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Court of Appeals

Division III

State of Washington

No. 34230-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CRAIG BURTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES..... 3

D. STATEMENT OF THE CASE..... 6

E. ARGUMENT 15

 1. The evidence was insufficient to prove that Mr. Burton committed second degree assault. 15

 a. The State bears the burden to prove every element of the offense beyond a reasonable doubt. 15

 b. To prove second degree assault, the State had to prove that Mr. Burton had the specific intent of causing the charged victims fear and apprehension of bodily injury through the use of a deadly weapon. 16

 c. The evidence did not prove that Mr. Burton intended to cause fear and apprehension of bodily injury. 19

 d. The evidence was insufficient to conclude that Mr. Burton had the specific intent to cause fear and apprehension in Officer Jensen. Mr. Burton was unaware of Officer Jensen’s presence in the south and his actions were directed at officers in the north..... 22

 2. Mr. Burton was deprived of his right to effective assistance of counsel through his counsel’s failure to raise a defense of diminished capacity..... 24

 a. Defendants have a constitutional right to effective assistance of counsel. 24

 b. The evidence and law supported a diminished capacity defense. Counsel was deficient in failing to raise the defense..... 25

c. The case turned on an assessment of Mr. Burton’s intent. There is a reasonable probability that, but for counsel’s failure to argue diminished capacity, Mr. Burton would have been acquitted of the second degree assault charges.....	29
3. As applied in this case, application of the firearm enhancements to the offenses denied Mr. Burton equal protection of the laws.	30
4. The trial court had authority to grant an exceptional sentence downward on the base sentencing range. The court erred in concluding that it lacked this authority.	35
5. The trial court had authority to grant an exceptional sentence by modifying the length of the firearm enhancements. The court erred in concluding that it lacked this authority.....	41
6. Despite no criminal history, Mr. Burton was sentenced to 10 years of imprisonment for harmlessly discharging a firearm during a mental breakdown. This excessive sentence is unconstitutionally cruel.....	43
a. Excessive sanctions qualify as unconstitutionally cruel punishment.	43
b. Mr. Burton’s sentence is unconstitutionally excessive. No legitimate penological interest justifies the sentence.	44
7. No costs should be awarded for this appeal.....	49
F. CONCLUSION.....	50

TABLE OF AUTHORITIES

United States Supreme Court Cases

<u>Atkins v. Virginia</u> , 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).....	43, 46
<u>City of Cleburne, Tex. v. Cleburne Living Ctr.</u> , 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).....	32
<u>Graham v. Florida</u> , 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).....	45, 46, 47
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)....	15
<u>McLaughlin v. Florida</u> , 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964).....	32
<u>Miller v. Alabama</u> , __ U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).....	46, 48
<u>Roper v. Simmons</u> , 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).....	46
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	25, 29
<u>Weems v. United States</u> , 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910).....	43

Washington Supreme Court Cases

<u>In re Per. Restraint of Brett</u> , 142 Wn.2d 868, 16 P.3d 601 (2001)	25
<u>Kaiser v. Suburban Transp. Sys.</u> , 65 Wn.2d 461, 398 P.2d 14 (1965)	40
<u>Mission Springs, Inc. v. City of Spokane</u> , 134 Wn.2d 947, 954 P.2d 250 (1998).....	32
<u>Morris v. Blaker</u> , 118 Wn.2d 133, 821 P.2d 482 (1992)	33
<u>Myrick v. Board of Pierce Cy. Comm’rs</u> , 102 Wn.2d 698, 677 P.2d 140, 687 P.2d 1152 (1984).....	32

<u>Robel v. Roundup Corp.</u> , 148 Wn.2d 35, 59 P.3d 611 (2002).....	16
<u>State v. Alexander</u> , 125 Wn.2d 717, 888 P.2d 1169 (1995)	38
<u>State v. Blazina</u> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	49
<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 396 (1995).....	17
<u>State v. Cienfuegos</u> , 144 Wn.2d 222, 25 P.3d 1011 (2001).....	25, 27
<u>State v. Conover</u> , 183 Wn.2d 706, 355 P.3d 1093 (2015)	41, 42, 43
<u>State v. Eastmond</u> , 129 Wn.2d 497, 919 P.2d 577 (1996).....	17, 18
<u>State v. Eaton</u> , 168 Wn.2d 476, 229 P.3d 704 (2010).....	25
<u>State v. Elmi</u> , 166 Wn.2d 209, 207 P.3d 439 (2009)	17, 24
<u>State v. Fain</u> , 94 Wn.2d 387, 617 P.2d 720 (1980).....	44
<u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	35
<u>State v. Griffin</u> , 100 Wn.2d 417, 670 P.2d 265 (1983).....	25, 26
<u>State v. Head</u> , 136 Wn.2d 619, 964 P.2d 1187 (1998)	16
<u>State v. Homan</u> , 181 Wn.2d 102, 330 P.3d 182 (2014)	16
<u>State v. Hutsell</u> , 120 Wn.2d 913, 845 P.2d 1325 (1993)	36
<u>State v. Kelley</u> , 168 Wn.2d 72, 226 P.3d 773 (2010)	35
<u>State v. Manussier</u> , 129 Wn.2d 652, 921 P.2d 473 (1996)	32
<u>State v. Nolan</u> , 141 Wn.2d 620, 8 P.3d 300 (2000)	49
<u>State v. O’Dell</u> , 183 Wn.2d 680, 358 P.3d 359 (2015).....	46
<u>State v. Rogers</u> , 112 Wn.2d 180, 770 P.2d 180 (1989).....	39
<u>State v. Ross</u> , 141 Wn.2d 304, 4 P.3d 130 (2000)	16
<u>State v. Ruff</u> , 122 Wn.2d 731, 861 P.2d 1063 (1993).....	33

<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	25, 26, 29, 30
<u>State v. Tilton</u> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	25
<u>State v. Vasquez</u> , 178 Wn.2d 1, 309 P.3d 318 (2013).....	16, 21
<u>State v. Witherspoon</u> , 180 Wn.2d 875, 329 P.3d 888 (2014).....	44

Court of Appeals Cases

<u>Estate of LaMontagne v. Bristol-Myers Squibb</u> , 127 Wn. App. 335, 111 P.3d 857 (2005).....	7
<u>State v. A.M.</u> , 163 Wn. App. 414, 260 P.3d 229 (2011).....	16
<u>State v. Abuan</u> , 161 Wn. App. 135, 257 P.3d 1 (2011).....	17, 23, 24
<u>State v. Berrier</u> , 110 Wn. App. 639, 41 P.3d 1198 (2002).....	33, 34, 35
<u>State v. Bradley</u> , 192 Wn. App. 1044 (2016) (unpublished).....	36
<u>State v. Bunker</u> , 144 Wn. App. 407, 183 P.3d 1086 (2008).....	40
<u>State v. Callahan</u> , 87 Wn. App. 925, 943 P.2d 676 (1997).....	18
<u>State v. Gilcrist</u> , 15 Wn. App. 892, 552 P.2d 690 (1976).....	39
<u>State v. Karp</u> , 69 Wn. App. 369, 848 P.2d 1304 (1993).....	23
<u>State v. Khanteechit</u> , 101 Wn. App. 137, 5 P.3d 727 (2000).....	40
<u>State v. Kruger</u> , 116 Wn. App. 685, 67 P.3d 1147 (2003).....	26, 28, 30
<u>State v. Marchi</u> , 158 Wn. App. 823, 243 P.3d 556 (2010).	28
<u>State v. May</u> , 68 Wn. App. 491, 843 P.2d 1102 (1993).....	32
<u>State v. Mohamed</u> , 187 Wn. App. 630, 350 P.3d 671 (2015).....	42, 43
<u>State v. Pedro</u> , 148 Wn. App. 932, 201 P.3d 398 (2009).....	34
<u>State v. Sinclair</u> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	49

Constitutional Provisions

Const. art. I, § 12.....	31
Const. art. I, § 14.....	44
Const. art. I, § 22.....	24
Const. art. I, § 3.....	15
U.S. Const. amend. VI.....	24
U.S. Const. amend. VIII.....	43
U.S. Const. amend. XIV.....	15, 30

Statutes

Laws of 1995, ch. 129, § 1.....	48
RCW 10.73.160(1).....	49
RCW 9.41.185(1).....	33
RCW 9.41.230.....	19
RCW 9.41.270(1).....	18
RCW 9.41.270(2).....	18
RCW 9.94A.533(3).....	31
RCW 9.94A.533(3)(b).....	41
RCW 9.94A.533(3)(e).....	41
RCW 9.94A.533(3)(f).....	31
RCW 9.94A.535.....	35
RCW 9.94A.535(1).....	36
RCW 9.94A.535(1)(e).....	36, 37, 39

RCW 9.94A.540(1).....	42
RCW 9.94A.540(1)(c)	48
RCW 9.94A.540(1)(b)	48
RCW 9A.08.010(1)(a)	17
RCW 9A.36.011(1).....	34
RCW 9A.36.021(1)(c)	16
RCW 9A.36.021(2)(a)	31
RCW 9A.36.045(1).....	31, 34
RCW 9A.36.045(3).....	31

Rules

CrR 6.1(d)	16
RAP 14.2.....	49
RAP 15.2(f).....	49

Other Authorities

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.20 (4th ed).....	26
11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (4th ed).....	17
INTENT, Black’s Law Dictionary (10th ed. 2014)	17

A. INTRODUCTION

Following his doctor's instructions to continue taking a medication that was causing him to suffer from suicidal thoughts, Craig Burton tried to have the police kill him. Intending to hurt no one, Mr. Burton—a skilled army veteran—discharged a gun harmlessly into some trees. Police later shot Mr. Burton. Mr. Burton survived, and his suicidal thoughts stopped once he received a change in medication. While no one else was hurt and Mr. Burton had not aimed or shot at the police, he was charged with three counts of first degree assault while armed with a firearm. After electing a bench trial, Mr. Burton was acquitted of first degree assault, but was found guilty of the lesser offenses of second degree assault based on the theory he intended to cause fear and apprehension. Due to the firearm enhancements, Mr. Burton, a young man with no criminal history and three young children, was sentenced to 10 years' imprisonment.

Because the evidence was insufficient to prove that Mr. Burton had the specific intent to cause fear and apprehension in the three officers he was charged with assaulting, the convictions should be reversed and dismissed. Alternatively, the failure by his trial counsel to raise a diminished capacity defense deprived Mr. Burton of effective assistance of counsel, requiring reversal and remand for a new trial. If the convictions are not reversed, remand for resentencing is necessary because the firearm

enhancements deprived Mr. Burton of equal protection of the laws, the trial court erroneously concluded it lacked authority to grant an exceptional sentence downward, and the sentence is unconstitutionally cruel.

B. ASSIGNMENTS OF ERROR

1. In violation the guarantees of due process under the Fourteenth Amendment to the United States Constitution and article I, § 3 of the Washington Constitution, the evidence and findings do not support the conclusion that Mr. Burton committed second degree assault.

2. To the extent it is a finding of fact and if it can be read to support a conclusion that Mr. Burton intended to specifically cause fear and apprehension of bodily harm, the trial court erred in entering Conclusion of Law (CL) 11. CP 140.

3. To the extent it is a finding of fact, the trial court erred in entering CL 29. CP 143.

4. To the extent it is a finding of fact, the trial court erred in entering CL 30. CP 143.

5. To the extent it is a finding of fact, the trial court erred in entering CL 31. CP 144.

6. In violation of the Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution, Mr.

Burton was deprived of his right to effective assistance of counsel.

7. In violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution and the prohibition against special privileges and immunities set forth in article I, § 12 of the Washington Constitution, the court erred in imposing three firearm enhancements.

8. Erroneously believing it lacked discretion, the trial court erred in denying Mr. Burton's request to grant an exceptional sentence down on his base sentence range of 15 to 20 months.

9. Erroneously believing it lacked discretion, the trial court erred in denying Mr. Burton's request to reduce the length of the firearm enhancements under the exceptional sentence provisions.

10. In violation of the prohibition against cruel punishment under the Eight Amendment to the United States Constitution and article I, § 14 of the Washington Constitution, the trial court erred in sentencing Mr. Burton to 10 years of imprisonment.

C. ISSUES

1. To prove Mr. Burton guilty of second degree assault, the evidence had to establish that Mr. Burton had the specific intent to create fear and apprehension of bodily injury in the charged victims through his use of a deadly weapon. To create an encounter where he would be killed

by police without endangering others, Mr. Burton discharged a firearm harmlessly into air. Because he did not intend to scare law enforcement, he never aimed or shot at them. Given the lack of direct evidence and the patently equivocal circumstantial evidence on Mr. Burton's intent, did the State fail to prove he specifically intended to create fear and apprehension as required for second degree assault?

2. When Mr. Burton harmlessly discharged his gun, he was aware of a group of three officers approaching from the north. He was unaware of a group of officers located to the south. The charged victim for the third count of assault was one of these officers in the south. Did the State fail to prove that Mr. Burton had the specific intent to create fear and apprehension of bodily harm in this officer when Mr. Burton was not aware of his presence?

3. When a mental condition tends to negate the requisite intent necessary to commit the charged crime, there is a valid defense of diminished capacity. When he tried to have the police kill him, Mr. Burton was suffering from a mental condition exacerbated by side effects caused by a prescription medication. He could not explain why he acted as he did. Despite the testimony of an expert and Mr. Burton about these facts, defense counsel did not present a diminished capacity defense. Was Mr. Burton deprived of effective assistance of counsel where diminished

capacity was a valid defense and the key issue was Mr. Burton's intent?

4. Equal protection principles forbid the government from making arbitrary classifications. There must be a basis in reality for the classification. Excluded from the firearm enhancement provisions is the crime of drive-by shooting, which requires a shooting that creates a substantial risk of death or serious physical harm to another. Mr. Burton safely and harmlessly discharged a firearm, but was deemed to have "assaulted" three officers and received three firearm enhancements. Was Mr. Burton deprived of equal protection of the laws because the statutory exemption arbitrarily excludes a similar, but less culpable offense?

5. Mr. Burton sought an exceptional sentence downward to zero days on his base standard range sentence of 15 to 20 months. The evidence of Mr. Burton's mental state showed that his capacity to appreciate his wrongdoing was significantly impaired, a statutory mitigating circumstance. The trial court erroneously concluded it lacked authority to grant an exceptional sentence. Should this Court remand for reconsideration of an exceptional sentence?

6. The firearm enhancement provisions do not contain language forbidding a sentencing court from reducing an enhanced sentence under the exceptional sentence provisions. In contrast, the statute setting mandatory minimums for certain crimes contains language forbidding a

sentencing court from reducing the sentence under the exceptional sentence provisions. Given the different language, did the trial court err in concluding that it lacked authority to reduce the enhanced sentence under the exceptional sentence provisions?

7. The constitutional prohibition against cruel punishment forbids excessive sanctions. Though he had no criminal history and injured no one, Mr. Burton received a ten-year sentence for the act of harmlessly discharging a firearm. This draconian result was required by the firearm enhancements provision. No legitimate penological interest justifies such an excessive sentence. As applied in this case, is the ten-year sentence unconstitutionally excessive?

D. STATEMENT OF THE CASE

Craig Burton was raised in a military family. CP 134 (FF 139); RP 660. He joined the army and served as a combat medic. CP 134 (FF 136); RP 658. During his service, Mr. Burton was stationed in South Korea. RP 658. After receiving an honorable discharge, Mr. Burton joined the national guard. CP 134 (FF 137, 143); RP 658. Around 2014, he took a job at the Mann-Grandstaff VA (Veterans Administration) Medical Center in Spokane as an intermediate care technician. CP 134 (FF 135); RP 656.

Mr. Burton was diagnosed with attention deficit hyper-activity disorder (ADHD) as a child and continued to receive treatment for this

condition as an adult. CP 132, 134 (FF 117, 120, 134); RP 635, 661. To treat and manage this condition, Mr. Burton was prescribed Adderall. CP 133-34 (FF 127, 141); RP 635-36. This treatment worked well for him while he was in the military. CP 142 (FF 134); RP 635-36. After he got out of the military, the Veterans Administration changed Mr. Burton's treatment to save money. CP 135 (FF 144-45); RP 636. This change resulted in Mr. Burton suffering from classic ADHD symptoms, such as impulsivity. RP 636-37. This caused Mr. Burton problems at work and at home with his wife. RP 636. Mr. Burton had married when he was 19 years old and had three young children. RP 696. Mr. Burton and his wife separated in early January 2015, and Mr. Burton filed for divorce shortly thereafter. RP 692-93

Mr. Burton sought a return to his prior treatment regime. RP 663. Instead, around February 2015, Mr. Burton was prescribed paroxetine (Paxil) to address issues of anger and irritability. CP 135 (FF 146); RP 637-38. These issues were byproducts of Mr. Burton's ADHD not being treated successfully. CP 132 (FF 121-22); RP 638. The Food and Drug Administration has a "black-box" warning¹ that paroxetine may increase suicidality. CP 132 (FF 123); RP 638. A person who experiences suicidal thoughts while taking paroxetine is directed to talk to their doctor. CP 133

¹ See Estate of LaMontagne v. Bristol-Myers Squibb, 127 Wn. App. 335, 349 n.17, 111 P.3d 857 (2005).

(FF 124); RP 640.

After about four weeks on the medication, Mr. Burton experienced suicidal thoughts. CP 133, 135 (FF 125, 147); RP 641, 664. He had not experienced suicidal thoughts before. CP 132 (FF 118); RP 670. Mr. Burton told his doctor, but his doctor maintained he should continue to take paroxetine. CP 135 (FF 148); RP 664. In late April, Mr. Burton attempted to commit suicide by overdosing on his medication. CP 135 (FF 149); RP 139, 641, 665-66. Mr. Burton's girlfriend, Rebecca Libby, and her mother, Karen Christopher, took Mr. Burton to the emergency room. CP 135 (FF 150); RP 126, 139, 665. Mr. Burton saw his doctor a couple of days later. RP 666. Rather than directing Mr. Burton to stop taking paroxetine, the doctor improperly doubled the dose. CP 133, 135 (FF 128, 151); RP 666. Mr. Burton did as he was instructed. RP 666.

Due to the paroxetine, Mr. Burton continued to experience suicidal thoughts. CP 133, 135-36 (FF 129, 152, 155); RP 667. On May 6, 2015, these thoughts overwhelmed Mr. Burton after he came home from work. CP 116 (FF 1); RP 668, 671. Ms. Libby, who noticed that Mr. Burton "wasn't himself," left and went to her mother's house. RP 105. Concerned that Mr. Burton might hurt himself, she spoke to her mother. CP 116 (FF 4); RP 108. Ms. Libby and Ms. Christopher decided to visit Mr. Burton and possibly take him to the hospital again. CP 116 (FF 5); RP 113-14.

Ms. Christopher spoke to Mr. Burton outside the home. CP 117 (FF 10, 13); RP 115-16; 137-39. Although Mr. Burton was drinking beer, he did not seem impaired by alcohol. CP 117 (FF 13, 16); RP 140-41. Mr. Burton was visibly upset and had been crying. CP 117 (FF 14); RP 137. Mr. Burton expressed frustrations with his pending divorce. CP 116, 136 (FF 2-3, 14, 154); RP 138. He was upset about the amount of child-support payments and believed the amount was unfair because custody of the children was evenly split. CP 116, 136 (FF 2-3, 136); RP 138, 668-69. Mr. Burton told Ms. Christopher to call the police. CP 118 (FF 15); RP 139. He indicated to Ms. Christopher that he was thinking of killing himself. RP 145-46. Ms. Christopher noticed that Mr. Burton had a small handgun. CP 118 (FF 17); RP 141. Ms. Christopher went inside the house and told her daughter she should speak with Mr. Burton. CP 118 (FF 19); RP 118. Ms. Libby went outside, but Mr. Burton told her to go away. RP 119. While Ms. Libby was outside, Ms. Christopher called 911. CP 118 (FF 19); RP 142.

Around 10:00 p.m., police responded to a report of a suicidal man with a gun and went to the area of Mr. Burton's home at 5527 N. Ash St., Spokane, Washington. CP 122-23, 128 (FF 46, 55, 83; CL 1). This is a densely populated area with many residences. Ex. 27. Mr. Burton's home was between residences and parking to the home was accessed by an

alleyway running north to south behind the home. Ex. 27; 62-73.

Officers Christopher Benesch, Sean Wheeler, and Adam Potter approached Mr. Burton's residence on foot from the north through the alley. RP 212-15, 260, 447-48. The backyard where Mr. Burton was standing was adjacent to his driveway in the alley, surrounded by a tall fence and could not be seen into. RP 218; CP 117, 139 (FF 9; CL 8). There was a gate on the fence adjacent to the driveway and the detached garage. Ex 67, 76; CP 117, 136 (FF 8, 160). Mr. Burton's and Ms. Christopher's vehicles were parked outside the gate. CP 117 (FF 8).

The officers' plan was to go to the premises unseen, observe the scene, secure Ms. Libby, and make verbal contact with Mr. Burton to see if he wanted help. CP 122, 139 (FF 47; CL 6); RP 215, 259-60.

With Officer Benesch leading in the front with a shield, Officer Wheeler in the middle, and Officer Potter in the back—also with a shield, they made their approach. CP 122, 128 (FF 48, 85); RP 260, 451. When Mr. Burton went to the gate, he saw them approaching. CP 136 (FF 160); RP 674. Based on their appearance, he concluded they were not there to talk to him. RP 674. Mr. Burton decided he wanted the police to shoot and kill him, but did not want anyone else endangered. CP 136 (FF 161); RP 675, 687, 712-13. Mr. Burton, having a military background and a father who worked in law enforcement, was familiar with the rules of

engagement. CP 134 (FF 139-40); RP 660-61. Wanting the officers to retreat temporarily, Mr. Burton, standing outside of the fence between his car and the gate, fired three rounds at some trees to the west, a safe backstop. CP 130, 137, 139 (FF 101, 103-04, 162; CL 9); RP 675-77, 680, 709. Mr. Burton did not intend to frighten the officers; rather he wanted them to react per their training. CP 136-37 (FF 157, 169-70); RP 681, 686-87.

As Mr. Burton planned, the three officers retreated.² CP 137 (FF 171); RP 678. Mr. Burton safely discharged the remaining eight rounds. CP 130-31, 137-39 (FF 101, 103-05, 163-64, 170, 175; CL 9); RP 677, 680. Around this time, the three officers heard Mr. Burton say something to the effect of “do it.” CP 122, 124, 128, 140 (FF 49, 58, 84; CL 10); RP 221, 273-74, 452. Mr. Burton then “cleared” the gun to ensure it was empty and put it on safety. CP 123, 137 (FF 53, 165); RP 679. He then stepped out into the alley with the gun directed at the ground, expecting police would shoot him after he refused to drop the weapon. CP 123-24, 128, 137 (FF 51, 54, 58, 128, 167-68); RP 235, 680.

By this point, Officer Nicholas Spolski had joined the three officers to the north. CP 129 (FF 94-96); RP 512. He confronted Mr.

² Ms. Libby, who saw Mr. Burton go outside the gate, went inside when she heard the shots, and eventually went out the front door. RP 120. Her mother, Ms. Christopher, was outside the front of the house with other officers at the time of the gunshots. RP 342-43.

Burton from about 25 to 30 yards away. CP 129 (FF 95); RP 524. After Mr. Burton refused to drop the gun, Officer Spolski shot Mr. Burton in the abdomen, and Mr. Burton collapsed onto the ground. CP 123-24, 128-30, 140 (FF 52, 58, 86-87, 97-98; CL 12, 14); RP 229, 273, 521.

Unknown to Mr. Burton when he discharged the gun, another group of officers had gathered at the south end of the alley. CP 124-25, 127 (FF 62-63, 77-82); RP 329, 460, 500-01, 584-85. Their plan was containment. RP 472. One of these officers was Jake Jensen, who arrived at about 9:59 p.m. RP 469-71. Officer Jensen was wearing a body camera. CP 128 (FF 89); RP 476-77; Ex. 21.

The video shows Officer Jensen arriving on the scene. Ex. 21. He and the other officers in this area take cover behind vehicles in the alley. About eight minutes after he arrived, three rapid gunshots can be heard in the background. About 18 seconds later, three more rapid shots can be heard. About 27 seconds later, three more rapid shots occur. About six seconds later, one shot can be heard. The eleventh shot is heard about two seconds later. About eight minutes later, the shot Officer Spolski fired at Mr. Burton can be heard. Shortly thereafter, Officer Jensen and the other officers from the south approach the northern officers and Mr. Burton. Mr. Burton can be seen lying on the ground and heard screaming in agony.

The State charged Mr. Burton with three counts of first degree

assault, alleging Mr. Burton, while armed with a firearm, had assaulted Officers Potter, Benesch, and Jensen. CP 1-2. Mr. Burton waived his right to a jury trial and elected a bench trial. RP 83-85.

The court heard testimony from the many officers who were at the scene on May 6, 2015, police detectives who conducted the subsequent investigation, many of the residents in the area, Ms. Libby, Ms. Christopher, and Dr. Mathew Layton—a psychologist who met with Mr. Burton and testified about his mental condition and the medications used to treat him. CP 116-133 (FF 12-133). Mr. Burton’s suicidal thoughts had resolved once the jail changed his medications and he stopped taking paroxetine. CP 133 (FF 130-32). Mr. Burton also testified. CP 134-38 (FF 134-176).

On February 11, 2016, the court found Mr. Burton not guilty of first degree assault, but found him guilty of the lesser offense of second degree assault on all three counts. RP 781-839.³ The court found Mr. Burton “did not intend to inflict great bodily harm on the named victim law enforcements,” “never pointed his weapon at law enforcement,” and “never fired a shot” in their direction. CP 141 (CL 20). The court found that if Mr. Burton had intended to shoot law enforcement, it was unlikely he would have missed. CP 141-42 (CL 21). Mr. Burton “simply did not

³ The court entered detailed written findings of fact and conclusions of law on the same day. CP 110-45. A copy is attached in Appendix A.

intend to harm anyone other than himself, a goal which he accomplished when he was shot by law enforcement.” CP 142 (CL 24). The court, however, concluded that Mr. Burton had specifically intended to create apprehension and imminent fear of bodily injury in the officers. CP 143 (CL 29-31). Afterward, the court belatedly found that all three offenses were committed with a firearm. CP 170-71.

Mr. Burton moved to arrest judgment for insufficient evidence as to count three, which concerned Officer Jensen. CP 150-52; RP 844-46, 878-79. The court denied the motion. RP 873-76.

Together, the three firearm enhancements added nine years to the base range sentence of 15 to 20 months. CP 193. At sentencing, Mr. Burton asked that the court grant an exceptional sentence downward of zero days on his base sentence. RP 846. Mr. Burton also argued the court had discretion to impose less than 36 months on each firearm enhancement. RP 949. Alternatively, he argued that the consecutive nine-year sentence required by the firearm enhancements, as applied to him, constituted unconstitutionally cruel punishment. RP 853-54. The trial court rejected his arguments, concluding that this Court would reverse such decisions on appeal. RP 900-03.

The trial court, however, was frustrated and saddened with having to sentence Mr. Burton to ten-years of imprisonment:

I don't think going to prison is going to rehabilitate Mr. Burton. Rehabilitate him so he won't do what? He doesn't need rehabilitation. I don't think it's going to protect society because I'm not satisfied that society is necessarily at risk with Mr. Burton in the community. If he's back in the community, well, putting that aside, it just strikes the Court when I'm in a situation like this that it's a significant waste of the taxpayer's resources for a gentleman like Mr. Burton to be incarcerated for years.

...

I've said this before, I'm going to say it again, I am very saddened by this situation that Mr. Burton finds himself in and I return to my earlier comments that not only am I saddened, I'm incredibly frustrated by a mandatory firearm enhancement in the State of Washington that I have no ability to deviate from.

...

And Mr. Burton, I have no ill will for you at all. I think you're a good person and I wish you the best of luck, sir, and if I get the chance to see you some day and shake your hand, it would be a privilege.

RP 900, 903, 908. Mr. Burton appeals.

E. ARGUMENT

1. The evidence was insufficient to prove that Mr. Burton committed second degree assault.

a. The State bears the burden to prove every element of the offense beyond a reasonable doubt.

The State must prove every element of the crime charged beyond a reasonable doubt. Const. art. I, § 3; U.S. Const. amend. XIV; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). At

the conclusion of a bench trial, the trial court must enter written findings of fact and conclusions of law. State v. Head, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998); CrR 6.1(d). Challenged findings are reviewed for substantial evidence, meaning evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. State v. Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). The evidence is viewed in the light most favorable to the State. Id. at 106. However, “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). Unchallenged findings are verities on appeal. State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). The findings must support the conclusions of law. Id. Conclusions of law are reviewed de novo.⁴ Id.

b. To prove second degree assault, the State had to prove that Mr. Burton had the specific intent of causing the charged victims fear and apprehension of bodily injury through the use of a deadly weapon.

A person commits second degree assault by assaulting another with a deadly weapon. RCW 9A.36.021(1)(c). Based on the common law, there are three definitions of “assault”: “(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon

⁴ A finding of fact which is actually a conclusion of law is reviewed de novo. Robel v. Roundup Corp., 148 Wn.2d 35, 43, 59 P.3d 611 (2002). Similarly, a conclusion of law which is really a finding of fact is reviewed for substantial evidence. State v. Ross, 141 Wn.2d 304, 309, 4 P.3d 130 (2000). Some of the court’s conclusions of law appear to be findings of fact.

another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.” State v. Abuan, 161 Wn. App. 135, 154, 257 P.3d 1 (2011) (quoting State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009)). Mr. Burton was convicted under the third meaning.

Assault by attempt to cause fear and apprehension of injury requires proof that the defendant had specific intent to create reasonable fear and apprehension of injury in the charged victim.⁵ State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); Abuan, 161 Wn. App. at 158 (adhering to rule). “Specific intent” means “intent to produce a specific result, as opposed to intent to do the physical act that produces the result.” Elmi, 166 Wn.2d at 215; see also RCW 9A.08.010(1)(a) (“A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.”); INTENT, Black’s Law Dictionary (10th ed. 2014) (defining “specific intent” as “[t]he intent to accomplish the precise criminal act that one is later charged with.”). Intent may not be inferred from evidence that is patently equivocal. Vasquez, 178 Wn.2d at 14.

⁵ As defined in the pattern instructions: “An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.” 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (4th ed) (brackets omitted); accord CP 143 (CL 27).

Specific intent to create fear in the charged victim may be inferred when a defendant points a gun at the person, unless the person knows the gun is unloaded. Eastmond, 129 Wn.2d at 500; State v. Callahan, 87 Wn. App. 925, 930 n.1, 943 P.2d 676 (1997). The mere display of a gun, however, is insufficient to infer specific intent. Id. The defendant may, in the words of the statute prohibiting the unlawful display of weapons, only have “an intent to intimidate.” RCW 9.41.270(1). Unlawful display of a weapon is a misdemeanor, not a felony. RCW 9.41.270(2).

Similarly, the harmless discharge of a gun does not, by itself, support inferring an intent to cause fear and apprehension of bodily injury in others. As provided by the legislature, this conduct may only amount to a misdemeanor, unless there is resulting injury:

(1) For conduct not amounting to a violation of chapter 9A.36 RCW, any person who:

...

(b) Willfully discharges any firearm, air gun, or other weapon, or throws any deadly missile in a public place, or in any place where any person might be endangered thereby. A public place shall not include any location at which firearms are authorized to be lawfully discharged;

...

although no injury results, is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.

(2) If an injury results from a violation of subsection (1) of

this section, the person violating subsection (1) of this section shall be subject to the applicable provisions of chapters 9A.32 and 9A.36 RCW.

RCW 9A.32.030.⁶ This demonstrates legislative intent that, absent a resulting injury from the discharge of the firearm or evidence proving the discharge was conduct amounting to an assault, the person has only committed a misdemeanor offense, not a felony assault.

c. The evidence did not prove that Mr. Burton intended to cause fear and apprehension of bodily injury.

The State bore the burden of proving that Mr. Burton had the specific intent to create reasonable fear and apprehension of bodily injury in officers Potter (count 1), Benesch (count 2), and Jensen (count 3). The trial court found Mr. Burton commenced a multipart firing of his weapon while in his backyard. CP 139 (CL 9). The court further found that Mr. Burton “did not intend to inflict great bodily harm on the named victim law enforcements” and that he “never fired a shot in the direction of law enforcement, purposely unloaded his weapon prior to stepping into the officers’ view and never pointed his weapon at law enforcement at any time.” CP 141 (CL 20). The court also found it was unlikely that Mr. Burton would have missed if he had intended to shoot at law enforcement, and that there was no evidence of damage from any bullets in the area. CP

⁶ Chapter 9A.36 RCW is the chapter outlawing assault. Chapter 9A.32 RCW concerns homicide.

141-42 (CL 21-22). Nevertheless, the court still determined that Mr. Burton intended to create fear and apprehension of imminent bodily injury in all three officers. CP 143-44 (CL 29-31).

The evidence did not prove that Mr. Burton intended to create fear and apprehension by harmlessly firing his weapon. Concerning the direct evidence of Mr. Burton's intent, Mr. Burton explained that when he saw Officers Wheeler, Benesch, and Potter approaching from the north, he reacted. RP 685, 706, 712. He testified that he intended not to scare the officers into shooting him, but to cause them to resort to their training. RP 678, 681, 687-88; CP 137 (FF 169). While he wanted to be killed, he did not want others to be hurt, so frightening the officers would be counter to this goal. RP 713; see CP 136 (FF 161) ("Mr. Burton testified he did not want the police to have any reason to shoot neighbors or, for that matter, even the dog in his home."). If Mr. Burton had wanted to frighten the officers, he could have aimed, or shot, at or near them. RP 688; see CP 141-42 (CL 21) ("highly unlikely" that Mr. Burton would have missed targets or failed to hit anything close to the officers). Thus, the direct evidence did not support a conclusion that Mr. Burton intended to cause fear and apprehension of imminent bodily injury.

The court appears to have inferred that Mr. Burton intended to cause fear and apprehension because these thoughts can inevitably result

in people when they hear nearby gunshots. See CP 144 (CL 31) (“it goes without saying, even in a highly trained and skilled law enforcement officer member of the military, an unknown individual firing 11 shots in the dark, in close proximity to your person, is going to cause apprehension and fear.”). This is speculative. Discharging a gun in a public place does not inevitably mean that the person intended to cause fear and apprehension of great bodily harm in nearby persons. If it did, the statute providing that it is a misdemeanor to unlawfully discharge a firearm in a place where it might endanger others would be meaningless. RCW 9A.41.230(1)(b). Moreover, Lieutenant Dean Sprague testified that officers respond to their training when hearing gunshots and that when shot at before, he did not experience fear. RP 352-53. Thus, Mr. Burton’s discharge of a firearm, by itself, is patently equivocal. The court’s contrary conclusion is not supported by the evidence. Because the evidence was patently equivocal, the court erred in concluding the State had proved beyond a reasonable doubt that Mr. Burton intended to cause fear and apprehension. See Vasquez, 178 Wn.2d at 14-16 (patently equivocal evidence that defendant possessed forged documents did not prove intent to injure or defraud).

Accordingly, all three convictions for second degree assault should be reversed and dismissed.

d. The evidence was insufficient to conclude that Mr. Burton had the specific intent to cause fear and apprehension in Officer Jensen. Mr. Burton was unaware of Officer Jensen's presence in the south and his actions were directed at officers in the north.

Even if the evidence supported the conclusion that Mr. Burton intended to cause fear and apprehension of bodily harm, the evidence did not prove he had this specific intent as to Officer Jensen (count 3).

Unlike officers Potter and Benesch, Officer Jensen (along with other officers) was out of view at the south end of the alley. There was no evidence indicating that Mr. Burton was aware of Officer Jensen's presence before he fired the shots. The evidence affirmatively indicated otherwise. Officer Jensen did not see Mr. Burton until after all the shots were fired and he testified that Mr. Burton's comments may have been directed to police in the north. RP 501. Other officers in the south testified similarly. Corporal Blaine Kakuda testified that he did not observe Mr. Burton directing any verbal comments in his direction at the southern end of the alley. RP 329. Officer Joseph Matt did not as well. RP 416. Officer Yeshua Matthew testified he was too far away to see activity in Mr. Burton's driveway. RP 438. Officer Benesch, who was at the north end of the alley, testified that Mr. Burton looked south only after he fired all his shots. RP 460. Detective Michael Drapeua testified that, based on his subsequent investigation, Mr. Burton had no view to the south. RP 584-85.

Because the evidence did not show that Mr. Burton was aware of Officer Jensen's presence, the court erred in concluding that Mr. Burton had the specific intent to cause Officer Jensen fear and apprehension. State v. Karp, 69 Wn. App. 369, 374, 848 P.2d 1304 (1993) (to commit this form of second degree assault requires "that the defendant commit an intentional act, directed at another person."). This conclusion is supported by this Court's opinion in State v. Abuan, 161 Wn. App. 135, 257 P.3d 1 (2011). There, three people in an open garage were shot at by a person in a passing vehicle. Abuan, 161 Wn. App. at 142. A fourth person was inside the house at the time. Id. The State charged the defendant with second degree assault of the man inside the house. Id. at 145. This Court held the evidence was insufficient because it did not prove that the defendant, Abuan, "specifically intended to assault" the charged victim, Fomai:

no trier of fact could have found that Abuan specifically intended to assault Fomai. There is no evidence that Abuan knew Fomai was at the house or that Abuan intended to fire the gun at Fomai. Francis, his younger brother, and his uncle were in the garage. The attached garage covered most of the front of the house and, when shots were fired, Fomai was in the house on the telephone and could not see the shooting. No shots hit the house, although bullets hit the garage. A crime scene technician detected bullet damage only to the garage frame and door.

Id. at 159.

Here, Mr. Burton harmlessly discharged his weapon when he saw

the group of officers approaching from the north. There was no evidence that Mr. Burton knew Officer Jensen was to the south. And unlike first degree assault, a transferred intent analysis is inappropriate as to second degree assault. Compare Elmi, 166 Wn.2d at 211 (holding that under first degree assault statute, intent to inflict great bodily harm on a specific person may transfer to unintended persons) with Abuan, 161 Wn. App. at 156-58 (distinguishing Elmi because second degree assault statute does not codify principle of transferred intent and noting that if it did, “anyone in the neighborhood who heard the gunshots could be a victim of an assault”). Thus, the conviction for assaulting Officer Jensen should be reversed for insufficient evidence of specific intent to assault him.

2. Mr. Burton was deprived of his right to effective assistance of counsel through his counsel’s failure to raise a defense of diminished capacity.

a. Defendants have a constitutional right to effective assistance of counsel.

Criminal defendants have the right to effective assistance of counsel under our state and federal constitutions. U.S. Const. amend. VI; Const. art. I, § 22.⁷ To establish ineffective assistance of counsel, there must be deficient performance and resulting prejudice. Strickland v.

⁷ “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.” Const. art. I, § 22.

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Deficient performance is performance falling below an objective standard of reasonableness. Strickland, 466 U.S. at 687. A claim of ineffective assistance presents a mixed question of law and fact, reviewed de novo. In re Per. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

b. The evidence and law supported a diminished capacity defense. Counsel was deficient in failing to raise the defense.

Washington does not “punish defendants with diminished capacity.” State v. Eaton, 168 Wn.2d 476, 482 n.2, 229 P.3d 704 (2010). “A diminished capacity defense requires evidence of a mental condition, which prevents the defendant from forming the requisite intent necessary to commit the crime charged.” State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). A defendant is entitled to an instruction on diminished capacity when “there is substantial evidence of such a condition and such evidence logically and 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. Griffin, 100 Wn.2d 417, 419, 670 P.2d 265 (1983); accord State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). The pattern instruction reads: “Evidence of mental illness or disorder may be taken into consideration in determining whether the

defendant had the capacity to form (fill in requisite mental state).” 11

Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.20 (4th ed).

Generalized instructions on criminal intent are not sufficient to apprise the trier of fact of mental disorders which may diminish a defendant’s capacity to commit a crime. Griffin, 100 Wn.2d at 420. The failure of defense counsel to present a diminished capacity defense may constitute deficient performance. See, e.g., Thomas, 109 Wn.2d at 227-28; State v. Kruger, 116 Wn. App. 685, 693, 67 P.3d 1147 (2003).

Despite diminished capacity not being raised as a defense, the evidence at trial supported it. Dr. Layton testified about Mr. Burton’s mental state and the effect that prescription medications, particularly paroxetine (Paxil) had upon it. CP 131-34 (FF 113-33). Mr. Burton had been diagnosed with ADHD since childhood. RP 635. He still took medication, primarily Adderall, for this mental condition. RP 635-36; 646, 663; Ex. 98. He was prescribed paroxetine, an anti-depressant, about four months before the incident. RP 638. Dr. Layton testified that Mr. Burton’s two suicide attempts were consistent with the use of paroxetine. RP 638, 648, 651; CP 133 (FF 129). He disagreed with the decision to double Mr. Burton’s dose of paroxetine after he first attempted to kill himself. RP 641-42. He testified that alcohol should not be used with the drug. RP 649-50; CP 134 (FF 133). Patients like Mr. Burton may “display

disinhibition, impulsivity, weight loss, insomnia, and paranoia.” CP 134 (FF 133); see RP 649-50.

Mr. Burton’s testimony also supported the defense. He testified that he was unable to “explain his thought process” that day. RP 704-05. He believed that if he had not been in a “drug-induced” state and had “a clear mind with a clear head,” “none of this would have happened.” RP 706. Acknowledging he had never been diagnosed with post-traumatic stress disorder, he stated that when he saw three officers approaching him, “a trigger went off in my head like I was no longer in a civilian setting” and that he “was now in a tactical environment.” RP 706. He explained that while “the way I did things makes sense to me. The fact that I did them makes absolutely no sense.” RP 713. He did not “know why I did what I did, but I do know that the actions I took were specifically taken to ensure that I was killed in the safest fashion possible.” RP 713.

The foregoing evidence was sufficient to raise a defense of diminished capacity. The evidence regarding Mr. Burton’s mental state tended to negate the conclusion that Mr. Burton acted with intent to cause law enforcement fear of imminent bodily harm. Thus, the trier of fact would have properly considered diminished capacity had it been raised. See Cienfuegos, 144 Wn.2d at 227 (defendant entitled to diminished capacity instruction where evidence showed he was incapable of forming

element of intent due to mental impairment); Kruger, 116 Wn. App. at 692 (in assault case, defendant entitled to voluntary intoxication instruction where evidence showed intoxication affected defendant's mind).⁸

While Mr. Burton was tried by the bench, both sides submitted jury instructions to assist the trier of fact. CP 62-100; supp. CP __ (sub. no. 63). The court relied on these instructions in rendering its verdict. RP 617, 825-28; CP 142-43 (CL 26-27).

Counsel's failure to raise the defense and provide an instruction on diminished capacity was deficient performance. The key issue was Mr. Burton's intent. Mr. Burton's mental state tended to show that he had not acted intentionally in placing officers in fear of imminent bodily injury. Without a diminished capacity defense, counsel could not properly argue his theory of the case, which was lack of intent. Further, asking the trier of fact to consider diminished capacity would have only aided Mr. Burton's defense that the State had failed to prove this essential element. Accordingly, the deficient performance prong is met.

⁸ "[T]he requirements for establishing diminished capacity are essentially the same as those required to prove intoxication." State v. Marchi, 158 Wn. App. 823, 836, 243 P.3d 556 (2010).

c. The case turned on an assessment of Mr. Burton's intent. There is a reasonable probability that, but for counsel's failure to argue diminished capacity, Mr. Burton would have been acquitted of the second degree assault charges.

The failure to raise a diminished capacity defense was prejudicial, meaning that had it been raised, there is a reasonable probability the result of the proceeding would have been different. Strickland, 466 U.S. at 694; "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Proof that the outcome would have been altered is not required. Thomas, 109 Wn.2d at 226.

Here, the court concluded that:

While Mr. Burton did not intend to inflict great bodily injury upon the officers, he nevertheless planned and carried out a confrontation with law enforcement that was clearly designed to impose upon those law enforcement officer apprehension and fear, which would cause them to then shoot Mr. Burton and kill him.

CP 143 (CL 30). The court further reasoned that Mr. Burton "knew and understood" that he was creating apprehension and fear in the officers by firing his weapon. CP 144 (CL 31).

If Mr. Burton's counsel had raised a diminished capacity defense, there is a reasonable probability that the court would have drawn different conclusions. With a diminished capacity instruction, the court could have concluded that due to Mr. Burton's mental state, Mr. Burton did not

understand that shooting his gun would create fear and apprehension in the officers. With such a defense, the court may have credited (rather than discredited) Mr. Burton's testimony that he had not intended to cause fear and apprehension in the officers. If so, the court would have acquitted Mr. Burton of second degree assault. Mr. Burton establishes prejudice. See Thomas, 109 Wn.2d at 231-32; Kruger, 116 Wn. App. at 694-95.

Because Mr. Burton was deprived of effective assistance of counsel, this Court should reverse the three convictions for second degree assault and remand for a new trial.

3. As applied in this case, application of the firearm enhancements to the offenses denied Mr. Burton equal protection of the laws.

The State alleged, and the court found, that Mr. Burton was armed with a firearm when he committed the three offenses. Based on these firearm enhancements, Mr. Burton's sentence was increased by nine years. Because the imposition of these firearm enhancements, as applied to Mr. Burton, violate the equal protections provisions of the state and federal constitutions, this Court should order the enhancements stricken.

Under the Fourteenth Amendment, no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Washington Constitution provides a similar guarantee.

Const. art. I, § 12.⁹

Under the firearm enhancement provisions, when the defendant is armed with firearm at the time of a felony offense, the sentence is increased. RCW 9.94A.533(3). This provision applies to all felonies except “[p]ossession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.” RCW 9.94A.533(3)(f) (emphasis added).

For discharging a firearm with intent to create apprehension of injury, Mr. Burton was convicted of three counts of second degree assault, a class B felony. RCW 9A.36.021(2)(a). Drive-by shooting is also a class B felony. RCW 9A.36.045(3). That offense is committed when a person:

recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

RCW 9A.36.045(1).

The issue is whether, as applied in this case, having an exemption for drive-by shooting but not second degree assault (as committed by Mr. Burton) violates the guarantee of equal protection. State v. May, 68 Wn.

⁹ “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Const. art. I, § 12.

App. 491, 497, 843 P.2d 1102 (1993) (law may not violate equal protection on its face, but can be invalid as applied to a defendant). In analyzing this issue, rational basis review applies. See State v. Manussier, 129 Wn.2d 652, 673, 921 P.2d 473 (1996) (rational basis review applies when a physical liberty interest alone is involved in a statutory classification). Arbitrary or irrational classifications do not survive rational basis review.¹⁰ City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 446, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); McLaughlin v. Florida, 379 U.S. 184, 190, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964).

In analyzing equal protection claims under rational basis review, the court asks (1) whether the classification applies alike to all members within the class; (2) whether there is some basis in reality for distinguishing between those within and those without the class; and (3) whether the challenged classifications have any rational relation to the purpose of the challenged statute. Myrick v. Board of Pierce Cy. Comm'rs, 102 Wn.2d 698, 701, 677 P.2d 140, 687 P.2d 1152 (1984). While this test is deferential, not all laws pass muster. For example, a statutory scheme that allowed those convicted of violent crimes to regain their right to possess firearms, but did not allow people who were involuntarily detained for mental health treatment to regain the same right,

¹⁰ "Irrational" means unreasonable, foolish, illogical, or absurd. Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 970, 954 P.2d 250 (1998).

failed the second prong of the analysis. Morris v. Blaker, 118 Wn.2d 133, 149, 821 P.2d 482 (1992); accord State v. Ruff, 122 Wn.2d 731, 861 P.2d 1063 (1993). In that context, there was no “plausible justification” for distinguishing the two classes. Morris, 118 Wn.2d at 149.

Similarly, this Court has already held that the provision at issue is arbitrary and violates equal protection as applied in the context of persons convicted of possessing short-barreled shotguns, RCW 9A.02.030(1). State v. Berrier, 110 Wn. App. 639, 649-51, 41 P.3d 1198 (2002). In Berrier, a firearm enhancement was applied to the defendant’s sentence for possessing a short-barreled shotgun. Id. at 647-48. But had the defendant been convicted of possessing a machine gun, the enhancement would not have applied. Id. at 649. This Court reasoned that the purpose of the firearm enhancement statute was not “furthered by differentiating between short-barreled shotgun possessors and machine gun possessors.” Id. at 650. The Court rejected the argument that the legislature could have rationally distinguished between the two classifications. Id. at 650-51.

Here, as applied to Mr. Burton, the statutory exemption also violates equal protection under the second prong of the test. The trial court found that Mr. Burton intended to harm no one but himself. CP 142 (CL 24). He “never fired a shot in the direction of law enforcement, purposely unloaded his weapon prior to stepping into officers’ view and never

pointed his weapon at law enforcement at any time.” CP 141 (CL 20). While creating apprehension and fear, Mr. Burton’s conduct was less culpable than a person who commits the offense of drive-by shooting. He discharged his firearm not a “reckless” manner, but in a manner intended to not endanger anyone but himself. See CP 141-42 (CL 21-24); RCW 9A.36.045(1) (requiring that discharge of firearm be reckless). And his discharge of the firearm did not create “a substantial risk of death or serious physical injury to another person.” RCW 9A.36.045(1). Still, the firearm enhancements apply to him, but not to others who perpetrate more dangerous acts under RCW 9A.36.045(1).

Inherent in the offense of drive-by shooting is that the person must use a firearm. The purpose of exempting this crime appears to be that the use of a firearm is a necessary element of the underlying crime itself. Berrier, 110 Wn. App. at 650; State v. Pedro, 148 Wn. App. 932, 946-47, 201 P.3d 398 (2009).¹¹ But, as applied in Mr. Burton’s case, this is also true here. As charged and proved in Mr. Burton’s case, the second degree assault with a deadly weapon required proof that Mr. Burton discharged a

¹¹ Pedro rejected a different, albeit similar, equal protection argument as to firearm enhancements in the context of a conviction for first degree assault. State v. Pedro, 148 Wn. App. 932, 947, 201 P.3d 398 (2009). Pedro is materially distinguishable because this is an applied challenge and first degree assault requires proof of “intent to inflict great bodily harm.” RCW 9A.36.011(1).

firearm.¹² See State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005) (elements of offense are viewed as charged and proved, not on an abstract level). Thus, this legislative purpose alone does not justify excluding Mr. Burton from the protections of the statutory exemption.

As applied to Mr. Burton, there is no rational basis for not also applying the statutory exemption to the firearm enhancements to him. The “assaults” that he perpetrated were less dangerous and not as culpable when compared to the offense of drive-by shooting. And the rationale for excluding drive-by shooting (the inherent use of a firearm) applies with equal force to the offenses Mr. Burton committed (use of a firearm to create fear and apprehension of injury). Because the firearm enhancements are unconstitutional as applied to Mr. Burton, this Court should vacate the enhancements and remand for resentencing. Berrier, 110 Wn. App. at 651.

4. The trial court had authority to grant an exceptional sentence downward on the base sentencing range. The court erred in concluding that it lacked this authority.

A sentencing court “may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of [Sentencing Reform Act (SRA)], that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. An

¹² Despite this fact, the cumulative punishment that results does not violate the prohibition against double jeopardy. State v. Kelley, 168 Wn.2d 72, 83, 226 P.3d 773 (2010).

exceptional sentence below the standard range may be imposed if the court finds that mitigating circumstances are established by a preponderance of the evidence. RCW 9.94A.535(1). One mitigating circumstance is that the “defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired.” RCW 9.94A.535(1)(e); see, e.g., State v. Bradley, 192 Wn. App. 1044 (2016) (unpublished) (“The trial court’s reliance on the factor stated in RCW 9.94A.535(1)(e) supports an exceptional sentence as a matter of law.”). “Voluntary use of drugs or alcohol is excluded.” RCW 9.94A.535(1)(e); see, e.g., State v. Hutsell, 120 Wn.2d 913, 917, 845 P.2d 1325 (1993) (addict’s use of cocaine was voluntary so this mitigator did not apply).

Relying on RCW 9.94A.535(1)(e), Mr. Burton sought an exceptional sentence downward. Mr. Burton’s base sentence range (which excludes the time added by the firearm enhancements) was 15 to 20 months. CP 193. Mr. Burton asked that the court grant an exceptional sentence of zero days on this base range. CP 157; RP 846. Mr. Burton argued that when he committed the offenses, his capacity to appreciate the wrongfulness of his conduct was significantly impaired due to his ADHD and the effects caused by his prescribed medication, paroxetine. CP 155-57; RP 846-48. Mr. Burton also noted that the goals of the SRA would be

met. CP 157-58; RP 848.

The State opposed the request, arguing that granting an exceptional sentence would be improper. CP 179-82. Despite the unique circumstances and the evidence showing that Mr. Burton's actions were an untoward side-effect from using a prescribed medication, the State argued, "no evidence was admitted establishing circumstances that distinguish Mr. Burton's crimes from other second degree assaults committed by the use of a deadly weapon or firearm." CP 182. The State also shifted the focus away from RCW 9.94A.535(1)(e) and presented the strawman argument that granting an exceptional sentence would be error because it would be based on fulfilling the purposes of the SRA. CP 180-82.

In its ruling that it lacked authority to grant Mr. Burton's request, the trial court did not address Mr. Burton's argument on RCW 9.94A.535(1)(e) and instead accepted the State's strawman:

Now, here Mr. Burton has requested that the Court provide for an exceptional sentence downward. What is problematic with that request is that the mitigating factors that Mr. Burton references, all which the Court frankly absolutely agrees with, but nevertheless they are already contemplated within the SRA. And sentencing judges, as counsel may be aware, and as I discovered again in my research independently, have consistently been reversed in this state when they impose an exceptional sentence downward, or frankly it could be upward, but here, downward for factors that are already included in the standard sentencing range. Some of the arguments consistently advanced that you read about in case law in this state are deviate downward for

lack of criminal history or low risk to reoffend or protection of the public is not necessary or a defendant's clear concern for others that was displayed throughout the trial, all clear mitigating factors. But these are all things applicable to Mr. Burton, which are already inclusive in the SRA, and there are a number of cases that have pointed this out over and over in the Pascal case, Fowler case, Freitag case are examples of what happens when a court sidelines the mitigating factors already built into the SRA and decides to deviate downwards, frankly because they're looking for an opportunity to accomplish an end result that they think fits. I'm confident I don't have any reasonable basis that's been offered to mitigate below the standard range. I just don't have that in front of me. And doing so, I am confident would be absolute reversible error by the Court.

RP 903-04 (emphasis added).

The court misunderstood Mr. Burton's argument. Mr. Burton did not argue that he should get an exceptional sentence downward because the purposes of the SRA were mitigating circumstances. This is would not be a valid basis. State v. Alexander, 125 Wn.2d 717, 730 n.22, 888 P.2d 1169 (1995) ("the purposes of the Sentencing Reform Act enumerated in RCW 9.94A.010 are not in and of themselves mitigating circumstances."). Rather, he argued that RCW 9.94A.535(1)(e) was a mitigator that applied and that the purposes of the SRA would be fulfilled. This is proper. Id. at 730 ("Once a valid mitigating factor is identified by the trial court, the purposes section of RCW 9.94A.010 may properly be considered by the court in fashioning an appropriate sentence.").

To impose an exceptional sentence under RCW 9.94A.535(1)(e),

there must be supporting evidence showing impairment of the defendant's capacity to appreciate the wrongfulness of his conduct and to act in conformity with the law. State v. Rogers, 112 Wn.2d 180, 185, 770 P.2d 180 (1989). There was evidence in the record to support this conclusion. Mr. Burton suffered from ADHD. His condition worsened and he began to have suicidal thoughts as a side-effect of his prescribed medication, paroxetine. Mr. Burton reported this side-effect, but was instructed to continue taking the medication. This led to Mr. Burton's suicide attempt on May 6, 2015. Mr. Burton testified that he did not understand why he acted as he did. RP 713. Thus, if the trial court had not erred in its analysis, it could have granted an exceptional sentence under RCW 9.94A.535(1)(e).

The State may object to this analysis and argue that Mr. Burton's use of paroxetine was voluntary. But Mr. Burton was not taking paroxetine for recreational purposes. See State v. Gilcrist, 15 Wn. App. 892, 894, 552 P.2d 690 (1976) ("when a person drinks intoxicating beverages or takes drugs for other than medicinal purposes he is voluntarily intoxicated and this type of intoxication is no defense to a crime requiring no specific intent.") (emphasis added). He was taking it for medical purposes as directed by his doctor. This is akin to involuntary intoxication. Id. ("where a physician prescribed a medicine which caused

intoxication that intoxication has been held to be involuntary.”); see Kaiser v. Suburban Transp. Sys., 65 Wn.2d 461, 467-68, 398 P.2d 14 (1965) (driver who fell asleep due to unknown side effect of prescribed medication not guilty of negligence per se). As for Mr. Burton’s alcohol use, he drank some alcohol on May 6, 2015, but the amount of alcohol was not significant and he had not appeared intoxicated. CP 117 (FF 13, 16); RP 140-41. Regardless, these are arguments the sentencing court may consider on remand when exercising its discretion.

Where a defendant has requested an exceptional sentence below the standard range, the appellate court may review the sentencing court’s decision if the court either refused to exercise its discretion or relied on an impermissible basis for refusing to grant an exceptional sentence. State v. Khanteechit, 101 Wn. App. 137, 138, 5 P.3d 727 (2000). A trial court’s erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is an abuse of discretion that justifies remand. State v. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008), affirmed, 169 Wn.2d 571, 238 P.3d 487 (2010). Here, the trial court erroneously believed that it lacked discretion. RP 903-04. Thus, reversal and remand for a new sentencing hearing is warranted.

5. The trial court had authority to grant an exceptional sentence by modifying the length of the firearm enhancements. The court erred in concluding that it lacked this authority.

Under the firearm enhancements statute, three years was added to the sentences for each of the convictions. CP 193-94; RCW 9.94A.533(3)(b). The enhancements were also ordered to run consecutive to one another, for a total mandatory time of nine years. CP 193-94; RCW 9.94A.533(3)(e).

Mr. Burton argued that the trial court had discretion under the exceptional sentence provisions of RCW 9.94A.535 to modify the length of time on each enhancement. CP 159-63; RP 848-51. He asked that each of the three-year enhancements be reduced to two months. CP 162. The court ruled it lacked authority to do so. RP 901.

The issue is one of statutory interpretation reviewed de novo. State v. Conover, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015).

The legislature has instructed that firearm enhancements are mandatory:

Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.

RCW 9.94A.533(3)(e). But this language does not say the length of time

imposed for a firearm enhancement cannot be modified under the exceptional sentence provisions of RCW 9.94A.535.

The legislature did, however, use such restrictive language in RCW 9.94A.540(1), which instructs that mandatory minimum terms for certain offenses “shall not be varied or modified under RCW 9.94A.535.” RCW 9.94A.540(1). Thus, that similar language is not included in the firearm enhancement provisions indicates the length of enhancements can be modified under the exceptional sentence provisions. See Conover, 183 Wn.2d at 713 (“the legislature’s choice of different language indicates a different legislative intent.”); State v. Mohamed, 187 Wn. App. 630, 641, 350 P.3d 671 (2015). Even if there are other reasonable interpretations, the rule of lenity requires the reasonable interpretation that is most favorable to the defendant be applied. Conover, 183 Wn.2d at 711-12.

This kind of analysis has been applied in cases involving similar issues. Id. at 714-15 (bus stop enhancements were not required to run consecutive to each other because language in bus stop enhancement provision was different and less restrictive than language used in firearm enhancement provision); Mohamed, 187 Wn. App. at 641-45 (school zone enhancement could be waived because provision used language that was different and less restrictive than language used in firearm enhancement provision). Following Conover and Mohamed, this Court should hold that

the trial court had authority to vary or modify the length of the firearm enhancements under the exceptional sentence provisions of RCW 9.94A.535.

Because the sentencing court erred in concluding that it lacked authority, this Court should reverse and remand for a new sentencing hearing. Conover, 183 Wn.2d at 719; Mohamed, 187 Wn. App. at 647.

6. Despite no criminal history, Mr. Burton was sentenced to 10 years of imprisonment for harmlessly discharging a firearm during a mental breakdown. This excessive sentence is unconstitutionally cruel.

a. Excessive sanctions qualify as unconstitutionally cruel punishment.

The Eighth Amendment to the United States Constitution forbids “cruel and unusual punishment.” U.S. Const. amend. VIII. Excessive sanctions by the government are prohibited. Atkins v. Virginia, 536 U.S. 304, 311, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). It “is a precept of justice that punishment for crime should be graduated and proportioned to offense.” Weems v. United States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910) (punishment of 12 years for crime of falsifying record held excessive). Whether a sanction is excessive is based on the specific facts of the case rather than whether sanction appears excessive in the abstract. Atkins, 536 U.S. at 311.

The Washington Constitution provides that “Excessive bail shall

not be required, excessive fines imposed, nor cruel punishment inflicted.” Const. art. I, § 14. This provision is more protective than the Eighth Amendment. State v. Witherspoon, 180 Wn.2d 875, 887, 329 P.3d 888 (2014); State v. Fain, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980).

To determine if a punishment is cruel, the court examines four factors: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. Fain, 94 Wn.2d at 396. No one factor is dispositive. Witherspoon, 180 Wn.2d at 888.

In Fain, our Supreme Court held that the defendant’s life sentence, based on a current conviction of second degree theft and past convictions in California for the relatively minor crimes of grand larceny and forgery, constituted cruel punishment in violation article I, § 14. Fain, 94 Wn.2d at 389-90, 402. The rationale was that the defendant’s sentence was “entirely disproportionate to the seriousness of his crimes.” Id. at 402.

b. Mr. Burton’s sentence is unconstitutionally excessive. No legitimate penological interest justifies the sentence.

A proportionality analysis under both the Eighth Amendment and article I, §14 establishes that Mr. Burton’s sentence is unconstitutionally excessive. Considering the first Fain factor, which examines the nature of

the offense, Mr. Burton's offense was relatively minor. While in the abstract, second degree assault against law enforcement sounds serious and reprehensible, the specific facts in this case prove otherwise. What Mr. Burton did was discharge 11 shots from a handgun harmlessly into the air while police officers were in the nearby vicinity. He did not aim or fire his weapon at police officers. He did not intend to hurt anyone but himself. Indeed, only Mr. Burton was injured because of his actions. Excluding the determination that Mr. Burton intended to cause fear and apprehension of bodily injury, his offense is indistinguishable from the crime of unlawful discharge of a firearm, a misdemeanor.

While not explicitly part of the Fain factors, the penological justifications for a sentencing practice is key in analyzing whether a sentence is excessive. See Graham v. Florida, 560 U.S. 48, 71, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Retribution, deterrence, incapacitation, and rehabilitation are legitimate reasons for penal sanctions. Id. When these justifications are inadequate to justify a sentence, unconstitutional punishment results. See id. at 71 (“A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”); id. at 72 (“if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered.”).

Retribution must be directly tied to personal culpability. See id. at 74. The personal characteristics of the defendant and details of the offense matter. Miller v. Alabama, __ U.S. __, 132 S. Ct. 2455, 2463-64, 183 L. Ed. 2d 407 (2012). For example, the mentally retarded are generally less culpable and thus cannot be executed. See Atkins, 536 U.S. at 321 (execution of mentally retarded person is cruel and unusual punishment). Similarly, youth are also generally less culpable, resulting in restrictions on how they are punished. Roper v. Simmons, 543 U.S. 551, 568-71, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005) (death penalty may not be imposed on those under 18); Graham, 560 U.S. at 82; Miller, 132 S. Ct. at 2460 (mandatory life without parole sentences for juveniles violate the Eighth Amendment); State v. O'Dell, 183 Wn.2d 680, 689, 358 P.3d 359 (2015) (a defendant's youthfulness can be a mitigating factor).

Here, Mr. Burton's culpability is diminished because he was suffering from a mental impairment at the time of offenses. He is not responsible for suffering from ADHD. Mr. Burton is also not responsible for following his doctor's instructions to treat his condition with paroxetine, which had untoward side-effects and caused him to attempt suicide. Given these circumstances, retributive justice does not justify a decade of imprisonment. See Graham, 560 U.S. at 71-72.

The interests of deterrence and incapacitation are also inadequate.

A change in medication resolved Mr. Burton's suicidal thoughts. Mr. Burton has no other criminal history. As the trial court recognized, the risk of recidivism was low. See RP 900 ("I don't think [ten years of imprisonment] is going to protect society because I'm not satisfied that society is necessarily at risk with Mr. Burton in the community."). There is no need to incapacitate Mr. Burton. It is also unlikely that punishing Mr. Burton will deter others from trying to commit "suicide by cop," because people contemplating suicide are not acting rationally. Regardless, any deterrent effect is not enough to justify the sentence. See Graham, 560 U.S. at 72.

Finally, as to rehabilitation, the trial court properly recognized that Mr. Burton did not need rehabilitation: "I don't think going to prison is going to rehabilitate Mr. Burton. Rehabilitate him so he won't do what? He doesn't need rehabilitation." RP 900. The interest in rehabilitation did not justify a mandatory ten-year sentence.

In sum, the four legitimate penological justifications do not justify the sentence, indicating unconstitutional punishment.

Turning back to the Fain factors, the second factor examines the purpose behind the statute. As the statement of legislative intent shows, the purpose of firearm enhancements was largely to "stigmatize" the use of deadly weapons by criminals and to distinguish between "gun

predators” and other criminals. Laws of 1995, ch. 129, § 1. In other words, the purpose was one of deterrence and just deserts. While these are legitimate concerns, as applied in Mr. Burton’s case, they are inadequate to justify the ten-year sentence, for the reasons explained earlier.

Concerning the third Fain factor, Washington is not alone in creating mandatory penalties when firearms are used in connection with a criminal offense. However, even assuming that most jurisdictions would punish Mr. Burton in a similar manner, a legislative tallying is not determinative. See Miller, 132 S. Ct. at 2470-71 (that many states imposed life without parole on juveniles did not preclude conclusion that such punishment violated Eighth Amendment).

Finally, as to the fourth Fain factor, Mr. Burton is likely being punished more severely than others who have committed more serious or harmful crimes. For example, a person may who commits first degree assault or first degree rape may only serve five years. RCW 9.94A.540(1)(b), (c) (setting out mandatory minimum terms). These are class A offenses with a seriousness level of 12. In contrast, second degree assault is class B offense with a seriousness level of 4. But due to the firearm enhancements, Mr. Burton’s mandatory minimum sentence is greater than that of first degree assault and first degree rape.

Considering the four Fain factors and the penological justifications

for punishment, Mr. Burton’s sentence is unconstitutionally excessive under article I, § 14 and the Eight Amendment. This Court should reverse Mr. Burton’s sentence.

7. No costs should be awarded for this appeal.

If the State substantially prevails in the appeal, the State may request appellate costs. RCW 10.73.160(1); RAP 14.2. This Court has discretion under RAP 14.2 to decline an award of costs. State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016), rev. denied, 185 Wn.2d 1034, 377 P.3d 733. In exercising its discretion, the court should make “an individualized inquiry” into whether it is equitable to impose costs. Sinclair, 192 Wn. App. at 391 (citing State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015)). A person’s ability to pay is an important factor. Id. at 389.

The trial court found Mr. Burton indigent and waived all discretionary legal financial obligations. Supp. CP __ (sub. 91); CP 196-97; RP 904-05. This creates a presumption of indigency that continues on appeal. RAP 15.2(f); Sinclair, 192 Wn. App. at 393.

As required by this Court’s general order, Mr. Burton filed the report as to continued indigency.¹³ This report also supports declining an award of costs. While Mr. Burton is young and has a history of

¹³ Attached in Appendix B.

employment, the report indicates he owes over \$10,000 in debt and is responsible for child support arrears in the monthly amount of \$850. Given this report and the record, imposing costs on Mr. Burton for this appeal would be an undue hardship. No costs should be awarded.

F. CONCLUSION

The convictions should be reversed for insufficient evidence and the charges dismissed. If not, the convictions should be reversed due to ineffective assistance of counsel and the case remanded for a new trial. Alternatively, resentencing is required due to the constitutional violations and the trial court's mistaken belief that it lacked authority to grant an exceptional sentence downward.

DATED this 6th day of January, 2017.

Respectfully submitted,

s/ Richard W. Lechich

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Appendix A

FILED
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Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

State of Washington)
) CASE NO. 2015-01-01763-3
) PA#: 15-9-56627-0
 Plaintiff(s)) RPT#: CT I-III: 001-15-149053
) RCW CT I-III: 9A.36.011(1)(A)-F
 vs.) (9.94A.825) (#05401)
)
 Craig Scott Burton)
 Defendant(s)) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW RE: BENCH
) TRIAL

This matter was tried to the Court without a jury from January 13th, 2016 to January 21st, 2016. The Honorable Michael P. Price presiding at the bench trial.

The State was represented by Mr. Mark Lindsey and Ms. Jessica A. Pilgrim. The Defendant appeared personally at the trial and through his attorney Mr. John P. Stine.

The Court believes it is appropriate and relevant to comment on the level of representation in this case. Representation on the part of all the attorneys involved

was exceptional, and I base this on my 13 years on the Superior Court bench. Counsel were all well prepared, thoroughly organized, and professional. The State was vigorously and well represented. The Defendant was vigorously and well represented.

The following witnesses appeared and testified at trial:

- 1) Rebecca Libby
- 2) Karen Christopher
- 3) Shannon Bryant
- 4) Debra Lincoln
- 5) Adam Milzarek
- 6) Kent Firestone
- 7) Randy Hoisington
- 8) Jana Hoisington
- 9) Carl Gaumer
- 10) Michael Mears
- 11) Officer Adam Potter
- 12) Officer Sean Wheeler
- 13) Joseph Cain
- 14) Corporal Blaine Kakuda
- 15) Lieutenant Dean Sprague
- 16) Sargent Troy Teigen
- 17) Officer John Arredondo
- 18) Glenn Davis
- 19) Officer Dale Wells

- 20) Officer Joseph Matt
- 21) Officer Yeshua Matthew
- 22) Officer Christopher Benesch
- 23) Officer Jake Jensen
- 24) Officer Nicholas Spolski
- 25) Detective James Dresback
- 26) Detective Michael Drapeau
- 27) Randall Fichte
- 28) Dr. Matthew Layton
- 29) Craig Burton

The official clerk's exhibit list includes all of the exhibits offered and admitted into evidence. The Court has considered only the evidence that was admitted and has not considered any evidence that was not admitted during the trial or which was stricken.

3.5 HEARING

First, I will address the State's motion pursuant to Criminal Rule 3.5, at which time the State sought to admit all statements made by the Defendant that occurred on or about the evening of May 6, 2015 in the area of 5527 N. Ash, Spokane, WA and on May 8th at a Spokane Hospital.

Multiple law enforcement officers testified that they heard an individual, later identified as the Defendant Craig Burton, shout "do it" or "just do it" after firing a volley of shots from his location in the backyard of 5527 N. Ash.

After being shot by law enforcement and on the way to the hospital in an ambulance, Officer Christopher Benesch took a statement from the Defendant, which he referred to as a "dying declaration." Officer Benesch asked the Defendant why he did what he did, to which the Defendant replied, "I just want to die."

On May 8, 2015, Officer Dale Wells was standing watch over the Defendant while he was hospitalized for treatment of the gunshot wound. The Defendant informed Officer Wells that he wished to say something. He then told the Officer that he was "sorry if anyone was hurt" and also that "he had fired his gun into the air so police officers would shoot him." He also stated that he "wished the bullet had hit him two inches to the right, so it would have killed him." Finally, he stated, "I just wanted you guys to kill me."

Later, while incarcerated, the Defendant spoke via jail-recorded telephone calls to his father, Mr. Jack Burton, on June 2, 2015 and again on June 15, 2015. Multiple statements were made, but of particular significance are the following statements of the Defendant:

- ❖ “I didn’t even – like, I didn’t even raise my gun at ‘em when I got shot. Like, I just walked out with the gun and got, I thought -- like, I thought they bean-bagged me.”
- ❖ “I fired like 11 shots.”
- ❖ “I mean, they may have been able to see through the fence, like, ‘cause I fired a few rounds when I was in my yard, and then I stood out by the truck and fired a few rounds in the air.”

Criminal Rule 3.5 provides in pertinent part that a hearing is required when a statement of the accused is to be offered in evidence and such statement is subject to constitutional protection.

Here, with the exception of the dying declaration taken by Officer Benesch in the back of the ambulance, all statements made by the Defendant on May 6th and May 8th, 2015 were either spontaneous “just do it”... “do it” or were voluntarily offered; for example, the Defendant’s statements made to Officer Dale Wells while the Defendant was hospitalized. The Defendant’s telephonic statements made on June 2nd, 2015 and June 15th, 2015, while incarcerated in the Spokane County jail, were offered by the Defendant during a time period where he was obviously in custody and had been Mirandized. Further, all phone calls by inmates from the jail are recorded, and inmates are clearly advised of such recording during each and every call.

However, the Defendant’s statements to Officer Benesch, while being transported to the hospital, were made while the defendant was seized and was

arguably not free to leave. Granted, the Defendant had been shot, and providing emergency aid to him was everyone's priority. Nevertheless, the questions asked of the Defendant while in the ambulance were clearly incriminatory and were asked without the Defendant having been advised of right to remain silent pursuant to *Miranda v. Arizona* 384 U.S. 436 (1966).

The focus of a hearing under Criminal Rule 3.5 is on the voluntariness of the statements, not on its contents or the culpability of the accused. See *State v. Negrete*, 72 Wn. App. 62, (1993).

Here, all statements made by Mr. Burton were voluntarily offered and were either completely spontaneous ("just do it" or "do it") or were directly offered by Mr. Burton (statement to officer at hospital and phone calls with father on Spokane County jail recording).

However, the statement taken by Officer Christopher Benesch in the ambulance on May 6th, 2015 was not properly subject to constitutional protections and will therefore not be considered by the Court. Again, the balance of statements referenced above are admissible pursuant to Criminal Rule 3.5, and the Court now turns to deliberations on the verdict.

FINDINGS OF FACT

At approximately 10:00 p.m. on May 6, 2015, Spokane Police were alerted to a potentially suicidal male with a gun at a residence located at 5527 N. Ash, in Spokane, Washington. The facts are as follows:

1. On May 6th, 2015, Mr. Craig Burton was overwhelmed by life circumstances beyond his control.
2. Mr. Burton and his wife had filed for divorce, and his divorce would soon be finalized.
3. Mr. Burton was concerned he would be unable to pay the amount of child support required, and he feared he may lose his home and his vehicle as a result of the ongoing divorce.
4. On May 6th, 2015, numerous text messages were exchanged between Mr. Burton, his wife, Tiffany Shuskey, and Mr. Burton's girlfriend, Rebecca "Becca" Libby. Ms. Libby contacted her mother, Karen Christopher, at approximately 6:30 p.m. to express concern for Mr. Burton and to seek her advice.
5. Ms. Libby and Ms. Christopher decided to drive to the residence at 5527 N. Ash, given their concern for Mr. Burton's wellbeing and alarm regarding his mental state at that time.
6. Ms. Libby and Ms. Christopher drove together to 5527 N. Ash in Ms. Christopher's Toyota Prius.
7. Upon arriving at the address, Ms. Christopher parked in the alley directly behind the residence. Ms. Libby and Ms. Christopher arrived at approximately 8:00 p.m.

8. Ms. Christopher parked her vehicle directly behind Mr. Burton's Chevrolet Suburban. Both vehicles were located directly in front of a detached garage behind 5527 N. Ash.

9. The backyard of 5527 N. Ash is bordered by a white vinyl privacy fence approximately eight feet in height.

10. After parking the Toyota Prius, Ms. Christopher and Ms. Libby entered the backyard of 5527 N. Ash and observed Mr. Burton sitting on the back porch of the residence.

11. Ms. Libby had been with Mr. Burton earlier in the day and had previously moved into Mr. Burton's residence in late January 2015. Ms. Libby testified that their relationship was ending, and she had observed Mr. Burton on the morning of May 6th, 2015 to be withdrawn and was "not himself." Ms. Libby's attempts to cheer Mr. Burton up were unsuccessful, and Mr. Burton remained cold and withdrawn in his demeanor.

12. Ms. Libby testified that Mr. Burton had attempted suicide approximately two weeks prior to May 6th, 2015, and she had taken him to a Spokane hospital emergency room because of a prescription drug overdose.

13. Both Ms. Libby and her mother, Karen Christopher, spoke to Mr. Burton after they encountered him on the backyard steps of 5527 N. Ash, and both testified that he had clearly been consuming alcohol.

14. Ms. Christopher testified that she noted that Mr. Burton was very quiet, and he appeared to have been crying. He continuously stated, "Life is not fair," and referenced his divorce and the possible loss of his house, his truck, and his children.

15. Ms. Christopher testified she was concerned Mr. Burton may be suicidal based on his behavior and his failed suicide attempt several weeks prior. Several times he told her to "call the police."

16. Ms. Christopher testified she could see a beer on the steps next to Mr. Burton, and although it was clear he had been drinking, he did not appear to be intoxicated or inebriated.

17. Ms. Christopher testified she noticed Mr. Burton had a handgun when he reached for his beer. She testified she did not believe Mr. Burton presented a threat to her. Nevertheless, she asked him to give her the gun, which Mr. Burton declined to do.

18. Ms. Christopher testified, during the time period wherein she was speaking to Mr. Burton, her daughter, Ms. Libby, was inside the residence in the kitchen.

19. Ms. Christopher contacted her daughter in the kitchen of the residence and told her that Mr. Burton had a gun. Ms. Christopher called 911 and reported the situation to the dispatch operator. 911 advised Ms. Christopher to leave the residence, and she complied, although her daughter remained inside the residence.

20. Ms. Rebecca Libby testified and advised that on May 6, 2015, Mr. Burton was not himself. He acted cold and withdrawn.

21. Ms. Libby testified that she and Mr. Burton had both gone to work that morning, but he had apparently left work early. Mr. Burton and Ms. Libby exchanged multiple texts that day, which caused Ms. Libby concern about Mr. Burton's wellbeing. She shared those texts with Mr. Burton's wife, Tiffany Shuskey, and also discussed the situation at length with her mother, Karen Christopher.

22. Ms. Libby testified that, upon contacting Mr. Burton in the backyard of 5527 North Ash, she was never threatened in any way by Mr. Burton, nor was she aware of any threats he may have made to her mother, Karen Christopher.

23. Ms. Libby, contrary to the testimony of her mother, Karen Christopher, testified that Mr. Burton was intoxicated and that she took a loaded magazine from Mr. Burton, presumably without his knowledge, and placed the magazine in her mother's purse.

24. Ms. Libby testified she removed the loaded magazine from Mr. Burton to protect him... not out of fear he would harm her.

25. Ms. Libby testified that she later heard what she believed to be nine gunshots and that she was extremely upset and crying hysterically at the time.

26. Ms. Shannon Bryant testified. She resides at 5611 North Ash, which is a few houses away from Mr. Burton's residence.

27. She was at home with her two children and heard at least five gunshots on the evening of May 6th, 2015. She called 911 in response and stayed inside her residence, as directed by the 911 operator. She did not locate any damage to her home or property caused by bullets. Neither she nor her children were injured.

28. Ms. Debra Lincoln testified. She lives close to Mr. Burton's residence at 5526 North Oak Street. On May 6, 2015, she was asleep and woke to the sound of gunshots.

29. Ms. Lincoln testified that she believed there were 10 or 11 shots fired. She observed that the motion detector on her garage had been activated, and the light was on. Her husband and two sons were home and asleep.

30. Ms. Lincoln testified that she looked out her window and saw lots of police activity and later observed an ambulance in the alley.

31. Mr. Adam Milzarek testified. He resides at 5209 North Belt, which is approximately eight blocks from Mr. Burton's residence at 5527 North Ash. On the evening of May 6, 2015, Mr. Milzarek was home with his wife and children. Mr. Milzarek heard three to five gunshots in rapid succession. He was awake at the time and was just preparing to go to bed.

32. Mr. Kent Firestone testified. He stated that on May 6, 2015, he was home with his girlfriend and was watching TV. He heard three to five gunshots. He immediately went to his back door and saw numerous police officers. He observed a police car at Joseph and Ash.

33. Mr. Firestone testified that police officers appeared to be using garages for "cover." He heard yelling and could hear "drop the gun, drop the gun, drop the gun."

34. Mr. Firestone testified that he observed a police SUV coming down the alley and later observed an ambulance in the same alley. Mr. Firestone testified that there was no damage to his residence from bullet strikes.

35. Mr. Randy Hoisington testified. He resides at 5523 North Ash and was home on May 6th, 2015, when he heard multiple gunshots at approximately 10:00 p.m. in the evening.

36. Mr. Hoisington testified that he heard around four gunshots and then went outside his residence to investigate. He almost immediately encountered police officers, who advised him to go back into his house.

37. Mr. Hoisington testified that he looked out his kitchen window and saw three police officers in front of a car. He saw what he believed to be shields the officers were holding. He heard one more gunshot and then observed an ambulance in the alley.

38. Ms. Jana Hoisington testified. She is married to Mr. Randy Hoisington, and resides with him at 5523 North Ash.

39. Ms. Hoisington heard gunshots on the evening of May 6, 2015, which woke her up. She heard at least two gunshots and then observed police officers in the alley behind her house while looking out her kitchen window.

40. Ms. Hoisington testified that her backyard has a five foot cyclone fence, which borders the alley. She observed police officers standing at or near the cyclone fence. Ms. Hoisington testified that she heard shots at approximately 10:00 p.m. in the evening, and there was no damage to her home from the bullet strikes.

41. Mr. Carl Gaumer testified. He resides at 5513 North Ash, near Mr. Burton's residence, and was home on the evening of May 6, 2015.

42. Mr. Gaumer testified he detected movement in the alley behind his home and went outside to investigate. He saw multiple police officers and police lights flashing. He could hear yelling but was unsure what was being said.

43. Mr. Gaumer was home with his three year old son during this incident. He took his gun and cell phone with him when he went outside. He heard approximately 10 gunshots and then one big gunshot.

44. Mr. Michael Mears testified. On May 6, 2015 at approximately 9:45 in the evening, he was heading to the store to purchase groceries and was driving south on Ash when he heard approximately five gunshots.

45. Mr. Mears observed a young woman walking in the area of Ash and Rowan, who appeared to be in distress and was very upset. He contacted the woman and asked if she was okay. He walked with her to an area where police officers were located.

46. Officer Adam Potter testified. He has been a police officer in Spokane for nine years. On May 6, 2015, he was working a night shift and was dispatched to the area of 5527 North Ash to investigate a suicidal male in a backyard with a gun.

47. Officer Potter testified that he parked his police car on Ash and contacted three other officers already on scene. Officer Potter was in possession of his AR 15 long rifle. He encountered Officer Benesch and Officer Wheeler, and they discussed a plan to get the male with a gun to talk to them. Officer Potter testified he observed a Toyota Prius in the alley behind 5527 North Ash.

48. Officer Potter testified that it was dark, except for a spotlight, and he could not see the individual with a gun. Officer Potter testified that he then heard gunshots coming from the backyard area. He believed a gate to the yard might have been opened. Officer Potter was standing behind his ballistic shield.

49. Officer Potter testified that he heard a male yell "just do it" and then heard more gunshots from the backyard area. Officer Potter testified that he believed he was being shot at, and he feared for his life.

50. Officer Potter testified that he heard a sound, from his training and experience, he believed to be reloading of a gun. He also heard a female at the front of the house.

51. Officer Potter testified that the male briefly came into view and then disappeared. The male then stepped into full view in front of officers and was holding a handgun. The male was commanded multiple times to put the gun down. The male did not put the gun down after multiple commands by officers.

52. Officer Potter testified the male was now a clear danger to law enforcement and citizens. He had been commanded multiple times to put his weapon down and had refused to do so. The male was shot one time by another officer, at which point, officers approached the male and removed the gun from the male's reach and immediately began medical treatment.

53. Officer Potter testified that, upon examination, there were no bullets in the chamber of the gun that had been in the possession of the Defendant.

54. Officer Potter testified on cross-examination that he never saw the male point a gun at anyone, nor did he hear bullets strike anything. He testified further that when the male appeared in the alley holding the gun, he pointed the weapon at the ground and never raised the weapon from that position.

55. Officer Sean Wheeler testified. He has been with the Spokane Police Department for nine and one half years. He is highly trained and is a member of the Spokane Police Department SWAT team. He responded to 5527 North Ash at 21:52 hours and encountered Karen Christopher, who advised her daughter's boyfriend was making suicidal statements.

56. Officer Wheeler testified he brought his beanbag gun to the scene, and shortly thereafter, heard a volley of shots. He testified that officers were very exposed.

He testified further that he later heard a gun being manipulated, which sounded, from his training and experience, like a weapon being reloaded.

57. Officer Wheeler testified he heard nine or 10 shots fired in total, and officers called for the "Bear-Cat" vehicle to be deployed. Officer Wheeler testified that the situation was very dynamic in that the armed individual could not be seen and that he was fearful for his safety and the safety of his fellow officers.

58. Officer Wheeler testified that he heard the male say "do it" or "come and do it" several times. Officer Wheeler testified that he never saw the male until he stepped into the alley from the backyard of 5527 North Ash. Officer Wheeler testified that the male did not drop his gun after repeated commands to do so. Officer Wheeler testified that he was next to Officer Spolski, who fired one shot, which struck the male in the abdomen.

59. Mr. Joseph M. Cain testified. He resides at 5609 North Oak and was at home watching the news on television on May 6th, 2015, when he heard four shots followed by an additional round of shots.

60. Mr. Cain testified that he went outside his residence and could hear what he believed to be police officers shouting "put the gun down." He testified he also heard a person yelling "just do it, just do it."

61. Mr. Cain testified he heard one single shot fired, at which time, he could see from his vantage point on Oak a person laying on the ground in the alley.

62. Officer Blaine Kakuda testified. He has been a police officer in Spokane for 21 years and is currently a patrol corporal. He responded to the scene at 5527 North Ash regarding a possible suicidal male with a gun.

63. Officer Kakuda parked his vehicle on Rowan and met up with fellow officers already on scene. Officers developed a brief tactical plan, and shortly after, the officers heard a quick volley of shots fired from the backyard of 5527 North Ash with additional shots fired shortly thereafter.

64. Officer Kakuda testified he was fearful and scared that he would be shot. The individual firing the shots could not be seen. Officers were concerned about potential cross fire or potentially being flanked by the unknown individual who was firing a gun.

65. Officer Kakuda testified he never saw shots being fired, but only heard them. Officer Kakuda was also aware of neighbors who may have exited their homes to see what was going on.

66. Lieutenant Dean Sprague testified. He responded to a call regarding a suicidal male with a gun on May 6, 2015 at 21:54 hours and parked his vehicle at Ash and Maple.

67. Lieutenant Sprague asked Karen Christopher to leave the scene at 5527 North Ash and walk down the block. Upon contacting Ms. Christopher, Lieutenant Sprague found her to be very upset and highly concerned regarding the welfare of her daughter, who remained at the 5527 North Ash location. After gunshots were heard, Ms. Christopher was escorted away from the scene.

68. Lieutenant Sprague testified that after shots were fired, the event became "substantially escalated."

69. Officer Troy Teigen testified. He has been a police officer since 1992. He arrived on scene on May 6, 2015 at approximately 10:00 p.m.

70. Officer Teigen testified that he heard three gunshots and three more gunshots followed by two additional shots. Officer Teigen did not hear shouting from either law enforcement or the unknown male.

71. Officer Teigen testified that he checked the home at 5527 North Ash after the male was shot and also did a safety check of the surrounding neighborhood.

72. Officer John Arredondo testified that he has been a police officer for 18 years. He was dispatched to 5527 North Ash on May 6, 2015 at 2155 hours.

73. Officer Arredondo testified that he encountered Karen Christopher and Rebecca Libby after arriving on scene. He heard three gunshots, at which point, Karen Christopher and Rebecca Libby were frantic and were very upset about the situation.

74. Mr. Glenn Davis testified. He is with the crime lab and has been employed in that capacity for 13 years. Mr. Davis is a firearms identification expert. Mr. Davis testified that all of the spent cartridges recovered from the crime scene, with the exception of one cartridge, could be positively identified as having been fired by a Smith and Wesson Beretta PX4 semiautomatic pistol, which was in the possession of the Defendant on May 6, 2015.

75. Officer Dale Wells testified. He was a Spokane police officer from 2005 through 2014. Officer Wells testified that he spoke to the Defendant at the hospital after he became conscious following his gunshot wound. Officer Wells testified that the Defendant said, "he wished police had killed him" and that he was "very glad nobody was hurt."

76. Officer Joseph Matt testified. He has been a police officer in Spokane for two and one half years. Prior to that time, he worked for the Coeur d' Alene Police Department for six years.

77. Officer Matt testified that he came to the scene at 5527 North Ash on May 6, 2015 and could hear "let's do this" being shouted by an unknown male voice. He heard shots fired and thought that the unknown male was shooting at police officers.

78. Officer Matt testified that he never saw the unknown male peering over the fence and thought he also heard the words "just do it" being shouted.

79. Officer Yeshua Matthew testified. He has been a police officer for eight years. He was on duty on May 6, 2015 and arrived on scene at 21:54 hours. He brought with him his AR-15 service rifle and ballistic shield upon exiting his police vehicle.

80. Officer Matthew testified that he heard the words "come on, just do it" shouted perhaps two or three times. He also heard what he believed to be a pistol being reloaded.

81. Officer Matthew testified that he heard 11 shots fired, and officers could not easily advance on the unknown male because there was no cover available for them. Officer Matthew testified that he was fearful for his safety and that of his fellow law enforcement officers. He heard officers say "drop the gun, don't do it."

82. Officer Matthew testified that he never saw the Defendant until he was shot by Officer Spolski. He never observed the Defendant come up behind law enforcement or in any way climb over or peer over the fence at 5527 North Ash.

83. Officer Christopher Benesch testified. He responded to a call regarding an intoxicated, suicidal male with a gun on May 6, 2015. He arrived on scene at approximately 10:00 p.m. and contacted Officer Wheeler and Officer Potter, who were already on scene.

84. Officer Benesch testified that he saw a pistol come over the backyard fence. He heard multiple shots fired and saw "muzzle flash." He heard "do it" being yelled from the backyard of 5527 North Ash.

85. Officer Benesch testified that he heard what sounded, from his training and experience, like a gun being reloaded. He observed the Defendant step into the alley with a weapon in his hand. Officer Benesch had his ballistic shield in one hand and his duty weapon in the other.

86. Officer Benesch testified that the male was commanded multiple times to drop his weapon and did not do so.

87. Officer Benesch testified that the Defendant was shot one time by Officer Spolski after he did not drop his weapon. Officer Benesch could not tell where shots that were fired by the unknown male were directed or aimed.

88. Officer Benesch immediately assisted the Defendant after he was shot by administering chest shields front and back. AMR later arrived and transported the Defendant to the hospital for treatment of a gunshot wound.

89. Officer Jake Jensen testified. He is a K-9 officer and has been with the Spokane Police Department for 15 years. He brought K-9 Officer Cruz with him on May 6, 2015 to 5517 North Ash. Officer Jensen was wearing a body cam, which was filming during the incident.

90. Officer Jensen testified the situation was extremely dangerous and highly dynamic. It was dark and the backyard where the unknown male was located was enclosed by a vinyl privacy fence. Officer Jensen heard three shots and then additional shots followed. He heard a voice yell "come do it."

91. Officer Jensen testified he had his ballistic shield, service revolver, and non lethal beanbag rifle with him. He heard more shots fired for an eventual total of 11 shots.

92. Officer Jensen testified he was scared of being shot and that officers could not specifically identify the threat and where it was coming from.

93. Officer Jensen testified he could not tell where the shots fired were directed or aimed... only that he could tell the shots were coming from the backyard of 5527 North Ash.

94. Officer Spolski testified. He's been a police officer with the Spokane Police Department for eight years and is currently a senior patrol officer. He was working power shift on 5/6/2015 and heard gunshots almost immediately after arriving at 5527 North Ash.

95. Officer Spolski testified that he took his AR-15 rifle to the scene and was not sure, when he arrived, if anyone had been shot.

96. Officer Spolski testified that, as he was running down the alley towards 5527 North Ash, he heard a second barrage of gunfire, and then observed the Defendant in the alley.

97. Officer Spolski testified that the male was holding a gun. He shouted at the male "show me your hands, drop the gun, drop the gun."

98. Officer Spolski testified that when the male did not drop the gun after multiple commands to do so, he fired one shot at the male from approximately 25 to 30 yards away. Officer Spolski testified he felt he had no option other than to shoot the male who would not drop his weapon despite repeated commands from law enforcement.

99. Officer Spolski testified that he had no idea what the direction of the shots were being fired by the unidentified male.

100. Detective James Dresback testified. He has been a police officer since 1984. Detective Dresback was assigned to this investigation.

101. Detective Dresback testified that multiple shell casings were located after this incident in the backyard/alley area of 5527 North Ash.

102. Detective Dresback testified that a search of the residence after this incident revealed nine bottles of medications and then seven additional bottles. Detective Dresback has investigated 50 to 60 shootings during his career. He did not locate any bullets that may have been fired by the Defendant, nor did he locate any bullet holes or bullet strikes anywhere.

103. Detective Michael Drapeau testified. He has been a police officer for 21 years. Detective Drapeau listened to a number of calls the Defendant made from the Spokane County Jail where the Defendant admitted firing a gun numerous times on May 6, 2015.

104. Detective Drapeau testified that all the spent cartridges were located in the backyard of 5527 North Ash and in the alley area near a Chevrolet Suburban.

105. Detective Drapeau testified that, in recorded phone calls from the jail to his father, the Defendant stated that he did not fire at officers.

106. Detective Drapeau testified that no bullet strikes were located, and no one in the neighborhood advised law enforcement of damage to their property caused by bullet strikes.

107. The State rested its case.

108. The defense brought a Motion to Dismiss, which was well argued by both sides and properly directed the Court to review Washington law pertinent to the facts in this proceeding. The Defendant's Motion to Dismiss was denied.

109. The Defendant presented his case in chief by first calling defense investigator Randall Fichte.

110. Mr. Fichte testified that he works for the Public Defender's Office as an investigator and has been so employed for two years and worked 13 months prior to that time as an intern for the Public Defender's Office.

111. Mr. Fichte testified he was assigned to this case in July of 2015. Mr. Fichte testified that he went to the residence at 5527 North Ash to photograph the backyard, fence, and alley.

112. Mr. Fichte testified that he was also searching for evidence of a bullet hole or bullet strike and that none were found, despite the fact that he deployed a metal detector to assist in his search.

113. The defense called Dr. Matthew Layton M.D. Ph.D. Dr. Layton is a board certified psychiatrist with a Ph.D. in pharmacology.

114. Dr. Layton is the previous director of Spokane Mental Health. He has received multiple awards and honors for his work in the field of medicine and psychiatry.

115. Dr. Layton reviewed extensive records for the Defendant and carefully studied his VA records and prescription history.

116. Dr. Layton reviewed the report regarding the Defendant that was prepared by Dr. Grant.

117. Dr. Layton testified that the Defendant had been previously diagnosed with attention deficit disorder and hyperactivity disorder.

118. Dr. Layton testified he could find no report of suicide attempts or suicidal ideations by the Defendant in his medical records.

119. Dr. Layton testified the Defendant was displaying impulsive and intrusive behaviors at work, which are classic symptoms of ADHD.

120. Dr. Layton testified that the VA changed the Defendant's prescription regimen for ADHD.

121. Dr. Layton testified VA notes indicated the Defendant was displaying ongoing symptoms of frustration and anger.

122. Dr. Layton testified the Defendant was prescribed Paroxetine/Paxil in February of 2015 because of his anger and irritability.

123. Dr. Layton testified that Paxil presents with what is known in the medical community as a "black box" warning, advising that Paxil may, in some patients, cause suicidal ideation or thoughts.

124. Dr. Layton testified that Paxil can be prescribed for anxiety and that the "black box warning" tells patients if they are experiencing suicidal thoughts to immediately report the same to their physician.

125. Dr. Layton testified that the Defendant's VA medical records presented complaints by the Defendant in April 2015 of suicidal thoughts and ideations and that Paxil/Paroxetine takes approximately four to six weeks before therapeutic benefits are noted.

126. Dr. Layton testified that the Defendant attempted suicide after he was prescribed Paxil, and the VA then made a decision to double his dosage.

127. Dr. Layton testified the Defendant was also being prescribed Adderall and Clonidine in addition to Paxil.

128. Dr. Layton testified that doubling the Defendant's dosage of Paxil was not appropriate under the circumstances.

129. Dr. Layton testified the Defendant's suicide attempts were absolutely consistent with his contemporary prescription of Paroxetine/Paxil.

130. Dr. Layton testified that, after being arrested for this incident in May of 2015, the Defendant continued to express suicidal ideations while in the Spokane County Jail and was placed on suicide watch.

131. Dr. Layton testified that the Defendant was continuing to receive Paroxetine at the jail, but requested that this medication be terminated, which was done.

132. Dr. Layton testified that, after the Defendant ceased taking Paroxetine/Paxil, all suicidal thoughts and ideations by him stopped.

133. Dr. Layton testified that alcohol should not be consumed while taking Paroxetine/Paxil, and patients may also display disinhibition, impulsivity, weight loss, insomnia, and paranoia.

134. The Defendant Craig Burton testified.

135. Mr. Burton testified, for two years prior to this incident, he has worked at the Spokane VA hospital as an intermediate care technician.

136. Mr. Burton had training in the military, which was of assistance in his current position with the VA.

137. Mr. Burton was previously stationed at Fort Lewis/McChord, and was active duty for four years and then served two years in the National Guard.

138. Mr. Burton testified he was honorably discharged from the military and had received extensive weapons training and is considered an expert with multiple weapons, including the Beretta 9 millimeter handgun.

139. Mr. Burton testified his father was in the Air Force and later served as a police officer and sheriff, as well as a corrections officer.

140. Mr. Burton testified he received de-escalation training in the military and learned a great deal about police work from his father.

141. Mr. Burton testified he had been treated for ADHD and took medication to assist him in that regard.

142. Mr. Burton testified, while in the military, he was prescribed Adderall, which worked very well for him and successfully managed his ADHD symptoms.

143. Mr. Burton testified that the military gave him a 90 day advance supply of Adderall at the time of his honorable discharge.

144. Mr. Burton testified that when he came to Spokane to work for the VA, he requested a prescription for Adderall. He testified he was given Adderall, but it was a lower dosage than he had previously received.

145. Mr. Burton testified that he did not do well on the lower dosage of Adderall and demanded that he be prescribed Adderall XR.

146. Mr. Burton testified that his VA physician declined to increase his Adderall, and instead, prescribed him Paxil in February of 2015.

147. Mr. Burton testified that approximately four weeks after being prescribed Paxil, he started to have suicidal ideations.

148. Mr. Burton testified that he told his physician about his suicidal ideations and was told to wait a little bit longer for the medication to properly take effect.

149. Mr. Burton testified that approximately one week after advising his physician of his suicidal ideations, he attempted to commit suicide by prescription drug overdose.

150. Mr. Burton's suicide attempt failed, and his girlfriend and her mother were able to quickly get him emergency care.

151. Mr. Burton testified that upon advising the VA of his suicide attempt, his Paxil dose was doubled.

152. Mr. Burton testified that he was, by now, having constant suicidal ideations and was continuously questioning why he was here and not dead.

153. Mr. Burton testified that he experimented with a homemade gun silencer for his 9 millimeter Beretta and fired it in the basement of his home and that a bullet lodged in his foosball table afterwards.

154. Mr. Burton testified his marriage had crumbled, and he was very upset that he was being asked to pay \$900 a month in child support, even though the Proposed Parenting Plan that had been agreed upon would be roughly a 50/50 split of time with the children.

155. Mr. Burton testified that on May 6th, 2015, he had not specifically formulated a plan to die, but was thinking about it constantly.

156. Mr. Burton testified that he gave his girlfriend "Becca" a reason to leave and that his thoughts were consumed with death, causing him to retrieve a loaded gun out of his closet.

157. Mr. Burton testified that he believed if he created the right encounter for law enforcement, they would implement their training and experience, and they would shoot and kill him.

158. Mr. Burton testified that he remembered begging Ms. Karen Christopher and his girlfriend Becca to call the police, but thought the police would likely first knock on his door to contact him before doing anything else.

159. Mr. Burton testified that he remembered hearing sirens and did not see law enforcement out in front of his home.

160. Mr. Burton testified he went to his backyard gate and could see police in the alley through the window of his Chevrolet Suburban. He saw that officers had ballistic shields.

161. Mr. Burton testified he did not want the police to have any reason to shoot neighbors or, for that matter, even the dog in his home.

162. Mr. Burton testified he fired the first three rounds into the trees in the neighborhood because he knew it was a "safe backdrop."

163. Mr. Burton testified that when he saw the silhouette of police in the alley, he fired three more shots, assuming law enforcement would move back.

164. Mr. Burton testified that he fired several more shots in the air to empty his magazine.

165. Mr. Burton testified, at this point, he dropped his magazine and placed his gun on safety.

166. Mr. Burton testified he again presumed that police would likely retreat at this point.

167. Mr. Burton testified that when he eventually stepped into the alley, at no time did he point his weapon at law enforcement officers.

168. Mr. Burton testified that upon stepping into the alley, he assumed he would be told to drop his weapon, and if he did not do so, he would be shot.

169. Mr. Burton testified he did not scare officers into shooting him, and that he thought police would not be fearful or afraid.

170. Mr. Burton testified that he never, ever intended to hurt or harm law enforcement officers and shot every round away from law enforcement.

171. Mr. Burton testified that the event "played out to a T" as he had planned.

172. Mr. Burton admitted on cross-examination that he never explored counseling options that had been offered to him by the VA.

173. Mr. Burton admitted on cross-examination that he never asked law enforcement for a counselor or mental health professional to speak with on May 6th, 2015.

174. Mr. Burton testified on cross-examination that law enforcement should not have been "scared" and their training should have taken over, and that since he did not actually fire at police, they had no reason to be fearful.

175. Mr. Burton reiterated on cross-examination that he never intended to harm anyone except himself and did not fire at police at any point on May 6, 2015.

176. Mr. Burton testified on redirect from his counsel that, had he actually intended to shoot at law enforcement, as a trained marksman, he would have "not missed."

Based on the foregoing Findings of Fact and after careful consideration of all the evidence, the Court finds beyond a reasonable doubt the following:

CONCLUSIONS OF LAW

1. Law enforcement officers were called to 5527 North Ash, Spokane, Washington on May 6th, 2015 to investigate concerns regarding a suicidal male with a gun.

2. Law enforcement responded quickly and were dealing with a situation which was highly dynamic and potentially very dangerous.

3. Upon arriving on scene, officers encountered Ms. Karen Christopher... the mother of the Defendant's girlfriend.

4. Ms. Christopher was extremely concerned that Mr. Burton may take his own life with a handgun or that her daughter "Becca" who was still at the residence might be injured.

5. Ms. Christopher had firsthand knowledge of Mr. Burton's current possession of a gun as well as a recent suicide attempt approximately two weeks prior.

6. Multiple officers arrived on scene at varying times, and several groups of officers began formulating plans to de-escalate the situation and hopefully provide mental health assistance to the Defendant.

7. Officers took varying strategic positions around the residence at 5527 North Ash and primarily in the alley behind the home.

8. Multiple officers testified that the situation was incredibly dangerous and dynamic. Officers had no way of knowing exactly where the Defendant was. The backyard at 5527 North Ash is enclosed with an eight foot vinyl privacy fence, and absent minimal spotlights available, it was pitch dark.

9. The Defendant commenced a multipart firing of his weapon while in the backyard of 5527 North Ash. The Defendant testified that he fired each and every shot away from law enforcement, either into the trees or in the air. However, officers could not see the Defendant and had no way of knowing who or what he was firing at.

10. Multiple law enforcement officers testified they heard the Defendant yell "do it" or "just do it" while up to 11 shots were fired from an enclosed position that officers could not see.

11. By the time the Defendant stepped into full view of law enforcement in the alley behind 5527 North Ash, he had already fired 11 shots from his 9 millimeter handgun and had made no attempt to ask law enforcement for help. Instead, Mr. Burton's actions were designed to heighten officer concerns where deadly force would be used to kill him.

12. Mr. Burton stepped into the alley and continued to hold his 9 millimeter handgun. Although Mr. Burton did not point his weapon at officers, he made no attempt to put the gun down, despite repeated commands from law enforcement to do so.

13. Although the Defendant had fired all the ammunition in his weapon and had removed the magazine prior to stepping into view in the alley, officers had no way to know the gun was not loaded. To the contrary, multiple officers heard Mr. Burton "manipulate" the weapon shortly before he stepped into the alley, and all those officers testified, from their training and experience, that the "manipulation" of the weapon they heard sounded like a gun being reloaded.

14. After repeated commands to drop his weapon proved unsuccessful, officers used justifiable force to ensure their safety and the safety of citizens in the area by firing one shot, which struck Mr. Burton in the abdomen.

15. Mr. Burton's injuries were critical, but thanks to the immediate response of law enforcement and medical personnel, Mr. Burton survived.

16. The crimes for which Mr. Burton is charged are as follows:

Count One: First degree assault as to Officer Adam Potter;

Count Two: First degree assault as to Officer Christopher Benesch;

Count Three: First degree assault as to Officer Jake Jensen.

17. To convict the Defendant of the above counts, the State must prove beyond a reasonable doubt that the Defendant committed each count as to the three named law enforcement officers with a firearm with intent to commit great bodily harm and that these acts occurred in the State of Washington.

18. Here, there is no doubt the Defendant fired his 9 millimeter handgun in the presence of the above named law enforcement officers. There is no doubt these acts occurred in Spokane, Washington. There is, however, reasonable doubt the Defendant intended to inflict great bodily harm upon the officers.

19. WPIC 10.01 states in pertinent part that a person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

20. Here, the evidence clearly demonstrates that the Defendant did not intend to inflict great bodily harm on the named victim law enforcements. To the contrary, the evidence and testimony demonstrate that the Defendant never fired a shot in the direction of law enforcement, purposely unloaded his weapon prior to stepping into the officers' view and never pointed his weapon at law enforcement at any time.

21. Further, it strikes the Court as highly unlikely that the Defendant would have missed his mark 11 separate times, given his level of knowledge and expertise with multiple firearms. More so, it seems unlikely that each shot fired by the Defendant

would have failed to strike anything at all in the area where law enforcement were stationed. The evidence and testimony was that there is no indication of a bullet strike anywhere near the respective areas where law enforcement were positioned. In fact, there was no evidence of a bullet strike anywhere that was testified to in this trial.

22. There is reasonable doubt regarding the Defendant's intent to inflict great bodily injury on any of the named victims, which then precludes a finding of guilt on the charge of assault in the first degree as charged in Counts One, Two, and Three.

23. A similar analysis to the above also precludes a finding of guilt as to this defendant to the lesser included offense of attempted assault in the first degree.

24. The lesser included charge of attempted first degree assault fails based upon the same question of intent previously referenced. If the Defendant did not intend to commit first degree assault, then logic dictates that intent cannot be otherwise found in support of attempted assault in the first degree. Again, this defendant simply did not intend to harm anyone other than himself, a goal which he accomplished when he was shot by law enforcement.

25. Turning to the lesser included offense of assault in the second degree, the elements of this offense require that the Defendant assaulted the three named law enforcement officers with a deadly weapon in the State of Washington. And distinct from first degree assault, there is no longer a requirement that a defendant intend to inflict great bodily harm.

26. WPIC 35.10 provides that a person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon.

27. WPIC 35.50 defines an assault as an act done with intent to inflict bodily injury upon another, intending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury, if not prevent it. It is not necessary that bodily injury be inflicted. An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury, even though the actor did not actually intend to inflict bodily injury.

28. Here, Officers Pottér, Benesch, and Jensen all testified that they were fearful of being shot by the Defendant and could not tell where the Defendant was and what he may have been specifically shooting at. However, the focus, pursuant to WPIC 35.50 is not solely directed towards the question of whether officers were in apprehension or fear of bodily injury. (All testified they clearly were.) The analysis must also inquire as to whether the actor (in this case, Mr. Craig Burton) intended to create in the named law enforcement officers apprehension and fear of bodily injury.

29. Here, the facts clearly demonstrate beyond a reasonable doubt that, while the Defendant, Mr. Craig Burton did not intend to inflict great bodily harm on law enforcement officers, he did in fact intend to create in those same law enforcement officers reasonable apprehension and imminent fear of bodily injury.

30. Indeed, Mr. Burton's own testimony was illustrative regarding his intentions on May 6, 2015. While Mr. Burton did not intend to inflict great bodily injury upon the officers, he nevertheless planned and carried out a confrontation with law enforcement that was clearly designed to impose upon those law enforcement officers apprehension and fear, which would cause them to then shoot Mr. Burton and kill him.

31. It goes without saying, even in a highly trained and skilled law enforcement officer or member of the military, an unknown individual firing 11 shots in the dark, in close proximity to your person, is going to cause apprehension and fear. Mr. Burton knew and understood that by creating apprehension and fear in officers, they would then hopefully fall back upon their training and experience and shoot him. Indeed, Mr. Burton testified that his plan "went off to a T." Whether Mr. Burton was aware of it or not, his intention in imposing apprehension and imminent fear of bodily injury upon law enforcement officers was an action that directly constitutes assault in the second degree.

Now, therefore, having heard all the testimony in this trial, mindful of the exhibits entered into evidence, and having excluded and/or not considered evidence and/or testimony which was stricken, mindful of statutory authority and case law guidance, argument of counsel, and otherwise being fully advised:

1. Now finds beyond a reasonable doubt that Mr. Craig Scott Burton is NOT GUILTY of the crime of first degree assault as charged in Counts One, Two, and Three of the Information.
2. Mr. Craig Scott Burton is NOT GUILTY of the lesser included offense of attempted first degree assault as to Counts One, Two, and Three of the Information.
3. Mr. Craig Scott Burton is GUILTY of the lesser included offense of second degree assault on or about the 6th day of May, 2015 as to Officer Adam Potter, Officer

Christopher Benesch, and Officer Jake Jensen, as charged in Counts One, Two, and Three of the Information.

4. This act occurred in the City of Spokane, in the State of Washington.

DATED this 11th day of February, 2016



JUDGE MICHAEL P. PRICE

Appendix B

REPORT AS TO CONTINUED INDIGENCY

(in support of motion or request that the court exercise discretion
not to award costs on appeal)

Please fill out this report to the best of your ability. While you are not required to answer all of the questions, complete information will help the court determine whether to deny costs on appeal to the State, should it prevail.

I, Craig S. Burton certify as follows:

1. That I own:

- a. No real property
 b. Real property valued at \$_____
 c. Real property valued at \$_____, on which I am making monthly payments of \$_____ for the next _____ months/years (circle one).

2. That I own:

- a. No personal property other than my personal effects
 b. Personal property (automobile, money, inmate account, motors, tools, etc.) valued at \$_____
 c. Personal property valued at \$_____, on which I am making monthly payments of \$_____ for the next _____ months/years (circle one).

3. That I have the following income:

- a. No income from any source.
 b. Income from employment: \$_____ per month.
 b. Income of \$ 133 per month from the following public benefits:

- Basic Food (SNAP) SSI Medicaid Pregnant Women Assistance Benefits
 Poverty-Related Veterans' Benefits Temporary Assistance for Needy Families
 Refugee Settlement Benefits Aged, Blind or Disabled Assistance Program

Other: VA Disability

4. That I have:

- a. The following debts outstanding:
- | | Approximate amount owed: |
|--|--------------------------|
| Credit cards, personal loans, or other installment debt: | \$ <u>10,000 +</u> |
| Legal financial obligations (LFOs): | \$ _____ |
| Medical care debt: | \$ _____ |
| Child support arrears: | \$ <u>850 per month</u> |
| Other debt: | \$ _____ |

Approximate total monthly debt payments:

\$ 850

() b. No debts.

5. That I am without other means to pay costs if the State prevails on appeal and desire that the court exercise discretion to deny costs.

6. That I can pay the following amount toward costs if awarded to the State:

\$ 0.

7. That I am 27 years of age at the time of this declaration.

8. That the highest level of education I have completed is: High School + some college

9. That I have held the following jobs over the past 3 years:

Employer/job title	Hours per week	Pay per week	Months at job
VA / ICT	40	\$800	12 30

10. That I have received the following job training over the past three years: _____

11. That I have the following mental or physical disabilities that may interfere with my ability to secure future employment: Degenerative Disk Disease, Orcaalgia,

12. That I am financially responsible for the following dependents (children, spouse, parent, etc.):
~~John Craig Burton~~

I, Craig Burton, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

16 Dec 2016
Date and Place

Craig Burton
Signature of (Defendant) (Respondent) (Petitioner)

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

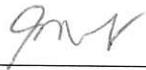
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 34230-1-III
)	
CRAIG BURTON,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF JANUARY, 2017, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN O'BRIEN [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] CRAIG BURTON 389347 WASHINGTON STATE PENITENTIARY 1313 N 13 TH AVE WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF JANUARY, 2017.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710