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COA NO. 36501-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

DALLAS LANGE,

Appellant.

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

The Honorable Randall Krog, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in excluding testimony from the defendant's proposed expert witness.

2. The court erred in giving a first aggressor instruction that did not make the relevant law manifestly apparent.

3. Prosecutorial misconduct in closing argument violated appellant's due process right to a fair trial.

4. Defense counsel's failure to object to or request a curative instruction for the prosecutorial conduct violated appellant's right to effective assistance of counsel.

5. Cumulative error deprived appellant of his due process right to a fair trial.

6. The court erred in imposing the following conditions of community custody:

a. "undergo an evaluation for treatment for . . . mental health . . . and fully comply with all recommended treatment." CP 150.

b. "undergo an evaluation for treatment for . . . substance use disorder . . . and fully comply with all recommended treatment." CP 150.

6. The judgment and sentence is not definite and certain in regard to the \$200 criminal filing fee, but if it was imposed, it was error.

7. The court violated RCW 9.94A.760(1) in not designating the total amount of legal financial obligations imposed.

8. The cost of supervision imposed as part of the sentence is unauthorized by statute.

Issues Pertaining to Assignments of Error

1. Whether the exclusion of expert testimony violated the right to present a complete defense because (1) the proposed testimony concerning appellant's mental disorder reasonably related to impairment of the ability to form a culpable mental state, and thus would have been relevant and helpful to the jury in assessing a diminished capacity defense; or (2) the testimony would have been relevant and helpful in assessing appellant's state of mind in relation to his self-defense claim?

2. Whether the first aggressor instruction, in not informing the jury that words alone are insufficient to make the defendant the first aggressor in an altercation, was erroneous because it failed to make the relevant legal standard manifestly apparent to the jury?

3. Whether the prosecutor committed misconduct in closing argument by misstating the first aggressor standard and the components of self-defense, requiring reversal of the conviction due to the incurable nature of the misconduct and a substantial likelihood that it affected the

verdict? Alternatively, whether defense counsel was ineffective in failing to object to the prosecutor's misconduct or request a curative instruction?

4. Whether a combination of errors specified above violated appellant's right to a fair trial under the cumulative error doctrine?

5. Whether the court erroneously ordered mental evaluation and treatment as a condition of community custody because it did not find a statutorily defined mental illness that contributed to the offense?

6. Whether the sentencing condition requiring substance abuse evaluation and treatment must be stricken because it is not crime-related?

7. Whether the judgment and sentence must be made definite and certain regarding the status of the \$200 criminal filing fee and, if the fee was imposed, whether it must be stricken because it is a scrivener's error and cannot be imposed on an indigent defendant?

8. Whether the judgment and sentence should be corrected to reflect the total legal financial obligations owed, thereby complying with statutory mandate?

9. Whether the cost of community custody supervision must be stricken from the judgment and sentence because appellant is indigent?

B. STATEMENT OF THE CASE

Dallas Lange appeals from his conviction and sentence for first degree assault. CP 164-79.

1. Procedural Facts

The State charged Lange with attempted first degree murder and first degree assault of Jerry Billings. CP 16-17. The jury received instruction on self-defense. CP 131. The jury was also given a first aggressor instruction. CP 132. The jury hung on the attempted murder count. CP 138; RP 467-70. It returned a guilty verdict for first degree assault along with a special verdict for a deadly weapon enhancement. CP 139, 141. The court sentenced Lange, who has no criminal history, to 147 months confinement and 36 months of community custody. CP 148-50.

2. Pre-trial ruling excluding testimony from Lange's expert witness

Before trial, Lange notified the State and the court that the defenses to the charges were diminished capacity, self-defense and defense of others. CP 180. The State moved to exclude testimony from Lange's proposed expert witness, Dr. Cummings, on the ground that it did not meet the evidentiary standard for a diminished capacity defense. CP 184-87; RP¹ 25-27. The defense opposed the motion, arguing the expert's testimony would be relevant and helpful to the jury in assessing a diminished capacity defense, or in alternative, was otherwise relevant to

¹ Citation to the verbatim report of proceedings: RP - two consecutively paginated volumes consisting of 11/19/18, 12/5/18, 12/6/18, 12/17/18. 2RP - 4/2/18.

Lange's state of mind. RP 25-26. The court excluded the testimony on the ground that it would be irrelevant and confusing. CP 18-20; RP 27-32.

3. Background and events leading up to the altercation

Jerry Billings, Kirsten ("KK") Pauling, Theresa ("Tweeter") Pauling, Theresa's two young children, and Lange lived on the same property. RP 188-89. Kirsten is Billings's girlfriend and Theresa's mother. RP 186. Theresa was Lange's girlfriend. RP 188. Lange had known the 46-year-old Billings for most of his life. RP 189, 213, 337.

Lange paid \$500 in monthly rent to Billings. RP 189, 342-43. He worked at McDonalds. RP 365. Billings, Theresa and Kirsten were on food stamps. RP 189. Theresa described herself as being on maternity leave because she was pregnant with a third child. RP 206. Billings was in charge of paying rent to the landlord. RP 227.

According to Billings, he bought a car for Theresa to drive to work so that she could support her kids. RP 216, 229-30. Billings maintained he helped pay for the car. RP 229. Theresa and Lange testified Billings did not help pay for the car. RP 307, 343. Theresa and Lange bought the car with their money. RP 307, 343-44. The car was registered in Billings's name because Theresa's license was suspended. RP 307-08.

A few days before the event at issue, Billings bought new car tires for \$200. RP 190-91, 217. According to Billings and Kirsten, they took

the car to Les Schwab, which made them buy new tires because the tires on the car were bald or split. RP 217. Billings thought he should be paid back the money he spent on the tires. RP 217. According to Theresa, Billings needed to buy new tires because he was driving recklessly and blew one out. RP 308. The story about Les Schwab making them buy new tires because they were in bad shape was a lie. RP 318.

Come December 2017, Billings was short on rent money because he paid for the new tires. RP 228. Lange and Theresa paid their share of the rent. RP 308-09. Billings wanted them to pay an extra \$450 to cover his share but they could not afford it. RP 309-10. Billings was upset about that. RP 310.

4. December 6, 2017: setting the table

Billings collects weapons. RP 231. On December 6, 2017, Margaret Randall came over to Billings's mobile home to trade some weapons in exchange for tattoo work Billings did on her daughter. RP 160, 172-73, 231. Randall met with Billings in the tattoo parlor, a bedroom converted into an office. RP 160-61. According to Billings, Randall brought about 10 weapons consisting of various cutting instruments. RP 231. Jasmine Randall, Margaret's daughter, said there were between five and eight knives. RP 176-77. There was a very large one with a spiked handle, at least 18-24 inches long, as well as smaller ones. RP 176. The

smaller ones had six-inch blades. RP 176-77. The blades were sharp. RP 176. One or two were daggers. RP 176. The weapons were laid out on the table in the office so that Billings could examine them. RP 232. Witnesses gave various versions about what happened next.

5. Billings's version of events

Billings was in his office talking to Margaret when Lange asked for the keys to the car. RP 218, 232-33. Billings assumed Lange was not going to pay for the tires. RP 218. Billings "wasn't going to give up the keys so they could drive the car." RP 218. He did not think they "deserved" to drive the car. RP 218. They argued. RP 233. Lange got mad and told Billings to "fuck off" several times. RP 218. Billings cursed back. RP 233. Billings testified this was not normal behavior for Lange, as he had "always been real calm and kicked back." RP 218.

Lange said he was going to slash the tires. RP 218. Billings said he was not going to do that. RP 218. Lange went outside and Billings followed. RP 218. Billings asked him what he was doing to do. RP 219. In the doorway, Lange turned around and hit Billings in the forehead with his fist. RP 219. Billings tackled and wrestled Lange to the ground, "grabbed him by the eye," incapacitated him, and told him to calm down or it was going to get worse. RP 219, 238. Thinking Lange had calmed down, Billings let go and got up. RP 219.

Billings went back to his office. RP 220. After a few seconds, he heard Kirsten "screaming about put it down and stop." RP 220. Billings turned and saw Lange with an ax he had taken from the wall. RP 220. Kirsten was trying to keep him from going towards Billings. RP 220. Billings did not arm himself with anything. RP 220. But there were weapons all around him. RP 220. As described by Billings, "there's stuff on the walls all over the place," including a morning star (club-like weapon) and axes.² RP 234. Billings asked Lange what he was going to do. RP 221. Lange swung over the top of Kirsten and hit Billings in the face and chest with the ax. RP 221.³ Billings denied threatening Lange with a weapon, his fists, or in any other way. RP 221, 226. He denied charging at Lange. RP 226.

6. Lance Fletcher's testimony

Fletcher had known Billings and Lange for years. RP 325-26. After the incident, Billings talked about what happened. RP 327. Billings told Fletcher that he punched Lange six or seven times and then pinned him to the ground with his thumb in Lange's eyes trying to "calm" him down. RP 332. Fletcher responded, "where I'm from that's not how you

² Kirsten testified a mace, throwing axes and throwing knives were on the wall. RP 203-04.

³ An emergency physician described the lacerations to Billings's face and chest as "severe." RP 242. Billings recovered in two months. RP 225.

calm someone down." RP 334. Billings laughed. RP 334. Billings admitted to Fletcher that he (Billings) was the first one to become physical. RP 332.

7. Kirsten Pauling's version of events

Billings refused to give the keys to Theresa so that she could drive Lange to work. RP 191-92. Kirsten heard Theresa yell for her from the porch. RP 192. Kirsten ran out and saw Lange on top of Billings. RP 192. She tried to pull them apart and told them to stop. RP 192-93. They did. RP 193. Lange let go and backed up. RP 193. Billings went inside, followed by Kirsten, Theresa and then Lange. RP 194. Kirsten thought the fight was done. RP 195. There were two axes on the wall. RP 195. Lange grabbed one of the axes and took off the cover. RP 195. Lange said something like "this is our house" and "you're the one that's leaving." RP 207-08. Kirsten tried to push Lange back, telling him not to do it. RP 195. Lange swung over Kirsten and hit Billings. RP 195. Billings stepped back into his office, looked in the mirror, told Lange "You're fucked now, there's nothing I can do for you. KK, go call an ambulance." RP 195.

8. Margaret Randall's version of events

Lange came in and asked for the car keys, as he needed to go to work. RP 162. Billings refused to give him the keys. RP 162. Lange

became enraged. RP 162. They argued. RP 163. Lange uttered a profanity. RP 163. Billings told him to get out. RP 163. Lange left, slamming the door. RP 163. Billings walked out of the room. RP 163. Margaret went to the living room and saw Billings and Lange on the front porch, locked in each other's arms, trying to push each other back and forth. RP 164. Billings came "slamming back through the door" and returned to his office. RP 165. Lange went to the kitchen, stayed there for a few seconds, then headed to the office. RP 166-67. Kirsten said "guys, stop" and inserted herself between Lange and Billings. RP 167. Lange returned to the kitchen. RP 168. Margaret thought "everything was done" and she was going to leave. RP 168.

Kirsten ran back over, saying "Dallas, no, no, no, no." RP 168. Margaret heard a noise and metal going through the air. RP 168. She heard Billings say, "What are you going to do; are you going to hit me with that thing?" RP 168. Lange did not say anything; "he just kept going towards Jerry down the hall and the office." RP 168. She heard Billings say "You are f'd. That's it, you're f'd." RP 168. Lange responded "No, you are, you're the one going to jail, that's it." RP 168. Lange went back to the kitchen and paced around. RP 168. He "was acting like nothing had happened." RP 170. Kirsten asked, "why did you do that?" RP 168-

69. When Billings came out, he had a big slash down his face and was bleeding from his chest through a ripped shirt. RP 169.

9. Jasmine Randall's version of events

Margaret's daughter, Jasmine stayed outside. RP 173. She heard yelling; someone said, "Get out of my house." RP 173. The argument spilled out onto the front porch. RP 173. Lange and Billings were scuffling. RP 174. She could not tell who was the "aggressor." RP 174. Punches were thrown. RP 174. They pushed each other back and forth. RP 174-75. After a minute, Kirsten came out and broke them up. RP 175. Lange went inside first. RP 175. No more than five minutes passed. RP 177. When she approached the porch to retrieve her mother, Billings came out of the house, bleeding from his face and chest. RP 175.

10. Cory Randall's version of events

Margaret's husband, Cory, stayed outside. RP 180, 182. He heard yelling and arguing. RP 182. Lange came out onto porch, followed by Billings. RP 182. Lange "swung at the door" a split second before Billings came through the doorway. RP 183. Billings bearhugged him and they went against a refrigerator. RP 183. They tussled, Kirsten broke them up, and Billings went back inside. RP 182. Lange went inside 20-30 second later. RP 182. Cory heard more commotion and yelling. RP 182-

83. A minute later, Billings came out with a cut on his cheek and chest.
RP 182-83.

11. Theresa Pauling's version of events

Lange was getting ready to go to work. RP 310. She saw Lange go into the office. RP 311. Billings came out, mumbling under his breath, stomping around and agitated. RP 311-12. Theresa went to warm up the car and noticed the keys were not in the ignition. RP 312. Theresa asked her mother to get the keys from Billings. RP 312. She came back and reported that Billings said, "nobody is driving the f'ing car because they're on his tires." RP 313. Theresa told Lange what Billings said. RP 313. Lange said he needed to get to work and he was going to get the keys. RP 313, 319. Theresa stayed outside. RP 313. She heard yelling. RP 313. She heard Lange say, "we paid for the car, it's our car" and Billings say "no, it's my car, it's in my name. Nobody is taking it." RP 313.

Theresa then heard scuffling. RP 313. She walked around the side of the house and saw Billings pinning Lange against the wall, saying "Dallas, stop it." RP 313. He had a handful of Lange's hair and a finger in his eye. RP 313. Theresa screamed "stop" and her mother came out and broke up the fight. RP 314. Billings and Lange went inside. RP 314, 321. Theresa stood by the walkway into the kitchen. RP 314. Lange and Billings continued to yell at each other, calling each other names, "talking

crap to each other." RP 314, 323. Billings turned to go to his office. RP 323. Lange grabbed the ax from the wall. RP 323. She heard her mother scream not to do it. RP 324. She did not see the blow but saw blood and Lange with an ax in his hand. RP 315, 324. Kirsten attended to Billings in the bathroom. RP 316. Lange went outside, then came back in and said, "I don't want to be here anymore." RP 316.

12. Lange's statements to police

Lange cooperated when police arrived. RP 254, 259, 263-64. Officer Lucatero described him as "very stoic" and "very calm." RP 264. Lange spoke with Deputy Stelljes at the scene, before he was taken to jail. RP 250, 253. According to Stelljes, Lange said he was in an argument, the argument escalated to fighting, the fighting stopped, they started to go their separate ways, then Lange grabbed a nearby ax and swung it at Billings. RP 253. He did not claim he felt threatened. RP 253. He was frustrated with Billings. RP 253. Lange felt like he was getting bullied by Billings and he was tired of dealing with him. RP 253.

Officer Lucatero spoke with Lange at the jail, about four hours later. RP 274. Lange looked distraught but he spoke calmly. RP 275. It looked like he'd been weeping. RP 280. Lange provided a written statement. RP 276. As recounted by Lucatero, Lange described the disagreement about payment for the tires and Billings's refusal to turn over

the car keys. RP 278. They cursed each other, then pushed each other, put fingers in each other's eyes, and then the fight broke up. RP 278. They went inside, Lange grabbed an ax from the wall and hit Billings with it. RP 278. Lange wanted Billings out of the house and their lives; he was basically done with him. RP 278-79. He denied an intent to kill. RP 280.

13. Lange's testimony

Lange testified in his own defense. According to Lange, Billings became abusive and would go into rages after Theresa moved in. RP 344. Billings treated the kids "like crap" and was very controlling of Kirsten. RP 344-45. "There was always a fear of Jerry in that house." RP 389. Billings "would go into rages, screaming and yelling, destroying things." RP 375. Lange described an incident in the summer of 2017 where Billings got angry. RP 339-41. Lange had taken a bite out of a doughnut, noticed ants on it, and threw the doughnut out the kitchen window. RP 340. Billings found the doughnut outside and became very angry, telling him not to throw food on "his floor." RP 340-41. Afterwards, Billings acted like he had come out of some sort of trance, asking what happened and what he said. RP 341. Billings had told Lange that "when he goes into rages like this he blacks out and loses all control over himself." RP 341. Billings talked about being in fights in the past. RP 339. One time, he talked about hitting a guy with a wrench on top of his head as hard as

he could. RP 339. He would say that if he's in a fight, he treats it like a fight to the death. RP 339.⁴

On the day in question, Lange and Theresa returned home from Christmas shopping. RP 346. Lange gave Billings \$250 toward the rent, which he paid every two weeks, and walked off. RP 346. Billings wanted \$250 more to be able to cover rent. RP 347. The landlord had initiated an eviction. RP 347. Lange went with Theresa to the car so that she could drive him to work. RP 347, 365. The keys were not in the ignition. RP 348. Theresa learned Billings had the keys and told Lange that he would not let them take the car. RP 348.

Lange walked to the office and asked about the keys, wanting to go to work. RP 348-49. He saw a dozen or more knives laid out on the table. RP 351. Billings told him that he was not giving them the keys, that Lange hadn't given him enough money, and that he was going to sell the tires off the car. RP 349. Billings seemed angry and irritated. RP 349. Confused, Lange tried to talk him out of it. RP 349. He became frustrated. RP 349-50. Billings told him "You can fuck off and walk to work." RP 350. Lange told Billings "maybe I'll go out and slash the tires." RP 350.

⁴ Billings testified that he had been in fights before, and that he'd been shot and stabbed. RP 226-27. Billings previously stabbed someone. RP 237. Billings talked about these incidents but denied telling Lange that he fought to the death. RP 227. He also denied saying he had uncontrollable rage. RP 235.

He said that because on other occasions Billings had threatened to slash the tires and smash the windows. RP 350. They both said, "fuck you." RP 350. After Lange said, "fuck you," Billings was very angry and said something about Lange being in his face. RP 350.

Billings stood up and charged at Lange, who was standing in the doorway. RP 350. Billings kicked a baby gate in the doorway at him. RP 352. Lange stepped backwards and retreated to the porch by slamming the door on Billings, to create space between them. RP 352. Billings continued to come after him. RP 352. Lange punched him in self-defense, as Billings was charging towards him. RP 353, 366. Lange denied Billings was charging to prevent Lange from slashing the tires, as he had made no movement toward the car. RP 367.

Billings grabbed Lange, slammed him into the refrigerator, got on top of him and put his thumbs in Lange's eyes. RP 353. He was yelling at Lange to calm down and stop, which Lange did not understand because "I didn't do anything to him." RP 353. Lange had his thumbs in Billings's eyes too, in self-defense, trying to stop Billings from attacking him. RP 368. It was a "pretty scary moment." RP 369. He felt his life could have been in danger "with a 350-plus-pound man on top of you assaulting you." RP 369-70. Lange described Billings as "much larger." RP 370.

Kirsten told Billings to stop, and Billings stood up and walked back to his office. RP 353-54. Lange went inside and headed in the opposite direction. RP 354. He turned around and saw Billings in the doorway to the office. RP 354. The knives were within his reach on the table. RP 354, 393. Lange picked the ax off the wall because "I had just been assaulted, knowing who he is and what he's capable of and that he was within reach of numerous weapons, I felt scared for my safety and the safety of my family." RP 354-55. He grabbed the ax the moment he realized Billings was "standing near numerous weapons and in a rage that as far as I'm aware he was in no control of himself." RP 371. He grabbed the ax by "pure instinct." RP 372, 392. It happened in a couple of seconds. RP 392. He intentionally took off the cover and knew he had armed himself. RP 372.

Lange felt he had to stop Billings from arming himself. RP 393. Billings had told him "you're done." RP 378. Billings did not have a weapon when Lange hit him with the ax, but "they were within arm's reach" and Billings could have charged after him with a weapon. RP 378, 387. Billings was walking towards the knives "in an angry rage." RP 395. Lange stepped forward and swung at him with the ax using both hands, striking him in the face. RP 355-56. He did not aim for any particular body part. RP 373. He intentionally hit him. RP 373. Lange did not

intend to kill Billings; he wanted to stop him from further assaults. RP 355. "I know that he just doesn't stop when he goes into those rages that he's got in before, he just continues on and on." RP 355.

Kirsten got in between them. RP 356. She was not in between them when he swung. RP 374. Lange pulled back and stepped backwards, and walked to the kitchen, feeling he had accomplished what he needed to do. RP 356. Theresa told him to go outside, but Lange yelled "no, I'm not leaving anyone here alone with him." RP 356. He did not feel he had done anything wrong, as he had "just hit a very violent, uncontrollable person" who had weapons readily available to him. RP 378.

When police arrived, he followed their instruction. RP 358. He described the living situation, what Billings "had done to us," and what he (Lange) had done. RP 359. He cried at the jail and felt "completely distraught at the whole situation." RP 360. In the written statement, Lange stated he wanted Billings out of their lives, by which he meant that he and Theresa did not want to live with him any longer. RP 361. Lange did not claim self-defense from the beginning because "I was in complete shock at the whole situation. I had never been arrested before. So I just -- I didn't think of it at the time." RP 361. Lange felt intimidated. RP 380. Officer Lucatero wrote the statement for him and Lange signed off on it "so that they would leave me alone." RP 380-81, 394. He at most

skimmed through the statement before signing it because he was "tired, exhausted, I was still in shock over the whole thing that happened." RP 393-94. He did not tell police he was acting in self-defense because no one asked him why he swung the ax. RP 391.

C. ARGUMENT

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

The court's exclusion of expert testimony to show diminished capacity was improper 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. These are separate defenses. The expert testimony was relevant and helpful to the jury in assessing Lange's state of mind in relation to his claim of self-defense. Either way, the court's exclusion of the defense expert violated Lange's right to present a complete defense to the charges against him.

a. Over defense objection, the court prohibited testimony from Lange's expert witness.

Defense counsel specified the defenses of diminished capacity, self-defense and defense of others in the omnibus application. CP 180. The State subsequently moved to exclude the testimony of Dr. Cummings,

contending the doctor's proposed testimony did not logically and reasonably connect Lange's mental state with any claim of diminished capacity. CP 184-87; RP 25-27. Defense counsel opposed the motion to exclude, arguing Dr. Cummings's testimony was relevant to whether Lange was unable to form the requisite intent for murder or assault for a diminished capacity defense. RP 25-26. Counsel further argued "[a]t a minimum, even if they don't find that there is diminished capacity, it is relevant mental state evidence that the jury should be able to use given Dr. Cummings' background and his examination of Mr. Lange." RP 26.

Dr. Cummings is a licensed clinical psychologist. CP 22, 31. He produced a written report. CP 21-31. As the basis for his report, the doctor interviewed Lange, conducted psychological tests on him, reviewed legal and medical documents, and interviewed Lange's mother. CP 22-23. Cummings was asked to "assess the respective contributions of sleep deprivation, cannabis dependence, or 'mental health condition' to a diminished capacity state, i.e., whether Dallas could form the mental intent of an intentional act of attempting to murder or otherwise assault the alleged victim, Jerry Billings." CP 23. His role was "to attempt to explain why Dallas Lange engaged in the actions which resulted in being charged with assault, then attempted murder." CP 23.

Cummings observed Lange was constantly preoccupied with monetary stress, as he and his girlfriend were trying to provide for their family, just before the Christmas holidays. CP 26. Billings and Lange were in conflict over rent money and use of the vehicle. CP 25-26.

Turning to the ultimate altercation with Billings, Lange saw himself as acting in self-defense. CP 26. "The seminal moment erupted when 'I had a mental breakdown from stress, the money, and sleep deprivation. I wasn't expecting to get attacked. I had tunnel vision and picked up the nearest thing on the wall. A big axe. I took a step forward and swung it.'" CP 27. Lange explained he felt he had to do something dramatic to "stop him from doing anything further to me and my family." CP 27. According to Dr. Cummings, Lange "had essentially snapped after building up a large residue of resentment towards Jerry Billings that led to the verbal fight." CP 27.

Psychological testing indicated Lange suffered from a severe mental disorder. CP 28. He best fit the following disorders: melancholic disorder, with avoidant personality type; schizoid personality type, and borderline personality style. CP 28. Clinical syndromes suggested by his clinical profile include major depression (recurrent, severe), generalized anxiety disorder, and posttraumatic stress disorder. CP 28. Although he is typically able to function adequately, "periods of marked emotional,

cognitive, or behavioral dysfunction are likely." CP 28. Regarding PTSD, Lange had experienced a traumatic event during childhood in which he suffered intense fear and pain. CP 27, 29. "The residuals of this experience appear to persistently recur through distressing recollections and he is likely to avoid exposure to the cues that resemble aspects of the traumatic event in question. Anticipating these recurrences may result in other signs of distress, including difficulty falling asleep, outbursts of anger, panic attacks, or a numb and detached disposition." CP 29.

Lange was a "severely depressed and traumatized man under great financial stress who has chosen a path of submission and accommodation in order to passively acquiesce to the demands of aggressive others." CP 30. Dr. Cummings' "best professional guess is that Dallas Lange harbored increasing resentment towards Jerry Billings for his deceitfulness and financial exploitation." CP 30. On December 6, 2017, Lange "reacted to mounting internal stress and genuine perception of danger to his well being, by securing the nearest potent weapon in order to neutralize the very source of that immediate danger, to wit, Mr. Billings, who weighs 145 kgs. (about 320 pounds). His momentary impulsive decision was surely regrettable but reflected a build-up of deep anger that had been masked via his passive-aggressive demeanor until he snapped." CP 30. Lange was a "passive, depressed young man who has been striving to live

a mainstream life with a family in order to belong. When his very existence seemed to be threatened, he lost control[.]" CP 30-31.

The court prohibited Dr. Cummings from testifying, ruling Lange's capacity to form intent was not diminished and that the expert's testimony would be irrelevant and confusing to the jury. CP 18-20; RP 27-32. According to the court, Dr. Cummings did not logically and reasonably articulate that Lange's medical condition "precluded" him from forming premeditated "intent" to cause death or intent to cause bodily harm by use of a deadly weapon. CP 19-20; RP 31.

b. The right to present a defense and standard of review.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v. Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. VI, XIV; Wash. Const. art. 1, § 3, 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Defendants have the right to present evidence that might influence the determination of guilt before a jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. If evidence is relevant, the burden is on the State to show the evidence is so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process at trial. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). That is, the State must demonstrate a compelling interest to exclude a defendant's relevant evidence. Id. The State's interest in excluding prejudicial evidence must "'be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.'" State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Darden, 145 Wn.2d at 622).

A trial court's decision to exclude evidence is generally reviewed for abuse of discretion. Darden, 145 Wn.2d at 619. A claimed violation of the Sixth Amendment right to present a defense is reviewed de novo. Jones, 168 Wn.2d at 719.

- c. **The expert's testimony was admissible to support a diminished capacity defense.**

"To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the specific intent to commit the crime charged." State v. Ellis, 136 Wn.2d 498, 521, 963 P.2d 843 (1998) (quoting State v. Edmon, 28 Wn. App. 98, 107, 621 P.2d 1310 (1981)). "[T]he opinion of an expert concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged." State v. Atsbeha, 142 Wn.2d 904, 918, 16 P.3d 626 (2001).

Dr. Cummings's evaluation meets this standard. For the attempted murder count charged here, the State needed to prove Lange acted with intent to cause Billings's death and that the intent was premeditated. CP 16; RCW 9A.32.030(1)(a). For the assault count, the State needed to prove Lange assaulted Billings with a deadly weapon with the intent to inflict substantial bodily harm. CP 17; RCW 9A.36.011(1)(a).

Ellis supports Lange's argument that he had expert testimony in hand to advance a diminished capacity defense. In Ellis, the Supreme Court held the trial court abused its discretion in excluding expert testimony to support a diminished capacity defense. Ellis, 136 Wn.2d at 523. The defendant Ellis was charged with premeditated first degree murder committed against his mother and his two-year-old half-sister. Id.

at 500. Defense expert Dr. Whitehill opined Ellis suffered from a borderline personality disorder and intermittent explosive disorder. Id. at 520. He explained these disorders underlay Ellis's killing of his mother because they related to his "emotional discontrol." Id. Ellis was "an individual whose perceptual process, whose interpreting process, his decision making capacity and his ability to properly regulate his behavior, was severely compromised as a direct result of this ongoing personality disturbance." Id. Dr. Whitehill further explained Ellis, in a "continuously disregulated state," killed his sister because he believed "this was a child who symbolized all of what he did not receive with respect to maternal attachment, all of what Jamie, his young sister received [s]he awakened as a stimulus, someone which reminded him, which triggered another intense exacerbation of an already existing level of emotional discontrol." Id.

Defense expert Dr. Cripe opined Ellis suffered from an antisocial personality disorder and impulse control disorder. Id. The mental disorder was causally connected to lack of intent in that "when he went over there in that situation with his mother, he walked in there with this history of problems, this history of mental disorder. . . . He is in a situation where certain stressors arise. And given the weaknesses in his psychological makeup, the mind is overpowered basically by-there is a

breakdown in the deliberation process, in forming judgments and decisions, and the person ends up acting from disarray and from confusion and emotional forces, rather than from a deliberate forming of intent." Id. at 520-21.

In holding it was error to exclude this expert testimony, the Supreme Court held the foundational criteria announced in Edmon were not absolute and not controlling.⁵ Id. at 521-22. Rather, admissibility of expert testimony concerning the diminished capacity defense must be determined under ER 401 and ER 702.⁶ Id. at 521.

"Evidence is relevant if a logical nexus exists between the evidence and the fact to be established." State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15, review denied, 138 Wn.2d 1014, 989 P.2d 1142 (1999). To satisfy ER 401 and ER 702, expert testimony "must have the tendency to make it more probable than not that defendant suffered a mental disorder, not amounting to insanity, that impaired the defendant's ability to form the culpable mental state to commit the crime charged." Atsbeha, 142 Wn.2d at 918.

⁵ See Edmon, 28 Wn. App. at 102-03) (listing what came to be known as the "Edmon factors").

⁶ER 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

Expert testimony, based on Dr. Cummings's evaluation, would have related to Lange's mental functioning and was admissible under the rules of evidence. Lange's case is not a carbon copy of Ellis, but the salient facts and themes are similar. In Ellis, the defendant suffered from a personality disorder related to impulsive behavior and emotional dysregulation in reaction to stress. Ellis, 136 Wn.2d at 520-21. Lange's case presents a similar dynamic. Lange described suffering from a "mental breakdown" due to stress. CP 27. According to Dr. Cummings, Lange "essentially snapped." CP 27. Lange was a "severely depressed and traumatized man under great financial stress." CP 30. Lange's diagnosed mental conditions made him likely to experience "periods of marked emotional, cognitive, or behavioral dysfunction." CP 28.

In this regard, the PTSD and anxiety diagnoses are particularly significant. "PTSD is recognized within the scientific and psychiatric communities and can affect the intent of the actor resulting in diminished capacity." State v. Bottrell, 103 Wn. App. 706, 715, 14 P.3d 164 (2000), review denied, 143 Wn.2d 1020, 25 P.3d 1019 (2001). "PTSD is an anxiety-related disorder which occurs in response to traumatic events outside the normal range of human experience." State v. Janes, 121 Wn.2d 220, 233, 850 P.2d 495 (1993).

As recognized in Bottrell,

The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.⁷

Lange had experienced a traumatic event during which he suffered intense fear and pain. CP 27, 29. The trauma had a residual and persistent effect on Lange. CP 29. Trying to avoid exposure to cues that resemble the traumatic event may result in other signs of distress, including "outbursts of anger" and "panic attacks." CP 29. In conjunction with PTSD, Lange suffered from an anxiety disorder. CP 28. Dr. Cummings tied Lange's mental impairment to what happened on December 6, 2017, the day in question. On that day, Lange "reacted to mounting internal stress and genuine perception of danger to his well being." CP 30. He "snapped" and made a "momentary impulsive decision." CP 30. "When his very existence seemed to be threatened, he lost control[.]" CP 30-31.

Lange's mental condition was relevant to whether the State carried its burden of proving intent beyond a reasonable doubt. Expert testimony

⁷ Bottrell, 103 Wn. App. at 714 (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 424 (4th ed. 1994)).

that Lange suffered from major depression, anxiety disorder and PTSD exacerbated by stress is relevant because it tends to make the existence of Lange's intent less probable than it would be without the evidence. The jury was entitled to consider Lange's actions on the day in question in light of his mental issues. Lange's mental problems made it less probable that he actually formed the intent to cause Billings's death or to intentionally assault Billings with the specific intent to inflict great bodily harm.

"In a diminished capacity case, the expert's opinion must be helpful to the trier of fact in assessing the defendant's mental state at the time of the crime." State v. Mitchell, 102 Wn. App. 21, 27, 997 P.2d 373 (2000). The jury heard evidence of the stresses Lange experienced leading up to the charged crimes. What jurors lacked was an expert witness to inform them of the significance of Lange's diagnosed mental condition in relation to those stressors. Dr. Cumming's expert testimony would have assisted the trier of fact to understand the significance of Lange's mental condition in relation to the mens rea elements of the State's case: whether Lange acted with the requisite intent to cause Billings's death or assault him.

Dr. Cummings's view of Lange's mental problems was "capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime." State v. Greene, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999). Dr. Cummings's could have explained to the jury

the effects of the PTSD, the depression and the anxiety disorder on Lange's mental functioning. From that, the jury would have had a complete picture by which to judge whether Lange actually intended to kill with premeditation or assault with intent to inflict great bodily harm.

Dr. Cummings did not opine in his report whether Lange's mental disorder actually produced the impaired mental state at the time of the crime. The trial court seized on language in the report that it was Dr Cummings's "best professional *guess*" that Lange harbored increasing resentment and his "momentary impulsive decision" reflected a build-up of anger until he "snapped." CP 19. But "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." Mitchell, 102 Wn. App. at 27. "[E]xpert testimony couched in terms of 'could have', 'possible', or 'similar' is uniformly admitted at trial. The lack of certainty goes to the weight to be given the testimony, not to its admissibility. This is so, in part, because the scientific process involved often allows no more certain testimony." State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177, 192 (1991), abrogated on other grounds by State v. Schierman, 192 Wn.2d 577, 438 P.3d 1063 (2018). "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." Mitchell, 102 Wn. App. at 28.

Further, the "admissibility of expert testimony under ER 702 does not require the expert to testify with certainty to the ultimate question of fact." Id. at 22. In Mitchell, the proffered expert, Dr. Muscatel, "could not say with reasonable certainty" that the defendant's "mental disorder actually caused his capacity to be diminished at the time of the incident. He could say only that it was possible." Id. at 26. In excluding the testimony, the trial court "reasoned that if Dr. Muscatel did not have enough facts or information to state an opinion on the ultimate question, the jury would be similarly unable to do so. Under ER 702, this was error. A jury should be allowed to determine whether Mitchell was experiencing delusions at the time of his arrest even if Dr. Muscatel could say only that it was possible." Id. at 28.

Dr. Cummings did not opine with certainty that Lange's mental conditions impaired his capacity to form intent. But fairly read as a whole, the expert expressed his opinion that it was possible. The doctor articulated in his report how Lange's mental condition figured into the event. "The State must prove actual intent. The defendant is entitled to present evidence that he had a mental disorder that interfered with his ability to form intent. The rest is up to the jury." State v. Johnson, 150

Wn. App. 663, 671, 208 P.3d 1265 (2009), review denied, 167 Wn.2d 1012, 220 P.3d 208 (2009).

In its ruling, the court stated, "while Dr. Cummings opines that the defendant appears to be depressed he does not logically and reasonably articulate that the defendant's medical condition *precluded* the defendant from forming the premeditated 'intent' to cause the death of the alleged victim." CP 19-20 (emphasis added).

Dr. Cummings's report, however, makes clear that Lange suffers from more than just depression. CP 28. Elsewhere in its ruling the court recognizes this fact: "The relevant inquiry in this case is whether the diagnosed personality disorders of melancholic Disorder, with Avoidant personality Type; Schizoid Personality type; and Borderline Personality Style; and the following clinical syndromes of Major Depression; Generalized Anxiety Disorder; and Posttraumatic Stress Disorder impaired Defendant's ability to form the premeditated 'intent' to cause death of another person." CP 19. Dr. Cummings's linkage of Lange's mental condition to his state of mind goes beyond depression.

Lange also takes issue with the trial court's use of the word "precluded" in relation to forming the requisite mental state. CP 20. Dr. Cummings did not opine that Lange was "precluded" from forming intent in relation to the offense. The diminished capacity defense, however, does

not require preclusion. Impairment of the ability to form the culpable mental state, not a complete inability to form the mental state, is the touchstone of the defense. There is no meaningful difference between "whether the defendant had the capacity to form intent versus whether the defendant had an impaired capacity to form intent." Johnson, 150 Wn. App. at 671. That Dr. Cummings did not opine Lange's mental condition "precluded" him from forming intent is no bar to his testimony.

The trial court "determine[d]" that Lange's "capacity to form premeditated 'intent' was not diminished" and that Dr. Cummings report "clearly indicates that he knew what he was doing and acted intentionally to protect himself from the perceived aggression of the alleged victim." CP 19-20. In so ruling, the court overstepped its role as evidentiary gatekeeper. It is not for the trial court to decide whether Lange's capacity was actually diminished. That is for the trier of fact to decide. Mitchell, 102 Wn. App. at 28; Johnson, 150 Wn. App. at 671. The court's role is limited to determining whether the proffered testimony meets the evidentiary criteria for presenting a diminished capacity defense. In that regard, the court's interpretation of Dr. Cummings's report is infirm. Dr. Cummings nowhere stated an opinion that Lange "knew what he was doing." On the contrary, the report articulates the manner in which Lange's mental conditions affected his actions against Billings on the day

in question. In any event, the culpable mental state at issue here is intent, not knowledge. "The jury learns from the expert how the mental mechanism operates, and then applies what it has learned to all the facts introduced at trial." Mitchell, 102 Wn. App. at 27. Here, the trial court's erroneous exclusion of expert testimony deprived the jury of its opportunity to get a complete picture of Lange's mental functioning at the time of the charged offense and in doing so violated Lange's right to present a defense.

d. Apart from diminished capacity, the expert's testimony was admissible to support the claim of self-defense.

Self-defense and diminished capacity are distinct defenses. Janes, 121 Wn.2d at 226. Lange raised both defenses. CP 180. In addition to arguing for admission of the expert's testimony to support the diminished capacity defense, counsel argued in the alternative that "[a]t a minimum, even if they don't find that there is diminished capacity, it is relevant mental state evidence that the jury should be able to use given Dr. Cummings' background and his examination of Mr. Lange." RP 26. Given that the only other defense in this case was self-defense, it is apparent counsel was arguing that Dr. Cummings's testimony would still be relevant to show Lange's state of mind in that context. The court erred

in not permitting Lange to present expert testimony in support of his self-defense claim.

Lange's self-defense claim was based on RCW 9A.16.020(3), which deems the use of force lawful "[w]henever used by a party about to be injured . . . in preventing or attempting to prevent an offense against his or her person . . . in case the force is not more than is necessary." See CP 131 (self-defense instruction given to jury).

Evidence of self-defense "must be assessed from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." Janes, 121 Wn.2d at 238. This approach incorporates both subjective and objective components. Id. It is subjective in that the jury is "entitled to stand as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act." Id. (quoting State v. Wanrow, 88 Wn.2d 221, 235, 559 P.2d 548 (1977)). It is also subjective in that "the jury is to consider the defendant's actions in light of all the facts and circumstances known to the defendant." Janes, 121 Wn.2d at 238. The defendant must subjectively believe in good faith that he was in imminent danger of being injured. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). The evaluation is objective in that "the jury is to use this information in determining 'what a reasonably prudent [person] similarly situated would

have done.'" Janes, 121 Wn.2d at 238 (quoting Wanrow, 88 Wn.2d at 236) (internal quotation marks omitted). The circumstances to be considered cannot be limited to what immediately precedes the defendant's use of force. Wanrow, 88 Wn.2d at 234-236.

To assess Lange's claim of self-defense, the jury needed to stand in Lange's shoes and consider all the relevant circumstances from his point of view. It could not do so without considering expert testimony on Lange's mental state. A reasonable jury could find Lange's mental conditions, particularly his PTSD and anxiety disorder, affected his perception of imminent danger.

Dr. Cummings recognized that Lange saw himself as acting in self-defense. CP 26. Lange reacted to a "genuine perception of danger." CP 30. He lost control when his "very existence seemed to be threatened." CP 31. Lange's perception was influenced by his mental conditions: he was a "severely depressed and traumatized man" under a great deal of stress. CP 30. Lange suffered from a severe mental disorder. CP 28. His mental conditions made periods of marked cognitive dysfunction likely. CP 28. One of those mental conditions was PTSD. CP 28-29.

The Supreme Court recognizes expert testimony on PTSD is relevant to a claim of self-defense and is helpful to the trier of fact in assessing the claim. In State v. Allery, the defendant suffered prolonged

abuse at the hands of her husband, who she eventually shot and killed. State v. Allery, 101 Wn.2d 591, 592-93, 682 P.2d 312 (1984). At trial, the defendant offered expert testimony that she suffered from a form of PTSD (battered woman syndrome) and claimed self-defense. Id. The defense theory of the case "was that her intimate familiarity with her husband's history of violence convinced her that she was in serious danger at the time the shooting occurred." Id. at 595. The trial court excluded the expert testimony. Id.

The Supreme Court reversed, holding expert testimony on the syndrome admissible was admissible under ER 702 because it "may have a substantial bearing on the woman's perceptions and behavior at the time of the killing and is central to her claim of self-defense." Id. at 596-97. Expert testimony explaining why a person suffering from the syndrome "would fear increased aggression against herself would be helpful to a jury in understanding a phenomenon not within the competence of an ordinary lay person." Id. at 597. "[T]o effectively present the situation as perceived by the defendant, and the reasonableness of her fear," it was appropriate that the jury be given a professional explanation of the battering syndrome and its effects through the use of expert testimony.

In Janes, the Supreme Court addressed battered child syndrome, which is another form of PTSD. Janes, 121 Wn.2d at 222, 233. Alluding

to the battered woman's syndrome in Allery, Janes observed "[b]oth syndromes find their basis in abuse-induced PTSD and elicit a similar response from the abuse victim." Id. at 235. The 17-year-old defendant in Janes shot his mother's boyfriend, who had subjected the defendant to physical and mental abuse. Id. at 222-225. Expert testimony established that the defendant suffered from PTSD, leaving him hypervigilant (on high alert and constantly monitoring for signals that suggest imminent danger). Id. at 230-231, 233-234. Although the trial court instructed the jury on diminished capacity, it denied instruction on self-defense based on lack of imminent danger. Id. at 227-28.

The Supreme Court held that such evidence is relevant and helpful to jurors in deciding whether a defendant's belief he was in danger was reasonable under the circumstances. Id. at 236. The Court explained "the jury is to inquire whether the defendant acted reasonably, given the defendant's experience of abuse. Expert testimony on the battered person syndromes is critical because it informs the jury of matters outside common experience. Once the jury has placed itself in the defendant's position, it can then properly assess the reasonableness of the defendant's perceptions of imminence and danger." Id. at 239. The Supreme Court remanded for consideration whether the defendant had been entitled to a self-defense instruction. Id. at 242.

Janes and Allery are instructive because they show expert testimony on a PTSD condition is needed for jurors to place themselves in the defendant's position, consider the defendant's perception of events through the lens of that mental condition based on all of the circumstances known to the defendant, and then assess the reasonableness of the defendant's perception of imminence and danger from that standpoint.

Lange's perception of imminent harm was based on his knowledge of Billings. Lange knew Billings fought to the death. RP 339. He knew Billings was subject to rages. RP 341, 355, 375. He knew Billings was capable of assaulting someone with a deadly weapon based on Billings's description of an earlier attack. RP 339. He knew Billings had charged at him and gouged his eyes. RP 350-53. He knew Billings had deadly weapons within arm's reach and was moving toward them in an angry rage when Lange, from his perspective, used the ax to defend himself. RP 354-55, 371, 393, 395. In addition, Lange suffered from PTSD, which jurors could view as affecting his perception of the danger he faced. Dr. Cummings opined that Lange was a severely depressed and traumatized man who genuinely feared for his safety and responded in a stressful situation when his very existence seemed threatened. CP 30-31. Expert testimony, then, was relevant to Lange's claim of self-defense and would have helped the jury assess this claim through consideration of the

situation as perceived by Lange and the reasonableness of his fear. As it turned out, the trial court excluded Dr. Cummings's testimony, focusing exclusively on whether it met the diminished capacity standard, and made no accommodation for admitting the testimony to support the self-defense claim. In so doing, the court violated Lange's right to present relevant evidence in support of his self-defense claim.

e. The error was not harmless beyond a reasonable doubt.

Violation of the right to present a defense is constitutional error. Jones, 168 Wn.2d at 724. "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Evidence of guilt was not so overwhelming that the jury necessarily would have found guilt even if it heard Dr. Cummings's expert testimony. Although Billings was not physically assaulting Lange at the time Lange used the ax, imminent danger of harm "does not require an actual physical assault." Janes, 121 Wn.2d at 241. "A threat, or its equivalent, can support self-defense when there is a reasonable belief that the threat will be carried out." Id. In making that assessment, the jury's consideration of Lange's perception of the danger as filtered through his

mental condition would have given the jury a different picture of Lange's self-defense claim. The expert testimony would have strengthened the claim, such that the jury may not have decided that the State proved the absence of self-defense beyond a reasonable doubt.

Alternatively, the presentation of a diminished capacity defense through expert testimony may have altered the outcome. "[M]ental disorders are beyond the ordinary understanding of lay persons." Ellis, 136 Wn.2d at 517. An expert witness was necessary to explain the significance of Lange's mental condition to the lay jury in relation to his capacity to form the requisite intent on the assault charge for which he was ultimately convicted. Without that testimony, the jury was left with an incomplete picture of Lange's mental state at the time of the event for which he stood trial.

When a diminished capacity defense is presented, "[t]he jury learns from the expert how the mental mechanism operates, and then applies what it has learned to all the facts introduced at trial." Mitchell, 102 Wn. App. at 27. The jury knew something about the troubles Lange experienced, but it knew nothing of Lange's mental disorders and how they, in conjunction with other circumstances, affected his mental state. Without testimony from an expert explaining the significance of Lange's mental condition in relation to the circumstances leading up to the crimes,

the jury was left without the information it needed to render a decision based on all relevant facts related to critical issue of Lange's state of mind. The psychological context for Lange's actions, informed by expert testimony, was missing. Had the defense been presented, the jury would have received a different lens through which to view Lange's action that day in relation to the state of mind he had when he did it. A diminished capacity defense may have made the difference. The conviction must be reversed because the State cannot prove otherwise beyond a reasonable doubt.

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.

In State v. Kee, 6 Wn. App. 2d 874, 876, 431 P.3d 1080 (2018), the trial court committed reversible error in giving a first aggressor instruction "without also instructing the jury that words alone are not sufficient to make a defendant the first aggressor in an altercation." As in Kee, the first aggressor instruction in Lange's case fails to specify that words alone cannot constitute the provoking act. The conviction must be reversed because the instruction failed to make the law on self-defense manifestly apparent to the jury.

- a. **The first aggressor instruction allowed the jury to ignore Lange's self-defense claim based on an erroneous belief that words alone could constitute the disqualifying provocation.**

"[T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force." State v. Riley, 137 Wn.2d 904, 912, 976 P.2d 624 (1999). An aggressor instruction should be given only where there is credible evidence from which a jury can reasonably determine the defendant provoked the need to act in self-defense. Id. at 909-10. Courts should use care in giving an aggressor instruction because it impacts a claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. Id. at 910 n.2.

The court gave the following first aggressor instruction to the jury:

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon kill or use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense. CP 132 (Instruction 22).

"Jury instructions are sufficient when they are supported by substantial evidence, permit the parties to argue their theories of the case, and properly inform the jury of the applicable law." Kee, 6 Wn. App. 2d at 880. "Before addressing whether an instruction sufficed to allow a

party to argue its theory of the case, the court must first decide the instruction accurately stated the law without misleading the jury." State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).

"Jury instructions must more than adequately convey the law of self-defense." Id. at 900. "Self-defense instructions are subject to heightened scrutiny and 'must make the relevant legal standard manifestly apparent to the average juror.'" Kee, 6 Wn. App. 2d at 880 (quoting State v. Woods, 138 Wn. App. 191, 196, 156 P.3d 309 (2007)).

In Riley, the Supreme Court held that "words alone cannot be the provoking conduct that justifies a first aggressor instruction." Kee, 6 Wn. App. 2d at 880-81 (citing Riley, 137 Wn.2d at 911-12). However, the pattern jury instruction in Kee did not convey this rule of law because the trial court did not instruct the jury that words are not adequate provocation to negate self-defense. "WPIC 16.04 does not include an express statement that words alone cannot constitute aggression that negates self-defense." Kee, 6 Wn. App. 2d at 882. The pattern instruction's reference to an "intentional act" and the "defendant's acts" could be viewed as requiring some physical conduct. Kee, 6 Wn. App. 2d at 882. "But verbally abusing someone also constitutes an 'act.' When there is evidence that the defendant provoked an altercation with words, particularly when

the State suggests that those words constitute first aggression, the language of WPIC 16.04 is inadequate to convey the law established in Riley." Kee, 6 Wn. App. 2d at 882.

The same concerns are present in Lange's case. The first aggressor instruction here is likewise based on WPIC 16.04. CP 132. There is evidence regarding a physical altercation on the porch between Lange and Billings. There is conflicting evidence on who initiated the physical altercation. Billings testified he never threatened Lange in any way and Lange punched him as went to the porch. RP 219, 221, 226. Lange testified that Billings angrily kicked the baby gate at him and then charged at him, to which Lange responded by attempting the slam the door to create some distance and then punching Billings in self-defense. RP 350-53, 366. According to Fletcher, Billings admitted that he was the first one to become physical.⁸ RP 332.

However, the interaction between Billings and Lange started with a verbal altercation. There was yelling. RP 173, 182, 313. They argued

⁸ Outside presence of jury, the court admitted Fletcher's testimony for impeachment purposes, not as substantive evidence, but no limiting instruction was given to the jury. RP 331. In the absence of a limiting instruction, the jury could consider Fletcher's testimony about Billings's statements as substantive evidence. State v. McComas, 186 Wn. App. 307, 320 n.4, 345 P.3d 36 (2015), review denied, 184 Wn.2d 1008, 357 P.3d 666 (2015).

about the car keys. RP 233. Lange profanely cursed Billings, telling him to "fuck off." RP 163, 218, 350. Lange also threatened to slash the tires before the physical fight ensued. RP 218, 350. Therefore, the evidence supported a finding that Lange's *words*, rather than his physical acts, first provoked the physical altercation. From the evidence presented at trial, a reasonable juror could have concluded that Lange's argument, cursing, or comment about slashing the tires, provoked Billings.

Additionally, the trial court's instruction allowed the State to argue that Lange's initiation of the argument with his words was enough to satisfy the first aggressor standard. In closing argument, the State argued Lange could not "create a situation" where he needed to use self-defense, which is broad enough to encompass the provoking words used by Lange. RP 432-33. The State also contended "Jerry is totally justified in getting up and making sure that his tires aren't going to get slashed. And who's the first person who brings violence to it? The defendant. He slams the door in his face, then he punches him." RP 434. As noted, there is a conflict in the evidence about who was the first person to become physical. The State's allusion to Billings making sure his tires are not going to get slashed in the context of the first aggressor standard is an invitation to treat Lange's threat to slash the tires — Lange's words — as basis to find a provocation that renders self-defense unavailable.

"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. The trial court's erroneous first aggressor instruction affected Lange's ability to argue that he acted in self-defense by precluding the jury from even considering the argument if it found Lange was the first aggressor based on his words.

The error is constitutional in nature and cannot be deemed harmless unless the State proves it is harmless beyond a reasonable doubt. State v. Stark, 158 Wn. App. 952, 961, 244 P.3d 433 (2010), review denied, 171 Wn.2d 1017, 253 P.3d 392 (2011). An improper aggressor instruction is prejudicial because it guts a self-defense claim. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), overruled on other grounds as noted in In re Pers. Restraint of Reed, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). The court instructed self-defense was "not available as a defense" if Lange was the first aggressor. CP 132. The first-aggressor instruction improperly negated Lange's claim of self-defense by allowing the jury to treat the defense as unavailable based on words alone. The remedy is reversal. Kee, 6 Wn. App. 2d at 882.

b. This challenge may be raised for the first time on appeal because the improper instruction is a manifest error affecting a constitutional right.

Defense counsel did not object to the aggressor instruction, but the error may be raised for the first time on appeal because it is a manifest error affecting a constitutional right under RAP 2.5(a)(3). A constitutional error is manifest "if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record." State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

A defendant has the constitutional right "to have a jury base its decision on an accurate statement of the law applied to the facts in the case." State v. Miller, 131 Wn.2d 78, 90-91, 929 P.2d 372 (1997). In the absence of an objection at trial, "an appellate court will consider a claimed error in an instruction if giving such an instruction invades a fundamental right of the accused." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The aggressor instruction invaded Lange's fundamental right to present a complete defense and the right to hold the State to its burden of proof.

As noted earlier, the defendant has the constitutional right to defend against the State's allegations by presenting a complete defense. Crane, 476 U.S. at 690; Jones, 168 Wn.2d at 720; U.S. Const. amend. VI and XIV;

Wash. Const. art. 1, §§ 3, 22. In this case, the right to present a complete defense encompassed Lange's claim of self-defense.

Due process also requires the State to prove every element of the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. 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. Woods, 138 Wn. App. at 198.

Based on these constitutional guarantees, Lange had the right to have the jury fully consider his claim of self-defense without having it foreclosed based on an erroneous legal standard. A first aggressor instruction informs the jury that if it determined Lange was the first aggressor, then his self-defense claim is unavailable and the jury does not have to consider whether the State has proved beyond a reasonable doubt that the defendant did not act in self-defense. State v. Bea, 162 Wn. App. 570, 575-76, 254 P.3d 948, review denied, 173 Wn.2d 1003 (2011). Therefore, the first aggressor instruction implicates Lange's constitutional right to present a defense and to have the constitutional right to have the jury prove the absence of self-defense beyond a reasonable doubt.

This instruction had the effect of relieving the State of its burden of proving the absence of self-defense beyond a reasonable doubt on an

improper basis. 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"); State v. O'Hara, 167 Wn.2d 91, 107, 217 P.3d 756 (2009) (citing LeFaber, 128 Wn.2d at 900, 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). This instructional error constitutes a manifest constitutional error that may be raised for the first time on appeal.

3. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT VIOLATED LANGE'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct can violate the due process right to a fair trial. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. In this case, the prosecutor committed misconduct by misstating the first aggressor standard and the law on self-defense. The misconduct violated Lange's right to a fair trial, requiring reversal of the conviction. In the alternative,

defense counsel was ineffective in failing to object to the misconduct or request a curative instruction.

a. The prosecutor committed misconduct in misstating the first aggressor standard in closing argument.

"Statements by the prosecution or defense to the jury upon the law, must be confined to the law as set forth in the instructions given by the court." Davenport, 100 Wn.2d at 760. "The prosecutor may not misstate the law to the jury." State v. Swanson, 181 Wn. App. 953, 959, 327 P.3d 67, review denied, 181 Wn.2d 1024, 339 P.3d 635 (2014).

The prosecutor argued in closing:

Now, you're going to hear about self-defense. Well, there's also an instruction we call the aggressor instruction that says that *you cannot act in a manner to create a situation where you have to use self-defense*. I can't threaten your life and then hold a knife up and then you say wait a minute, you go grab your own knife and then I shoot you. I *can't create a situation* where I have to use self-defense because I'm the aggressor. RP 432-33 (emphasis added).

The prosecutor later returned to the first aggressor idea: "Jerry is totally justified in getting up and making sure that his tires aren't going to get slashed. And who's the first person who brings violence to it? The defendant. He slams the door in his face, then he punches him." RP 434.

It might be said that Lange's threat to slash the tires created a situation where Lange needed to act in self-defense. But words alone do not constitute sufficient provocation under the first aggressor standard.

Riley, 137 Wn.2d at 909-11. The prosecutor's argument, to the extent it conveyed to the jury that Lange was the first aggressor because he provoked Billings by threatening to slash the tires, is therefore a misstatement of the law.

Further, the prosecutor's argument that Lange could not "create a situation" where he needed to act in self-defense is also a misstatement of the law because it exceeds the confines of the first aggressor standard. RP 432-33. In terms of creation, the correct standard is whether the defendant "create[d] a necessity for acting in self-defense." CP 132; see Riley, 137 Wn.2d at 908-09 (approving of instruction defining the standard in this manner). Creation of a "situation," on the other hand, encompasses scenarios where the defendant did or said something that provoked the complaining witness in some manner, which led to the ultimate physical altercation, but did not amount to an act of provocation under the law. For example, Lange did not pay the extra rent wanted by Billings, which Billings was not happy about. In a sense, Lange "created a situation" leading to acting in self-defense because the failure to pay rent was an initial domino step in the causal chain of events ultimately leading to Lange's use of the ax. But the failure to pay extra money to Billings does not qualify as a provoking act under the first aggressor standard. Lange argued with and cursed at Billings, telling him to "fuck off." Those words

may have in some sense created the situation that led to Billings's response and Lange's subsequent action. But those words do not qualify as provoking conduct under the law.

The provoking act must be intentional and one that a "jury could reasonably assume would provoke a belligerent response by the victim." Bea, 162 Wn. App. at 577 (quoting State v. Wasson, 54 Wn. App. 156, 159, 772 P.2d 1039 (1989)). The rationale for a first aggressor instruction is that the defendant's provocation creates a reasonable apprehension of bodily harm that entitles the victim to respond with force to defend him or herself. Riley, 137 Wn.2d at 910-11. The cases addressing the first aggressor standard thus all rely on aggressive, physical acts by the defendant done as the provoking act. See, e.g., Riley, 137 Wn.2d at 909-10 (defendant drew his gun first and aimed it at another person); Kee, 6 Wn. App. 2d at 879-80 (defendant threw first punch). While the prosecutor gave an example of creating a situation that involved physical provocation, its later reference to Lange's threat to slash the tires conveyed to the jury that the provocation need not be confined to physical acts. The prosecutor's argument that self-defense was unavailable when the defendant "creates a situation" where self-defense is needed is a misstatement of the law because it encompasses words alone and is not

confined to situations where a provocation reasonably justifies a violent response.

b. The prosecutor committed misconduct in misstating the self-defense standard in closing argument.

It is misconduct for the prosecutor to misstate the law on self-defense. See State v. Walker, 164 Wn. App. 724, 736, 265 P.3d 191 (2011) (addressing defense of others), remanded, 175 Wn.2d 1022, 295 P.3d 728 (2012), aff'd on remand, 173 Wn. App. 1027 (2013). Again, the State has the burden of proving, beyond a reasonable doubt, the absence of self-defense as an element of its case. Woods, 138 Wn. App. at 198. "Misstating the basis on which a jury can acquit insidiously shifts the requirement that the State prove the defendant's guilt beyond a reasonable doubt." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012).

The jury was instructed on self-defense in part as follows:

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident. CP 131 (Instruction 21).

After addressing the first aggressor issue in closing argument, the prosecutor turned to the self-defense standard:

And self-defense is measured not by what the defendant thinks but what a reasonable person would think. Was it reasonable that the defendant had to hit Jerry Billings in the head with an ax while he's looking right at him? What had Jerry Billings done? And that kind of gets me to this whole case. It's sad. It's foolish. It's petty. You know, there should have been an adult in the room to say what are you guys arguing about, this makes no sense. RP 433 (emphasis added).

The prosecutor followed up on the theme: "And self-defense, *it's all based upon a reasonable-man standard.* It's about what would a reasonable person do faced with those circumstances that you find to be the facts." RP 434 (emphasis added). "It's got to be reasonable to what the perceived threat is, and here there is no threat." RP 434.

The prosecutor misstated the law on self-defense in essentially telling the jury that what Lange thought was irrelevant. Contrary to the prosecutor's argument, the self-defense standard is not measured solely by what a reasonable person would think. What the defendant thinks must also be taken into account because, as described in section C.1.d., supra, the self-defense standard incorporates not only an objective standard but a subjective one as well.

"The subjective aspects ensure that the jury fully understands the totality of the defendant's actions from the defendant's own perspective."

Janes, 121 Wn.2d at 239. "The objective portion of the inquiry," on the other hand, "serves the crucial function of providing an external standard. Without it, a jury would be forced to evaluate the defendant's actions in the vacuum of the defendant's own subjective perceptions." Id. "The ultimate question is whether the defendant subjectively believed that the use of force was necessary and whether that belief was objectively reasonable." State v. Yelovich, 1 Wn. App. 2d 38, 42-43, 403 P.3d 967 (2017), aff'd, 191 Wn.2d 774, 426 P.3d 723 (2018).

In light of this defined legal standard, the prosecutor, in telling the jury that self-defense is not about what the defendant thinks and that it is "all about" the reasonable person standard, misstated the law on self-defense. In assessing Lange's self-defense claim, the jury needed to view the circumstances from Lange's point of view. Janes, 121 Wn.2d at 238. The jury needed to take Lange's subjective perception into account to fully understand his actions from his own perspective. Id. at 239. The objective standard — what a reasonably prudent person would have done — is assessed in conjunction with the subjective component. The two are intertwined: "By learning of the defendant's perceptions and the circumstances surrounding the act, the jury is able to make the 'critical determination of the 'degree of force which . . . a reasonable person in the same situation . . . seeing what [s]he sees and knowing what [s]he knows,

then would believe to be necessary." Id. (quoting Wanrow, 88 Wn.2d at 238). "The subjective aspects ensure that the jury fully understands the totality of the defendant's actions from the defendant's own perspective." Id. The prosecutor's argument treated Lange's subjective belief as irrelevant and, in doing so, warped the standard for the jury's assessment of self-defense.

c. The error is preserved for appeal and reversal is required because the misconduct prejudiced the outcome.

Defense counsel did not object to the misconduct. Appellate review remains available in the absence of objection if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). When applying this standard, reviewing courts should "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). "[T]he failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial." State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976, cert. denied, 135 S. Ct. 2844, 192 L. Ed. 2d 876 (2015).

Disregard of a well-established rule of law is deemed flagrant and ill-intentioned misconduct. State v. Fleming, 83 Wn. App. 209, 214, 921

P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997).

A prosecutor's misconduct is also flagrant and ill-intentioned where case law and professional standards available to the prosecutor clearly warned against the conduct. Glasmann, 175 Wn.2d at 707. Case law in existence well before Lange's trial, such as that cited in this brief, clearly defined the applicable law and warned against the prosecutor's misconduct in this case.

The misconduct here was not the type to be remedied by a curative instruction. "The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wash. 144, 148, 13 P.2d 464 (1932)). Statements made during closing argument are intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984).. Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). A prosecutor's misstatement of the law is a particularly serious error with "grave potential to mislead the jury." Davenport, 100 Wn.2d at 763. The prosecutor's misstatements of the law in Lange's case were repeated. The cumulative effect of misconduct in the form of misstating the law can overwhelm the power of instruction to cure. State v. Allen, 182 Wn.2d 364, 376, 341 P.3d 268 (2015). The prosecutor's improper argument went

to the key issue in the case: whether Lange acted in self-defense, and whether the first aggressor rule made that defense unavailable.

Reviewing claims of prosecutorial misconduct is not a matter of determining whether there is sufficient evidence to convict. Glasmann, 175 Wn.2d at 710. Rather, the standard for showing prejudice is a substantial likelihood that the misconduct affected the verdict. Id. at 711. There was conflicting evidence on whether Lange was the first aggressor. There was also conflicting evidence on the self-defense claim. Under these circumstances, there is a substantial likelihood that the prosecutor's misconduct affected the outcome. Trained and experienced prosecutors presumably do not risk appellate reversal by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. Fleming, 83 Wn. App. at 215. Reversal is appropriate where, as here, the reviewing court is unable to conclude from the record whether the jury would have reached its verdict but for the misconduct. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

d. In the alternative, counsel was ineffective in failing to object to the misconduct or request curative instruction.

Lange is guaranteed the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816

(1987); U.S. Const. amend. VI; Wash. Const., art. I, § 22. In the event this Court finds proper objection or request for a curative instruction could have cured the prejudice resulting from the misconduct, then defense counsel was ineffective in failing to take such action.

Defense counsel is ineffective where (1) the attorney's performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). "If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." In re Pers. Restraint of Cross, 180 Wn.2d 664, 722, 327 P.3d 660 (2014).

When a prosecutor resorts to improper argument, defense counsel has a duty to interpose a contemporaneous objection "to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks." Emery, 174 Wn.2d at 761-62 (quoting 13 Washington Practice: Criminal Practice and Procedure § 4505, at 295 (3d ed. 2004)). No legitimate reason supported the failure of counsel to properly object or request curative instruction given the prejudicial nature of the prosecutor's comments. The prosecutor's comments were improper.

If an objection and instruction could have redirected the jury to the proper considerations and cured the prejudice resulting from the improper comments, then counsel had no legitimate tactical reason for not objecting. See State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (defense counsel deficient in failing to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument); Burns v. Gammon, 260 F.3d 892, 895-96 (8th Cir. 2001) (had counsel objected and prompted a curative instruction in response to the prosecutor's improper comment, prejudice would have been avoided).

Defense attorneys must be ever vigilant in defending their clients' rights to fair trial, including being aware of the law and making timely objections in response to misconduct. State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995). Such vigilance is necessary to allow the trial court to cure prejudice at the time of trial, before the jury deliberates. Established authority signaled that the prosecutor's arguments were improper. Instead of a timely objection and curative instruction to disregard the improper argument, the jury was left to consider them as a proper part of deliberations. No conceivable legitimate tactic explains this choice. See Burns, 260 F.3d at 897 ("the failure of trial counsel to elicit a cautionary instruction from the judge allowed the jury to consider

counsel's argument without riposte. A cautionary instruction would have lessened, if not eliminated, the prejudice to Burns.").

Defense counsel's deficient performance prejudiced Lange because the case turned on whether the State proved beyond a reasonable doubt that Lange did not act in self-defense. Lange's self-defense claim was the contested issue at trial and the misconduct attached itself to that same issue. The jury normally places great confidence in the faithful execution of the obligations of a prosecuting attorney. State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (2015), review denied, 185 Wn.2d 1015, 368 P.3d 171 (2016). As a result, the jury can be expected to view the prosecutor's interpretation of the law as set forth in the instructions as an accurate statement of the law. The misconduct here undercut the correct standard for determining the self-defense claim. Reversal is required because defense counsel incompetently failed to object to misconduct and there is a reasonable probability the failure to object affected the outcome.

4. CUMULATIVE ERROR VIOLATED LANGE'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Every defendant has the due process right to a fair trial. Davenport, 100 Wn.2d at 762; U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not

reversible error, cumulatively produce an unfair trial by affecting the outcome. Coe, 101 Wn.2d at 788-89, 684; Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). Even where an error is not properly preserved for appeal, the court retains the discretion to examine the error if it contributes to the cumulative effect of violating the right to a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

As discussed above, an accumulation of errors affected the outcome and produced an unfair trial here. These errors include (1) exclusion of expert testimony (section C.1., supra); (2) deficient first aggressor instruction (section C.2., supra); (3) prosecutorial misconduct (section C.3., supra); and (4) ineffective assistance in failing to object to the misconduct (section C.3., supra). These errors have a cumulative impact because each undermines Lange's defense.

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

As a condition of community custody, the court ordered Lange to "undergo an evaluation for treatment for . . . mental health . . . and fully comply with all recommended treatment." CP 150. This condition can only be imposed when specific statutory prerequisites are followed. The court's failure to find Lange suffers from a statutorily defined mental illness that contributed to the offense bars imposition of this condition.

The court's authority to impose sentence in a criminal case is strictly limited to that authorized by the legislature in the sentencing statutes. State v. Johnson, 180 Wn. App. 318, 325, 327 P.3d 704 (2014). Whether the court had statutory authority to impose a given condition is reviewed de novo on appeal. Id. The trial court's decision is reviewed for abuse of discretion only if it had statutory authorization. Id. at 326.

RCW 9.94B.080 provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist 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. An order requiring mental status evaluation or treatment may be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

RCW 9.94B.080 authorizes a trial court to order mental health evaluation and treatment as a condition of community custody only when the court follows specific procedures. State v. Brooks, 142 Wn. App. 842, 851, 176 P.3d 549 (2008) (addressing former RCW 9.94A.505(9), now codified at RCW 9.94B.080). A court cannot order an offender to participate in mental health treatment unless "the offender suffers from a

mental illness which influenced the crime." State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003).

The court must also find that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025. RCW 9.94B.080; Brooks, 142 Wn. App. at 851. The term "mentally ill person" is specifically defined under RCW 71.24.025(28) (referencing definitions contained in subsections 1, 10, 36, 37). Only offenders who meet that definition are subject to mental health conditions as part of community custody under the plain language of the statute. State v. Shelton, 194 Wn. App. 660, 676, 378 P.3d 230 (2016), review denied, 187 Wn.2d 1002, 386 P.3d 1088 (2017). The court, in sentencing Lange, did not make the statutorily mandated finding that he was a "mentally ill person" as defined by RCW 71.24.025 and that this mental illness influenced a crime for which he was convicted. It simply ordered imposition of the condition. RP 478. The court therefore erred in imposing the condition. Shelton, 194 Wn. App. at 676.

Defense counsel did not object to this sentencing condition. "In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). The rule applies to erroneous community custody conditions. State v. Bahl, 164 Wn.2d 739,

744, 193 P.3d 678 (2008). The condition pertaining to mental health evaluation and treatment must be stricken from the judgment and sentence.

State v. Lopez, 142 Wn. App. 341, 354, 174 P.3d 1216 (2007).

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

As a condition of community custody, the court ordered Lange to "undergo an evaluation for treatment for . . . substance use disorder . . . and fully comply with all recommended treatment." CP 150. This condition is unauthorized by statute because there is no relationship between the offense and use of alcohol or drugs.

As a condition of community custody, the court is authorized to require an offender to "[p]articipate in crime-related treatment or counseling services" and in "rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." RCW 9.94A.703(3)(c), (d). But court-ordered substance abuse evaluation and treatment must address an issue that contributed to the offense. Jones, 118 Wn. App. at 207-08; State v. Munoz-Rivera, 190 Wn. App. 870, 893, 361 P.3d 182 (2015). A condition is "crime-related" only if it "directly relates to the circumstances of the crime." RCW 9.94A.030(10). Substantial

evidence must support this determination. State v. Irwin, 191 Wn. App. 644, 656, 364 P.3d 830 (2015).

Here there is no evidence that Lange was intoxicated or consumed alcohol or drugs before the altercation. There is therefore no evidence linking the prohibited conduct to the offense. The remedy is to strike the condition from the judgment and sentence. State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

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

a. The criminal filing fee must be clarified and stricken.

The court imposed a \$200 criminal filing fee as a legal financial obligation (LFO). CP 151. Or did it? Based on its placement in the judgment and sentence, it is unclear. The main left-hand column of costs does not list the fee, but the indented portion does. A sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2, 4 (1998) (quoting Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). The sentence here does not meet this standard.

Clarity could have been achieved if the court followed the statutory requirement of listing the total amount of LFOs in the judgment and sentence. RCW 9.94A.760(1) provides that "[t]he court *must* on either the judgment and sentence or on a subsequent order to pay, designate the total

amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law." (emphasis added). The total LFO line on page seven of the judgment and sentence is empty. CP 152. The court therefore violated its duty under RCW 9.94A.760(1).

The inclusion of the \$200 filing fee is probably a scrivener's error. The State only requested imposition of the \$500 victim penalty assessment, the \$100 DNA collection fee, and future restitution. RP 476. The trial court, in pronouncing sentence, simply stated "\$500 victim penalty assessment, \$100 DNA collection fee, and then restitution in an amount to be determined." RP 478. The court at sentencing did not order imposition of the \$200 criminal filing fee.

From this, it is apparent that the court did not intend to impose the \$200 fee. A scrivener's error is a clerical mistake that, when amended, would correctly convey the trial court's intention, as expressed in the record at trial. State v. Davis, 160 Wn. App. 471, 478, 248 P.3d 121 (2011). "[T]he amended judgment should either correct the language to reflect the [trial] court's intention or add the language that the [trial] court inadvertently omitted." State v. Snapp, 119 Wn. App. 614, 627, 82 P.3d 252, review denied, 152 Wn.2d 1028, 101 P.3d 110 (2004). The remedy for a scrivener's error in a judgment and sentence is to remand to the trial

court for correction. In re Pers. Restraint Petition of Mayer, 128 Wn. App. 694, 702, 117 P.3d 353 (2005). Lange therefore requests remand to remove the mistakenly included \$200 filing fee.

Even if the filing fee were not a scrivener's error, it must still be stricken. Under RCW 36.18.020(2)(h), the \$200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." This provision "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who are indigent at the time of sentencing. State v. Ramirez, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id. at 749-50.

Lange is indigent. An indigent person includes one "whose annual after-tax income is 125% or less than the federally established poverty guidelines[.]" RCW 10.101.010(3)(c). The trial court found Lange indigent and allowed this appeal at public expense. CP 162-63. According to the declaration in support of his indigency motion, Lange was presently unemployed, had no income and no assets. See Ramirez, 191 Wn.2d at 747 (relying on financial statement in indigency declaration as evidence of indigency at time of sentencing). Lange did not have an

income above 125 percent of the federal poverty level.⁹ The filing fee is therefore unauthorized.

b. The cost of community supervision is discretionary and therefore must be stricken because Lange is indigent.

RCW 10.01.160(1) authorizes the court to impose costs on a convicted defendant. This general authority is discretionary. The statute states the court "*may* require the defendant to pay costs." RCW 10.01.160(1) (emphasis added). Recent amendments to the LFO statute prohibit the imposition of costs on indigent defendants. "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." RCW 10.01.160(3).

The court imposed 36 months of community custody. CP 150. The judgment and sentence states: "[w]hile on community custody, the defendant shall: . . . (7) pay supervision fees as determined by DOC." CP 150. RCW 9.94A.703(2)(d) states "*Unless waived by the court, . . . the court shall order an offender to: . . . (d) Pay supervision fees as determined by the Department.*" (emphasis added). Given the language authorizing the court to waive the cost, the cost of community custody is discretionary.

⁹ The current federal guideline is \$12,490 for a family of one. See U.S. Dep't Of Health & Human Servs., Office Of The Asst. Sec'y For Planning & Evaluation, Poverty Guidelines (2019), available at <https://aspe.hhs.gov/poverty-guidelines> (last visited July 17, 2019).

State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018).

Discretionary costs cannot be imposed on indigent defendants. RCW 10.01.160(3). The cost of supervision must be stricken from the judgment and sentence because Lange is indigent.

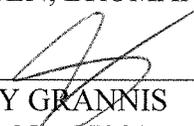
D. CONCLUSION

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

DATED this 26th day of July 2019

Respectfully Submitted,

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