specific intent or knowledge elements of a crime. *State v. Eakin*, 127 Wn.2d 490, 496, 902 P.2d 1236 (1995). “Diminished capacity arises out of a mental disorder, usually not amounting to insanity that is demonstrated to have a specific effect on one's capacity to achieve the level of culpability required for a given crime.” *State v. Gough*, 53 Wn.App. 619, 622, 768 P.2d 1028 (1989).

Washington does not punish defendants with a diminished capacity that precludes the formation of the crime's identified intent. *State v. Eaton*, 168 Wn.2d 476, 482 n.2, 229 P.3d 704 (2010). An accused may utilize diminished capacity when substantial evidence reasonably connects the defendant's alleged mental condition with the inability to possess the required level of culpability to commit the crime charged. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001).

A trial court may admit evidence of the defendant's diminished capacity "if it tends logically and by reasonable inference to prove that a defendant was incapable of having the required level of culpability." *Gough*, 53 Wn. App. at 622. Additionally, "[t]o maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

When knowledge is an element of the offense, knowledge may be challenged by competent evidence of diminished capacity due to a mental disorder that causes the inability to act knowingly at the time of the offense. *State v. Edmon*, 28 Wn. App. 98, 104, 621 P.2d 1310 (1981). Specifically related to arson, the Court in *State v. Davis*, 34 Wn. App. 546, 662 P.2d 78 (1983) held that diminished capacity can negate the elements of knowingly and maliciously. *Davis*, 34 Wn. App. at 548-549.

Davis was charged with arson in the first degree, but ultimately pleaded guilty to reckless burning after a Western State

psychiatrist determined that Davis' schizophrenia and paranoia prevented Davis from acting knowingly and maliciously. *Davis*, 34 Wn. App. at 548-549. Accordingly, in an arson case, diminished capacity can preclude a finding that the defendant acted knowingly because a person suffering from diminished capacity cannot form the "knowledge" element of the crime. *Davis*, 34 Wn. App. at 548-549; *Edmon*, 28 Wn. App. at 104.

In *State v. Thomas*, 109 Wn.2d 222, 227, 743 P.2d 816 (1987), the petitioner claimed she was denied effective assistance of counsel because her assigned trial counsel failed to competently present a diminished capacity defense based on voluntary intoxication to a charge of attempting to elude a police vehicle. *Thomas*, 109 Wn.2d at 223.

The Supreme Court concluded that Thomas was denied effective assistance of counsel because trial counsel failed to offer a critical jury instruction which would have "better enabled her counsel to argue the ... theory of the case" and, the jury would have had a correct statement of the law if the instruction had been given. *Thomas*, 109 Wn.2d at 227-229.

Similarly, in *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d

735 (2003), the State Supreme Court held that despite a limited record, counsel was ineffective for failing to raise a diminished capacity defense where there was evidence that Tilton smoked marijuana and could not remember the incident. *Tilton*, 149 Wn.2d at 784. 2

In jury trial cases, our courts have repeatedly held counsel's performance to be prejudicially deficient when counsel fails to request a diminished capacity defense but counsel has been unable to find a published case addressing this issue during a bench trial. *State v. Burton*, Unpublished and not reported in P.3d, 1 Wn. App. 1015 (2017), Division One addressed this issue. (Per GR 14(1)(a), this case is not cited for precedential value but rather for persuasive purposes as the court deems appropriate). rather is for illustrative purposes).

In *Burton* the evidence of guilt was overwhelming. A psychiatrist testified that Burton's suicidal attempt by "cop" in his assault case and his depression was due to a known side-affect of taking Paxil but no expert opined that either condition interfered in

2 The Court in *Tilton*, reversed on other grounds because the record was insufficient as reconstructed.

his ability to form an intent to cause fear in the police officers. In light of the overwhelming evidence of guilt and Burton's unequivocal desire to assault the police to cause his own death, the evidence did not support a diminished capacity defense.

Here, contrary to *Burton*, the evidence against Mr. White not overwhelming and there was no expert testimony. Rather, Mr. White establishes deficient performance because his schizoaffective disorder was relevant to the knowledge element of the arson charges, there were no strategic reasons not to raise diminished capacity. This defense did not conflict with the defense of lack of identity and if Mr. White's schizo-affective disorder prevented his forming the intent for arson, the court would have entered a conclusion of not guilty. In short, there was no reason not to raise this defense.

Mr. White was prejudiced because the case against Mr. White based entirely on weak, circumstantial evidence, the information regarding Mr. White's schizoaffective disorder was relevant to the intent element of arson, uncontroverted, and likely would have altered the outcome of the trial.

Mr. White was denied his constitutional right to effective

assistance of counsel due to counsel failing to request an expert evaluation on diminished capacity where defense counsel knew that Mr. White suffered from schizo-affective disorder.

b. Mitigation Exceptional Sentence

Generally, under the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, a trial court must impose a sentence within the standard range. *State v. Law*, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). An appellate court analyzes the appropriateness of an exceptional sentence by answering the following three questions under the indicated standards of review:

1. Are the reasons given by the sentencing judge supported by evidence in the record? As to this, the standard of review is clearly erroneous.
2. Do the reasons justify a departure from the standard range? This question is reviewed de novo as a matter of law.
3. Is the sentence clearly too excessive or too lenient? The standard of review on this last question is abuse of discretion.

State v. Ha'mim, 132 Wn.2d 834, 840, 940 P.2d 633 (1997) (overruled in part on other grounds by *State v. O'Dell*, 183 Wn.2d 680, 689-99, 358 P.3d 359 (2015)).

When sentencing an adult defendant, a court can impose an exceptional sentence below the standard range if it finds

a “defendant's capacity to appreciate the wrongfulness of his ... conduct ... was significantly impaired.” RCW 9.94A.535(1)(e).

The record must show both the existence of the mental condition and the connection between the condition and significant impairment of the defendant's ability to appreciate the wrongfulness of his conduct. *State v. Rogers*, 112 Wn.2d 180, 185, 770 P.2d 180 (1989). Here, the uncontroverted record, agreed to by the court, counsel and the prosecutor identified Mr. White as suffering from a mental illness as defined by RCW 71.02.245 (effective July 1, 2018). RP 16-17 (2-13-18). Additionally, the pre-sentence investigation provided uncontroverted evidence that Mr. White’s criminal activity was a result of his mental illness that became exacerbated when he was homeless and not taking his medication. CP 30-38.

RCW 71.02.245 statute defines mentally ill persons expansively. First section (28) defines mentally ill persons by referencing other subsections in RCW 71.02.245:

(28) “Mentally ill persons,” “persons who are mentally ill,” and “the mentally ill” mean persons and conditions defined in subsections (1), (10), (36), and (37):

RCW 71.02.245(28). Second, section (1) provides:

(1) “Acutely mentally ill” means a condition which is limited to a short-term severe crisis episode of:

(a) A mental disorder as defined in RCW 71.05.020 or, in the case of a child, as defined in RCW 71.34.020;

(b) Being gravely disabled as defined in RCW 71.05.020 or, in the case of a child, a gravely disabled minor as defined in RCW 71.34.020; or

(c) Presenting a likelihood of serious harm as defined in RCW 71.05.020 or, in the case of a child, as defined in RCW 71.34.020.

RCW 71.02.245(1). Third, section 10 provides:

(10) “Chronically mentally ill adult” or “adult who is chronically mentally ill” means an adult who has a mental disorder and meets at least one of the following criteria:

(a) Has undergone two or more episodes of hospital care for a mental disorder within the preceding two years; or

(b) Has experienced a continuous psychiatric hospitalization or residential treatment exceeding six months' duration within the preceding year; or

(c) Has been unable to engage in any substantial gainful activity by reason of any mental disorder which has lasted for a continuous period of not less than twelve months. “Substantial gainful activity” shall be defined by the authority by rule consistent with Public Law 92-603, as amended.

RCW 71.02.245(10). Forth, section (36) provides:

(36) “Seriously disturbed person” means a person who:

- (a) Is gravely disabled or presents a likelihood of serious harm to himself or herself or others, or to the property of others, as a result of a mental disorder as defined in chapter 71.05 RCW;
- (b) Has been on conditional release status, or under a less restrictive alternative order, at some time during the preceding two years from an evaluation and treatment facility or a state mental health hospital;
- (c) Has a mental disorder which causes major impairment in several areas of daily living;
- (d) Exhibits suicidal preoccupation or attempts; or
- (e) Is a child diagnosed by a mental health professional, as defined in chapter 71.34 RCW, as experiencing a mental disorder which is clearly interfering with the child's functioning in family or school or with peers or is clearly interfering with the child's personality development and learning.

RCW 71.02.245(36). (Section 37) relates to children and is not relevant in Mr. White's case. RCW 71.02.245 (37).

Under RCW 9.94A.535(1)(e), any one of the above agreed definitions of mental illness set forth under RCW 71.02.245 was sufficient to permit the sentencing court to exercise its discretion to impose either an exceptional sentence downward or to impose a standard range sentence. Since the court agreed with the presence of the mental illness factor, this in effect appears to telegraph the

court's willingness to entrain a lesser sentence based on Mr. White's limited capacity to appreciate the wrongfulness of his conduct or to impose a standard range sentence, rather than an exceptional sentence upward.

To be effective, defense counsel was required at a minimum to initiate a reasonable evaluation of a Mr. White's mental condition because there were significant question about Mr. White's ability to formulate intent. See, *Cross*, 180 Wn.2d at 687 (defense counsel duty to investigate impact of mental illness on criminal case).

Identical to the argument above regarding counsel's prejudicial, deficient performance in failing to raise diminished capacity as a defense, here, too counsel prejudiced Mr. White by failing to argue mitigation. The record suggests that the court would have imposed a lesser sentence if counsel had offered mitigation because the court agreed and understood that Mr. White was mentally ill. *Tilton*, 149 Wn.2d at 784; *Thomas*, 109 Wn.2d at 232 (citing *Strickland*, 466 U.S. at 688).

This Court must reverse and remand for a new trial.

3. HE THE STATE VIOLATED MR. WHITE'S DUE PROCESS RIGHTS WHEN IT OFFERED TESTIMONY IDENTIFYING HIM AS THE SUSPECT SEEN IN THE SURVEILLANCE VIDEOS AND IT FAILED TO LAY NECESSARY FOUNDATION TO ENSURE THE IDENTIFICATION WAS RELIABLE

"The reliability of suspect identification by victims or eyewitnesses implicates due process because impermissibly suggestive police procedures may result in mistaken identifications. Courts must therefore ensure that such testimony is reliable. This is accomplished by considering the witness's opportunity to observe the suspect, the accuracy of any prior descriptions, the witness's level of certainty, and the passage of time." *State v. Collins*, 152 Wn. App. 429, 465-66, 216 P.3d 463 (2009) (citing *Manson v. Brathwaite*, 432 U.S. 98, 111-14, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)).

This due process concern exists because when a witness is testifying about someone they do not know, "the witness' recollection of the stranger can be distorted easily by the circumstances or later actions of the police." *Collins*, 152 Wn. App.

at 466 (*quoting Manson*, 432 U.S. at 111-14). Identification testimony should be excluded from evidence if the circumstances of the identification are unnecessarily suggestive and arranged by law enforcement. *State v. Sanchez*, 171 Wn. App. 518, 573, 288 P.3d 351 (2012). “Police use of an unnecessarily suggestive procedure need not have been intentionally suggestive to trigger the requirement for judicial inquiry, however.” *Sanchez*, 171 Wn. App. at 573 (*citing Perry v. New Hampshire*, 565 U.S. 228, 237, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012)).

Courts employ a two part analysis in determining whether an identification is admissible under the Due Process Clause. *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). First, the defendant must establish that the identification procedure was impermissibly suggestive. *Vickers*, 148 Wn.2d at 118. The court must then determine, based on the totality of the circumstances, whether the identification procedure created a substantial likelihood of irreparable misidentification. *Vickers*, 148 Wn.2d 118.

Washington case law primarily defines “impermissibly suggestive” in the context of photo montages. In that context, an “impermissibly suggestive” identification procedure is one that

“directs undue attention” to a particular photo or suspect. *State v. Kinard*, 109 Wn. App. 428, 433, 36 P.3d 573 (2001). The identification procedure used in this case directed all of Mr. Nostrant’s attention to one suspect: Mr. White.

Mr. Nostrant never met Mr. White before trial, yet the trial court allowed Mr. Nostrant to identify Mr. White as the person depicted in the surveillance videos based on clothing. RP 80-81. The footage admitted at trial did not show a person’s face and the claimed footage from 5:00 pm on June 19, 2017 did not exist and was not presented at trial. RP 91-92.

Mr. Nostrant apparently only came to the realization he had previously viewed this video and informed the state of his ability to identify Mr. White on the day before the trial was set to begin, but without the benefit of the earlier footage and only after he had been provided with Mr. White’s photograph. RP 91-92. There is no evidence in the record that Mr. Nostrant had identified Mr. White previously, meaning Mr. Nostrant’s identification at trial was the first time he had ever identified the person on video as Mr. White. At that point, Mr. Nostrant was aware of Mr. White’s identity and had discussed him with Ms. Patterson. RP 75. Mr. Nostrant also was

aware Mr. White had been arrested for starting the fires and was about to be tried for arson. CP 6.

This case exemplifies the well-documented problems with eyewitness identifications that give rise to due process concerns. Mr. White was identified as the perpetrator of these crimes based on witness testimony that relied entirely on a single viewing of a video that was not produced or even in existence at the time of trial. RP 91-92. This viewing allegedly occurred four months before the trial actually occurred. RP 91. In the intervening time between seeing this video and trial, Mr. Nostrant was provided with a substantial amount of information suggesting that the person he saw in the video was Mr. White. Mr. Nostrant only revealed his ability to identify Mr. White after having received all of this information on the day before trial. RP 91. This procedure was “impermissibly suggestive” under the first prong of the *Vickers* analysis.

The second *Vickers* prong requires the court to determine whether the impermissibly suggestive identification procedures created a substantial risk of irreparable misidentification. *Vickers*, 148 Wn.2d at 118. In evaluating the due process implications of Mr.

Nostrant's identification, this court must evaluate Mr. Nostrant's opportunity to observe the suspect, the accuracy of any prior descriptions, his level of certainty, and the passage of time. *Collins*, 152 Wn. App. at 465-66.

Regarding the first of these *Collins* factors, the record does not establish that Mr. Nostrant had any opportunity to observe Mr. White before trial except for his review of the purported video he claimed to have seen when he was retrieving footage of the fires for the police some four months before trial. RP 91-92. In the videos that were admitted into evidence, the person who approaches Ms. Patterson's home before the fires start is wearing a hood and cannot be identified. RP 80-81.

Furthermore, Mr. Nostrant was never introduced to Mr. White. RP 75. Mr. Nostrant only knew of Mr. White because Ms. Patterson had discussed Mr. White with Mr. Nostrant in the past. RP 75.

The second factor discussed in *Collins* is the accuracy of any prior descriptions. In this case, the record does not show that Mr. Nostrant had the opportunity to describe Mr. White on any previous occasion. Mr. Nostrant was out of the country at the time

of the June 19, 2017 fire and his only opportunity to see the suspect was on the videos discussed during trial which did not show Mr. White's face. RP 75-76. From the record in this case, it is not possible to gauge the accuracy of any prior descriptions.

The third factor to examine is the witness's level of certainty. There is nothing in the record that would cast doubt on Mr. Nostrant's certainty in his own identification of Mr. White. However, eyewitness identifications are notoriously unreliable and this fact has been recognized by the Washington State Supreme Court. *State v. Riofta*, 166 Wn.2d 358, 371, 209 P.3d 467 (2009) (citing Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008)). For this reason, courts have stressed the importance of due process protections such as cross-examination regarding identifications to ensure their accuracy is properly tested for the trier of fact. *Sanchez*, 171 Wn. App. at 572 (quoting *Perry*, 565 U.S. at 237).

In this case, because the state failed to produce the video Mr. Nostrant relied on in making his identification at trial. Mr. White never had the opportunity to cross-examine Mr. Nostrant regarding his ability to identify Mr. White based on the purported video where

Mr. White's face and clothing was visible. Although Mr. Nostrant appears confident in his identification, the possibility of mistaken identification under these circumstances is great, and Mr. White never had the opportunity to meaningfully counter the identification.

The final consideration in evaluating the due process implications of Mr. Nostrant's identification is the passage of time. Mr. Nostrant claimed to have seen Mr. White on his surveillance video when he was combing through video related to the fires. RP 76, 80. From the record, it appears this video was viewed once, roughly a week after the fire on October 16, 2017. RP 76. Mr. White's trial did not begin until February 23, 2018. CP 39. Thus, roughly four months passed between the day when Mr. Nostrant claims to have seen Mr. White on video and the trial. Four months is a substantial amount of time to pass for a witness to identify someone they have never met. *Riofta*, 166 Wn.2d at 371; Garrett, *Judging Innocence*, 108 Colum. L.Rev. at 60 ("The vast majority of [studied] exonerees (79%) were convicted based on eyewitness testimony; we now know that all of these eyewitnesses were incorrect.").

An evaluation of these factors demonstrates that the

procedure used to identify Mr. White was not only impermissibly suggestive, but also created a substantial risk of misidentification. Mr. Nostrant's identification at trial cannot be compared to any prior identifications because the record shows that he did not even disclose his ability to identify Mr. White to the state until the day before trial. Finally, four months passed between the time Mr. Nostrant purportedly viewed the deleted video and the time he identified Mr. White at trial.

Mr. Nostrant's identification testimony relied on an impermissibly suggestive identification procedure. This procedure created a substantial risk of irreparable misidentification. The admission of this testimony violated Mr. White's right to Due Process and requires reversal of his conviction and a new trial. *State v. McDonald*, 40 Wn. App. 743, 747-48, 700 P.2d 327 (1985) (reversing defendant's conviction on Due Process grounds due to the admission of an unreliable in-court identification).

4. HE THE STATE VIOLATED MR.
WHITE'S DUE PROCESS RIGHTS
WHEN IT PERMITTED MS.
PATTERSON TO EXPRESSED AN
IMPROPER OPINION ON MR.
WHITE'S GUILT

Witnesses are not permitted to testify to their opinion of the defendant's guilt, whether by direct statement or inference. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). Such testimony improperly infringes on the role of the trier of fact. *Black*, 109 Wn.2d at 348. Improper opinions on guilt typically involve an assertion relating directly to the defendant. *Heatley*, 70 Wn. App. at 577 (citing *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967)).

Opinion testimony is not inadmissible solely because it encompasses an ultimate issue of fact. ER 704. However, such testimony is still subject to the requirements of ER 701 and should be excluded when it lacks the proper foundation. *Heatley*, 70 Wn. App. at 579. Under ER 701, opinion testimony from a lay witness must 1) be rationally based on the perception of the witness, 2) be helpful to a clear understanding of the witness' testimony or

determination of a fact in issue, and 3) not be based on scientific, technical, or specialized knowledge. ER 701. Whether testimony constitutes an impermissible opinion on guilt or a permissible opinion embracing an 'ultimate issue' will generally depend on the specific circumstances of each case. *Heatley*, 70 Wn. App. at 579.

In the context of the evidence before the trier of fact in this case, Ms. Patterson's testimony constitutes an impermissible opinion on Mr. White's guilt because it is not helpful in understanding her testimony or determining any fact in issue. Identity was a fact in issue, but Ms. Patterson did not identify her son, she merely testified that the videos had a similar "gait" and "posture" to her son and she "believed" the gait of person in video "resembled" Mr. White because Ms. Patterson was aware of her son's gait. RP 140-41, 173.

The record does not contain any testimony describing how Mr. White's walk is distinctive from anyone else's, nor does it contain testimony describing the features of Mr. White's posture that made him recognizable in the videos. Accordingly, Ms. Patterson's testimony merely states clearly her belief that the person in the video resembled Mr. White; It did not positively

identify him. Moreover, the testimony was not complicated and did not require an explanation to permit understanding. ER 701.

Ms. Patterson's testimony does not contain any specific observations that distinguish Mr. White's posture or style of movement from anyone else. The testimony is not helpful in determining any fact in issue because the trier of fact cannot compare what is seen in the videos admitted as evidence against what Mr. Patterson is describing. Simply testifying that the unidentified figure in the videos has a similar posture or style of movement to her son is not helpful to the trier of fact when any number of other people could have similar features.

Ms. Patterson's testimony constitutes an improper opinion of Mr. White's guilty. The testimony should have been excluded and the trier of fact required to determine whether the person seen in the videos was Mr. White.

A trial court's erroneous decision to admit evidence at trial is subject to a harmless error analysis. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) (Thomas II). An error is not harmless if there is a reasonable probability that it affected the outcome of the trial. *State v. Goggin*, 185 Wn. App. 59, 69, 339 P.3d 983

(2014).

The record demonstrates that the testimony from Mr. Nostrant and Ms. Patterson was the deciding factor in the court's determination of guilt. Findings of Fact 10-11; Conclusions of Law 3-4; CP 40-43. The trial court articulated on the record that the crucial factual issue in Mr. White's trial was whether he was the person seen on video in exhibits 28 and 29. RP 173.

In deciding this issue and finding Mr. White guilty, the trial court relied heavily on the identification testimony from both Ms. Patterson and Mr. Nostrant. RP 173-174. In fact, the trial court stated that it was not convinced beyond a reasonable doubt that the person seen on video was Mr. White until after it had heard the second round of testimony from Ms. Patterson where she discussed the suspect's posture and movement seen on video. RP 174-175. But Ms. Patterson's testimony was limited to her believing the gait of person in video "resembled" Mr. White. RP 140-41. "Resembled" does not establish identification beyond a reasonable doubt, and Mr. Nostrant's single view of a video in this case also, could not establish identification beyond a reasonable doubt because Mr. Nostrant did not know Mr. White.

The trial court's comments after closing arguments indicate that the case had not been decided before the state presented Ms. Patterson's second round of testimony. Based on these comments, there is a reasonable probability Mr. White would have been acquitted in the absence of this testimony. The trial court's reliance on this testimony in convicting Mr. White was improper and requires that Mr. White's conviction be reversed, and the case remanded for a new trial. *Goggin*, 185 Wn. App. at 69.

D. CONCLUSION

The outcome of Mr. White's trial depended on whether the state was able to identify him as the suspect seen in exhibits 28 and 29. To accomplish this, the state relied on evidence that lacks foundation and corroboration. The admission of Mr. Nostrant's identification testimony violated Mr. White's Due Process rights because the identification procedure used by law enforcement was impermissibly suggestive and created a risk of misidentification.

The state also offered testimony that constitutes an improper opinion on Mr. White's guilt when it had Ms. Patterson testify that the suspect resembled her son due to his general "posture" and the "way he walks" without laying any foundation to show Mr. White's

posture was distinct or recognizable.

The admission of these two pieces of testimony was erroneous and prejudiced Mr. White, resulting in two convictions in this case. Based on these errors, his conviction must be reversed, and the case should be remanded for a new trial where the testimony will be excluded from evidence.

DATED this 8th day of October 2018.

Respectfully submitted,

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

LISE ELLNER, WSBA No. 20955
Attorney for Appellant

A handwritten signature in black ink that reads "Spencer Babbitt" in a cursive style.

SPENCER BABBIT, WSBA No. 51076
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor's Office appeals@co.grays-harbor.wa.us and Ronald White/DOC#294521, Monroe Correctional Complex-SOU, PO Box 514, Monroe, WA 98272 a true copy of the document to which this certificate is affixed on October 8, 2018. Service was made by electronically to the prosecutor and Ronald White by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

Signature

LAW OFFICES OF LISE ELLNER

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