70069-3

70069-3

NO. 70069-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON

Respondent,

v.

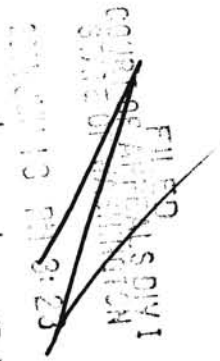
JOJO EJONGA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE PATRICK OISHI

BRIEF OF RESPONDENT



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A. ISSUES PRESENTED

Should this Court reject the defendant's ineffective assistance of counsel claim that is based on his assertion that his trial counsel should have fought harder in regards to a particular mental defense (diminished capacity over insanity) and because, according to him, the expert witness retained by his trial attorney was not believable?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant was charged with three counts of attempted first-degree murder and three counts of first-degree assault arising out of a single incident wherein he stabbed three women. CP 1-7, 553-56. A deadly weapon allegation was charged with each count. CP 553-56. One count of attempted murder and one count of assault also had a sentence enhancement charged, specifically, that the defendant committed the act knowing that the victim was pregnant. Id. A jury convicted the defendant as charged. CP 638-51.

At sentencing, because each count of attempted murder had a corresponding count of first-degree assault pertaining to the same act of stabbing each victim, the State agreed that the three

first-degree assault convictions had to be vacated on double jeopardy grounds. CP 723; see In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) (where the same act of firing a gun at a single victim is the basis of attempted murder and first-degree assault convictions, the assault conviction must be vacated on double jeopardy grounds). The defendant received a standard range sentence of 792 months. CP ___; sub # 192A.

2. SUBSTANTIVE FACTS

Victims Valerie Maganya and her mother, Estella Nyandwi, were born in the Congo and currently live in Des Moines, Washington. 1/8 RP[1] 29-30; 1/9 RP 130. Victim Tuwalole Mwamba is the girlfriend of Valerie's brother. 1/8 RP 30, 95. At the time of this incident, Tuwalole was seven months pregnant. 1/6 RP 31. The defendant was also born in the Congo. 1/17 RP 32.

Valerie met the defendant at Highline Community College through a mutual friend. 1/8 RP 31. The defendant asked Valerie out on a date but Valerie rejected the defendant's offer, telling him that she was engaged to be married. 1/8 RP 31-32. The defendant told Valerie that he didn't care, he also liked married women. Id.

[1] The verbatim report of proceedings shall be cited by date and page number. For proceedings ordered at a later date, such as opening statements, the verbatim report of proceedings shall be cited by date, page number and name of the portion of the trial transcribed.

Valerie told the defendant that if he wanted to be friends, that was fine, but there would be nothing beyond that. Id. Despite his romantic advances having been rejected, the defendant pursued a friendship with Valerie and her brother. 1/8 RP 32.

At times, the defendant would stay over at Valerie's house and sleep on the couch. 1/8 RP 33. On one particular occasion when the defendant was over, Estella noticed that some of her money was missing. 1/8 RP 35; 1/9 RP 132. Estella also discovered that over $1000 dollars had been withdrawn from her back account via checks made payable to Valerie. 1/8 RP 35; 1/9 RP 132-34. Estella asked Valerie to look into the thefts. 1/9 RP 133.

Using a ruse that she needed signatures to start an African club at school, Valerie got the defendant to sign a petition. 1/8 RP 36. She then compared the defendant's writing to the writing on the checks, and they matched. 1/8 RP 36-37. When Valerie went to the bank to tell them that the checks on her mother's account had been forged by the defendant, she discovered that the defendant had drained her account of approximately $3,000. 1/8 RP 36. Valerie reported the theft to the bank and then went home and confronted the defendant. 1/8 RP 37. At first he denied

responsibility, until Valerie told him the bank had him on camera. Id. He then promised to pay the money back. Id. Valerie informed the defendant that he was no longer welcome in their home. 1/8 RP 38.

The next time Valerie saw the defendant was at her cousin's birthday party. 1/8 RP 39. After the party, the defendant jumped into a car that was blocking Valerie's car. 1/8 RP 40. He accidently put the car in reverse and hit Valerie's car, causing over $1,000 worth of damage. Id. at 40-41. He then put the car in drive and jumped out, then he laid on the ground as if he were dead. Id. at 41. Valerie stopped the car and confronted the defendant, who refused to respond until Valerie said she was going to call the police, at which point the defendant got up and ran away. 1/8 RP 41; 1/9 RP 18-19.

When the defendant got home he posted on his Facebook page a message saying that he did not give a fuck who Valerie was or what she thought, he had the best lawyers and they would take care of him. 1/8 RP 42. Angered by the defendant's post, Valerie posted that the defendant was a thief and a fraud and that nobody should let him into their home. 1/9 RP 21. The defendant then sent Valerie a message, telling her that he was sorry, that he would

pay for the damage to her car and asking her to take down the post. 1/9 RP 21-22. Valerie agreed. Id.

A few days later, on May 8, 2011, Valerie, Estella and Tuwalole all went to dinner together to celebrate Mother's Day. 1/9 RP 22. While driving home from dinner, the defendant called Valerie and asked her to meet him at his apartment so he could pay her the money that he owed her. 1/9 RP 23. The defendant lived in an apartment in Kent with his mother. 1/9 RP 23. Instead of going to meet the defendant alone, Estella and Tuwalole insisted on going along. 1/9 RP 23.

When the three women arrived at the defendant's apartment complex, the defendant was standing in the parking lot, wearing white sneakers, blue jeans, a t-shirt, jacket and a hat. 1/9 RP 24. The defendant was quite upset that Valerie had brought Estella and Tuwalole along. 1/9 RP 24. He then told Valerie that he did not really have the money to pay her, that his cousin had the money. 1/9 RP 24. The defendant convinced Valerie to drive him to an apartment complex in Des Moines to get the money. 1/9 RP 24. While in the car, the defendant's demeanor appeared normal. 1/9 RP 101-02.

Arriving at their destination, the defendant instructed Valerie where to park and said that his cousin would be there any moment. 1/9 RP 25. He then got out of the car and placed a phone call, mistakenly calling Tuwalole's number. 1/9 RP 25. He then climbed into the back of the car, shut the door and made sure that the back window was all the way up. 1/9 RP 25, 137. He asked what the women were doing and when they said that they were on their phones on Facebook, the defendant pulled out a knife and began stabbing Tuwalole. 1/9 RP 26.

Tuwalole was able to fight the defendant off and jump out of the car. 1/9 RP 27, 105. The defendant then reached into the front seat and began stabbing Valerie, saying, "I'll kill you today Valerie." 1/9 RP 27, 44, 137-38. He also began to stab Estella as she fought to get out of the car. 1/9 RP 138. The defendant grabbed Estella by the neck and stabbed her in the chest as well as through the side of her face, slicing her tongue. 1/9 RP 27, 138. Despite having been stabbed multiple times, Estella was able to escape from the car. 1/9 RP 27, 138. However, she was not able to make if very far before she collapsed to the ground. 1/9 RP 27-28.

The defendant then jumped out of the car and chased after Tuwalole. 1/9 RP 28, 107-08. Just as Tuwalole reached an

adjoining parking lot, she was hit from behind by the defendant. 1/9 RP 107-08. As Tuwalole turned, the defendant stabbed her in the neck. 1/9 RP 108. Tuwalole fell to the ground and curled up in a fetal position to try and protect her unborn child. 1/9 RP 108. The defendant proceeded to stab Tuwalole approximately a dozen times as she lay on the ground defenseless. 1/9 RP 109; 1/15 RP 6. The defendant only stopped his brutal attack and ran off towards Highway 99 when a nearby resident who had heard the commotion, yelled at him to stop. 1/9 RP 122; 1/15 RP 6-7.

The defendant used an ordinary kitchen knife to stab the women. 1/9 RP 55, 67. He held the knife with a paper towel, apparently with the intent of preventing his prints from being found on the knife. 1/9 RP 55. As he fled the scene, he threw his jacket and the paper towel over a fence, however, he was observed doing so by persons who had heard the commotion, and officers were able to recover the items. 1/10 RP 21, 99; 1/15 RP 7-8. He also was observed discarding his t-shirt. 1/10 RP 106.

Miraculously all three victims lived and one of the victims was able to tell responding officers who their attacker was. 1/10 RP 27, 124. An area search commenced at nearby Highline Community College. Id. A patrol officer spotted a person who

matched the defendant's description walking alongside the road. 1/10 RP 27-28. When stopped, the defendant, in a full change of clothes, appeared nervous, but in all other respects, he had no difficulty interacting or understanding the officer. 1/10 RP 28, 32-33. Upon being stopped, the defendant identified himself as "Eric." 1/10 RP 28. Using a K-9 to track back from where the officer stopped the defendant, a bloody knife and half a pair of scissors were located just where the officer had first spotted the defendant. 1/10 RP 34-35. In a search incident to arrest, a pair of rubber gloves and a pair of knit gloves were found on the defendant's person, as well as a check book in Estella's name. 1/10 RP 30, 37. An in-car video of the defendant during transport showed him cooperative and appearing normal. 1/10 RP 132.

The defendant's shoes and the knife that was recovered near where he was arrested, both tested positive for the presence of blood. 1/15 RP 29-34. DNA testing of the blood on the defendant's shoes was a match for Tuwalole. 1/15 RP 29-34. The DNA on the knife was a mixed sample matching Tuwalole and the defendant. Id.

All three women were transported to Harborview Medical Center, with Tuwalole and Estella arriving intubated and in critical condition. 1/14 RP 38-40.

Tuwalole had stab wounds to both sides of her chest, her lung was punctured, she was bleeding into her chest cavity, and her unborn baby was in severe distress. 1/14 RP 40-41, 43. Doctors performed an emergency C-section and were able to save her baby. 1/14 RP 44. Tuwalole suffered multiple stab wounds to her arms, back, shoulders, chest, neck and face. 1/9 RP 114.

Estella had approximately 17 stab wounds to her hands, neck, face, head, and chest. 1/9 RP 138-39. Bleeding profusely when she arrived, Estella had possible puncture wounds to her lungs and a neck wound that barely missed severing her carotid artery and hitting her spine. 1/14 RP 46-47.

Valerie's wounds were considered serious and life threatening, but not critical. 1/14 RP 51. 16 staples were used to close stab wounds to Valerie's head. 1/9 RP 29. She also had multiple stab wounds on her arms and neck. 1/9 RP 29; 1/14 RP 51.

In testifying about the defendant's background, Valerie said that other than a single incident, she had never known the

defendant to act out in anger. 1/9 RP 35. The one occasion was when Valerie was dancing at a club with friends and the defendant forcefully grabbed her arm and told her that she was out of control, that she did not even know the person she was dancing with. 1/9 RP 36. Other than that, and the fact that sometimes he would be very happy and other times he would act cold, Valerie described the defendant of being of average intelligence with no other apparent emotional/mental health issues. 1/9 RP 35-37, 65. In the days leading up to the stabbing, Valerie testified that she did not notice anything unusual about the defendant's behavior. 1/9 RP 44.

Tuwalole also found the defendant to be a perfectly average individual in the eight months she had known him. 1/9 RP 96. Estella described the defendant as just a normal kid she had welcomed into her home as a friend of the family. 1/9 RP 130-31.

The Defense Case

The defendant did not testify at trial. His mother, Alembe Lihau, testified that the family lived in the Congo[2] when President Mobutu was the ruler of the country. 1/15 RP 79-80. She claimed that the defendant's father was one of President Mobutu's

[2] Formerly known as Zaire, also referred to in the record as Equateur. 1/15 RP 79.

bodyguards. Id. at 83. Lihau testified that as a newborn, the defendant contracted malaria and had to be hospitalized. 1/15 RP 81. She also said that as a child, the defendant fell off the first story of a building and injured his head. Id. at 86. According to Lihau, the defendant lost consciousness for an unknown period of time, had to be hospitalized, and had headaches and was more irritable after the fall. Id. at 86-88.

When Mobutu was overthrown in a violent revolution, the defendant's father was sent to a training center and it was believed that he was killed there. Id. at 84-85. Sometime later, in 2005, Lihau and her grandson were arrested by troops loyal to the new president. Id. at 89-90. With the help of others, she was able to escape to Nigeria. Id. at 91-92. She met up with the defendant in Nigeria, and in 2010, they immigrated to the United States. Id. at 93-94.

Lihau claimed that within four days of arriving in the United States, the defendant fell and lost consciousness. Id. at 95. She claimed that when this happened a second time, the defendant went to the hospital to get checked out. Id. at 96. Asked if she noticed any changes in the defendant in the weeks leading up to

the attempted murder, Lihau said that the defendant had been very agitated and that he had not been sleeping much. 1/15 RP 97.

The defense called as a witness Doctor Jerome Kroll, a board-certified clinical psychiatrist for over 40 years. 1/17 RP 6, 19, 21 . Dr. Kroll was Phi Beta Kappa at Brown University and did his medical training at Albert Einstein Medical College in New York, followed by a residency and faculty position at Cornell Medical School and Hospital. 1/17 RP 6, 8. He ran two psychiatric wards and taught both residents and medical students. Id.

Dr. Kroll also did a military stint working at Leavenworth where he conducted psychological evaluations of every new patient – many were soldiers returning from Vietnam who suffered from PTSD. Id. at 7. After the military, Dr. Kroll secured a position as director of training at the largest psychiatric hospital in New York. Id. at 9. In 1976, he took a faculty position at the University of Minnesota and ran a 24 bed acute psychiatric ward. Id. at 10.

Dr. Kroll has written over 60 psychiatric articles and four books. Id. at 11. The focus of his research and practice has been on refugee populations from Africa, PTSD and borderline personality disorders. Id. at 11-14. Minnesota happens to have a large East African immigrant population, including immigrants from

the Congo and Nigeria. Id. at 13. In 2011, Dr. Kroll published an article on the psychological assessment of 600 Somali patients he had assessed at the clinic he ran. Id. at 12. He testified that he has done psychiatric assessments on over 800 patients from East Africa. Id. at 18-19.

Dr. Kroll was retained to do a psychiatric assessment of the defendant to determine whether his mental health capabilities regarding the attempted murders fit within the parameters of Washington's insanity or diminished capacity laws. 1/17 RP 22. Along with conducting a clinical interview of the defendant, Dr. Kroll reviewed all of the discovery materials, the jail medical records, what other medical records were available considering the defendant's life history, statements of the victims, writings of the defendant, interviews with other persons, the reports and notes of the State's expert, police videotapes of the defendant at the scene of his arrest, and he conducted an interview with the defendant's mother. 1/17 RP 22-25. He also ordered an EEG and reviewed an MRI done on the defendant. 1/17 RP 23-24.

In addition, Dr. Kroll did some additional research on the civil war and political conditions in the Congo and how that affected families living in the country, along with the difficulties and

limitations of cross-culture forensic evaluations and malingering. Id. at 27-29. It is imperative, Dr. Kroll noted, that one understands the culture and values of a particular country when doing a psychiatric assessment of a person from that country. Id. at 30.

In the clinical interview conducted by Dr. Kroll, the defendant provided the following information to the doctor:

After his mother left for Nigeria, he was left with his brother and sister in the Congo. Id. at 45. In 2006, the home they were staying was attacked, some residents of the home were shot and the defendant was hit in the head with a rifle butt. Id. Subsequently, with the help of friends, the defendant escaped to Nigeria. Id. He never saw his brother or sister again. Id. at 47.

Life was difficult as a refugee. Id. at 48. While he went to school and learned both English and French, he had no parental guidance, no income, and he stayed away from home for days on end. Id. At one point, two men, Ali and Jubril, took an interest in the defendant. Id. at 48. The men taught the defendant how to fix cell phones and even talked about providing scholarship money for him to attend college. Id. The men, according to the defendant, were members of al Qaeda grooming him to join the group. Id. He

told Dr. Kroll that he went on multiple trips to partake in al Qaeda training camps in Yemen, Pakistan and Somalia. Id. at 50.

In 2010, the family was granted refugee status by the United States. Id. at 51. The defendant worked at a fish company for six months and then got another job at Macy's. Id. at 52. He registered at Highline Community College and met a number of people there from the Congo and West Africa. Id. He socialized with these friends at clubs in the area. Id.

Shortly before the crime, the defendant told Dr. Kroll that he reported to the police that he had been receiving harassing phone calls. Id. at 52. He told Dr. Kroll that the calls were from Ali and al Qaeda and that Ali offered him millions of dollars to bomb Microsoft. Id. at 53. The defendant said he was frightened and intimidated and told Ali that he would do it, in the hopes that by agreeing, the group would leave him alone. Id. at 53.

The defendant's recollection of the actual attempted murders was "imperfect," according to Dr. Kroll. 1/17 RP 55. The defendant told Dr. Kroll that on the morning of the incident Ali showed up at his apartment, pointed a gun at him and said that they had given him money, now he needed to plant a bomb. Id. at 58. The defendant told Ali that he owed Valerie money. Id. Ali told the

defendant to meet him that night in Des Moines and he would give him the money. Id. The defendant then called Valerie and told her to meet him that night so she could get her money. Id. at 58-59.

Valerie was supposed to meet him at 7:00 p.m. and when she was late, the defendant became suspicious. Id. at 59. When the three women appeared at 9:30, he became even more suspicious. Id. Still, he gave them directions to the apartment complex in Des Moines. Id. Once in the parking lot, a number of vehicles showed up. Id. at 60. The defendant believed the individuals were talking to each other and that they were speaking Swahili, a language he does not understand. Id. This triggered more anxiety and it was like his "head blew up." Id.

Apparently delusional, the defendant believed the three women in the car were in fact three men, that they belonged to al Qaeda, and that he was going to be killed. Id. He then pulled out a kitchen knife that he told Dr. Kroll he had brought with him for protection. Id. Unable or unwilling to provide specific details, the defendant merely told Dr. Kroll that he attacked the three women, not knowing if they were women or men or linked to al Qaeda. Id. at 61. In explaining how his hand ended up being cut, the defendant told Dr. Kroll that Ali had inserted a computer chip into

his palm to track his movements and that after the incident, it was gone. Id. at 62.

Dr. Kroll diagnosed the defendant with delusional mood disorder, post-traumatic stress disorder (PTSD), and mood disorder secondary to a brain injury. Id. at 67. He testified that there is a high rate of psychosis in young immigrant men from Africa, that there can be a rapid onset of irrational behavior, sometimes violent, and a rapid recovery once hospitalized and on medication. Id. at 65.

With a mood disorder secondary to a traumatic brain injury, Dr. Kroll testified, a person will have difficulty regulating one's own emotions exhibited by irritability and moodiness. Id. at 76.

Dr. Kroll testified that one of the symptoms of PTSD is that a person may be hyper-vigilant, highly suspicious, wondering if other persons are going to attack them. Id. at 69. The person will startle easily and excessively. Id.

With delusional mood disorder a person feels or has intuition of danger, is perplexed as to what's going on around them -- that things are not as they seem. Id. at 69. The person will misread a

situation and take a normal situation and believe that there is danger present. Id. Combined with his PTSD, according to Dr. Kroll, the defendant believed he was being set up by al Qaeda. Id. at 69, 73.

Dr. Kroll iterated that because of the events of the defendant's life, he was dealing with a high number of stressors. Id. at 82-83. His Global Assessment Functioning or GAF level, an assessment of a person's ability to function day to day, was a 40. Id. at 83-86. Normal range is between 60 to 70. Id.

Dr. Kroll also testified that he fully considered whether the defendant was malingering but that he ruled that out. Id. at 90-96. He indicated that the threatening letters written by the defendant – see section below – were likely written by the defendant because he suspected people did not believe him and he wanted others to believe his story. Id. at 95. Based on his 40 years of experience, 30 years dealing specifically with refugee populations, and after reviewing all the information available, Dr. Kroll averred that due to the defendant's abnormal mental state, he was unable to know the difference between right and wrong, to appreciate the nature of his

actions, and was unable to form criminal intent, the standards for insanity and diminished capacity. 1/17 RP 29, 100.

The Defendant Fabricated Evidence

Mentioned nowhere in the defendant's brief to this Court is the fact that the defendant was caught fabricating evidence in an attempt to support his mental defense. After the defendant had been arrested, and while he was being held in custody pending trial, threatening letters were received by King County Prosecutor Dan Satterberg and King County Superior Court Judge Mary Roberts. 1/24 RP 14. At the same time, the defendant sent a letter to the Kent Police Department claiming that he had received a threatening letter while in the jail. Id. at 25. He enclosed the letter he purportedly received and requested that an investigation be conducted. Id. A fourth threat letter was recovered from a purported burglary that occurred at the defendant's mother's house. Id. at 26-27.

The letters to the judge and elected prosecutor were purportedly sent by a member of al Qaeda and threatened to kill the defendant if he was released, and the judge and prosecutor if he

was not kept in jail. See exhibits 122A and 123A.[3] The letter received by the defendant indicated that it had been sent from a member of al Qaeda and threatened to kill him for betraying the cause. See exhibit 128A. The letter recovered from the defendant's mother's house was similarly threatening. See exhibit 115A.

A criminal investigation was commenced. 1/24 RP 14, 26. In an attempt to determine who was sending the letters, all mail received by the jail and addressed to the defendant was intercepted. Id. at 17-19. Three letters were intercepted, all similarly threatening. Id.; see exhibits 124A, 125A and 126A. However, upon further investigation, including fingerprint analysis and handwriting analysis, it was discovered that the defendant had created all of the letters himself and orchestrated their delivery. See 1/24 RP 52-54, 75-83.

The State's Expert

In rebuttal, the State called Doctor Mark McClung as a witness. 1/23 RP 21. As a forensic psychiatrist, Dr. McClung

[3] The exhibits designated to this Court are copies. The originals were chemically treated during analysis and are potentially hazardous. So that the jurors could more carefully review the letters, they received the original letter—encased in plastic, and a copy that they could more readily handle. 1/24 RP 95. The original exhibit received a standard exhibit number, the copy received the same exhibit number followed by the letter A.

specializes in psychiatry that interfaces with the law, assessing people for competency, future dangerousness, insanity, and other types of evaluations of persons included in the criminal justice system population. Id. at 22. In short, after assessing the defendant, Dr. McClung opined that while the defendant exhibited certain antisocial personality traits not rising to the level of a disorder, and he may suffer from a mild form of PTSD, the defendant is malingering, faking symptoms of a mental illness. Id. at 34, 68.

Dr. McClung noted a number of red flags indicating that the defendant was not so mentally disturbed that he was insane or could not form the intent to commit the crimes. Upon being booked in the King County Jail, medical staff did not observe, and the defendant did not report, any psychosis symptoms. Id. at 32-33. From what he could tell, the defendant's first mention of al Qaeda and terrorist occurred some six months after his arrest. Id. at 33. While he did report symptoms consistent with PTSD after his arrest, he exhibited no abnormal behaviors. Id. Additionally, with the level of impairment reported by the defendant at the time of crime, one would expect more severe symptoms in the days and weeks

leading up to the event, but the defendant's life was largely intact prior to the event, with no serious disabilities noted. Id. at 34, 36.

The defendant also exhibited behaviors strongly suggesting he was malingering, faking symptoms of mental illness. For example, persons who malinger will many times exhibit symptoms of a disorder that are commonly known, but they will not exhibit symptoms known more generally only by experts. For example, the defendant expressed that he was having flashbacks and nightmares, consistent with PTSD, but he did not exhibit "numbing symptoms" consistent with PTSD and he did not avoid social contact and loud places as would be expected. Id. at 42-43.

A malingerer will also endorse symptoms if they are somehow suggested to them. Id. at 44-45. Here, the defendant was asked during his assessment if he shuffled his feet, something he had not been observed doing. After the question was asked, the defendant began shuffling his feet, which is not a symptom of disorder. Id. Similarly, when the defendant was asked if he felt dizzy when he felt hopeless, he endorsed this symptom even though there is no evidence the two symptoms are connected. Id. at 48.

Finally, the acts of the defendant around the time of the crime itself demonstrated that he was not severely disabled at that time. The fact that he brought with him a change of clothing, gloves and the weapon, were acts strongly suggestive of an ability to intend an act and know right from wrong. Id. at 62. The fact that after stabbing the victims – an intentional act in itself, the defendant fled the scene, changed his clothing, discarded his bloody clothing, discarded the weapon and gave a false name, are all acts indicating purposeful and behavior indicative of guilty knowledge. Id. at 61-62, 64, 67. The facts, Dr. McClung testified, do not fit the form of someone having a paranoid delusion, an event that would tend to start gradually and would profoundly affect a person's level of functionality over a period of time. Id. at 52, 58-60.

C. ARGUMENT

1. THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS WITHOUT MERIT

The defendant's claim of ineffective assistance of counsel is premised on his assertion that his trial counsel did not fight hard enough regarding his diminished capacity mental defense, and that his trial counsel hired and called as a witness an expert who was not believable. The defendant's claim is misguided and lacks merit.

Trial counsel's argument that his attorney did not sufficiently argue diminished capacity is belied by the record and, in any event, what theory or theories to pursue is a matter of trial strategy. Additionally, the facts the defendant avers support his claim that the defense expert was not believable do not support his claim and are distorted. Defense counsel and the defense expert did everything possible with the facts they were presented – including having to deal with the fact that the defendant was caught fabricating evidence in an attempt to support his mental defense.

2. THE HURDLE THE DEFENDANT MUST OVERCOME

To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that his trial counsel's performance was constitutionally deficient, and (2) that counsel's deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Brockob, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). Trial counsel's performance can be considered deficient only if, after considering all the circumstances, it falls below an objective standard of reasonableness. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To establish prejudice, "[t]he

defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In re Yates, 177 Wn.2d 1, 35, 296 P.3d 872 (2013) (citing Strickland, 466 U.S. at 694. If a defendant fails to establish either prong of the ineffective assistance of counsel test, the court need not inquire further. State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, rev. denied, 162 Wn.2d 1007 (2007).

A reviewing court begins with the strong presumption that trial counsel's conduct and performance was reasonable. In re Yates, 177 Wn.2d at 35-36 (citing Strickland, 466 U.S. at 689). Counsel's conduct is evaluated by its reasonableness at the time it was undertaken. Id. It is the defendant's burden to overcome this "strong presumption." Id.

Here, the defendant identifies no actual error that occurred at trial, rather, his claim against his trial attorney constitutes nothing more than hindsight disagreements with his counsel's decisions on trial strategy and tactics, which generally will not support a claim of ineffective assistance of counsel. See e.g. State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981) (the decision to call witnesses and ask certain questions is generally a matter of legitimate trial tactics that will not support claim of ineffective

assistance); State v. Johnson, 113 Wn. App. 482, 493, 54 P.3d 155 (2002) (counsel was not ineffective for failing to argue self-defense when inconsistent with defendant's testimony and evidence), rev. denied, 149 Wn.2d 1010 (2003). As the Supreme Court has stated, "the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment." State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006) (citing State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)).

3. CONTRARY TO THE DEFENDANT'S CLAIM, HIS TRIAL COUNSEL PRESENTED TWO MENTAL DEFENSES WITH EQUAL FORCE

There are two "defenses" recognized in Washington relating to the mental condition of a defendant – insanity and diminished capacity.

Insanity is an affirmative defense created by statute. State v. Crenshaw, 98 Wn.2d 789, 792-93, 659 P.2d 488 (1983). To establish the defense of insanity, it must be shown that at the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that (a) he or she was unable to perceive the nature and quality of the act with which he or she is charged; or (b) he or she was unable to tell right from wrong with reference to the particular act charged.

RCW 9A.12.010(1). Known as the M'Naghten rule,[4] a defendant has the burden of proving insanity by a preponderance of the evidence. Crenshaw, 98 Wn.2d at 793.

Unlike diminished capacity, by raising an insanity defense, a defendant has two shots at avoiding criminal liability. Before the jury even gets a chance to consider the issue, upon request, the trial judge must weigh the evidence and grant a motion for acquittal if the evidence preponderates in the defendant's favor. RCW 10.77.080; State v. Sommerville, 111 Wn.2d 524, 532, 760 P.2d 932 (1988). Only if the court weighs the evidence and is not satisfied that acquittal by reason of insanity is warranted, is the question submitted to the jury to decide. Sommerville, 111 Wn.2d at 532.

The concept of diminished capacity also relates to a mental disorder or illness of a defendant. State v. Gough, 53 Wn. App. 619, 622, 768 P.2d 1028, rev. denied, 112 Wn.2d 1026 (1989). Not a true "affirmative defense," when diminished capacity is pled as a defense it is treated as a rule of evidence that allows the defense to introduce evidence relevant to the defendant's state of mind. State v. Stumpf, 64 Wn. App. 522, 525 n.2, 827 P.2d 294 (1992) (citing

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[4] Referring to M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843).

John Q. La Fond & Kimberly A. Gaddis, Washington's Diminished Capacity Defense Under Attack, 13 U. Puget Sound L.Rev. 1, 22 (1989)).

Essentially, pleading diminished capacity allows the defense to introduce evidence of a mental disorder that logically tends to show that the defendant was not capable of possessing the required *mens rea* of the crime charged.[5] Stumpf, 64 Wn. App. at 525. Thus, when a defendant presents substantial evidence of a mental illness or disorder and the evidence logically and reasonably connects the defendant's alleged mental condition with the inability to form the mental state necessary to commit the charged crime, a defendant is entitled to a diminished capacity jury instruction. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001); State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

Finally, "[t]o maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a

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[5] Here, to prove first-degree assault, the State was required to prove that the defendant intended to assault each victim and that he intended to inflict great bodily harm. RCW 9A.36.011(1)(a), (c); CP 553-56, 704. To prove attempted first-degree murder, the State was required to prove that the defendant had the premeditated intent to cause the death of each victim. RCW 9A.32.030(1)(a); CP 553-56, 694. "Intent" means to act with the objective or purpose to accomplish a result that constitutes a crime. RCW 9A.08.010(1)(a); CP 692. "Premeditation" is defined as the deliberate formation of and reflection upon the intent to take a human life and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short. State v. Hoffman, 116 Wn.2d 51, 83, 804 P.2d 577 (1991).

mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

Here, contrary to the defendant's assertion on appeal, from the very beginning, his trial counsel vigorously and equally pursued both an insanity defense and a diminished capacity defense. Defense counsel's trial memorandum notified the court that the defense would be pursuing "insanity, and diminished capacity" and that Doctor Jerome Kroll would be testifying as an expert witness. CP 43. The defense provided the court with a summary of the defendant's personal and mental health background, as well as Dr. Kroll's full mental health evaluation of the defendant. CP 44-47, 64-87. Defense counsel proposed, and the court gave, WPIC 18.20, the approved diminished capacity jury instruction.[6] Defense counsel also proposed, and the court gave, WPIC 20.01,

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[6] See CP 237 (defense proposed instruction) and CP 686 (Jury Instruction # 7). CP 686, the instruction read to the jury provided as follows:

> Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form the intent to inflict great bodily harm or the premeditated intent to kill.

the approved instruction defining insanity,[7] and WPIC 20.02, the approved insanity jury instruction pertaining to the burden of proof.[8] Further, defense counsel filed a motion that required the trial court to independently review the evidence and make a determination as to whether the defendant was not guilty by reason of insanity. CP 24-26.

On appeal, the defendant contends that defense counsel presented a defense that was certain to fail (insanity) while ignoring a more plausible defense (diminished capacity) and that this constitutes ineffective assistance of counsel. Def. br. at 1. This is incorrect. Nowhere in the record is it supported that the defense pursued insanity to a greater degree than diminished capacity. The

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[7] See CP 238 (defense proposed instruction) and CP 683 (Jury Instruction # 4). CP 683, the instruction read to the jury provided as follows:

> In addition to the plea of not guilty, the defendant has entered a plea of insanity existing at the time of the act charged. Insanity existing at the time of the commission of the act charged is a defense. For a defendant to be found not guilty by reason of insanity you must find that, as a result of mental disease or defect, the defendant's mind was affected to such an extent that the defendant was unable to perceive the nature and quality of the acts with which the defendant is charged or was unable to tell right from wrong with reference to the particular acts with which the defendant is charged.

[8] See CP 239 (defense proposed instruction) and CP 684 (Jury Instruction # 5). CP 684, the instruction read to the jury provided as follows:

> The burden is on the defendant to establish the defense of insanity by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty by reason of insanity.

two defenses relied on the exact same evidence – the testimony of Dr. Kroll as applied to the facts of the case, and defense counsel pursued both defenses equally.

Dr. Kroll testified that he was hired by defense counsel to do a full "psychiatric assessment" of the defendant and "assess as best as one can what his mental status was at the time of the incident, what were the events in his childhood leading up to his present situation, and to render an opinion of whether he fits within the not guilty by reason of insanity standard or diminished capacity under the laws of the State of Washington." 1/17 RP 22. In concluding his testimony regarding his evaluation of the defendant, Dr. Kroll opined that "at the time of the incident, because of his abnormal mental state, he was unable to appreciate the difference between right and wrong and to appreciate the nature of his actions as to how we, as we really see it, so he was unable to know right and wrong and to know the nature of his actions. That would be the Washington State insanity standards." 1/17 RP 100. Asked about the defendant's ability to form the requisite intent for each crime (i.e., diminished capacity), Dr. Kroll opined that "at the time of the incident, his mental state was such that he was unable to form

a criminal intent to commit a crime. The intention was not to commit a crime because he wasn't able." 1/17 RP 100.

In closing, defense counsel adeptly discussed both diminished capacity and insanity, telling the jury that it had to determine what the defendant's "mental state" was at the time of the acts. 1/28 RP 79, also 1/28 RP 93, 95-96. After discussing all the facts of the case, and Dr. Kroll's testimony, counsel astutely discussed diminished capacity *first* -- a defense that if successful would result in a complete acquittal. 1/28 RP 107. Counsel then told the jury that if it found the defendant could form the requisite intent to commit the crime, then it still turn to determine whether the defendant was insane at the time he committed the acts -- a defense that would result in an acquittal but *potentially* result in confinement at a mental hospital. 1/28 RP 110.

In short, the defendant's claim that trial counsel pursued an insanity defense over a diminished capacity defense, is belied by the record. In any event, even if defense counsel had pursued one mental defense more aggressively than another mental defense, this would have been a matter of legitimate trial strategy of which an ineffective assistance of counsel claim cannot succeed. Cross, 156 Wn.2d at 606 (actions taken or avoided and the methodology

employed are matters of trial tactics that rest with the sound judgment of the attorney); Byrd, 30 Wn. App. at 799 (legitimate trial tactics will not support claim of ineffective assistance).

4. THE DEFENDANT'S MISGUIDED SELF-DEFENSE / DIMINISHED CAPACITY ARGUMENT

Part of the defendant's argument hinges on his assertion that he was entitled to a self-defense instruction and that this would have made the diminished capacity defense more viable. Def. br. at 12. This assertion is misguided. The defendant did not testify and the substantive evidence admitted at trial did not support the giving of a self-defense instruction.

Self-defense is a creation of statute and case law. The statute in question is RCW 9A.16.050, the self-defense statute pertaining to murder.[9] Under the statute, a person is justified in using deadly force in self-defense only if: (1) the person subjectively feared that he or she was in imminent danger of death or great personal injury; (2) this belief was objectively reasonable; (3) the person exercised no greater force than was reasonably necessary; and (4) the defendant was not the aggressor. State v. Read, 147 Wn.2d 238, 243-44, 53 P.3d 26 (2002);

[9] The justifiable use of deadly force for attempted murder is the same as it is for murder. State v. Cowen, 87 Wn. App. 45, 53, 939 P.2d 1249 (1997).

State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). In order to raise self-defense before the jury, a defendant bears the initial burden of producing credible evidence tending to prove each statutory element of the defense. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); State v. Acosta, 101 Wn.2d 612, 619, 683 P.2d 1069 (1984).

There is a subjective component to the test for self-defense -- whether the defendant actually feared death or great personal injury; and an objective component -- whether the defendant's fear of harm was reasonable under the circumstances. State v. Ra, 144 Wn. App. 688, 706, 175 P.3d 609 (citing Read, 147 Wn.2d at 242), rev. denied, 164 Wn.2d 1016 (2008) . In other words, a person's right to use force is dependent upon what a reasonably cautious and prudent person in similar circumstances would have done and whether he reasonably believed he was in danger of bodily harm.[10] State v. Theroff, 95 Wn.2d 385, 390, 622 P.2d 1240 (1980).

Additionally, self-defense finds its "basis in necessity and generally ends with the cessation of the exigent circumstances

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[10] "The objective portion of the inquiry 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. In essence, self-defense would always justify homicide so long as the defendant was true to his or her own internal beliefs." State v. Janes, 121 Wn.2d 220, 239, 850 P.2d 495 (1993).

which gave rise to the defensive act." Janes, 121 Wn.2d at 237 (citing United States v. Peterson, 483 F.2d 1222, 1229 (D.C. Cir.), cert. denied, 414 U.S. 1007 (1973). The force used must be no more than is necessary to effect the purpose intended and no reasonable effective alternative to the use of force appeared to exist. State v. Brightman, 155 Wn.2d 506, 520, 122 P.3d 150 (2005); RCW 9A.16.010(1).

With these standards in mind, the defendant's argument fails. First, the defendant fails to mention that he did not testify, thus, he was required to produce other evidence that would support the giving of a self-defense instruction. The actual facts of the crime do not support a self-defense claim. The substantive facts show that the defendant obtained and concealed on his person a knife and change of clothing and that he then lured the main intended victim, Valerie Maganya, to him on a ruse and when she showed up with her mother and her brother's girlfriend, he tricked them into driving to a different location where he proceeded to stab the three unarmed and defenseless women.

The "facts" the defendant attempts to rely on to support his position that he was entitled to a self-defense instruction is the testimony of the experts when they related the story as told to them

by the defendant in conducting their psychiatric examinations. One of the problems with this argument is that it relies on facts that are not substantive evidence. Another problem is that even under the facts the defendant attempts to rely, he would not have been entitled to a self-defense instruction had he requested one.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). The hearsay rule excludes hearsay from being admitted as evidence except as specifically provided by the rules of evidence, court rules, or statute. ER 802. The theory of the hearsay rule is that cross examination is the best way to reveal whatever untrustworthiness lies beneath the assertions of a witness. State v. Chapin, 118 Wn.2d 681, 685, 826 P.2d 194 (1992) (citing 5 J. Wigmore, Evidence § 1362, at 3 (Chadbourn rev. 1974)). The hearsay rule thus represents "a rule rejecting assertions, offered testimonially, which have not been in some way subjected to the test of cross-examination." Id.

ER 703 allows expert witnesses to base their opinions on facts otherwise inadmissible as long as the facts are "of a type reasonably relied upon by experts in the particular field in forming

opinions or inferences upon the subject." State v. Wineberg, 74 Wn.2d 372, 384, 444 P.2d 787 (1968). The admission of these facts, however, is not proof of them.

> [I]f an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration. His explanation merely discloses the basis of his opinion in substantially the same manner as if he had answered a hypothetical question. It is an illustration of the kind of evidence which can serve multiple purposes and is admitted for a single, limited purpose only.

Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue, 106 Wn.2d 391, 399-400, 722 P.2d 787 (1986) (citations omitted) (quoting State v. Wineberg, 74 Wn.2d at 382).

In sum, out-of-court statements of a defendant on which an expert bases his opinion are not admitted as substantive proof, i.e., the truth of the matter asserted. State v. Lucas, 167 Wn. App. 100, 109-10, 271 P.3d 394 (2012) (diminished capacity defense). Rather, the out-of-court statements are offered only for the limited purpose of explaining the expert's opinion. Id. (citing 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence author's cmts. at 387, 400 (2011-2012 ed.); see also State v. Anderson, 44 Wn. App. 644, 652-53, 723 P.2d 464 (1986) (court did not abuse its discretion in allowing the State's

experts to testify about Anderson's out-of-court statements to them because the statements were not offered to prove the truth of the matter asserted), rev. dismissed as moot, 109 Wn.2d 1015 (1987).

Here, with the defendant having not testified and his statements to his expert and the State's expert not being admitted for the truth of the matter asserted, there is no evidence that would have supported the giving of a self-defense instruction. Further, even if the statements could be considered for the truth of the matter asserted, the defendant's out-of-court statements still would not support the giving of a self-defense instruction.

While the defendant told the experts that he variously thought the three women were members of al Qaeda and/or that the three women appeared to him as men, he claimed that he did not have a memory of assaulting or stabbing the women. Thus, even if one accepted the truth of his alleged disillusion, there is no basis to say he stabbed the women while in imminent fear of death or great bodily harm any more than it can be said he stabbed them in anger for their attempting to recruit him, to stop them from carrying out their alleged plot to bomb Microsoft, or to prevent future harm to himself or in retaliation for past acts. Further, self-defense is allowed only where the amount of force used is

necessary and where no reasonable alternative exists. The defendant was out of the car by himself only to return and stab the women. Even in his alleged delusional state, the chasing down of a fleeing victim and the stabbing of a prone person over and over again, does not justify the giving of a self-defense instruction. See In re Faircloth, 177 Wn. App. 161, 170, 311 P.3d 47 (2013) (where the defendant continued his attack after the victim was incapacitated, the defendant was no longer acting out of necessity); State v. Dyson, 90 Wn. App. 433, 438-39, 952 P.2d 1097 (1997) ("To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable.").

5. THE DEFENDANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR CALLING A WITNESS WHO WAS NOT CREDIBLE IS MISGUIDED

Finally, the defendant claims that his trial counsel was constitutionally ineffective for calling a witness who was not credible, specifically, Doctor Jerome Kroll. This claim is based in part on an unsupported presumption that some other expert witness would have testified differently than Dr. Kroll in regards to certain facts. But an expert witness must deal with the facts of the

case as presented – he or she does not get to pick or choose only the facts that support a desired proposition. Further, only an incompetent or unethical expert witness would take a position contrary to the position taken by Dr. Kroll in regards to the facts the defendant now complains.

To begin, a trial counsel's decision on what witnesses to call and how to question those witnesses is a matter of trial strategy. State v. Grier, 171 Wn.2d 17, 31, 246 P.3d 1260 (2011); State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262, rev. denied, 99 Wn.2d 1013 (1983); see also State v. Krause, 82 Wn. App. 688, 697, 919 P.2d 123 (1996), rev. denied, 131 Wn.2d 1007 (1997). Deficient performance cannot be shown by matters that go to reasonable trial strategy or tactics. Grier, 171 Wn.2d at 33; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). This Court will begin with the strong presumption that counsel provided effective representation. McFarland, 127 Wn.2d at 336. To rebut this strong presumption, a defendant bears the burden of establishing that "there is no conceivable legitimate tactic explaining counsel's performance." Grier, 171 Wn.2d at 42 (citing State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Here, the defendant fails to show how counsel's conduct in

retaining and calling Dr. Kroll as a witness does not fall within the parameters of legitimate trial strategy.

The defendant cites to Dr. Kroll's acknowledgement that the defendant's acts of bringing the weapon and change of clothing to the scene, fleeing afterwards, disposing of the weapon and giving a false name, are important facts that must be considered in assessing the defendant's mental state. Def. br. at 11, 16. What the defendant fails to articulate is what credible expert would ever say that these acts – or any acts around the time of a crime, do not have evidentiary value in determining whether the defendant was acting volitionally and knowingly. Dr. Kroll's credibility was actually enhanced by admitting the obvious. At the same time, Dr. Kroll stated that the defendant's acts, while important to consider, were not determinative of the defendant's mental state. 1/22 RP 29, 53, 56.

The defendant criticizes the fact that Dr. Kroll had an older version of the DSM than the prosecutor. Def. br. at 11. The American Psychiatric Association publishes the Diagnostic and Statistical Manual of Mental Disorders (DSM), a compilation of mental disorders that "reflect[s] a consensus of current formulations of evolving knowledge in the mental health field."

State v. Klein, 156 Wn.2d 103, 117, 124 P.3d 644 (2005). In its introduction, the book explains that the specific diagnostic criteria in the manual "are meant to serve as guidelines to be informed by clinical judgment and are not meant to be used in a cookbook fashion." DSM-IV-TR at xxxii. Washington courts recognize that the DSM "is an evolving, imperfect document that should not be treated as sacrosanct." Klein, 156 Wn.2d at 117 (quoting In re Young, 122 Wn.2d 1, 28, 857 P.2d 989 (1993)).

First published in 1952, the current version, DSM-V, was published in May of 2013, after the defendant's trial. 1/22 RP 66. At the time of trial, the current edition was the DSM-IV, first published in 1994. There was a slightly revised edition, referred to as DSM-IV-TR, that was published in 2000. Dr. Kroll indicated that he had with him the DSM-IV version, that the revised version has only minor changes, and that he did not want to carry the revised volume with him. 1/22 RP 9, 66-67, 90. The defendant fails to articulate how this shows Dr. Kroll is wholly lacking in credibility. He does not even attempt to demonstrate that something in the revised edition was pertinent to his case that was not in Dr. Kroll's volume.

The defendant criticizes the fact that Dr. Kroll is a practicing psychiatrist and not a forensic psychiatrist like Dr. McClung, but again he fails to articulate why this is critical. In point of fact, jurors may be far more inclined to believe a practicing psychiatrist, a person who actually treats people, than a person who makes their living conducting evaluations for court.

He criticizes the fact that Dr. Kroll did not interview friends of the defendant and that he came out with a diagnosis prior to reviewing MRI and EEG results. Def. br. at 11. But the defendant ignores the fact that it was Dr. Kroll who ordered the EEG, and that both Dr. Kroll and Dr. McClung testified that while both tests were negative, this was not surprising and not determinative. 1/22 RP 17-18, 78-80; 1/23 RP 56. Further, Dr. Kroll testified that he had sufficient information to make his diagnosis at the time he did. 1/22 RP 16. The defendant also fails to identify who it is that Dr. Kroll should have interviewed and what helpful information they would have provided, especially when considering that even by the defendant's own account, he was not exhibiting signs of severe mental impairment prior to the event.

The defendant criticizes the fact that Dr. Kroll openly questioned the defendant's veracity. Def. br. at 15. In doing so,

Dr. Kroll admitted what was proven and uncontested at trial -- the defendant lied and fabricated evidence by writing letters purporting to be from al Qaeda. 1/22 RP 31-32. After providing a possible reason for the defendant's fabrications – that he may have felt people did not believe him, Dr. Kroll added that in every psychiatric assessment, the doctor must sift through all the information and make the best assessment possible based on all the information, not just one particular piece of information. Id. at 117.

The defendant even criticized the fact that on one occasion Dr. Kroll did not properly state the standards for diminished capacity and insanity. Def. br. at 11, 23. What he fails to mention is that this was during a phone interview with the prosecutor and the doctor did not have the standards with him, he was simply asked to recite the exact standards from memory – something few practitioners have mastered. Dr. Kroll testified that he did not have the standards memorized, that he is well aware of the standards and has used and studied them extensively. 1/22 RP 7, 97-99, 141-42. He testified that he had Washington's written standards with him when he wrote his report. Id.

In sum, the defendant raises many criticisms, but they are just that, criticisms, and unfounded at that. Dr. Kroll is a

well-qualified practitioner (see exhibit 111, Dr. Kroll's curriculum vitae), with decades of experience dealing with a specific population of which the defendant was a part. Calling him as a witness was a tactical and strategic decision that is not called into question by the defendant's complaints.

6. A LACK OF PREJUDICE

All of the above sections deal with the defendant's failure to prove that his trial counsel's actual performance was constitutionally deficient. At the same time, this case is readily resolved by looking at the defendant's failure to prove that but for counsel's alleged deficient performance there is a reasonable probability that the results of his trial would have been different. In re Yates, 177 Wn.2d at 35-36; Strickland, 466 U.S. at 694. Failure under either prong of the ineffective assistance of counsel test is dispositive. Foster, 140 Wn. App. at 273.

The defendant cannot overcome two related factual components of this case.

First, the defendant's actions prior to the stabbings (his preparation in bringing a concealed knife, clothing to change into, rubber gloves and a towel to handle the weapon and avoid leaving prints, and his obtaining the victim's presence on a ruse), and his

actions during the stabbing (calling Valerie by name when he said he was going to kill her, making sure all the windows in the car were up, and chasing after one of the victims), and his actions immediately after the stabbing (fleeing the scene, disposing of his bloody clothing and the weapon, and giving of a false name), are all actions demonstrating knowing, volitional, intentional acts that would be undertaken by a person intending to commit the crime of murder and knowing it is wrong.

Second, add to this the fact that the defendant did not mention terrorist or al Qaeda until six months after he was arrested and jailed and then he created fabricated evidence in an attempt to support his claim, and the defendant's claim of prejudice clearly fails. The defendant wrote and had sent to various people, including himself, letters purporting to be from al Qaeda and threatening to kill him and others.

Even ignoring the very credible testimony of the three victims, and the physical evidence admitted at trial, the defendant cannot show that when these two facets of the case are combined, that but for the alleged deficiencies of his trial counsel, there is a reasonable likelihood that the results of trial would have been different.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 18th day of June, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Mitch Harrison, the attorney for the appellant, at 101 Warren Ave N, Seattle, WA, 98109-4928, containing a copy of Brief of Respondent, in STATE V. EJONGA, Cause No. 70069-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

06/18/14
Date

Done in Seattle, Washington