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Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31517-7-III

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STATE OF WASHINGTON, Respondent,

v.

MICHAEL LEE WEST, JR., Appellant.

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APPELLANT'S BRIEF

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## **I. INTRODUCTION**

Michael Lee West, Jr. was serving a prison sentence in the Walla Walla State Penitentiary, in Walla Walla, Washington for first degree murder and second degree rape before he was transferred to Airway Heights Correctional Center, in Airway Heights, Washington. Shortly after his transfer, West attacked his cell mates, Chad Bolstad and Gary Welch, on October 10, 2010. After several continuances and stays to evaluate his competency, West was found competent to go to trial on charges of first degree assault and second degree assault, respectively. After pleading not guilty by reason of insanity, West was tried before a jury in February 2013. The jury rejected West's insanity plea, and found him guilty as charged. West was ultimately sentenced to 50 years in prison.

Several errors during the trial phase significantly prejudiced West and deprived him of a fair trial. First, West's attorney rendered ineffective assistance of counsel by failing to move the court to enter a judgment of acquittal by reason of insanity. Second, West's attorney rendered ineffective assistance of counsel by failing to object to evidence admitted where the State elicited prejudicial and misleading remarks from the expert witness during direct examination. Because of this cumulative error, the result of the trial cannot be relied upon as just.

## **II. ASSIGNMENTS OF ERROR**

**ASSIGNMENT OF ERROR 1:** Defense counsel rendered ineffective assistance of counsel when he failed to move the court to enter judgment of acquittal by reason of insanity.

**ASSIGNMENT OF ERROR 2:** Defense counsel rendered ineffective assistance of counsel when he failed to object to prejudicial and misleading testimony when the State elicited improper testimony upon direct examination of the State's expert witness.

**ASSIGNMENT OF ERROR 3:** Cumulative error deprived West of a fair trial.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**ISSUE 1:** Whether defense counsel rendered ineffective assistance of counsel when:

- (a) Trial counsel failed to move the court to enter a judgment of acquittal by reason of insanity, when West pled and proved that defense and the court would have acquitted had the defense made the motion;

(b) The State elicited prejudicial and misleading testimony from the State's expert witness William Grant, M.D. on rebuttal, and defense counsel failed to object;

ISSUE 2: As the result of these cumulative errors, West's trial was rendered fundamentally unfair.

#### **IV. STATEMENT OF THE CASE**

Michael Lee West, Jr. is a 37 year-old male, mentally ill, with an extensive criminal history. RP 432. In 2004, while West was in the Spokane County Jail on pending forcible rape charges, he attacked and killed his cell mate. RP 463-465. In 2005, West received a 548 month sentence for a conviction for first degree murder and a sentence of 280 months to life for a conviction for rape in the second degree. He was incarcerated in the Walla Walla State Penitentiary. CP 421-423.

In 2009, West became clearly, unequivocally, psychotic. RP 466. West developed extreme religiosity, rapid and tangential speech, and lack of sleep. CP 162, RP 466. He spoke rapidly about the coming of Jesus, said that he was giving everyone their only warning, that God was unhappy with everyone, that he had learned Hebrew in one day because God had taught it to him. *Id.* He believed that he was an angel as well as a prophet of God. *Id.* God was mad with everybody. *Id.* God paid

Barack Obama four million dollars to get him out of prison and Barack Obama was coming by with a limousine to pick him up. RP 466. West stayed up and kept other people up ranting. *Id.* He was one of the kings of the twelve tribes of Israel. *Id.* The Israelis had paid \$400,000 for his release so they could take him back to Israel because he was one of their kings. *Id.* This type of behavior went on and on. *Id.* West was admitted to the mental health unit after staying up two nights chanting, and was given antipsychotic medication. CP 162, RP 466.

West was placed on a very heavy dose of antipsychotic medication and he was eventually stabilized. RP 466-467. He was diagnosed with schizoaffective disorder, with delusions. CP 152. West still thought he was a prophet of God, but he was stable enough to be working in the kitchen. RP 467. Believing it would be safe to house him at Airway Heights Corrections Center, where security is lower, DOC transferred him. *Id.*

Before West was transferred to Airway Heights, he announced his intention to go off medication because he said that he was not mentally ill. *Id.* West then stopped taking his medication. *Id.* On October 1, 2010, when he was processed into Airway Heights, he reported himself as not

being mentally ill and not being under treatment. Nobody treated him.  
CP 163, RP 467-469.

On October 10, 2010, at Airway Heights, West was housed in a cell with inmates Chad Bolstad and Gary Welch. RP 261. When Welch returned from Bible Study, West and Bolstad were already inside the cell. RP 262. According to Welch, West was acting crazy and talking about God and the archangels. RP 263. He was pacing around and saying he was the devil and both Welch and Bolstad had to worship him because the end of times was coming. This went on until lights out. RP 263-264.

When lights out came, West attacked Bolstad and ordered him to bow before him and to worship him as God. RP 264. Bolstad refused and West knocked Bolstad to the ground in front of the cell door, punching and kicking him in the head violently. RP 264-265. Welch saw West digging at Bolstad's eyes with his thumbs and saw him remove one of Bolstad's eyes after Bolstad was on the ground, knocked out in a pool of his own blood. RP 266. During the attack on Bolstad, West was chanting, "Give me the apple, give me the apple." RP 266. At one point Welch got off his bunk to try to stop the situation, but West then turned toward Welch and told him "Get on the bunk, bitch, or I'll kill you." RP 267.

Bolstad pushed his way past West towards the door, hit the cell's panic button, and started screaming for help. RP 268. West turned and looked at Welch and said, "Nobody is coming for you." RP 267. West grabbed a towel, wrapped it around Welch's neck and started to strangle him with it, and hit him in the head several times. RP 269.

At approximately 10:10 PM, Corrections Officers McClaughlin and Ramirez heard screaming coming from A-Wing 33 cell. RP 97, 106. When they arrived at the cell, West had Welch on the floor in a choke hold, hitting him in the head with closed fists. RP 98-99, 106. Bolstad was lying on the floor on his back next to the door bleeding from his eyes, unconscious and unresponsive. RP 108. West was yelling and talking about his religious beliefs. RP 102.

Staff described West as being in a squatting position. RP 128. He remained in a squatting position and asked Sergeant Grimes if Grimes was his god. RP 129. He was directed to lie down on the floor and place his hands behind his back. *Id.* He did not comply but yelled, "I will obey your command if you tell me you are my god!" RP 129-130. He was again ordered to lay down on the floor with his hands behind his back. RP 130. He did not comply. RP 130. He remained in a squatting position, facing the door and yelling, "Are you my god?" RP 130. Sergeant

Baldwin directed West to stay on the floor and the cell door was opened. Officers slid Bolstad (who had been lying on his back with his head at the cell door) to the floor and placed him on a back board while West continued his religious tirade. RP 118, 131-132. One of Bolstad's eyeballs was lying on his cheek. RP 119, 132.

A team was assembled to remove West from the cell. RP 135-136. He was again ordered to lie on the floor with his hands behind his back. RP 136. The team placed him in restraints and he was escorted from the cell. *Id.* He complied until they approached the front door of the T-Unit, at which point he dropped to his knees and said some sort of prayer, which sounded like Hebrew. RP 137, 146, 166. Eventually he complied with orders to stand. RP 138, 146, 166. Witnesses described him as ranting and raving, shouting, "I am Satan, bow to me! President Clinton will pick me up in a limousine tomorrow morning," and "I am God, bow down to me." CP 163.

West was taken to a segregation unit housed in another building and placed in a holding cell. RP 150. During this time, he continually claimed to be Lucifer and said he was sent to be the king of the earth. RP 163. According to Investigator Servadius, when West was moved from

an isolation cell to a segregation cell, he stated, "I just killed my chimo celli and pulled his fucking eyes out." CP 164.

When a camera was placed in a room where West had been segregated, he look at the camera and said, "My debut" then went on to chant that he was Lucifer and all shall obey him. CP 165. Video footage from the segregation cell shows West saying, "That dude I killed was a baby fucker...very disgusting...doesn't deserve to live when he'll hurt little children but when a man comes at you, I put my thumbs in his brain man and popped his eyes out what he deserves he got." CP 165.

When Detective Justice and Investigator Servadtius contacted West in the segregation cell, Justice heard West screaming and chanting that he was Lucifer and all should praise him. CP 165. When Justice introduced himself, West told him, "I am Lucifer. You should praise me." *Id.* West said he was going to murder Justice, his family, and 144,000 others who did not follow his word. *Id.*

He was placed alone into a segregation unit cell pending investigation of the incident. RP 371. Although he was housed alone during this time period in the segregation unit cell, he could still communicate with other inmates in adjoining cells. RP 217. Correctional Officer Maurice Knight was stationed at an observation booth near the

segregation unit which housed West. RP 215-216. Knight had the ability to monitor communications between the inmates with the aid of a speaker. RP 217. He turned on this speaker to aid his auditory observation because of West's recent alleged violent behavior. He overheard an inmate ask West, "Hey West. What are you in here for?" West responded, "I killed my chimo celli then gouged his fucking eyes out." CP 164, 359, RP 217. West further stated: "My celli, he was a child molesting mother fucker." CP 359, RP 218.

Bolstad was transported to Sacred Heart Medical Center. One of Bolstad's eyes was torn out of its socket. The other was damaged beyond repair. RP 253. After several surgeries over the course of 6 months, Bolstad had the other eye removed as well. RP 253-258.

Over the next few months, West had several evaluations and was placed on antipsychotic medication. CP 166. After several continuances and stays to evaluate his competency, West was found competent to go to trial on May 21, 2012, and arraigned on charges of first degree assault and second degree assault. CP 1-2, 184. After pleading not guilty by reason of insanity, West was tried before a jury in February 2013.

After the State presented its case-in-chief, defense counsel presented it's expert witness, psychologist Kenneth Muscatel, Ph.D.,

regarding West's insanity defense. RP 390. Muscatel testified that West has a mental disease or defect. RP 412. Muscatel does not have any doubt that West understood the nature and quality of his actions. RP 417. But Muscatel testified that West did not understand the wrongfulness of his conduct at the time because West was extremely impaired and delusional. RP 417-419. On rebuttal, the state called its expert witness, William Grant, MD. RP 454. Grant agreed that West has a mental disease or defect, but Grant disagreed with Muscatel's opinion of the second prong regarding whether West understood the nature and quality of his actions, and opined that West did know right from wrong. RP 478.

Defense counsel did not move the trial court for acquittal. The jury rejected West's insanity plea, and found him guilty as charged. The trial court ultimately sentenced West to an exceptional sentence of 600 months in prison. West timely appeals.

## **V. ARGUMENT**

### **A. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL THAT PREJUDICED WEST'S DEFENSE**

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Claims of ineffective

assistance of counsel are reviewed de novo. *State v. Grier*, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009).

“To establish ineffective assistance of counsel, the defendant must show that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense.” *State v. Turner*, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Prejudice is established where the defendant shows that the outcome of the proceedings would likely have been different but for counsel’s deficient representation. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

Where the record shows an absence of conceivable *legitimate* trial tactics or theories explaining counsel’s performance, such performance falls “below an objective standard of reasonableness” and is deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). In short, unreasonable trial tactics justify reversal. *Grier*, 150 Wn. App. at 633.

1. Counsel’s performance was deficient because he failed to move the Court to acquit West by reason of insanity.

West claims that defense counsel rendered ineffective assistance when he failed to move the court to acquit West by reason of insanity, under RCW 10.77.080. Specifically, West argues that (1) defense

counsel's failure to move the court to acquit the defendant by reason of insanity before jury instructions fell below the standard of a reasonable prudent attorney; and (2) that defense counsel's failure caused prejudice because it's more likely than not that the trial court would have granted the motion to acquit by reason of insanity, and because the horrifying nature of the case required the trial court's objective evaluation.

In Washington, the legislature recognized the defense of insanity in RCW 9A.12.010, which states as follows:

To establish the defense of insanity, it must be shown that:

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

RCW 9A.12.010. Although recognized by the legislature, the right to present a defense of insanity is also a constitutional right of due process guaranteed under Article 1, section 3 of the Washington Constitution and

the Fourteenth Amendment of the United States Constitution. *State v. Strasburg*, 60 Wash. 106, 124-125, 110 P. 1020 (1910).

Under RCW 10.77.030, insanity is an affirmative defense in the state of Washington, which must be pled in writing and proved by a preponderance of the evidence. This statute states:

- (1) Evidence of insanity is not admissible unless the defendant at the time of arraignment or within ten days thereafter or at such later time as the court may for good cause permit, files a written notice of his or her intent to rely on such a defense.
- (2) Insanity is a defense which the defendant must establish by a preponderance of the evidence.
- (3) No condition of mind proximately induced by the voluntary act of a person charged with a crime shall constitute insanity.

RCW 10.77.030.

The legislature also adopted RCW 10.77.080, which states:

The defendant may move the court for a judgment of acquittal on the grounds of insanity: PROVIDED, That a defendant so acquitted may not later contest the validity of his or her detention on the grounds that he or she did not commit the acts charged. At the hearing upon the motion the defendant shall have the burden of proving by a preponderance of the evidence that he or she was insane at the time of the offense or offenses with which he or she is charged. If the court finds that the defendant should be acquitted by reason of insanity, it shall enter specific findings in substantially the same as set forth in RCW 10.77.040. If the motion is denied, the question may be submitted to the trier of fact in the same manner as other issues of fact.

RCW 10.77.080. Thus, under this statute, a defendant who gives written notice of the intent to rely upon the defense of insanity gets two chances for acquittal. The first chance occurs when the defense moves the court to acquit by reason of insanity. *State v. Box*, 109 Wn.2d 320, 745 P.2d 23 (1987). If the court declines to do so, then the defendant may take the case to the jury and make the same argument. *State v. Barrows*, 122 Wn.App. 902, 96 P.3d 438 (2004).

Under RCW 10.77.080, the trial court acts as a finder of fact when it decides a motion for acquittal by reason of insanity. *State v. Huff*, 64 Wn.App. 641, 655, 826 P.2d 698 (1992). As a result, the standard of review for an appeal from a denial of such a motion is the substantial evidence rule. *State v. Sommerville*, 111 Wn.2d 524, 760 P.2d 932 (1988). Under this rule, the court of appeal reviews the trial court's factual findings and must affirm if there is any evidence to support those findings. *State v. Klein*, 156 Wn.2d 103, 124 P.3d (2005).

The practical effect of RCW 10.77.080 is that it gives the defendant two chances of acquittal by reason of insanity. It is the functional equivalent of allowing a defendant to go to a bench trial and get a second chance for acquittal in front of a jury if the court refuses to acquit. The reason for this unusual result is that under RCW 10.77.080,

the court either grants the motion and acquits the defendant, or the court denies the motion without finding the defendant guilty. As a result, for a defendant seeking acquittal by reason of insanity, there is no potential detriment from bringing the motion for acquittal, and a very real likelihood that a jury trial will not be necessary. Thus, there are no tactical advantages for a defendant seeking acquittal by reason of insanity to abandon a motion a motion for acquittal under RCW 10.77.080, particularly when graphic and violent evidence of the crime is presented that necessarily inflames the jury's passions and invites an emotional response.

Under RCW 10.77.080, there are no procedural time limits for bringing the motion. Nothing within the statute requires that the motion be brought pretrial as opposed to any point prior to the case being submitted to the jury for its decision. Even that last requirement is questionable, although it might be argued from the last sentence of the statute, which states as follows: “[i]f the motion is denied, the question may be submitted to the trier of fact in the same manner as other issues of fact.” However, a close look at this sentence does not reveal a legislative intent to set a time limit. Rather, it reveals a statement by the legislature that a negative decision by a judge on motion to acquit by reason of insanity does not preclude a jury review of the same issue. Thus, in the

present case, there was no procedural bar preventing the defendant's counsel from moving the court for acquittal by reason of insanity at the close of the state's rebuttal case. In addition, no tactical reason existed for failing to bring the motion. Consequently, trial counsel's failure to move the court to acquit the defendant by reason of insanity following the close of the state's case on rebuttal fell below the standard of a reasonably prudent attorney, and as such, was deficient. *Turner*, 143 Wn.2d at 730.

In addition, trial counsel's failure to move the trial court to acquit by reason of insanity at the end of the state's case on rebuttal caused the defendant prejudice. In this case, a fair view of the evidence presented at trial, including the evidence from both the defense and the state's experts, indicates that the trial court would more likely than not have granted the motion and entered a judgment of acquittal.

The evidence in this case reveals that both defense expert witness Muscatel and state expert witness Grant agreed that West suffered from a major mental disorder and a delusional disorder. Both doctors agreed that they believed that West was capable of understanding the nature and quality of his act. Although Grant concluded that West understood the difference between right and wrong, Muscatel opined that West did not

understand the wrongfulness of his conduct at the time because West was extremely impaired and delusional. RP 417-419.

Thus, in this case, the evidence presented at trial through the observation of the civilian witnesses and the opinions of experts strongly supports a conclusion that West was legally insane at the time he assaulted Bolstad and Welch, particularly considering the lower burden of proof needed to establish the defense. Under this evidence, it is highly likely that the trial court would have found the defense proved by a preponderance of the evidence and entered judgment of acquittal by reason of insanity had defense counsel simply made the motion at the end of the state's case upon rebuttal. Thus, trial counsel's failure to bring the motion not only fell below the standard of the reasonably prudent attorney, but it caused prejudice, thereby denying the defendant effective assistance of counsel.

Since RCW 10.77.080 creates an unusual situation in which a defendant claiming insanity is entitled to the equivalent of two trials, the remedy for a denial of the bench trial should be a remand of this case to the trial court with instructions to allow the defense to present its motion to acquit to the trial court, which should then vacate the judgment of guilt if the trial court grants the motion. Given the fact that the case has already

been presented in its entirety to the trial court, the appropriate procedure would be for the trial court to review the evidence presented at trial, hear argument from both parties, and then grant the motion and vacate the judgment of conviction, or deny the motion and let the jury's verdict stand.

2. Counsel' performance was deficient because he failed to object to prejudicial and misleading statements when the state elicited improper testimony upon direct examination of the state's expert witness.

Defense counsel failed to object to prejudicial and misleading testimony elicited on rebuttal during direct examination of the state's expert witness. Specifically, the State elicited improper testimony from their expert witness, William Grant, M.D., on rebuttal, and defense counsel failed to object. The general rule is that witnesses are to state facts, and not to express inferences or opinions. *State v. Madison*, 53 Wn.App. 754, 760, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

To establish that counsel's failure to object to evidence constituted ineffective assistance, West must show that (1) counsel's failure to object fell below prevailing professional norms, (2) the trial court would have sustained the objection if counsel actually had made it, and (3) the result of the trial would have differed if the trial court excluded the evidence. *State v. Sexsmith*, 138 Wn.App. 497, 509, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008). "The test of the skill and competency of counsel is: After considering the entire record, was the accused afforded a fair trial[?]" *State v. Lei*, 59 Wn.2d 1, 6, 365 P.2d 609 (1961).

West must show that there is no conceivable legitimate tactic explaining counsel's performance. *Grier*, 171 Wn.2d at 33. One conceivable legitimate tactic explaining counsel's performance could exist if counsel did not want to risk emphasizing the damaging testimony with an objection. *State v. Donald*, 68 Wn.App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024 (1993).

During rebuttal testimony on direct examination from Grant, the prosecutor asked the following question:

Q: Dr. Grant, do you have an opinion as to whether or not treatment by detention in a state facility instead of a less

restrictive treatment is in the best interest of the defendant and others?

A: State facility, you mean hospital?

Q: Or other institution.

A: Well, he - - you couldn't have in a hospital. We had him in a hospital and we had him in a hospital when he wasn't psychotic. He had already committed the murder and we had to seclude him. We couldn't let him out. He didn't like seclusion. He threatened anybody who came near him or put their hands through the door. He bruised his hand or cut his hand or something and a nurse was trying to treat his hand and told her "you better stay back, because I'll get a hold of your hair and snap your neck." He had a list of staff members that he had particular grievances with who he wanted to get his hands on. He at one point said, "I ought to just go off and make you guys commit and fight me because that would be fun."

There are vulnerable patients at the hospital, really infirm, psychotic. The staff under current Medicare rules

are not allowed to defend themselves. So he is far too dangerous to be maintained in a hospital.

In terms of another State institution, yeah, the prison is equipped to manage him.

RP 476-477. Defense counsel failed to object to any of the elicited testimony. In addition, during cross-examination, defense counsel revisited the subject, asking Grant the following:

Q: A few moments ago you testified whether Mr. West should be confined to a different state hospitals or prisons, correct?

A: Correct.

Q: And it was your opinion that Mr. West should be confined to the prison?

A: Yes.

Q: So, prior to this incident, he was confined to the prison.

A: Yes.

Q: Was he confined in a cell with other people or solitary confinement?

A: I don't know.

Q: You were asked by Mr. Steinmetz whether or not he would be appropriate for an alternative, or lesser restrictive alternative. Can you explain to the jury what that means?

A: I took it to mean a hospital.

Q: Okay. Is there any way that Mr. West is ever going to go to a hospital?

A: I hope not.

RP 505-506.

In the initial exchange, the prosecutor appears to be trying to elicit testimony concerning the special verdict forms regarding insanity.<sup>1</sup> CP 402-405; *see also* RCW 10.77.040. The purpose of the special verdict questions on insanity is for the jury to first determine if a person is criminally insane, and if so then whether he should be committed to an institution or set free. *State v. Wilcox*, 92 Wn.2d 610, 612, 600 P.2d 561,

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<sup>1</sup> Question 3 states: "If your answer to Question 2 is "yes," is the defendant a substantial danger to other persons unless kept under further control by the court or other persons or institutions?" Question 4 states: "If your answer to Question 2 is "yes," does the defendant present a substantial likelihood of committing criminal acts jeopardizing public safety or security unless kept under further control by the court or other persons or institutions?" Question 5 states: "If your answer to either Questions 3 or 4 is "yes," is it in the best interests of the defendant and others that the defendant be placed in treatment that is less restrictive than detention in a state mental hospital." CP 402-405.

562 (1979). The problem in this case is that this line of questioning and Grant's answers are inflammatory, prejudicial, and misleading to the jury. Evidence whose probative value is outweighed by its potential prejudice should not be admitted. ER 403. This testimony created a strong inference that if the jury found West not guilty by reason of insanity, then he could be hospitalized instead of remaining in prison. This improperly suggested to the jury that the only possible way to keep this dangerous individual in prison is to find him guilty as charged.

Relevant evidence is admissible under Evidence Rule (ER) 401 where it has any tendency to make the existence of a fact that is "of consequence to the determination of the action" more or less probable. *State v. Hughes*, 106 Wn.2d 176, 201, 721 P.2d 902 (1986). However, under ER 403, evidence whose probative value is outweighed by its potential prejudice should not be admitted. Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision by the jury and which creates an undue tendency to suggest a decision on an improper basis. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Because the testimony elicited in this case by both the state and defense counsel is prejudicial and misleading to the jury, it creates an undue tendency to suggest that the only possible outcome of West's case that will preserve public safety is a guilty verdict.

Accordingly, because defense counsel's failure to object fell below prevailing professional norms. (the trial court would likely have sustained the objection if defense counsel actually had made it.) In light of the highly inflammatory nature of the testimony and its extremely prejudicial impact on the jury, there is a strong probability that the results of the trial would have differed if the trial court excluded the evidence. As a result, defense counsel's failure to object to the elicited testimony of Grant constitutes ineffective assistance.

3. Because of the cumulative error incurred, the result cannot be relied upon as just.

A defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. *In re Personal Restraint of Lord*, 123 Wash.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964 (1994). Absent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial. *State v. Stevens*, 58 Wash.App. 478, 498, 794 P.2d 38 (1990).

The prejudicial error in this case occurred when defense counsel failed to move the court to acquit West by reason of insanity and when defense counsel failed to object to improper, prejudicial, and misleading testimony, thereby resulting in a trial that was fundamentally unfair and

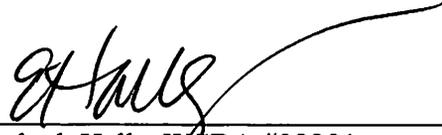
unjust. The evidence presented in this case was, simply put, horrifying. Extreme care was necessary to ensure that inflamed emotions did not direct the verdict. As such, the fact that defense counsel never asked the trial court – who is presumed to know the law and apply it without personal prejudice or emotion – to acquit as a matter of law, and the fact that defense counsel failed to object to testimony whose primary object was to show how dangerous it would be to not send West to prison, rendered the trial process fundamentally unfair by eliminating the only realistic option for acquittal. Thus, the error cannot be cured without a new trial.

## **VI. CONCLUSION**

West respectfully requests that the court find that prejudicial errors were committed below such that his convictions ought to be reversed and his case remanded for further proceedings. West's attorney rendered ineffective assistance of counsel by failing to move the trial court to acquit by insanity and failing to object to prejudicial and misleading testimony elicited by the state. These errors significantly prejudiced West's defense, depriving him of a fair trial. West's judgment and sentence should be vacated, the convictions reversed, and the case remanded for new trial.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of October,

2013.

A handwritten signature in cursive script, appearing to read "Elizabeth Halls", written over a horizontal line.

Elizabeth Halls, WSBA #32291  
Attorney for Appellant

A handwritten signature in cursive script, appearing to read "Andrea Burkhart", written over a horizontal line.

Andrea Burkhart, WSBA #38519  
Attorney for Appellant

**DECLARATION OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Mark Lindsey  
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Michael West, Jr., DOC # 726489  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 22<sup>nd</sup> day of October, 2013 in Walla Walla, Washington.

  
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Elizabeth Halls