

FILED  
Court of Appeals  
Division III  
State of Washington  
3/16/2020 3:30 PM

COA NO. 36501-8-III

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

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STATE OF WASHINGTON,

Respondent,

v.

DALLAS LANGE,

Appellant.

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

The Honorable Randall Krog, Judge

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REPLY BRIEF OF APPELLANT

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**A. ARGUMENT IN REPLY**

**1. THE COURT'S ERRONEOUS EXCLUSION OF EXPERT TESTIMONY VIOLATED LANGE'S RIGHT TO PRESENT A DEFENSE.**

The State contends an abuse of discretion occurs "only when no reasonable person would take the view adopted by the trial court." Brief of Respondent (BR) at 3 (quoting State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)). Although this phrase is sometimes bandied about, the abuse of discretion standard is more nuanced and expansive than suggested.

"[T]o say an abuse of discretion exists when 'no reasonable man, woman or judge' would have taken the view adopted by the trial court is not accurate" because it improperly focuses on the "reasonableness of the decision-maker" rather than the reasonableness of the decision. Coggle v. Snow, 56 Wn. App. 499, 506, 784 P.2d 554 (1990). "A trial judge afforded discretion is not free to act at whim or in boundless fashion, and discretion does not allow the trial judge to make any decision he or she is inclined to make." State v. Curry, 191 Wn.2d 475, 484, 423 P.3d 179 (2018) (citing Coggle, 56 Wn. App. at 504-05).

Saying no reasonable judge would have ruled as the trial court did is just another way of saying "we must find the decision is 'unreasonable or is based on untenable reasons or grounds.'" State v. Arredondo, 188 Wn.2d 244, 256, 394 P.3d 348 (2017) (quoting State v. Mason, 160 Wn.2d 910,

922, 162 P.3d 396 (2007)). Thus, a trial court abuses its discretion "if any of the following is true: (1) The decision is 'manifestly unreasonable,' that is, it falls 'outside the range of acceptable choices, given the facts and the applicable legal standard'; (2) The decision is 'based on untenable grounds,' that is, 'the factual findings are unsupported by the record'; or (3) The decision is 'based on untenable reasons,' that is, it is 'based on an incorrect standard or the facts do not meet the requirements of the correct standard.'" State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

As argued in the opening brief, the court abused its discretion in excluding expert testimony to show diminished capacity because the testimony met the evidentiary criteria for admission. Even if it was proper to exclude this testimony to show diminished capacity, the court still abused its discretion in failing to admit the testimony to support Lange's claim of self-defense because it was relevant and helpful to the jury in assessing Lange's state of mind in relation to that claim under ER 702. The court's decision fell outside the range of acceptable choices, given the facts and defense in relation to the applicable legal standard embodied in ER 702.

The State claims the court properly excluded the expert testimony because the expert framed his opinion in terms of "suggestion" and "appearance," rendering the opinion incapable of being helpful to the trier of fact BR at 7-9. But unequivocal opinion is not required. "[A]n expert's lack of certainty goes to the weight of the testimony, not its admissibility." State v. Lord, 117 Wn.2d 829, 854-55, 822 P.2d 177 (1991), abrogated by State v. Schierman, 192 Wn.2d 577, 438 P.3d 1063 (2018). "This is so, in part, because the scientific process involved often allows no more certain testimony." Id. at 853. For example, "expert testimony couched in terms of 'could have', 'possible', or 'similar' is uniformly admitted at trial." Id.

This principle applies to expert opinion on diminished capacity: "it is not necessary that the expert be able to state an opinion that the mental disorder actually did produce the asserted impairment at the time in question—only that it could have, and if so, how that disorder operates." State v. Mitchell, 102 Wn. App. 21, 27, 997 P.2d 373 (2000). "The jury, after hearing all the evidence, may find probability where the expert saw only possibility, and may thereby conclude that the defendant's capacity was diminished even if the expert did not so conclude." Id. at 28. The State does not address Mitchell.

**2. THE FIRST AGGRESSOR INSTRUCTION FAILED TO MAKE THE LAW MANIFESTLY APPARENT TO THE JURY AND PREJUDICED LANGE'S SELF-DEFENSE CLAIM, REQUIRING REVERSAL OF THE CONVICTION.**

The State argues the court properly gave the first aggressor instruction because the evidence supported it. BR at 9-13. There is no dispute that the evidence, looked at in the light most favorable to the State, supported the giving of a first aggressor instruction. Rather, Lange's argument on appeal is that the particular wording of the instruction is constitutionally infirm under State v. Kee, 6 Wn. App. 2d 874, 876, 431 P.3d 1080 (2018). The State's brief does not address this problem.

The State does not contest that this issue may be raised for the first time on appeal under RAP 2.5(a)(3). Appellate courts are not in the business of constructing arguments for litigants. State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). But the Supreme Court's recent decision in State v. Grott, \_\_Wn.2d\_\_, \_\_P.3d\_\_, 97183-8, 2020 WL 829894 (slip op. filed Feb. 20, 2020), which came out after the State filed its brief, is relevant to the issue. Grott is addressed here because it requires some reconfiguration of Lange's argument that the improperly worded aggressor instruction is a manifest constitutional error.

Under Grott, "unpreserved objections to first aggressor instructions must be evaluated on a case-by-case basis to determine whether they may

be raised for the first time on appeal." Grott, 2020 WL 829894 at \*4. In Grott, the issue on appeal was "whether the evidence was sufficient to support giving a first aggressor instruction." Id. Mr. Grott "[did] not object to the wording of the instruction but to the fact that it was given at all, contending that it was not supported by the evidence presented at trial." Id. at \*5.

Grott clarified that "first aggressor instructions are used to explain to the jury one way in which the State may *meet* its burden: by proving beyond a reasonable doubt that the defendant provoked the need to act in self-defense." Id. The asserted error in that case was not of constitutional magnitude because the first aggressor instruction did not relieve the State of its burden of proof. Id. The asserted error was not manifest because evidence supported the instruction. Id. at \*6.

The issue on appeal in Lange's case is different, thereby yielding a different conclusion. Unlike in Grott, Lange objects to "the wording of the instruction," not to "the fact that it was given at all." Id. at \*5.

As Grott recognizes, the first aggressor instruction is tethered to the State's burden of disproving a self-defense claim. Id. So when the wording of the instruction does not adequately convey the law on the first aggressor standard, it fails to adequately convey how the State may disprove the defendant's claim of self-defense.

When the defendant raises the issue of self-defense, the absence of self-defense becomes another element of the offense that the State must prove beyond a reasonable doubt. State v. Woods, 138 Wn. App. 191, 198, 156 P.3d 309 (2007) (citing State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984)). The wording of the first aggressor instruction lowered the State's burden of proof in that it permitted the jury to find Lange was the first aggressor, and therefore did not act in lawful self-defense, based on verbal provocation alone. "By failing to instruct the jury that words alone are insufficient provocation for purposes of the first aggressor jury instruction, the trial court did not ensure that the relevant self-defense legal standards were manifestly apparent to the average juror." Kee, 6 Wn. App. 2d at 881-82.

Self-defense instructions that contain "an ambiguity regarding an elemental component of the self-defense instruction" can be challenged for the first time on appeal under RAP 2.5(a)(3). State v. O'Hara, 167 Wn.2d 91, 108, 217 P.3d 756 (2009) (addressing State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996)).<sup>1</sup> For example, the instruction in LeFaber, in

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<sup>1</sup> O'Hara disapproved of LeFaber to the extent it suggested all errors in self-defense instruction are automatically reviewable for the first time on appeal under RAP 2.5(a)(3). O'Hara, 167 Wn.2d at 101. O'Hara held "appellate courts should analyze unpreserved claims of error involving self-defense instructions on a case-by-case basis to assess whether the claimed error is manifest constitutional error." Id. at 104.

failing to make the law on self-defense manifestly apparent, "effectively relieved the State of its burden of proving the defendant had a reasonable belief he was in imminent danger of harm." O'Hara, 167 Wn.2d at 108; see also State v. Ackerman, 11 Wn. App. 2d 304, 310, 453 P.3d 749 (2019) (ambiguous jury instructions potentially diluted the State's burden by incorrectly conveying the elements of self-defense, so error could be raised for first time on appeal under RAP 2.5(a)(3)).

Similarly, by failing to make it manifestly apparent that words alone cannot constitute the provocation, the first aggressor instruction allowed the jury to find Lange guilty based on a faulty legal standard. Kee, 6 Wn. App. 2d at 881-82. In this manner, the instruction made it easier for the State to convict by allowing the State to disprove Lange's claim of self-defense. The error is of constitutional magnitude because the first aggressor instruction contains an ambiguity directly tied to the State's burden to disprove self-defense as an element of its case. Further, the aggressor instruction allowed the jury to decide the issue of self-defense based on an erroneous legal standard and thereby deprived Lange of fully arguing his theory of the case that he acted in self-defense. See Kee, 6 Wn. App. 2d at 882 ("the trial court's instructions affected Kee's ability to argue that she acted in self-defense");

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O'Hara, 167 Wn.2d at 107 (citing LeFaber as a case where error assigned to an ambiguous self-defense instruction was a manifest error affecting a constitutional right because it deprived the defendant of his ability to argue his theory of the case).

An error is manifest if it causes actual prejudice to the defendant by having practical and identifiable consequences on the trial. State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999). The error here had the practical and identifiable consequence of permitting the jury to find the State disproved Lange's claim of self-defense on the erroneous basis that Lange verbally provoked Billings to react. Self-defense was the only defense Lange was able to present. The instructional error undercut that defense by making it easier for the jury to reject it.

**3. THE COURT ERRED IN REQUIRING MENTAL HEALTH EVALUATION AND TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.**

The State concedes the court erred in imposing the mental health condition in the absence of the requisite finding that Lange suffers from a statutorily defined mental illness that contributed to the offense. BR at 21. It suggests the remedy is remand so that the trial court can determine whether to order evaluation based on the statutory requirements. BR at 21.

If there is any fact finding on remand, it cannot be a matter of entering a rote finding that Lange meets the statutory requirement. There

must be reasonable grounds "to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense." RCW 9.94B.080. The definitions of a mentally ill person are varied and specific. RCW 71.24.025(32) ("Mentally ill persons" is defined "in subsections (1), (10), (39), and (40) of this section.").

Any fact found must be supported by substantial evidence. See State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190, 1192 (2007) ("we review findings of fact that underlie the imposition of community custody for substantial evidence"), disapproved on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). If this issue is remanded for possible fact-finding, the State will need to justify its request and the requisite legal standard must be met.

**4. THE CONDITION REQUIRING EVALUATION AND TREATMENT FOR SUBSTANCE ABUSE DISORDER IS NOT CRIME-RELATED AND THEREFORE MUST BE STRICKEN.**

Court-ordered substance abuse evaluation and treatment must address an issue that contributed to the offense. State v. Munoz-Rivera, 190 Wn. App. 870, 893, 361 P.3d 182 (2015) (citing State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003)). The State contends evaluation and treatment for substance use disorder was properly imposed because the

expert's report showed Lange smoked "dabs" on a regular basis and had done so just prior to his projected drive to work that day. BR at 21; see CP 25-26 (expert's report).

Lange's use of dabs did not contribute to the offense. As explained in the expert's report, "dabs" is an umbrella term for butane hash oil. CP 25. According to research, "there is no known association between dabs and violence; if anything, it seems to be sedating[.]" CP 26. This is consistent with Lange's description of the effect the drug has on him: "you just don't want to move . . . like a high dose of Oxycontin." CP 25. Lange was using dabs to medicate his anxiety and chronic insomnia. CP 26. The expert thought it "highly unlikely that the use of dabs led to any aggressive behavior." CP 26.

Courts use the "substantial evidence" standard to determine whether a condition "directly relates to the circumstances of the crime." State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015); RCW 9.94A.030(10). "Substantial evidence" is "evidence that would persuade a fair-minded person of the truth of the statement asserted." PacifiCorp Envtl. Remediation Co. v. Washington State Dep't of Transp., 162 Wn. App. 627, 657, 259 P.3d 1115 (2011) (quoting Cingular Wireless, LLC v. Thurston County, 131 Wn. App. 756, 768, 129 P.3d 300 (2006)). The expert report relied on by the State is not substantial evidence that Lange's dabs use

contributed to the offense. If anything, that report shows Lange's dabs use did not contribute to the violent offense for which he was convicted because the drug has a sedative effect, the opposite of aggression. CP 25-26. Lange assaulted Billings *despite* the calming effect of dabs use. Substantial evidence does not establish the substance use condition of community custody is directly related to the circumstances of the offense.

**5. LEGAL FINANCIAL OBLIGATION ERRORS IN THE JUDGMENT AND SENTENCE MUST BE FIXED.**

The State concedes the supervision fee should be stricken due to Lange's indigency. BR at 22. The concession is appropriate and is further supported by a new decision that came out after the State filed its brief.

In State v. Dillon, \_\_ Wn. App. 2d \_\_, 456 P.3d 1199, 1209 (2020), the Court of Appeals struck the supervision fee because the record demonstrated that the trial court intended to impose only mandatory legal financial obligations (LFOs). In that case, the trial court indicated at sentencing that it would impose mandatory LFOs. The court did not mention supervision fees and the LFO section of the judgment and sentence did not include any reference to the supervision fee. Under the section in the judgment and sentence on community custody conditions, the requirement to "pay supervision fees as determined by DOC" was buried in a lengthy paragraph on community custody. "From this record, it appears

that the trial court intended to waive all discretionary LFOs, but inadvertently imposed supervision fees because of its location in the judgment and sentence." Id. The Court of Appeals therefore remanded to strike the supervision fee. Id. at 1202.

The record in Lange's case is comparable. At sentencing, the State simply requested the mandatory \$500 victim penalty assessment and the \$100 DNA collection fee. RP 476. The judge, in pronouncing sentence, only ordered imposition of these fees. 1RP 478. The judge flatly stated, "I'm just going to order mandatory costs, no discretionary costs in this matter." RP 480. The LFO section of the judgment and sentence, setting forth the LFOs imposed, does not include supervision fees. CP 151-52. The requirement to pay supervision fees was buried in a boilerplate paragraph listing community custody conditions. CP 150. As in Dillon, the record shows the trial court did not intend to impose the discretionary supervision fee. The remedy is remand to strike the fee. Dillon, 456 P.3d at 1202, 1209.

**B. CONCLUSION**

For the reasons stated above and in the opening brief, Lange requests reversal of the conviction. If this Court declines to reverse the conviction, then the sentencing errors should be corrected.

DATED this 16<sup>th</sup> day of March 2020

Respectfully Submitted,

  
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**March 16, 2020 - 3:30 PM**

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**Appellate Court Case Title:** State of Washington v. Dallas John Paul Lange  
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