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NO. 52656-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

KURT R. KILLIAN,

Appellant.

BRIEF OF APPELLANT,
KURT R. KILLIAN

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
THE HONORABLE BRYAN E. CHUSHCOFF, JUDGE

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I. INTRODUCTION

On July 28, 2018, Kurt Killian was walking down a public street when he heard the voice of a woman he believed was dead. Unbeknownst to him, Christine Wilson, his ex-girlfriend, lived along that road. Ms. Wilson is the protected party in a no-contact order restraining Mr. Killian. Ms. Wilson walked out on her front porch, she and Mr. Killian briefly spoke, and then Mr. Killian walked away.

The state charged Mr. Killian with violating a domestic-violence no-contact order. A jury convicted him of this charge. However, this case was replete with errors. The trial court erred by denying Mr. Killian's motion to dismiss and allowing the state to reopen its case in chief after it failed to meet its burden of proof. The court also violated Mr. Killian's right to free exercise of religion by refusing to allow him to swear an oath on a Bible before testifying. The prosecutor committed misconduct by stating his personal opinion about Mr. Killian's guilt in opening statements. Additionally, insufficient evidence supported Mr. Killian's conviction because the state failed to prove that he knowingly violated the no-contact order. Finally, Mr. Killian's trial attorney provided ineffective assistance by failing to raise diminished capacity as a mitigating factor at sentencing. Even if none of these errors require reversal alone, together the cumulative error denied Mr. Killian a fair trial. This Court should reverse.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred by granting the state's motion to reopen its case in chief and denying Mr. Killian's motion to dismiss.

Assignment of Error 2: The trial court violated Mr. Killian's constitutional right to free exercise of religion by failing to accommodate his request to swear an oath on a Bible.

Assignment of Error 3: The prosecutor committed misconduct, prejudicing Mr. Killian, by stating his personal opinion about Mr. Killian's guilt during opening statements.

Assignment of Error 4: Insufficient evidence supported Mr. Killian's conviction for violating a no-contact order.

Assignment of Error 5: Mr. Killian was denied effective assistance of counsel when his trial attorney failed to raise diminished capacity as a mitigating factor at sentencing.

Assignment of Error 6: Cumulative error denied Mr. Killian a fair trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Did the trial court err by denying Mr. Killian's motion to dismiss and granting the state's motion to reopen after the state failed to meet its burden of proof during its case in chief?

Issue 2: Did the trial court violate Mr. Killian's right to free exercise of religion by refusing to allow him to swear an oath on a Bible before

testifying?

Issue 3: Did the prosecutor commit misconduct, prejudicing Mr. Killian, when he repeatedly expressed his personal opinion of Mr. Killian's guilt during opening statements?

Issue 4: Was there insufficient evidence to support Mr. Killian's conviction when the state failed to prove beyond a reasonable doubt that Mr. Killian knowingly violated a no-contact order?

Issue 5: Was Mr. Killian denied effective assistance of counsel when his trial attorney failed to raise diminished capacity as a mitigating circumstance at sentencing when his siblings both testified to his delusional mental illness?

Issue 6: Did cumulative error deny Mr. Killian a fair trial?

IV. STATEMENT OF THE CASE

Kurt Killian and Christine Wilson were in a romantic relationship from about 2013 to 2017. RP at 49-50.¹ They have known each other for

¹ Initially, Mr. Killian did not request the verbatim report of proceedings (VRP) for opening statements and voir dire. Later, he requested the VRP for those portions of the case. The VRP was thus transcribed at different times and was not all sequentially numbered. This brief uses "RP" to cite to the VRP transcribing the trial (excluding voir dire and opening statements) spanning October 30, October 31, November 1, and November 9, 2018 and numbered pages 1 to 254. This brief uses "10/30/18 RP" to cite to the VRP transcribing the beginning of voir dire that occurred on October 30, 2018, numbering pages 1 to 79. This brief uses "10/31/18 RP" to cite to the VRP transcribing the remained of voir dire and opening statements that occurred on October 31, 2018, numbering pages 1 to 21.

many years and have an adult child together. RP at 69-70. In April 2017, their relationship ended. RP at 50. The district court entered a domestic violence no-contact order listing Ms. Wilson as the protected party. Ex. 6; RP at 50.

A few months later, in October 2017, Mr. Killian received information that Ms. Wilson was deceased. RP at 160-61. Mr. Killian was in jail at the time. RP at 160. He received a phone call from his daughter telling him that Ms. Wilson was fatally hit by a truck while riding her bike. RP at 160-61. The next day, Mr. Killian received another phone call, this time from his sister. RP at 162-63. His sister told Mr. Killian that his daughter lied; Ms. Wilson was still alive. RP at 163. Mr. Killian was confused, but ultimately believed his daughter. RP at 164.

Mr. Killian was released from jail on July 21, 2018. RP at 165. A week later, on July 28, 2019, he was walking along a public road towards his daughter's workplace when he encountered Ms. Wilson. RP at 166, 172. Ms. Wilson lived in a trailer along that road. RP at 52, 74. Mr. Killian was surprised to see her because he believed she was deceased. RP at 165-66. According to both Ms. Wilson and Mr. Killian, they briefly exchanged words, then Mr. Killian left and walked towards a nearby park. RP at 56, 58, 172.

According to Ms. Wilson, she was leaving her house when she saw Mr. Killian at the fence to her property, standing on the steps. RP at 54-55. Mr. Killian told her “it was expired.” RP at 56. Ms. Wilson did not know what that meant, but she was afraid and upset. RP at 56. She went to her neighbor’s house and asked him to call 911. RP at 57-58. Mr. Killian left immediately. RP at 58.

Mr. Killian denied saying anything to Ms. Wilson. RP at 101. According to him, she told him to wait right there, then she left. RP at 172. Mr. Killian expected Ms. Wilson to call the police, so he walked to a nearby park to wait for them. *Id.* A police officer arrived shortly after and arrested Mr. Killian. RP at 97, 102, 177.

The state charged Mr. Killian with violating a domestic violence no-contact order. CP 3-4. The state elevated the charge to a felony due to Mr. Killian’s criminal history. *Id.* Five witnesses testified at trial: Ms. Wilson; her neighbor, David Puckett; the police officer who arrested Mr. Killian, Deputy Bradley Crawford; the police officer who responded to Ms. Wilson’s house, Deputy Emily Holznagel; and Mr. Killian. RP 48, 87, 92, 123, 157.

During opening statements, the prosecuting attorney made several comments on Mr. Killian’s guilt. Near the beginning of his opening, the prosecutor said “I don’t want to promise you something beforehand” but

“[h]ere’s what I think that the facts are going to show in this case.” 10/31/18 RP at 15. He then described the evidence the state planned to present during trial. 10/31/18 RP at 16-17. At the end of his opening, the prosecutor described this as a “very straightforward case.” 10/31/18 RP at 17. He said that “[w]e have had some fun during jury selection. We have had some laughs, but it’s time to get serious at this point. A crime has been committed.” *Id.* He ended by stressing, “I believe that the only answer is the defendant is guilty.” *Id.*

At trial, Ms. Wilson testified that she and Mr. Killian previously resided together in an apartment in Tacoma. RP at 72, 80-81. After their relationship ended, she moved to a trailer. RP at 52, 72. She did not tell Mr. Killian her address. RP at 81. She did tell him that she was moving to Brookdale Mobile Home Park but did not tell him the unit number. RP at 61, 83. Ms. Wilson’s name was not on her mailbox. RP at 81. However, her son’s car was parked in her driveway. RP at 61-62. Ms. Wilson believed that Mr. Killian recognized her son’s car. *Id.*

Mr. Puckett, Ms. Wilson’s neighbor, testified that Ms. Wilson came to his house and asked him to call 911. RP at 87. She appeared upset and was crying. *Id.* Mr. Puckett called 911 and then he and Ms. Wilson walked out to the road. RP at 88. They saw Mr. Killian walking away, at least 1,000 yards away. *Id.* Mr. Killian did not turn around. RP at 89.

Two police officers also testified. Deputy Crawford testified that he located Mr. Killian at the park down the street from Ms. Wilson's house. RP at 97. Mr. Killian answered all of Deputy Crawford's questions. RP at 107-09. He did not fight or argue. RP at 109. Deputy Crawford arrested him. RP at 102. Deputy Holznagel testified that she responded to the 911 dispatch by going to Ms. Wilson's home. RP at 124. She met with Ms. Wilson, who appeared upset. RP at 125.

After Deputy Holznagel's testimony, the state rested. RP at 129. However, the state failed to prove every element of its case. RP at 138. The state charged Mr. Killian with felony violation of a no-contact order but failed to prove the criminal history necessary to elevate this offense from a misdemeanor. *Id.* At the beginning of the case, the parties agreed to stipulate to Mr. Killian's criminal history. RP at 22, 26-27. The state did not offer this stipulation into evidence during its case in chief. RP at 138.

Mr. Killian moved to dismiss for failure to prove every element of the charged offense. *Id.* The state moved to reopen its case in chief in order to admit the stipulation. RP at 139. The trial court found no prejudice to Mr. Killian. RP at 141. The court denied Mr. Killian's motion to dismiss and permitted the state to reopen its case. RP at 141-42. The stipulation was admitted into evidence and read to the jury immediately before Mr. Killian's testimony. RP at 156.

Before he testified, Mr. Killian wanted to swear an oath according to his religious principles. RP at 149. Specifically, he wanted to swear (not affirm) his oath on a Bible. RP at 149-50, 153. Mr. Killian attempted to bring a Bible to court, but the jail guards would not permit him to do so. RP at 149. The trial court judge repeatedly said that he had no problem with Mr. Killian swearing an oath on a Bible. RP at 149, 152. However, the court also chastised Mr. Killian for not making prior arrangements. RP at 150-51. The court expressed concern about improperly “boosting” Mr. Killian’s testimony, but acknowledged that Mr. Killian could swear on a Bible held outside the view of the jury. RP at 151-52.

Mr. Killian’s attorney asked for ten minutes to try and find a Bible at the law library. RP at 152. The court granted this request, but the attorney could not find a Bible. RP at 152-53. Mr. Killian requested to at least “swear” his oath rather than “swear or affirm.” RP at 153. The court denied this request. RP at 154-55. The court did not want to single out Mr. Killian or appear to comment on his credibility relative to other witnesses. *Id.* In the end, Mr. Killian gave the standard oath. RP at 157.

Mr. Killian testified that he did not know where Ms. Wilson lived in July 2018. RP at 168, 170. After his phone call with his daughter, Mr. Killian believed Ms. Wilson was dead. RP at 165. He was not looking for her on July 28, 2018. RP at 166. Instead, Mr. Killian testified that he was

walking along a public road on the way to see his daughter when he heard Ms. Wilson's voice. RP at 166, 172. When he saw her, he realized she was alive and expected her to call the police. RP at 172. Mr. Killian testified that he then changed his route and went to a nearby park to wait for police officers. RP at 172.

The jury convicted Mr. Killian of felony violation of a no-contact order. RP at 234. His sentencing hearing took place on November 9, 2018. RP at 242. Because of his criminal history, Mr. Killian's mandatory minimum and maximum sentences were both 60 months. RP at 250. The state did not argue for an exceptional sentence. RP at 243.

Mr. Killian's brother and sister both spoke to the court at the sentencing hearing. RP at 246-48. According to them both, Mr. Killian suffers from mental illness and has been prescribed medication. RP at 264, 248. His brother told the court that, without medication, Mr. Killian "see[s] demons." RP at 246-47. With medication, Mr. Killian "still see[s] demons, but [he] knows that they are not real." RP at 246. According to his siblings, Mr. Killian suffers from delusions and cannot accurately perceive reality. RP at 247. His siblings also provided context about July 2018. They told the court that Mr. Killian was released from jail without his medication and with "no place to go." RP at 247. A week later, the incident with Ms. Wilson occurred. RP at 165.

Despite these statements, Mr. Killian's attorney did not raise mental health or diminished capacity as mitigating factors at sentencing. RP at 244-45. Mr. Killian's attorney asked the judge to enter a sentence below the standard range but did not point to a specific mitigating circumstance to make this request. *Id.* The court trial sentenced Mr. Killian to 60 months confinement. CP 109-122. The court explained that "I don't really have a lot of discretion here," adding "there is no real basis for me to deviate downward." RP at 250, 252. Mr. Killian appeals. CP 123.

V. ARGUMENT

Numerous errors in this case deprived Mr. Killian of a fair trial and violated his constitutional rights. The trial court erred by denying his motion to dismiss and allowing the state to reopen its case. The court also violated Mr. Killian's free exercise rights by refusing to allow him to swear an oath on a Bible. The prosecutor committed misconduct by expressing his opinion of Mr. Killian's guilt to the jury. The evidence itself was also insufficient to support Mr. Killian's conviction. Finally, Mr. Killian's attorney was ineffective by failing to raise diminished capacity as a mitigating factor at sentencing. Even if each error alone was harmless, accumulated together they deprived Mr. Killian of a fair trial. This Court should reverse.

A. The Trial Court Erred by Granting the State’s Motion to Reopen its Case in Chief and Denying Mr. Killian’s Motion to Dismiss.

At the conclusion of the state’s case in chief, the state failed to establish all of the elements necessary to convict Mr. Killian of a felony. RP at 138. Specifically, the state failed to prove that Mr. Killian had prior felony convictions, elevating violation of a no-contact order from a misdemeanor to a felony. *Id.* The parties had agreed to a stipulation, but the prosecutor neglected to offer it for admission during the state’s case in chief. RP at 22, 129, 138. Mr. Killian moved to dismiss the charge. RP at 138. However, the trial court denied his motion and allowed the state to reopen its case in chief. RP at 142. The trial court erred, prejudicing Mr. Killian. This Court should reverse.

Usually, the decision about whether to grant a motion to reopen and allow a party to introduce additional evidence falls within the trial court’s discretion. *State v. Sanchez*, 60 Wn. App. 687, 696, 806 P.2d 782 (1991). Appellate courts review that decision for abuse of discretion. *Id.* A court abuses its discretion when it decides an issue on untenable grounds or for untenable reasons. *Id.*

To demonstrate that a ruling on a motion to reopen was reversible error, the moving party must show both abuse of discretion and prejudice. *State v. Brinkley*, 66 Wn. App. 844, 848, 837 P.2d 20 (1992). Prejudice

results when allowing the state to reopen its case creates potential unfairness or places the defendant at a disadvantage. *See id.* at 850. Relevant factors include (1) whether the defendant had excused witnesses who would have rebutted the new evidence; (2) whether the State had deliberately withheld evidence; (3) whether the defendant's case suffered more harm than had the evidence been offered at the proper time; (4) whether the trial court provided time for the defendant to continue the case, interview additional witnesses, and put on rebuttal witnesses; (5) whether the new evidence was highly technical; and (6) whether the nature of the testimony and the stage of the trial might place undue emphasis on it. *Id.* at 850-51.

Here, the trial court erred by allowing the state to reopen its case and by denying Mr. Killian's motion to dismiss. The court abused its discretion because the sequence of events in this case placed an undue emphasis on the felony stipulation. *See id.* at 850. The state rested its case in chief, in front of the jury. RP at 129. The court then permitted the state to reopen its case and admit the stipulation. RP at 143, 156-57. The court read the stipulation right before Mr. Killian testified. RP at 156. The timing harmed Mr. Killian more than if it was presented at the proper time because it presented the jury with his felony convictions right before Mr. Killian testified. *See Brinkley*, 66 Wn. App. at 850. This prejudiced Mr. Killian by

undermining his credibility, unfairly placing him at a disadvantage. *Id.*

This Court should reverse.

B. The Trial Court Violated Mr. Killian’s First Amendment Right to Free Exercise of Religion by Prohibiting him from Swearing or Affirming in the Manner of his Choice.

The trial court also erred by refusing to allow Mr. Killian to swear an oath on a Bible before testifying. The court’s actions violated Mr. Killian’s right to free exercise of religion. This Court should reverse and remand for a new trial.

Freedom of religion is a fundamental right “of vital importance,” protected by both the United States and Washington Constitutions. *First Covenant Church v. Seattle*, 120 Wn.2d 203, 226, 840 P.2d 174 (1992); U.S. Const. amend. I; Wash. Const. art. I, § 11. The Supreme Court has stated that “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” *Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526 (1972). The Washington Constitution is even more protective of religious freedom than the United States Constitution. *First Covenant Church v. Seattle*, 120 Wn.2d at 226. Any burden on religious free exercise must withstand strict scrutiny. *Munns v. Martin*, 131 Wn.2d 192, 199, 930 P.2d 318 (1997).

Courts apply a three-step test to decide a free exercise challenge. First, the party must have a sincere religious belief. *Id.* Second, the

challenged state action must burden the free exercise of religion. *Id.* at 200. Third, if the if the first two requirements are met, the state must prove that its actions are narrowly tailored to advance a compelling state interest. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 642, 211 P.3d 406 (2009). Here, all three steps require reversal.

1. Mr. Killian has a sincere religious belief, which motivated his desire to swear an oath on a Bible.

In order to trigger free exercise protections, “individuals must prove only that their religious convictions are sincere and central to their beliefs. The court will not inquire further into the truth or reasonableness of the individual’s convictions.” *Backlund v. Board of Comm’rs*, 106 Wn.2d 632, 639, 724 P.2d 981 (1986). The protection of the free exercise clause extends to all sincere religious beliefs because courts may not evaluate religious truth. *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051 (1982).

Here, Mr. Killian was motivated by his sincere religious beliefs. Mr. Killian is a devout Christian. He attempted to bring a Bible to court on the day he testified, but prison staff would not let him. RP at 149. The trial court explained that there is no required form for an oath, but Mr. Killian disagreed. RP at 150. According to Mr. Killian, “it seems like it would be a hollow oath if I didn’t have my Bible.” *Id.* He reiterated, “it would be a hollow oath to me.” *Id.* Mr. Killian’s desire to swear an oath on a Bible

stemmed from his “moral, ethical, or religious beliefs about what is right and wrong.” *Welsh v. United States*, 398 U.S. 333, 340, 90 S.Ct. 1792 (1970). He was thus motivated by sincere religious beliefs, triggering free exercise protections. *Id.*

2. The trial court’s refusal to accommodate Mr. Killian’s requests burdened his free exercise of religion.

The trial court’s actions also burdened Mr. Killian’s free exercise of religion. An action burdens free exercise if it “operates against a party in the practice of his [or her] religion.” *Munns*, 131 Wn.2d at 200. Here, the trial court refused to accommodate Mr. Killian’s request to swear an oath on a Bible, or to “swear” rather than “affirm” the oath. RP at 150-55. The court’s actions thus “operated against” Mr. Killian’s ability to practice his sincere religious beliefs, burdening free exercise. *Munns*, 131 Wn.2d at 200.

3. The trial court’s actions cannot withstand strict scrutiny.

Because the trial court’s actions burden Mr. Killian’s ability to practice his sincerely held religious beliefs, the state must prove that these actions pass strict scrutiny. *Northshore United Church of Christ*, 166 Wn.2d at 642. The state cannot meet this burden because the court’s actions were not narrowly tailored to serve a compelling state interest. *Id.*

Generally, compelling state interests advance necessities of national or community life such as clear threats to public health, peace, and welfare.

See, e.g., State v. Clifford, 57 Wn. App. 127, 787 P.2d 571 (1990) (requiring drivers to be licensed serves a compelling state interest); *Backlund*, 106 Wn.2d 632 (hospital has compelling interest in requiring staff physician to purchase professional liability insurance); *State ex rel. Holcomb v. Armstrong*, 39 Wn.2d 860, 239 P.2d 545 (1952) (UW rule requiring x-ray of all incoming students for tuberculosis upheld advances a compelling interest). Even where a compelling state interest exists, the state must use the least restrictive possible means to achieve that interest. *First Covenant Church of Seattle*, 120 Wn.2d at 226-27.

Washington law does not require witnesses to make any particular type of oath before testifying:

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

ER 603. This is similar to the federal rule.² Federal cases have held that courts must accommodate religious beliefs pertaining to swearing or affirming oaths. *See United States v. Ward*, 989 F.2d 1015, 1020 (9th Cir. 1992) (reversing where the trial court refused to allow the defendant to

² “Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness’s conscience.” Fed.R.Evid. 603.

swear an oath of his own invention); *Ferguson v. C.I.R.*, 921 F.2d 588 (5th Cir.1991) (reversing where the trial court insisted upon a party using a standard oath in order to testify); *Moore v. United States*, 348 U.S. 966, 75 S.Ct. 530 (1955) (per curiam) (reversing where a trial judge refused the testimony of witnesses who would not use the word “solemnly” in their affirmations for religious reasons).

The Ninth Circuit examined a similar issue in *Ward*. 989 F.2d 1015. In that case, Mr. Ward was charged with tax evasion. *Id.* at 1016. He represented himself and wanted to testify at trial. *Id.* at 1017. However, he refused to take the standard oath. *Id.* For reasons known only to him, Mr. Ward distinguished between “truth” and “honesty.” *Id.* He proposed an alternative oath that read: “Do you affirm to speak with fully integrated Honesty, only with fully integrated Honesty and nothing but fully integrated Honesty?” *Id.* The trial court refused this accommodation. *Id.* Mr. Ward offered to take both oaths, but the trial court still refused to deviate from the standard oath. *Id.* Mr. Ward did not testify at trial, and the jury convicted him of all charges. *Id.*

The Ninth Circuit reversed, holding that the trial court’s “interest in administering its precise form of oath must yield to Ward’s First Amendment rights.” *Id.* at 1019. Mr. Ward had a sincere, if idiosyncratic, religious belief about the content of his oath. *Id.* at 1018-19. There was no

indication that he sought clever language to avoid telling the truth. *Id.* at 1020; *see also United States v. Fowler*, 605 F.2d 181, 185 (5th Cir.1979) (court properly refused testimony from witness who offered to swear only to an oath that created loopholes for falsehood). The trial court abused its discretion by refusing to accommodate Mr. Ward's oath, particularly considering that Federal Rule 603 required no specific oath or affirmation. *Ward*, 989 F.2d at 1019.

Here, like in *Ward*, Mr. Killian sought to give a specific oath before testifying. He wanted to swear—not affirm—his oath on a Bible. RP at 149-50, 153. Mr. Killian attempted to bring his Bible to court in order to make his oath. RP at 149. Without a Bible, he believed he would be giving a “hollow oath,” violating his religious principles. RP at 150.

The trial court refused to accommodate Mr. Killian's request. The judge gave Mr. Killian's attorney ten minutes to find a Bible in the courthouse law library. RP at 152. When the attorney could not locate a Bible, the trial court pressed on with proceedings. RP at 152-53. Mr. Killian asked at least to “swear” rather than “affirm” the oath, but the judge refused this request as well. RP at 153-54. The court did not want to “singl[e] him out” by administering a different type of oath. RP at 154. Faced with the alternative of not testifying at all, Mr. Killian relented and gave the standard oath. RP at 155, 157.

The trial court's actions served no compelling state interest. *See Northshore United Church of Christ*, 166 Wn.2d at 642. The court seemed concerned about delaying the proceedings, stating that this was a "predictable kind of problem" that Mr. Killian "should have provided for." RP at 151. The court was also concerned about "boosting," or making Mr. Killian's testimony seem more or less credible because he swore on a Bible or delivered a different type of oath. RP at 151, 154.

Neither of these justifications amount to a compelling state interest sufficient to interfere with free exercise of religion. Getting a Bible for Mr. Killian would likely take an hour. At the very most, proceedings would have been delayed a day so that Mr. Killian could bring his Bible from jail. Avoiding a one-day delay of proceedings is not an "interest[] of the highest order" that cannot be "otherwise served." *Yoder*, 406 U.S. at 215.

Treating all witnesses fairly is arguably a compelling state interest, but the court's actions were not narrowly tailored. The court admitted that Mr. Killian could swear on a Bible, held out of view of the jury, so that his testimony was not improperly boosted. RP at 152. Additionally, other courts have upheld a witness's right to give an oath using slightly different language, even though this arguably singles him out. *See Ward*, 989 F.2d 1015; *Ferguson*, 921 F.2d 588; *Moore*, 348 U.S. 966. Here, the trial court's actions burdened the free exercise of Mr. Killian's religion without

narrowly advancing a compelling state interest. This Court should reverse and remand for a new trial. *See Northshore United Church of Christ*, 166 Wn.2d at 642.

C. The Prosecutor Improperly Commented on Mr. Killian’s Guilt During Opening Statements.

During opening statements, the prosecutor expressed his personal opinions about this case. Specifically, he told the jury that “a crime has been committed,” adding “I believe that the only answer is the defendant is guilty.” 10/31/18 RP at 17. This Court should also reverse because the prosecutor improperly commented on Mr. Killian’s guilt.

The right to a fair trial is a fundamental liberty secured by the United State and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). A “[f]air trial’ certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011)

(alteration in original) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Both requirements are met in this case.

1. The prosecutor committed misconduct by expressing his personal belief to the jury that Mr. Killian was guilty.

The prosecutor committed misconduct on this case by clearly and repeatedly expressing his personal opinion that Mr. Killian was guilty. It is well established that a prosecutor cannot use his position of power and prestige to sway the jury. *In re Glasmann*, 175 Wn.2d 696, 706, 286 P.3d 673 (2012). A prosecutor may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case. *Id.* Such an opinion is "likely to have significant persuasive force with the jury" due to the "prestige" of the office and the "fact-finding facilities presumably available" to prosecutors. *Id.* (internal quotations omitted).

Many Washington cases warn of the danger of a prosecutor expressing a personal opinion of guilt. *See, e.g., State v. McKenzie*, 157 Wn.2d 44, 53, 134 P.3d 221 (2006) (finding it improper for a prosecutor to express his individual opinion that the accused is guilty, independent of the

testimony in the case); *State v. Dhaliwal*, 150 Wn.2d 559, 577, 79 P.3d 432 (2003) (permitting latitude to attorneys to argue the facts in evidence and reasonable inferences therefrom, but prohibiting statements of personal belief of a defendant's guilt or innocence); *State v. Stith*, 71 Wn. App. 14, 21-22, 856 P.2d 415 (1993) (deeming a prosecutor's comment in closing argument that the appellant "was just coming back and he was dealing [drugs] again' impermissible opinion "testimony"); *State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (concluding it was error for a prosecutor to tell the jury he "knew" the defendant committed the crime).

The Washington Supreme Court examined this issue in *Monday*, 171 Wn.2d 667. In that case, the prosecutor made a "variety of improper comments during opening statements and closing argument," including expressing his personal belief about the strength of the state's case. *Id.* at 676-77. The Court reversed, holding that the prosecutor committed misconduct by improperly commenting on "the guilt and veracity of the accused." *Id.* at 677.

Here, like in *Monday*, the prosecutor improperly expressed his personal opinion of Mr. Killian's guilt in his opening statement. He described this as a "very straightforward case." 10/31/18 RP at 17. He said that "[w]e have had some fun during jury selection. We have had some laughs, but it's time to get serious at this point. **A crime has been**

committed.” *Id.* (emphasis added). He ended by stressing, **“I believe that the only answer is the defendant is guilty.”** *Id.* (emphasis added).

Declaring that “a crime has been committed” amounts to an opinion of Mr. Killian’s guilt. Stating “I believe the only answer is the defendant is guilty” expresses the prosecutor’s personal opinion about this case. These statements improperly threw the weight of the prosecutor’s authority behind his opinions, not the evidence. The prosecutor committed misconduct by expressing a personal opinion on Mr. Killian’s guilt. *See Monday*, 171 Wn.2d at 677.

2. The prosecutor’s misconduct prejudiced Mr. Killian by improperly influencing the jury.

The prosecutor’s misconduct prejudiced Mr. Killian. Prejudice requires showing a substantial likelihood that the misconduct affected the jury verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). Mr. Killian did not object at trial. Thus, Mr. Killian must show that a jury instruction would not have cured the prejudice. *Thorgerson*, 172 Wn.2d at 443. “[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.” *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011).

The Washington Supreme Court examined prosecutorial misconduct in *Glasmann*, 175 Wn.2d 696. In that case, the prosecutor improperly expressed his personal belief that Mr. Glasmann was guilty. *Glasmann*, 175 Wn.2d at 699. The prosecutor used PowerPoint slides during closing argument, showing pictures superimposed with the prosecutor's own commentary. *Id.* at 701. Several slides depicted pictures of Mr. Glasmann with "GUILTY" superimposed over them. Defense counsel did not object. *Id.* at 702.

The Washington Supreme Court reversed, holding that the prosecutor committed misconduct by expressing his personal opinion of Mr. Glasmann's guilt. *Id.* at 707. The prosecutor's conduct prejudiced Mr. Glasmann by tainting the jury's assessment of his mental state, a necessary determination for the crimes charged. *Id.* at 708. The Court held that "[a] prosecutor could never shout in closing argument that 'Glasmann is guilty, guilty, guilty!'" and it would be highly prejudicial to do so." *Id.*

Here, like in *Glasmann*, the prosecutor expressed to the jury his personal belief that Mr. Killian was guilty. 10/31/18 RP at 17. As explained above, this amounted to misconduct. Mr. Killian was prejudiced by this misconduct because, like in *Glasmann*, his mental state was central to the case. Mr. Killian was charged with violating a no-contact order, a crime that requires the accused to act "knowingly." RCW 26.50.110(1). This was

the same mental state at issue in *Glasmann*. 175 Wn.2d at 708. The prosecutor's statements prejudiced Mr. Killian by improperly influencing the jury's assessment of his mental state, requiring reversal.

D. Insufficient Evidence Supported Mr. Killian's Conviction.

The state also presented insufficient evidence to support Mr. Killian's conviction. Specifically, the state failed to prove beyond a reasonable doubt that Mr. Killian knowingly or willfully violated the no-contact order protecting Ms. Wilson. Instead, the evidence showed that Mr. Killian's contact with Ms. Wilson was accidental, and that he terminated contact immediately. This Court should reverse.

“The State must prove every element of a crime beyond a reasonable doubt for a conviction to be upheld.” *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (quoting *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). To determine whether sufficient evidence supports a conviction, courts view the evidence in the light most favorable to the state and determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182, 185 (2014).

A claim of insufficient evidence admits the truth of the state's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and

direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Under RCW 26.50.110, a defendant commits the offense of violating a no-contact order when he knowingly has contact with another, knowing that a no-contact order exists and prohibits the contact. *State v. Clowes*, 104 Wn. App. 935, 943-44, 18 P.3d 596 (2001), *disapproved on other grounds*, *State v. Nonog*, 169 Wn.2d 220, 237 P.3d 250 (2010). The offense has three essential elements: willful contact with another, the prohibition of such contact by a valid no-contact order, and the defendant's knowledge of the no-contact order. *State v. Washington*, 135 Wn. App. 42, 49, 143 P.3d 606 (2006) (quoting *Clowes*, 104 Wn. App. at 944). The element of willfulness requires a purposeful act. *State v. Sisemore*, 114 Wn. App. 75, 78, 55 P.3d 1178 (2002).

In order to violate a no-contact order, the accused must act with intent. *Id.* (citing *State v. Danforth*, 97 Wn.2d 255, 258, 643 P.2d 882 (1982)). Accidental or inadvertent contact with the protected party does not amount to a criminal offense if the accused immediately breaks off the contact. *Id.* For example, in *Sisemore*, the defendant was charged with violating a no-contact order for walking down the street with the protected

party. *Id.* at 76. He maintained that the contact was accidental and thus not criminal. *Id.* at 77. The Court of Appeals affirmed, holding that even if the contact was accidental, the defendant could and should have terminated contact immediately. *Id.* at 78.

Here, substantial evidence does not support the conclusion that Mr. Killian knowingly or willfully violated a no-contact order. Unlike in *Sisemore*, Mr. Killian had accidental contact with Ms. Wilson, which he immediately broke off. Mr. Killian was walking down a public street when he happened upon Ms. Wilson's house. RP at 171. He did not know where she lived.³ RP at 168, 170. According to Ms. Wilson's testimony, Mr. Killian was on the steps by the gate to her property. RP at 55. Both Ms. Wilson and Mr. Killian testified that they had a very brief verbal exchange, and then Mr. Killian immediately left. RP at 56-58, 172.

This evidence is not sufficient to establish more than accidental contact, which Mr. Killian immediately terminated. It is extremely unfortunate that Mr. Killian walked past Ms. Wilson's house. She understandably felt fearful, upset, and anxious upon seeing him so

³ At most, the state's evidence establishes that Mr. Killian knew that Ms. Wilson lived at Brookdale Mobile Home Park and knew what car her son drove. RP at 60-62. Ms. Wilson did not tell Mr. Killian her address. RP at 81. She did not tell him the name of the town, county, or even state where she lived. *Id.* Her name was not on her trailer or her mailbox. *Id.*

unexpectedly. However, that is not sufficient to find him guilty beyond a reasonable doubt. A reasonable trier of fact would not conclude that Mr. Killian knowingly or willfully violated the no-contact order by unwittingly walking past Ms. Wilson's house, particularly when he terminated contact immediately. *See Sisemore*, 114 Wn. App. at 78. This Court should reverse based on insufficient evidence.

E. Mr. Killian Received Ineffective Assistance When his Trial Counsel Failed to Raise Diminished Capacity as a Mitigating Factor at Sentencing.

This Court should also reverse because Mr. Killian was denied effective assistance of counsel at his sentencing hearing. Both his brother and his sister informed the court at sentencing that Mr. Killian has longstanding mental health issues requiring medication. RP at 246-48. When he is unmedicated, Mr. Killian has hallucinations, "sees demons," and cannot accurately perceive reality. RP at 246-47. Despite this, his trial counsel failed to raise diminished capacity as a mitigating circumstance. RP at 244-45. The trial court sentenced Mr. Killian to 60 months incarceration (both the mandatory minimum and maximum sentence), in part because no mitigating circumstances were presented. RP at 252. This Court should reverse and remand.

Every criminal defendant has a constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104

S.Ct. 2052 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A claim of ineffective assistance presents a mixed question of fact and law reviewed de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). Ineffective assistance occurs when (1) counsel's performance was deficient, and (2) this deficient performance prejudiced the client. *Hendrickson*, 129 Wn.2d at 77. Both requirements are met here.

1. Reasonable trial counsel would have investigated diminished capacity as a mitigating factor for sentencing.

Mr. Killian's trial counsel performed deficiently by failing to investigate his mental capacity as a mitigating factor at sentencing. Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Generally, courts assume that trial counsel is effective. *State v. Crawford*, 159 Wn.2d 86, 98, 147 P.3d 1288 (1999). However, a defendant overcomes this presumption by demonstrating "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *Id.*

Effective assistance of counsel includes a duty to adequately investigate potential mental health defenses. *State v. Fedoruk*, 184 Wn. App. 866, 880, 339 P.3d 233 (2014). Generally, courts will not find counsel

ineffective for “strategic choices made after thorough investigation of law and facts relevant to plausible options.” *Strickland*, 466 U.S. at 690-91. However, counsel may be ineffective by making strategic choices “after less than complete investigation.” *Id.*

Counsel’s failure to investigate factors relevant to sentencing can amount to ineffective assistance. *State v. Estes*, 188 Wn.2d 450, 462-63, 395 P.3d 1045 (2017) (counsel was ineffective by failing to adequately investigate the impact of a deadly weapon enhancement on defendant’s sentence). Generally, a trial court must impose a sentence within the standard range. *State v. Law*, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). However, a court can impose an exceptional sentence below the standard range if it finds that a “defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.” RCW 9.94A.535(1)(e).

At Mr. Killian’s sentencing hearing, his brother and his sister both discussed his mental health issues. His brother said that Mr. Killian “suffers from a diagnosed mental illness” that makes him “see demons.” RP at 246-47. Mr. Killian takes medication for his mental illness. *Id.* According to his brother, when he is on medication Mr. Killian “still see[s] demons” but “know[s] that they are not real.” RP at 246. Mr. Killian was released from jail in July 2018 about a week before the incident with Ms. Wilson. He was

released “without medication” and was homeless, with “no place to go.” RP at 247. Mr. Killian’s sister confirmed that he has a mental illness, was released from jail without medication, and can be “pretty manic” when unmedicated. RP at 248.

Under these circumstances, reasonable trial counsel would have investigated diminished capacity as a mitigating factor for sentencing. Mr. Killian’s untreated mental illness at the time of the alleged offense raises the possibility that his ability to “appreciate the wrongfulness of his conduct” or “conform his conduct to the requirements of the law” was “significantly impaired.” *See* RCW 9.94A.535(1)(e). Failing to investigate and raise diminished capacity as a mitigating factor served no strategic purpose and amounted to deficient performance. *See Strickland*, 466 U.S. at 690-91.

2. Counsel’s deficient performance prejudiced Mr. Killian.

Mr. Killian also suffered prejudice. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A “reasonable probability” is lower than a preponderance but more than a “conceivable effect on the outcome.” *Strickland*, 466 U.S. at 693-94. It exists when there is a probability

“sufficient to undermine confidence in the outcome.” *Estes*, 188 Wn.2d at 458.

As explained above, diminished capacity is a mitigating circumstance that can be raised at sentencing. RCW 9.94A.535(1)(e). To establish this mitigating factor, the record must show both (1) the existence of the mental condition and (2) the connection between the condition and the defendant’s ability to appreciate the wrongfulness of his conduct or conform his conduct to the law. *See State v. Rogers*, 112 Wn.2d 180, 185, 770 P.2d 180 (1989).

Here, there was a reasonable probability of a different sentence had Mr. Killian’s counsel raised diminished capacity as a mitigating circumstance. First, Mr. Killian has a history of mental illness and was prescribed medication at one point. RP at 246-48. Testimony from his prescribing mental health professional likely would have established the existence of a mental health condition. *Rogers*, 112 Wn.2d at 185.

Second, Mr. Killian’s brother stated that Mr. Killian experiences visual hallucinations when he has not taken his medication. RP at 246-47. A person experiencing hallucinations and disconnecting from reality likely cannot appreciate the wrongfulness of his conduct or conform it to the law. *Rogers*, 112 Wn.2d at 185. Thus, under the test set out in *Rogers*, presenting diminished capacity most likely would have met the criteria for mitigating

Mr. Killian's sentence. Trial counsel's failure to raise this evidence undermined the outcome of this proceeding, requiring reversal. *Estes*, 188 Wn.2d at 458.

F. Cumulative Error Denied Mr. Killian a Fair Trial.

Even if each of the errors described above are not sufficient for reversal, their cumulative effect denied Mr. Killian a fair trial. This Court should reverse and remand because of the pervasiveness of the errors in this case.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Under the cumulative error doctrine, a defendant may be entitled to a new trial when several errors produce a trial that is fundamentally unfair. *See, e.g., State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (accumulated errors, including permitting inadmissible evidence and prosecutorial discovery violations, required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)

(reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

In this case, the errors made by the trial court, prosecutor, and defense counsel each warrant reversal. However, even if each error standing alone is harmless, the accumulation of these errors deprived Mr. Killian of a fair trial. *See Coe*, 101 Wn.2d at 789. This Court should reverse. *State v. Venegas*, 155 Wn. App. 507, 526-27, 228 P.3d 813 (2010).

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VI. CONCLUSION

Kurt Killian's conviction for violating a domestic violence no-contact order must be reversed due to pervasive and significant errors at his trial and sentencing. The trial court erred by denying Mr. Killian's motion to dismiss, allowing the state to reopen its case in chief, and refusing to accommodate Mr. Killian's right to swear an oath on a Bible before testifying. The prosecutor committed misconduct by stating his personal opinion about Mr. Killian's guilt in opening statements. The evidence also was insufficient to support a conviction. Finally, Mr. Killian's trial attorney provided ineffective assistance by failing to raise diminished capacity as a mitigating factor at sentencing. These errors denied him a fair trial and violated his constitutional rights. Mr. Killian respectfully requests that this Court reverse his conviction and remanded for a new trial.

RESPECTFULLY SUBMITTED this 16th day of May, 2019.



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No. 52656-5-II

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

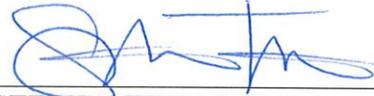
On May 16, 2019, I electronically filed a true and correct copy of the **Opening Brief by the Appellant, Kurt Killian**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

Kristie Barham (X) via U.S. mail
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SIGNED in Port Orchard, Washington, this 16th day of May,

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