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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

BRUCE LANG, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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LAWRENCE H. HASKELL  
Prosecuting Attorney

Larry Steinmetz  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

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## **I. RESPONDENT'S ISSUES PRESENTED**

1. Should this Court remand with an order to vacate the second-degree assault conviction if that conviction merged with the first-degree robbery conviction at sentencing and the imposition of a standard range sentence on the second-degree assault in the judgment and sentence appears to be a scrivener's error?

2. If the defendant feigned signs of mental illness while testifying, did the trial court manifestly abuse its discretion when it permitted the State to present rebuttal testimony from a psychiatrist concerning that unexpected behavior?

## **II. STATEMENT OF THE CASE**

Bruce Lang was convicted by a jury of first-degree robbery and second-degree assault. CP 70. This appeal timely followed.

Stephanie Brown was in a romantic relationship with the defendant and lived on the west side of Spokane. RP 216-17. On September 15, 2014, Brown observed Lang stab a male with a knife in an alleyway. RP 220-21, 229. After the stabbing, the defendant removed his shirt and wrapped it around his head and instructed Brown "let's go," as police approached. RP 224.

At the time of the incident, victim Torry Delong was homeless and owned a bicycle and a rolling suitcase. RP 240-42. Delong's bicycle needed

chain parts so he walked toward the area of Sharp and Boone. RP 244. Delong observed an unknown male<sup>1</sup> and a female; the male motioned for Delong to approach him. RP 244. Lang asked Delong if he had any drugs. RP 245. Lang described the stabbing:

And before I even could answer or anything, I had my right arm behind me. He grabbed my right arm behind my back, spun me around. I thought he just punched me, but I hit the ground and he was on the bicycle trying to ride away. It doesn't have a chain. Kind of what the hell?

I said, [“]What are you punching me for?” And I reached down, “Did you just stab me?”

RP 245.

Lang had Delong's suitcase in his right hand as he rode away on Delong's bicycle.<sup>2</sup> RP 246. Delong yelled at Lang about being stabbed; Lang remarked: “Yeah, just f--king stabbed you.” RP 246.

Witness Claire Kasch observed the defendant, Brown, and Delong together near Boone Street and Monroe Avenue. RP 231-32. After the stabbing, Delong ran up to Kasch and appeared to be in shock. RP 233, 239. Delong had a “bad wound with blood everywhere” on his back. RP 234. Both ran to a nearby ambulance company so a medic could attend to

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<sup>1</sup> Delong made an in-court identification of the defendant as the person who attacked him. RP 245.

<sup>2</sup> Delong did not give Lang permission to take his bicycle or his suitcase. RP 248.

Delong. RP 235. Doctor Thomas Coomes treated Delong at Sacred Heart Medical Center after the stabbing. RP 270. Delong had an approximate one inch deep single stab wound to the right side of his chest (near and downward from the armpit area). RP 271-72.

Shortly after the incident, Spokane Police Department Lieutenant Troy Teigen patrolled the neighborhood near the stabbing and contacted Lang, who was with a female (Brown). RP 302, 304. Lang had no shirt on and appeared very nervous. RP 306. Lang had no weapon on his person. RP 306. Lang identified himself as Jason Ian Lambert, a name which did not exist in police records. RP 308-09. During that investigative stop, officers ultimately identified Lang. RP 309. Lang was not in possession of Delong's suitcase or bicycle at the time of the stop. RP 310-11. Lang was not taken into custody for the stabbing at that time. RP 310.

The investigation of the stabbing was suspended on October 22, 2014. RP 341-42. On June 3, 2015, detectives again contacted Lang. RP 347. Lang agreed to be recorded during that contact.<sup>3</sup> RP 348, 370. When asked why he agreed to make a statement to the police, Lang

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<sup>3</sup> A CrR 3.5 hearing was conducted and the trial court determined that the defendant's statements to detectives regarding the incident would be admissible at the time of trial. RP 182-89. The trial court excluded non-relevant portions of his statement. No written findings of fact or conclusions of law were entered into the record. No assignment of error has been designated regarding the court's ruling. The redacted audio recording of the confession was played for the jury. RP 371.

remarked: “It’s just the right thing to do.” RP 375. The defendant confessed to stabbing Delong, along with taking the bicycle and suitcase. RP 349, 373. Lang specifically described the person stabbed, the stab wound inflicted, and that “Stephanie”<sup>4</sup> was with him. RP 349. Lang said he stabbed Delong because he “wanted [Lang’s] stuff.” RP 375. After the interview, a detective contacted Brown by telephone. RP 352. Brown’s version of the stabbing was consistent with Lang’s version of events. RP 353.

### III. ARGUMENT

#### **A. THE SECOND-DEGREE ASSAULT CONVICTION SHOULD BE VACATED AS IT MERGED WITH THE FIRST-DEGREE ROBBERY CONVICTION AT SENTENCING; THE STANDARD RANGE SENTENCE ENTERED ON THE SECOND-DEGREE ASSAULT APPEARS TO BE A SCRIVENER’S ERROR.**

Lang asserts that his second-degree assault conviction should be merged with his first-degree robbery conviction to avoid violating double jeopardy. The State agrees.

At the time of sentencing, Lang’s standard range sentence on the first-degree robbery was 129 to 171 months and 63 to 84 months on the second-degree assault. CP 80. The defense attorney requested the trial court merge the second-degree assault conviction with the first-degree robbery conviction. RP 490. The defense attorney acknowledged that if the court

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<sup>4</sup> Stephanie Brown.

merged the second-degree assault with the first-degree robbery, Lang's offender score would remain at a "10.5" with the same standard sentencing range of 129 months to 171 months. RP 490. The State did not contest the defendant's merger argument. During its oral remarks at sentencing, the trial court sentenced Lang to 171 months solely on the first-degree robbery. RP 503-04. The record does not reflect either that the court imposed a sentence for the second-degree assault or found that the two crimes merged.

Assault in the second-degree merges into first-degree robbery when there is no independent purpose for each crime. *State v. Freeman*, 153 Wn.2d 765, 778, 108 P.3d 753 (2005). The crimes "may in fact be separate when there is a separate injury to 'the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.'" *Id.* at 778-79. Here, the trial court did not sentence Lang on the second-degree assault. Moreover, the record suggests Lang's second-degree assault of Delong was committed to accomplish the taking of Delong's suitcase and bicycle. It does not appear Lang's conduct of stabbing Delong was independent of his contemporaneous action of stealing Delong's property.

The court's imposition of a standard range sentence on the second-degree assault appears to be a scrivener's error. This Court should remand with an order to vacate the second-degree assault conviction against Lang.

*See, State v. Weber*, 159 Wn.2d 252, 269, 149 P.3d 646 (2006) (usual remedy for double jeopardy violation is to vacate the offense carrying the lesser sentence).

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PERMITTED THE STATE TO PRESENT REBUTTAL TESTIMONY BY A PSYCHIATRIST THAT THE DEFENDANT MALINGERED AND WAS ANTISOCIAL AFTER THE DEFENDANT TESTIFIED AND TACTICALLY FEIGNED DIMINISHED CAPACITY AND/OR MENTAL ILLNESS WHEN ANSWERING QUESTIONS.**

Standard of review.

A trial court's admission of rebuttal testimony is reviewed for manifest abuse of discretion. *State v. White*, 74 Wn.2d 386, 394, 444 P.2d 661 (1968). A manifest abuse of discretion occurs when the decision "falls outside the range of acceptable choices, given the facts and the applicable legal standard," *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013), or when it is "manifestly unreasonable or based upon untenable grounds or reasons," *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A decision is based on untenable grounds when the record does not support the court's factual findings. *Dye*, 178 Wn.2d at 548. A decision is based on untenable reasons when it is based on an incorrect legal standard, or a misapplication of a correct standard. *Id.* Even when an appellate court disagrees with the trial court, the appellate court will not reverse unless the trial court abused its discretion. *Id.* at 548. Any error in a

trial court's evidentiary decision "requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial." *State v. Barry*, 184 Wn. App. 790, 802, 339 P.3d 200 (2014).

In the present case, Lang testified during his case-in-chief. During direct examination, when asked a question by his lawyer, Lang responded to most questions with another question, failing to provide an appropriate response. *See, e.g.*, RP 400-02. During cross-examination, the following exchange took place:

[DEPUTY PROSECUTOR]: Mr. Lang, you were able to describe to Detective Robertson the person that you stabbed, correct?

[DEFENDANT]: The person I stabbed?

[DEPUTY PROSECUTOR]: You were able to describe that person to Detective Robertson, correct?

[DEFENDANT]: Yeah.

[DEPUTY PROSECUTOR]: Do you remember how you described him?

[DEFENDANT]: No.

[DEPUTY PROSECUTOR]: Remember telling Detective Robertson that he was --

[DEFENDANT]: You have to stop threatening me, okay?

[DEPUTY PROSECUTOR]: I'm not threatening you.

[DEFENDANT]: Because if you don't get your way when you get your response, the staff assault people and you just send them back to the court, you send them back to jail. So -- everybody knows I'm going to make you bite yourself because you guys were poisoning me when I made my confession.

So...

[DEPUTY PROSECUTOR]: All right. Mr. Lang, let's talk about that a little bit now. Since 2015, you've been interviewed by three people out at Eastern State Hospital, correct?

[DEFENDANT]: Yeah.

[DEPUTY PROSECUTOR]: In 2015, correct?

[DEFENDANT]: Yeah.

[DEFENSE ATTORNEY]: Your Honor, I'm going to argue this is beyond the scope.

[DEPUTY PROSECUTOR]: Your Honor, this goes --

THE DEFENDANT: You have to stop threatening me or I'm going to get down until the prosecutor can represent my case and not threaten me.

THE COURT: It is beyond the scope of [d]irect.

[DEPUTY PROSECUTOR]: This goes to his credibility.

THE DEFENDANT: She's threatening me when she's asking questions, too.

[DEPUTY PROSECUTOR]: This goes to his credibility.

THE DEFENDANT: I have no respect for her.

THE COURT: You be quiet until we ask you a question.

THE DEFENDANT: Okay. Go ahead.

THE COURT: You may proceed.

[DEPUTY PROSECUTOR]: Thank you.

[DEPUTY PROSECUTOR]: You were interviewed in 2015, correct?

[DEFENDANT]: Yeah.

[DEPUTY PROSECUTOR]: And in 2016, correct?

[DEFENDANT]: I'm not --

[DEFENSE ATTORNEY]: Excuse me, Your Honor. I don't know -- what was the court's ruling?

THE DEFENDANT: I don't have to sit here and --

THE COURT: Wait a second. One person at time. Mr. Lang, please be quiet. Your lawyer is making a record. Mr. Compton.

[DEFENSE ATTORNEY]: What was -- I'm sorry, what was the ruling on the objection?

THE COURT: I ruled that she had a right -- he volunteered what he's saying and she has a right to respond to it. This goes to his credibility.

[DEPUTY PROSECUTOR]: In 2016, correct?

[DEFENDANT]: I'm not answering your questions while you're threatening me, okay?

[DEPUTY PROSECUTOR]: In 2017, correct?

[DEFENDANT]: I'm not answering your question while you're threatening me.

[DEPUTY PROSECUTOR]: In all three cases, you've had a diagnosis, correct?

[DEFENDANT]: Listen, I'm not answering your question while you're threatening me.

[DEPUTY PROSECUTOR]: Isn't it true that you've been diagnosed as malingering?

[DEFENDANT]: No. Okay, do you have a problem with me?

[DEPUTY PROSECUTOR]: Isn't it correct that malingering means faking?

[DEFENDANT]: Okay. I'm not answering your questions. What is your question? What is your question? I'm not admitting to something so you can have your staff assault me, okay?

[DEPUTY PROSECUTOR]: And have you been diagnosed with being antisocial?

[DEFENDANT]: No, I haven't.

[DEPUTY PROSECUTOR]: And you've been diagnosed as --

[DEFENDANT]: Okay. Are you -- are you -- do you have a problem with me? Do I need a new prosecutor to represent my case?

[DEPUTY PROSECUTOR]: Yes or no.

[DEFENDANT]: Okay. Do I need a prosecutor to represent my case that doesn't have a problem with me?

[DEPUTY PROSECUTOR]: Your Honor, I move to strike as being nonresponsive.

[COURT]: Stricken. Please answer her questions.

[DEFENDANT]: What's the question?

[COURT]: You're going to hear it.

[DEFENDANT]: Okay. What's the question?

[COURT]: She's going to give it to you.

[DEFENDANT]: Okay.

[COURT]: Pay attention to her.

[DEFENDANT]: You pay attention to me and not threaten me.

THE COURT: I'm not threatening you.

THE DEFENDANT: Okay. I know you're not.

[DEPUTY PROSECUTOR]: You've been diagnosed as malingering?

[DEFENDANT]: Oh, I haven't, no.

[DEPUTY PROSECUTOR]: Mr. Lang, do you remember on Tuesday that you previously testified in this case?

[DEFENDANT]: Do I remember when?

[DEPUTY PROSECUTOR]: Tuesday.

[DEFENDANT]: I -- I --

[DEPUTY PROSECUTOR]: That you testified?

[DEFENDANT]: No, I don't.

[DEPUTY PROSECUTOR]: And you admitted at that time that you had been diagnosed as malingering.

[DEFENDANT]: No, I don't.

[DEPUTY PROSECUTOR]: And you admitted that malingering might mean you were faking it?

[DEFENDANT]: I was faking what?

[DEPUTY PROSECUTOR]: And that you also --

[DEFENDANT]: I never answered nothing.

[DEPUTY PROSECUTOR]: You also answered my questions in the affirmative when I asked you if you understood that you were faking it.

[DEFENDANT]: No.

[DEPUTY PROSECUTOR]: Isn't it true, Mr. Lang, that you do this for a fact?

[DEFENDANT]: No.

[DEPUTY PROSECUTOR]: You do this because you think that this is what normal people in the community think of as being crazy?

[DEFENDANT]: No.

[DEPUTY PROSECUTOR]: And you do this to manipulate people?

[DEFENDANT]: No, I don't.

[DEPUTY PROSECUTOR]: And you gave a confession to Detective Robertson where you admitted that you stabbed Torry Delong?

[DEFENDANT]: No, I didn't.

[DEPUTY PROSECUTOR]: In the back.

[DEFENDANT]: No, I didn't.

[DEPUTY PROSECUTOR]: In order to take his property.

[DEFENDANT]: No, I never --

[DEPUTY PROSECUTOR]: And that you used a six-inch knife.

[DEFENDANT]: No, I never.

RP 404-09.

After Lang testified, the State moved the court to present rebuttal testimony to refute Lang's apparent behavior and his attempt to exhibit

diminished capacity on the stand.<sup>5</sup> After argument, the trial court allowed the State to present rebuttal testimony. RP 411-17. The defense attorney objected to the rebuttal testimony. RP 417.

Dr. William Grant is employed by Eastern State Hospital as a forensic psychiatrist. RP 419. Since 2015, Dr. Grant testified that Lang had been evaluated by different forensic evaluators who all reached the same conclusion. RP 420. In 2017, Dr. Grant evaluated Lang and diagnosed Lang as malingering, with antisocial personality disorder and borderline personality disorder. RP 420-21. Dr. Grant explained “malingering” as faking. RP 422. Lang did not suffer from a mental disease or defect at the time of the evaluation. RP 421.

“Relevancy and the admissibility of relevant evidence are governed by ER 401 and ER 402.” *State v. Rice*, 48 Wn. App. 7, 11, 737 P.2d 726 (1987). Relevant evidence is any evidence tending to prove or disprove a material fact. *Id.* at 12; ER 401. Relevant evidence is generally admissible, and irrelevant evidence is inadmissible. ER 402. ER 403 provides relevant evidence can “be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” A danger of unfair prejudice exists

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<sup>5</sup> It is clear from the record that Lang’s defense counsel had no knowledge of or participated in anyway in Lang’s scheme to portray himself as having diminished capacity and/or mental illness.

“[w]hen evidence is likely to stimulate an emotional response rather than a rational decision.” *State v. Beadle*, 173 Wn.2d 97, 120, 265 P.3d 863 (2011). Trial courts have considerable discretion to consider the relevancy of evidence and to balance “the probative value of the evidence against its possible prejudicial impact.” *Rice*, 48 Wn. App. at 11.

A party may open the door during the questioning of a witness to otherwise inadmissible evidence. *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006); *see also State v. Young*, 158 Wn. App. 707, 719, 243 P.3d 172 (2010), *review denied*, 171 Wn.2d 1013 (2011) (a defendant may open the door to evidence that would otherwise be inadmissible, even if constitutionally protected, if the rebuttal evidence is relevant). Moreover, “[u]nder the invited error doctrine, a party may not set up error at trial and then complain about the error on appeal.” *Korum*, 157 Wn.2d at 646. In that regard, rebuttal evidence is admissible if not cumulative and if it answers new points raised by the defense. *State v. Fitzgerald*, 39 Wn. App. 652, 662, 694 P.2d 1117 (1985). Accordingly, a party may open the door to otherwise inadmissible evidence by introducing evidence that must be rebutted to preserve fairness and determine the truth. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

(1) [A] party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular

subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence.

*State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008) (citing Karl B. Tegland, 5 WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.14, at 66-67 (5<sup>th</sup> ed. 2007)).

For example, in *Gefeller*, a police officer was asked on cross-examination by the defense whether the defendant had taken a lie detector test and whether the defendant had been cooperative during the test. 76 Wn.2d at 454. After the officer responded “yes” to both questions, the officer was asked about the test results. *Id.* The officer responded that the results were inconclusive. *Id.* On redirect, the State asked the officer what he meant by inconclusive results; on re-cross, the defendant asked about the officer's experience and education with polygraph tests. *Id.* at 454-55.

On appeal, the defendant argued that the trial court improperly admitted evidence that he had taken a polygraph test and that the results had been inconclusive. *Id.* at 454. The Supreme Court rejected this argument, noting that the defendant had opened the door to this testimony by “first asking whether [a polygraph test] had been given and whether the defendant had been co-operative concerning it.” *Id.* at 455. As the Court explained, “[I]t is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he [or she] contemplates that the rules will permit cross-examination or redirect examination, as the case may be,

within the scope of the examination in which the subject matter was first introduced.” *Id.* The court further explained, “It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it.” *Id.*

Under the “opening the door” doctrine, the introduction of inadmissible evidence by one party allows an opponent, in the court’s discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission. *See United States v. Whitworth*, 856 F.2d 1268, 1285 (9<sup>th</sup> Cir. 1988). The doctrine does not permit the introduction of evidence that relates to a different issue or is irrelevant to the evidence previously admitted. *Id.* Thus, the State may pursue the subject only “to clarify a false impression.” *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009).

For example, in *State v. Froehlich*, 96 Wn.2d 301, 305, 635 P.2d 127 (1981), the defense attorney attacked the credibility of a State’s witness by asking a series of questions “designed to demonstrate his poor memory and suggestibility” attempting to undermine the witness’s credibility. *Id.* at 306. “This was done to cause the jury to infer that since the witness did not remember these other matters he must be mistaken or lying when he said he remembered critical events.” *Id.* The trial court permitted

a psychiatrist to testify that the witness “had an ‘anxiety reaction,’ that he had not suffered brain damage in [an] accident, that he was not psychotic and that he could differentiate between truth and untruth.” *Id.* In affirming the trial court, our high court reasoned, in part:

The mental defects of the witness were clearly demonstrated to the trial court and jury by the extreme state of nervousness. A review of the record made by the trial court in expressing its concerns makes it equally obvious to this court on appeal. Where, as here, the mental disability of a witness is clearly apparent and his competency is a central issue in the case, the jury need not be left in ignorance about that condition or its consequences.

*Id.* at 306-07.

Under the peculiar facts of this case we feel the expert testimony was properly admitted to enlighten the jury. The questions of competence and credibility were critical, and were put into issue by appellant. Thus, it was necessary for both the trial judge and the jury to hear the psychiatrist’s testimony to enable the judge to pass upon the question of competency, and, in view of the finding of competency, for the jury to pass upon the issue of credibility.

*Id.* at 308.

As the psychiatric rebuttal testimony in *Froehlich* was admissible to refute a defense contention about the mental capacity of a witness, the court’s reasoning is applicable in this case. Lang did not assert diminished capacity or insanity as a defense at trial. There was no evidence Lang suffered from a mental disease or defect or that he had diminished capacity at the time of committing the offenses. In an effort of uncounseled self-help after the State had presented its evidence, Lang attempted to create a false

impression that he had diminished capacity and/or a mental illness, without expert testimony, in an obvious attempt to influence the jury's consideration of whether he could form the mental states necessary to commit the charged crimes.<sup>6</sup> Lang's accusations toward the deputy prosecutor and his odd behavior left the impression that he suffered from either diminished capacity or mental illness. Dr. Grant's rebuttal testimony explained and contradicted Lang's purposeful, unorthodox effort to create a false impression that he suffered from diminished capacity or a mental illness. Without Dr. Grant's testimony, the jury would have been left with the one-sided impression, without distinction, that Lang's behavior was real and that he suffered from a mental disease or defect. The trial court was in the best position to observe Lang's behavior and answers to questions and determine the relevance of Dr. Grant's rebuttal testimony. *See State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009) ("Generally, we defer to the assessment of the trial judge who is best suited to determine the prejudicial effect of a piece of evidence"). The trial court did not manifestly abuse its discretion.

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<sup>6</sup> Robbery includes the non-statutory element of specific intent to steal. *State v. Sublett*, 176 Wn.2d 58, 88, 292 P.3d 715 (2012); *see* CP 61. In addition, specific intent to create apprehension of bodily harm or to cause bodily harm is a necessary element of second-degree assault. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); *see* CP 67.

In the alternative, if there was error, it was harmless. Lang has not argued that the alleged error was of constitutional magnitude; the harmless error standard applies. The improper admission of evidence is reversible error solely if it results in prejudice. *State v. Nelson*, 108 Wn. App. 918, 926, 33 P.3d 419 (2001), *review denied*, 145 Wn.2d 1026 (2002). In assessing whether the error was harmless, an appellate court measures the admissible evidence of guilt against the prejudice caused by the improperly admitted evidence. *Id.*; *see also State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (“[t]he improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole”).

Here, the evidence against Lang was overwhelming. Lang’s stabbing of Delong and the taking of his property was personally observed and testified to by his former girlfriend. Lang subsequently confessed to law enforcement that he stabbed Delong, he described the specific nature of the stab wound, and he stabbed Delong to obtain Delong’s property. Other than to explain Lang’s odd behavior and responses on the witness stand, the rebuttal testimony was not directly related to Lang’s guilt.

Finally, if error, it was invited. Lang should be precluded from raising this claimed error because he contributed to it at the time of trial. A party who sets up an error at trial cannot claim that very action as error on

appeal and receive a new trial. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In determining whether the invited error doctrine applies, our courts consider “whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it.” *In re Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). The doctrine requires “affirmative actions by the defendant.” *In re Thompson*, 141 Wn.2d 712, 724, 10 P.3d 380 (2000).

Under the “invited error” doctrine, a defendant may not make a tactical choice in pursuit of some real or hoped-for advantage and later urge his own action as a ground for reversal. *State v. Lewis*, 15 Wn. App. 172, 176, 548 P.2d 587 (1976), *overruled on other grounds by State v. Stephens*, 22 Wn. App. 548, 591 P.2d 827 (1979). In the present case, Lang purposefully opened the door to rebuttal testimony concerning his behavior on the witness stand. Invited error should preclude this Court’s review of the claimed error.

#### **IV. CONCLUSION**

This Court should remand to the trial court to vacate the second-degree assault conviction as it merged into the first-degree robbery conviction at sentencing.

Regarding Dr. Grant's rebuttal testimony, it is obvious from the record that Lang deliberately attempted to feign symptoms of diminished capacity and/or mental illness on the witness stand, as his own trial strategy, to give the jury cause to question his ability to form the necessary mental states for the charged crimes, even though the jury was not instructed on diminished capacity or insanity as potential defenses. Examples include: Lang's approach of answering his own counsel's questions during direct examination with counter-questions; Lang's claims that the deputy prosecutor, court staff and the judge were threatening or assaulting him; and his assertions that the deputy prosecutor represented him during trial. Because Lang fabricated diminished capacity and/or a mental illness while testifying during trial and attempted to sway the jury and the outcome of the trial, the trial court did not manifestly abuse its discretion by permitting Dr. Grant to rebut and explain Lang's behavior. If the trial court had not permitted Dr. Grant to testify, the jury would have been left with a one-sided impression of Lang's mental state at the time of the commission of the offenses.

If this Court determines that the trial court erred, any error is harmless as the independent evidence of Lang's guilt is overwhelming when

weighed against any alleged prejudicial effect of the rebuttal testimony.

Finally, if error, it was invited by Lang.

Respectfully submitted this 11 day of July, 2019.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Larry Steinmetz #20635  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

BRUCE LANG,

Appellant.

NO. 36397-0-III

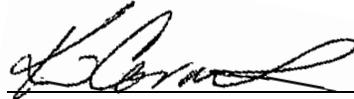
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I certify under penalty of perjury under the laws of the State of Washington, that on July 11, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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