

FILED
Court of Appeals
Division III
State of Washington
6/27/2019 3:49 PM

NO. 36069-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SANTIAGO ALBERTO SANTOS,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant has raised twelve (12) assignments of error and lists fourteen issues pertaining to those assignments of error. These issues are set forth below directly from the Appellant's brief;

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 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?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The trial court’s ruling that the State does not have the burden of disproving the diminished capacity was not error.
2. There was no evidence of self-defense, therefore the trial court’s ruling that it would not instruct the jury as to that defense was not error.
3. The trial court did not abuse its discretion, nor violate the defendant’s right to present a defense, when it ruled the defense could not insinuate, without any evidence, that the ketamine found in the victim’s system was there because the

victim was allegedly gay; once again, there was NO evidence of this, nor that he somehow assaulted Santos in a drug crazed homosexual attack.

4. The court did not err when it allowed the admission of the unsolicited statements made by Santos after he invoked his right to an attorney.
5. There was no error therefore, there can be no cumulative error.
6. The State presented substantial evidence that the acts of Santos when he murdered Mr. Jaime were atypical and therefore demonstrated deliberate cruelty.
7. The defendant knew that children lived and played in and at the home where he brutally murdered Mr. Jaime. The State presented sufficient evidence to support the “destructive impact” aggravator.
8. The method the aggravators were presented to the jury was not error.
9. The aggravators plead and proven by the State are not vague and therefore can not be “void for vagueness.”
10. The “deliberate cruelty” aggravator is not void for vagueness.
11. The “destructive impact” aggravator is not void for vagueness.
12. The State will agree to file an ex parte amendment to the Judgement and Sentence waiving the filing fee.
13. The State will agree to file an ex parte amendment to the Judgement and Sentence striking the provision regarding interest on non-restitution financial obligations.
14. The State will agree to file an ex parte amendment to the Judgement and Sentence striking the imposition of supervision fees.

II. STATEMENT OF THE CASE

Pre-trial the court conducted a CrR 3.5 hearing to determine if anything Santos said would be admissible. The State wanted to introduce

two unsolicited statements in rebuttal. RP 58-59. Two officers were called regarding two sets of unsolicited statements made by Santos.

Officer Arraj testified that he read Santos his Miranda rights twice at the crime scene. This was done twice because Santos indicated that he did not understand after the first reading. The officer asked him questions, but Santos never responded. RP 26, 28-9.

After arriving at the Grandview police department Officer Arraj took pictures of the defendant. Officer Arraj forgot the camera he used to take the pictures in the cell Santos was in. After Officer Arraj realized his mistake he returned to the cell. As he approached the cell he observed Santos had placed the camera in the cuffing port. Santos spontaneously stated, "you forgot something." The officer stated nothing to Santos prior to the statement. After he retrieved the camera, the officer determined that the "SD" card that had been inside the camera and contained all the pictures that had been taken was missing. A search of Santos' cell did not turn up the card. RP 31-32

Det. Fairchild testified that on the morning of the murder he served a search warrant on Santos. It was served at about 3:00 AM. RP 48. Santos was read his Miranda rights again and was eventually served with a search warrant for his DNA. This warrant had been telephonically approved by a judge. RP 48

From the argument of the second part of the hearing, the statement the State wanted to be able to introduce, only in rebuttal if Santos testified, was an unsolicited statement to Det. Fairchild. When Santos was given a copy of the DNA search warrant Santos stated “I don’t see no judge’s signature on the warrant.” RP 60. The State wanted to introduce this on rebuttal to show that it was very astute of Santos to make this statement. The warrant served on him was “telephonically” approved which is why there was no actual judge’s signature. RP 59.

The court ruled that the unsolicited statement about the officer forgetting the camera was admissible as well as the statement “I don’t see no signature of no judge on this.” RP 64. The court indicated that this too was an unsolicited statement and could be used by the State.

The Court ruled, “Again, if they're unsolicited and there's no interrogation ongoing, voluntary statements, statements not in response to any question are certainly admissible. There is a long line of cases in the State of Washington to that fact... So the court would find those were unsolicited statements made by the defendant in this particular case and would be admissible not in the state's case in chief, but only on rebuttal.” RP 64-66

Angel Flores was twelve years old at the time his uncle, his tio, was murdered. RP 391. He was 16 at the time of his testimony. RP 378.

He and six other members of his family were spending some time together, having a sleep over. RP 379-80. They were playing outside, they ate their dinner and then they watched some TV. RP 381.

Mr. Flores testified that he recognized Santos from having seen him at his home on a prior occasion and on that date he had heard Santos speak. RP 381. Mr. Flores testified that his uncle was the only adult home after Mr. Flores' mother left at about 6:00-6:30 PM.

Mr. Flores fell asleep while the others were still watching TV and was awakened later by "...this loud sound like something fall to the ground." He then heard his uncle crying and heard arguing. RP 382 He testified he heard Santos saying "...you're dying slowly. I told you I was going to do this." Santos was heard saying that he was doing what he was doing because Mr. Jaime owed Santos something, Mr. Flores did not know what was owed. RP 382-3.

Mr. Flores testified that Santiago Santos "...used the restroom right next to the room we were sleeping in. When he came back he said, "I'm going to come back for your family." Mr. Flores further testified that Santos stated the name "Fajardo...he said it when he was talking about what he owed him." RP 382. He testified he heard Santiago say "you're dying slowly." RP 384.

Mr. Flores testified that when he heard these last statements he

panicked...[he] woke up the children...[w]e tried to open the window but it was frozen. RP 384. He was then reminded by his sister that his phone was in his backpack which was in the room with him and the other children. He retrieved the phone, that he was frightened, and he called 911. He told 911 there was someone who was harming his uncle and that they needed to send help. RP 385.

Mr. Flores testified he heard the police arrive, that the officers announced they were from Grandview Police Department and the officers told him and the children to stay in the room. RP 386-7 He further testified that before he was removed from the house he overheard officers questioning his uncle. He heard his uncle say “Santiago.” RP 387-8

On cross examination Mr. Flores testified that when he was initially interviewed by Det. Fairchild he identified the attacker as “Santos”. RP 398. He testified that in a previous statement he said he heard Santos retrieving a knife from the knife drawer in the kitchen and start cutting his tio. Mr. Flores testified that Santos was one of his uncle’s best friends. RP 400-1. He reiterated that he heard his uncle crying and that he heard Santos state that Fajardo had told him, Santos, to do something. RP 401-2

Mr. Flores confirmed that later he remembered more of what Santos said on the night of the murder. Mr. Flores told investigators at

this later interview that Santos had said that what he was doing to Mr. Jaime was payback...that he was going to get [Mr. Jaime] back as well as his family and friends...that Santos would do to them what he was doing to Mr. Jaime. RP 405. He testified that he heard his uncle open the door for Santos. RP 406.

On redirect Mr. Flores testified that Identification 115 (later admitted as an exhibit) was a picture of the knife drawer in the kitchen and that it was partially open. He also testified that Identification 100 (later admitted as an exhibit) depicted his grandmother's Bible with a knife on top. He did not recognize the knife. He stated the Bible is located in the living room. RP 407, 408-9.

A recording of the 911 call was played for the jury. RP 420. Prior to that, the court and the parties discussed the content of the 911 call and determined that a transcript would be admitted of the call, Exhibit 195. They edited the transcript due to a possible prejudicial statement to indicate:

THE COURT: It reads, there's this guy at my house. He's, uh, he's -- unintelligible -- he's killing my tio. Does that work?

MR. SMITH: Yes.

MR. RAMM: Yes. RP 418

The next State's witness was Mr. Stritzke, Washington State Patrol crime laboratory forensic scientist assigned to the DNA unit. He analyzed

samples taken from several items, one was the shirt taken from Santos and the other was the knife found hidden in the closet on top of the Bibles. He testified “[m]y conclusion was the DNA profiles obtained from the red-brown staining on the blade of the knife and the shirt match the DNA profile for Manuel Jaime. The estimated probability of selecting an unrelated individual at random from the U. S. population with a matching profile is 1 in 15 quintillion.” RP 438.

Officer Arraj was one of the first officers on scene after they received a call from dispatch indicating they were needed at Mr. Jaime’s residence located at 635 E. Second Street in Grandview. When he initially arrived, he observed Mr. Jaime down in the doorway with extensive wounds. Mr. Jaime asked for help and was bleeding. The officer determined that he needed to find the suspect, who had been reported by the 911 caller. The officer went to the front of the house and shined his flashlight into the home and onto Santos, whom the officer had observed. When Santos was illuminated by the officer’s flashlight he laid down on the floor of the bedroom. In order to effectuate the arrest of Santos, Officer Arraj had to return to the location of Mr. Jaime and had to go through the big puddle of blood that had accumulated around Mr. Jaime as he lay mortally injured on the floor of his home. RP 444-45.

Officer Arraj went into one of the bedrooms in this home and

found the defendant lying face down with his hands behind his head. Santos was handcuffed and escorted from the home and into a police vehicle. RP 445-6. This officer estimated that Santos was 6'3-6'4" tall and weighed between 230-240 lbs. RP 448.

Once Santos was secure the officer went back to Mr. Jaime. Officer Arraj testified "He was on the floor. He was bleeding extensively from dozens of stab wounds. He had a couple of right-puncture wounds to his chest. I could hear sucking sounds. He had a large incision in his abdomen so his intestines had come out partially. He was pleading with me saying, you know, "let's go; let's go; let's go." RP 448. He testified that he did not believe Mr. Jaime would survive his wounds. He questioned Mr. Jaime as to who had stabbed him, the response was "Santiago." Officer Arraj wanted there to be no confusion so he asked "Santiago, who's in the house?" Mr. Jaime stated "yes." Officer Arraj continued to question Mr. Jaime but, "At this point he was just basically pleading with me saying, you know, "let's go, let's go, let's go." RP 448.

Officers were trying to stop the bleeding at the scene. They tried using a large abdomen pack which is a very large gauze bandage. "I put it on the abdomen area where he had multiple stab wounds and his intestines are coming out. Unfortunately, he has dozens of other wounds that he was bleeding from. So, I was unable to effectively control the bleeding." RP

449-50. This officer testified that he observed blood on the knives in the kitchen. RP 451

While securing the rest of the residence this officer discovered seven children in one of the bedrooms. He told the children to stay in that room until he returned. RP 446. This officer went back into the home and made contact with the seven children. He determined that he would “play a game” with the children which involved the children shutting their eyes for the longest time. The officer did this in order that the children could be removed from the home without seeing the “puddle of blood”. RP 451-2

When this officer observed Santos he observed that he had blood on his hands, his clothing and boots. The clothing was collected and samples of the blood was taken for analysis. RP 451. The officer took photographs of the defendant while they were still in the cell. He accidentally left the camera in the cell. When he realized this error, he returned to the cell to retrieve the camera. When he arrived at the cell Santos had the camera and asked the officer if he had forgotten something. The officer checked the camera and the storage card that contained all of the pictures had been removed and could not be found. RP 453-4

This patrol officer testified that at the time he was interacting with Santos he did not appear to be intoxicated. RP 471-2.

On cross examination Santos inquired of this officer regarding

collection of evidence: “Well, did you collect the pair of underwear that he had on at any time? The pair of underwear, the last pair of underwear he was wearing, that pair, it was never collected as evidence, right?” This officer stated that he personally did not collect the underwear. RP 465

Officer Chilson had direct contact with Santos on the day of the murder. RP 523. He stated that Santos appeared to be steady on his feet and from the distance he was from Santos he did not smell the odor of intoxicants. RP 525-5.

Joel Byam - deputy chief of operations for Yakima County Fire District 5, at the time also a volunteer fire fighter for the City of Grandview, was one of the treating EMT’s who had first contact with Mr. Jaime. Mr. Byam entered Mr. Jaime’s home and began to assess his patient. That Mr. Jaime was struggling to breath. He testified Mr. Jaime “...had a lot of open wounds. It was hard to figure out where to start as far as how we triage a patient because of the amount of wounds and the amount of blood loss and open wounds.” RP 534-5. Mr. Jaime was pronounced dead at 3:52 AM. RP 536

Detective Fairchild was asked on more than one occasion during cross examination by trial counsel for Santos how many pairs of underwear Santos was wearing at the time he murdered Mr. Jaime. Santos even asked in the same series of questions why this detective did not ask

for testing to be done on Santos' inner most pair of underwear after he was informed that Mr. Jaime had ketamine in his system at the time of his death. RP 568.

Dr. Jeffrey Reynolds, forensic pathologist, testified regarding the autopsy performed on Mr. Jaime. He testified that he found "[a] surprising number of stab wounds." He counted 59 stab wounds and in addition there were several smaller superficial injuries that were not counted. He testified these wounds were almost entirely found above the waist. He stated that there were no defensive wounds, which he found surprising. RP 579-80. He also stated that "[m]ost of them were the back and the sides of the chest and significantly none in the region of the heart." RP 580. One of the wounds found on Mr. Jaime's abdomen was so severe that "[s]ome internal organs were out." RP 581. He also noted that of the 59 stab wounds, not one had injured the victim's heart. RP 583. Dr. Reynolds was shown the knife that was seized from the scene of the murder and he opined that the injuries he observed on Mr. Jaime could have been produced by that weapon because it only had one sharp edge, was not serrated and did not have a hilt like a hunting. RP 589.

Dr. Reynolds testified that the results of the toxicology testing helped to explain one of the particular things in this murder, the lack of defensive wounds. He testified that if a person was on ketamine "...it is

like your brain is over here and the rest of your body is over here, and they're not talking to each other much.” RP 605. The doctor opined that if you are being stabbed 59 times a person would usually try to stop it. When Dr. Reynolds was informed that Mr. Jaime had ketamine in his system he testified “[y]our motor skills, you're pretty useless. I mean, when we saw that in this report, it absolutely explained why we have no defensive wounds on the hands, the forearms or the wrists. You could keep stabbing and he's not going to react.” RP 605-6

Dr. Reynolds testified that the cause of death was that Mr. Jaime had bled to death. RP 605. Reynolds also testified that the effects of ketamine could be overcome by pain. If a person has been given ketamine and then they are hurt, “...you’re going to wake them up. Pain can override the drug.” RP 605.

Officer Travis Shepard was with the City of Yakima Police Department at the time of trial and was a Sergeant for Grandview at the time of this murder. He was assigned to the LEAD Drug Task Force. He was working the victim as a confidential informant (CI) at the time of his murder. He had known Mr. Jaime for about eight years. He testified that Mr. Jaime was not “working off” charges but was working as an informant to make money. RP 619-20, 628. One of the targets whom Mr. Jaime had worked while he was a CI was an individual named “Fajardo.” RP 623,

646-7. Officer Shepard testified that Mr. Jaime actually made a hand to hand purchase of methamphetamine from Mr. Fajardo. RP 660-61.

This officer testified that when he had contact with Santos on the night of this murder, he did not smell the odor of intoxicants about Santos. RP 663.

Stacey Redhead is a Washington State Patrol crime laboratory forensic scientist fingerprint expert. She analyzed the knife that was found at the scene and determined that there was a fingerprint on the knife. She compared that print to the victim's prints and the defendant's prints and determined the print belonged to Santos. RP 674-5.

Mrs. Maria Mendez is Mr. Jaime's mother. At the time of his death she was in Texas because her brother had died of cancer. She testified that her son Manuel had never been married, that at the time of his murder he did not have a girlfriend but that he had had a girlfriend in the past. RP 680, 683-4. Mrs. Mendez did not recognize the knife found hidden in the closet on top of the Bibles. RP 691-2. She also testified that Manuel did not have any knives nor any other weapons. RP 685.

Mrs. Mendez and Manuel's sister, Alma Guillen, testified that Manuel knew Fajardo and that Alma had gone to school with Fajardo. RP 689-90, 697. Mrs. Mendez testified the Bibles that were found up on the closet shelf belonged to her and Manuel and that they were kept in the

living room. RP 690-1.

The State moved early in this case to preclude the defendant from questioning witnesses about the effects and use of ketamine by the homosexual community. The State accurately stated there was no evidence of homosexuality in the case.

Santos' response was:

The drug itself is a very unusual drug. Dr. Reynolds will testify to that. He'll testify to the fact that it was used as anesthesia in humans but has some very negative side effects. It is used commonly as a street drug in the gay male population. This incident began in the bedroom. There's no question about that...All we're saying is this drug can be used in this particular manner, and this incident began in the bedroom. Nobody knows what the relationship was as between Mr. Santos and Mr. Jamie, what they were doing in the bedroom.

THE COURT: Do you know of anybody that's going to provide testimony as to if they had a relationship or anything of that nature?

MR. SMITH: Yes. Angel Flores will testify that they were best friends or is one of his best friends. This is the kind of thing that people don't broadcast, frankly. So, I don't think it's unfair in this case for this jury to know that this drug is commonly used in that capacity.

...

THE COURT: Well, now we're getting into the issue of whether or not the relevance or the prejudicial effect of it outweighs any potential relevance of the evidence in this case. What is the potential relevance of a homosexual relationship in determining the facts in this case?

Santos went on to try and explain the need for this testimony

because his expert, Dr. Bernard, would opine that an attack or something of a sexual nature could have caused Santos, because of his alleged mental illness, to react violently. RP 89.

The court was still troubled with how any testimony regarding homosexuality or the use of this drug was relevant:

THE COURT: Why is it relevant to this particular case? Unless there's evidence that shows a nexus between that and homosexual activity that would prompt this response, again, we're making a quantum leap from this is a drug that's used by the gay community and motivation for what took place on November 15th. RP 91.

Santos again explained that the murder started in the bedroom and that no one knew how long they had been in that room. The court again: "Is this a drug that is always used or substantially used by the homosexual community?" RP 92 Santos stated that ketamine is a street drug that has multiple uses...the research is that it is used by male homosexuals simply to either enhance or make more tolerable the sexual act." RP 92.

The court then made inquiry that this drug was used for other purposes and Santos responded "[I]ots, just recreation and, like I say, to reach to some other state. It's used for -- why he was using it, I don't know." RP 92. After which the trial court ruled:

THE COURT: Well, at this point in time the court is going to grant the motion to exclude reference to homosexual activity unless there's evidence that would show a nexus between that activity and the incident that occurred that

night. RP 92

Santos' renewed his motion to allow inquiry into "...the unusual properties of this drug Ketamine and specifically that it is known to be used in the homosexual population to enhance or tolerate sexual activity." RP 703. The State objected stating there was no evidence suggesting homosexual activity, even Santos's expert made no mention of any sexual advances, Santos may have been hit on the back of the head but there was no indication of even that and therefore the court should once again deny the motion. The court: "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. (The totality of these motions and the testimony from the defense expert is contained in Appendix A attached to this brief.)

Chris Johnston from the Washington State toxicology lab did testify that he found ketamine in Mr. Jaime's blood. The level was in excess of 1 milligram per liter of blood in the blood, and norketamine a metabolite of ketamine was found also and this drug is sometimes used recreationally as a street drug. RP 709. He testified the effects "[b]asically it kind of almost like severs the connection between the head and the body. The head and the body have a hard time communicating

back and forth. The head doesn't feel the pain of the body.” RP 713. He testified the location from which the blood sample was taken might result in a test result higher than in the person’s actual system. RP 715-6.

Trevor Allen, forensic scientist, Washington State Patrol crime lab assisted the local agencies in documenting the crime scene. He has training in blood spatter, blood staining, and crime scene analysis. RP 721-22. He testified extensively regarding the locations of the blood found throughout Mr. Jaime’s home, noting there was blood, blood cast off, blood spatter, blood that had dripped and pooled throughout many areas of the home. In the bedroom identified as Mr. Jaime’s, there was castoff on the ceiling as well as blood spatter on the walls. RP 795, 803. His opinion was the bloodletting event started in bedroom two, continued down the hallway. RP 795. He identified blood that had dripped in and around a kitchen drawer that contained utensils such as knives. RP 800. Mr. Allen testified he found “...diluted blood stains along the sink.” RP 736-7, 784-5. He stated when there were diluted blood stains in a sink it indicated someone has cleaned up. RP 796-7. He testified the blood stains in the kitchen, through the dining room were low and then got lower. He testified it appeared the bleeder stopped in the kitchen near the utensil rack RP 801. The blood trail ended in the living room where a large pool was found. RP 795-6.

Mrs. Maria Santos testified on behalf of her son, the defendant. She testified that she lived in the house which was just down the street from Mr. Jaime's home and that her son Santiago lived there with her. She testified that they moved to California when Santos was in the eighth grade. RP 848-9, 850. They live in California until Mrs. Santos moved back to Washington. Santiago Santos was 18 at the time but did not move back to this State until he was 25 which was in November or December of 2013. RP 849. (This crime occurred on November 14, 2014. CP 000006)

Mrs. Santos was questioned regarding Santiago's actions, about his conduct in the home during this initial period of time that the family lived in Grandview. RP 850-53. She testified that her son did not like to have people over and that he would put sheets over the windows, that Santiago told her that people were out to harm him, that he had a tumor in his head, internal bleeding and was suffering from STD's which he had gotten from his girlfriend. RP 853, 855, 858-59. She testified that Santiago did not maintain his relationship with the girlfriend who had infected him with the sexually transmitted disease (STD). RP 859. She testified that he had worked in the orchards with the apples and at the time of this murder he was working at a warehouse in Prosser. RP 855. And that his drinking was "just normal."

On cross examination she testified that her son had obtained a

certification to be a certified medical assistant. RP 862. She stated that he would drink and that he would drink at work. RP 864. She testified that she heard Santiago talking to himself in his room on numerous occasions. She also stated that he had a cellphone and that he talked on the phone a lot. RP 866. She testified that “Andrea” was the girlfriend who had given Santiago the STD and that this was the girlfriend who would come over to her home. RP 866.

The defendant took the stand and testified as to his life and what he recalled happening on the night of Manuel Jaime’s murder. RP 880-914. Santos stated he did not know who killed Mr. Jaime or why he was killed. RP 881. He agreed with his attorney that he had been diagnosed as having “acute paranoid schizophrenia.” RP 881. He did not agree that he felt people were out to get him but “... the world is a dangerous place...I’m always attentive to my safety.” RP 881. He refuted his attorneys’ statement people were out to harm him stating “I don’t believe people are but I’m attentive of such things.” RP 881. He recounted that he did not sit endlessly in his home with all of the windows covered and the lights off. RP 882. His statement regarding his mother’s claim that he sat in this room talking to himself he was just “thinking” and that “[p]eople would think and just theorize on their own. It doesn’t mean that one’s talking to themselves they’re in a crazed state. People think all the time. It does not

mean that they're crazy. It's just thoughts. It's no different than talking. It's just thoughts." RP 883.

His explanation of his need to go to the clinic was that at the time he did believe that he had a tumor in his head, but he was wrong. And that the reason that he had thought he was bleeding internally was that in the past he had violent fights and been shot with large rubber bullets and that had caused bleeding that had some residual effect. RP 883-84.

During direct examination Santos said he understood why he was being asked questions about to his past, that it was to determine if he was being deceptive, he said he was being honest with his answers. RP 884.

Santos described what appeared to be a fairly normal life from childhood to the time of the murder. RP 895-6. That he generally got good grades but that he nearly failed to get his diploma from high school because [t]hat's how much we kind of partied on the side...partying a lot affected my grades." RP 897. He recounted that he had taken courses after high school and had obtained a certificate that allowed him to work in the medical field but he had never used that certificate. RP 897-8. He recounted that when he moved back from California he lived with his mother and sisters and got a job working in the orchards and eventually he got a job that he liked working in the wine industry. RP 899-901. His mother had testified that she did not know how he got to work but Santos

clarified that he got rides from his cousin Abel who worked in the same plant or a plant near his and that they would ride together. RP 900-01.

Santos stated he went out into public and had a social life, he would "...go to bars and places, dance places and stuff like that to go socialize, casinos and stuff like that." RP 901. Santos testified on the night of the murder he was out drinking at a bar in Prosser and he had consumed several drinks he compared to Long Island iced tea, eight beers and four or five shots and he has lost count of how much he had to drink. Stating "I'm able to drink a lot before I get really drunk. At the time I was still consciously aware of how many drinks I was consuming. However, I didn't keep count. I just keep drinking and drinking and drinking. And that "[s]ometimes I do blackout. Sometimes it just kind of hits me out of nowhere. RP 902-3. He once again confirmed that he was being social, "I was at the bar and just kind of commingling around there." When asked where he had gone next he testified "I don't recall that. It's kind of like an amnesia, sir. Like I could have easily known that but kind of the hits to the head, kind of like blacked out that area." RP 903.

He had no recollection of how he arrived back in his neighborhood. He testified that when he got into the neighborhood Mr. Jaime "...popped out the side and said hello." Jaime invited him into his home. RP 889-90, 904. He did not remember much from inside the home

testifying during direct examination he had "...blacked out from a bunch of it." He denied the bloody knife with his fingerprint on it was his and that he was ambidextrous. RP 890.

When asked if he had an argument with Mr. Jaime he testified, "No. I haven't had a dispute with him my entire life. I know that's true. Something could have happened. I don't know what it is... I haven't been angry with him either, which is kind of a strange thing." RP 892. Santos testified he believed he had been struck in the head that night, but he very specifically testified he could not state Mr. Jaime had hit him. RP 891.

Santos testified there could have been a third person present who had killed Mr. Jaime and further stated it was possible Mr. Jaime was protecting Mr. Santos from this third person. RP 891. Or that Santos was protecting Mr. Jaime from this other attacker. RP 892. Santos had a limited memory of what actually happened but remembered some of the struggle that occurred. He testified Mr. Jaime did not owe him anything, that "I don't even know that he did drugs". Santos specifically testified he did not take drugs in Mr. Jaime's bedroom and testified that drugs "... were not part of this encounter." RP 893.

Santos stated he did not recall making a statement about "Fajardo" and he did not know that person. Santos admitted he had seen children playing in the yard and knew children lived in the home where the murder

occurred. RP 906

Santos is 6'3" tall and weighed, at the time of trial, around 235 pounds RP 907.

When asked if he knew how his fingerprint got on the knife he testified "If I had it in my hand it would be on there." And would have been in his hand to defend himself. RP 908.

Santos testified he knew Manuel Jaime, had been in the home before, and knew Mr. Jaime from the time he was a child:

Q. Let me ask you this. Manuel Jaime's house, where it was down from your house, had you been there before?

A. Yes.

Q. How long ago?

A. Passing by when I was a child.

Q. How would you describe Manuel Jaime and your relationship?

A. A good person with good morals that I knew of since I was a kid, since I was a kid.

Q. He was a good person with good morals?

A. Yeah. RP 908-9.

Santos testified on redirect that he knew that Angel Flores lived in the same home the murder occurred in and that he knew other children were living there and he had seen them playing there. He testified "[t]hey stayed there and lived there. It's obvious. It's obvious." that they lived there. RP 911

The defense called one expert to address Santos' ability to form the intent to commit the crimes he was charged with. Dr. Philip Barnard

tested Santos and concluded he was delusional. RP 938. He diagnosed Santos with delusional disorder and a personality disorder with schizoid paranoia and avoidant features. RP 948-50.

The State called Dr. Fanto, a licensed clinical psychologist employed by the Washington State Office of Forensic Mental Health Services as a forensic evaluator. Dr Fanto opined that based on his interview, the report issued by Dr. Bernard, the police reports and testing done with Santos that at the time of this murder Santos was not suffering from any sort of mental illness. RP 969-74. Dr. Fanto took into account Santos' actions on the night of the murder in assessing whether Santos suffered a mental health issue which would have precluded him from forming intent on the night of this murder. "My opinion was that he had the capacity to form the specific mental element of the crime charged...Premeditation, intent to kill." RP 976.

Dr. Fanto testified Santos' actions on the night of the murder were goal directed behavior. Santos formed a plan to go out and go drinking, he picked places and on that night at locations in more than one town, he got from one location to the other, he paid for his drinks, his no direct route home had to be thought about, it was not a rote linear action. All of which the doctor testified was Santos "...engaging in purposeful, goal-directed behavior." RP 979 Dr. Fanto testified the statements made by Santos

while and/or during his attack on Mr. Jaime which were overheard by Angel Flores were also indicative of a person capable of forming intent. RP 980. The doctor stated that the act of Santos hiding the knife was yet another act that showed he was capable of forming intent. RP 980-1. Dr. Fanto testified that Santos' actions of dropping to the ground when observed by the police, removing the memory card from the camera and disposing of it were important because Santos was "...not presenting with any level of impairment. The behavior is then purposeful..." RP 989-90.

Dr. Bernard took the stand to rebut the testimony of Dr. Fanto. He opined there could have been another act that might have provoked Santos' psychotic response to the alleged action of Mr. Jaime. He interpreted the fact Santos was wearing four pairs of underwear when he murdered Mr. Jaime as Santos being in fear of being approached sexually by another person, the underwear was "protective gear." RP 963-4.

Santos argued he should be allowed to present the defense of diminished capacity. This was based almost exclusively on the testimony Santos thought he had been struck in the back of the head and the opinion of Dr. Bernard that such a strike could provoke a delusional response. That Santos believed he was under attack and had to defend himself. RP 21-22. The court ultimately allowed Santos to argue diminished capacity, the jury was instructed on diminished capacity. The court determined that the

State did not bear the burden to disprove the defense. RP 1052, 1064-66.

Santos further argued this possible blow to his head was a legal basis to argue self-defense. The trial court ruled: “The court finds that there simply is speculation at this point in time as to whether or not there is any evidence in his case that the defendant under circumstances which amounts to the fact that he was trying to defend his life against the victim in this case that would justify the instruction. More importantly, the court finds that there is no evidence that Mr. Santos has 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. I mean, there is just simply no evidence that he was in great apprehension of serious physical harm.” RP 1050

During the discussion about jury instructions Santos proposed the elements instruction include an element that the State must disprove diminished capacity beyond a reasonable doubt. The court ruled as follows:

THE COURT: No. It's the Lester case and State vs. Marchi. It was a Division II case decided in September of 2010. The Lester case was decided in February 2015 also by Division II.

The court finds that the reasoning expressed by Division II seems to be appropriate and makes sense to the court. They held that the state does not bear the burden of disproving the defendant's diminished capacity defense. The court went on to hold that the state has an obligation to

prove each and every element of the crime charged.

In this particular circumstance, both first degree murder, second degree murder, second degree assault require that the state prove beyond a reasonable doubt that the defendant had the requisite intent to commit those crimes. The jury can consider the defense of diminished capacity when dealing with the issue of whether or not the state has proved beyond a reasonable doubt the intent requirement. They have the obligation basically to consider whether or not there was diminished capacity and evidence of diminished capacity to the extent that the defendant could not have developed intent.

In this court's opinion, it seems logical that the state already has the burden to prove intent. The defense in this case is raising the defense of diminished capacity, which goes to the very issue of intent and whether or not it creates a reasonable doubt. So, again, I don't believe the state has to go to the extent they have to disprove diminished capacity because they have the obligation to prove beyond a reasonable doubt that there was intent. RP 1064-5

III. ARGUMENT

Issue 1. The State is not required to disprove the defense of diminished capacity beyond a reasonable doubt.

The State also presented the testimony from Dr. Fanto who rebutted much of Santos' expert's findings regarding diminished capacity. Santos does not mention this testimony. RAP 10.3(5) Statement of the Case. A fair statement of the facts and procedure relevant to the issues presented for review, without argument.

Santos is correct, the State does bear the burden of proving all elements of a charge beyond a reasonable doubt, the State does not have to disprove a diminished capacity defense beyond a reasonable doubt.

Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged. State v. Furman, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993). Diminished capacity "allows a defendant to undermine a specific element of the offense, a culpable mental state, by showing that a given mental disorder had a specific effect by which his ability to entertain that mental state was diminished." State v. Gough, 53 Wn.App. 619, 622, 768 P.2d 1028 (1989).

Appellant cites State v. Nuss, 52 Wn.App. 735,763 P.2d 1249 (Div. 3 1988) it did not establish that when "diminished capacity" is asserted and sufficient evidence of that is presented that shifts the burden thereby requiring the State to disprove the defense beyond a reasonable doubt, it is factually off point and the last sentence of the section quoted by Santos states "A claim of diminished capacity merely negates one of the elements of the alleged crime; **it is not an affirmative defense.** Id at 739 (Emphasis added)

Starting with State v. Fuller, 42 Wn.App. 53, 55, 708 P.2d 413 (Div. 1 1985) which addressed intoxication and a Fuller's claim that the State had the burden of establishing beyond a reasonable doubt that he was not intoxicated the courts have ruled that "In summary, intoxication is not a "defense" to a crime of any kind. Evidence of it may bear upon whether

the defendant acted with the requisite mental state, but resolution of that issue should not be dealt with in the instructions any different from the other elements of the offense.”

In 1987 State v. James, 47 Wn.App. 605, 606, 736 P.2d 700 (Div. 2 1987) addresses intoxication, specifically addressing intoxication as diminished capacity. The James court stated: “The dispositive issue on appeal is whether trial courts are required to give a separate jury instruction expressly stating that the State must disprove beyond a reasonable doubt diminished capacity because of voluntary intoxication once the defense is raised. We conclude that the "to convict" instruction sufficiently allocates the burden of proof to the prosecuting attorney and that a separate instruction is not required in diminished capacity cases.”

Just as Santos argues here that James argued “...diminished capacity...may negate the specific intent elements...[h]e then contends that in cases where intent is one of the elements of the offense and evidence of (diminished capacity) is present, the trial court must instruct that the State bears the burden of disproving diminished capacity...beyond a reasonable doubt.

The James court, citing Fuller stated “[b]ut, unlike self-defense, intoxication or diminished capacity does not add an additional element to the charged offense. See State v. Fuller, 42 Wn.App. 53, 55, 708 P.2d 413

(1985)...We conclude that there is no necessity to instruct the jury that the State has the burden of proving the absence of diminished capacity or intoxication when it had already been instructed that the State must prove the requisite mental state beyond a reasonable doubt.” Id at 608-9.

State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (Wash. 1987) addressed the difference between self-defense and voluntary intoxication under the premise of diminished capacity. The Coates court succinctly opined “Under Washington law, an act done in self-defense is lawful...If the jury finds the claim of self-defense to be meritorious, it should find the defendant not guilty. Since there is, therefore, some concrete result to be obtained by proving or disproving a claim of self-defense, it makes sense to tell the jury that one party or the other has the burden of proof on this issue.” The court then cites Fuller An instruction on burden of proof similar to the one given on self-defense need not be given because the toxic effect of a drug upon a person's capability of acting knowingly is not a legally recognized defense...Intoxication may raise a reasonable doubt as to the mental state element of the offense...but evidence of intoxication does not add another element to the offense.”

In 1987 the Washington State Supreme court in Coates rejected Santos’ reliance on State v. Acosta and State v. McCullum, Appellant’s brief at 17, “The defendant's reliance on State v. Acosta, 101 Wn.2d 612,

683 P.2d 1069 (1984) and State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983) is misplaced. Both McCullum and Acosta deal with the manner in which a defendant's claim of self-defense must be presented to the jury. If the jury finds the claim of self-defense to be meritorious, it should find the defendant not guilty. Since there is, therefore, some concrete result to be obtained by proving or disproving a claim of self-defense, it makes sense to tell the jury that one party or the other has the burden of proof on this issue.” Coates, at 890. The court then cites to State v. Fuller, supra, indicating that “An instruction on burden of proof similar to the one given on self-defense need not be given because the toxic effect of a drug upon a person's capability of acting knowingly is not a legally recognized defense.” Coates at 890.

State v. Marchi, 158 Wn.App. 823, 243 P.3d 556 (2010), *petition for review denied* 171 Wn.2d 1020, 253 P.3d 393 (2011) (Once again not to point out the obvious to this court but denial of review in both the case and Sao would indicate that the Washington State Supreme court agrees with the outcome of this case as well as Marchi.) was cited by the trial court when it denied Santos attempts to have an element added to the convict instruction. This case is directly on point. Marchi, as the State has stated above, references the cases back into the 1980's which address intoxication and diminished capacity. The court in Marchi, at 836, states

that diminished capacity is not a “complete defense” as is self-defense “...but, rather, is evidence the jury may take into account when determining whether the defendant could form the requisite mental state to commit the crime.” Citing Stumpf, 64 Wn.App. at 524, 827 P.2d 294 and James, 47 Wn.App. at 608, 736 P.2d 700.

Again in State v. Sao, 156 Wn.App. 67, 230 P.3d 277 (2010), Petition For Review: Denied State v. Sao, 170 Wn.2d 1017, 245 P.3d 773 (2011), the court denied Sao ineffective assistance claim based on an allegation that his counsel had been ineffective for not proposing an instruction which would have required the State to disprove Soa’s claim of diminished capacity beyond a reasonable doubt. The Sao court citing James, supra, “Unlike self-defense, intoxication causing diminished capacity is not a “true” defense to a criminal act.” Id at 76. Thus, intoxication or diminished capacity does not add an additional element to the charged offense, which the State must disprove at trial.” Id at 76-77.

Santos contends the trial court erred by failing to instruct the jury that the State had the burden of disproving his diminished capacity due to mental illness defense beyond a reasonable doubt. He argues that his diminished capacity defense negates the mens rea element of murder and that failing to provide the requested instruction relieved the State of its burden of proof. Santos compares a diminished capacity due to mental

illness defense to self-defense claims asserting that both negate an ability to act intentionally and, thus, the State must disprove both beyond a reasonable doubt.

In addition, Santos urges this court to not follow State v. Marchi, 158 Wn. App. 823, 243 P.3d 556 (2010) “[b]ecause the reasoning of Marchi is unpersuasive and is inconsistent with subsequent precedent, this Court should not follow it.” (Appellant’s brief at 21)

This court rejected a mental illness diminished capacity special jury instruction argument in Marchi. This court definitively extended the reasoning from James, supra., to diminished capacity due to mental illness defenses holding that “...neither diminished capacity nor intoxication is a complete defense but, rather, is evidence the jury may take into account when determining whether the defendant could form the requisite mental state to commit the crime.” Marchi, at 836.

Here, as in Marchi, the trial court's "to convict" elements instruction properly allocated the State's burden of proof and properly instructed the jury that it could consider Santos’ mental illness or mental disorder when deciding if the State had proven that he acted with the requisite intent. And to the extent Santos argues that diminished capacity adds an element to charged offenses that the State must disprove, this court has consistently rejected that argument. Marchi at 836, State v. Sao,

156 Wn.App. 67, 76-77, 230 P.3d 277 (2010); James, 47 Wn.App. at 608. Accordingly, as in Marchi, the trial court's jury instructions did not relieve the State of its burden to prove beyond a reasonable doubt that Santos acted intentionally when he killed Mr. Jaime.

As set forth above in the State's facts section the trial court followed this court's opinions in Marchi and Lester. There was no error.

Issue 2. The trial court properly denied Santos' request for a self-defense instruction.

To raise a self-defense claim in a murder prosecution, a defendant must produce some evidence to establish the killing occurred in circumstances amounting to defense of life and produce some evidence he or she had a reasonable apprehension of great bodily harm and imminent danger. RCW 9A.16.050; State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). Walker states that the trial court is to judge the defendant's actions to "...determine what a reasonable person would have done if placed in the defendant's situation. Walker, 136 Wn.2d at 772, 966 P.2d 883

Santos produce nothing that would meet this standard, he testified he may have been struck in the back of the head, he was uncertain when or if that actually occurred, he did not know if Mr. Jaime had struck the blow and his response, his defense, to this possible blow delivered by someone,

was to stab Mr. Jaime 59 times, in a brutal act that progressed throughout three rooms and a hallway in Mr. Jaime's own home. Santos testified Mr. Jaime invited Santos to enter that home.

A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction. State v. Werner, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010), *citing State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). A defendant is entitled to an instruction on self-defense if there is some evidence demonstrating self-defense. Id., *citing State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). "[T]he degree of force used in self-defense is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant." Walden, 131 Wn.2d at 474, 932 P.2d 1237. "Deadly force may only be used in self-defense if the defendant reasonably believes he or she is threatened with death or 'great personal injury.'" Walden, 131 Wn.2d at 474, 932 P.2d 1237.

Jury instructions are appropriate if they allow the parties to argue their theories of the case, do not mislead the jury, and do not misstate the law. State v. Stevens, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). An appellate court reviews jury instructions *de novo* as to whether they adequately state the applicable law, in the context of the jury instructions as a whole. Id.; State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076

(2006).

The trial court ruled as follows:

The court finds that there simply is speculation at this point in time as to whether or not there is any evidence in this case that the defendant under circumstances which amounts to the fact that he was trying to defend his life against the victim in this case that would justify the instruction. More importantly, the court finds that there is no evidence that Mr. Santos has 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. I mean, there is just simply no evidence that he was in great apprehension of serious physical harm. RP 1050

State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002) “The standard of review when the trial court has refused to instruct the jury on self-defense depends on why the court refused the instruction. If the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, an issue of fact, the standard of review is abuse of discretion. If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is de novo. (Citation omitted).”

The two components of self-defense have four elements: "(1) the defendant subjectively feared that he was in imminent danger of death or

great bodily harm; (2) this belief was objectively reasonable"; "(3) the defendant exercised no greater force than was reasonably necessary"; and "(4) the defendant was not the aggressor."

Santos bases his claim the trial court erred on testimony of Dr. Bernard, the expert hired to evaluate Santos, and Santos' own testimony. Dr. Bernard testified Santos related to him in an interview that he remembers going into Mr. Jaime's home and "...the next thing he remembers is that someone hit him in the back of the head." Santos did not tell this doctor who hit him in the head, just "someone" and the record does not indicate when the alleged blow was even struck. Santos also told this doctor he had no dispute with, was not mad at, and denied having any bad feelings towards Mr. Jaime. RP 945-7.

By Santos' own words he did not know who killed Mr. Jaime or why he was killed. RP 88, had no recollection of how he arrived back in his neighborhood, that when he got into the neighborhood Mr. Jaime "...popped out the side and said hello", Jaime invited him into his home. RP 889-90, 904, he did not remember much from inside the home he had "...blacked out from a bunch of it", he denied the bloody knife with his fingerprint RP 890, he stated "I haven't had a dispute with him my entire life. I know that's true. Something could have happened. I don't know what it is... I haven't been angry with him either, which is kind of a

strange thing.” RP 892, Santos testified he believed he had been struck in the head that night, but he very specifically testified he could not state Mr. Jaime had hit him, RP 891, that there could have been a third person present who had killed Mr. Jaime and it was possible Mr. Jaime was protecting Mr. Santos from this third person, RP 891, or Santos was protecting Mr. Jaime from this other attacker. RP 892. Santos had a limited memory of what actually happened but remembered some of the struggle that occurred, never stating who he was struggling with and that “I don’t even know that he did drugs”, he testified he didn’t take drugs in Mr. Jaime’s bedroom, drugs “... were not part of this encounter.” RP 893. And finally, he testified regarding the victim “A good person with good morals that I knew of since I was kid, since I was a kid. He agreed Mr. Jaime was a good person with good morals. RP 908-9.

Literally nothing supported giving a self-defense instruction. The hinting and innuendo that Mr. Jaime might have made sexual advances on Santos is supported by nothing in the record but a speculative statement by a defense expert, a statement that is supported by not one fact. And the insinuation that the reason Santos was wearing four pairs of underwear was to protect himself from some sexual assault would indicate that Santos knew before hand that something might occur, he planned on going to the Jaime residence, he planned to protect himself and as he testified the

reason he would have had the knife found in the home would have been to protect himself, once again an act involving premeditation, forethought.

A person under attack does not spontaneously, instantly, put on four pairs of underwear between the time the first blow is struck and the time he begins to defend himself.

3. Additional information about ketamine was properly excluded.

The State does not dispute Santos' right to present a defense. The error with this allegation is that the proffered information was not relevant and was more prejudicial than probative. Santos citing State v. Darden, 145 Wn.2d 612, 621-24, 41 P.3d 1189 (2002) states Darden does cite the abuse of discretion which is true on the pages noted "621-24. However, the second sentence of the analysis section of Darden states, "**A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion...Abuse exists when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.**" Id at 619 (Citations omitted, emphasis added.)

Santos' goal in introducing the additional information about the uses of ketamine was an attempt to paint the victim as a homosexual sexual predator who was self-ingesting this drug to "enhance" or make the sex act "more tolerable" and that he attacked Santos in a drugged craze. Once again there is **literally nothing** in the record indicating Mr. Jaime

was gay, or even if he was gay how these facts were relevant. Santos in his testimony disavowed any indication that there were drugs used or anything of a sexual nature involved in his encounter with this man he stated he knew since he was a small boy. ER 402 “Evidence which is not relevant is not admissible.”

The only “evidence” was speculation and conjecture from Santos’ trial counsel. Those included the attack started in the bedroom, the drug is unusual, it is used commonly as a street drug in the gay male population, no one knew what the relationship was between Santos and the victim or what they were doing in the bedroom, these two men were best friends, “this is the kind of thing people don’t broadcast, Dr. Bernard said the attack could have been triggered by something sexual, it is used by male homosexuals to enhance or make more tolerable the sexual act. RP 88-92. Santos did not proffer to put on witnesses who would support this theory.

The court inquired how the issue of homosexuality had any relevance to the case, how the stated information was more probative than prejudicial, again asking how “a homosexual relationship” was relevant to the facts of the case, the significance of the gay community potentially using the drug, finally stating “Unless there's evidence that shows a nexus between that and homosexual activity that would prompt this response, again, we're making a quantum leap from this is a drug that's used by the

gay community and motivation for what took place on November 15th.”

The court then denied the use of this highly prejudicial information and denied it a second time again when Santos renewed his motion. RP 704

This court need look no farther than Darden to determine the actions of the trial court were correct. This “evidence” was nothing more than an attempt to introduce speculative information which was irrelevant, salacious and homophobic. (See Appendix A) State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) “Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. (Citations omitted.)

4. Santos’ spontaneous statements were properly admitted.

Det. Fairchild contacted Santos, read him his Miranda rights, Santos invoked. The Officers then proceeded to serve Santos with a search warrant for DNA, he was read the document and given a copy. Det. Fairchild told Santos how the sample would be taken. Santos read

the warrant and stated “I don’t see no judge’s signature on this paper.”

The Fifth Amendment to the United States Constitution states that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.” To preserve an individual's right against compelled self-incrimination, police must inform a suspect of this rights before subjecting him or her to “(1) custodial (2) **interrogation** (3) by an agent of the State.” (Emphasis added). When these conditions are met but *Miranda* warnings are not given, the suspect's “self-incriminating statements . . . are presumed to be involuntary, and to violate the Fifth Amendment.” A trial court must exclude such statements from the evidence at trial.”

State v. Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995).

Wholly unsolicited statements and statements made in response to words not likely to solicit incriminating information are admissible even in the absence of *Miranda* warnings. State v. Eldred, 76 Wn.2d 443, 448, 457 P.2d 540 (1969). Interrogation includes ““any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.”” State v. Richmond, 65 Wn. App. 541, 544, 828 P.2d 1180 (1992) (alteration in original) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980)). Brief, neutral, non-accusatory inquiries do not infringe on a defendant's privilege against self-incrimination. State v. Lister, 2 Wn.

App. 737, 741, 469 P.2d 597, *review denied*, 78 Wn.2d 994 (1970). *See State v. Ortiz*, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985) (generally, statement is voluntary when spontaneous, unsolicited, and not the product of custodial interrogation); *State v. Miner*, 22 Wn. App. 480, 483, 591 P.2d 812 (1979) (spontaneous, voluntary, and unsolicited statements not coerced under *Miranda*).

The manner in which Detective Fairchild executed the search warrant for buccal swabs was not an interrogation. Nothing was said that was in the form of a question. To the contrary, Mr. Santos was the one asking the questions. Furthermore, the answers and statements made to Mr. Santos would not normally lead to an incriminatory statement. In fact, there are no incriminating statements here. The purpose, the reason, the State sought to introduce these statements was to rebut his diminished capacity defense and would not be introduced in the State's case-in-chief. They were introduced to demonstrate Santos was not under the influence of anything, drug or alcohol immediately after he murdered Mr. Jaime and in fact his actions, his inquiry, was very logical and intelligent. The statements were used in conjunction with testimony from numerous officers who had immediate contact with Santos at the crime scene or just after which indicated they did not detect the odor of intoxicants, that he was able to walk, was stable on his feet and that his actions were not that

of a person whose capacity was diminished. Statements inadmissible under Miranda, may be used to attack a defendant's credibility should he take the stand and testify inconsistently with such statements. Harris v. New York, 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971).” State v. Ortiz, 34 Wn. App. 694, 698, 664 P.2d 1267, 1269 (1983).

The trial court watched the video, read the transcript and heard from the officer during the hearing, it then ruled:

There was no conversation whatsoever between Detective Fairchild and Mr. Santos....So the court clearly finds that was an unsolicited statement made by the defendant...The standard is whether or not during the course of interrogation he made statements pursuant to questions posed to him that could potentially be used against him in trial. That's what we're really dealing with in the statements. Again, if they're unsolicited and there's no interrogation ongoing, voluntary statements, statements not in response to any question are certainly admissible. There is a long line of cases in the State of Washington to that fact...So the court would allow the statements of Mr. Santos... So the court would find those were unsolicited statements made by the defendant in this particular case and would be admissible not in the state's case in chief but only on rebuttal. RP 64-6

Even if this court were to determine the trial court improperly allowed the State in rebuttal to admit the statements made by Santos any error would be harmless. The evidence in this case was overwhelming. The court need only review the State's fact section to see that these statements in rebuttal of Santos' diminished capacity argument would

have no effect on the final verdict. Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) The purpose of the harmless error rule is to prevent setting aside convictions for small errors or defects that have little, if any, likelihood of changing the result of the trial; State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977) A harmless error is one which is trivial, formal or merely academic and which affects in no way the outcome of the case. Even basic constitutional rights are subject to the harmless error analysis. See, e.g., State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995) Failure to instruct jury as to every element of a crime; State v. Lane, 125 Wn.2d 825, 839, 889 P.2d 929 (1995) Trial judge's comment on the evidence; State v. Buss, 76 Wn. App. 780, 789, 887 P.2d 920 (1995) Denial of right to cross-examine witness.

5. There was no error therefore, there can be no “cumulative error.”

Cumulative error claims are constitutional issues, which the court reviews de novo. State v. Clark, 187 Wn.2d 641, 649, 389 P.3d 462 (2017). In order to receive relief based on the cumulative error doctrine, "the defendant must show that while multiple trial errors, 'standing alone, might not be of sufficient gravity to constitute grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial.'" Id. (quoting State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)). Cumulative error does not apply where there are no errors, or the

errors are few and have little or no effect on the trial's outcome. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Because there were no errors, the cumulative error doctrine does not apply.

State v. Sorenson, 6 Wn.App. 269, 272, 492 P.2d 233 (1972) “We have examined the entire record and find the claimed error to be without merit. As the court observed in State v. Thomas, Supra, 71 Wn.2d at 472, 429 P.2d at 233, '(s)ome defendants are, in fact, guilty and no amount of forensic skill is going to bring about an acquittal.’”

6. There were no errors in the sentence imposed, nor the basis for that sentence.

Santos did not challenge the aggravating factors as void for vagueness, as being in conflict with the constitution; Santos did challenge the factual basis of these aggravators (RP 1223) in the trial court. He has not explained to this court why it should consider this issue for the first time on appeal. This court has ruled on innumerable occasions that issues not raised in the trial court may not be raised for the first time on appeal. Generally, appellate courts will not entertain issues raised for the first time on appeal. RAP 2.5(a); Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 441, 191 P.3d 879 (2008). The reason for this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. See also, State v. Nitsch, 100 Wn.App. 512, 519, 997

P.2d 1000 (2000). This court need not address this issue.

Many of the cases cited by appellant address statutes or aggravators which actually change the term of confinement. Here the aggravators, after having been decided by the jury beyond a reasonable doubt, allow the court to find grounds to impose an exceptional sentence. Santos acknowledges this. He specifically addresses the law pertaining to exceptional sentences.

Santos makes a generalized argument that alleged constitutional errors addressed in the rest of his brief may be used by this court as a cumulative basis to set aside the sentence. There were no constitutional errors therefore this allegation is unfounded.

Santos posits that the State should present the jury with evidence of a typical homicide so that when they are deliberating the deliberate homicide aggravator they will know how to judge the actions of a particular defendant. In the year 2019 in the city and county of Yakima, in these United States a sitting juror has a wealth of knowledge, which they do not leave at the door of the court, upon which to base whether a murder is typical or atypical and therefore the basis for finding, beyond a reasonable doubt, that the actions of Santos were deliberate cruelty.

He argues that because he “candidly testified” he knew children lived and played at this house, but he was specifically unaware of others

present in the house, he should not be held to account on the second aggravator. He also did not testify that he stabbed Mr. Jaime 59 times, taunting him as he slowly bled to death and yet the jury did not believe that part of his **candid** testimony and found beyond a reasonable doubt that he committed those acts. Just as this jury found facts to support his conviction even though Santos could not remember killing Mr. Jaime, they were presented with more than sufficient information that others, children, would be in this home on a Friday night/early morning. There was no reason for Santos to say, "I'm going to come back for your family." RP 383. Angel Flores testified that he listened to his uncle crying, that when he heard Santos say he was going to kill the rest of the family, that he was dying slowly, then this 12 year of boy panicked "[he] woke up the children" and tried to open a window but it was stuck and finally very frightened he called 911 and told them he and the children were there and someone was harming his uncle.

Santos argues the State did not prove this murder, the actions of this defendant, did "manifest deliberate cruelty to [Mr. Jaime.]" The State will not repeat all of the facts set out above and this court will have independently reviewed the VRP. Suffice it to say that entering another person's home when you invited in and then setting upon the occupant of that home, stabbing the victim in the chest, the sides, the back, his face

and head, 59 times. All the while taunting the victim that “he was dying slowly” as Mr. Jaime did just that, slowly bled to death. Taunting that you, his killer, were going to do the same thing to his family (which it should be noted is an acknowledgment that he knew of others living in the home), taking time to pause this brutal and relentless attack to go into the bathroom, use the restroom, wash his hands, then renew the attack. Continuing the attack through three rooms and a hallway is the very epitome of manifest cruelty. This was not the “typical” murder where the victim dies of a stab wound after an angry confrontation or fit of anger. This was a methodical, brutal, drawn out act with a running dialog from the killer as the victim screams and pleads.

In State v. Duncalf, 177 Wn.2d 289, 300 P.3d 352 (Wash. 2013) the defendant raised a due process vagueness challenge to RCW 9.94A.535(3) (y) and (t). Our Supreme Court determined the statute (y) was not vague, stating in part:

A person of reasonable understanding would not have to guess that causing such permanent injuries-injuries significantly greater than those contemplated by the legislature in defining "substantial bodily harm"-might subject him to a sentence above the standard range.

The actions of Santos are such that a person of reasonable understanding would not have to guess that causing Mr. Jaime’s death by invading Mr. Jaime’s home and stabbing him 59 times throughout much of

the house would subject him to a sentence above the standard range.

State v. Allen, ___ Wn.2d. ___, 431 P.3d 117 (2018) cited by Santos is distinguishable. The aggravators in Allen are from a separate statute regarding aggravated homicide. Those factors literally change the penalty, not the range as is the case with the aggravators Santos challenges. “If the jury found that either one of the aggravating circumstances existed, the minimum penalty for each first-degree murder conviction would increase from a term of years to mandatory life imprisonment without the possibility of release or parole. Former RCW 10.95.030(1) (1993). *Id.* (Emphasis added, footnote omitted.)

Santos argues the trial court erred by imposing an exceptional sentence based on both the "deliberate cruelty" and "destructive and foreseeable" aggravators. He asserts as one basis they are unconstitutionally vague under the due process clause. The court has previously found that void for vagueness challenges do not apply to sentencing aggravators and so should find in this case.

Under the due process clause, a statute is void for vagueness if it either (1) fails to define the offense with sufficient precision that a person of ordinary intelligence can understand it, or (2) it does not provide standards sufficiently specific to prevent arbitrary enforcement. State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Both prongs of the

vagueness doctrine focus on laws that proscribe or mandate conduct. State v. Baldwin, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003). Our Supreme Court has held that aggravating circumstances are not subject to vagueness challenges under the due process clause. Baldwin, 150 Wn.2d at 459:

The sentencing guideline statutes challenged in this case do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State. [*United States v. Wivell*. 893 F.2d [156,] 160 [(8th Cir. 1990)]. Sentencing guidelines do not inform the public of the penalties attached to criminal conduct nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature. A citizen 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. Thus, the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines.

Baldwin, 150 Wn.2d at 459. Further, the guidelines do not create a "constitutionally protectable liberty interest" because they do not require that a specific sentence be imposed. Baldwin, 150 Wn.2d at 461.

Santos acknowledges Baldwin but argues that it does not constitute controlling authority. Instead, he argues that a due process vagueness challenge is possible in light of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

Blakely provides for no such thing. Blakely concerns itself with the Sixth Amendment jury trial right. As applied to sentencing facts, Blakely

discusses *who* decides the factual contest, it does not concern itself with *what* is decided. Santos has not provided this court with any cogent legal argument suggesting how Blakely, a decision firmly anchored in the Sixth Amendment right to a jury trial, has modified the Fourteenth Amendment due process vagueness analysis articulated in Baldwin.

This court addressed an identical issue addressing “destructive impact” in State v. DeVore, 2 Wn.App.2d 651, 661-2, 13 P.3d 58 (Div. 3 2018) ruling the aggravator was not subject to this type of challenge based on State v. Baldwin:

[W]e must first determine whether the void for vagueness doctrine applies in the context of a sentencing factor that may increase the length of incarceration, but not beyond the statutory maximum for the crime. The State, based on State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003), contends sentencing aggravating factors are not subject to a vagueness challenge. Matthew DeVore agrees that Baldwin stands for such a proposition, but contends that United States Supreme Court decision and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), overrule Baldwin. Based on another recent United States Supreme Court decision, Beckles v. United States, ___ U.S. ___, 137 S.Ct. 886, 197 L.Ed.2d 145 (2017), we agree with the State.

While not in the context of aggravators this court recently addressed void for vagueness in the context of the eluding statute, State v.

Schilling, 35719-8-III (WACA). Schilling argued that Johnson v. United States, 576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) had altered the manner by which courts should determine if a matter is void for vagueness. This court stated:

We conclude that Johnson did not change existing law for assessing vagueness claims...Mr. Schilling reads too much into the *Johnson* opinion.^[2] It does not change vagueness analysis except to perhaps add an additional approach when legislation dictates that a statute be construed in a manner that precludes "as applied" consideration. It does no more than that.
^[2] We note that the Washington Supreme Court has continued to use the "as applied" test since the *Johnson* opinion was issued without any apparent concern that the standard has changed. *E.g.*, State v. Evergreen Freedom Found., 192 Wn.2d 782, 432 P.3d 805 (2019); State v. Murray, 190 Wn.2d 727, 416 P.3d 1225 (2018).

State v. Colbert, 17 Wn. App. 658, 664, 564 P.2d 1182 (1977):

The defendant is entitled to a fair and unbiased trial. State v. Beard, 74 Wn.2d 335, 444 P.2d 651 (1968). He is not entitled to a perfect trial. A perfect trial is always sought but seldom, if ever, attained. To suggest that a perfect trial is a normal expectation is to suggest that a judge, two attorneys, 12 jurors and innumerable witnesses, all of various ages and talents are omnipotent, not subject to human error and apparently possessing iron stomachs unaffected by repulsive testimony.

Neither aggravator is void for vagueness. Both were plead and proven the jury beyond a reasonable doubt. There is absolutely no merit to these allegations.

7. Legal financial allegations.

There is no necessity for this case to be remanded for any reason and specifically not for the amendment of the judgment and sentence to remove legal financial obligation issues. The State will agree to file an amended judgment and sentence to remove the filing fee, delete any provision for interest on costs other than restitution and although debatable, because of the length of the sentence imposed the State will agree to waive the imposition of the cost of supervision.

As this court is well aware, there are significant costs involved in returning an inmate to the county jail for this type of action. Therefore, the State would specifically request this court note in its opinion that the State may enter an amended judgment and sentence without the presence of the defendant. The actions which will be taken are ministerial in nature and do not affect any rights of this defendant.

Santos has not raised this LFO issue but to negate a later claim the State would point out to this court that it would appear the defendant has had DNA taken in at least one previous case. Therefore, the State would suggest that when this court remands this matter to correct the other LFO matters, it order the cost for the DNA collection set forth in the judgment and sentence be struck too. The sample has been taken which is all the State requires.

IV. CONCLUSION

There were no errors in this case. This appeal should be denied.

Respectfully submitted this 27th day of June 2019,

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APPENDIX A

STATES MOTION TO EXCLUDE TESTIMONY REGARDING KETAMINE.

MR. RAMM: There was one other thing that came up during some of the interviews. I would like to bring it to the court's attention.

Mr. Smith, in speaking with both the toxicologist and Dr. Reynolds, the description of the use of ketamine being a drug favored by homosexuals. I don't think there's any evidence of any homosexuality in this case. So the state would move to exclude that reference or any reference to homosexuality.

THE COURT: Mr. Smith.

MR. SMITH: Well, I don't think -- here's the point, your Honor. Nobody knows. The drug itself is a very unusual drug. Dr. Reynolds will testify to that. He'll testify to the fact that it was used as anesthesia in humans but has some very negative side effects. It is used commonly as a street drug in the gay male population.

This incident began in the bedroom. There's no question about that. What was happening there as between these two individuals, they want to say it was some -- that there was some evidence of the motive being this Fajardo or a hit man named Fajardo. Frankly, there's no foundation for RP 88

that and nobody knows.

All we're saying is this drug can be used in this particular manner, and this incident began in the bedroom. Nobody knows what the relationship was as between Mr. Santos and Mr. Jamie, what they were doing in the bedroom.

THE COURT: Do you know of anybody that's going to provide testimony as to if they had a relationship or anything of that nature?

MR. SMITH: Yes. Angel Flores will testify that they were best friends or is one of his best friends. This is the kind of thing that people don't broadcast, frankly. So I don't think it's unfair in this case for this jury to know that this drug is commonly used in that capacity.

THE COURT: Well, now we're getting into the issue of whether or not the relevance or the prejudicial effect of it outweighs any potential relevance of the evidence in this case. What is the potential relevance of a homosexual relationship in determining the facts in this case?

MR. SMITH: Well, Dr. Barnard says if there was an incident, one, an attack or it could be something sexual, that it doesn't mean necessarily that each of the individuals was homosexual. It doesn't mean that at all. If there was something that provoked a violent attack based on his delusional state, if there is something that provoked that, it could create a violent reaction.

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THE COURT: As I understand, Dr. Barnard's evidence from your comments is that if there was something that provoked a violent response to a person suffering from schizophrenia, that could result in the type of occurrence that occurred in this case.

MR. SMITH: If there was something, if there was an incident. One of the things that's mentioned is a blow to the back of the head, which Mr. Santos advises him that that occurred.

The state wants to introduce this to show that the individual was incapacitated. We don't know that that was the case at all of why he was incapacitated. I don't know if they're saying Mr. Santos incapacitated him or he incapacitated himself or whatever. Under the circumstances presented here, I think it's fair for the jury to know the several uses of this drug.

THE COURT: What does the state intend to elicit in this testimony about ketamine?

MR. RAMM: Just what are the effects of the drug.

THE COURT: Okay. And what are those effects?

MR. RAMM: It's an anesthesia-type drug that they previously had given adult patients and juveniles. They've since not used it. It's used more in veterinary clinics.

THE COURT: Again, I guess I'm having a difficult time understanding the significance of the gay community

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potentially using this drug.

MR. SMITH: Do you want to know why they use it?

THE COURT: No. Why is it relevant to this particular case? Unless there's evidence that shows a nexus between that and homosexual activity that would prompt this response, again, we're making a quantum leap from this is a drug that's used by the gay community and motivation for what took place on November 15th.

MR. SMITH: I agree. The evidence that I believe will be presented is the multiple effects of this drug, which include hallucinations , nightmarish hallucinations . These two individuals were -- there's really no explanation. They were in a bedroom for how long they were in the bedroom. Nobody knows that. That's where the incident began at some point in time.

The state is going to say that he was under the influence of the drug and he was incapacitated. So I think that opens it up for at least the jury to know the different uses of this illegal drug.

THE COURT: How does the issue of homosexuality have any relevance to the issues presented to the trier of fact? Where is that connection, Mr. Smith?

MR. SMITH: Well, I think it could be connected by Dr. Barnard, who will indicate, again, a blow to the head,

say a homosexual advance, a sexual advance could provoke a
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violent response based upon his delusional state.

THE COURT: Is this a drug that is always used or
substantially used by the homosexual community?

MR. SMITH: It's a street drug that has multiple
uses at this stage. The research and what we know from
Dr. Reynolds is that it can produce a dissociative state.
There's indications of something called a K-hole, which
is just a state where it can render you -- the research is
that it is used by male homosexuals simply to either enhance
or make more tolerable the sexual act.

THE COURT: Is it used for other purposes as a
street drug?

MR. SMITH: Lots, just recreation and, like I say,
to reach to some other state. It's used for -- why he was
using it, I don't know.

THE COURT: Well, at this point in time the court
is going to grant the motion to exclude reference to
homosexual activity unless there's evidence that would show
a nexus between that activity and the incident that occurred
that night.

MR. SMITH: Very good, your Honor.

THE COURT: All right. Any other matters?

MR. RAMM: No, your Honor.

RP 88-92

DEFENSE RENEWS MOTION REGARDING KETAMINE.

MR. SMITH: Your Honor, before we talk to the toxicologist, I want to renew my motion to ask him about the unusual properties of this drug Ketamine and specifically that it is known to be used in the homosexual population to enhance or tolerate sexual activity.

I believe, if asked, Dr. Barnard would say that if Mr. Santos felt that someone was coming onto him that it could provoke a reaction from him that might explain this. Frankly, there was no evidence log really that was in the discovery. I did not know until recently that there was contents. There wasn't any report that indicated there was contents. If there was, I never saw it. The contents of Mr. Santos' pockets included a condom and a small amount of change. That's the evidence.

THE COURT: Mr. Ramm, do you wish to be heard?

MR. RAMM: It's just not relevant. There is no evidence to suggest that there was any homosexual activity. There is nothing in Dr. Barnard's report indicating any advance or anything like that.

He indicates that maybe he got hit in the back of the

RULING

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head, but there's no indication of that. Some of the evidence is contrary. I would ask the court to deny the motion.

THE COURT: 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.

MR. SMITH: Thank you, your Honor.

THE COURT: Anything else?

MR. SMITH: No, your Honor.

RP 704

PHILIP BARNARD, M.D. - REDIRECT BY SMITH

Q. Could there have been, besides your opinion, could there have been other actions besides a blow to the back of the head that would have or could have provoked a psychotic response?

A. It's a possibility that Mr. Santos was being approached sexually and --MR. RAMM: Objection, calls for speculation.

THE COURT: There's an objection. I need to rule. It also calls for an answer dealing with possibilities, not probabilities. The court deals with probabilities,

Counsel. **I will instruct the jury to disregard the answer.**

MR. SMITH: Let me rephrase the question.

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Q. (By Mr. Smith) In your opinion, based upon your evaluation and your experience and training, can you say to a reasonable degree of medical certainty whether or not there could have been other actions that may have provoked a psychotic response by Mr. Santiago Santos?

A. Yes.

MR. RAMM: Objection, calls for speculation

THE COURT: You need to lay a foundation, Counsel.

Q. (By Mr. Smith) Can you tell us what the basis for that opinion is.

A. When Mr. Santos was arrested, he was wearing four pair of boxer shorts, which means to my interpretation that there was some fear of being approached sexually by another individual. He was using it as protective gear.

Q. What about the medical records with regard to his claim he was suffering from an STD? Does that have any bearing?

A. That's one of the other delusions, somatic delusion I talked about earlier.

DECLARATION OF SERVICE

I, David B. Trefry, state that on June 27, 2019 I emailed a copy of the State's Motion for Extension of time to: Richard Wayne Lechich and Gregory Charles Link at wapofficemail@washapp.org.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of June, 2019 at Spokane, Washington.

s/ David B. Trefry
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June 27, 2019 - 3:49 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36069-5
Appellate Court Case Title: State of Washington v. Santiago Alberto Santos
Superior Court Case Number: 14-1-01649-8

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