NO. 45789-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BOBBY JERREL SMITH II,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

APPELLANT'S OPENING BRIEF

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Robert Fowler came into Billy Jerrell Smith's home uninvited, demanded money, and threatened to cut Mr. Smith's throat while brandishing a knife. Mr. Smith feared for his life and shot Mr. Fowler several times, killing him. After charging Mr. Smith with murder, the prosecution insisted Mr. Smith could not offer evidence about how prior traumatic experiences affected him because the legal test for self-defense did not include his subjective perspective. Although this was the wrong legal standard, the court agreed. The court also let a police detective give his opinion that Mr. Smith was lying about having been threatened with a knife, despite Mr. Smith's objection.

When the jury convicted Mr. Smith, the probation department joined his request for a lesser sentence based on his imperfect efforts to defend himself from an intruder in his home. The court refused based on its belief that it would be disregarding the jury's verdict to impose below the standard range.

B. ASSIGNMENTS OF ERROR.

1. The court denied Mr. Smith his Sixth Amendment right to present a defense and Fourteenth Amendment right receive a fair trial

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A. INTRODUCTION.

Robert Fowler came into Bobby Jerrell Smith's home uninvited, demanded money, and threatened to cut Mr. Smith's throat while brandishing a knife. Mr. Smith feared for his life and shot Mr. Fowler several times, killing him. After charging Mr. Smith with murder, the prosecution insisted Mr. Smith could not offer evidence about how prior traumatic experiences affected him because the legal test for self-defense did not include his subjective perspective. Although this was the wrong legal standard, the court agreed. The court also let a police detective give his opinion that Mr. Smith was lying about having been threatened with a knife despite Mr. Smith's objection.

When the jury convicted Mr. Smith, the Department of Corrections investigated the case and asked the court to impose a lesser sentence based on his imperfect efforts to defend himself from an intruder in his home. The court refused based on its belief that it would be disregarding the jury's verdict to impose below the standard range.

B. ASSIGNMENTS OF ERROR.

1. The court denied Mr. Smith his Sixth Amendment right to present a defense and Fourteenth Amendment right receive a fair trial

by barring information relevant to showing his belief he was acting in self-defense.

2. The court violated Mr. Smith's state and federal constitutional rights to a fair trial by jury when admitting a detective's opinions about the State's evidence and Mr. Smith's veracity.

3. The court improperly refused to give a limiting instruction when admitting a police detective's opinions about the case.

4. Cumulative error denied Mr. Smith a fair trial.

5. The court misapplied the law and failed to exercise its discretion when denying Mr. Smith's request to impose a sentence below the standard range.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether a person justifiably acts in self-defense is measured by his perception that such force was necessary coupled with how a reasonable person would have acted when standing in his shoes. Misrepresenting self-defense as only how a reasonable person would act, the prosecution convinced the court that Mr. Smith's subjective beliefs were irrelevant and the court limited evidence that Mr. Smith had suffered a prior traumatic incident that affected his feelings when Mr. Fowler threatened him in his living room. Did the court's ruling

barring evidence of experiences affecting how Mr. Smith reacted when threatened by an intruder violate his right to present a defense?

2. No witness may offer opinions on the veracity of the accused and opinions offered by a police officer are particularly prone to influencing the jury. A police detective said Mr. Smith's explanation of the incident was scientifically impossible and could not be true. Over Mr. Smith's objection, the detective's opinions were admitted for their truth, without any limiting instruction, even though his opinions involved disputed facts and inaccurate scientific theories. Did the court's admission of opinion testimony by a police detective invade the province of the jury and deny Mr. Fowler a fair trial?

3. A court is authorized to impose a sentence below the standard range based on mitigating factors such as having acted in self-defense, not provoking the incident, or having a mental disorder. The Department of Corrections joined Mr. Smith's request for an exceptional sentence below the standard range based on the unprovoked intrusion into Mr. Smith's home that caused him to believe he needed to defend himself from deadly force. But the court refused because the jury had not found Mr. Smith acted in self-defense. Did the court

misunderstand its authority to impose a sentence below the standard range and reject the request based on the wrong legal standard?

D. STATEMENT OF THE CASE.

In 2011, 58-year-old B.J. Smith lived with his developmentally disabled daughter and they kept to themselves. 10/14/13RP 42. Mr. Smith was honorably discharged from the Navy after suffering from post-traumatic stress disorder that left him with severe nightmares and an inability to handle stressful situations. 10/10/13RP 40, 54; 10/14/13RP 39; CP 114.

Mr. Smith met Robert Fowler a few months before this incident. 10/14/13RP 42. Mr. Fowler told Mr. Smith he had been in prison five times, once for assaulting a girlfriend with a machete and another time for armed robbery. *Id.* at 44. He also claimed to have been a Marine who served in Vietnam, where he described killing people by cutting their throats. *Id.* at 43. More recently, Mr. Fowler was arrested when he stabbed his own mattress because he imagined there was an intruder inside it. Ex. 59 at 3; 10/14/13RP 46. Mr. Smith suspected Mr. Fowler was delusional and offered to get him help from the Veteran's Administration where Mr. Smith received aid for his post-traumatic stress disorder (PTSD). Ex. 59 at 3-4. Mr. Smith grew "more and more

afraid" of Mr. Fowler and warned him "do not come over any more" because Mr. Smith had "bad PTSD" and Mr. Fowler's visits were "stressin' me out." Ex. 59 at 3, 7.

On June 20, 2011, Mr. Fowler came to Mr. Smith's home, knocked forcefully, and asked for beer and $20. Ex. 59 at 7, 13. Mr. Smith told him he could not come in, but Mr. Fowler begged and Mr. Smith relented. 10/14/13RP 51. Once inside, Mr. Fowler told Mr. Smith, "you have the money, I know you do. You're rich." Ex. 59 at 7. When Mr. Smith refused, Mr. Fowler grabbed a knife resting on a table and said, "Now give me money or I'll cut your throat." *Id.* Mr. Smith had a concealed weapons permit and was carrying a gun under his clothes. Ex. 59 at 10; 10/14/13RP 50. He pulled out his gun, but Mr. Fowler said, "I'm not scared of that! And he kept comin' toward" Mr. Smith. Ex. 59 at 7; 10/14/13RP 53.

Afraid for his life, Mr. Smith fired the gun. Ex. 59 at 14-15. Mr. Smith thought he missed because he saw Mr. Fowler continue moving while holding the knife. Ex. 59 at 15-16. Mr. Smith fired again but thought he only "nicked" Mr. Fowler, who turned and started moving upstairs where Mr. Smith's daughter was asleep. Ex. 59 at 16. Mr. Smith said, "there's no way you're getting to my daughter," and fired

three more shots. Ex. 59 at 17-19. He "never saw any of my rounds hit" Mr. Fowler until the last shot, which he aimed at Mr. Fowler's head because he feared Mr. Fowler was still threatening him with a knife and capable of hitting him with it. Ex. 59 at 19-20, 22, 29. Throughout the incident, Mr. Fowler still had the knife in his hand, causing Mr. Smith to be "afraid for my life and my daughter's life." Ex. 59 at 29. Mr. Smith had been taught in the military that when under the threat of deadly force, he must shoot until the threat ended, stopping the situation. Ex. 59 at 17, 54-55.

The entire incident was "very quick"; it was "a few seconds of absolute terror" and "a complete blur" to Mr. Smith. 10/14/13RP 53-54. Mr. Smith immediately called 911 and waited for police as directed. *Id.* at 57. He consistently described this incident to several police officers in multiple recorded interviews. Ex. 59, Ex. 95A, Ex. 103.

Mr. Smith was charged with first degree intentional murder. CP 94. At his trial, forensic pathologist Daniel Selove described five bullets that entered Mr. Fowler's body, some exiting and reentering the body, which caused his death. 10/10/13RP 152. Mr. Fowler appeared to have been hit first in his shoulder, non-fatally, and then in his chest, ear, and head, with bullets traveling different paths in his body. 10/10/13RP

153, 155-58, 175. It was likely that two bullets fired close in time caused most injuries and Dr. Selove thought that the direction of the blood loss indicated he was lying down when the last two bullets were fired. 10/10/13RP 165, 171-72.

The State theorized that Mr. Fowler could not have been holding a knife as Mr. Smith said because there appeared to be blood on Mr. Fowler's hand and yet his blood was not on the knife. 10/14/13RP 10, 123. There was some DNA on the knife, but the partial profile could not exclude either Mr. Smith or Mr. Fowler, and the knife belonged to Mr. Smith. 10/10/13RP 88-89. Detective Kevin Spencer told the jury that it was "scientifically" impossible for Mr. Fowler to have been holding the knife based on the lack of blood on the knife; this opinion was admitted despite Mr. Smith's objection. Ex. 100 at 15-17; 10/2/13RP 2-4, 7. Dr. Selove said he had not tested Mr. Fowler's hands to determine whether the substance on his hands was blood. 10/10/13RP 173.

Mr. Fowler's girlfriend, Karla Pennington, and her brother said Mr. Fowler appeared to be in a good mood earlier in the day, although they were not present at the time of the incident. 10/9/13RP 91-92, 95

Mr. Fowler had marijuana in his system but the forensic investigators did not know when he consumed it. 10/14/13RP 13.

The jury convicted Mr. Smith of second degree murder as a lesser included offense. CP 21. Mr. Smith asked the court for an exceptional sentence below the standard range because he was defending himself against a threatening intruder in his home, as well as his lack of predisposition, as shown by his lack of criminal history, honorable military service, and age. 1/14/14RP 22-26. Several community members spoke on his behalf and the Department of Corrections concurred with Mr. Smith's sentencing recommendation. 1/14/14RP 26-30; CP 117-18. The court refused because it believed that it would be disregarding the jury's verdict to use Mr. Smith's self-defense as the basis for a lesser sentence. 1/14/14RP 37, 40.

E. ARGUMENT.

1. **By using the wrong legal standard governing self-defense to bar evidence about Mr. Smith's point of view and refusing to limit a police officer's unscientific lay opinions about disputed evidence, the court denied Mr. Smith a fair trial.**

The "constitutional floor" established by the Due Process Clause "clearly requires a fair trial in a fair tribunal" before an unbiased court. *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797, 138 L.

Ed. 2d 97 (1997); U.S. Const. amend. 14; Wash. Const. art. I, § 3, 21, 22. The right to a fair trial includes the right to present a defense, which means, "at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 107 L. Ed. 2d 708, 110 S. Ct. 668 (1990) (improper evidentiary rulings deprive a defendant of due process where it is so unfair as to "violate[ ] fundamental conceptions of justice").

Numerous erroneous court rulings throughout the course of Mr. Smith's trial denied him his right to a fair trial, as detailed below.

a. *Using the wrong legal standard, the court impermissibly refused to admit evidence relevant to Mr. Smith's defense.*

i. *Self-defense is judged from the defendant's point of view.*

The right to bear arms in self-defense is "deeply rooted" and "fundamental" to our concept of liberty. *McDonald v. City of Chicago, Ill.*, 561 U.S. _, 130 S. Ct. 3020, 3036-37, 177 L. Ed. 2d 894 (2010);

State v. Sieyes, 168 Wn.2d 276, 292, 225 P.3d 99 (2010); U.S. Const. amends. 2, 14; Art. I, § 24 ("The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired.")

It is a "well-settled principle in Washington" that the jury must view self-defense from the conditions as they appeared to the defendant. *State v. Walden*, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The prosecution bears the burden of disproving, beyond a reasonable doubt, that the defendant reasonably believed force was necessary to defend himself against imminent bodily harm. *Id.* at 473.

Self-defense has subjective and objective components. The jury "must place itself in the defendant's shoes and view the defendant's acts in light of all the facts and circumstances the defendant knew when the act occurred." *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

> [Jurors are to] put themselves in the place of the appellant, get the point of view which he had at the time of the tragedy, and view the conduct of the [deceased] with all its pertinent sidelights as the appellant was warranted in viewing it. In no other way could the jury safely say what a reasonably prudent [person] similarly situated would have done.

State v. Janes, 121 Wn.2d 220, 238, 850 P.2d 495 (1993) (quoting *State v. Wanrow*, 88 Wn.2d 221, 235–36, 559 P.2d 548 (1977)).

As explained in *Janes*, self-defense is premised on the defendant's own experiences, even those experiences that occurred earlier in time:

> the jury is entitled to stand as nearly as practicable in the shoes of [the] defendant, and from this point of view determine the character of the act. Also, the jury is to consider the defendant's actions in light of *all* the facts and circumstances known to the defendant, even those substantially predating the killing. The self-defense evaluation is objective in that the jury is to use this information in determining "what a reasonably prudent [person] similarly situated would have done.

121 Wn.2d at 238 (internal citations omitted). The subjective component of self-defense ensures "the jury fully understands the totality of the defendant's actions from the defendant's own perspective." *Id.* at 239.

ii. *The prosecution convinced the court to bar evidence showing Mr. Smith's point of view based on the wrong legal standard.*

Insisting the legal standard for self-defense asks only what a "reasonable person" would do, the prosecution moved to limit evidence about Mr. Smith's personal experiences and mental state, claiming this information was irrelevant and misleading. 9/19/13RP 59; CP 126-28. The premise of the prosecution's argument was that there is no

"subjective standard to self-defense," only the "reasonable person" test. 10/7/13RP 21.

As *Janes* explains, the "objective" component of self-defense asks "what a reasonably prudent [person] similarly situated would have done."121 Wn.2d at 238. But the prosecution ignored the equally important subjective prong entitles the jury to "determine the character of the act" from the defendant's point of view, "in light of *all* the facts and circumstances known to the defendant." *Id.* (emphasis in original); *see generally State v. Corn*, 95 Wn.App. 41, 53, 975 P.2d 520 (1999) (reversing conviction where jury instruction "misstated the subjective nature of the self-defense analysis"); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.04.01 (3d Ed) ("a defendant's actions are to be judged against his or her own subjective impressions rather than those that a detached jury might determine to be objectively reasonable").

Subjectively, how PTSD affected the accused's viewpoint is a pertinent, admissible consideration in a self-defense case. *See, e.g., State v. Green*, _ Wn.App. _, 328 P.3d 998, 997 (2014) (well-established that "PTSD can affect a person's perception" and is relevant in a self-defense case). As a lay witness, Mr. Smith's perceptions of his mental state, colored by his prior experiences in life-threatening

situations and his belief that stressful situations make him crumble, would be helpful to understanding his point of view and relevant to determining the justification for his actions. ER 701; ER 403.

Despite the established subjective standard of measuring whether a person acted justifiably in self-defense, the prosecution insisted that Mr. Smith's discussion of PTSD was entirely irrelevant and it was "concerned" that if the jury heard this evidence, Mr. Smith might "argue there is a subjective standard to self-defense." 10/7/13RP 21. It further asserted that the only vehicle for Mr. Smith to explain how PTSD affected him would by through expert testimony. *Id.* Mr. Smith did not plan on offering an expert to discuss PTSD, but expected to elicit evidence that Mr. Smith's actions were affected by his prior experiences, including his impression of how PTSD affected him. 10/7/13RP 16, 17. He argued that this information was part of "how he sees the world" and it was relevant to his intent and his relationship with Mr. Fowler. *Id.* at 16-17, 20.

Based on the State's incorrect explanation of the law, the court redacted a significant portion of Mr. Smith's interview with Detective Spencer and prohibited Mr. Smith from explaining how PTSD affected his actions. 10/7/13RP 18-19. The excised portion of Mr. Smith's

statement to Detective Spencer included Mr. Smith's explanation of how he felt during the incident. Ex. 95A at 19.

In the redacted portion of the interview, Mr. Smith said his PTSD arose from a near death experience while serving on a submarine in the Navy, which he saw as "closely related" to this incident. Ex. 95A at 19. He felt he was similarly "faced with imminent death" during the submarine incident as when confronted by Mr. Fowler. *Id.* Trying to save his life on the submarine was "similar, because I was faced with imminent death . . . and I was forced to take action to attempt to save my life and then, the life of my daughter." *Id.*

He also explained how he followed his military training during the incident, having been trained to stop a lethal threat. Ex. 95A at 26. In the military, they would "train, train, train, train" so they would respond to danger instinctively. *Id.* On the submarine, he knew immediately how to handle danger, without asking a supervisor, and likewise, when Mr. Fowler confronted him with a knife and threatened to cut Mr. Smith's throat, Mr. Smith's "training" was to "draw your weapon . . . the number one reason for use of deadly force is imminent death to your own person." *Id.* at 27.

To understand Mr. Smith's perspective when confronted by Mr. Fowler, it was necessary to understand his military experience, including the stressful situation that left him disabled. His prior traumatic experiences on the submarine in the Navy caused him to "crumble" in routine situations, such that he could not hold a job even though he appeared healthy on the outside. Ex. 95A at 13. Mr. Smith said he had to "constantly" tell himself he was not on the submarine anymore. *Id.* at 32.

His explanations to the detective about having post-traumatic stress was not akin to an expert's diagnosis of a mental defense, because he considered his PTSD as a physical disorder stemming from a prior traumatic experience and he had no other mental disorders. Ex. 95A at 13, 20-21. Having PTSD was an experience that profoundly affected him and shaped how he conducted his life, including living quietly, keeping to himself, and guarding against his nightmares. By keeping him from explaining this aspect of his point of view at the time of the incident, the court did not let the jury hear critical information for assessing his conduct. *See James*, 121 Wn.2d at 239 ("by learning of the defendant's perceptions and the circumstances surrounding the act, the jury is able to make the '*critical determination* . . . seeing what he sees

and knowing what he knows'") (*quoting Wanrow*, 88 Wn.2d at 238; emphasis added in *Janes*).

The jury was entitled to stand in Mr. Smith's shoes, knowing all he knew, which included his present-day feelings of fear and vulnerability arising from his previous experiences with life-threatening trauma. Information affecting his perspective was an essential part of his right to present a defense.

The right to present a defense prohibits a judge from limiting the defendant's elicitation of relevant evidence about the incident. *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). Evidence relevant to a theory of defense may be barred only where it is of a character that undermines the fairness of the trial. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The State bears the burden of showing that the evidence is "so prejudicial as to disrupt the fact-finding process at trial." *Jones*, 168 Wn.2d at 720 (quoting *Darden*, 145 Wn.2d at 622). For evidence of high probative value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." *Id.*

The court's ruling denied Mr. Smith his right to "put before a jury evidence that might influence the determination of guilt." *Ritchie*,

480 U.S. at 56. The jury was required to view the evidence from Mr. Smith's perspective to determine whether Mr. Smith acted in self-defense, yet the court excluded relevant, material evidence that explained Mr. Smith's subjective perspective.

b. *The court impermissibly admitted a police officer's opinions about the strength of the evidence and untrue scientific conclusions and refused to give a limiting instruction.*

i. *A police officer's opinions about the plausibility of the defense are generally inadmissible.*

Generally, witnesses are barred from giving opinions about the accused person's credibility, guilt, or strength of the evidence. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Police officers carry an "aura of reliability" when testifying. *Id.* at 595. Opinions voiced by police officers are "especially prone to influence" jurors. *State v. Demery*, 144 Wn.2d 753, 772, 30 P.3d 1278 (2001) (Sanders, J., dissenting); *see also State v. Barr*, 123 Wn.App. 373, 384, 98 P.3d 518 (2004) ("the opinion of a government official, especially a police officer, may influence a jury").

It is "clearly inappropriate" for witnesses to give opinions of their personal beliefs about the accused's guilt, his intent, or his

veracity. *Montgomery*, 163 Wn.2d at 591. Such opinions are improper "whether direct or by inference." *Id.* at 594.

Police officers may not offer expert opinions about scientific conclusions unless qualified by the court. ER 701; ER 702. Before any such opinion is offered, "certain procedures must be followed" to "lay the proper foundation for opinion testimony." *Montgomery*, 163 Wn.2d at 592. Under ER 702, a witness must be qualified as an expert by "knowledge, skill, experience, training, or education" before testifying to an opinion. Even an expert may not give on opinion on facts beyond her area of expertise. *State v. Hudson*, 150 Wn.App. 646, 654-55, 208 P.3d 1236 (2009).

In *Montgomery*, two defendants were charged with possession of pseudoephedrine with intent to manufacture methamphetamine. 163 Wn.2d at 583. A police officer testified that he "felt" the defendants were "buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different stores, going to different checkout lanes. I'd seen those actions several times before." *Id.* at 588. A chemist similarly testified, without objection, that the "combined purchases" of the defendants "are all what lead me toward this pseudoephedrine is possessed with intent."

Id. The court held this testimony was an improper opinion on the defendant's guilt. *Id.* at 594-95.

In *Demery*, the jury heard a recorded interview of a detective questioning the defendant. 144 Wn.2d at 757. The detective asked the defendant whether he was going to "stick with" his story, and said he should "start telling the truth." *Id.* at 756 & n.2. The defendant told the officers they were looking at him like they thought he was lying. An officer responded, "Cause you are." *Id.* at 756 n.2.

In a split ruling, five justices held that the officer's statement that he did not believe the defendant was telling the truth was inadmissible opinion evidence. 144 Wn.2d at 765 (Alexander, J., concurring); *Id.* at 769-70 (Sanders, J. dissenting). [1] They reasoned that when statements made during interrogation are offered into evidence,

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[1] The four-justice "lead" opinion ruled that jurors understood the detectives' statements during interrogations were not offered as opinion evidence but as background. 144 Wn.2d at 760.

Concurring in the result, Justice Alexander agreed with the dissent that if an officer's opinion would be inadmissible as in-court testimony, it cannot be admitted simply because it was a statement made during interrogation. *Id.* at 765 (Alexander, J., concurring). However, he believed the erroneous opinion testimony was an insignificant part of the State's case. *Id.*

The four-justice dissent stated that opinions offered by police officers are inadmissible evidence, and this rule applies when made in a suspect's recorded interrogation. *Id.* at 700-72.

they must be admissible under the rules of evidence, including ER 803(a)'s prohibition on opinion testimony. *Id.*

The remaining four justices agreed that an officer's opinion about a case is unfairly prejudicial and irrelevant. *Id.* at 759 (Owens, J. plurality). If using an officer's statements to provide context for the defendant's responses, the court should give a limiting instruction to the jury, "explaining that only the defendant's responses and not the third party's statements, should be considered as evidence." *Id.* at 762.

In *State v. Dolan*, 118 Wn.App. 323, 329, 73 P.3d 1011 (2003), a father was charged with assaulting his child. The prosecutor asked a police officer whether "there was any indication" the mother could have caused the child's injuries. *Id.* at 328. The officer responded, "I don't believe so." *Id.* The prosecutor asked a Child Protective Services case worker why the mother was not required to leave the home and the witness responded that she "didn't feel the child was at risk with [the] mother and she wasn't really the person in question." *Id.* at 329.

This Court concluded that these witness' opinions were not based on personal or special knowledge and were inadmissible under ER 701 and ER 702. *Id.* In addition, their opinions whether the evidence implicated the child's mother "was up to the jury, not a

witness." *Id.* These improper opinions were influential in the case because they were "expressed by a governmental official." *Id.*

ii. *The court admitted improper opinion testimony from a police officer.*

Demery teaches that evidence offered in a recorded interview is no different than evidence offered by in-court testimony and comments made during interrogation are not exempt from the rules of evidence. 144 Wn.2d at 770 (Sanders, J. dissenting); 144 Wn.2d at 765 (Alexander, J., concurring). Here, the court's instructions to the jury underscore this rule.

The court directed the jury to treat all evidence equally, including evidence from "witnesses, stipulations, and the exhibits that I have admitted during the trial." CP 24 (Instruction 1). It instructed the jury that it "must consider all of the evidence that I have admitted" to decide whether a proposition has been proven. CP 25 (Instruction 1). It defined circumstantial evidence as evidence the jury "may reasonably infer" based on common sense and experience, and said this evidence is as valuable as direct evidence. CP 28 (Instruction 3).

The detective's recorded interview was played for the jury and admitted as an exhibit. 10/10/13RP 103, 106-07; Ex. 100. The court's

instructions required the jury to consider the detective's statements during the recorded interview for their truth, and draw any available inferences, when deciding whether Mr. Smith acted in justifiable self-defense. CP 24, 25, 28. The court refused Mr. Smith's request to instruct the jury not to consider the detective's statements during the recorded interview for their truth. 10/10/13RP 104-05.

During the portion of the interview admitted as Ex. 100, Detective Spencer gave a lengthy discourse on the properties of blood evidence. Ex. 100 at 8-15. He said he had researched and studied a lot about latent evidence, including blood evidence left at a crime scene. Ex. 100 at 7-8. His qualifications also included being a "weapons specialist" who did "a lot of firearms investigation" as well as being "trained and certified" as "a tactical tracker" keenly aware of "detail" that is critical to crime scene investigation. *Id.* Jurors generally assume an officer is reliable based on his training and experience, and here, Detective Spencer said in the recorded interview that he was a particularly qualified in crime scene investigation. *See Coffel v. Clallam Cnty.*, 58 Wn.App. 517, 523, 794 P.2d 513 (1990) ("Police officers are presumed to know the penal laws").

However, his discussion of blood evidence was not actually true, nor was he qualified to offer expert opinion on blood evidence. 10/9/13RP 104-05; 10/10/13RP 16-17. For example, he claimed that "under a microscope" each animal has observably different types and shapes of blood cells, which is inaccurate. *Id.* He insisted that the "magnetic properties" and "salt content" of blood affected its quickness to dry, which was not supported by any forensic expert witness. Ex. 100 at 14; *see* 10/10/13RP 112-13.

The jury heard the detective's opinion that "scientifically" Mr. Fowler "was not holding that knife when he got shot" because the forensic tests found "absolutely no red blood cells on the knife." Ex. 100 at 15, 17. If Mr. Fowler had been holding knife, his blood would necessarily be found on it, "because of the magnetic properties" of blood cells. Ex. 100 at 22. "[M]icroscopic analysis" has shown there is "zero" blood on the knife. Ex. 100 at 21.

He opined that this scientific evidence "goes against" Mr. Smith's statement that Mr. Fowler was armed with a knife. Ex. 100 at 17, 21. When Mr. Smith denied planting the knife, the detective replied that Mr. Smith may be misremembering, "Cause it's . . . it's very clear he did not have the knife in his hand in the beginning" when he was

shot. Ex. 100 at 22. A "scientist will testify that there's no blood on the knife and there's no other way that it could be other than that the knife was not present at the time." Ex. 100 at 21.

The detective premised his comments on his claim that Mr. Fowler "had blood on the inside of his hands," so his blood would have been on the knife due to the scientific properties of blood if he was holding the knife as Mr. Smith said. Ex. 100 at 15.

But Detective Spencer's opinion that Mr. Fowler had blood on his hands was a significant, disputed contention at trial. 10/14/13RP 133. The State had not tested Mr. Fowler's hands to see if he had blood on them. 10/10/13RP 173. Forensic pathologist Dr. Daniel Selove said it was his "opinion" that Mr. Fowler had some blood on his hands but he did not confirm it forensically. *Id.* Forensic scientist Mariah Lowe believed it was possible Mr. Fowler could have been holding the knife before he was shot and not left trace blood evidence on the knife. 10/10/13 RP 117. She explained that dried blood might not travel from the hand to a knife, but if the blood was liquid, it would have likely left blood on the knife. 10/10/13RP 112. Although the knife did not have blood stains on it, it did contain a partial DNA profile from which neither Mr. Smith nor Mr. Fowler could be excluded. 10/10/13RP 88,

95, 97-98. The State did not seek DNA tests of whatever substance appeared on Mr. Fowler's hands. 10/10/13RP 116. As the court stated, whether there was blood on Mr. Fowler's hand is "up to the jury" to decide. 10/10/13RP 105.

Additionally, Detective Spencer used the recorded interview to press Mr. Smith to change his story. The detective told Mr. Smith he was not calling Mr. Smith a liar, but this accusation is implicit in his remarks. Ex. 100 at 17 ("I'm not saying you're lying . . . But I need to make sure . . ., we need to clarify"); *Id.* at 56 (detective stated he had not called Mr. Smith "a liar' but was "merely stating the facts" contradicting Mr. Smith). The only reasonable construction of the detective's comments is that he believed Mr. Smith was not telling the truth because "the facts" do not support his story. *See State v. Black*, 109 Wn.2d 336, 349, 745 P.2d 12 (1987).

Defense counsel objected to admitting Detective Spencer's opinions that it was impossible for Mr. Fowler to have been holding a knife when Mr. Smith shot him based on his claims about the blood evidence. 10/2/13RP 2-4, 7-8. The court initially agreed that his opinions did not need to be included, but when the State insisted it was "very relevant," the court relented. It said there was "no harm" in

admitting the detective's opinions about the evidence with a single redaction of what "the scientist said" regarding the knife not being in Mr. Fowler's hand. *Id.* at 6-10.

Defense counsel also objected to the detective's opinions about the properties of blood evidence. She said, "there's been no testimony that he's an expert in this field to give these opinions." 10/9/13RP 104. She asked for a foundation explaining his basis of knowledge and complained that his statements about blood evidence during the recorded interview were scientifically inaccurate. *Id.* at 104-05. She asked the court to give a limiting instruction to the jury that his remarks while interrogating Mr. Smith are not to be considered for their truth. *Id.* The court refused to give a limiting instruction and told the defense it could question the detective about whether he was a blood expert. 10/9/13RP 105.

The jury should not have heard Detective Spencer's unqualified opinions that Mr. Fowler could not have been holding a knife when he was shot, inferring that Mr. Smith must be lying. The court's refusal to give a limiting instruction on the substantive admissibility of Detective Spencer's statements cemented the resulting prejudicial effect. *Demery*, 144 Wn.2d at 761-62 (Owens, J., plurality) (the trial court should give a

limiting instruction to the jury, explaining that only the defendant's responses, and not the third party's statements, should be considered as evidence); *Id.* at 772 (lack of limiting instruction renders detective's opinion especially likely to influence jury).

c. *Improperly admitting the detective's opinions on whether Mr. Smith acted in self-defense while limiting Mr. Smith's explanation of his perspective in a near-death situation denied him a fair trial.*

The prosecution bears the burden of establishing beyond reasonable doubt that any error of constitutional dimension is harmless. *Chapman v. California,* 386 U.S. 18, 22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Matter of Hagler*, 97 Wn.2d 818, 825, 650 P.2d 1103 (1982). The deprivation of Mr. Smith's right to present a defense and the prosecution's reliance on prejudicial opinion testimony invading the province of the jury are constitutional errors that are presumed prejudicial. *See Jones*, 168 Wn.2d at 721; *Demery*, 144 Wn.2d at 759.

Alternatively, when viewed as evidentiary errors, a new trial is necessary "where there is a risk of prejudice and 'no way to know what value the jury placed upon the improperly admitted evidence.'" *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583, 587 (2010) (quoting *Thomas v. French,* 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)).

The "cumulative effect of repetitive prejudicial error" may deprive a person of a fair trial. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956). Under the cumulative error doctrine, even where one error viewed in isolation may not warrant reversal, the court must consider the effect of multiple errors and the resulting prejudice on an accused person. *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

The court's exclusion of testimony critical to assessing Mr. Smith's perspective at the time of the incident, while admitting the detective's opinion on the scientific impossibility of Mr. Smith's self-defense claim without any limiting instruction went to the heart of the case.

By prohibiting Mr. Smith from explaining the extent to which his prior traumatic experience affected his actions when threatened by Mr. Fowler, he was denied a full and fair ability to present his defense. The jury did not learn the extent Mr. Smith's disability affected his life, causing him to crumble during stress and the parallels he saw between the incident on the submarine that caused his disorder and being confronted in his home by Mr. Fowler. The State argued to the jury that it was not reasonable to believe Mr. Smith's explanation of the incident,

but Mr. Smith had been prohibited from fully explaining his point of view based on his experiences.

Detective Spender's opinions about the blood evidence were adopted by the prosecution and formed its theory of the case. 10/14/13RP 120, 123, 164, 167-68. The State also emphasized what Detective Spencer thought in its closing argument, underscoring the importance with which the State viewed his opinion. 10/14/13RP 163-64. Detective Spencer was permitted to offer otherwise impermissible opinions about the strength of the evidence against Mr. Smith as a lay witness and the jury instructions let the jury use these statements as substantive evidence against Mr. Smith.

The court's refusal to give a limiting instruction on the substantive admissibility of Detective Spencer's statements cemented the resulting prejudicial effect. *Demery*, 144 Wn.2d 753, 761-62 (the trial court should give a limiting instruction to the jury, explaining that only the defendant's responses, and not the third party's statements, should be considered as evidence).

These errors, taken together, affected the jury's evaluation of the evidence in a close case that depended on the jury's assessment of Mr. Smith's credibility. Mr. Smith should have been able to fully explain

the reasons for his fear when Mr. Fowler threatened him and his daughter in his home and should not have heard the detective's opinions of whether Mr. Smith's explanation could be true based on concocted theories of blood evidence. These errors denied him a fair trial.

2. As the Department of Corrections explained to the court, Mr. Smith's belief he was defending himself and his daughter from a menacing intruder in their home, together with his complete lack of criminal history and exemplary military service, justified a sentence below the standard range.

After an extensive presentence investigation, the Department of Corrections agreed that Mr. Smith should receive a sentence below the standard range. But the court concluded it lacked authority to deviate from the standard range because the jury had not found Mr. Smith acted in self-defense. Because the court misunderstood its legal authority, a new sentencing hearing is required.

a. *A court's sentencing decision requires reversal when it rests on an incorrect understanding of the law.*

It is well established that courts have authority to impose a sentence below the standard range based on an unsuccessful defense presented to the jury. *State v. Jeannotte*, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997). Had the jury sufficiently believed the defense theory, it

would have found the accused's conduct was legally justified or excused and acquitted. *Id.* at 851-52. The Legislature recognizes that even when a particular defense did not satisfy the jury as a legal excuse, the circumstances of the case may "justify distinguishing the conduct" in this case from conduct in typical cases. *Id.*

The Legislature simultaneously authorized a judge to deviate below the standard range based on an "illustrative" list of mitigating factors, while enacting a sentencing scheme with precisely calculated standard sentencing ranges. RCW 9.94A.530; RCW 9.94A.535. The nonexclusive list of mitigating factors the Legislature included in the Sentencing Reform Act includes when a defendant was provoked or was not the aggressor in the incident. 9.94A.535(1)(a).

"The 'failed defense' mitigating circumstance for imposing an exceptional sentence include[s] self-defense" and "mental conditions not amounting to insanity." *Jeannotte*, 133 Wn.2d at 851. It includes circumstances where the victim was an aggressor or a provoker of the incident. *Id.* Likewise, RCW 9.94A.535(1)(e) authorizes an exceptional sentence below the standard range if a preponderance of evidence shows that, "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the

requirements of the law, was significantly impaired" for a reason other than drugs or alcohol.

The SRA grants the court authority to vary from the standard range "where factors exist which distinguish the blameworthiness of a particular defendant's conduct from that normally present in that crime." *State v. Hutsell*, 120 Wn.2d 913, 921, 845 P.2d 1325 (1993) (citing with approval, David Boerner, *Sentencing in Washington*, § 9-23 (1985)). Although a defendant's lack of predisposition to commit an offense is not alone a mitigating factor, the defendant's general character is a circumstance for the court to consider in conjunction with other mitigating information. *Jeannotte*, 133 Wn.2d at 852-53.

When a judge misunderstands the extent of his sentencing discretion, this misinterpretation of the law is a fundamental defect undermining the validity of the sentence imposed. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 332-33, 166 P.3d 677 (2007); *see State v. Miller*, 181 Wn.App. 201, 216, 324 P.3d 791 (2014). When a judge relies on "an impermissible basis for refusing to impose an exceptional sentence," it has misapplied the law and a new sentencing hearing is required. *State v. Khanteechit*, 101 Wn.App. 137, 138, 5 P.3d 727 (2000); RCW 9.94A.585.

b. *The evidence of Mr. Smith's lack of predisposition, exemplary military record, PTSD, and right to defend himself in his own home provide ample legal grounds for an exceptional sentence below the standard range.*

Mr. Smith consistently explained he acted in self-defense and the circumstances support his belief. Ex. 59 at 7-8, 14-17, 19; Ex. 100 at 62; 10/14/13RP 52-54. He shot Mr. Fowler during "a few seconds of absolute terror" when he feared for his life. 10/14/13RP 54. The incident happened in Mr. Smith's home when the victim had invited himself inside despite Mr. Smith's requests to be left alone. *Id.* at 51. He demanded money from Mr. Smith and Mr. Smith refused. *Id.* at 52, 56. The victim held a knife, threatened Mr. Smith, and indicated an intent to threaten Mr. Smith's developmentally disabled daughter who was also inside the home. *Id.* at 53-54.

Mr. Smith's belief that he was acting in lawful self-defense also stemmed from his military experience. On one hand, the military trained him to shoot in a life-threatening situation until the threat was completely gone, and his final attempt to be sure Mr. Fowler was no longer a threat was probably the reason his self-defense claim failed. Ex. 59 at 17, 27, 44, 52-56. On the other hand, his military experience

left him physically disabled and unable to handle stressful situations. Ex. 95A at 6-8, 14.

He also had reason to fear Mr. Fowler based on Mr. Fowler's recent conduct. Mr. Fowler told Mr. Smith he had been to prison five times, including using a machete against a girlfriend and committing armed robbery. 10/14/13RP 44. Mr. Fowler regularly carried a knife or razor and claimed to have violently killed people *Id.* at 43, 47, 92. Mr. Smith was unsure if Mr. Fowler's stories about himself were true because he behaved erratically and nonsensically at times, but Mr. Smith knew Mr. Fowler had recently stabbed his own mattress because he imagined an intruder was inside it. *Id.* at 45-46.

Mr. Smith's account of events, and his conviction for the lesser charged offense of second degree murder, constitutes a "failed" claim of self-defense. He defended himself against a threatening interloper in his own home. Although the jury did not find his behavior met the legal justification of being a necessary response to an imminent threat, he felt he had no choice but to act as he did in a matter of seconds.

The court refused to impose an exceptional sentence because it felt bound by the jury's verdict. It claimed it could not "second guess the jury" which had rejected self-defense. 1/14/14RP 37. It

characterized the defense request for an exceptional sentence as "being asked to disregard the finding of the jury." 1/14/14RP 40.

The court was wrong to equate imposing a lesser sentence with "disregarding" or "second guessing" the jury's verdict. The jury's verdict did not signal any belief in the length of incarceration the case merited. *See. e.g.*, CP 26 (court's instruction to jury: "You have nothing whatsoever to do with any punishment that may be imposed"). And the "failed defense" mitigating factor necessarily arises only when the jury's verdict did not support the defense. The court's refusal to consider a failed defense as a basis for a lesser sentence out of deference to the jury's verdict shows it misunderstood its discretion.

Mr. Smith was certainly not a typical offender targeted by the Legislature when setting the presumptive punishment range. He was 60 years old, in poor health, and had never committed even a minor crime. CP 113, 117-18; 1/14/14RP 25. He did not provoke or invite the intrusion into his home. 10/14/13RP 51-52. He called himself a "hermit" based on his preference for being left alone. *Id.* at 42. He acted against an intruder out of a belief that he needed to defend himself and his daughter. Id. at 54; Ex. 59 at 7, 29, 48. He had an exemplary record of military service while also suffering from a severe disability caused

by his service to his country and while acting as sole custodial parent to a daughter with a developmental disability. 10/14/13RP 42, 55.

The Department of Corrections suggested an exceptional sentence of 72 months as a reasonable term of punishment that held Mr. Smith responsible but accounted for these mitigating circumstances. CP 118. It premised this recommendation upon extensive review of the case and its experience with the criminal justice system. *Id.*

The court's belief that the jury's verdict did not authorize it to consider the possibility of an exceptional sentence based on failed self-defense was a fundamental defect and undermines the validity of the sentence imposed.

c. *Remand for resentencing is required.*

The court indicated its sympathy toward Mr. Smith by imposing a sentence of 130 months, close to the bottom of the standard range. 1/14/14RP 40. Yet it refused to consider an exceptional sentence because it believed such a sentence would mean it disregarded the jury's finding the State proved Mr. Smith did not act in lawful self-defense. *Id.*

Had the jury found Mr. Smith acted in lawful self-defense, he would have been acquitted and no sentence would be imposed. *See Id.*at

855 ("These mitigating circumstances would be meaningless if the sentencing court were bound by the jury's rejection of the defense."). The court's failure to recognize that mitigation was possible because there was a valid basis for an exceptional sentence below standard range constitutes an abuse of discretion. *See Jeannotte*, 133 Wn.2d at 851.

Having been convicted of a lesser included offense, all parties agreed he should receive some punishment. CP 118; 1/14/14RP 26. But the standard range punishment imposed was not mandated by the jury's verdict. Instead, the court was required to consider the circumstances of the incident, and decide whether Mr. Smith's efforts to defend himself in his own home based on his perspective as a traumatized military veteran and father substantially differentiated him from the typical offender and justified a sentence below the standard range. *See* RCW 9.94A.535(1).

Under these circumstances, the court was authorized to impose a sentence below the standard range. The circumstances of the case are extraordinary. His unplanned shooting, provoked by his unpredictable neighbor in his own home and exacerbated by his feelings of vulnerability from his PTSD and his daughter's special needs,

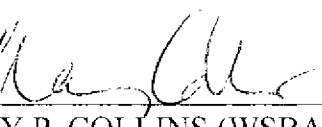
authorized the court to depart from the standard sentencing range had it understood the scope of its legal discretion. Remand for a new sentencing hearing is required.

F. CONCLUSION.

Mr. Smith's conviction and sentence should be reversed and his case remanded for further proceedings.

DATED this 7th day of October 2014.

Respectfully submitted,



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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 45789-0-II
	)	
BOBBY SMITH II,	)	
	)	
Appellant.	)	

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