IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32268-8-III

STATE OF WASHINGTON, Respondent,

v.

ERIC M. HARRIS, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

After fatally shooting his brother, Larch, Eric Harris was arrested and advised of his *Miranda* rights. He told police, "I think I should probably have an attorney present." In spite of his invocation, police continued to speak with Harris and eventually obtained a confession that was introduced against Harris at trial. Harris claimed self-defense, and several eye-witnesses presented conflicting evidence as to what exactly happened and the degree of danger Harris was in when Larch, indisputably, attacked him on his own property. After the State elicited testimony from Harris's cell mate that Harris showed no remorse for the shooting, Harris sought to introduce rebuttal testimony from two witnesses who observed him shortly after the shooting and would have testified that he was crying and hugged one of the witnesses for a long time. The trial court excluded the defense witnesses from testifying, finding that the testimony was hearsay and was not relevant. Harris was convicted of the lesser included offense of second degree murder with a firearm enhancement, and unlawfully possessing a firearm. Despite a paucity of evidence of even drug use by Harris, let alone chemical dependency, the trial court found that Harris suffered from a chemical dependency and ordered him to participate in a drug treatment program and submit to random urinalysis upon his release. These errors require remand.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in denying Harris's CrR 3.5 motion to suppress statements.

ASSIGNMENT OF ERROR 2: The trial court erred in entering finding of fact 2.4 that Harris's request for counsel was equivocal.

ASSIGNMENT OF ERROR 3: The trial court erred in excluding defense witness testimony that was relevant to rebut the testimony of an inmate witness that Harris was not remorseful about the shooting.

ASSIGNMENT OF ERROR 4: The trial court erred in finding Harris suffered from a chemical dependency that contributed to the offense, and imposing affirmative obligations to enter treatment and submit to random urinalysis based on that finding.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Did Harris make an unequivocal request for his attorney when initially advised of his *Miranda* rights? YES.

ISSUE 2: Did the trial court deny Harris the ability to present a defense when it excluded defense witnesses who would have testified that Harris was remorseful about the shooting? YES.

ISSUE 3: Is there evidence in the record from which a finding that Harris suffers from a chemical dependency can be supported? NO.

IV. STATEMENT OF THE CASE

Eric Harris was charged with first degree murder and unlawful possession of a firearm in the shooting death of his brother, Larch Harris. CP 1-3, 9. Numerous witnesses were present at the time. CP 11. Harris left the scene before law enforcement officers arrived and was apprehended the following day. CP 11, 24. Shortly after his arrest, Detective Mike Gilmore interviewed Harris and advised him of his constitutional rights, which Harris acknowledged he understood. CP 24; 1 RP 19. When Gilmore asked if Harris was willing to talk, Harris said, "Well I don't know I think I should probably have an attorney present." CP 24. The following conversation then ensued:

> Gilmore: Okay
>
> Harris: I mean, don't you, I mean uh, I don't know well uh let's just get it over with
>
> Gilmore: alright, you sure? Cause it's your prerogative man ...
>
> George: You gotta ...
>
> Gilmore: Um I mean it is what it is uh we've only got one side of it but I don't want to force you into ...
>
> Harris: well there's only gonna be one side, the other guy's dead

> Gilmore: well I haven't heard from you, see what I'm saying
>
> Harris: k, right
>
> Gilmore: So like I say, I'm not, I'm not gonna push it on ya if, if ya choose to talk to an attorney, that's fine if ya, if ya choose to talk to us that's fine to, but it's it's gotta be your decision man
>
> George: It has to be your decision, Eric
>
> Harris: uh, let's just get it done now.

CP 24-25. Harris then gave a statement implicating himself in the shooting, telling the officers that there had been a fight at his house Thursday or Friday night between Larch[1] and a gentleman named Raymond Peterson. 1 RP 27-28. Afterward, Larch would not leave the property and Harris called 911 to get him to leave. 1 RP 29-30. On Saturday, the day before the shooting, Larch showed up still wanting to fight Peterson, who was also calling Harris about wanting to fight. 1 RP 30.

On the day of the shooting, Harris and a woman named Mary were going to ride a horse, so Harris saddled it and left the halter rope loose so the horse could eat while he had breakfast. 1 RP 31. Harris then saw

[1] Because both brothers and Larch's son Thomas Harris share a last name, for clarity, the Appellant will be referred to as "Harris," the victim will be referenced by his first name, "Larch," and Larch's son (a witness) will be referenced by his first name, "Thomas." No disrespect is intended.

Larch taking the saddle off the horse. 1 RP 31. When asked what he was doing, Larch said the saddle was his and threw it in the back of his truck. 1 RP 31-32. Harris then got a gun out of the back of Larch's truck and fired a warning shot. 1 RP 32. Larch continued to advance on Harris and was hitting him, hard and fast. 1 RP 32-33. Harris fired the gun, not meaning to shoot Larch in the chest. 1 RP 33. Harris denied owning the gun or bringing it out of his house, and he denied knowing what happened to it after the shooting. 1 RP 33, 39. He admitted that he and his brother had fought before and stated, "[I]t was either that or you know, he'd have been, you know, the dominant one, I guess . . . I mean, I had to finish the fight." 1 RP 34-35.

Once the sheriff arrived, Harris ran out back into the field and slept there that night. 1 RP 38. Police searched Harris's house and found parts of the shotgun used in the shooting inside. 1 RP 40. Harris claimed it was just scrap iron. 1 RP 43. He later admitted to firing the gun a couple of times when his brother lived in Idaho. 1 RP 47. Harris was a felon and knew that he was not supposed to possess a firearm. 1 RP 43.

Following a CrR 3.5 hearing, the court found that Harris's request for counsel was equivocal, and that that the further colloquy was necessary to determine whether Harris intended to invoke or waive his right to

counsel. 1 RP 72; CP 374. Following the colloquy, Harris voluntarily waived his right to counsel. 1 RP 72. Accordingly, Harris's statement was admitted at trial. 1 RP 72; 5B RP 899-924; CP 375.

At trial, Harris proceeded on self-defense and necessity theories. CP 38, 271, 289. Multiple eyewitnesses testified on behalf of the State as well as the defense. Larch's son, Tom Harris, testified that Harris ran out from the house yelling at Larch about the horse and they started swinging at each other. 3 RP 336-38. He believed that Larch may have swung or kicked first. 3 RP 344. During a lull in the fight, Harris ran into the house. 3 RP 339. He approached Larch and shot the gun into the air. 3 RP 344. They continued to fight, Harris using the gun to hit Larch. 3 RP 344-45. Thomas claimed to have seen the gun the day before when Harris had it and showed it to Larch. 3 RP 346. According to Thomas, the fight was not very serious and nobody was getting hurt. 3 RP 348. They separated to about ten feet and Larch raised his arms, said "Are you really going to shoot your own brother?" and Harris cocked the gun and pulled the trigger. 3 RP 349-50.

Thomas put Larch in the truck while somebody was calling the ambulance. In the meantime, Harris continued to yell at Larch and nearly

slammed the door on Thomas. 3 RP 351. According to Thomas, Harris was shouting, "You think you're tough now." 3 RP 352.

Other witnesses' testimony deviated from Thomas's testimony in certain respects. Jonathan Elliott, who testified for the State, said that during the confrontation over the saddle, Larch was threatening Harris before throwing the first punch and starting to hit him. 3B RP 446. Elliott turned away as other witnesses left and shut the gate, so he did not see the gun come into play. 3B RP 446-47. When he turned back, he saw Larch punching Harris and Harris backing up. 3B RP 447. Larch was yelling at Harris to shoot him and advancing on him to swing again, and Harris shot him. 3B RP 448. Shortly afterward, Harris came out of the house and gave Elliott a box of shells and told him to go get rid of it. 3B RP 451. Elliott hid the box behind the seat of a car inside a barn, and another witness, Melissa Eldred, hid the gun in the same place. 3B RP 452-53. Elliott also claimed to have seen the gun in Harris's house the day before the shooting. 3B RP 455. Unlike Thomas, Elliott thought the fight seemed serious and that Larch was really trying to hurt Harris. 3B RP 461.

Holly Wilson, another State's witness, testified that she was driving up the driveway when she heard a gunshot. 4 RP 495, 498. She

saw Harris with a gun arguing with Larch. 4 RP 498-500. Wilson recalled that Larch raised his hands up and said "What, are you going to shoot – shoot your brother," and Harris threw a rake at him. 4 RP 500. Larch then ran at Harris and they fought. 4 RP 501. Wilson did not consider the fight serious. 4 RP 502. She disagreed that Harris was swinging the gun at Larch. 4 RP 502. She just remembered Harris lifting the gun and shooting Larch, with an ugly look on his face. 4 RP 503. She also recalled that Harris was not really fighting, it was mostly Larch. 4 RP 504.

In addition to eyewitness and forensic testimony, the State also called Tessa Proctor, who testified that she saw Harris at her house the night before and he was sawing on a gun. 5B RP 943-45. According to Proctor, Harris told her he needed the gun for protection. 5B RP 945.

Lastly, the State called Harris's cellmate, Shane Lyng, to testify about information he received from Harris during their incarceration. 6 RP 1037, 1044. According to Lyng, Harris told him about sawing off the shotgun the day before the shooting. 6 RP 1048. There were some other firearms at his house that Larch gathered up and took home. 6 RP 1049. Harris went with another person to look for Raymond Peterson's truck, and they flattened the tires and shot through the window. 6 RP 1050.

When Larch arrived the next morning, Harris was not happy about being disturbed. 6 RP 1051. Larch yelled at him about leaving the horse saddled and Harris said "Fuck this," and went inside to get his shotgun. 6 RP 1052. Larch was yelling, and after Harris fired a warning shot, Larch attacked him, punching and yelling him. 6 RP 1052-53. Harris went down, and then rolled up and shot Larch. 6 RP 1053. Harris initially tried to shoot and was not able to because the safety was engaged, so he disengaged the safety and shot Larch. 6 RP 1055. He told Thomas, "Get him out of here," went back to the house, and handed off the shotgun and the box of shells and said to get rid of them. 6 RP 1053. According to Lyng, Harris never expressed any remorse over the shooting. 6 RP 1056.

After the State rested, Harris proffered two witnesses who would rebut Lyng's testimony that Harris never expressed remorse. 6B RP 1156-57, 1161. The trial court excluded both witnesses on the grounds that whether Harris felt remorse "doesn't have to do with the mental state at the time of the incident" and that Harris's tears amounted to a nonverbal assertion of fact that was inadmissible under the hearsay rule. 6B RP 1159, 1167-68, 7 RP 1216.

Several defense witnesses testified about the altercation at Harris's house a few nights before the shooting. Jennifer Maners described Larch

coming to Harris's house several times that night and violently attacking her sister. 6 RP 1072-73. Several people tried to stop the fight, and eventually Larch started fighting with somebody else who arrived at the house. 6 RP 1076. Harris intervened and the fight eventually ended, but Larch continued to come back to Harris's house and try to enter, until Harris called the police. 6 RP 1077-78.

Similarly, Raymond Peterson testified about being attacked by Larch at Harris's house while Larch was fighting with his wife. 6B RP 1119-20. Harris and some other people intervened to break up the fight and Peterson left. 6B RP 1122.

Gerald Gurl testified that on the morning of the shooting, he went with Harris to try to find Mary. Gurl claimed that he wanted to find Peterson and slashed the tires on his truck. 6B RP 1128-29. He denied that Harris was armed or damaged the truck. 6B RP 1130. Eventually they picked Mary up and went back to Harris's house. 6B RP 1131. In describing the fatal altercation, Gurl saw Larch and Harris argue and it looked like Larch was going to attack him, but Harris ran back inside the house. 6B RP 1137. Harris fired the warning shot and Larch ran at Harris and kicked and punched him. 6B RP 1138-39. Harris was getting beaten badly and was trying to get Larch to leave, and as Gurl turned to go back

into the house he heard a gunshot. 6B RP 1139-40. Gurl called 911 and Harris and the other people present left. 6B RP 1141-42.

Melissa Eldred testified that she was inside when she heard the argument between Larch and Harris. 7 RP 1222. She asked Gurl to go outside and see what was going on, and Gurl came back in and said it was two brothers fighting. 7 RP 1222. They heard the fight escalate, so Eldred went back outside where she saw Larch attacking Harris. 7 RP 1222-23. She described the attack as violent. 7 RP 1224. She went back into the house and Harris came in and got the gun. 7 RP 1225. Harris fired a warning shot and Larch continued to approach Harris in an aggressive manner. 7 RP 1226. Harris was continuing to tell Larch to get off his property, and Larch was coming toward Harris, yelling. 7 RP 1226-27. When Larch came at him again, Harris pulled the trigger. 7 RP 1228. Eldred described Larch as the aggressor and Harris tried to back away but Larch kept coming at him. 7 RP 1228-29.

Mary Krieger also described the previous fight at Harris's house, where she saw Larch kicking his wife Jamie in the ribs as hard as he could. 7B RP 1325, 1327. She tried to pull Larch off and he punched her twice. 7B RP 1326-27. Harris also tried to pull Larch away and ended up fighting with Larch too. 7B RP 1327-28. Raymond Peterson was arriving

at the house as the fight had finished, and Larch then attacked Peterson. 7B RP 1328-29. Several people then intervened to break up the fight and Peterson eventually was able to run out of the room. 7B RP 1330-31. Larch chased Peterson out of the house and later came back to the house, yelling outside the windows and threatening to shoot them. 7B RP 1331-32. He refused to leave when Harris asked, and Harris had to call the police for help. 7B RP 1333. Larch disappeared about the time the police lights were coming down the road. 7B RP 1334.

On the day of the shooting, Krieger testified that she and Harris were going to ride the horse. 7B RP 1338. After Larch put the saddle in the back of his truck, he and Harris started yelling and Larch swung on Harris. 7B RP 1340. While Larch was hitting Harris, he screamed at him, "You better go get your gun." 7B RP 1342. Harris ran toward the house and came back in the yard and fired a warning shot in the air. 7B RP 1342-43. He told Larch to leave, and Larch refused. 7B RP 1343. Harris then ran up to Larch and struck Larch in the side of the face with the gun. 7B RP 1343. Larch started to swing on Harris and Harris was backing away. 7B RP 1344. She could not see Harris behind a truck, but she saw Larch standing over him, still trying to hit him, as the second shot went off and she heard Larch say, "You shot me in my lung." 7B RP 1347-48. After the shot, Krieger ran inside and told people to leave. 7B RP 1348.

She got in the truck and tried to drive Larch to the hospital, but she could not get the truck in gear. 7B RP 1349. Harris's demeanor was upset after he shot Larch. 7B RP 1351.

The jury acquitted Harris of the first degree murder charge but convicted him of the lesser included offense of second degree murder with a firearm enhancement and unlawfully possessing a firearm. 8 RP 1529-30, CP 346-51. The court rejected Harris's request for an exceptional sentence downward and sentenced him to 204 months' imprisonment on the murder charge with an additional 60 months consecutive for the firearm enhancement. 8 RP 1564, CP 386. The court also found that Harris suffered from a chemical dependency and ordered drug and alcohol treatment and random UA's upon his release. 8 RP 1565, 1567, CP 397, 401. Harris timely appeals. CP 395.

V. ARGUMENT

I. The trial court erred in finding Harris's request for counsel was equivocal and in admitting his statement made after invoking his right to counsel.

If, in the course of a custodial interrogation, a suspect requests counsel, the interrogation must cease until an attorney is present. *Edwards*

v. Arizona, 451 U. S. 477, 101 S. Ct. 1880, 38 L.Ed.2d 378 (1981); *Miranda v. Arizona*, 384 U.S. 436, 474, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Robtoy*, 98 Wn.2d 30, 35, 653 P.2d 284 (1982), *overruled on other grounds by Davis v. U.S.*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994). This rule prevents police "from badgering a defendant into waiving previously asserted *Miranda* rights." *Davis*, 512 U.S. at 458 (*quoting Michigan v. Harvey*, 494 U.S. 344, 350, 110 S. Ct. 1176, 108 L.Ed.2d 293 (1990)).

Invocation of the right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Davis*, 512 U.S. at 459 (*quoting McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 115 L.Ed.2d 158 (1991)). However, mere reference to an attorney does not require cessation of questioning; the request for counsel must be unambiguous. *Davis*, 512 U.S. at 459. To meet this standard, the accused "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.*

In *Davis*, where the accused stated, "Maybe I should talk to a lawyer," the U.S. Supreme Court held that the remark was not a request

for counsel. *Id.* at 462. Similar statements in which the accused "maybe" or "might" want a lawyer, or questions whether a lawyer is needed, have likewise been held no to constitute unequivocal requests for counsel. *See, e.g., State v. Radcliffe*, 164 Wn.2d 900, 904, 194 P.3d 250 (2008) (defendant "did not know if he needed a lawyer"); *U.S. v. Fouche*, 776 F.2d 1398, 1401 (9th Cir. 1985) (*overruled on other grounds in California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L.Ed.2d 690 (1991)) (accused said he "might want a lawyer"); *Norman v. Ducharme*, 871 F.2d 1483, 1484 (9th Cir. 1989) (defendant asked police officer whether he should get an attorney); *U.S. v. Ogbuehi*, 18 F.3d 807, 813 (9th Cir. 1994) (defendant asked officer whether he needed a lawyer); *U.S. v. Doe*, 60 F.3d 544, 546 (9th Cir. 1995) (defendant's mother stated "maybe he ought to see an attorney.")

Here, unlike the conditional expressions found to be equivocal statements that a lawyer is *perhaps* being requested, Harris clearly stated, "I think I should probably have an attorney present." CP 24. It is difficult to conceive of an alternative interpretation that would make it difficult to understand Harris's statement as a request for counsel. *Davis*, 512 U.S. at 459. Because any reasonable law enforcement officer would understand from this statement that Harris wanted his attorney present, questioning should have immediately ceased and Harris's invocation scrupulously

honored. *Edwards*, 451 U.S. at 484-85 ("We further hold that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him.").

In similar cases where the accused used the words "I think" in his invocation, several courts have found that the language does not render the request unequivocal. *See Shedelbower v. Estelle*, 885 F.2d 570, 573 (9th Cir. 1989) (acknowledging invocation when accused stated, "You know, I'm scared now. I think I should call an attorney."); *Cannady v. Dugger*, 931 F.2d 752, 755 (11th Cir. 1991) ("I think I should call my lawyer" was an unequivocal request for counsel); *but see contra, Diaz v. Senkowski*, 76 F.3d 61 (2d Cir. 1996) (no unambiguous invocation when accused stated "I think I want a lawyer," then asked, "Do you think I need a lawyer?" and volunteered statements to police after they informed him they would not speak to him further and would speak to his grandmother); *Burket v. Angelone*, 208 F.3d 172, 197 (4th Cir. 2000) (holding no *Miranda* warnings required when accused stated "I think I need a lawyer" because he was not in custody at the time).

Because Harris's invocation was clear, if not spoken "with the discrimination of an Oxford don," under *Edwards* questioning was

required to immediately case until he had an opportunity to speak with counsel. Any subsequent waiver resulting from police-initiated conversation is presumed invalid. *McNeil,* 501 U.S. at 175 (citing *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404, 89 L.Ed.2d 631 (1986), *overruled on other grounds by Montejo v. Louisiana*, 556 U.S. 778, 129 S. Ct. 2079, 173 L.Ed.2d 955 (2009)). Accordingly, the trial court erred in finding Harris's invocation to be equivocal. Because the statements were obtained in violation of Harris's right to counsel, the statements should have been suppressed at trial.

Statements admitted improperly after a valid invocation are reviewed for harmless error. *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177 (1991) (*citing Arizona v. Fulminante*, 499 U.S. 279, 292, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991)). Because Washington courts apply the "overwhelming untainted evidence" standard of harmless error, the court must evaluate only the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilty. *Reuben*, 62 Wn. App. at 627 (*citing State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

In the present case, the untainted evidence was conflicting as to how the fight transpired, what the apparent motives were, and whether

Harris was in serious danger from Larch when he fired the gun. It is extremely likely that the jury, in evaluating the inconsistencies in the testimony, gave significant weight to Harris's confession and compared it to the other witnesses' statements and the forensic evidence. "A defendant's confession is probably the most probative and damaging evidence that can be admitted against him." *Fulminante*, 499 U.S. at 292 (J. White, dissenting) (internal quotations omitted). The fact that Harris denied ownership of the gun and claimed to have gotten it from Larch's truck, as well as Harris's statement that he had to finish the fight, are statements that a jury likely would have considered carefully in evaluating Harris's self-defense claim. Accordingly, because the untainted evidence was conflicting, it was not so overwhelming as to probably lead to a guilty verdict even without of the statement.

Admission of Harris's post-invocation confession violated his right to counsel and was not harmless. As such, his conviction should be reversed and the case remanded for a new trial.

II. The trial court deprived Harris of his right to present a defense when it excluded defense testimony relevant to Harris's state of mind and to rebut testimony from a State witness that Harris had no remorse.

The right to present a defense through the testimony of witnesses is grounded in the Sixth Amendment to the U.S. Constitution and article 1, section 22 of the Washington State constitution. *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S. Ct. 646, 98 L.Ed.2d 798 (1988); *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). Of course, the defendant has no right to present irrelevant evidence. *Maupin*, 128 Wn.2d at 924-25 (*citing State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). However, if evidence is improperly excluded in contravention of the right to compulsory process, the violation is presumed to be prejudicial and the burden is on the State to prove that the error was harmless beyond a reasonable doubt. *Maupin*, 128 Wn.2d at 929; *State v. Burri*, 87 Wn.2d 175, 182, 550 P.2d 507 (1976) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.Ed.2d 705 (1967)).

In the present case, the trial court excluded two defense witnesses from testifying that Harris was remorseful for the shooting shortly afterward, to rebut testimony presented by the State that Harris did not

show or express any remorse to his cell mate, Shane Lyng. The first witness, Mary Lane, was proffered to testify about Harris's demeanor at the time leading up to and during his arrest. 6B RP 1054-56. Likewise, the defense proffered Stacy Vollendorf to testify to Harris's demeanor and crying shortly before his arrest. 6B RP 1160, 1163.

One of the witnesses was not named on the defense's witness list, having been contacted only within the last couple of days. 6B RP 1155. The State also stated that one of the witnesses had been present in the courtroom during the trial. 6B RP 1157. Defense counsel denied knowing what she looked like and once he learned she was present, immediately told her she had to stay out of the courtroom. 6B RP 1158. The trial court noted these facts, and then further ruled that the testimony would be hearsay and that whether he was remorseful was not relevant to Harris's mental state at the time of the shooting. 6B RP 1159. The trial court further concluded that Harris's act in crying was assertive conduct that amounted to a statement, which could not be introduced through a third-party. 6 RB 1167. The trial court further denied Harris's request to research authority for the position that Harris's demeanor was not hearsay. 6 RP 1166.

The proffered testimony was not hearsay. Non-verbal conduct, such as a wave or a certain finger gesture, may constitute a statement, but it must be intended by the declarant as an assertion. ER 801(a)(2); *In re. Dependency of P.B.*, 104 Wn.2d 643, 652, 709 P.2d 1185 (1985). By contrast, nonassertive conduct is admissible as circumstantial evidence of facts in question as limited by relevance principles. *Id.* at 652-53. The burden is on the party claiming the conduct is assertive, and doubtful cases are to be resolved in favor of admissibility. *Id.* at 654.

To the extent the defense offered Lane and Vollendorf's testimony that Harris hugged Vollendorf and was in tears shortly after the shooting, the conduct sought to be introduced was non-assertive. The trial court accordingly erred in excluding their testimony about Harris's non-expressive conduct under the hearsay rule.

The testimony could still be excluded on grounds of relevance. The threshold of relevance is low and even minimally relevant evidence is admissible. *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). Here, the proffered evidence was circumstantial evidence of Harris's state of mind shortly after shooting his brother. Harris's state of mind was relevant because it was circumstantial evidence that he did not premeditate the shooting, as alleged by the State, but rather reacted under the stresses

of the altercation and wished he had not had to act as he did. It is also relevant to rebut the testimony of Lyng, in response to direct questioning by the State, that Harris never expressed remorse and, to the contrary, was angry, saying things like "Fuck him," and "He was an asshole." 6 RP 1056. Having opened the door to Harris's feelings about his brother and possible motives for the shooting, rebuttal testimony that Harris appeared emotionally distraught about the shooting is certainly relevant to rebut the State's damaging evidence of Harris's coldness and lack of regret.

The evidence was not hearsay, relevant, and should have been admitted. Its exclusion violated Harris's right to compulsory process under the Federal and Washington constitutions. Accordingly, the State must prove that the jury would have reached the same verdict beyond a reasonable doubt had the defense testimony been presented. Here, because of the conflicting testimony, it is nearly impossible to know what factors may have swayed the jury to reject Harris's claim of self-defense, but it is certainly within the realm of reason that the jury considered Lyng's testimony about Harris's lack of remorse as evidence that Harris acted from hatred for Larch rather than concern for his own safety. As such, Harris's inability to rebut that inference and show that he was extremely distraught shortly after the murder was potentially fatal to his

defense. The error was not harmless beyond a reasonable doubt, and the conviction should be reversed and the case remanded.

III. The trial court exceeded its jurisdiction when it imposed drug and alcohol treatment and random UA conditions because there was insufficient evidence that Harris suffered from a chemical dependency that contributed to the offense.

Imposition of sentence conditions that require participation in chemical dependency treatment and other affirmative conduct, such as UA's, requires a finding that the defendant suffers from a chemical dependency. *State v. Warnock*, 174 Wn. App. 608, 612, 299 P.3d 1173 (2013); *State v. Jones*, 118 Wn. App. 199, 208, 76 P.3d 258 (2003). The present version of the Sentencing Reform Act (SRA) provides:

> Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

RCW 9.94A.607. Accordingly, under the statute's plain language, conditions to participate in treatment and perform other affirmative conduct require evidence that (1) the defendant suffers from a chemical

dependency, (2) the dependency contributed to the offense, (3) the conduct ordered is reasonably related to the circumstances of the crime, and (4) the conduct ordered is reasonably necessary or beneficial to the offender and the community for rehabilitation.

In the present case, there was no evidence presented at trial that any drug use by Harris contributed to the offense in any way. At trial, the only testimony about alleged drug use was: (1) An offer of proof made outside the presence of the jury that Larch was worried about his wife going to Harris's house because of her addiction and he believed Harris was giving her drugs, 5 RP 752; (2) Discussion outside the presence of the jury of a letter from Shane Lyng stating that Harris had sold some meth and cleaned a meth bong the night before the shooting, 6 RP 1066-67; (3) A witness, Jennifer Maners, admitted she had used methamphetamine on the night that Larch got into a fight at Harris's house, 6 RP 1079; (4) Another witness, Mary Krieger, admitted she was under the influence of methamphetamine on the day of the shooting, 7B RP 1365. Besides these nominal statements, the only assertions about drug use came from the prosecuting attorney's sentencing argument, and the State's bare assertions, unsupported by evidence, are insufficient. *See, e.g., State v. Hunley*, 175 Wn.2d 901, 910, 287 P.3d 584 (2012).

Even if this bare showing were sufficient to establish drug use by Harris, it does not establish the existence of a dependency. Washington courts have recognized that chemical dependency is a mental disorder, with specific diagnostic criteria adopted by the American Psychiatric Association and published in the Diagnostic and Statistical Manual of Mental Disorders. *See State v. Hutsell*, 120 Wn.2d 913, 917, 845 P.2d 1325 (1995). None of the arguments and evidence presented provide sufficient evidence that any drug use by Harris rose to the level of a chemical dependency.

Moreover, there is simply no connection alleged or shown between any drug use by Harris and the circumstances of the crime in question. There was no allegation or suggestion that Harris was under the influence of drugs at the time of the offense, or that drugs served as any part of the motivation for the offense.

Thus, on the record before the court, the trial court's imposition of chemical dependency and UA conditions exceeded the trial court's jurisdiction because there is insufficient evidence to support a finding of chemical dependency that contributed to the offense. The finding of chemical dependency and the conditions imposed should be stricken from the judgment and sentence.

VI. CONCLUSION

For the foregoing reasons, the conviction and the judgment and sentence herein should be reversed and the case remanded for further proceedings.

RESPECTFULLY SUBMITTED this 4th day of September, 2014.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Timothy Rasmussen
Stevens County Prosecutor
215 S. Oak Street
Colville, WA 99114

Eric M. Harris, DOC # 888118
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

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

Signed this 4th day of September, 2014 in Walla Walla, Washington.

Breanna Eng