Supreme Court No. 92030-3
Court of Appeals No. 70069-3-I

SUPREME COURT
OF THE STATE OF WASHINGTON

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JOJO D. EJONGA, Petitioner

v.

STATE OF WASHINGTON, Respondent



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PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

Petitioner, Jojo Ejonga, through attorney Mitch Harrison, asks this court to accept review of the Court of Appeals Order confirming the decision of the Trial Court.

## II. COURT OF APPEALS DECISION

Mr. Ejonga seeks review of the unpublished opinion filed *State of Washington v. Jojo D. Ejonga*, No. 70069-3-I. *See* Appendix A.

## III. ISSUES PRESENTED FOR REVIEW

The Court of Appeals' Opinion denying Mr. Ejonga's request for a new trial based on the ineffective assistance of Defense Counsel violates Mr. Ejonga's rights under the United States and Washington State Constitutions.

## IV. STATUS OF PETITIONER

### i. Background

Growing up in the Democratic Republic of the Congo, Mr. Ejonga contracted cerebral malaria as an infant.[1] Later, as a boy, Mr. Ejonga fell off a balcony and was found unconscious after an unknown period of time.[2] Upon returning home, Mr. Ejonga's mother had to teach him how to

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[1] RP 1/17 at 34.
[2] RP 1/23 at 76.

speak again.[3] Mr. Ejonga was angrier and more irritable, he had persistent headaches and fainting spells, he became more impulsive and his attitude and concentration in school became altered.[4]

In 2005, Mr. Ejonga suffered another blow to his head when a soldier, during a raid of Mr. Ejonga's home, struck him with the butt of his rifle, knocking Mr. Ejonga unconscious.[5] In 2006, Mr. Ejonga was a different person, plagued with nightmares and flashbacks.[6] Mr. Ejonga finally found refuge in the United States around February 2010.[7]

Shortly after his arrival, Mr. Ejonga was rushed to the ER with complaints of headaches, and stomach and back pains.[8] When Mr. Ejonga was finally seen by a doctor, he was hyperventilating and sweating heavily.[9] Although the ER doctor could not find a source for the pain, Mr. Ejonga was given a multitude of drugs, including Ativan (a sedative), Dilaudid and Toradol (pain medications), and Zofran (another pain-reliever/anti-inflammatory).[10]

A classmate, Valerie Maganya, had a chance to get to know Mr.

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[3] RP 1/23 at 77.
[4] RP 1/23 at 86.
[5] RP 1/23 at 87.
[6] RP 1/23 at 87.
[7] RP 1/23 at 88.
[8] RP 1/23 at 88.
[9] RP 1/23 at 88.
[10] RP 1/23 at 88.

Ejonga well; Mr. Ejonga lived with Ms. Maganya's family for some period of time.[11] Ms. Maganya recalls that Mr. Ejonga had mood swings, and he would go from "quite happy and friendly" to cold and angry.[12] When Mr. Ejonga was angry, he would scold Ms. Maganya for dancing with her friends,[13] and when in a good mood, Mr. Ejonga had a habit of saying things that seemed "childish" and odd.[14] Often unprovoked, Mr. Ejonga would inappropriately comment about animals or kids in such a manner that Ms. Manga felt "very uncomfortable."[15]

**ii. The Incident**

On May 8, 2011, approximately one week after the Facebook conversation, Mr. Ejonga called Ms. Maganya and asked if she wanted to come and pick up her money.[16] Sometime between 8:30 and 9:00 pm, Ms. Mangaya arrived at the parking lot in front of Mr. Ejonga's apartment.[17] When the car pulled up, Mr. Ejonga was upset that Ms. Mangaya had brought along her mother and a friend, Tuwalole Bwamba, but he

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[11] RP 1/8 at 31.
[12] RP 1/9 at 35-36.
[13] RP 1/9 at 35-36.
[14] RP 1/9 at 47.
[15] RP 1/9 at 66.
[16] RP 1/9 at 22-23.
[17] RP 1/9 at 23.

proceeded to get in the car anyway.[18]

Sitting behind Ms. Maganya, Mr. Ejonga informed the passengers that his money was being held by his cousin in Des Moines and they would have to drive there to collect it.[19] Ms. Bwamba recalled that Mr. Ejonga appeared to be acting normally when he got in the car.[20] Ultimately, Mr. Ejonga directed the car to a dark parking lot where Mr. Ejonga told them to park.[21]

Upon arrival, Mr. Ejonga told Ms. Maganya that his cousin would be out shortly with the money. Mr. Ejonga called Ms. Bwamba and claimed it was a mistake as he meant to dial his cousin.[22] Mr. Ejonga got back in the car and asked the other passengers what they were doing.[23]

The three passengers mentioned that they were browsing Facebook, when suddenly, Mr. Ejonga began stabbing the three women inside the car.[24] Ms. Mangaya later recalled that Mr. Ejonga did not seem to be in control of himself.[25] During the attack, Mr. Ejonga's face was

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[18] RP 1/9 at 24.
[19] RP 1/9 at 24-25.
[20] RP 1/9 at 102.
[21] RP 1/9 at 25.
[22] RP 1/9 at 25.
[23] RP 1/9 at 25.
[24] RP 1/9 at 26.
[25] RP 1/9 at 55.

blank and he was biting his tongue.[26]

Mr. Ejonga recalled seeing different people in the car chasing him with a knife and gun, and perceived himself to be outside the car.[27] Mr. Ejonga recalls feeling as if he had been struck in the head again, but this time his body became energized.[28] He was no longer in the car with Ms. Mangaya; he was being chased by people carrying knives and guns, while his car was suddenly filled with strange men.[29] He recalls that the people chasing him were yelling unintelligible things, which sounded like Swahili.[30]

### iii. Mental Health Evaluation and Trial

Upon arrival at the jail, Mr. Ejonga mentioned being suicidal and having a history of panic attacks, but that he was not on any medications.[31] Three days later the jail staff was put on alert as Mr. Ejonga was found in his cell, not moving and unresponsive to moderate pain cues; his speech was slow and unclear.[32] A week after Mr. Ejonga first arrived, a jail staff member e-mailed the psychiatric nurse that Mr. Ejonga had been hearing

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[26] RP 1/9 at 56.
[27] RP 1/23 at 95.
[28] RP 1/23 at 95.
[29] RP 1/23 at 94-95.
[30] RP 1/23 at 98-100.
[31] RP 1/23 at 102-103.
[32] RP 1/23 at 104.

voices.[33]

When the doctor visited Mr. Ejonga on May 17, Mr. Ejonga continued to report some symptoms while denying others. Mr. Ejonga refused to admit his feelings of suicide or hearing voices, but admitted that his symptoms of anxiety and panic were chronic.[34] At this time, Mr. Ejonga was prescribed Zoloft.[35] The next day, Mr. Ejonga reported trouble sleeping; he was seeing people in his cell that wanted to cause him harm, even when his eyes were open.[36] His medical request also made mention of hearing voices from his past, when his family was being attacked in their home country.

Later Mr. Ejonga reported nightmares and intrusive imagery. The medical professional believed these delusions could be related to PTSD, and Mr. Ejonga was proscribed Prazosin.[37] The medical staff followed up because Mr. Ejonga was still hearing voices; although he reported the Zoloft helped.[38]

A psychiatric nurse practitioner later met with Mr. Ejonga. Mr.

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[33] RP 1/23 at 105.
[34] RP 1/23 at 105-106.
[35] RP 1/23 at 109.
[36] RP 1/23 at 106.
[37] RP 1/23 at 108.
[38] RP 1/23 at 109.

Ejonga reporting hearing voices and feeling afraid.[39] After another visit, the medical staff determined Mr. Ejonga's hearing voices was generalized anxiety and PTSD-related symptoms.[40] The reports of nightmares did not begin to abate until the end of July.[41]

By September 1, Mr. Ejonga was denying his psychosis but was still struggling with voices and flashbacks that worsened when speaking with his lawyer.[42] On December 1, Mr. Ejonga was hearing voices and having flashbacks while being held in the downtown jail. He complained to the nurse practitioner that his hand was hurting from a microchip that was placed inside of him. Mr. Ejonga mentioned that he may have ended up in this situation because he unknowingly ingested PCP at some point.[43] The nurse practitioner's notes reflect that that Mr. Ejonga exhibited "paranoia, appears logical at times, engaged in interview, frustrated." She diagnosed Mr. Ejonga with PTSD and gave him Abilify, an anti-psychotic useful for treating mood disorders and PTSD.[44]

Overall, Mr. Ejonga was prescribed a variety of medications to help him cope with his symptoms. Mr. Ejonga reported hallucinations, a

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[39] RP 1/23 at 105-10.
[40] RP 1/23 at 110.
[41] RP 1/23 at 110-11.
[42] RP 1/23 at 111.
[43] RP 1/23 at 111-12.
[44] RP 1/23 at 112.

lack of sleep, depression, and auditory hallucinations, such as voices, babies crying, dogs barking and cats screaming.[45] Altogether, he was prescribed Zoloft, Elavil, Prazosin for PTSD and lithium for mood disorders.[46] It was only after being put on this cocktail that Mr. Ejonga reported feeling more settled, calm, and generally less upset, although the symptoms and hallucinations never disappeared.[47]

At trial, Mr. Ejonga's trial attorney put forth an insanity defense. The non-expert witnesses' collective testimony established undisputed facts regarding the time leading up to the attack, the attack itself, and the attack's aftermath. Due to the insanity defense, the expert witnesses analyzed whether Mr. Ejonga met the M'Naghten test.

The defense expert, Dr. Kroll testified first. He diagnosed Mr. Ejonga with PTSD and a delusional disorder.[48] Dr. Kroll based these diagnoses on Mr. Ejonga's extensive history of symptoms and opined that Mr. Ejonga met the insanity standard.

However, on cross-examination, the State revealed several gaping holes in Dr. Kroll's testimony. Dr. Kroll admitted that none of his diagnoses carried symptoms indicating a failure to understand the

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[45] RP 1/23 at 114-18.
[46] RP 1/17 at 87-88.
[47] RP 1/17 at 88.
[48] RP 1/17 at 67.

difference between right and wrong.[49] Additionally, Dr. Kroll admitted that the facts that Mr. Ejonga brought a knife, half pair of scissors, rubber gloves, and a change of clothes and fled the scene were important facts in determining whether Mr. Ejonga knew the difference between right and wrong.[50] Dr. Kroll was also impeached with statements from a pre-trail interview where he could not accurately state and separate Washington's standards for insanity and diminished capacity.[51] Finally, the State elicited evidence belying a thorough psychological analysis: Dr. Kroll did not interview other people other than Mr. Ejonga's mother, he completed his opinion before he received the MRI and EEG results,[52] and the prosecutor used a more recent version of the DSM than Dr. Kroll.

Next, Dr. McClung, the State's expert witness, testified that Mr. Ejonga did not meet the insanity standard. Dr. McClung found it probable that Mr. Ejonga suffered from PTSD and antisocial personality traits.[53] Dr. McClung testified that most people who suffer from PTSD are not violent unless antisocial personality traits are also present.[54] Moreover, Dr. McClung harbored strong suspicions that malingering accounted for many

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[49] RP 1/22 at 10.
[50] RP 1/22 at 55-56.
[51] RP 1/22 at 6-8.
[52] RP 1/22 at 17.
[53] RP 1/23 at 34.
[54] RP 1/23 at 37-38.

of Mr. Ejonga's symptoms. As a consequence, Dr. McClung opined that Mr. Ejonga's PTSD did not cause him to commit the crime[55] nor did Mr. Ejonga meet the insanity standard.[56]

After the conclusion of closing arguments, Mr. Ejonga was convicted on three counts of First Degree Attempted Murder and three counts of First Degree Assault. Accordingly, Mr. Ejonga appeals his convictions.

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This court should accept review because Mr. Ejonga's Defense Counsel was ineffective for failing to argue diminished capacity and choosing to rely on an expert witness that lacked credibility.

Defense Counsel focused almost exclusively on an insanity defense, despite the expert's testimony that Mr. Ejonga's mental capacity was impaired. Based on the testimony of Dr. Kroll, the insanity defense had absolutely no chance of success. Putting forth such a defense, which even the defense expert rejects, should be considered ineffective assistance of counsel. This deficient representation prejudiced Mr. Ejonga because a diminished capacity defense argument had a reasonable probability of success.

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[55] RP 1/23 at 59-60.
[56] RP 1/23 at 68.

### i. Standard of Review

Issues regarding the ineffective assistance of counsel are mixed questions of law and fact that are reviewed *de novo*.[57] This court shall apply the facts to the law and draw its own conclusions regarding a defendant's claims of ineffective assistance of counsel. Under *Strickland*, courts apply a two prong test.

First, the defendant must show that Defense Counsel's performance fell below "an objective standard of reasonableness,"[58] or that trial counsel's performance was objectively unreasonable.[59] Defense Counsel acts unreasonably if his or her actions cannot be viewed as a legitimate "trial strategy or tactics."[60] In other words, if the court can see no reasonable justification for Defense Counsel's actions, the representation must be considered "deficient" under *Strickland*. Then, the defendant must show that Defense Counsel's performance prejudiced the defendant.[61]

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[57] *In re Personal Restraint of Brett*, 142 Wn.2d 868, 874 (2001).
[58] *Strickland v. Washington*, 466 U.S. 668, 689, 80 L. Ed. 2d 674, 104 S. Ct. 2025 (1984).
[59] *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).
[60] *See id*; *see also State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (citing *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)) ("Deficient performance is not shown by matters that go to trial strategy or tactics.").
[61] *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2025 (1984)).

### ii. It Was Unreasonable for Defense Counsel to Rely Solely on an Insanity Defense when the Evidence Only Supported a Diminished Capacity Argument.

Defense Counsel can provide ineffective assistance by failing to raise a diminished capacity defense. Viewing the evidence in a light that is most favorable to the defendant, the defendant will be entitled to advance a diminished capacity defense if three requirements are met.[62] A defendant must show: (1) the charged crime contains a *mens rea* element; (2) there is evidence that the defendant suffers from some sort of mental disorder; and (3) expert testimony allows the jury to reasonably conclude that his mental disorder negated the *mens rea* required for the crime charged.[63] Additionally, the expert's testimony must explain the connection between the disorder and the diminution of capacity.[64]

A diminished capacity defense only requires the defendant to show an inability to form the requisite mental state at the time the crime was committed,[65] unlike a defense of insanity, which requires a complete

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[62] *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Williams*, 93 Wn. App. 340, 348, 968 P.2d 26 (1998); A defendant is entitled to a diminished capacity jury instruction "whenever there is substantial evidence of such a condition and such evidence logically and reasonably connects the defendant's alleged mental condition with the inability to possess the required level of culpability to commit the crime charged." *State v Griffin*, 100 Wn.2d 417, 419, 670 P.2d 265 (1983).

[63] *State v. Atsbeha*, 142 Wn.2d 904, 914, 921, 16 P.3d 626 (2001); *State v. Eakins*, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995); State v. Griffin, 100 Wn.2d 417, 418–19, 670 P.2d 265 (1983); *State v. Guilliot*, 106 Wn.App. 355, 363, 22 P.3d 1266 (2001).

[64] *State v. Edmon*, 28 Wash.App. 98, 103, 621 P.2d 1310, *review denied*, 95 Wash.2d 1019 (1981).

[65] *State v. Edmon*, 28 Wn. App. 98, 103-04, 621 P.2d 1310, 1314 (1981).

inability to tell right from wrong.[66]

When the defendant is able to produce evidence that tends to satisfy a diminished capacity defense, the "failure of defense counsel to present a diminished capacity defense... has been held to satisfy both prongs of the *Strickland* test."[67] In *Tilton*, the defendant smoked marijuana both before and after the act constituting the crime charged and presented evidence of having a history of blackouts caused by marijuana use.[68] The Court, finding deficient representation, determined that a "reasonably competent attorney would have raised "a diminished capacity defense.[69]

Other jurisdictions have gone so far as to recognize that failure to raise the defendant's only plausible defense can constitute ineffective assistance of counsel. In *Keats*, the defendant while inside his home, threatened to kill himself and started a fire in the home. The court found deficient representation because defense counsel raised a diminished capacity defense—which Wyoming does not recognize— because defense counsel failed to conduct an adequate investigation.[70] The opposite mistake that Mr. Ejonga's attorney made.

At trial, Defense Counsel only put forth an insanity defense,

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[66] RCW 9A.12.010.
[67] *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).
[68] *Tilton*, 149 Wn.2d at 784-85.
[69] *Tilton*, 149 Wn.2d at 785.
[70] *Keats v. Wyoming*, 115 .3d 1110, 1119, 2005 WY 81 (2005).

despite presenting facts that best supported a diminished capacity instruction. Overall, Defense Counsel's assistance fell below an objective standard of reasonableness because even the defense expert Dr. Kroll acknowledged that Mr. Ejonga did not meet the legal definition of insanity. Assuming the insanity defense was not impossible, Defense Counsel produced an expert, who lacked credibility and failed to back up his own opinion. In light of the defense expert's admission, Defense Counsel should have argued diminished capacity.

Initially, Dr. Kroll, testified on direct examination that Mr. Ejonga was legally insane at the time he committed the act. Dr. Kroll stated that Mr. Ejonga both was unable to know right from wrong and to appreciate the nature of his actions—satisfying either prong of the insanity standard.[71] The expert also claimed that he held this opinion to a reasonable degree of medical certainty.[72] However, Dr. Kroll immediately recanted his diagnosis when questioned about this opinion on cross-examination.

On cross-examination, Dr. Kroll admitted that "I don't believe any of the diagnoses in this category show an inability to know right from wrong."[73] When the defense expert admits that the diagnosed disorders do not have symptoms that rise to the level of insanity, the jury cannot find

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[71] RP 1/17 at 100.
[72] RP 1/17 at 100.
[73] RP 1/22 at 10.

the defendant insane.

Dr. Kroll even admitted the importance of the State's evidence that strongly contradicted Dr. Kroll's earlier opinion that Mr. Ejonga satisfied the M'Naghten test for insanity. When the State questioned Dr. Kroll about the facts that Mr. Ejonga brought a weapon in the car, carried rubber gloves, fled the scene upon discovery by a witness, and hid the weapon, Dr. Kroll agreed that these were important factors in determining whether someone knows right from wrong.[74] By agreeing with the State and acknowledging the importance of these facts, the defense expert, Dr. Kroll, ensured that the jury could not accept the insanity defense.

However, Dr. Kroll did confidently testify that Mr. Ejonga's capacity was limited by his PTSD, and a delusion order which began to manifest in prison and consisted of randomly occurring hallucinations. Like Keats, Defense Counsel was presented with an opportunity to pursue two different mental capacity defenses. However, instead of choosing diminished capacity which was supported by the evidence and Dr. Kroll's testimony, Defense Counsel choose to pursue the insanity defense which lacked any support. Because Dr. Kroll couldn't testify that Mr. Ejonga was insane at the time the incident occurred, but still testified that his mental capacity was diminished, any "reasonably competent attorney would have

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[74] RP 1/22 at 55-56.

raised "a diminished capacity defense."[75]

### iii. Mr. Ejonga was Prejudiced by Defense Counsel's Decision to Rely on the Testimony from an Expert Witness That Lacked Credibility.

Generally, a decision to actually call a witness will not support a claim of ineffective assistance of counsel.[76] However, trial counsel's competence can be overcome by a showing that counsel failed to conduct an appropriate investigation of the expert's qualifications before calling the expert as a witness.[77] When preparing for trial, defense counsel has a burden to investigate their expert's qualifications. If the defense chooses an expert who cannot support their own argument, courts have found this decision to be prejudicial to the defendant.[78] When an expert witness is exposed at trial as being unqualified to testify on behalf of the defendant, defense counsel has provided ineffective assistance.[79]

The United States Supreme Court recognizes that a defendant could be prejudiced when a jury does not believe an expert.[80] In *Hinton*, the defense counsel's performance was deficient for selecting an expert lacking in credibility: the expert had an outdated education and an odd

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[75] *Tilton*, 149 Wn.2d at 785.
[76] *Thomas*, 109 Wn.2d at 230 (1987).
[77] *Id.*
[78] *Id.* at 231.
[79] *Thomas*, 109 Wn.2d at 231 (1987).
[80] *Hinton v. Alabama*, 571 U.S. ___ (2014).

appearance. Although the expert gave the necessary testimony, the quality of the recovered bullet sample made it impossible to tell whether the bullet was fired from the defendant's gun. On cross examination, the State easily discredited the expert by questioning him about his lack of education and expertise, his poor vision, and how he struggled to use a microscope. The Court immediately recognized the problem with the expert and noted that: "[the expert's] testimony would have done Hinton a lot of good if the jury had believed it."[81] The Court remanded on the issue of whether prejudice occurred, highlighting the potential prejudice that occurred by selecting an expert witness who lacks credibility.

The importance of expert witnesses in an insanity or a diminished capacity defense is paramount to explaining the defendant's limited mental capacity. Defense Counsel's decision to use an expert without credibility prejudiced Mr. Ejonga because there was little chance the jury would believe Dr. Kroll. By putting an expert on the stand who recanted their testimony on the stand, Defense Counsel eliminated the possibility for a diminished capacity defense.

First, Dr. Kroll expert on the stand did not know the legal standards for insanity or diminished capacity. The State interviewed the defense expert before trial—but after Dr. Kroll filed his report—in

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[81] *Hinton v. Alabama*, 571 U.S. ___ (2014).

Defense Counsel's presence. During this interview, the State asked Dr. Kroll whether he was familiar with Washington's diminished capacity standard. During the interview, Dr. Kroll admitted that "I didn't look into it carefully . . . ."[82] Dr. Kroll went so far as to admit that, during the interview he mixed M'Naghten and the diminished capacity standards.[83] There was no strategic reason for putting such a vulnerable expert on the stand.

While being cross-examined, Dr. Kroll went so far as to admit that there was strong evidence showing that Mr. Ejonga knew right from wrong. Specifically, Dr. Kroll ignored in his pre-trial report, but acknowledged at trial that Mr. Ejonga had taken several actions—bringing a knife, scissors, change of clothes, and rubber gloves, and fleeing the scene—which were significant factors in showing that Mr. Ejonga could distinguish right from wrong. Additionally, Dr. Kroll agreed at trial that Mr. Ejonga identifying himself as "Eric" to the arresting police officer,[84] was a suspicious activity showing a deliberate intent to commit the crime.[85] This admission destroyed any chance for Mr. Ejonga to receive any relief based on an insanity defense, but not with a diminished capacity

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[82] RP 1/22 at 6.
[83] RP 1/22 at 8.
[84] RP 1/22 at 53.
[85] RP 1/22 at 53.

approach.

Finally, Dr. Kroll failed to interview any potential witnesses, other than Mr. Ejonga and his mother, and completed his report even before the results of the EEG or the MRI were known.[86] Although Dr. Kroll explained that normal EEG and MRI results do not preclude brain injuries, he explained that a perfectly normal test result was not irrelevant.[87]

In addition to conducting a premature analysis, Dr. Kroll, unlike the State's expert, is not a forensic psychologist, nor does he have anything other than limited experience conducting forensic examination.[88] Forensic psychologists specialize in the nexus between psychology and the law.[89] For an expert's opinion to carry weight with the jury, having the ability and credentials to deftly merge psychology and the law is imperative.

By choosing an expert witness who could not competently testify to a diminished capacity standard, Mr. Ejonga was prejudiced by his counsel. Based only on the defense expert's own testimony, a reasonable jury could not have found that Mr. Ejonga suffered from a diminished mental capacity. Dr. Kroll testified that Mr. Ejonga intentionally placed

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[86] RP 1/22 at 17.
[87] RP 1/22 at 17.
[88] RP 1/17 at133.
[89] RP 1/17 at 145.

himself in a situation likely to trigger negative mental responses and gave a false name when questioned by the arresting police officer. Furthermore, Dr. Kroll was not a forensic psychologist, and was unaware of the difference between insanity and diminished capacity. Like in *Hinton*, where an expert's testimony lacked any sense of credibility, Mr. Ejonga was prejudiced by Defense Counsel's choice to retain an expert who was unable to believe his own testimony, eliminating any chance that the jury could believe him.

As a result, the jury could not believe Mr. Ejonga's claim of insanity, and the jury refused to consider a claim of diminished capacity.

## VI. CONCLUSION

Defense Counsel provided Mr. Ejonga with ineffective assistance at trial. Defense Counsel put forth an insanity defense which was not supported by the evidence, and which was rebutted by its own expert witness at trial. Any other reasonable attorney would have argued diminished capacity, as both the evidence and the two expert witnesses agreed that Mr. Ejonga suffered from some limiting mental condition. Therefore, this court should grant this petition, and remand the case for a new trial based on the actual evidence presented.

July 17, 2015

Respectfully submitted,

Mitch Harrison
Attorney for Petitioner
Washington State Bar Association #43040

## CERTIFICATE OF SERVICE

I, Christopher Wieting, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am employed by the law firm of Harrison Law.

2. At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

3. On the date set forth below, I served in the manner noted a true and correct copy of this **Petition for Review** on the following persons in the manner indicated below:

| | |
|---|---|
| Washington State Court of Appeals<br>Division I<br>One Union Square<br>600 University St<br>Seattle, WA 98101-1176 | ☐ U.S. Mail<br>☐ Email:<br>☐ Fax:<br>☒ Hand Delivery |
| King County Prosecuting Attorney<br>King County Courthouse, Rm W554<br>516 Third Avenue<br>Seattle, WA 98104-2362 | ☒ U.S. Mail<br>☐ Email:<br>☐ Fax: |
| Jojo Ejonga, DOC #366372<br>Washington State Penitentiary<br>1313 North 13th Avenue<br>Walla Walla, WA 99362 | ☒ U.S. Mail<br>☐ Email:<br>☐ Fax: |

DATED this 17th day of July, 2015 at Seattle, Washington.

Christopher Wieting

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON



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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JOJO D. EJONGA,<br><br>Appellant. | ) | No. 70069-3-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: May 26, 2015 |

APPELWICK, J. — Ejonga appeals his conviction for three counts of attempted murder in the first degree. Ejonga asserts that his trial counsel was ineffective for pursuing an insanity defense, rather than arguing diminished capacity. He contends that the State deprived him of due process by destroying video footage that might have supported his mental defenses. He raises four issues in his statement of additional grounds. We affirm.

## FACTS

Jojo Ejonga had a troubled upbringing. He grew up in the Democratic Republic of the Congo, where his father was a bodyguard for President Mobutu Sese Seko. As a child, Ejonga suffered illness and injury, after which his mother noticed a change in his disposition. When Mobutu was removed from power, Ejonga's father was killed. Ejonga was six years old at the time. When Ejonga was 14 years old, his mother was arrested. She escaped and fled to Nigeria. Sometime after his mother's arrest, Ejonga was hit in the head with the butt of a soldier's rifle and knocked unconscious. In 2006, Ejonga met up with his mother in Nigeria, and in 2010, they immigrated to the United States.

Ejonga attended Highline Community College, where he met Valerie Maganya. Maganya and her mother, Estella Nyandwi, are also from the Congo. Ejonga and

Maganya became friends, and Ejonga would occasionally stay over at the house Maganya shared with her mother.

One day, Nyandwi discovered that some of her money was missing. She asked her daughter about it, because there were checks totaling over $1,000 written in Maganya's name. Maganya realized that the handwriting on the checks matched Ejonga's. Maganya also discovered that $3,000 was missing from her own bank account. Maganya confronted Ejonga, who initially denied taking the money. When Maganya told Ejonga there was video footage showing him withdrawing the money, Ejonga confessed and promised to pay her back for the stolen money.

Maganya saw Ejonga again at a birthday party a week later. After the party, Ejonga jumped into a car that was parked in front of Maganya's. Ejonga put the car in reverse and hit Maganya's car. Ejonga then jumped out of the car, laid down, and played dead. The collision caused $1,100 in damage to Maganya's car.

An hour later, Ejonga posted on Facebook that he did not care what happened that night, because he had the best lawyers and they would take care of him. Maganya responded by posting that Ejonga was a thief and a fraud and that no one should let him into their homes. Ejonga then messaged Maganya that he would pay for the car if she took down the post. Mangaya agreed.

On May 8, 2011, Maganya and Nyandwi went out to dinner with Tuwalole Mwamba, Maganya's brother's girlfriend. Mwamba, who was seven months pregnant, had suggested they celebrate Mother's Day together because they were all mothers. On the way home from dinner, Maganya got a call from Ejonga, who asked if she would like

to come pick up her money. Nyandwi and Mwamba volunteered to go along. Maganya drove, Nyandwi was in the front passenger seat, and Mwamba was in the back seat.

At 8:30 or 9:00 p.m., they went to meet Ejonga in the parking lot of his mother's apartment in Kent. Ejonga was upset that Maganya brought Nyandwi and Mwamba along. He told them that he did not have the money, because his cousin had it in Des Moines. Maganya agreed to drive Ejonga to Des Moines to get the money. Ejonga got into the backseat behind Maganya.

Ejonga directed Maganya to the parking lot of an apartment complex. He got out and made a call, accidentally dialing Mwamba instead of his cousin. He then got back in the car, closed the back window, and asked the women what they were doing. Maganya and Mwamba replied that they were on Facebook.

Ejonga then began to stab Mwamba with a kitchen knife. Mwamba was able to escape the car and started to run away. Ejonga then reached into the front seat and stabbed Maganya. He told her, "I'll kill you today, Valerie." He also stabbed Nyandwi, slicing her tongue. Nyandwi and Maganya were eventually able to escape from the car. Ejonga jumped out of the car and chased after Mwamba. When he caught up with Mwamba, he struck her and she fell. Ejonga stabbed her as she lay in a ball on the ground.

A resident from a nearby apartment saw Ejonga attacking Mwamba and yelled at him to let her go. Ejonga ran away. He threw his jacket over a fence, along with a bloody paper towel in which he had been holding the knife. A witness observed him doing so

and directed the police to the items. Another witness saw Ejonga shedding his T-shirt and discarding it.

All three women survived, and one was able to identify their attacker to the police. During an area search nearby, Officer Kevin Montgomery encountered Ejonga walking along the road. It was very dark, so Officer Montgomery drove past Ejonga a few times to make sure he matched the suspect's description. When Ejonga moved into a better lit area, Officer Montgomery stopped and walked up to him. Ejonga told Officer Montgomery that his name was "Eric." He was nervous and sweating. Officer Montgomery observed that Ejonga had scratches on his face, his clothes were disheveled, and there was a dark stain on his shoes that looked like blood.

Officer Montgomery arrested Ejonga. Officers discovered a knife where Officer Montgomery first spotted Ejonga. DNA (deoxyribonucleic acid) profiling showed that Ejonga's and Mwamba's DNA were present on the knife.

Officer Shawn O'Flaherty transported Ejonga to the police station. Later that night, Officer J. Coppedge transported Ejonga from the station to the hospital and back. Patrol car videos were recorded during both transports.

Ejonga was charged with three counts of attempted murder in the first degree and three counts of assault in the first degree.

Ejonga's trial counsel pursued a defense based on mental illness, citing the traumatic experiences from Ejonga's youth. Counsel hired psychiatrist Dr. Jerome Kroll to evaluate Ejonga's mental state at the time of the offense. Ejonga told Dr. Kroll that when he got back into Maganya's car, it seemed that the car was full of al-Qaeda

members who had guns and knives and were going to kill him. Ejonga said he had been suspicious and fearful that night and brought the knife along for protection. According to Ejonga, he believed he was stabbing the terrorists, not the three women he knew. Dr. Kroll diagnosed Ejonga with delusional mood disorder, post-traumatic stress disorder (PTSD), and mood disorder secondary to brain injury. At trial, Dr. Kroll testified about Ejonga's delusion and opined that, as a result of his mental state, Ejonga was unable to know right from wrong, to know the nature of his actions, or to form a criminal intent.

In rebuttal, the State called Dr. Mark McClung, a forensic psychiatrist who also assessed Ejonga. Dr. McClung opined that Ejonga had antisocial personality traits and probable PTSD but also demonstrated malingering psychiatric symptoms. Dr. McClung testified that he did not believe Ejonga's psychiatric problems rendered him unable to appreciate the nature of his actions or the difference between right and wrong.

Ejonga was convicted of three counts of attempted murder in the first degree. He was sentenced to 792 months in custody. He appeals.

## DISCUSSION

Ejonga argues that his trial counsel was ineffective for pursuing an insanity defense, rather than focusing on a diminished capacity defense. He contends that the State denied him due process by destroying patrol car video footage taken after his arrest. He filed a statement of additional grounds, arguing improper expert testimony, ineffective assistance of counsel, and prosecutorial misconduct.

I. Ineffective Assistance of Counsel

Ejonga argues that his trial counsel was ineffective for pursuing an insanity defense, which was certain to fail, rather than focusing on a diminished capacity defense, which had a greater likelihood of success. He further asserts that counsel was ineffective for calling an expert witness lacking in credibility. He maintains that these failures prejudiced him, because there was a reasonable probability the jury would have accepted a diminished capacity defense, especially if supported by a credible expert.

We review de novo a claim of ineffective assistance of counsel. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance claim, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and (2) the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which falls below an objective standard of reasonableness. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If counsel's conduct can be characterized as a legitimate trial strategy or tactic, performance is not deficient. Id. Prejudice occurs if, but for the deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. Id. at 34. There is a strong presumption of effective assistance. Id. at 33.

Insanity is an affirmative defense requiring the defendant to show that, at the time of the commission of the offense, as a result of mental disease or defect, the defendant's mind was affected to such an extent that (1) he was unable to perceive the nature and quality of the act charged or (2) he was unable to tell right from wrong with reference to

the particular act charged. RCW 9A.12.010(1); State v. Crenshaw, 98 Wn.2d 789, 792-93, 659 P.2d 488 (1983). Diminished capacity is not a true "affirmative defense," but an argument that a specific element of the offense, mens rea, has not been proved. See State v. Gough, 53 Wn. App. 619, 622, 768 P.2d 1028 (1989). A defendant is entitled to a diminished capacity instruction when there is substantial evidence of a mental condition that logically and reasonably connects with the inability to possess the required level of culpability to commit the crime charged. State v. Cienfuegos, 144 Wn.2d 222, 227-28, 25 P.3d 1011 (2001).

Ejonga asserts that counsel was ineffective for failing to argue diminished capacity, because that defense, unlike insanity, had a reasonable probability of success. However, the record shows that counsel rigorously pursued the diminished capacity defense. Before trial, she hired Dr. Kroll to evaluate Ejonga's mental state at the time of the incident, including whether he had the ability to form a criminal intent. Dr. Kroll interviewed Ejonga and concluded that Ejonga was unable to tell right from wrong or form the requisite criminal intent. Counsel indicated in her trial memorandum that she intended to pursue both defenses and would call Dr. Kroll to testify.

Counsel continued to pursue the defense at trial. In opening statements, counsel referred to the diminished capacity standard, telling the jury that Ejonga was "incapable of forming a criminal intent." Counsel questioned Dr. Kroll about Ejonga's mental state, and Dr. Kroll opined that Ejonga fit within both the insanity standard and the diminished capacity standard. And, counsel requested—and the court gave—an instruction stating, "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."

Ejonga acknowledges that the jury was given a diminished capacity instruction but asserts that defense counsel failed to argue it to the jury. However, in closing, counsel addressed both defenses, even discussing diminished capacity first. She told the jury that it was "asked to assess [Ejonga's] mental state at the time of the acts charged." After reviewing Dr. Kroll's testimony, she noted that his opinion was that Ejonga was "unable to form intent." She then directed the jury's attention to the relevant jury instructions and explained:

> You'll have two instructions bearing on this. One is the instruction that talks about mental state, that's Instruction No. 7. 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.
>
> So if you find that because of his mental illness or disorder he was unable to form that intent or the premeditation, then you must find him not guilty. But even if you find that the State has proven all of the elements of the crimes, including the mental state, you must still find him not guilty by reason of insanity if you find that it's more probably true than not that as a result of a mental disease or defect the defendant's mind was affected to such an extent that he was unable to perceive the nature and quality of the acts with which he is charged or unable to tell right from wrong with reference to the particular acts with which he is charged.

In sum, Ejonga's assertion that counsel failed to pursue the diminished capacity defense is not supported by the record and provides no basis to find ineffective assistance of counsel.

Ejonga also suggests that counsel was deficient for even pursuing the insanity defense. Defense attorneys in criminal cases have wide latitude to control strategy and tactics, including which defense theory to pursue. See, e.g., In re the Pers. Restraint of

Davis, 152 Wn.2d 647, 745, 101 P.2d 1 (2004). Counsel pursued diminished capacity, the defense Ejonga now argues was proper. Ejonga cites no authority for the assertion that, once counsel has selected a proper defense, counsel is ineffective for pursuing an additional defense that is less likely to succeed.

Ejonga further asserts that defense counsel was deficient in failing to make a self-defense argument to support the diminished capacity defense. However, the aggressor in a conflict may not avail himself of a claim of self-defense. State v. Craig, 82 Wn.2d 777, 783-84, 514 P.2d 151 (1973). Ejonga asserts that he was not the aggressor, because in his delusion the terrorists created the dangerous situation. But, the only evidence of Ejonga's delusion came from the testimony of Drs. Kroll and McClung about what Ejonga told them. Out-of-court statements on which experts base their opinions are not hearsay, because they are not offered as substantive proof, i.e., the truth of the matter asserted. State v. Lucas, 167 Wn. App. 100, 109, 271 P.3d 394 (2012). Instead, they are offered only for the limited purpose of explaining the expert's opinion. Id. The experts' testimony recounting Ejonga's out-of-court statements cannot support a self-defense instruction. And, the substantive evidence—namely, testimony from Maganya, Nyandwi, and Mwamba—contradicts Ejonga's assertion that he was not the aggressor. A self-defense instruction was not proper here. Failing to ask for a self-defense instruction was not deficient.

Ejonga also challenges defense counsel's decision to call Dr. Kroll as a witness, asserting that Dr. Kroll lacked credibility. "Ordinarily, the decision whether to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective

assistance of counsel." State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). Despite this, Ejonga raises numerous criticisms of the expert. None of them demonstrate that Dr. Kroll lacked credibility, much less that counsel was ineffective for calling him.

First, Ejonga asserts that Dr. Kroll demonstrated ignorance of the legal standard. Dr. Kroll admitted that he failed to recall the standard for diminished capacity during a pretrial interview with the prosecutor. However, Dr. Kroll testified that he had the standard in front of him when he wrote his report concluding that Ejonga was unable to form a criminal intent.

Second, Ejonga argues that Dr. Kroll used an outdated copy of the Diagnostic and Statistical Manual of Mental Disorders. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (4th rev. ed. 2000) (DSM-IV-TR); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) (DSM-IV). Dr. Kroll brought the DSM-IV with him to trial, rather than the newer DSM-IV-TR. He testified that he was familiar with the DSM-IV-TR and that it was a "minor update" and that the two volumes are "substantially the same."

Third, Ejonga criticizes Dr. Kroll for interviewing only Ejonga and his mother, whereas the State's expert interviewed several people. The witnesses that Dr. McClung interviewed did not report that they observed signs of mental impairment. That information would have been largely unhelpful to support Dr. Kroll's assessment.

Fourth, Ejonga complains that Dr. Kroll finished his opinion before the electroencephalogram (EEG) or the magnetic resonance imagery (MRI) results were

known. The EEG and MRI results did not indicate any brain abnormalities. But, Dr. Kroll explained that the normal results did not affect his diagnosis.

Finally, Ejonga observes that Dr. Kroll is a psychiatrist, not a forensic psychologist. Ejonga maintains that, for "an expert's opinion to carry weight with the jury, having the ability and credentials to deftly merge psychology and the law is imperative." Ejonga cites no authority for this assertion. And, his suggestion that an expert should specialize in the law is problematic, as an expert witness may not give an opinion on matters involving questions of law. Everett v. Diamond, 30 Wn. App. 787, 792, 638 P.2d 605 (1981).

Ejonga has not shown that his counsel's performance was deficient. His ineffective assistance claims fail.

II. Video Footage of Police Transport

Ejonga contends that the State denied him due process by destroying video footage that might have supported his mental defense. We review an alleged violation of due process de novo. State v. Johnston, 143 Wn. App. 1, 11, 177 P.3d 1127 (2007). Due process requires that the prosecution disclose material exculpatory evidence to the defense and preserve such evidence for use by the defense. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). If the State fails to preserve material exculpatory evidence, criminal charges must be dismissed. Wittenbarger, 124 Wn.2d at 475. To constitute "material exculpatory evidence," the evidence must "possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the

defendant would be unable to obtain comparable evidence by other reasonably available means." Id.

The evidence in question here is video footage taken in Officer Coppedge's patrol car during Ejonga's postarrest transport from the police station to the hospital. The footage was destroyed after 90 days pursuant to police department policy. However, footage of Ejonga's transport earlier that night—from the crime scene to the police station—was preserved. During the earlier transport, Ejonga asked the officer if his parents[1] were notified. Because his father had been dead for many years, Ejonga argued that this demonstrated he was mentally unstable. Accordingly, Ejonga asserted, the destroyed tape might have also been favorable and material to his mental defenses.

If a defendant makes a specific request for evidence preservation, he is denied due process if there is a reasonable possibility the destroyed evidence was favorable and material. State v. Boyd, 29 Wn. App. 584, 589-90, 629 P.2d 930 (1981). A specific request is one giving the prosecutor or police notice of exactly what the defense desired. Id. In Boyd, the court found that a request was sufficiently specific even though the defendant mistakenly requested a recording taken the day after the incident occurred. See id. at 586, 589-90. The request also included the defendant's name, cause number, and the crime involved. Id. at 589. The court reasoned that, because the defendant indicated these specific identifying details, he gave notice of exactly what he wanted notwithstanding the reference to the wrong day. Id. at 586, 589-90.

[1] The State argued below that Ejonga actually asked "is my parent aware," in the singular. Defense counsel disputed this assertion. The video from Officer O'Flaherty's patrol car is not part of the record on appeal.

Here, Ejonga sought "all physical evidence relating to the alleged offense including, but not limited to, police communications (911) tapes, and the scene of the alleged crime" and "[a]ny written or recorded statements and the substance of any oral statements made by [Ejonga]." Although Ejonga's request was not as specific as in Boyd, it explicitly referenced police tapes and recordings of Ejonga's statements. Assuming without deciding that this was sufficiently specific, Ejonga cannot establish a violation of due process. Ejonga acknowledges that he cannot prove the video was exculpatory or material. Nor can he show a reasonable possibility that it was. Officer Coppedge's written report about the transfer indicated no bizarre behavior on Ejonga's behalf. Evidence may be material and favorable if there is a reasonable probability that it tends to rebut a police officer's testimony. City of Seattle v. Fettig, 10 Wn. App. 773, 776, 519 P.2d 1001 (1974). But, Officer Coppedge did not testify, and his report was not admitted into evidence. There is no other evidence as to what occurred during the transport. Thus, Ejonga can make only speculative assertions about the usefulness of the video. This is insufficient to demonstrate a violation of due process. See State v. James, 26 Wn. App. 522, 525, 614 P.2d 207 (1980) ("Speculation that evidence might be exculpatory is not enough.").

Ejonga did not suffer a violation of his right to due process as a result of the video's destruction.

III. Statement of Additional Grounds

Ejonga raises four issues in his statement of additional grounds. First, Ejonga argues that Dr. McClung relied on a test that was not normed for the African population

and was out-of-date. But, the trial court found that the test was not reasonably relied upon by experts in the field and excluded any testimony based on the test.

Second, Ejonga argues that his counsel was ineffective for failing to call as a witness the jail psychiatrist who treated Ejonga. The jail psychiatrist did not testify. Nothing in the record establishes what that testimony would have been. We cannot review this assertion of ineffective assistance.

Third, Ejonga argues that the prosecutor committed misconduct by falsely alleging that he stole Nyandwi's money and damaged Maganya's car. And fourth, Ejonga argues that his counsel was ineffective for failing to object to the prosecutor's allegations. The prosecutor's statements were based on the victims' testimony. The testimony was properly elicited as proof of motive under ER 404(b). The prosecutor did not commit misconduct. Counsel's failure to object was not ineffective.

We affirm.

WE CONCUR: