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No. 36069-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

SANTIAGO ALBERTO SANTOS,

Appellant.

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

BRIEF OF APPELLANT (AMENDED)

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. INTRODUCTION

It is a basic principle of American law that “wrongdoing must be conscious to be criminal.” Morissette v. United States, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952).

Santiago Santos is mentally ill. He suffers from delusions and paranoia. Due to his mental illness, he believed that people followed him and intended to hurt him. So that people outside could not observe him at home, he would cover the windows with blankets or drapes. Mental illness runs in Mr. Santos’s family.

One morning, Mr. Santos awoke in jail. He recalled drinking the night before and being invited by Manuel Jaime into his home. His head hurt and he thought he might have been hit in the head by Mr. Jaime.

Mr. Santos was told that Mr. Jaime was dead. He had been repeatedly stabbed. Charged with murder, Mr. Santos put on a defense of diminished capacity, presenting evidence that he had lacked the ability to act with intent or knowledge at the time of the incident. Although his defense negated the mental elements of the charged crimes, the court refused to instruct the jury that the State bore the burden of disproving diminished capacity beyond a reasonable doubt. Because this and other constitutional errors deprived Mr. Santos of a fair trial, his conviction for second degree felony murder must be reversed.

B. ASSIGNMENTS OF ERROR

1. In violation of due process under article I, § 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution, the court erred by failing to instruct the jury that the State bore the burden of disproving diminished capacity beyond a reasonable doubt.

2. In violation of due process under article I, § 3 and the Fourteenth Amendment, the court erred by failing to instruct the jury that the State bore the burden of disproving self-defense beyond a reasonable doubt.

3. In violation of the right to present a complete defense under article I, § 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution, the court erred by excluding evidence that ketamine is used recreationally to enhance sexual activity.

4. In violation of the right against self-incrimination under article I, § 9 of the Washington Constitution and the Fifth Amendment to the United States Constitution, the court erred by denying Mr. Santos's motion to exclude compelled statements and video.

5. In violation of CrR 3.5, the court failed to enter written findings of fact and conclusions of law.

6. In violation of due process under article I, § 3 and the

Fourteenth Amendment, cumulative error by the court deprived Mr. Santos of a fair trial.

7. In violation of due process under article I, § 3 and the Fourteenth Amendment, insufficient evidence supports the jury's special verdict finding the existence of two aggravating factors. The court erred by imposing an exceptional sentence.

8. In violation of due process and the right to a jury trial, as guaranteed by article I, §§ 3, 21 & 22 of the Washington Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, the court failed to properly instruct the jury on the "foreseeable and destructive impact" factor.

9. In violation of due process under article I, § 3 and the Fourteenth Amendment, the two aggravating factors found by the jury are void for vagueness. The court erred by imposing an exceptional sentence.

10. The court erred by imposing a \$200 filing fee against Mr. Santos as part of legal financial obligations.

11. The court erred by ordering that non-restitution legal financial obligations bear interest.

12. Without a finding of an ability to pay, the court erred by ordering Mr. Santos to pay supervision fees related to community custody.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When evidence supports a defense and the defense negates an element of the offense, the jury must be instructed that the State has the burden of disproving the defense beyond a reasonable doubt. Evidence supported Mr. Santos's defense of diminished capacity and it negated the mental elements of the offenses. Did the court err by refusing to instruct the jury that the State bore the burden of disproving diminished capacity beyond a reasonable doubt?

2. When some evidence supports a claim of self-defense, the court must instruct the jury on self-defense. Evidence showed a struggle between Mr. Santos and the decedent, and Mr. Santos believed the decedent struck him on the back of his head. The decedent was under the influence of ketamine, an anesthetic that causes a dissociative state and hallucinations. Mr. Santos's mental state was diminished. Given the evidence, did the court err by refusing to instruct the jury on self-defense?

3. Defendants have a constitutional right to present a complete defense. This includes the right to present relevant evidence and to rebut the prosecution. Ketamine, a substance found in the blood of the decedent, may be used recreationally to enhance sexual experiences. Theorizing that the physical confrontation may have been due to an unwanted sexual advance and to rebut a theory that ketamine had been used to disable the

decedent, Mr. Santos sought to elicit testimony about the sexual recreational use of ketamine. Did the court violate Mr. Santos's right to present a complete defense by excluding this evidence?

4. After a person in custody invokes his or her right to a lawyer, all interrogation must cease. After being arrested, Mr. Santos invoked his right to a lawyer. Rather than stop, the officer continued the interrogation by serving a warrant for Mr. Santos's DNA and demanding Mr. Santos's cooperation. Did the court err by admitting Mr. Santos's statements after he asked for a lawyer?

5. In light of the significant independent errors, did cumulative error deprive Mr. Santos of a fair trial?

6. The State must prove the existence of an aggravating circumstance beyond a reasonable doubt. The deliberate cruelty aggravator requires proof the crime was atypical in that it was more cruel than the typical one. No evidence was elicited about the "typical" second degree felony murder predicated on assault with a deadly weapon. Did the State fail to prove the deliberate cruelty aggravator?

7. The destructive impact aggravating circumstance requires proof that the impact of the crime on a third person be foreseeable to the defendant and be of a destructive nature atypical of the crime. The evidence did not prove that Mr. Santos was aware children were in a

closed bedroom of the house at the time of the incident. And the evidence did not prove the destructive nature of the offense was atypical. Did the State fail to prove the destructive impact aggravator?

8. An aggravating circumstance is an element of the offense. Misstating the requirements of an element of an offense to the jury is constitutional error. The jury was not told that to find the destructive impact aggravator, the impact must be foreseeable *to the defendant* and be atypical. Did the court err by not instructing the jury what was necessary to properly find the destructive impact aggravator?

9. Elements of an offense violate due process if they are so vague that they fail to provide notice or invite arbitrary application. Statutes that fix or increase sentences are also subject to the void for vagueness doctrine. Aggravating circumstances are elements and increase the range of punishment. Are they subject to vagueness challenges?

10. To find the deliberate cruelty aggravator, the offense must be atypical. But what makes an offense “typical” is inherently speculative. And it is unclear what threshold level of cruelty makes an offense atypical. Is the deliberate cruelty aggravator void for vagueness?

11. To find the destructive impact aggravator, the jury was asked only whether the crime involved a destructive and foreseeable impact on persons other than the victim. The jury was not provided any guidelines.

Given the lack of guidelines and the speculative nature of the inquiry, is the destructive impact aggravator void for vagueness?

12. The \$200 filing fee is no longer mandatory. It may not be imposed on an indigent person. The change in the law applies to cases on appeal. Mr. Santos is indigent. Should the \$200 fee be stricken?

13. As of June 7, 2018, interest no longer accrues on non-restitution legal financial obligations. Must the provision in the judgment and sentence stating otherwise be corrected?

14. Before imposing discretionary fees, including the requirement that the defendant pay supervision fees, the court must analyze the defendant's ability to pay. Without analyzing his ability to pay, the court required Mr. Santos to pay supervision fees. Did the court err?

D. STATEMENT OF THE CASE

Santiago Santos was born in Prosser and grew up in nearby Grandview. RP 848-49, 895. He moved to California when he was a teenager and lived with his mother and sisters there. RP 849, 896. Mr. Santos's mother returned to Grandview when Mr. Santos was about 18 years old. RP 849. Around December 2013, when Mr. Santos was about 25 years old, he returned to Grandview to live with his mother. RP 849-50.

According to his mother's testimony, Mr. Santos did not have friends visit him as child. RP 850-51. He did not like visitors at home and

would retreat to his room when people came over. RP 850-51. He placed sheets or curtains over the windows in the house so that people could not see inside. RP 852. This odd behavior continued when Mr. Santos moved home in 2013. RP 852. Mr. Santos told his mother that he thought people were following him and might be out to harm him. RP 855. Because Mr. Santos feared being followed and thought people might be pursuing him, he would walk home using zigzag patterns rather than directly RP 888, 943-44. He did not like the light and preferred the dark. RP 857.

Mental illness may run in Mr. Santos's family. RP 933. Mr. Santos's siblings have been diagnosed with bipolar disorder and his aunt suffers from mental illness. RP 866, 933.

In the early summer of 2014, Mr. Santos woke his mother up late at night, telling her that he felt like his head was going to explode and that he thought he had a tumor. RP 858; see Ex. 206, p. 12-13. She took him to the emergency room. RP 857. Mr. Santos told medical providers, "I think I have contracted a brain tumor. I am having pain inside my head." Ex. 206, p. 8. He was diagnosed with a headache and prescribed pain medication. Ex. 206, p. 9-13. Medical records note Mr. Santos had "photophobia."¹ Doctors found no acute intracranial abnormality. Ex. 206, p. 32.

¹ This is sensitivity to light and "is a common symptom seen in many neurologic disorders." <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5606068/>.

A little over a month later, Mr. Santos woke his mother again to take him to the emergency room. RP 857; Ex. 206, p. 18. He complained of severe pain in the area of his spleen and believed he was bleeding internally. RP 857; Ex. 206, p. 18. His internal organs were fine. Ex. 260, p. 35-36. He was diagnosed with gastritis and discharged. Ex. 206, p. 22.

A few weeks later, Mr. Santos returned to the hospital. Ex. 206, p. 15. Although he had recently been screened negative for sexually transmitted diseases, Mr. Santos insisted he was having symptoms from having sex and wanted treatment. Ex. 206, p. 15. Despite the evidence, he told his mother he was infected with a sexually transmitted disease. RP 858. Four years later at trial, Mr. Santos adhered to his belief that he had been diagnosed with a sexually transmitted disease. RP 882.

In fall 2014, Mr. Santos was working at a warehouse. RP 855, 885. On November 14, 2014, after he got off work around 11 p.m., Mr. Santos went to a bar in Prosser. RP 886. He drank heavily at this bar and possibly at a second bar. RP 886.

Later that night, sometime before 3:00 a.m., Mr. Santos found himself at Manuel Jaime's house. RP 887; Ex. 195. Mr. Jaime was Mr. Santos's age and lived close to Mr. Santos's house. RP 681, 689. Mr. Jaime did not have girlfriend. RP 683.

Mr. Jaime lived with his mother, Maria Mendez, and had lived

with her his whole life. RP 679, 686-87. Each had their own room in the three-bedroom house. RP 680-81. Mr. Jaime's sister, Griselda Flores, lived in a mother-in-law unit in the back of the house. RP 695. Ms. Flores's seven children stayed in the third bedroom. RP 679, 681. The oldest child was a boy, A.F., who was then 12 years old. RP 378-79.

Ms. Mendez was not home that night and had been on a trip to Texas since Halloween. RP 680. One of A.F.'s siblings was away as well. RP 379. According A.F., his mother had left for work around 6:00 p.m. and was also not home.² RP 393. A.F.'s maternal aunt, Alma Guillen, dropped her 10-year-old daughter off at the home to spend the night. RP 695, 699. She did not go into the house or see Mr. Jaime. RP 699.

Shortly before 3:00 a.m., A.F. awoke to a commotion. RP 382. He heard yelling and believed a man was killing his uncle. RP 382. He called 911. Exs. 194-195.

Three police officers responded. RP 444. Mr. Jaime was lying down near the doorway. RP 444. He had been stabbed many times and was greatly injured. RP 444, 448. An officer shined a flashlight on Mr. Santos, who was in one of the bedrooms. RP 445. Mr. Santos lay down on the floor. RP 445. Police arrested Mr. Santos without incident, although

² Ms. Flores did not testify.

the officer who escorted Mr. Santos to the police car felt like Mr. Santos was pulling him towards the car. RP 446, 460.

Asked by police who stabbed him, Mr. Jaime stated “Santiago.” RP 449. Mr. Jaime was taken to the hospital, but did not survive. RP 556.

Mr. Santos was placed in a cell. RP 525. Officers collected his clothing. RP 626. He was wearing four pairs of underwear. RP 464. An officer also took pictures using a digital camera. RP 452. The officer left the camera in the cell. RP 453. The officer returned to get the camera, but the memory card was missing and the photos deleted. RP 454, 627.

Later that morning, officers placed Mr. Santos in an interrogation room. Exs. 207, 208. Mr. Santos requested an attorney. RP 52; Pretrial (PT) Ex. D, p. 2. Officers did not cease their interaction with Mr. Santos and instead served a warrant for his DNA. PT Ex. D, p. 2-3. The officer read the warrant, which stated that Mr. Santos was under arrest for homicide and that Mr. Jaime was dead. PT Ex. D, p. 2-3. After some back and forth about the validity of the warrant, Mr. Santos agreed to submit to the seizure. PT Ex. D, p. 3-5. The interaction was recorded. PT Ex. C.

Detective Travis Shephard, who had been one of the officers to escort Mr. Santos into the cell at the station, knew Mr. Jaime for about eight years or more. RP 624, 628. Mr. Jaime was a “mercenary” informant. RP 623, 628, 644. Mr. Jaime had signed a contract with

Detective Shephard in late 2012. RP 661. Mr. Jaime had a criminal history. RP 628, 651, 653-55. This included not merely drug-related convictions, but also felonies for theft and burglary. RP 653-54. Mr. Jaime had been arrested for burglary in late December 2013 and sentenced to nine months' incarceration. RP 653-55; Exs. 200, 201.

In the summer of 2014, based on information from Mr. Jaime, Detective Shephard began an investigation into Jose Fajardo. RP 658, 697. In August, Detective Shephard used Mr. Jaime to conduct a controlled buy of narcotics from Mr. Fajardo. RP 648-51, 659-60. This resulted in Mr. Fajardo's arrest and prosecution. RP 623, 658.

Mr. Jaime never mentioned Mr. Santos to Detective Shephard and Detective Shephard never heard the name of Santiago Santos while working many years in Grandview. RP 661-62.

Following the incident, Ms. Guillen picked up her daughter and the other children from the police station, where the police had taken them. RP 695-96. Detective Shephard may have told Ms. Guillen that her deceased brother had worked for him and also told Mr. Jaime's father that his son was an informant. RP 642, 701. Ms. Guillen had gone to school with Mr. Fajardo and knew that her brother socialized with him. RP 690, 697. She did not know Mr. Santos or his family. RP 697.

A.F. gave conflicting statements about the incident. In his first

interview with police hours after the incident and before he interacted with his family, A.F. said he saw Mr. Santos inside his house with Mr. Jaime. RP 636. He said that Mr. Santos had retrieved a knife out of the kitchen drawer and started cutting his “tio.”³ RP 638; Ex. 199. He quoted Mr. Santos as saying: “you’re going to die. You’re going to die fast. You’re bleeding fast.” RP 637; Ex. 199.

Five days later, after A.F. had spoken with his family, police interviewed A.F. again. Ex. 205; RP 569. This time A.F. said he did not see what happened, stating he had been in the bedroom with the door closed the whole time. Ex. 205, p. 8; RP 569. He now claimed to have heard Mr. Santos say that “Fajardo” sent him. Ex. 205, p. 6-7; RP 402. He claimed that Mr. Santos made statements to the effect that Mr. Jaime owed money for drugs. Ex. 205, p. 6-7; RP 401. Unlike before, he now recalled Mr. Santos saying, “you’re dying slowly.” Ex. 205, p. 7; RP 397.

A.F. gave a third statement to police on December 5. RP 403. This time, he recalled Mr. Santos saying he was going to get payback and hurt their family. RP 405. He also believed that Mr. Jaime had opened the door to let Mr. Santos in, but that he had not seen this happen. RP 406.

A.F. claimed to have seen Mr. Santos with his grandmother and

³ Tio is Spanish for uncle.

her grandmother's friend, Juanita, at his house a week before the incident, and that Mr. Santos gave them roses. RP 381. Ms. Mendez, however, had been in Texas since Halloween. RP 680. Ms. Mendez denied knowing Mr. Santos and testified he did not give her flowers. RP 689, 691. Ms. Mendez testified, however, that Mr. Santos might have come over when he was a child. RP 689. A.F. told police that Mr. Santos was one of Mr. Jaime's best friends, although he could not explain why he thought this. RP 401.

In a bedroom of the house, police found a folding knife on top of books in a closet. RP 475, 481. The knife, which was not a kitchen knife, had blood on it. Ex. 100. It did not have a serrated edge. RP 588-89. It had Mr. Santos's fingerprint on it. RP 675.

The autopsy showed about 59 stab wounds, about 29 in the back and about 30 in the front. RP 595-96. There were no defensive wounds. RP 589. The autopsy revealed that Mr. Jaime had a significant amount of ketamine, a controlled substance, in his system. RP 709, 716. Ketamine is an anesthetic that may be used in surgeries, but is also used recreationally. RP 600-01, 710, 713. It has dissociative and hallucinogenic properties. RP 600-01, 713. There was no evidence that Mr. Jaime had been injected with ketamine. See RP 577-606 (testimony of forensic pathologist).

The State ultimately charged Mr. Santos with first degree murder and second degree felony murder predicated on second degree assault. CP

6-7. On both counts, the State alleged two aggravating circumstances, deliberate cruelty and that the offense had a destructive and foreseeable impact on other persons. CP 6-7. The trial occurred in 2018.

Mr. Santos testified that he recalled drinking heavily. RP 886, 902, 940-41. As he went by Mr. Jaime's house, Mr. Jaime invited him in. RP 887. Mr. Santos knew Mr. Jaime and had known him since childhood. RP 885, 908-09. He did not remember what happened in the house, but he vaguely recalled a struggle, and believed that Mr. Jaime might have struck him in the back of his head because it had hurt the next day. RP 892, 945, 947. He denied knowing Mr. Fajardo. RP 906. No evidence linked Mr. Santos to Mr. Fajardo. Mr. Santos stated he did not carry a knife. RP 906.

Mr. Santos's primary defense was diminished capacity. Dr. Philip Barnard, a clinical psychologist, concluded that Mr. Santos was delusional. RP 938. He diagnosed Mr. Santos with delusional disorder and a personality disorder with schizoid paranoia and avoidant features. RP 948-50. Mr. Santos agreed that he was mentally ill. RP 880. Dr. Barnard testified that Mr. Santos's mental disorder prevented him from forming the intent necessary to commit the charged crimes:

Q. Based upon the mental illness that he suffers from, do you have an opinion to a reasonable degree of medical or psychological certainty whether or not Mr. Santos could have formed the intent to commit the crime charged in this case?

A. I do. I believe that he could not. I believe that he has been afraid of being attacked, followed, attacked. When he entered the house, Mr. Jamie's house, that he was struck from behind. So it's like his delusional belief came to fruition and that it happened. I think that drove him into a psychotic rage, which was assisted with the disinhibiting factor of the extreme alcohol use so that he stabbed Mr. Jamie several times trying to defend himself.

RP 949-50.

Over Mr. Santos's objection, the court forbade the defense from eliciting that ketamine is used recreationally to enhance sex. RP 92, 704. The court refused to exclude the video from when police served the warrant for DNA on him. RP 65. Based on Dr. Barnard's testimony, the jury was instructed on diminished capacity, but not that the State bore the burden to disprove the defense. RP 1052, 1064-66. The court refused to instruct the jury on self-defense. RP 1064-66.

On count one, the jury convicted Mr. Santos of the lesser offense of first degree manslaughter. RP 1164. On count two, the jury convicted Mr. Santos of second degree felony murder. RP 1164. As to count two, the jury found the two aggravators had been proved. RP 1164-65.

The State sought an exceptional sentence upward. CP 160-61. The court vacated the manslaughter conviction and sentenced Mr. Santos on the conviction for second degree felony murder. CP 195. The court determined that an exceptional sentence was warranted and increased Mr.

Santos's sentence by ten years. RP 1235. In total, the court sentenced Mr. Santos to 398 months in prison. CP 165.

E. ARGUMENT

1. Depriving Mr. Santos of due process of law, the trial court refused to instruct the jury that the State bore the burden of disproving diminished capacity beyond a reasonable doubt.

a. When a defense negates an element of the offense and is supported by the evidence, due process requires the State disprove the defense beyond a reasonable doubt.

Due process requires the State bear the burden of proving all the elements of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. If a defense negates an element of an offense and is supported by the evidence, due process requires the State to disprove the defense beyond a reasonable doubt. State v. W.R., Jr., 181 Wn.2d 757, 763, 336 P.3d 1134 (2014). For example, when adequate evidence of self-defense is presented at trial in a murder or assault prosecution, the State has the burden of disproving the defense beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 618-19, 683 P.2d 1069 (1984); State v. McCullum, 98 Wn.2d 484, 495, 656 P.2d 1064 (1983). This is because self-defense negates not only the element that the defendant's use of force was unlawful, but also the intent and knowledge elements of the offenses. Acosta, 101 Wn.2d at 617-19.

Washington recognizes the defense of diminished capacity. State v. Griffin, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983). Diminished capacity is a mental condition that makes a person incapable of possessing or forming the required mental state necessary to commit the charged offense. State v. Furman, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993); State v. Gough, 53 Wn. App. 619, 622, 768 P.2d 1028 (1989). In other words, “diminished capacity . . . negates one of the elements of the alleged crime.” State v. Nuss, 52 Wn. App. 735, 739, 763 P.2d 1249 (1988).

b. Mr. Santos’s defense of diminished capacity negated the mental elements in the charged offenses. The court erred by rejecting Mr. Santos’s request to instruct the jury that the State must disprove diminished capacity.

Mr. Santos’s defense was diminished capacity. Mr. Santos called Dr. Barnard, a clinical psychiatrist, to testify and provide evidence in support of this defense. RP 914. Dr. Barnard testified that Mr. Santos suffers from mental illness. RP 948. Among other diagnoses, he diagnosed Mr. Santos with delusional disorder. RP 949-50. In Dr. Barnard’s expert opinion, Mr. Santos’s capacity was diminished. He opined that, as a result of this diminished capacity, Mr. Santos had been incapable of forming the intent necessary to commit the charged offenses. RP 949-50.

Based primarily on Dr. Barnard’s testimony, Mr. Santos asked the court to instruct the jury on his defense of diminished capacity. The court

found the evidence supported instructing the jury on the defense. RP 1052; cf. Griffin, 100 Wn.2d at 418-19 (requirements for diminished capacity were met). Based on this determination, the court instructed the jury that: “Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form the intent to accomplish a result that constitutes a crime.” CP 121.

Nevertheless, the court refused to instruct the jury that the State bore the burden of disproving diminished capacity beyond a reasonable doubt. RP 1064-66. Defense counsel argued that because the defense of diminished capacity negated the intent element of the charged crimes, the State bore the burden of disproving the defense beyond a reasonable doubt. RP 21, 1063-64. To make this requirement clear to the jury, defense counsel proposed instructions requiring the jury to so find in order to convict Mr. Santos. RP 1063; CP 89, 91, 99.⁴

Because diminished capacity negated the mental elements in the charged offenses, the court erred. “The key to whether a defense necessarily negates an element is whether the completed crime and the defense can coexist.” W.R., 181 Wn.2d at 765. The offense of first degree

⁴ The proposed language would have required the jury to find, as an element of each offense, that Mr. Santos “did not suffer from a mental illness that prevented him from acting with the purpose to accomplish a result which constitutes a crime.” CP 89, 91, 99; RP 1063.

murder required proof of premeditated intent to cause the death of another person. RCW 9A.32.30(1)(a). The offense of second degree felony murder, predicated on second degree assault also required proof of intent. RCW 9A.32.050(1)(b); RCW 9A.36.021(1)(c); State v. Byrd, 125 Wn.2d 707, 716, 887 P.2d 396 (1995) (assault requires proof of intent). If Mr. Santos's defense of diminished capacity was valid, this necessarily meant he could not be guilty of these offenses because he was incapable of having the requisite intent to kill or assault.⁵ Therefore, because the evidence supported Mr. Santos's claim of diminished capacity, the State bore the burden of disproving it beyond a reasonable doubt.

Precedent applying the "negates analysis" supports the foregoing conclusion. As explained earlier, the State must disprove self-defense because self-defense negates the mental elements that a defendant act with intent or knowledge that their actions constitute a crime. Acosta, 101 Wn.2d at 617-19. Similarly, in robbery and theft prosecutions, a good faith claim of title defense must be disproved by the State because the defense negates the intent to commit theft element of these offenses. State v.

⁵ As to count one, first degree murder, the jury was instructed on the lesser included offenses of second degree (intentional) murder and first degree manslaughter. Respectively, second degree murder required proof of intent to kill while manslaughter required proof of knowledge of a substantial risk that death may occur. CP 126, 129. Mr. Santos's claim of diminished capacity negated both the intent and knowledge elements in these offenses. See State v. Edmon, 28 Wn. App. 98, 104, 621 P.2d 1310(1981); Acosta, 101 Wn.2d at 618.

Hicks, 102 Wn.2d 182, 187, 683 P.2d 186 (1984). More recently, our Supreme Court has held that in rape prosecutions, a defense of consent must be disproved by the State because consent negates the element of forcible compulsion. W.R., 181 Wn.2d at 762-63. In doing so, the court overruled prior precedent. Id. at 759-60. Still more recently, this Court held, in the context of a prosecution for vehicular homicide and vehicular assault, the State must prove the absence of a superseding cause because this negates the element of proximate cause. State v. Imokawa, 4 Wn. App. 2d 545, 556, 422 P.3d 502 (2018), rev. granted, __ Wn.2d __ (2019).

In rejecting Mr. Santos's request, the court cited State v. Marchi, 158 Wn. App. 823, 243 P.3d 556 (2010). RP 1065-66. There, this Court rejected the same argument. Marchi, 158 Wn. App. at 833-36. Because the reasoning of Marchi is unpersuasive and is inconsistent with subsequent precedent, this Court should not follow it. Matter of Arnold, 190 Wn.2d 153-54, 410 P.3d 1133 (2018) (Court of Appeals is not bound to follow previous decisions from Court of Appeals).

Marchi failed to engage in the "negates" analysis. This disregard of the negates analysis is incorrect. W.R., 181 Wn.2d at 763 (explaining that Supreme Court had failed to apply the "negates" analysis in previous decision holding that State did not bear burden to prove lack of consent in rape prosecution). Rather, the opinion appears to reject the argument on

the theory that diminished capacity caused by mental illness is not actually a defense. Marchi, 158 Wn. App. at 835-36. The decision characterized diminished capacity as a “rule of evidence” concerning admission of “evidence relevant to subjective states of mind.” Id. at 834, citing State v. Stumpf, 64 Wn. App. 522, 525 n.2, 827 P.2d 294 (1992). The novel idea is traced to a law review article, which was cited in a footnote of a decision by this Court. Stumpf, 64 Wn. App. at 525 n.2, citing John Q. La Fond & Kimberly A. Gaddis, Washington’s Diminished Capacity Defense Under Attack, 13 U. Puget Sound L. Rev. 1, 22 (1989).

To be sure, there are particular requirements to put a defense of diminished capacity before the trier-of-fact. Griffin, 100 Wn.2d at 418-19. But the due process issue concerns the burden of proof and whether the defense negates an element of the charged offense. W.R., 181 Wn.2d at 763-64. The analysis asks whether the completed crime and defense can coexist, not whether there are particular requirements to raise the defense.

Labeling diminished capacity as something other than a “defense” does not make the due process issue evaporate. For example, in Imokawa, this Court held due process requires the State to prove the absence of a superseding cause beyond a reasonable doubt because its presence negates the element of proximate cause in the charged offenses. Imokawa, 4 Wn. App. 2d. at 556. Although it may be raised as a defense, superseding cause

is not typically characterized as a “defense.” Rather it is part of the concept of “proximate cause.” See State v. Meekins, 125 Wn. App. 390, 397-98, 105 P.3d 420 (2005).

Marchi also incorrectly characterized a defense of diminished capacity based on a mental disorder as being equivalent to a defense of voluntary intoxication. Marchi, 158 Wn. App. at 836. Our legislature has declared that *voluntary* intoxication does not absolve one of criminal responsibility, but that intoxication may nevertheless be considered:

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

RCW 9A.16.090. Unlike voluntary intoxication, mental illness is *involuntary*. Thus, while the two concepts may be related, they are distinct. See Furman, 122 Wn.2d at 454 (explaining that instruction on one defense may sometimes be adequate to argue other defense to the jury).

Because Marchi failed to apply the negates analysis and its reasoning is flawed, this Court should decline to follow it. Applying the negates analysis and consistent with more recent precedent, this Court should hold the State has the burden of disproving diminished capacity when the defendant meets the requirements for the jury to be instructed on

the defense. Because Mr. Santos met these requirements, the trial court erred by failing to instruct the jury that the State bore this burden.⁶

c. The State cannot meet its burden to prove the error harmless beyond a reasonable doubt.

The failure by the court to give an instruction is presumed prejudicial. Hicks, 102 Wn.2d at 186. And when the State's burden has been lightened by not requiring the State to disprove a defense beyond a reasonable doubt, this is constitutional error. W.R., 181 Wn.2d at 770. Constitutional error is presumed prejudicial and the State bears the burden of proving harmlessness beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

The State cannot meet its burden. Diminished capacity was the central issue in the case. Although the jury received an instruction on diminished capacity, the jury was not informed the State had the burden to disprove diminished capacity beyond a reasonable doubt. Defense counsel attempted to argue the State had this burden. RP 1141-42. But without proper instructions, the jury may have rejected his contention because counsel's argument was unsupported by the jury instructions and the jury

⁶ Although Mr. Santos proposed that the jury be informed of this requirement in the to-convict instructions, a separate instruction informing the jury of the State's burden would have been adequate. See State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991) (separate self-defense instruction adequate).

was told that counsel's arguments are not the law. CP 111. Further, the jury likely found the evidence concerning Mr. Santos's mental capacity compelling because the jury did not convict Mr. Santos of premeditated or intentional murder. RP 1163-64. Rather, the jury convicted Mr. Santos of first degree manslaughter and second degree felony murder. RP 1163-64.

Consistent with precedent where there was error in informing the jury of the proper allocation of the burden of proof, the failure to apprise the jury of the State's burden to disprove the defense of diminished capacity requires reversal. W.R., 181 Wn.2d at 770; Acosta, 101 Wn.2d at 624-25; Imokawa, 4 Wn. App. 2d at 559-60.

2. Depriving Mr. Santos of due process, the Court refused to instruct the jury on self-defense.

a. Defendants are entitled to instructions on self-defense when there is some evidence in support.

Force used in self-defense is lawful to prevent injury of oneself. RCW 9A.16.020(3). When there is some evidence of self-defense, the defendant is entitled to instructions on self-defense. State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); McCullum, 98 Wn.2d at 490. The threshold burden of production for a self-defense is low. State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Once this burden is met, due process requires the State to prove the absence of self-defense beyond a reasonable doubt. Walden, 131 Wn.2d at 469.

The evidence is viewed from the position of a reasonably prudent person in the shoes of the defendant. Id. at 474. This standard has both subjective and objective elements. Id. The subjective element requires the trier of fact to stand in the shoes of the defendant and consider all the facts and circumstances known to the defendant; the objective element requires the trier of fact to determine what a reasonably prudent person similarly situated would have done. Id.

All the evidence from the trial is considered, not just the evidence produced from the defendant's case. McCullum, 98 Wn.2d at 488. The evidence is viewed in the light most favorable to the defendant. State v. George, 161 Wn. App. 86, 95, 249 P.3d 202 (2011). "It is not the trial court's prerogative to resolve the question of whether a defendant in fact acted in self-defense." Id. at 100. The court "should deny a requested jury instruction that presents a defendant's theory of self-defense only where the defense theory is completely unsupported by evidence." Id.

b. The trial court incorrectly refused to instruct the jury on self-defense.

Mr. Santos asked the court to instruct the jury on self-defense and proposed self-defense instructions. RP 20-21, 1044-48; CP 84-93, 99. In support, he relied primarily on his own testimony along with the testimony from Dr. Barnard. RP 1044-48, 1050-51.

Dr. Barnard testified that Mr. Santos explained that Mr. Jaime had invited him into the house as he was walking by on his way home. RP 945. Mr. Santos told him he remembered someone hitting him on the back of the head and that he believed he must have defended himself, though he did not remember the details. RP 945, 947. Mr. Santos recalled having a terrible headache when he awoke at the police station. RP 947-48. Dr. Barnard testified he believed Mr. Santos likely believed he was acting in self-defense when he stabbed Mr. Jaime. RP 949-50.

Mr. Santos testified similarly. He recalled Mr. Jaime inviting him in. RP 889. He did not remember the details of what happened, but recalled getting hit on the back of his head and waking up with his head hurting. RP 891. Based on marks on his body, it appeared that he had been in a struggle. RP 892. Although he did not recall having a knife, he testified if he had used a knife, it must have been in self-defense. RP 908.

Additionally, Mr. Santos pointed out the uncontroverted evidence that Mr. Jaime had been under the influence of ketamine, which can cause nightmarish hallucinations. RP 593, 601, 1045. This supported the theory that Mr. Jaime attacked Mr. Santos. Because ketamine is an anesthetic that creates a dissociative state, Mr. Jaime likely did not feel the knife wounds and could continue to strike Mr. Santos.

The State opposed Mr. Santos's request that the jury be instructed

on self-defense. Viewing the evidence in its own favor, the State contended the evidence showed Mr. Santos was a trespasser who attacked Mr. Jaime. CP 100-06; RP 1046-47.

The court refused to instruct on self-defense. RP. 1049-50. The court reasoned Mr. Santos had not “produced any evidence that would suggest that he was in reasonable apprehension of great bodily harm such that it would allow him to engage in self-defense of this nature.” RP 1049. The court reasoned evidence about Mr. Santos being struck on the back of his head by Mr. Jaime did not warrant lethal self-defense. RP 1051.

Viewing the evidence in Mr. Santos’s favor, the evidence showed that Mr. Santos, who had been drinking heavily, was invited in by Mr. Jaime. He was in Mr. Jaime’s bedroom when he was struck on the head by Mr. Jaime, who was under influence of a substance that can cause a dissociative state and hallucinations. The blow was hard enough to cause Mr. Santos’s head to hurt greatly when he awoke in jail later. Although he could not recall wielding the knife, Mr. Santos testified that if he wielded it, it must have been in self-defense. There was also evidence of a struggle in the house. Mr. Jaime may have had the knife when the struggle started.

This evidence satisfied the low threshold required for self-defense instructions. Although Mr. Santos’s memory was incomplete, the evidence was adequate to infer that he subjectively feared imminent, serious injury.

He suffered from delusions, had been hit on the head, and there was a struggle where he wielded a knife. On the objective prong, this evidence was enough for a reasonable person in Mr. Santos's position to fear imminent, serious injury. See George, 161 Wn. App. at 98 ("an imminent threat of great bodily harm need not actually have been present, so long as a reasonable person in [the defendant]'s situation would have believed that such threat was present"). The court erred in concluding the evidence did not support self-defense. Cf. id. at 97-101 (trial court erred in denying self-defense instruction where evidence showed defendant retrieved gun and shot unarmed assailant who hit him).

c. The State cannot meet its burden to prove the error harmless beyond a reasonable doubt.

Because due process requires the State to disprove self-defense once some evidence is produced, it is constitutional error to fail to instruct the jury of this requirement. Acosta, 101 Wn.2d at 623-24. The error also denies defendants their due process right to present their theory of the case. George, 161 Wn. App. at 100-101. Here, Mr. Santos was prevented from presenting his theory of self-defense to the jury and the jury was not required to find the State disproved self-defense beyond a reasonable doubt. Because the State cannot prove beyond a reasonable doubt that the jury would have reached the same result absent the error, reversal is

required. Acosta, 101 Wn.2d at 623-24; George, 161 Wn. App. at 100-01.

3. In violation of Mr. Santos’s right to present relevant evidence in support of his defense, the court excluded relevant evidence about the drug ketamine.

a. As a part of the constitutional right to present a complete defense, a defendant has a right to present relevant evidence.

“The right of an accused in a criminal trial to due process is the right to a fair opportunity to defend against the State’s accusations.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Both the state and federal constitutions guarantee the accused the right to present a complete defense. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. VI; Const. art. I, § 22.

This constitutional right includes the right to present relevant evidence. Jones, 168 Wn.2d at 720. If the evidence is relevant, a court may exclude the evidence only if the State meets its burden to show unfair prejudice that disrupts the fairness of the trial. Id. Whether there has been a denial of this constitutional right is reviewed *de novo*. Id. at 719.

b. The court excluded evidence that the drug ketamine is used recreationally to enhance sexual experiences.

Although the precise amount was not determined, a significant

amount of ketamine was found in the decedent's blood. RP 709, 716.

Ketamine is a dissociative anesthetic that can nullify pain. RP 712. It is generally injected, but there are powder forms. RP 590.

Medically, the drug is commonly used by veterinarians. RP 713. It is not commonly used when operating on human adults. RP 600-01. It is known to produce unpleasant nightmares and hallucinations. RP 600-01.⁷

Ketamine is also used recreationally and is illegally sold for that purpose.⁸ RP 710, 713. It can produce a dissociative state. RP 713.

At trial, Mr. Santos sought to elicit testimony that ketamine has a reputation for being used recreationally by homosexual men to enhance sex. Before trial, the State moved to exclude any reference to homosexuality, asserting there was no evidence of homosexuality in the case. RP 88. Defense counsel explained the evidence would show that the incident began in Mr. Jaime's bedroom and, according to A.F., Mr. Santos and Mr. Jaime were best friends. RP 89. Dr. Bernard would have testified that a sexual advance by Mr. Jaime may have provoked a violent response by Mr. Santos, who was in a delusional state. RP 91-92. Moreover, since

⁷ Controversially, ketamine has been used to treat depression.
<https://www.nytimes.com/2014/12/10/business/special-k-a-hallucinogen-raises-hopes-and-concerns-as-a-treatment-for-depression.html>

⁸ The drug was made a federally controlled substance in 1999.
<https://www.govinfo.gov/content/pkg/FR-1999-07-13/pdf/99-17803.pdf>.

the drug may be used to incapacitate a person, the jury was entitled to understand the recreational uses of the drug. RP 91.

The court granted the State's motion, ruling the evidence inadmissible "unless there's evidence that would show a nexus between that activity and the incident that occurred that night." RP 92.

During trial and before the toxicologist testified, defense counsel requested that he be permitted to ask about the unusual properties of ketamine and "specifically that it is known to be used in the homosexual population to enhance or tolerate sexual activity." RP 703. He reiterated that Dr. Barnard would testify that a sexual advance may explain why Mr. Santos acted as he did during his delusional state. RP 703. The State opposed the request, arguing it was not relevant. RP 703-04.

The court excluded the evidence, ruling it was irrelevant:

I denied the request before because I just don't see any nexus between the evidence that's been presented thus far and this evidence. Without that nexus I can't find that it's relevant or material. So I will continue my ruling that I will deny evidence of that nature at this time.

RP 704.

c. The court's exclusion of relevant defense evidence violated Mr. Santos's right to present a complete defense.

Defendants have a constitutional right to present relevant evidence.

Jones, 168 Wn.2d at 720. This includes the right to present evidence to

rebut, deny, or explain evidence presented by the State. See Skipper v. South Carolina, 476 U.S. 1, 5 n.1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986); State v. Lyons, 199 Wn. App. 235, 237, 399 P.3d 557 (2017). Under the rules of evidence, evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

In analyzing a right to present a defense claim, the appellate court first asks if the excluded evidence was “minimally relevant.” Jones, 168 Wn.2d at 720. Our Supreme Court has not applied an abuse of discretion standard to this inquiry. Id. at 721-22 (evidence of consent in rape prosecution was more than “marginally relevant” evidence); State v. Darden, 145 Wn.2d 612, 621-24, 41 P.3d 1189 (2002) (not citing abuse of discretion standard and not giving any deference before concluding excluded evidence was relevant). Rather, review is *de novo*. See id. at 719. No deference is owed to the trial court’s view.⁹

Here, the evidence was more than minimally relevant. The defense

⁹ Contra State v. Horn, 3 Wn. App. 2d 302, 311-12, 415 P.3d 1225 (2018) (minimal relevancy reviewed for abuse of discretion); State v. Blair, 3 Wn. App. 2d 343, 350-51, 415 P.3d 1232 (2018) (no violation of right to present a defense if trial court properly applies rules of evidence). This Court is bound to follow the approach by our Supreme Court, which is *de novo* review. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

theory was that Mr. Jaime had been using ketamine recreationally.

Evidence about how ketamine is used recreationally was probative.

Further, the evidence was that the two men were in Mr. Jaime's bedroom late at night when the incident occurred. Dr. Barnard testified there could have been other actions besides being hit on the head that may have caused a psychotic response by Mr. Santos. RP 984. Specifically, Mr. Santos may have had a fear of sexual advances, which may have been why he was wearing four pairs of boxer shorts. RP 964. Evidence that ketamine was used recreationally during sexual activity supported the defense's theory that Mr. Santos's psychotic break was triggered by Mr. Jaime.

This evidence was also relevant to rebutting a theory (not supported by the evidence) that Mr. Santos injected Mr. Jaime with ketamine to disable him. Although the theory was not explicitly stated by the State, the State elicited evidence that would lead the jury to speculate this might have happened. In an interview that conflicted with other statements, A.F. claimed he heard Mr. Santos make statements about "Fajardo" sending him and that his uncle owed "Fajardo" money. RP 383, 402; Ex. 205 p. 6. Over Mr. Santos's objections, the State elicited evidence related to Mr. Fajardo. RP 559-61, 621-22. Mr. Jaime, a paid informant, worked with the police in a controlled buy resulting in Mr. Fajardo's arrest and prosecution. RP 623, 628, 658. Because the evidence

explained why someone would use ketamine recreationally, it supported the defense theory the Mr. Jaime had been using ketamine recreationally and rebutted the notion that Mr. Santos used the substance on Mr. Jaime.

As the evidence was more than minimally relevant, the evidence could only be excluded if the State showed the evidence was “so prejudicial as to disrupt the fairness of the fact-finding process at trial,” Jones, 168 Wn.2d at 720. The State can meet this burden only if it shows a compelling interest outweighing the defendant’s need for the evidence. Id. Here, evidence about the recreational uses of ketamine would not disrupt the fairness of the proceeding. And the record does not show that the State had a compelling interest in excluding the evidence, let alone one that would outweigh Mr. Santos’s need for the evidence to support his defense. Mr. Santos’s right to present a complete defense was violated.

d. The State cannot meet its burden to prove the error harmless beyond a reasonable doubt.

Constitutional error is presumed prejudicial and the State must prove the error harmless beyond a reasonable doubt. Id. at 724. The State cannot meet its burden. The evidence rebutted the State’s theory that Mr. Santos was a hitman for Mr. Fajardo. It also supported a defense theory that Mr. Santos’s psychotic episode was sparked by a sexual advance by Mr. Jaime. Instead, the defense was left with evidence only supporting the

theory that the reaction was caused by Mr. Jaime striking Mr. Santos. The jury may have found the other theory more plausible, particularly in light of other evidence. This included evidence that the two men were best friends (according to A.F.), Mr. Jaime did not have a girlfriend, Mr. Jaime invited Mr. Santos into the home late at night, the two were in Mr. Jaime's bedroom, and Mr. Santos was wearing four pairs of underwear.

Further, the jury did not convict Mr. Santos of premeditated intentional murder (first degree murder) or intentional murder (second degree murder). Rather, the jury convicted Mr. Santos of manslaughter and felony murder predicated on assault. This indicates at least some jurors doubted the State's theory that this was a premeditated murder and that there was no diminished capacity. The State cannot prove the excluded evidence would not have made a difference. Reversal is required.

4. After Mr. Santos invoked his right to an attorney, police continued to interrogate him. Mr. Santos's statements and video of the interrogation were admitted in violation of Mr. Santos's privilege against self-incrimination.

a. Once a person in custody has invoked his or her right to counsel, all custodial interrogation must cease.

The federal and state constitutions protect against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. To secure these constitutional rights, the police must advise suspects in custody of their right to remain silent and to have the presence of an attorney before

interrogation. Miranda v. Arizona, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Once an accused person in custody has invoked his or her right to counsel, that person “is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.” Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). By requesting counsel, the accused has expressed that he or she is “unable to deal with the pressures of custodial interrogation without legal assistance.” Arizona v. Roberson, 486 U.S. 675, 683, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988). This is a “bright-line rule.” Id. at 681. The presumption that the accused is unable to deal with the coercive pressures of custodial interrogation without a lawyer is continuing and, unless there has been a two-week break from custody, invalidates waivers obtained by the State. Maryland v. Shatzer, 559 U.S. 98, 104, 110, 130 S. Ct. 1213, 175 L. Ed. 2d 1045 (2010).

b. Mr. Santos invoked his right to an attorney, but the interrogation did not stop.

Several hours after Mr. Santos was arrested, Detective Fairchild attempted to interrogate Mr. Santos. RP 48; PT Ex. D, p. 1. After he read Mr. Santos’s his Miranda rights, Mr. Santos invoked his right to counsel,

stating “I’d like an attorney.” RP 52; PT Ex. D, at 2.

Nevertheless, Detective Fairchild immediately continued, stating he had a search warrant for Mr. Santos’s DNA. Detective Fairchild read the warrant to Mr. Santos. PT Ex. D, p. 2-3. This included language stating Mr. Santos was being prosecuted for homicide and that Mr. Jaime had died. PT Ex. D, p. 2-3.¹⁰ Det. Fairchild slid the warrant on the table toward Mr. Santos and retrieved a cotton swab,¹¹ telling Mr. Santos that he needed to swab the inside of his cheeks:

Okay. So that’s your copy of that that will go with you when you, with your property. So what I need, I need to have you swab the inside of your cheeks. One on each side. Right for about 15 seconds and then hand me the swabs back. Alright. Do you understand that? So one cheek or the other if you could swab inside of your mouth for me.

PT Ex. D, p. 3.

After examining the warrant, Mr. Santos responded, “I don’t see no judge’s signature on this paper.” PT Ex. D, p. 3; PT Ex. C, at 5:32-34. Detective Fairchild then said the warrant was done telephonically. PT Ex. D, p. 3. Mr. Santos reiterated his concern. PT Ex. D, p. 3. Detective Fairchild told Mr. Santos this was “definitely something that you can talk to your attorney about later,” but that he needed the swabs now. PT Ex. D,

¹⁰ A copy is attached in the appendix.

¹¹ This can be seen on the video. PT Ex. C, at 3:40-41.

p. 3.

Mr. Santos continued to express his concerns and Detective Fairchild informed Mr. Santos he was authorized “to use any force necessary” to get Mr. Santos’s DNA. PT Ex. D, p. 3-4. After one of the officers in the room stated it was a valid warrant and this was why they were video recording, the detective asked Mr. Santos, “Any other questions?” PT Ex. D, p. 4. Mr. Santos continued to express concern about the lack of a signature. PT Ex. D, p. 4. After inquiring further whether Mr. Santos would comply, Detective Fairchild stated he would be taking pictures to show that scratches on Mr. Santos were preexisting and not the result of any force they might use to execute the warrant. PT Ex. D, p. 4-5. He then took pictures of Mr. Santos. PT Ex. C, at 8:42-9:08.

Detective Fairchild asked if Mr. Santos would open his mouth for him. PT Ex. D, p. D, p. 5. Mr. Santos did not comply. PT Ex. D, p. 3; PT Ex. C. Detective Fairchild stated he did not want to use force and asked Mr. Santos if he understood. PT Ex. D, p. 5. Mr. Santos asked if they wanted to know how many injuries he had on him. PT Ex. D, p. 3.

Detective Fairchild stated he did not want to hurt Mr. Santos and that he did not want to aggravate any injuries that he may have. PT Ex. D, p. 5. Mr. Santos responded, “I don’t think you could hurt me any more than I already am.” PT Ex. D, p. 5. Mr. Santos ultimately agreed to submit to the

swabbing, placing his hand out for the swab. PT Ex. C. at 12:54. After Mr. Santos swabbed the inside of his mouth, Detective Fairchild asked him, “Do you have any questions for me before we take you back?” PT Ex. D, p. 5. Mr. Santos asked why they woke him up before 10:00. PT Ex. D, p. 5. After making a comment about working overtime, Detective Fairchild ended the interaction. PT Ex. D, p. 6.

c. The trial court erred by refusing to suppress the video and Mr. Santos’s statements.

Mr. Santos moved to exclude the video and his statements. CP 74-76. He argued that he had invoked his right to counsel. CP 75-76.

At the CrR 3.5 hearing, Detective Fairchild testified his purpose in interacting with Mr. Santos had been to interview him and serve the warrant. RP 48. Detective Fairchild agreed that Mr. Santos stated he wanted an attorney, but that he did not try to make one available for him. RP 52. Detective Fairchild testified that the warrant had to be executed within 10 days. RP 52-53.

Defense counsel reiterated that the video and Mr. Santos’s statements should be excluded because he had invoked his right to a lawyer and the interrogation had not ceased. RP 56-57.¹² The court

¹² Mr. Santos also argued that he had invoked his right to silence prior to being placed in the interrogation room. RP 54-55. Mr. Santos is not challenging the court’s determination on that issue.

rejected his argument, ruling that Mr. Santos's statements were unsolicited and that there was no interrogation.¹³ RP 65.

The court erred. "Interrogation" is not limited to express questioning. Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). The term refers to "any words or actions" that a person "should know are reasonably likely to elicit an incriminating response from the suspect." Id. This is an objective test. State v. Sargent, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988). The test is not whether the officer intended to elicit an incriminating response. Id. The focus is on "the perceptions of the suspect," not the person eliciting the response. Innis, 446 U.S. at 301; In re Pers. Restraint of Cross, 180 Wn.2d 664, 685, 327 P.3d 660 (2014).

Here, because Mr. Santos invoked his right to an attorney, no interrogation was permitted. Edwards, 451 U.S. at 484-85. The reading of the warrant and giving it to Mr. Santos to examine constituted "interrogation" because it was reasonably likely to elicit an incriminating response. The warrant stated that Mr. Santos was being prosecuted for

¹³ After conducting a CrR 3.5 hearing, the court must enter written findings of fact and conclusions of law. CrR 3.5(c). This ensures there is an adequate record for the review. See State v. Head, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998). Here, the trial court did not enter findings. This Court, however, may review the issue without remanding for findings if the Court is satisfied that the trial court's oral ruling provides sufficient information. State v. Radka, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004). Otherwise, this Court should remand for entry of written findings. See Head, 136 Wn.2d at 624-25.

homicide and that Mr. Jaime had died. The detective should have known that telling a suspect this was likely to elicit an incriminating response.

Our Supreme Court's opinion in Cross supports this conclusion. There, an officer told a murder suspect in custody that "sometimes we do things we normally wouldn't do and feel bad about it later." Cross, 180 Wn.2d at 684-85. This comment, which was directed at the suspect, implied that he was guilty. Id. at 686. Any response to the comment, including silence, would have been incriminating. Id. at 686. "An officer's comment is designed to elicit an incriminating response when a suspect's choice of replies to that comment are all potentially incriminating." Id. Thus, the officer's comment constituted interrogation. Id. at 684.

Here, the same reasoning applies. Any response by Mr. Santos would have been potentially incriminating. Id. at 686. Contrary to the trial court's ruling, Mr. Santos's statement about there being no signature on the warrant was in response to the warrant being read to him and then given to him. Moreover, the subsequent requests by the police for Mr. Santos to cooperate with the execution of the warrant by swabbing his mouth was conduct reasonably likely to elicit an incriminating response. State v. Britain, 156 Ariz. 384, 386, 752 P.2d 37 (1988) (request to consent to search and serving of warrant constituted interrogation that violated Edwards because defendant had invoked right to counsel). The

court should have excluded the video and Mr. Santos's statements.

This case is distinct from State v. Cherry, 191 Wn. App. 456, 469, 362 P.3d 313 (2015). There, police asked the defendant for consent to search his car after he invoked his right to silence under Miranda. Cherry, 191 Wn. App. at 460-61. The defendant initially declined and stated there were no drugs in the car because he had used them. Id. at 461. This Court held the request to consent to search following the defendant's invocation of his right to silence did not violate the Fifth Amendment. Id. at 469-71. The Court reasoned the "request for consent to search was not designed to elicit testimonial evidence and Cherry's consent was not an incriminating statement." Id. at 470-71.

Unlike in Cherry, police served a search warrant stating that Mr. Jaime had died and that Mr. Santos was being prosecuted for homicide. Mr. Santos invoked his right to counsel, which signaled he was unable to deal with the pressures of interacting with the police in custody without an attorney. Roberson, 486 U.S. at 683; Shatzer, 559 U.S. at 104-05.

Finally, this Court should view what happened for what it was: an attempted runaround of Mr. Santos's constitutional rights. There was no immediate need to obtain a sample of Mr. Santos's DNA. The warrant did not need to be immediately executed. RP 1036. And the sample was not even tested. RP 1036. This Court should reject the State's recipe for

undermining Miranda. See Missouri v. Seibert, 542 U.S. 600, 616-17, 124 S. Ct. 2601, 159 L. Ed. 2d 643 (2004) (holding improper two-step custodial interrogation tactic of first obtaining a confession and only then providing Miranda warning before obtaining a second confession).

d. The State cannot meet its burden to prove the error harmless beyond a reasonable doubt.

The admission of statements obtained in violation of Miranda is constitutional error. Arizona v. Fulminante, 499 U.S. 279, 292-97, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). The State cannot meet its burden to prove the error harmless beyond a reasonable doubt.

The tainted evidence was received by the jury not merely through testimony, but by video and transcript. RP 1032-33; Ex. 207, 208. The video was played for the jury. RP 1033. And it was cited by the State in closing argument. RP 1148. The evidence may have been used by the jury to undermine Mr. Santos's defense of diminished capacity. Because the State cannot prove the error harmless, reversal is required. See State v. Salas, 1 Wn. App. 2d 931, 951-52, 408 P.3d 383 (2018) (statements by defendant to medical personnel were prejudicial because they undermined defense theory that homicide was in self-defense).

5. Cumulative error deprived Mr. Santos of his right to a fair trial.

Due process entitles criminal defendants to a fair trial and an accumulation of errors may deprive a defendant of this right. Chambers, 410 U.S. at 289 n.3; State v. Perrett, 86 Wn. App. 312, 322-23, 936 P.2d 426 (1997); U.S. Const. amend. XIV; Const. art. I, § 3. Reversal is warranted for cumulative error when the combination of errors denies the defendant a fair trial. Salas, 1 Wn. App. 2d at 952.

Here, the jury was not instructed that the State bore the burden of disproving Mr. Santos's defense of diminished capacity beyond a reasonable doubt. The jury did not receive self-defense instructions. The jury did not receive relevant evidence about the drug ketamine. And the jury received tainted evidence that should have been excluded. Any combination of these errors deprived Mr. Santos of a fair trial, requiring reversal. See, e.g., Salas, 1 Wn. App. 2d. at 952; State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992).

6. The exceptional sentence should be reversed due to (1) the foregoing constitutional errors, (2) insufficient evidence, (3) instructional error, and (4) violation of the void for vagueness doctrine.

If the conviction is not reversed, this Court should reverse the exceptional sentence. The exceptional sentence is predicated on two aggravating factors, which the State alleged on the charge of second

degree felony murder by assault. CP 7. The State alleged (1) Mr. Santos's conduct manifested deliberate cruelty and (2) the crime involved a destructive and foreseeable impact on persons other than the victim. CP 7; RCW 9.94A.535(3)(a), (r). In a special verdict form, the jury found the State had proved the existence of these aggravators beyond a reasonable doubt as to the offense of second degree felony murder. CP 155. Based on the jury's findings, the trial court imposed an exceptional sentence upward, increasing Mr. Santos's sentence by about 10 years. RP 1235.

This exceptional sentence should be reversed for the following reasons: (1) the constitutional errors previously argued; (2) the evidence was insufficient to support the two aggravating factors; (3) the jury was not properly instructed on the "destructive and foreseeable impact" aggravator; and (4) both aggravating factors are unconstitutionally vague.

a. Background on law relevant to exceptional sentences.

Under the Sentencing Reform Act (SRA), a court generally must impose a sentence within the standard range. RCW 9.94A.530. To impose a sentence outside the standard range, called an exceptional sentence, there must be "substantial and compelling reasons." RCW 9.94A.535.

Aggravating circumstances may constitute substantial and compelling reasons to impose an exceptional sentence above the standard range. *Id.* Excluding a few exceptions, aggravating circumstances must be found by

the jury and proved beyond a reasonable doubt. RCW 9.94A.535(2), (3); RCW 9.94A.537.

This scheme is designed to respect the constitutional rights of defendants and comply with Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). LAWS OF 2005, ch. 68, § 1; State v. Stubbs, 170 Wn.2d 117, 130, 240 P.3d 143 (2010). Excluding the fact of a prior conviction, “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). The “‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*” Blakely, 542 U.S. at 303. Simply put, a court’s sentence must be authorized by the jury’s verdict. See id. at 305 n.8.

The key rationale to the Apprendi and Blakely decisions is the recognition that facts which increase the punishment for an offense are elements. Apprendi, 530 U.S. at 494 n.19. As explained in a later case, “[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.” Alleyne v. United States, 570 U.S. 99, 114-15, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). Applying this rule, the

Supreme Court held that any fact that increases the mandatory minimum sentence is an “element” of the crime. Alleyne, 570 U.S. at 103.

Our state Supreme Court recently followed the foregoing principles in State v. Allen, ___ Wn.2d ___, 431 P.3d 117, 123 (2018).

There, the court unanimously held that when a jury finds the State has not proved an aggravating factor beyond a reasonable doubt, double jeopardy bars retrial on that aggravator. Allen, 431 P.3d at 125. Because the aggravating factors at issue altered the legally prescribed punishment by increasing the minimum penalty, “[t]hey are elements.” Id. at 125.

b. The exceptional sentence should be reversed due to the constitutional errors previously identified.

Even if the Court finds any of the errors raised by Mr. Santos to be harmless as to the guilty verdict on second degree murder, the Court should conclude they are not harmless beyond a reasonable doubt as to the jury’s findings on the existence of the two aggravating factors. For example, the Miranda error led to the admission of evidence that the jury may have used to find that Mr. Santos acted with “deliberate cruelty” and that it was foreseeable to him that the impact of the offense on others would be destructive. Accordingly, because the State fails to rebut the presumption of prejudice and prove the constitutional errors harmless beyond a reasonable doubt as to the two aggravating factors, the

exceptional sentence should be reversed. See State v. Brush, 183 Wn.2d 550, 561, 353 P.3d 213 (2015) (reversing exceptional sentence because of error in jury instruction on meaning of aggravating factor).

c. The evidence does not support the deliberate cruelty aggravator because the typicality requirement was not satisfied.

As explained, because aggravating factors increase the punishment that may be imposed, they are elements of a greater crime, and due process requires the State to prove all elements beyond a reasonable doubt. Blakely, 542 U.S. at 303; RCW 9.94A.537(3). Moreover, under Washington’s law of the case doctrine, the State must prove any heightened requirement in the jury instructions. State v. Johnson, 188 Wn.2d 742, 756, 762, 399 P.3d 507 (2017). When a defendant challenges the sufficiency of the evidence on appeal, the court analyzes whether, viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L. Ed. 2d 560 (1970).

As set out in statute, it is an aggravating circumstance that the “defendant’s conduct during the commission of the current offense manifested deliberate cruelty to the victim.” RCW 9.94A.535(3)(a). The jury was instructed to decide “[w]hether the defendant’s conduct during

the commission of the crime manifested deliberate cruelty to the victim.”

CP 143 (instruction 30). The jury was further instructed that:

“Deliberate cruelty” means gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself, and which goes beyond what is inherent in the elements of the crime or is normally associated with the commission of the crime.

CP 144 (instruction 31) (emphasis added). This latter requirement is the typicality requirement and requires a comparison of the crime at issue with the typical version. See State v. Suleiman, 158 Wn.2d 280, 294 n.5, 143 P.3d 795 (2006) (stating that “a determination of whether this crime was far more egregious than the typical” requires a “factual comparison”).

The evidence does not support the jury’s finding that the deliberate cruelty aggravator was proved beyond a reasonable doubt. CP 155. There was *no evidence* presented at trial concerning “typical” second degree felony murders predicated on assault with a deadly weapon. The State did not provide any comparative facts to the jury showing other homicides were somehow significantly less egregious. The State introduced no testimony and no documentary evidence setting forth the facts of other murder cases, let alone second degree felony murder cases predicated on assault with a deadly weapon. Thus, this Court should hold that the deliberate cruelty aggravator is not supported by sufficient evidence.

d. The evidence does not support the destructive and foreseeable impact aggravator.

An aggravating circumstance is that the “offense involved a destructive and foreseeable impact on persons other than the victim.” RCW 9.94A.535(3)(r). The jury was instructed to decide “[w]hether the crime involved a destructive and foreseeable impact on persons other than the victim.” CP 143.

The law “requires an impact that is foreseeable to the defendant and of a destructive nature that is not normally associated with the commission of the offense in question.” State v. Webb, 162 Wn. App. 195, 206, 252 P.3d 424 (2011) (internal quotation omitted). In relationship to the destructive nature of the offense, the impact must be “lasting,” and generally requires evidence revealing a destructive impact observable *after* the crime has occurred. Id. at 207-08.

Here, these requirements were not met. First, the evidence did not establish foreseeability by Mr. Santos. At the time of the incident, children were in a bedroom of the house with the door closed. But the evidence did not establish that Mr. Santos knew they were present. Mr. Santos candidly testified that he was aware children sometimes played outside the home and lived there. RP 906, 910. But he was specifically unaware whether anyone other than Mr. Jaime was present in the house that night. RP 892.

There was no evidence he knew Mr. Jaime babysat any of the children.

Second, the evidence did not establish the destructive nature of the offense was atypical. All homicides have a destructive impact on family members of the deceased. More is required. Webb, 162 Wn. App. at 206. The State did not introduce evidence showing a destructive impact that was atypical.

To be sure, A.F. testified that he had been frightened when he heard the noises and called 911. RP 386. But this is not evidence that A.F. *continued* to experience trauma because of what he heard. See Webb, 162 Wn. App. 207-08 (evidence that nine-year-old present during robbery looked afraid inadequate in light of lack of evidence showing impact was lasting). The mother of one of the children, and aunt to the other children, also testified her daughter was distressed when she picked her up from the police station. RP 695-96. This evidence also did not show a lasting destructive impact on anyone that was atypical of the offense.

This Court should hold the destructive impact factor is not supported by sufficient evidence. Webb, 162 Wn. App. at 208.

e. The jury was not properly instructed on the destructive and foreseeable impact aggravator.

Due process and the right to a jury trial requires that the State prove every element of an offense to the jury. Apprendi, 530 U.S. at 499;

Const. art. I, §§ 3, 21, 22; U.S. Const. amend. VI, XIV. “[J]ury instructions must make the relevant legal standard manifestly apparent to the average juror.” Walden, 131 Wn.2d at 473. The failure to properly instruct the jury on every element is manifest constitutional error that may be raised for the time on appeal. RAP 2.5(a)(3); State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

The meaning of a statutory aggravating factor is an issue of law reviewed de novo. State v. Davis, 182 Wn.2d 222, 229, 340 P.3d 820 (2014). The goal of statutory interpretation is to effectuate legislative intent. State v. Conover, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015).

On the destructive and foreseeable impact aggravator, the jury was instructed using the language of the statute. RCW 9.94A.535(3)(r); CP 143, 154. As with other aggravating factors that must be found by the jury, the destructive and foreseeable impact aggravator was codified in reaction to Blakely. Stubbs, 170 Wn.2d at 130-31. The legislature did “not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances.” 131 LAWS OF 2005, ch. 68, § 1 (emphasis added). Based on this expressed intent, our Supreme Court refused to read a codified aggravator more expansively than it had done previous to codification. Stubbs, 170 Wn.2d at 130-31. Thus, judicial decisions interpreting the meaning of the

destructive and foreseeable impact factor remain relevant to the meaning of aggravators. See Webb, 162 Wn. App. at 206.

To reiterate, the foreseeable and destructive impact on others aggravator requires “an impact that is foreseeable to the defendant” and that the impact is “of a destructive nature that is not normally associated with the commission of the offense in question.” Webb, 162 Wn. App. at 206 (internal quotation omitted) (emphasis added).

The instructions, however, misstated the law by failing to tell the jury of these requirements. The instructions did not tell the jury that the destructive impact must be foreseeable to the defendant. Neither did the instructions tell the jury that the destructive impact must be atypical. Rather, the jury was simply asked “[w]hether the crime involved a destructive and foreseeable impact on persons other than the victim.” CP 143. By omitting what was required, this instruction misstated the law and did not make the law manifestly apparent to the jurors.

The omission or misstatement of an element in an instruction is subject to the constitutional harmless error test. Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The State cannot meet its burden to prove the error harmless.

The jury likely answered affirmatively to this aggravator being

present because nearly *every* homicide could be said to “involve[] a destructive and foreseeable impact on persons other than the victim.” CP 143. But more is required. The destructive impact from the crime must be atypical and that the impact must have been foreseeable to Mr. Santos.

If the evidence on this aggravator was not insufficient, it was certainly weak. Given the evidence of Mr. Santos’s mental state, if the jury had been properly instructed, the jury could have easily found the State had not proved the impact was foreseeable *to Mr. Santos*.

Thus, the error is not harmless beyond a reasonable doubt.

f. The void for vagueness doctrine applies to aggravating factors.

Besides not being supported by sufficient evidence, the two statutory aggravators found by the jury are unconstitutionally vague.

The state and federal constitutions prohibit the deprivation of life, liberty, or property without due process of law. Const. art. I, § 3; U.S. Const. amend. XIV. When “a criminal law [is] so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement,” it violates due process. Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015).

“[T]he most meaningful aspect of the vagueness doctrine is not

actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.” Smith v. Goguen, 415 U.S. 566, 574, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974). “[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department.” Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). In that sense, the void for vagueness “doctrine is a corollary of the separation of powers—requiring that [the legislative branch], rather than the executive or judicial branch, define what conduct is sanctionable and what is not.” Sessions v. Dimaya, ___ U.S. ___, 138 S. Ct. 1204, 1212, 200 L. Ed. 2d 549 (2018) (plurality opinion).

To reiterate, aggravators listed in RCW 9.94A.535(3) are “elements.” Therefore, they are subject to vagueness challenges, just like any other element of a criminal offense.

In a case predating Blakely, when aggravators were not considered elements, the Washington Supreme Court concluded that statutory aggravating factors are immune from vagueness challenges. State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003). In reaching this conclusion, the court reasoned that aggravating factors do not “vary the

statutory maximum and minimum penalties assigned to illegal conduct by the legislature.” Id. at 459. The court further reasoned that anyone “reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties.” Id.

Baldwin does not make sense post-Blakely. For example, the Court reasoned the vagueness doctrine did not apply because the sentencing court had broad discretion to impose an exceptional sentence so long as it articulated a substantial and compelling reason. Baldwin, 150 Wn.2d at 461. Under Blakely, this is no longer true and is inconsistent with the high court’s reasoning that it was immaterial that “the [sentencing] judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure.” Blakely, 542 U.S. at 305 n.8.

Our Supreme Court recently declined to reconsider the viability of Baldwin. State v. Murray, 190 Wn.2d 727, 732 n.1, 416 P.3d 1225 (2018).¹⁴ More recently, however, our Supreme Court held that double jeopardy barred retrial on an aggravator the jury had rejected. Allen, 431 P.3d at 125. The court reasoned that the aggravator was an “element” because if found it required a mandatory minimum sentence. Id.

¹⁴ The court assumed the challenge was proper and rejected the claim that the “rapid recidivism” aggravating factor was unconstitutionally vague as applied in the case before the court. Murray, 190 Wn.2d at 736-38.

Here, the aggravating factors at issue do not mandate a minimum penalty. But when a jury finds an aggravating circumstance in RCW 9.94A.535(3), the court is then authorized to impose a longer sentence. Excluding exceptions not applicable here, a court cannot impose a sentence beyond the standard range unless the jury finds an aggravating factor. Because statutory aggravators alter the range of punishment, they are elements subject to vagueness challenges.

Before Allen, this Court reached the contrary conclusion in two cases. State v. DeVore, 2 Wn. App. 2d 651, 665, 413 P.3d 58 (2018); State v. Brush, 2 Wn. App. 2d 40, 63, 425 P.3d 545 (2019). Both cases incorrectly reason that the jury's finding of an aggravator does not alter the range of punishment. DeVore, 2 Wn. App. 2d at 665; Brush, 2 Wn. App. 2d 61-62. They reason there is no alteration because the court must still sentence the defendant within the statutory maximum of the crime. DeVore, 2 Wn. App. 2d at 665; Brush, 2 Wn. App. 2d 61-63. This reasoning is wrong because without the aggravator, the judge is unable to impose a sentence beyond the standard range. And a sentence beyond the standard range is alteration of the range of punishment.

DeVore and Brush rely on recent United State Supreme Court precedent: Johnson v. United States, ___ U.S. ___ 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) and Beckles v. United States, ___ U.S. ___ 137 S. Ct.

886, 197 L. Ed. 2d 145 (2017). Read properly, these cases support application of the vagueness doctrine to aggravating factors.

In Johnson, the court stated the void for vagueness doctrine applies “not only to statutes defining elements of crimes, but also to statutes fixing sentences.” 135 S. Ct. at 2557. Because a provision of a federal statute increased a sentence to a minimum of 15 years, the vagueness doctrine applied. Id. at 2555. The court held the provision at issue to be unconstitutionally vague. Id.

Beckles involved a vagueness challenge to the federal sentencing Guidelines, specifically a provision similar to the one held vague in Johnson. Although once mandatory, the Guidelines are advisory. Beckles, 137 S. Ct. at 999; see United States v. Booker, 543 U.S. 220, 245, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). Thus, even though the language of the provision in Beckles was similar to the provision in Johnson, it did “not fix the permissible range of sentences.” Beckles, 137 S. Ct. 892. Rather, it simply guided sentencing “courts in exercising their discretion.” Id. at 894. Given their advisory nature, the Guidelines were not subject to due process vagueness challenges. Beckles, 137 S. Ct. at 892, 894.

Unlike in the provision in Beckles, which if satisfied resulted in an advisory sentence, the existence of an aggravator is necessary to impose the sentence at issue. Further, Beckles states the vagueness doctrine

applies to laws that permit juries to “prescribe the sentences or sentencing range available” and cited to Alleyne:

An unconstitutionally vague law invites arbitrary — enforcement in this sense if it “leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case,” or permits them to prescribe the sentences or sentencing range available, cf. Alleyne, 570 U.S., at —, 133 S. Ct., at 2160-2161 (“[T]he legally prescribed range *is* the penalty affixed to the crime”).

Beckles, 137 S. Ct. at 894-95 (emphasis added). Here, when the jury finds an aggravator, the jury is effectively prescribing a sentencing range up to the statutory maximum. Thus, Beckles supports application of the vagueness doctrine.

In sum, aggravating factors are elements. Once found by the jury, they effectively prescribe a higher sentencing range. Consistent with United States Supreme Court precedent and our Supreme Court’s recent decision in Allen, this Court should conclude that the statutory aggravators set out in RCW 9.94A.535(3) are subject to void for vagueness challenges.

g. The deliberate cruelty aggravating factor is void for vagueness.

The deliberate cruelty aggravator permits arbitrary application and does not provide fair notice of what conduct crosses the proscribed line. All assaults by a defendant with a deadly weapon that result in the victim’s death arguably constitute deliberate cruelty. At what point does a

“typical” felony murder predicated on assault with a deadly weapon become deliberately cruel? People can only guess.

Johnson supports the conclusion that this aggravator is impermissibly vague. There, the court applied the vagueness doctrine to the residual clause of the federal Armed Career Criminal Act (ACCA). Johnson, 135 S. Ct. at 2555. When applicable, this provision increased a sentence from a statutory maximum of 10 years to a minimum of 15 years. Id. The provision was triggered if the defendant had three or more convictions for a “violent felony.” Id. Under the residual clause, “violent felony” included a crime that “involves conduct that presents a serious potential risk of physical injury to another.” Id. The court held that imposing an increased sentence under this provision violated the prohibition against vague laws. Id.

In reaching this conclusion, the court reasoned two features of the clause made it vague. Id. at 2557. First, it required a person to ascertain what the “ordinary” version of the offense involved. Id. This was inherently speculative. How, the court asked, was this to be done? Id. By “[a] statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?” Id. (internal quotation omitted). Second, it was unclear what level of risk made a crime qualify as a violent felony. Id. at 2558. “By combining indeterminacy about how to measure the risk posed

by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” Id.; accord Dimaya, 138 S. Ct. at 1216 (plurality).

Here, the deliberate cruelty aggravator asks jurors to determine what the typical version of the crime entails and then compare that to the defendant’s conduct. Similar to an inquiry about what is “ordinary,” this typicality inquiry is inherently speculative. Further, it is unclear what level of deliberate cruelty makes a crime deliberately cruel. This indeterminacy makes juror determinations of the aggravator unpredictable and arbitrary. The Court should hold the aggravator void for vagueness.

h. The destructive and foreseeable impact aggravating factor is void for vagueness.

A similar analysis applies to the destructive and foreseeable impact aggravator. Juries are asked simply to determine if the crime at issue has a destructive and foreseeable impact on persons other than the victim. Unless the victim is a lonely hermit bereft of family or friends, all homicides might be said to have a destructive and foreseeable impact on others. How is a person to determine when this aggravator applies and when it does not?

As discussed, caselaw attempts to provide meaning to this

aggravator. But the jury in this case did not receive any such guidance through its instructions. Rather, the jury was simply asked to decide “[w]hether the crime involved a destructive and foreseeable impact on persons other than the victim.” CP 143. Without any “minimal guidelines,” the jury was free to find this aggravator based on its own “personal predilections.” Goguen, 415 U.S. at 574-75. Lawmakers may not “abdicate their responsibilities for setting the standards of the criminal law.” Id. at 575. Because the language of RCW 9.94A.535(3)(r) gives the finder of fact an “inordinate amount of discretion,” it is unconstitutionally vague. See State v. Myles, 127 Wn.2d 807, 812, 903 P.2d 979 (1995).

Even if the jury had been given guidance on what is meant by “foreseeable and destructive impact,” the jury would have to divine what the “ordinary” version of the crime consists of. As explained, this task asks too much. It results in arbitrary application. See Dimaya, 138 S. Ct. at 1216 (plurality); Johnson, 135 S. Ct. at 2557-28.

For these reasons, this Court should conclude that the destructive and foreseeable impact aggravator is void for vagueness.

i. The exceptional sentence must be reversed.

Both aggravating factors are not supported by sufficient evidence. The jury was not properly instructed on the “destructive and foreseeable impact” aggravator. And the two aggravators are unconstitutionally vague.

Because both aggravators are invalid, this Court should remand for a standard range sentence. Webb, 162 Wn. App. at 212.

If the Court concludes that only one aggravator is invalid, the Court should remand for reconsideration of the sentence. The trial court stated it would have imposed the same sentence if only one of the aggravators was valid. CP 196. This is not controlling. State v. Smith, 123 Wn.2d 51, 58 n.8, 864 P.2d 1371 (1993), overruled partly on other ground by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).

7. Remand is necessary to strike a \$200 filing fee, an interest accrual provision, and a requirement that Mr. Santos pay the costs of community custody.

In the judgment and sentence, the court imposed a \$200 filing fee, ordered that interest accrue on all legal financial obligations, and ordered that Mr. Santos pay the costs of community custody. CP 166-67. All of these provision must be stricken.

Mr. Santos is indigent. CP 173-78; RP 1235. Because Mr. Santos is indigent and his case is on direct appeal, the filing fee is improper under a recent change in the law. State v. Ramirez, 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018). Under the same change in the law, financial obligations excluding restitution no longer accrue interest as of June 7, 2018. Id. Finally, costs of community custody are discretionary and are subject to an ability to pay inquiry. State v. Lundstrom, __ Wn. App. 2d __, 429 P.3d

1116, 1121 n.3 (2018). But the court failed to inquire into Mr. Santos's ability to pay. See Ramirez, 191 Wn.2d at 742-46. For these reasons and under Ramirez and Lundstrom, the challenged provisions must be stricken.

F. CONCLUSION

Because constitutional errors deprived Mr. Santos of a fair trial, his conviction should be reversed and the case remanded for a new trial. Alternatively, the exceptional sentence should be reversed and the errors related to legal financial obligations corrected.

Respectfully submitted this 14th day of February 2019.

/s Richard W. Lechich
Attorney for Appellant - WSBA#43296
Washington Appellate Project - #91052
1511 Third Ave, Ste 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711

Appendix

1 Interview of SANTIAGO SANTOS

2 Date: November 15, 2014

3 RE: Santiago Santos

4		
5	FAIRCHILD	Okay. Do you understand you are being audio and video recorded,
6		Mr. Santos? Yes or no. Do you understand you are being audio and
7		video recorded, Mr. Santos?
8	SANTOS	Huh?
9	FAIRCHILD	Do you understand you are being audio and video recorded? Okay.
10		Before we get started I'll read you your <i>Miranda</i> warnings. Huh,
11		today's date is November 15, 2014. The time is 7:46 a.m. I am Det.
12		Mitch Fairchild with the Grandview Police Department. Huh, with
13		me are Officers Arraga and Officer Rubalcaba. Okay. For the record
14		your name is Santiago Berto Santos. Correct? With a date of birth of
15		January 17, 1989. Okay. Do you understand you have the right to
16		remain silent? Yes? Okay. Do you understand that any statement
17		you make can be used against you in a court of law? And do you
18		understand that you have the right to consult an attorney before you
19		are questioned? Do you understand you have the right to have an
20		attorney present while you are being questioned and consult with him
21		before answering any questions and making of any statements? And
22		do you understand that if you want and cannot afford an attorney one
23		will be appointed for you at no cost to you?
24	SANTOS	Well, shouldn't that person be here right now?
25	FAIRCHILD	That's up to you.
26	SANTOS	Well, one, if one is supposed to be appointed to me and one is
27		supposed to be present while you're telling me all this then why isn't
28		...
29	FAIRCHILD	It doesn't necessarily have to be here. It's up to you whether you
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31 Interview of SANTIAGO SANTOS

Re: Santiago Santos

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14-1-01649-8

4/16/2018

State Of Washington VS Santiago Santos

State Ident. _____ Defts. Ident. D

State Exhibit _____ Defts. Exhibit _____

1		would like an attorney or not. That's, that's ...
2	SANTOS	I'd like an attorney.
3	FAIRCHILD	Alright. So moving on from that then huh what I have here is a
4		search warrant for your DNA. Huh, In the name of the State of
5		Washington, or Yakima County State of Washington to Deputies or
6		any Peace Officer duly authorized to enforce or assist in enforcing
7		any law thereof Greetings. Whereas a complaint has been made to
8		and signed before the undersigned Judge of Yakima County Superior
9		Court stated under oath that he has probable cause to believe and does
10		believe that the following evidence/articles, to wit: Physical and
11		forensic evidence including but not limited to hairs, fibers, body
12		fluids, and other larger items containing, carrying, or otherwise
13		having attached to them forensic evidence which may corroborate,
14		substantiate or otherwise contribute to the ongoing investigation of
15		the crime of homicide. Being material to the prosecution of homicide
16		the result of the death of Manuel Ezequiel Jaime who died November
17		15, 2014, at 635 East 2 nd Street, Grandview, Washington 98930, that
18		such goods and chattels, evidence/articles and parts there are being
19		concealed on the following person Santiago Beto Alberto Santos, date
20		of birth is 1/17/1989; height 5'11"; weight 200 pounds; eyes brown;
21		hair black; last known address of 626 East 2 nd Street, Grandview,
22		Washington 98930. Now therefore you are hereby commanded to in
23		the name of the State of Washington within three days of this date to
24		use such force as may be necessary to search the above-described
25		person to wit: Santiago Beto Alberto Santos to seize all
26		goods/chattels, evidence to wit herein described. The same as
27		provided by law and to make due return of this warrant within three
28		days of the execution of the same showing the acts and things done
29		hereunder with particular statement of all articles, evidence seized,
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	the names of all persons and in whose possession the same were found, if any, and if no person being found in possession of said articles or evidence then your return shall so say. You are further commanded to serve a copy of this warrant upon the person herein described to wit Santiago Beto Alberto Santos. Herein fail not witness my hand and sealed this 15 th day of November. Telephonic signed by Judge Susan Lynn Hahn. Okay. So that's your copy of that that will go with you when you, with your property. So what I need, I need to have you swab the inside of your cheeks. One on each side. Right for about 15 seconds and then hand me the swabs back. Alright. Do you understand that? So one cheek or the other if you could swab inside of your mouth for me.
SANTOS	I don't see no signature of no judge on this.
FAIRCHILD	It was done telephonically. Huh, my signature stating that I did in fact talk to her on the phone and that she did approve the warrant. So huh again what I need you to do is ... you can either do it or I can do it. And it would be much easier if you did, did the swabbing of your cheeks.
SANTOS	I don't see no judge's signature on this paper.
FAIRCHILD	Okay. And definitely something that you can talk to you attorney about later. Right now I'm advising you is that I need these, these swabs. Okay.
SANTOS	Why should I believe you?
FAIRCHILD	I don't know why you wouldn't. I haven't lied to you about anything.
SANTOS	I'm not here to believe you. I want to see the judge's signature here.
FAIRCHILD	Okay. So, again we have two choices. You can either do it or I can do it. The warrant authorizes me to use any force necessary and I would rather not use any force at all. Okay. But I do need your DNA and that's what the warrant was for.

1	OFFICER	It's a valid warrant, Santiago. That's all he's asking for. He's just
2		asking for the swabs. That's why it's being video recorded. That
3		way if there is any questions or any doubts it shows on there that it's
4		a valid warrant and that he read it to you.
5	FAIRCHILD	Any other questions?
6	SANTOS	Yeah. I'm still wondering why you didn't go get the judge's
7		signature on the piece of paper show it to me.
8	FAIRCHILD	Okay. It's Saturday morning. The judge is not available. Had to call
9		her in Yakima at her residence. She authorized me over the phone to
10		approve the warrant. That's why it says telephonic. There is an
11		actual recording of the conversation that I had with the Judge. I'm
12		sure you will get it through your attorney when you go to court.
13	SANTOS	Huh. Huh. I still don't trust it cause you guys didn't go grab the
14		judge's ...
15	FAIRCHILD	Okay.
16	SANTOS	But you can do whatever you want.
17	FAIRCHILD	So are you going to let me swab your mouth or not?
18	SANTOS	Huh? Do you see me being difficult. No problem. Looking at this
19		piece of paper I don't see no signature on it by the judge.
20	FAIRCHILD	Well before I start I like to document that you got scratches on both
21		of your shoulders and your forearms. Okay. That are visible that I
22		can see from here. Okay. So if any force is used before we do that
23		I'm going to take some pictures so I can document that. Can you do
24		me a favor and stand up and turn around so I can see your back? No
25		injuries are visible. Alright. Go ahead and have a seat again. Thank
26		you. Okay. So I need you to open up your mouth for me. And all
27		I'm going to do is swab in the inside of your cheek. On one side with
28		one swab and then the other side with the other swab. Okay. So are
29		you going to open your mouth for me? Are you ready to open your
30		

1		mouth?
2	SANTOS	Naw. I'm hungry, man. And I'm thirsty.
3	FAIRCHILD	Okay. Well, we're going to do this first before anything else
4		happens.
5	SANTOS	That's cool.
6	FAIRCHILD	I like to make sure you get your breakfast and stuff as soon as we're
7		out of here.
8	OFFICER	Santiago, we're going to get this swab from you. It's better off if we
9		just get it from you. It's, that's all he's asking. Get this over with.
10		Get it done and then you can go back into your cell.
11	FAIRCHILD	This is the least invasive way to do this.
12	OFFICER	Let's hook him behind his back.
13	FAIRCHILD	Well, it would probably be just easier to put him in the chair.
14	OFFICER	True.
15	FAIRCHILD	So this is your last chance as voluntarily. I don't want to have to use
16		force against you. You understand that?
17	SANTOS	You want to know how many injuries I got on me right
18		[unintelligible].
19	FAIRCHILD	Well, I don't want to hurt you. I don't want to aggravate any injuries
20		that you may or may not have either.
21	SANTOS	Hum. I don't think you could hurt me any more than I already am.
22		Hum ...
23	FAIRCHILD	It's like 15 seconds on one cheek. Okay. I'll trade you. Do the other
24		cheek for me. That's, that's plenty. Thank you. Do you have any
25		questions for me before we take you back?
26	SANTOS	Well, why did you wake me up before 10?
27	FAIRCHILD	Huh?
28	SANTOS	Why the hell did you wake me up before 10:00?
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Interview of SANTIAGO SANTOS

Re: Santiago Santos

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FAIRCHILD	Cause I'm here on overtime I guess. Trying to save the City some money. Alright. Thank you very much. Alright. I'll put a copy with your property. Okay? Go ahead and turn the recorder off. The time now is 7:59.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 36069-5-III
)	
SANTIAGO SANTOS,)	
)	
Appellant.)	

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1511 Third Avenue, Suite 610
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Phone (206) 587-2711
Fax (206) 587-2710

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