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NO. 36501-8-III

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

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STATE OF WASHINGTON,

Respondent,

v.

DALLAS LANGE,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
OF KLICKITAT COUNTY, STATE OF WASHINGTON

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BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court abuse its discretion in excluding the defendant's expert testimony?
2. Did the court err in giving the first aggressor instruction?
3. Did the state commit misconduct during closing argument and violate the defendant's right to a fair trial?
4. Was defense counsel ineffective?
5. Did the court err in ordering the defendant to obtain an alcohol and mental health assessment and follow treatment recommendations?
6. Were the supervision fees and filing fee incorrectly imposed?

B. STATEMENT OF THE CASE

On December 6, 2018, a Klickitat County jury found the defendant, Dallas Lange, guilty of assault in the first degree. The jury also found that the assault was committed by a family or household member and that at the time of the assault the defendant was armed with a deadly weapon. Specifically, the jury found that the defendant got into an argument with one of his roommates, Jerry Billings, and with the intent to inflict great bodily injury, struck an unarmed Billings in the head with an axe. Implicit in the jury's decision was that the State disproved the defendant acted in self-defense beyond a reasonable doubt.

On December 6, 2017, the defendant and Billings argued about the use of a car that was registered in Billings' name. RP 365. While it appears that the defendant and his girlfriend, Kirsten Paulings, used and financially contributed to the purchase of the vehicle, Billings had recently

purchased new tires for the car and looked to the defendant and Pauling for reimbursement. RP 365. As a result of this debt, Billings was unwilling to release the keys so Paulings could drive the defendant to work. RP 366.

The defendant became upset with Billings' position and a confrontation ensued. RP 366. Harsh words were exchanged and the defendant threatened to slash the tires of the car in question. RP 218, 366. As the defendant left the house, an unarmed Billings followed him outside where a physical confrontation took place on the porch which involved the defendant slamming the front door into Billings and then punching him in the head, followed by mutual shoving and apparent eye gouging. RP 219, 366-368. This struggle was broken up by Theresa Paulings, Kirsten Pauling's mother, and both Billings and the defendant returned inside. RP 207.

Upon entering the house Billings turned right into his office and the defendant turned left into the living room. RP 207. Once in the living room the defendant grabbed an axe used for splitting firewood from its hanging place on the wall and began moving towards Billings. RP 207, 370. Seeing what the defendant was doing, Paulings moved between the two men and told the defendant not cause harm. RP 195. The defendant said words to the effect of "this is our house" and "you're the one who is leaving" before reaching over Paulings and striking Billings in the head with the axe. RP 195, 373.

The defendant's axe struck and hit the right side of Billings' face and chest. RP 303. Billings' "cheek was filleted open from his lower eyelid down to his chin and then on his chest in the same way." RP 303. The wounds to Billings' face and chest were extensive and due to their depth required stitching in layers-from the inside out-to close the wounds. RP 304.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE TESTIMONY OF THE DEFENDANT'S EXPERT TESTIMONY.

The admissibility of evidence is within the sound discretion of the trial court and the court's decisions will not be reversed absent abuse of that discretion. *State v. Hamlet*, 133 Wn.2d 314, 324, 994 P.2d 1026 (1997) (citing *State v. Markle*, 118 Wn.2d 424, 438, 823 P.2d 1012 (1992)). "An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court." *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). In other words, a trial court's evidentiary rulings are reviewed for abuse of discretion and a reviewing court should defer to those rulings unless "no reasonable person would take the view adopted by the trial court." *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001) (internal quotation marks omitted) (quoting *State v. Ellis*, 136 Wn.2d 498, 504, 963 P.2d 843 (1998)). If the court excluded relevant defense evidence, a reviewing court must determine as a matter of

law whether the exclusion violated the constitutional right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

For a defendant 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 culpable mental state to commit the crime charged. Admissibility of such testimony is determined under ER 401, ER 402 and ER 702. Under ER 702, expert testimony will be considered helpful to the trier of fact only if its relevance can be established. Relevant evidence, as defined under ER 401, is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

"It is not enough that...a defendant may be diagnosed as suffering from a particular mental disorder. The diagnosis must, under the facts of the case, be 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. Atsbeha*, 142 Wn.2d 904, 918, 16 P.3d 626 (2001). The opinion 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. *Id.* at 923. Expert testimony on diminished capacity and insanity is not helpful to a trier of fact under ER 702 where evidence could not reliably connect symptoms to defendant's mental capacity. *State v.*

*Greene*, 139 Wn.2d 64, 73-79, 984 P.2d 1024 (1999).

The right to present witnesses in one's own defense is a fundamental element of due process of law. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). It follows that one must be allowed to present witnesses to rebut or negate the State's presentation of proof as to an element of the crime with which one is charged. Thus, if the State in this case, presented, as it must, some evidence to the jury to suggest premeditation by the defendant, he must have the right to present evidence to the contrary. To deny him this right would be to deny him a fundamental element of due process of law. However, the right to present evidence in one's own defense is not utterly unfettered. That evidence must be relevant. There is no constitutional right to introduce irrelevant evidence. *Id.* at 925, 913 P.2d 808; *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); accord *United States v. Becker*, 444 F.2d 510, 511 (4th Cir. 1971); *People v. Grisset*, 288 Ill.App.3d 620, 681 N.E.2d 1010, 1019 (1997); *O'Rourke v. State*, 166 Neb. 866, 90 N.W.2d 820, 823 (1958); *State v. Cardenas-Hernandez*, 219 Wis.2d 516, 579 N.W.2d 678, 687 (1998).

The foremost conflict in this appeal is over what Dr. Cummings' report actually says and, by extension, what his anticipated testimony would have been, and the relevance of this testimony to the jury's task.

The defendant claimed diminished capacity and self-defense in his

omnibus application. CP 180. In support of his diminished capacity defense the defendant submitted the report of a Dr. Cummings. CP 143. While on page two of the report Dr. Cummings identifies that he was asked "whether Dallas could form the mental intent of an intentional act of attempting to murder or otherwise assault the alleged victim, Jerry Billings," Dr. Cummings report glaringly never addresses that question. There are no assertions in the report that can reliably connect the defendant's symptoms of depression, fear, social anxiety, self-pity and pessimism to the defendant's mental capacity to form the mental state at issue in this case. Dr. Cummings never provides the necessary nexus between the defendant's alleged psychological symptoms and any inability to form the necessary intent. Rather, the whole report reads like mitigation of the defendant's behavior, gratuitous victim blaming, editorializing on filing decisions, comments on consequences of conviction and hearsay without ever touching upon the issue for which the report was prepared. Beyond attempting to correctly frame the issue, the question surrounding of defendant's capacity to form the intent to commit the crimes charged is completely absent from the report. While Dr. Cummings' report and testimony was relevant to issues addressed at sentencing, it had no legal relevance to diminished capacity to commit the crime charged.

Dr. Cummings saw his role as an "attempt to explain why Dallas Lange engaged in the actions which resulted in being charged with assault,

then attempted murder." CP143. The report itself never actually contains a diagnosis of the defendant's alleged diminished capacity. The report states that the defendant "*appears* to fit the following personality disorders best: Melancholic Disorder, with Avoidance Personality Type: Schizoid Personality Type and Borderline Personality Style. Furthermore, clinical syndromes *suggested* by his test profiles include: Major Depression, recurrent, severe, General Anxiety Disorder, and Post Traumatic Stress Disorder. CP 143. Despite the defendant's repeated claims and assertions, Dr. Cummings never made an actual diagnosis of a mental disorder. Rather, he found just the "appearance" and "suggestion" of such disorders.

What Dr. Cummings' report did not do was diagnosis a mental disorder that impaired the defendant's ability to form the specific intent to commit the offenses charged. Instead Dr. Cummings "best professional guess is that Dallas Lange harbored increasing resentment toward Jerry Billings" and that 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." Interestingly, this "guess" never identified any mental disorder nor explained how that disorder affected the defendant's ability to form a specific intent.

In response to the State's motion to exclude the testimony of Dr. Cummings, the court conducted a careful review of relevant case law, considered ER 401, ER 402 and ER 702 and Dr. Cummings' report, and

ruled that Dr. Cummings' anticipated testimony would not logically and reasonably articulate that the defendant's mental condition precluded the defendant from forming the premeditated "intent" to cause the death, or inflict great bodily harm, of the alleged victim. CP 112, 129, RP 27-32. The trial court carefully assessed the question of whether the defendant demonstrated a causal connection between his alleged mental disorders and the requisite ability to form the criminal intent. Consequently, the trial court did not abuse its discretion in excluding the defense expert testimony. The trial court properly concluded Dr. Cummings simply did not demonstrate that the defendant's "appearing to fit" and "suggestions" of an alleged mental state rendered him incapable of intending the crime of which he was convicted. CP 112, 129, RP 27-32.

The defendant also claims that even if the court was correct in excluding the testimony of Dr. Cummings on the issue of diminished capacity it would be admissible on the issue of self-defense. This argument, though, must also fail because a different defense theory does not affect the fatal flaw in Dr. Cummings report. There was no diagnosis and no nexus was established between the 'assumed' and "suggested" mental illness and the defendant's mental state. The defendant can claim he has specific mental illness in attempt to avoid responsibility for his criminal actions but absent such a diagnosis, he is trying and failing to elevate "suggestion" to fact. While an actual diagnosis of a mental illness

and its effect on the defendant's ability to form the requisite mental state could well be admissible, any attempt to shoehorn "assumptions" and "suggestions" into a diagnosis are not, in fact, a diagnosis. See; *State v. Ellis*, 136 Wn.2d 498, 963 P.2d 842 (1998) (defendant diagnosed with borderline personality disorder and intermittent explosive disorder); *State v. Allery*, 101 Wn.2d 591, 682 P.2d 312 (1984) (diagnosis of PTSD, battered woman's syndrome); *State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993) (diagnosis of PTSD).

2. THE COURT DID NOT ERR IN GIVING THE FIRST AGGRESSOR INSTRUCTION.

Courts review de novo whether sufficient evidence justifies a first aggressor jury instruction. *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011). In making this determination, they must view the evidence in the light most favorable to the State. *Id.* There need only be some evidence that the defendant was the first aggressor to justify giving the instruction. *Id.*

Generally, a defendant cannot invoke a self-defense claim when he is the first aggressor and provokes an altercation. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). A first aggressor jury instruction is appropriate when there is credible evidence from which a jury can reasonably determine that the defendant provoked the need to act in self-defense. *Id.* at 909-10. A first aggressor instruction is also appropriate

when "there is conflicting evidence as to whether the defendant's conduct precipitated a fight." *Id.* The provoking act must be intentional, but it cannot be the actual, charged assault. *State v. Kidd*, 57 Wn. App. 95, 100, 786 P.2d 847 (1990).

In *Riley*, our Supreme Court held that "the giving of an aggressor instruction where words alone are the asserted provocation" is erroneous. 137 Wn.2d at 911. The court reasoned that a first aggressor jury instruction is based on the principle that a defendant cannot claim self-defense when he or she is the initial aggressor because the victim of the aggressive act is entitled to respond with lawful force. *Riley*, 137 Wn.2d at 912. A victim cannot, however, lawfully respond with force to a defendant's use of words alone. *Riley*, 137 Wn.2d at 912; see also *State v. Kee*, 6 Wn. App.2d 874, 431 P.3d 1080 (2018).

The law of self-defense does not apply to someone who provokes a physical altercation. *State v. Wingate*, 155 Wn.2d 817, 822, 122 P.3d 908 (2005). To guard against misapplication of the defense, an initial aggressor instruction may be given when credible evidence indicates the defendant initiated a confrontation with the victim by engaging in an act, beyond mere words, that is reasonably likely to provoke a belligerent response. *Bea*, 162 Wn. App. at 577.

The provoking act must be intentional and one that a "jury could reasonably assume would provoke a belligerent response by the victim."

*State v. Wasson*, 54 Wn. App. 156, 159, 772 P.2d 1039 (quoting *State v. Arthur*, 42 Wn. App. 120, 124, 708 P.2d 1230 (1985)). The unlawful act constituting the provocation need not be the actual striking of a first blow. *State v. Hawkins*, 89 Wn. 449, 154 P. 827 (1916). It must be related to the eventual assault as to which self-defense is claimed. *Wasson*, 54 Wn. App. at 159. The provoking act cannot be the actual assault. *Kidd*, 57 Wn. App. at 100.

A defendant may use necessary force against a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession even though the defendant does not reasonably believe that he is about to be injured. *State v. Bland*, 128 Wn. App. 511, 116 P.3d 428, 430 (2005). A trespass may support the giving of an aggressor instruction as the owner of property may lawfully use reasonable force to expel a malicious trespasser. RCW 9A.16.020; *Bea*, 162 Wn. App. at 578; *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The State need only produce some evidence that the defendant was the aggressor to meet its burden of production. *Id.* at 823 (citing *Riley*, 137 Wn.2d at 909-10).

Here, the defendant's own testimony shows, as the State argued, that it was not words but his own acts that instigated a violent act. He had just threatened to slash tires that belonged to Billings. CP 350. His first violent act was slamming the front door into Billings and then punching him in

the head. RP 352-353. After the brief fight on the front porch was broken up the defendant admitted to continuing into the house and arming himself with an axe. RP 354. The defendant then took the axe and struck an unarmed Billings in the face with a two-armed overhead blow. RP 355. The defendant's words, in threatening the property of Billings, resulted in Billings following the defendant outside to insure the safety of his property. It was the defendant's actions, not words, of slamming the door into Billings and then punching him in the head that led to the struggle on the front porch. It was after the front porch fight was broken up, the conflict had apparently concluded and the two men had returned into the house, that the defendant armed himself with the axe and struck the unarmed Billings in the head.

The State would submit that few, if any, violent conflicts do not involve some type of verbal exchange. However, the response of Billings to the "words" of the defendant was totally reasonable, and non-violent, as the jury presumably found. If a defendant may use necessary force against a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession even though the defendant does not reasonably believe that he is about to be injured, a person in Billings position, after hearing the defendant's threats to damage his property, can put himself in a position, without violence, where he can protect his property from malicious damage. See *Bland*, 128 Wn. App. at

511.

Here, the aggressor instruction was properly given. The defendant was not entitled to invoke the defense of self-defense if he provoked Billings by initiating a fight once an unarmed Billings acted in a non-violent manner to protect his property. Nor can he claim self-defense after the fight outside had concluded and the parties had separated, leaving an unarmed Billings merely present in the same room when the defendant decided to wield his ax. As explained in *Riley*, in order to invoke self-defense, the force defended against must be unlawful force. 137 Wn.2d at 911.

3. THE STATE DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT AND DID NOT VIOLATE THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct may deprive a defendant of her or his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). "In a prosecutorial misconduct claim, the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial." *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012); *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Courts review the prosecutor's conduct and whether prejudice resulted therefrom "by examining that conduct in the full trial context, including the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to

the jury." *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (internal quotation marks omitted) (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)).

Because the defendant failed to object at trial, the errors he complains of are waived unless he establishes that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Thorgerson*, 172 Wn.2d at 443.

The defendant must show (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) there is a substantial likelihood that the misconduct affected the jury's verdict. *Emery*, 174 Wn.2d at 761. Courts focus less on whether the State's misconduct was flagrant and ill-intentioned and more on whether the resulting prejudice could have been cured. *Id.* at 762. "[T]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (alteration in original) (quoting *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)). Courts ask whether "such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent the [defendant] from having a fair trial?" *Emery*, 174 Wn.2d at 762 (alteration in original) (quoting *Slattery v. City of Seattle*, 169 Wn. 144, 148, 13 P.2d 464 (1932)).

Courts review allegations of prosecutorial misconduct during closing argument in light of the entire argument, the issues in the case, the evidence discussed during closing argument, and the court's instructions. *State v. Sakellis*, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011). During closing argument, the State has wide latitude in drawing and expressing reasonable inferences from the evidence. *State v. Thompson*, 169 Wn. App. 436, 496, 290 P.3d 996 (2012).

In this case, the defendant did not object to any portion of the State's closing arguments that are being objected to in this appeal, let alone seek a curative instruction. Here the prosecutor never argued that words were sufficient to justify acting in self-defense. In fact, the prosecutor never invited the jury to treat the defendant's threats to Billings' property as justification for the first aggressor instruction. Rather, the prosecutor simply stated that a non-violent reaction to threats against one's property are reasonable and the jury needs to look at "who brings violence to it [the confrontation]. The defendant. He slams the door in his [Billings] face, and then punches him." RP 432. It is clear from the context, the evidence produced at trial, and the issues in the case that the prosecutor was speaking about the defendant's acts of physical aggression and not the defendant's words as the cause of the whole confrontation which led to the defendant striking an unarmed Billings in the head with an axe and the subsequent criminal charges.

During the State's closing argument the prosecutor never told the jury "that what Lange thought was irrelevant" as the defendant recklessly claims. Brief of Appellant, p. 48. Had the prosecutor actually done so an objection would have been made and a curative instruction, if requested, would have been fully justified. Rather, that was not said and after the jury had already been properly instructed on the law of self-defense, the prosecutor simply stressed the unreasonableness of the defendant's actions in light of the facts of the case. In fact, the prosecutor specifically told the jury when discussing self-defense that "[i]t's got to be reasonable to what the perceived threat is, and here there was no threat," which is exactly what the defendant, in his brief, argues saying "[t]he jury needed to take Lange's subjective perception into account to fully understand his actions from his own perception" RP 434, Brief of Appellant p. 49. Moreover, the prosecutor restated the law of self-defense, albeit with more specificity, during his rebuttal argument; "[a]nd self-defense is what would a reasonable person do knowing what the defendant knew then, and that is based upon the evidence in this case." RP 447.

Here the entire theme of the State's closing was that the whole dispute between the defendant and Billings was, in hindsight, sad, petty and foolish but that the defendant's acts resulted in the commission of a crime. The defendant precipitated the violence by assaulting Billing during a verbal dispute and then continued the violence by assaulting an unarmed

man with an axe. That any use of deadly force in the circumstances of this case was unreasonable, regardless of the defendant's perceptions of events. There was nothing in the prosecutor's arguments to the jury that was flagrant or ill intentioned. Nor were any of the prosecutor's arguments calculated to inflame the passions or prejudices of the jury." Am. Bar Ass'n, Standards for Criminal Justice std. 3-5.8(c) (2d ed. 1980); *State v. Brett*, 126 Wn.2d 136, 179, 892 P.2d 29 (1995). Simply put the prosecutor, without objection, vigorously argued the law and the facts of the case and, ultimately, convinced the jury of the defendant's guilt.

#### 4. DEFENSE COUNSEL WAS NOT INEFFECTIVE.

The defendant argues that his counsel was ineffective in failing to object or move for a curative instruction. Courts review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009) (citing *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001)). To prevail, the defendant must establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). For counsel's performance to be deficient, it must fall below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). "A court's scrutiny of this

performance is deferential, and we strongly presume reasonableness.” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption a defendant must establish an absence of any legitimate trial tactic that would explain counsel's performance. *Id.* The Supreme Court held that "we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (citation omitted) (quoting *Strickland*, 466 U.S. at 688). For the defendant to prove that the deficient performance prejudiced the defense, the defendant must "prove that, but for counsel's deficient performance, there is a 'reasonable probability' that the outcome would have been different." *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008) (quoting *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Here, as discussed above, the State contends there was no objectionable conduct in the closing argument. However, for purposes of argument, even if there had been an objection to the prosecutor's argument, for instance, an objection that the prosecutor misstated the role of words in arguing the first aggressor instruction or misstated the law of

self-defense, a failure to object is reasonable and legitimate tactical decision. Such an objection, had it been sustained, would have simply allowed the prosecutor to modify his argument, repeat the court's instruction, and, perhaps, be more eloquent in rephrasing his argument. For example, "Of course, words alone do not justify a violent response but we are not talking about the defendant's words we are talking about his acts of violence..." or, "counsel is correct that the jury must take into consideration the defendant's perceptions of events, and I apologize for giving that impression, but striking an unarmed person in the head with an axe is not reasonable under these circumstances..." Such responses to these type of objections are common and can allow the prosecutor to further highlight the defendant's criminal responsibility.

Additionally, even though the defense attorney did not object to one of two statements about the law of self-defense made by the prosecutor, he did address it and appropriately stated the applicable law of self-defense for the jury's consideration:

The law says the person using the force may employ such force and means as a reasonable, prudent person would use under the same or similar conditions as they appear to the person, as they appeared to the person, not even that they must be that way in fact, but as they appear 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.

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The defense attorney responded to the arguments made by the

prosecutor in his closing argument without the need to object. Moreover, in light of the totality of the parties' argument and the facts of the case, a failure to object to the prosecutor's comments cannot be said to a 'reasonable probability' to have affected the outcome of the case.

5. THE COURT DID NOT ERR IN ORDERING THE DEFENDANT TO OBTAIN AN ALCOHOL AND MENTAL HEALTH ASSESSMENT AND FOLLOW TREATMENT RECOMMENDATIONS.

At his sentencing the trial court ordered the defendant to serve a period of 36 months on community custody. CP 163. As part of his community custody conditions the defendant was ordered to undergo an evaluation for domestic violence, substance abuse disorder, mental health and anger management. CP 163. The defendant was also ordered to comply with any treatment requirements which stemmed from these evaluations. The defendant objects to the mental health and drug/alcohol portion of these conditions.

Trial courts may impose crime-related prohibitions while a defendant is in community custody. RCW 9.94A.505(8) – 703(3)(f). A '[c]rime-related prohibition' ... prohibit[s] conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). "Directly related" includes conditions that are "reasonably related" to the crime. *State v. Kinzle*, 181 Wn. App. 774, 785, 326 P.3d 870 (2014); see also *State v. Irwin*, 191 Wn. App. 644, 364 P.3d 830 (2015).

The State concedes that the court did not comply with the statutory requirements of RCW 9.94B.080 to justify ordering the defendant to participate in a mental health evaluation. Albeit, while there was no diagnosis of a mental illness which effected the defendant's ability to form the requisite intent to commit the crime he was convicted of, there was ample evidence which "suggests" the presence of some undefined, as yet, possible mental illness, which was reasonably related to the crime of conviction. This was implicit in the court's sentence. The State suggests the remedy would be to remand to the trial court to determine whether to order a mental health evaluation according to the requirements of RCW 9.94B.080. *State v. Shelton*, 194 Wn. App. 660, 677, 378 P.3d 230 (2016).

The Court also ordered a substance abuse disorder evaluation and that the defendant should follow any treatment recommendations. CP 163. The State disagrees with the defendant's assertion that there was "no evidence linking the prohibited conduct to the offense" Brief of Appellant (Amended) p.57. In fact, evidence of the defendant's drug use was discussed in the report of Dr. Cummings where the defendant self describes himself "like many street drug users" - he has smoked "dabs" on a regular basis since his adolescence, had routinely done so just prior to his projected drive to work that day, and when asked about concentrate tetrahydrocannabinol (THC) said "you just don't want to move...like a high dose of OxyContin." CP 143, 163, p 150. Clearly, while evidence of

the defendant's drug use was not introduced at the trial, and most likely would have been inadmissible had the State sought to offer it, the defendant's self-admitted drug use on the day of the assault was a fact that the court was aware of and felt was reasonably related to the assault of Billings.

#### 6. SUPERVISION FEES AND FILING FEE.

The State concedes that in light of current jurisprudence involving indigent defendants, the DOC fees for the period of the defendant's community custody should be stricken.

The defendant was ordered to pay a \$500 Victim Penalty Assessment and \$100 DNA fee at the time of his sentencing. The defendant's total legal financial obligation was recorded on his Judgment and Sentence as \$600. The defendant now claims that the pre-printed \$200.00 filing fee that was not ordered or included in his total legal financial obligation is somehow confusing and needs clarification. The fact that the filing fee was not ordered, can be addressed at the same time the trial court, as it must, strikes the Community Custody fees.

#### D. CONCLUSION

For the foregoing reasons the State respectfully asks this Court to affirm the defendant's conviction for Assault in the First Degree against a family or household member while armed with a deadly weapon. Further the State respectfully requests this court to remand this matter for the trial

court to comply with requirements of RCW 9.94B.080. Finally, at the remand, the trial court should strike the Community Custody fees and make obvious that a filing fee was not ordered.

A handwritten signature in black ink that reads "David M. Wall". The signature is written in a cursive style with a large, sweeping initial "D" that arches over the rest of the name.

DAVID M. WALL

W.S.B.A. No. 16463

Chief Deputy Prosecuting Attorney



# KLICKITAT COUNTY PROSECUTING ATTORNEY

January 31, 2020 - 9:56 AM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
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**Appellate Court Case Title:** State of Washington v. Dallas John Paul Lange  
**Superior Court Case Number:** 17-1-00144-1

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