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A. SUMMARY OF ARGUMENT

Kier Gardner was the victim of a brutal attack that left him with severe head wounds. Although he was the victim, he was restrained by law enforcement and brought to a hospital for treatment against his will. His continued resistance at the hospital resulted in two assault charges. The subsequent trial included several errors that violated Mr. Gardner's right to a fair trial as well as other constitutional rights. As set forth below, the resulting convictions should be reversed.

B. ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Gardner's due process right to a fair trial by ruling material impeachment evidence need not be disclosed to the defense.
2. The trial court abused its discretion in finding immaterial the evidence impugning police officer Claudia Murphy's credibility.
3. The trial court denied Mr. Gardner his right to present a defense in violation of the Sixth Amendment to the United States Constitution, article 1, section 22 of the Washington Constitution, and Mr. Gardner's state and federal due process rights.
4. The trial court abused its discretion in excluding evidence relevant to the defense.

5. The trial court violated Mr. Gardner's constitutional right against self-incrimination by compelling him to testify at trial.

6. The trial court's evidentiary rulings denied Mr. Gardner a fair trial by forcing him to choose among constitutional rights.

7. The trial court abused its discretion in denying Mr. Gardner's motion for a continuance to secure an expert witness.

8. Cumulative error denied Mr. Gardner his due process right to a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Gardner's right to due process violated where the trial court ruled the State did not have to disclose evidence that could have been used to demonstrate a key witness's untruthfulness, particularly where her credibility was a crucial issue at trial?

2. The Sixth and Fourteenth Amendments, along with similar guarantees of the Washington Constitution, are violated where a trial court bars a defendant from presenting evidence that supports his theory of defense. The refusal to admit even minimally-relevant evidence violates a defendant's rights unless the State can establish the relevance is substantially outweighed by potential prejudice to the fairness of process.

- a. Did the trial court err and violate Mr. Gardner's constitutional rights by excluding evidence relevant to Mr. Gardner's defense that the acts were not volitional?
- b. Did the trial court violate Mr. Gardner's right to silence when it required him to testify in support of his defense that the acts were not volitional?
- c. Did the trial court violate Mr. Gardner's constitutional rights by forcing him to choose between his right to present a defense and his right to silence?

4. Multiple errors may combine to deprive an accused person of a fundamentally fair trial, in violation of the due process clauses of the Washington and federal constitutions. In light of the cumulative effect of the errors assigned above, was Mr. Gardner denied a fundamentally fair trial?

D. STATEMENT OF THE CASE

1. **Background facts.**

On the night of July 27, 2012, or early in the morning of July 28, Kier Gardner was jumped by a group of unidentified men. RP 101-02, 174-75, 215. During the attack, Mr. Gardner was hit hard in the back of his head with a baseball bat, resulting in a large laceration, and

received other facial wounds. *E.g.*, RP 4, 110-11; Exhibit 1. He could not remember the events that followed. RP 193-96, 198-99.

Apparently, Mr. Gardner tried to treat his wound at a friend's home, but emergency responders and the police insisted he needed medical care. RP 215-21. Because Mr. Gardner resisted professional medical care, the police handcuffed him and took him to the St. Joseph's Medical Center emergency room in Bellingham, Washington. *E.g.*, RP 199-204, 215, 217-20.

Mr. Gardner telephoned his fiancée, Charitie Wells, from the hospital and she came to see him in the emergency room. RP 101, 102-03. Mr. Gardner continued to maintain he did not need medical care and sought to leave the hospital. RP 104-05. To prevent him from exiting, Ms. Wells placed herself between Mr. Gardner and the door. RP 19, 29, 105, 113. According to Ms. Wells, when Mr. Gardner nudged her out of the way in an attempt to leave the room, she fell over her twisted left foot and ended up on the ground.¹ RP 105, 106-07, 113, 115-16, 119. She was not hurt. RP 19-20, 74. Robert Ellsworth, a law enforcement officer who happened to be nearby, believed he saw

¹ Ms. Wells explained her left foot muscle has been twisted since birth such that her left foot is turned slightly inward and she has difficulty with balance. RP 208.

Mr. Gardner—wearing only boxer shorts and with bandages on his head approximately four inches in length—throw Ms. Wells to the ground, and then step out of the room. RP 16-20, 28, 30-31, 33. An emergency room nurse testified she saw Ms. Wells hit the door and both Ms. Wells and Mr. Gardner fall to the ground. RP 74.

Because Deputy Ellsworth was in the hospital on other business, he called for a police officer to attend to the situation. RP 20; *see* RP 123-24. About thirty minutes later, Sergeant Claudia Murphy, with Deputy Ellsworth's assistance, arrested Mr. Gardner for fourth degree assault, handcuffing him on a hospital gurney. RP 21-22, 133-37. Mr. Gardner verbally resisted. RP 23-24. Mr. Gardner interrupted Sergeant Murphy's reading of his *Miranda* rights, but she leaned in towards Mr. Gardner and continued anyway. RP 24, 62-63, 138-41. According to Deputy Ellsworth and Sergeant Murphy, Mr. Gardner then kicked Sergeant Murphy in the face, dislodging her eyeglasses. RP 24, 35-36, 141-43. A security officer standing outside of the room testified he saw Mr. Gardner's leg come up and strike Sergeant Murphy in the face. RP 50-55.

Mr. Gardner was further restrained while he received additional medical treatment, including nine staples in his head. RP 26-27, 56-57,

145-48, 166, 174. He was ultimately charged with assault in the fourth degree on Charitie Wells, a gross misdemeanor (RCW 9A.36.041), and assault in the third degree for kicking Officer Murphy (RCW 9A.36.031(1)(G)). CP 4.

2. Pretrial ruling that Mr. Gardner was not entitled to evidence showing the State's key witness was untruthful.

On the morning of trial, the State asked the court to review documents in camera to determine whether it was required to disclose them to Mr. Gardner. RP 3-4. These documents showed the untruthfulness of Sergeant Murphy in her professional capacity. CP ___ (Sub # 26A).² Sergeant Murphy had previously given false testimony in support of an unrelated warrant application, in which she had made false statements under oath. *Id.* In an introductory letter to the materials submitted for in camera review, the Prosecuting Attorney for Whatcom County admitted Sergeant Murphy's testimony was "not accurate or truthful." *Id.*

The documents also include a declaration from a witness in the unrelated case, in which the witness contests Sergeant Murphy's testimony and police report in another regard. *Id.* (witness attests she

² A supplemental designation of clerk's papers has been filed with the superior court for all documents referred to herein by subfolder number.

did not take action “without direction” but at Sergeant Murphy’s direction). The State dismissed the resulting case against the target of the search when Officer Murphy’s untruthful and inaccurate sworn testimony was exposed. *Id.* (Prosecuting Attorney’s letter at n.2).

Although Sergeant Murphy was the alleged victim of the third-degree assault charge against Mr. Gardner and a State’s witness on both charges, the trial court found the evidence immaterial and held that Mr. Gardner was not entitled to review it. RP 4-5; *see* CP __ (Sub #21 (State’s witness list)); CP __ (Sub #26A (letter from Prosecuting Attorney recognizes Sergeant Murphy will be called as witness for State)). As a direct effect of the court’s ruling, Mr. Gardner and his trial counsel were unaware of Officer Murphy’s history of lying under oath. *See* RP 3-5; CP __ (Sub # 26A).

3. The trial.

Mr. Gardner’s defense was that the wound to his head rendered him unable to control his faculties—he was unaware of his actions and thus could not act with the volition necessary to convict him of either

assault. *E.g.*, RP 4-5, 10-12, 175, 185-86, 239-41.³ In support of his defense, Mr. Gardner proposed a jury instruction, which would have stated: “The State must prove a certain minimal mental element of volition to establish criminal liability. In other words, a person must be aware of their actions and voluntarily choose to take that action.” CP 8; RP 11-12. Mr. Gardner’s trial counsel asserted it was within the jury’s common knowledge that severe head trauma could cause an individual to lose volitional control. RP 9. The jury would be able to assess Mr. Gardner’s condition based on his behavior with law enforcement and emergency medical responders, including his refusal to accept treatment for a severe head wound. RP 10-12. The trial court ruled Mr. Gardner could argue lack of intent based on the evidence produced at trial. RP 12. However, it also ruled that Mr. Gardner would need to testify for the defense to argue lack of intent. RP 13-16, 179-80.

At trial, the following additional evidence was admitted. An emergency room nurse who treated Mr. Gardner testified to Mr. Gardner’s extensive head injuries, which included bruising on his face,

³ See Concussion-Overview, *WebMD*, <http://www.webmd.com/brain/tc/traumatic-brain-injury-concussion-overview> at 1, 2 (last visited July 9, 2013) (symptoms can include not thinking clearly, not being able to concentrate, and convulsions or seizures).

swelling on one cheek, and a laceration over his eyebrow. RP 81-82. In addition to these visible wounds, Mr. Gardner had a bandage on his head “like a turban” coming around down to his eyebrows and covering most of the back of his head, which emergency responders had described as covering a “considerable wound.” RP 81-82. Nonetheless, Mr. Gardner did not want anyone touching or treating him. RP 83-84. Ms. Wells corroborated Mr. Gardner’s injuries and his illogical resistance to treatment. RP 104-05, 110-11, 113.

With regard to the fourth-degree assault charge, Ms. Wells testified Mr. Gardner simply intended to move her out of the way because he was refusing medical treatment; she was not hurt or offended; she did not want to press charges; and she told Deputy Ellsworth and Sergeant Murphy she did not want to press charges. RP 104-06, 115-16.

In his attempt to take immediate control of the situation, Deputy Ellsworth testified Mr. Gardner was highly sensitive and resistant to treatment. RP 20. According to the emergency room nurse, Mr. Gardner apologized for the commotion and was cooperative. RP 75-76. Deputy Ellsworth testified Mr. Gardner acted out, called everyone names, and often did not follow directions. RP 20-21.

The evidence was conflicting with regard to Sergeant Murphy's actions when she arrived at the hospital. Sergeant Murphy testified she found Ms. Wells in the waiting room and attempted to speak with her about the possible assault, but Ms. Wells was talking on her cellular telephone. RP 128-29. She further testified that Ms. Wells told her Mr. Gardner's mother was on the telephone and wanted to speak with Sergeant Murphy. RP 129. According to Sergeant Murphy, she took the telephone and had a conversation with Mr. Gardner's mother, who stated Ms. Wells was her son's girlfriend. RP 129-30, 162-63. The information was significant to Sergeant Murphy because it added a domestic violence component to the potential assault. RP 161-62, 167. When they testified, both Ms. Wells and Mr. Gardner's mother denied the two spoke and that Mr. Gardner's mother told Sergeant Murphy her son and Ms. Wells were dating. RP 207-08, 235-36.

Sergeant Murphy further testified that Ms. Wells told her Mr. Gardner was "just angry and drunk." RP 131. However, Ms. Wells said she did not tell Sergeant Murphy that Mr. Gardner was angry and drunk. RP 108.⁴

⁴ Notably, other witnesses testified Mr. Gardner did not appear to be under the influence of intoxicants during the alleged offenses. RP 25-26, 38-39, 80-83.

Ms. Wells's testimony also indicated grounds for concern over Sergeant Murphy's motivation. Sergeant Murphy told Ms. Wells that Mr. Gardner was being charged with third-degree assault because Mr. Gardner "was being a jerk to" Sergeant Murphy. RP 109.

The evidence also differed with regard to the assault of Sergeant Murphy. Sergeant Murphy testified Mr. Gardner was lying on his left side with his feet up on the gurney in the emergency room. RP 136-37, 140-41. She stood behind him. RP 137. According to Sergeant Murphy, Mr. Gardner initiated a "donkey kick backwards and then up. So he had to push off to his shoulders to get his feet high enough to impact with my head." RP 142. Officer Ellsworth and security officer Smit, on the other hand, concurred that Mr. Gardner was sitting (not lying) on the gurney and his kick simply came straight up to Sergeant Murphy, who was standing on his right. RP 22-24, 35-36, 46, 52-56.

In his defense, Mr. Gardner presented several witnesses. Officer Michael Shannon responded to a report of a fight among a large group of males at approximately 12:47 a.m. on July 28. RP 214-15, 221. He found Mr. Gardner in the bathroom trying to tend to the wound on the back of his head—Mr. Gardner's shirt was off and a bloody shirt lay on the floor. RP 217. Mr. Gardner had a large

laceration on the back of his head, a laceration on his face, and abrasions on his shoulder and cheek, the latter of which was swollen underneath his eye. RP 217. Officer Shannon witnessed Mr. Gardner repeatedly push away the medics that arrived on the scene, refusing medical attention. RP 217. When Mr. Gardner could not be convinced to go to the hospital, Officer Shannon “put [Mr. Gardner] in handcuffs and escorted him out of the house” based on “the obvious injury and the insistence of the EMT that he be seen at the hospital.” RP 218.

According to Officer Shannon, Mr. Gardner apologized once the transport was under way and then began cursing again when they arrived at the hospital. RP 220-21; *see* RP 227. Mr. Gardner provided inconsistent and nonsensical accounts of how he received the injuries. RP 224-25, 226-27 (hit by a car, assaulted at a party, and fell off skateboard).

Officer Jacob Esparza testified he was dispatched to a residence where Mr. Gardner was sitting on the couch refusing to go to the hospital to treat the cut on the back of his head. RP 199-200. Officer Esparza could not explain why Mr. Gardner did not want to go to the hospital, but Mr. Gardner was “pretty upset about” it and “was cursing and stuff like that.” RP 204.

Officer Bernard Vodopich also responded to the residence at which Mr. Gardner was trying to treat his wound and photographed him. Exhibit 1; RP 169-70, 177-78. Officer Vodopich witnessed Mr. Gardner resisting treatment and being taken into protective custody. He testified, Mr. Gardner had a “substantial head injury that I would have agreed that he probably should have gone to the hospital and have checked out.” RP 177-78.

Mr. Gardner testified only after the trial court ruled he could not present his defense unless he testified. RP 182-84, 185, 190-92, 193. Mr. Gardner explained, “I just remember getting jumped, that’s all I remember. I don’t remember much about it. I just can remember getting jumped.” RP 194. He could recall Ms. Wells showing up at the hospital, but not speaking with her. RP 198-99. He did not remember interacting with Sergeant Murphy or Deputy Ellsworth. RP 193-94. He recalled waking up in jail and asking his cellmate where he was, and then asking the guard and his mother why he was in jail. RP 195.

However, the trial court precluded Mr. Gardner from presenting other relevant evidence. RP 231. The court did not allow Mr. Gardner to present testimony from Connie Magana, a nurse who treated Mr. Gardner in jail. RP 172-73, 182-87; CP __ (Sub #30 (2nd Supplemental

Defendant's Witness List)). Nurse Magana would have testified about the prescriptions and treatment provided to Mr. Gardner for his extensive head injury, as well as Mr. Gardner's lack of recollection when he regained consciousness in jail. RP 172-74, 182-84.

Mr. Gardner was recalled after Nurse Magana was excluded. RP 230-31. He testified that once he regained consciousness in jail, he learned he had a wound that had been closed with staples and was being treated for a concussion. RP 232-34. The court precluded Mr. Gardner from discussing the medications he was provided. RP 232 (sustaining objection for lack of relevance).

Despite Mr. Gardner's testimony and the other evidence at trial, the court refused to provide Mr. Gardner's proposed jury instruction on volition. RP 239-43.

Mr. Gardner was found guilty. CP 28, 31. The trial court found Mr. Gardner's lack of consciousness and memory to be a mitigating factor and imposed an exceptional sentence below the standard range. CP 32, 39.

E. ARGUMENT

1. In finding the State's evidence of Sergeant Murphy's prior untruthfulness immaterial, the trial court abused its discretion and denied Mr. Gardner's right to due process.

The trial court's failure to disclose evidence the defense could use to impeach Sergeant Murphy, a key State witness whose credibility was at issue, violated Mr. Gardner's constitutional right to due process, and his conviction must be reversed.

This Court reviews de novo the legal question whether the evidence regarding Sergeant Murphy's prior untruthfulness constitutes material impeachment evidence. *State v. Burden*, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001) (citing *United States v. Manning*, 56 F.3d 1188, 1197 (9th Cir.1995)); *State v. Mullen*, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011).

a. The failure to disclose material, exculpatory evidence violates a defendant's constitutional right to due process.

Under the Fourteenth Amendment's due process clause, criminal prosecutions "must comport with prevailing notions of fundamental fairness," and a defendant must have a meaningful opportunity to present a complete defense. U.S. Const. amend. XIV; *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed.

2d 413 (1984); *see State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994) (state constitution no broader than federal with regard to material, exculpatory evidence relating to breath-testing program and driving while intoxicated laws). Fundamental fairness requires that the government preserve and disclose to the defense favorable evidence that is material to guilt or punishment. *Trombetta*, 467 U.S. at 480, 485-88; *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *accord* CrR 4.7(a), (e)(1).

Impeachment evidence is included within the material required to be disclosed. *State v. Benn*, 120 Wn.2d 631, 650, 845 P.2d 289 (1993) (“[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule” (alterations in original) (quoting *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985))). “Such evidence is ‘evidence favorable to an accused,’ . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.” *Bagley*, 473 U.S. at 676 (quoting *Brady*, 373 U.S. at 87). “When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within th[e] general rule [of Brady].” *Id.* at 677. “This may often require county prosecutors to disclose evidence

that tends to negate the guilt of the accused, including impeachment evidence related to the credibility of parties who testify against the accused at trial” *Kitsap County Deputy Sheriff’s Guild v. Kitsap County*, 167 Wn.2d 428, 447-48, 219 P.3d 675 (2009) (Johnson, J. dissenting). Thus the rule requiring disclosure encompasses evidence for misconduct or untruthfulness related to an officer who is a material witness at trial. *See id.* (Johnson, J. dissenting) (citing *United States v. Bland*, 517 F.3d 930, 934 (7th Cir. 2008) (internal investigation of police officer for misconduct should be disclosed but held not material on facts of case); *United States v. Holt*, 486 F.3d 997, 1001 (7th Cir. 2007) (police officer’s reputation for untruthfulness is admissible at trial)).

If the undisclosed evidence “is material in the sense that its suppression undermines confidence in the outcome of the trial,” a constitutional error occurs and any resulting conviction must be reversed. *Bagley*, 473 U.S. at 678.

- b. The trial court’s ruling prevented the disclosure of material impeachment evidence.

Despite these requirements to ensure the accused receives a fair trial, the trial court ruled that the State need not disclose Sergeant Murphy’s history of untruthfulness and inaccurate testimony to Mr.

Gardner. RP 4, 5. Sergeant Murphy was a key witness for the State, and thus a material aspect of its case against Mr. Gardner. She was the alleged victim of the third-degree assault charge and the arresting officer on the misdemeanor assault charge relating to Charitie Wells.

The right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable. *United States v. Abel*, 469 U.S. 45, 50, 105 S. Ct. 465, 468, 83 L. Ed. 2d 450 (1984); *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974). But here, the trial court's ruling deprived Mr. Gardner of the opportunity to cross-examine Sergeant Murphy on her prior untruthfulness under oath.

Mr. Gardner had a constitutional right to review the impeachment evidence. The trial court's ruling preventing the disclosure improperly limited Mr. Gardner's ability to impeach and effectively cross-examine the State's key witness, Sergeant Murphy.

c. The due process violation requires reversal of Mr. Gardner's conviction.

As discussed, a “new trial is required if ‘the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.’” *Bagley*, 473 U.S. at 677 (quoting *Brady*, 405 U.S. at 154).

As set forth above, the court's failure disclose to Mr. Gardner the evidence of Sergeant Murphy's untruthfulness violated due process. “The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.” *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

Here, the undisclosed evidence was particularly relevant in light of the conflict between Sergeant Murphy's testimony and that of Ms. Wells and Mr. Gardner's mother. While Sergeant Murphy told the jury she spoke with Mr. Gardner's mother and learned Ms. Wells was in a relationship with Mr. Gardner, Ms. Wells and Mr. Gardner's mother testified they did not relay this information to Sergeant Murphy. This conflict in the evidence bears striking similarity to the contested statements Sergeant Murphy made in the undisclosed materials. There, Sergeant Murphy stated under oath she was at a residence on “an

unrelated matter” when in fact she was at the residence for the specific purpose of the suspected controlled substances that formed the basis for the warrant—an entirely related purpose. CP __ (Sub # 26A).

Moreover, in the case at bar, Sergeant Murphy’s testimony regarding Mr. Gardner’s kick to her face differed from that of Officer Ellsworth and the hospital security officer, Mr. Smit. She was the only witness who testified Mr. Gardner was lying down on the gurney, while the others stated he was sitting. *Compare* RP 136-37, 140-41 *with* RP 22-24, 35-36, 46, 52-56. Sergeant Murphy further testified she was standing behind him whereas the other witnesses placed her to his right. *Compare* RP 137 *with* RP 22-24, 35-36, 46, 52-56. The jury reasonably would have been concerned about Sergeant Murphy’s credibility if the defense had been provided the opportunity to bring evidence of her untruthfulness to light.

This case stands in contrast to *State v. Garcia*, where the prosecution’s suppression of a witness’s recantation was held immaterial. 45 Wn. App. 132, 140, 724 P.2d 412, 417 (1986). Although this Court held the prosecution should have disclosed that the only claimed eyewitness to the charged murder recanted, the suppression did not ultimately undermine the process. *Id.* at 135, 139-

40. The witness called defense counsel two weeks later and repeated the recantation, also informing defense counsel of her conversation with the prosecutor. *Id.* at 135. Because defense counsel received the same evidence that the prosecution suppressed, the defense was able to use the evidence for impeachment purposes “by attacking [the witness’s] credibility in effective cross examination.” *Id.* at 140. Thus this Court held the *Brady* violation was not material. *Id.*

In the case at bar, Mr. Gardner did not otherwise have access to the impeachment evidence the court suppressed. Mr. Gardner was thus unable to present extrinsic evidence impeaching Sergeant Murphy’s credibility. Unlike in *Garcia*, here the lack of disclosure was material. In light of the violation of his constitutional right to due process, Mr. Gardner’s convictions for assault should be reversed. *See Bagley*, 473 U.S. at 677.

2. In its rulings on Mr. Gardner’s defense based on lack of a volitional act, the trial court violated Mr. Gardner’s right to present a defense and right not to testify.

The trial court violated Mr. Gardner’s due process rights to a fair trial, the right to present a defense, and the right to not testify when it denied his proposed instruction on volitional act, precluded him from calling the jail nurse, Connie Magana, as a witness, and required Mr.

Gardner to testify before he could argue lack of intent or present evidence related to that defense.

- a. An accused is guaranteed a meaningful opportunity to present a complete defense.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct 1727, 164 L. Ed. 2d 503 (2006); *Davis*, 415 U.S. at 318,. Article 1, section 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996) (reversing conviction where defendant was precluded from presenting testimony of defense witness). An accused must receive the opportunity to present his version of the facts to the jury. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010). “[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); accord *Washington*, 388 U.S. at 19.

Although an accused is entitled to present only relevant evidence, relevance is a low threshold. “To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality).” *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987) (citing 5 K. Tegland, *Wash. Practice* § 82, at 168 (2d ed. 1982)); *Davidson v. Metropolitan Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569, *review denied*, 106 Wn.2d 1009 (1986)). Relevant evidence includes facts that present direct or circumstantial evidence of any element of a claim or defense. ER 401; *Rice*, 48 Wn. App. at 12. Relevant evidence is generally admissible. ER 402. And “[e]vidence tending to establish a party’s theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible.” *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999) (emphasis added); *see Rice*, 48 Wn. App. at 12 (“Facts tending to establish a party’s theory of the case will generally be found to be relevant”).

So long as a defendant’s evidence is minimally relevant, “the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Jones*, 168

Wn.2d at 720 (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). Even then, “[r]elevant information can be withheld only ‘if the State's interest outweighs the defendant’s need.’” *Id.*

Although the trial court has discretion to determine whether evidence is admissible, an accused’s inability to present relevant evidence implicates the fundamental fairness of the proceedings and the error must be analyzed as a due process violation. *Jones*, 168 Wn.2d at 720; *Maupin*, 128 Wn.2d at 924.

- b. Mr. Gardner had a constitutional right to present the defense of lack of volitional act, which was denied when the court denied the proposed instruction and ruled he could not call witnesses in support of that defense.

As discussed in the statement of the case, Mr. Gardner’s primary defense was that he lacked volition to commit the assaults. Every crime must contain an actus reus and a mens rea. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). Actus reus is the “wrongful deed that comprises the physical components of a crime” while mens rea refers to the state of mind the prosecution must prove an accused had when committing the crime. *Id.* at 481. Inherent in the actus reus component is willed movement, a volitional act. *Id.* at 482-83. Thus the “State must prove a certain minimal mental element of volition to establish the actus reus.” *State v. Edwards*, 171 Wn. App. 379, 388,

294 P.3d 708 (2012). “Where an individual has taken no volitional action she is not generally subject to criminal liability as punishment would not serve to further any of the legitimate goals of the criminal law.” *Eaton*, 168 Wn.2d at 481-82. “We do not punish those who do not have the capacity to choose. Where the individual has not voluntarily acted, punishment will not deter the consequences.” *Id.* at 482. Where “a person is in fact unconscious at the time he commits an act which would otherwise be criminal, he is not responsible therefor [sic]. The absence of consciousness . . . excludes the possibility of a voluntary act without which there can be no criminal liability.” *State v. Utter*, 4 Wn. App. 137, 142, 479 P.2d 946 (1971) (first alteration in original).

To be clear, lack of volitional control based on unconsciousness is distinct from a diminished capacity defense. *See State v. Deer*, 175 Wn.2d 725, 733-34, 287 P.3d 539 (2012) (noting lack of conscious action is an affirmative defense similar to but distinct from diminished capacity); *Utter*, 4 Wn. App. at 139, 141 (same). A lack of willed movement need not be premised on a claim of mental disease, such as is necessary to assert a diminished capacity defense. *Deer*, 175 Wn.2d at 734; *Utter*, 4 Wn. App. at 141. Mr. Gardner made plain his defense

was based on his lack of willed movement after his head injuries, not a mental disorder. *E.g.*, RP 4-5, 10-12, 175, 185-86, 239-41; CP 8.

An accused is entitled to argue lack of conscious action. *Deer*, 175 Wn.2d at 741. “The issue of whether or not the appellant was in an unconscious or automatistic state at the time he allegedly committed the criminal acts charged is a question of fact” for the jury to determine. *Utter*, 4 Wn. App. at 143. “[A] defendant must be allowed to argue that her actions were involuntary, thus excusing her from criminal liability.” *Deer*, 175 Wn.2d at 741.

Nonetheless, the trial court excluded Nurse Magana, a defense witness who would have testified as to the nature of Mr. Gardner’s injuries and the treatment required for those injuries. The evidence should have been admitted as relevant to Mr. Gardner’s defense. The court ruled only that the evidence was not relevant and the State did not argue the evidence was “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” In fact, any such argument would have been without merit. Moreover, because it was highly probative, “no state interest can be compelling enough to preclude its introduction.” *Jones*, 168 Wn.2d at 720-21 (quoting *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983)).

- c. By tying Mr. Gardner's ability to argue his defense to his taking the witness stand, the trial court violated his constitutional rights to silence and to due process.

Under the Fifth Amendment to the United States Constitution and article I, section 9, no person shall be compelled to serve as a witness against himself in a criminal case. U.S. Const. amend. V; Const. art. I, § 9. "At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

Here, Mr. Gardner invoked his right to silence, declining to testify at trial. However, the trial court ruled that he could not present evidence of his involuntary act defense unless he testified. In fact, the court ruled that the content of Mr. Gardner's testimony was not critical, but he had to assume the witness stand. Compelling Mr. Gardner to be a witness at his own trial violated his constitutional right to silence. RP 179-80 (Gardner does not wish to testify but court states it "is not concerned with the content of his testimony. But for any of this to be relevant, it would require his first taking the stand and testifying."); RP 182-88 (Gardner invokes Fifth Amendment right; court abides by prior ruling and denies motion for continuance; Gardner changes mind and decides to testify). Moreover, pitting his constitutional right to silence

against his right to present a defense violated due process. See U.S. Const. amend. XIV; Const. art. I, § 3; *Simmons v. United States*, 390 U.S. 377, 394, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968) (holding because it would be “intolerable that one constitutional right should have to be surrendered in order to assert another[.]” defendant’s testimony at Fourth Amendment suppression hearing cannot be used against him or her at guilt phase of trial thereby maintaining Fifth Amendment right against self-incrimination); *McGautha v. California*, 402 U.S. 183, 212-13, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1971) (interpreting *Simmons* to apply where “compelling the election [between constitutional rights] impairs to an appreciable extent any of the policies behind the rights involved”), *vacated in part on other grounds by Crampton v. Ohio*, 408 U.S. 941, 92 S. Ct. 2873, 33 L. Ed. 2d 765 (1972).

To the extent an expert witness was necessary to support Mr. Gardner’s defense, he should have been allowed to call one instead of requiring Mr. Gardner to testify in his own behalf. Mr. Gardner maintained below, and continues to argue, that expert testimony was not required. *E.g.*, RP 9-12, 174, 182-83, 185. However, in the alternative, Mr. Gardner requested a continuance to secure an expert.

RP 11-12, 187-88. The court denied the motion without elaboration.

RP 188. If this Court finds an expert was necessary to support Mr. Gardner's defense, it should hold the trial court abused its discretion in denying Mr. Gardner's motion for a continuance to secure one. *See State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). By granting a continuance, the court would have avoided any "need" to force Mr. Gardner to choose between his constitutional right to silence and his constitutional right to present a defense.

d. The errors require reversal of the conviction.

Due process demands an accused be permitted to present evidence that is relevant and of consequence to his theory of the case. *Jones*, 168 Wn.2d at 720; *Maupin*, 128 Wn.2d at 924; *Rice*, 48 Wn. App. at 12. Because the court's exclusion of relevant evidence denied Mr. Gardner's Sixth Amendment right to present a defense, compelled him to testify in his own defense, and violated his right to a fair trial, the errors require reversal of his conviction unless the State can prove beyond a reasonable doubt that they "did not contribute to the verdict obtained." *Chapman v California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

The State cannot meet its burden in this case. Evidence that Mr. Gardner lacked an ability to control his conduct was compelling. There was no reasonable explanation for Mr. Gardner's entrenched refusal of medical care, particularly in light of the severity of his injuries. RP 81-82 (testimony of emergency room nurse); RP 104-05, 110-11, 113 (testimony of Wells); RP 217-18 (testimony of Officer Shannon); RP 177-78 (testimony of Officer Vodopich); Exhibit 1 (showing severity of wound to back of head); RP 204 (testimony of Officer Esparza). Further, the court found the evidence so compelling it imposed a sentence below the standard range. CP 32, 39. Finally, as set forth above, discrepancies in the evidence weakened the State's case. *See* Section E.1.c, *supra*.

In *Maupin*, our Supreme Court reversed a murder conviction where the trial court erroneously excluded evidence of a witness who saw the victim with someone other than the defendant on the day of the alleged crime. 128 Wn.2d at 928, 930. Though the excluded evidence would not have necessarily resulted in an acquittal, it "casts substantial doubt on the State's version of the crime." *Id.* at 930. Thus it was "impossible to conclude a reasonable jury would have reached the same result beyond a reasonable doubt." *Id.*

To reverse the convictions, this Court need not find that Mr. Gardner's version of events is "airtight." *Jones*, 168 Wn.2d at 724. A reasonable jury hearing the excluded evidence may have reached a different result. *See id.* Accordingly, the error was not harmless and requires reversal of Mr. Gardner's convictions with remand for a new trial. *Id.*; *Maupin*, 128 Wn.2d at 924.

3. Cumulative trial errors denied Mr. Gardner his constitutional right to a fair trial.

As set forth, each of the above trial errors requires reversal. Even if this Court disagrees, the aggregate effect of these trial court errors denied Mr. Gardner a fundamentally fair trial.

Under the cumulative error doctrine, even where no single trial error standing alone merits reversal, an appellate court may nonetheless find that together the combined errors denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S. Ct 1479, 146 L. Ed. 2d 435 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (holding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of

fundamental fairness”); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1994); *State v. Venegas*, 153 Wn. App. 507, 530, 228 P.3d 813 (2010). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

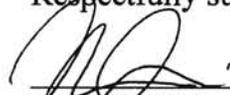
Here, each of the trial errors above merits reversal standing alone. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury’s verdict. In light of the cumulative effect of the trial errors, Mr. Gardner’s convictions should be reversed.

F. CONCLUSION

The trial court denied Mr. Gardner a fair trial and violated his constitutional rights on the several grounds raised above. On one or more of these independent grounds, or on several cumulatively, this Court should reverse Mr. Gardner’s convictions.

DATED this 9th day of July, 2013.

Respectfully submitted,



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Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 69726-9-I
)	
KIER GARDNER,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF JULY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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