NO. 32956-9-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

Robert C.,

Juvenile Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Robert C.[1] is a ten year old boy who has been abused by his family his entire life. He spent the first part of his life living with his father, who beat and belittled him on a constant basis. The only time he ever felt safe was when he lived with his mother in Montana, where he did well in school and engaged in counseling. Because of the extreme abuse Robert has suffered, his reaction to discipline or abuse from family members is to defend himself.

When this incident occurred, Robert was living in Yakima with his mother and two aunts, one of whom suffered from dementia. He had no private area and slept in the living room. When he got into a fight with his aunt over the television remote, he attempted to escape the conflict. Once he had cooled down, he was belittled, ordered to clean the toilet with a toothbrush, and assaulted by an aunt who kicked the bucket he was sitting on out from under him. He tried to escape to his mother's bedroom, but was pursued by his aunt who "got up in his face" and ordered him to "get his ass outside." After he warned his aunt

[1] The General Order of Division III "In Re the Use of Initials or Pseudonyms for Child Victims or Witnesses" does not appear to apply to child defendants but in keeping with the desire "to protect the privacy interests of children," the appellant will be referred to by his first name and last initial only.

not to assault him again, she tried to pull him out of the room, which is when he displayed a "little paring knife" he was holding for his protection.

B. ASSIGNMENTS OF ERROR[2]

1. The State failed to establish capacity by clear and convincing evidence.

2. Defense counsel's failure to argue self-defense constituted ineffective assistance of counsel.

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Children under 12 are presumed to lack the capacity to commit a crime. This burden is only overcome when the State is able to establish by clear and convincing evidence an accused child has sufficient capacity to understand the act and know it was wrong. The evidence at the capacity hearing established Robert's maturity did not exceed that of a ten year old. He was physically abused, suffered from mental illness, had trouble in school and an unstable home life. No other factors established the clear and convincing evidence required to demonstrate capacity. Must the decision of the trial court to find

[2] JuCR 7.11 requires written findings and conclusions when a case is appealed. Because no written findings have been filed with regard to capacity, guilt or sentence, Robert reserves the right to challenge their sufficiency in the future.

capacity be reversed where the State fails to establish by clear and convincing evidence Robert had capacity to commit the crime charged?

2. Robert is ten years old and a victim of domestic violence. He receives medication and counseling for the traumatic stress he suffers. When he is disciplined or abused, he attempts to defend himself, as he has learned, with force. Like other children, Robert lacks the capacity to exercise mature judgment and possesses only an incomplete ability to understand the world around himself. The evidence demonstrated he was afraid of being assaulted again by his relatives when he retreated to the bedroom and displayed the "little paring knife" after his aunt got in his face and attempted to assault him again. Must the court consider in determining capacity whether Robert was acting as a reasonable child when he attempted to defend himself against the physical and verbal abuse he was suffering?

3. Ineffective assistance occurs where counsel's performance falls below an objective standard of reasonableness and there is a reasonable probability counsel's poor work resulted in prejudice. Ineffective assistance occurs where a lawyer's mistakes allow a person to be convicted under evidence which is legally insufficient to support a conviction. Where evidence supports self-defense, the State has the

burden to prove beyond a reasonable doubt the defendant was not justified in defending himself. Defense counsel did not ask the court to consider self-defense because he did not think it applied. Must this court remand for a new trial where counsel's failure to ask the trial court to consider self-defense was not a strategic decision and where the defense was supported by the evidence introduced at trial?

D. STATEMENT OF THE CASE

1. Robert is the victim of serious child abuse.

Until he was five or six, Robert lived with his father in Yakima. VR 29.[3] His father was "an extremely negative influence," who "engaged in physically inappropriate contact" with him. VR 29. According to his mother Tina Collins, "His dad beat him on a constant basis. He belittled him. He pretty much abused him in all ways that -- some things we don't even know went on with him and his father." VR 106. Robert's Aunt Karissa Ratcliff described Robert's father as "an abusive jerk." VR 139. When the probation officer testified at the capacity hearing, he believed it was "spot on" Robert's anger was a result of the abuse Robert suffered from his family. VR 29.

[3] The verbatim report of proceedings contains one volume. This volume will be referred to as VR and accompanied by the page number referred to in the record.

Although Robert had moved out of Yakima with his mother for a period of time, he had moved back to the area, where probation believed his "father [wa]s more in the picture." VR 29. His grandmother had died and the family was "shooken" up. VR 108. His mother told the court his abusive father had been "coming around." VR 108. Drug use continued to be a problem for the father, who also lacked a stable job or address. VR 109.

2. Counseling was required to help Robert recover from his abuse.

Robert suffered from post-traumatic stress. VR 33. When he moved to Montana, he engaged in counseling, which helped him "dramatically." VR 114. Upon his return to Yakima, Robert engaged in treatment with Behavioral Health Services. VR 35. There were regular appointments and counseling sessions. VR 114. He was prescribed Prozac, an anti-depressant used to treat depression, obsessive-compulsive disorder (OCD), bulimia nervosa, premenstrual dysphoric disorder (PMDD), and panic disorder.[4] *Id.*

[4] Prozac is the common name for Fluoxetine. *See* U.S. National Library of Medicine, PubMed Health, Fluoxetine (2015), available at http://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0010346/.

Because of the trauma Robert suffered as a result of being assaulted by family members, he becomes aggressive when physically abused or disciplined. VR 107. His mother told the court "using physical abuse against Robert makes him … aggressive --- more aggressive because he's trying to protect himself." *Id.*

3. Post-traumatic stress caused Robert to have trouble in school.

In third grade, Robert missed a lot of school and got into trouble when he did attend classes. VR 106. He was expelled from school in third grade "a month after he started school." VR 107. When he moved to Montana with his mother, "it went great." VR 108. His grades improved and the family had fewer problems. "He was a good kid. He was a great student. He did really well." *Id.*[5]

[5] No evidence was ever introduced about how Robert was faring in school when this incident occurred.

4. Robert's home life continued to be abusive after moving in with his mother.

Although Robert was doing well in Montana, his mother moved him back to Yakima after a family member had died. He moved in with two of his aunts, into a house where did not have his own bedroom. VR 143. His older aunt Irene Smith suffered from dementia and called Robert "my baby". VR 81-82.

On September 12, 2014, Robert was watching television with his sister. VR 83. Although Ms. Smith admitted "I don't remember that far back" because she suffers from dementia and memory loss, she testified she got into an argument with Robert about the television remote control. VR 84. When she tried to take the remote from him, she told the court "I think he thought I was going to hit him, but I wasn't going to hit him." *Id.* She testified that Robert, reacting to this perception, hit and kicked her. *Id.* She then left, telling his mother, "[H]e's all yours." VR 86. Ms. Smith said because "I got that dementia going, and I kind of forget things" she did not remember all of the incident. VR 90. No other witness was able to testify to what happened between Robert and his older aunt, except from "just asking Auntie what happened." VR 118.

When his mother arrived, she told Robert he needed to respect his "elder" and could not have the remote. VR 98. She told him he was grounded. VR 98-99. Robert reacted by hitting his mother. *Id.* His mother went outside to their smoking area, "not paying attention to what Robert did." VR 100. When Ms. Ratcliff, his other aunt, came into the room, she could tell he was "pretty upset." VR 119.

Robert went outside to his quiet area to "cool off." VR 101. After a time, he was asked "if he was done." VR 102. He came over to his family and apologized for getting "mouthy." VR 121. He hugged his aunt and his mother. VR 122. He was told there would be consequences for his actions. Ms. Smith told him "he needed to go scrub the toilet with a toothbrush." *Id.* He got mad and told his family that was "child slave labor". *Id.* Ms. Ratcliff told him "you get off your ass." VR 123. She kicked the bucket he was sitting on "out from under him," causing him to fall upon the ground. *Id.*

Robert went back into the house to escape from his relatives. VR 123. He did not see his mother again until after the police had arrived. VR 100. Rather than give him quiet time, as advised by Robert's counselors, his Aunt Ratcliff pursued him into the house. VR 124. When she told him his mother did not want him inside, he "sat

there and said he wasn't moving. He wasn't doing anything. He was going to sit there." *Id.* He sat on the bed "normal." VR 125.

At this point, Robert's aunt's "level of angriness or anger or whatever you want to call it was getting up there." *Id.* She told him "you need to get your fucking ass outside. You are making me mad, and I don't want to get mad at you, so let's go." *Id.* She remembered "getting in his face, and I said, now I'm in your face." VR 126.

In response, Robert told her "the next person that touches me or says anything to me is … was either going to get their ass beat or get killed." *Id.* At trial, she testified "I honestly don't remember what he was saying." VR 142. Ms. Ratcliff then screamed at him "this was fucking ridiculous and that he needed to get outside." VR 128. She reached out to grab him and he held up the "little paring knife" he had taken from the kitchen drawer. VR 128, VR 134. The police were called and Robert waited in the bedroom for them to arrive. VR 71. He was taken into custody without incident. *Id.*

Although originally released to live with his mother, Robert was eventually held in detention. His mother did not visit him once he had been placed in custody for this charge, although she did speak to him twice a week by phone. VR 114.

5. Although finding Robert had the maturity of an average ten year old, the Court found clear and convincing evidence of capacity.

The only witness called at the capacity hearing was a Yakima County probation officer, who had no prior relationship with Robert. He interviewed Robert's mother and a probation officer in Montana. He testified "I don't know any ten year olds that are mature." VR 31. He said Robert had the "ability to engage in pro-social behaviors." Id.

The court found Robert's "maturity is right on for a ten year old of his age." VR 46. After reviewing the evidence presented during the capacity hearing, the court found Robert had capacity for all three charges. VR 45.

6. Robert was convicted of all charges and committed to the JRA.

Robert's trial took less than half a day. He was convicted of two counts of assault in the fourth degree and one count of assault in the second degree. VR 168. His lawyer did not ask the court to consider self-defense, despite abundant evidence Robert was defending himself, believing self-defense did not apply to these facts. VR 153. He was sentenced to 15-36 weeks, consecutive to 36 days in detention. VR 172.

E. ARGUMENT

1. Because he lacked criminal intent and did not understand his legal responsibility, Robert lacked the capacity to commit an assault.

a. The presumption a child lacks the capacity to commit a crime before they become 12 is only overcome by clear and convincing evidence.

The law presumes children under twelve lack the capacity to commit a crime. *State v. Erika D.W.*, 85 Wn. App. 601, 605, 934 P.2d 704 (1997); RCW 9A.04.050. This presumption is intended "to protect from the criminal justice system those individuals of tender years who are less capable than adults of appreciating the wrongfulness of their behavior." *State v. Ramer*, 151 Wn.2d 106, 114, 86 P.3d 132, 136 (2004), *quoting State v. Q.D.*, 102 Wn.2d 19, 23, 685 P.2d 557 (1984). The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. *J.D.B. v. N. Carolina*, --- U.S. ---, 131 S. Ct. 2394, 2403, 180 L. Ed. 2d 310 (U.S. 2011) *citing, e.g.*, 1 W. Blackstone, Commentaries on the Laws of England 464–465 (explaining limits on children's legal capacity under the common law "secure them from hurting themselves by their own improvident acts").

A child's age is far "more than a chronological fact." *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). It "generates commonsense conclusions about behavior and perception that apply broadly to children as a class." *Yarborough v. Alvarado*, 541 U.S. 652, 674, 124 S. Ct. 2140, 158 L.Ed.2d 938 (2004). Children "generally are less mature and responsible than adults." *Eddings*, 455 U.S., at 115. They "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S. Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality opinion). They "are more vulnerable or susceptible to ... outside pressures" than adults. *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005). History is "replete with laws and judicial recognition" that children cannot be viewed simply as miniature adults. *J.D.B.*, 131 S. Ct. at 2404.

In order to overcome the presumption of incapacity, the State must prove by clear and convincing evidence an accused child has sufficient capacity to understand the act and to know it was wrong. *State v. Ramer*, 151 Wn.2d at 114.[6] "Capacity requires the actor to

[6] Clear, cogent, and convincing evidence is a quantum of proof is less than "beyond a reasonable doubt," but more than a mere "preponderance." It is the quantum of

understand the nature or illegality of his acts. In other words, he must be able to form criminal intent. A 'sense of moral guilt alone, in the absence of knowledge of legal responsibility, is not sufficient.'" *Id.* at 115, *citing* 43 C.J.S. Infants § 197 (1978). This Court will review the record to determine whether there is substantial evidence establishing the State met its burden of overcoming the statutory presumption children under 12 years of age are incapable of committing a crime. *Id.*, at 112-13.

Courts consider seven factors to determine whether a child knew their act was wrong. *Id.*, at 114, *citing State v. J.P.S.*, 135 Wn.2d 34, 38–39, 954 P.2d 894 (1998). The factors a court should consider include (1) the nature of the crime, (2) the child's age and maturity, (3) whether the child showed a desire for secrecy, (4) whether the child admonished the victim not to tell, (5) prior conduct similar to the conduct charged, (6) any consequences attached to the conduct, and (7) acknowledgment the behavior was wrong. *Id.* Expert testimony and testimony from adults acquainted with the child are relevant to this inquiry. *J.P.S.*, 135 Wn.2d at 39. Also relevant is testimony from those

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evidence sufficient to convince the fact finder the fact in issue is "highly probable." *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 126, 615 P.2d 1279 (1980).

acquainted with the child and the testimony of experts. *See State v. Linares*, 75 Wn. App. 404, 415, 880 P.2d 550 (1994). But a child's acknowledgement he understood his act was wrong after the fact is insufficient to overcome the presumption of incapacity. *J.P.S.*, 135 Wn.2d at 44.

The capacity analysis must be made within the context of *Roper* and *J.D.B.*, which require the court to understand the lack of experience, perspective and judgment impacts a child's decision making process and makes them more vulnerable and susceptible to outside pressures than adults. *J.D.B.*, 131 S.Ct. at 2403. Understanding that a "reasonable" child will not act the same way as an adult "generates commonsense conclusions about behavior and perception," informing the decision making process of the juvenile court. *See Id.*, at 2402 (*quoting Alvarado*, 541 U.S. at 674 (Breyer, J., dissenting)).

b. Robert lacked capacity to be able to create criminal intent because he suffers from a long history of physical abuse and was attempting to protect himself from a verbal and physical assault when this incident occurred.

Robert lacked the capacity to commit the assaults he was charged with because he was not able form criminal intent. *Ramer*, 151 Wn.2d at 115. Robert suffers from a long history of abuse which has

caused extreme emotional distress requiring treatment and medication. His response to the actions of his relatives was consistent with this diagnosis, rather than the indication of criminal intent the court is required to find. *Id* at 116. (No capacity for an eleven year old charged with two count of first degree rape of child who admitted the conduct was "bad").

i. The nature of the crime does not support capacity.

Had the State chosen, it could have brought assault charges against Robert's aunt, Ms. Ratcliff. *See* RCW 9A.36.031. Ms. Ratcliff physically assaulted Robert when she kicked the bucket out from underneath him while he was sitting outside with his family. She assaulted him again in the bedroom when he was trying to get away from his family, by telling him "you need to get your fucking ass outside" and by "getting in his face." VR 126, VR 128. Robert's reaction to this assault is consistent with the way he reacts when he suffers from physical abuse or discipline: he tried to protect himself by using physical force. VR 107.

Research has consistently found children who are victims of domestic violence have higher levels of aggression, anger and hostility than children who do not suffer from abuse. H. Lien Bragg, *Child*

Protection in Families Experiencing Domestic Violence, U.S. Dep't of Health and Human Servs. 10 (2003). School-aged children like Robert may struggle with peer relationships, academic performance, and emotional stability. *Id.* Children who are physically abused demonstrate increased levels of emotional and psychological maladjustment as compared to children who only witness violence and are not abused. *Id.* at 12. Because physically abused children have seen only violence used to solve problems in the home, they are unaware of other problem-solving methods. *See, e.g.*, Brandt Steele, *Notes on the Lasting Effects of Early Child Abuse*, 10 Child Abuse and Neglect: Int'l J. 283, 285 (1986) (observing that victims of childhood abuse tend to inflict the same forms of abuse upon their own children).

A child's age will also affect how a reasonable person perceives their circumstances and this Court must analyze the nature of the crime from the point of view of a ten year old boy, who lacks, experience, perspective, and judgment to recognize and avoid choices detrimental to him. *See J.D.B.*, 131 S.Ct. at 2403 (A "reasonable child" has an incomplete ability to understand the world around himself). Because "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the

world around them," evaluating a juvenile's subjective belief that a threat exists against the standard of a reasonable adult person does not adequately assess a juvenile's culpability in a self-defense context. Marsha L. Levick, Elizabeth-Ann Tierney, *The United States Supreme Court Adopts A Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can A More Reasoned Justice System for Juveniles Be Far Behind?*, 47 Harv. C.R.-C.L. L. Rev. 501, 521 (2012) *quoting J.D.B.*, 131 S.Ct. at 2403. This Court must answer whether a reasonable child in Robert's circumstances would have acted the way he did. *Id.* Self-defense negates intent. *State v. McCullum*, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983) (self-defense negates the intent element of a crime). Analyzing the question of whether Robert believed he was justified in defending himself is a threshold question to determine whether he had capacity.

Robert has learned there are no consequences to the adult who assault him. Nothing in the record indicates they have been arrested or otherwise held accountable for their actions. Where children have not been taught to appreciate the wrongfulness of their conduct, a higher degree of proof is required to show the child understands the illegality of what they are doing. *See e.g., Ramer*, 151 Wn.2d at 115. This crime

is necessarily colored by Robert's understanding of what constitutes illegal behavior. He has lived his entire life with adults who do not appear to suffer consequences from assaulting him. VR 29. Both of his parents lack the ability to teach him appropriate behavior. His reaction to being yelled at by Ms. Smith over the remote and to being verbally and physically assaulted by Ms. Ratcliff is consistent with how children who have suffered from physical abuse behave. VR 107; Nancy Wright, Eric Wright, *SOS (Safeguard Our Survival): Understanding and Alleviating the Lethal Legacy of Survival-Threatening Child Abuse*, 16 Am. U. J. Gender Soc. Pol'y & L. 1, 43 (2007) ("After repeated beatings and threats, the children believe their lives are in 'mortal danger'"); *State v. Janes*, 121 Wn.2d 220, 231, 850 P.2d 495 (1993) (battered children constantly monitor the environment for signals which suggest danger is imminent). He has never been taught in a meaningful way to resolve his problems without the use of force; a behavior reinforced by the conduct of his family the day he was arrested for these assaults.

Robert is a child victim of extreme domestic violence and was reacting as expected to the assaults he suffered on September 12, 2014. The nature of this crime supports of finding of no capacity.

ii. Robert's age and maturity show his lack of capacity.

Although the court found Robert's maturity is "right on for a ten year old," the evidence does not support this finding. The evidence introduced at the capacity hearing confirmed Robert suffered from extreme domestic abuse. VR 29. He had trouble in school, which had resulted in a suspension. VR 106. His trauma caused him to suffer from mental illness, which required treatment with an anti-depressant. VR 35. He was involved in mental health counseling. *Id*. When directly questioned regarding Robert's maturity, the State's only witness at the capacity hearing testified "I don't know any ten year olds that are mature." VR 31. No other evidence contradicted this statement.

Even if the evidence did show Robert had the capacity of an average ten year old, this is still presumptive evidence he did not have capacity since the law presumes a ten year old lacks capacity to commit a crime. RCW 9A.04.050, *Erika D.W.*, 85 Wn.2d at 605. The evidence and the lower court's finding regarding maturity support the conclusion Robert lacked capacity, yet the lower court reached the opposite conclusion.

iii. Robert never demonstrated a desire for secrecy.

No evidence was introduced suggesting Robert showed any desire for secrecy. When the police arrived, Robert was in the same place where he had been when Ms. Ratcliff had left him. VR 71. He complied when asked to come out of the room to speak with the police. VR 76. This factor does not demonstrate that Robert had capacity.

iv. Robert never admonished anyone not to tell.

Robert never told anyone not to speak about the incident. This factor also does show Robert had capacity.

v. Robert's prior, similar conduct is consistent with a finding of no capacity.

Robert has been the victim of verbal and physical assault all of his life. VR 28-29. He, like many children who have been abused protect themselves from perceived abuse, sometimes with force. Bragg, *supra,* at 10. Robert behaved like a reasonable child who has an incomplete ability to understand the world around himself. *See, J.D.B.*, 131 S. Ct. at 2403. Although he has hit family members before, this is because he was "trying to protect himself" and was unable to differentiate between abuse and discipline. VR 107. His actions on September 12 were consistent with a child trying to defend himself

from being assaulted by a family member. This factor supports a finding of no capacity.

vi. Any consequences attached to prior conduct were not sufficiently proven to establish capacity.

Robert appears to have been subject to some sort of proceeding in Montana, which was described as similar to a diversion. VR 24-26. No direct testimony was introduced regarding Montana's court process. VR 24. The only explanation given about what actually takes place was that no court is held before probation meets with a youth. *Id.* This Court should not have confidence this procedure is similar to what might have happened in Washington.

Robert has never been to court before. Even if the court were to find Montana's diversion program is similar to Washington's, it does not appear Robert was ever provided process which would have helped him to understand the legal consequences attached to an assault.

vii. Robert never acknowledged his behavior was wrong.

Robert never acknowledged the behavior was wrong. This factor supports a finding of no capacity.

c. Reversal and dismissal is appropriate because the State failed to establish by clear and convincing evidence Robert had capacity to commit these crimes.

Under any circumstances, a court must presume a child whose maturity is "right on for a ten year old" is unable to form the capacity to commit a crime. RCW 9A.04.050. Nothing the court heard at the capacity hearing rebutted the presumption Robert lacked capacity to exercise mature judgment. *See, e.g., J.D.B.*, 131 S. Ct. at 2403. The court abused its discretion by an unreasonable application of the law to the facts. *Ramer*, 151 Wn.2d at 112-13. Robert is a victim of domestic violence, whose reaction to being assaulted by family members is to protect himself. The State failed to establish by clear and convincing evidence that this ten year old child had capacity to commit these crimes. This Court should reverse and dismiss these charges. *State v. James P.S.*, 85 Wn. App. 586, 594, 934 P.2d 698 (1997) *aff'd sub nom. State v. J.P.S.*, 135 Wn.2d 34, 954 P.2d 894 (1998).

2. The failure of defense counsel to pursue a self-defense claim when the evidence established Robert was defending himself was ineffective assistance of counsel.

a. *Where evidence supports a claim of self-defense, counsel commits ineffective assistance by failing to request the fact finder consider it as a defense.*

i. All persons charged with a crime are entitled to effective and competent counsel.

The right of effective counsel and the right of review are fundamental to, and implicit in, any meaningful modern concept of ordered liberty. *State v. A.N.J.*, 168 Wn.2d 91, 96, 225 P.3d 956 (2010) (counsel rendered deficient assistance by failing to conduct meaningful investigation of 12 year old client's case before proceeding to guilty plea). "The benchmark for judging any claim of ineffectiveness must be whether counsels conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 205, 80 L.Ed.2d 674 (1984). A defendant who raises an ineffective assistance claim "bears the burden of showing that (1) his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him." *A.N.J.*, 168 Wn.2d at 109.

While there is a "strong presumption that defense counsel's conduct is not deficient," this presumption is rebutted if "no conceivable legitimate tactic explain[s] counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To meet the prejudice prong, a defendant must show a reasonable probability "based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation." *Strickland*, 466 U.S. at 694; *A.N.J.*, 168 Wn.2d at 109.

ii. Where there is some evidence of self-defense, the State must prove beyond a reasonable doubt the defendant did not act in self-defense.

Reasonable force in self-defense is justified if there is an appearance of imminent danger. *State v. Bradley*, 141 Wn.2d 731, 737, 10 P.3d 358 (2000). The evidence of self-defense must be assessed from the standpoint of what a reasonably prudent person would have done under the circumstances as they appeared to the defendant. *State v. Janes*, 121 W.2d 220, 238, 850 P.2d 495 (1993), *citing State v. Allery*, 101 Wn.2d 591, 594, 682 P.2d 312 (1984). The threat does not need to be overt, nor does it need to immediately precede the act of self-defense. *Id.* at 241-42. Whether the victim's conduct constitutes a threat must be evaluated in light of the defendant's perceptions, based

on the entire relationship between the defendant and the victim. *Id.* Where a "reasonable person" standard otherwise applies, courts must determine how a child's age "would have affected how a reasonable person" would act. *See e.g., J.D.B.*, 131 S.Ct. at 2403; *see also* Levick, 47 Harv. C.R.-C.L. L. Rev. at 520. A child is entitled to defend himself or herself against a parent, even though the parent is engaged in an act of parental discipline. *State v. Graves*, 97 Wn. App. 55, 57, 982 P.2d 627 (1999).

Once the issue of self-defense is properly raised, the absence of self-defense becomes an element of the offense which the State must prove beyond a reasonable doubt. *State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977). The prosecution bears the burden of disproving, beyond a reasonable doubt, a defendant reasonably believed force was necessary to defend himself against imminent bodily harm. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

b. The evidence established Robert was acting in self-defense and the failure to request consideration of the defense was ineffective assistance.

i. Robert acted in self-defense by protecting himself from his aunt's assault.

Robert is a child who has suffered greatly at the hands of adults. From the beginning of his life, he was abused by his parents. VR 29. By all accounts, the abuse was more significant when he was living with his father, but it did not stop once he moved in with his mother. *See, e.g.,* VR 123 (Aunt describing kicking bucket Robert was sitting on out from under him after he had been ordered to clean the toilets with a toothbrush). Robert had significant mental health issues which resulted in him becoming "more aggressive because he's trying to protect himself" when he was abused or disciplined by family members. VR 107.

After getting into a fight with Ms. Smith, Robert attempted to use coping measures to prevent further conflict. VR 101. After calming down, he apologized to his family. VR 121. Instead of appreciating his fragile mental state, his family became aggressive with him, ordering him to clean the toilets with a toothbrush and assaulting him by kicking the bucket he was sitting on out from under him. VR 123. Robert did

not react to this assault, but instead retreated to a bedroom where he could be alone. VR 125. Rather than leave him alone, he was pursued by his aunt, who said to him "you need to get your fucking ass outside." VR 125. Ms. Ratcliff got "in his face." VR 126. Robert then told her he would not be assaulted again and when she came at him, he took out the "little paring knife" he was holding. VR 128, VR 134. Once she left the room, Robert stayed on the bed and did not come out until the police arrived. VR 71.

When defense counsel presented closing arguments, he focused on whether Robert had completed the act of assault, but did not ask the court to consider self-defense. He recognized Robert "hunkers down" when he is "confronted or attacked" and "sees his dad when he gets disciplined." VR 153. He stated "even without the issue of self-defense coming into this," Robert was not guilty of the assault against Ms. Ratcliff, but did not request the court to consider self-defense. *Id.* In her oral findings, the court never considered self-defense. See VR 156-68.

ii. Counsel's performance fell below an objectively reasonable standard when he failed to argue self-defense.

Although counsel recognized the possibility of self-defense, he did not seem to understand the defense applied to Robert's case. VR

153. "Counsel should be aware of the elements of any affirmative defense and know whether, under the applicable law of the jurisdiction, the client bears a burden of persuasion or a burden of production." WSBA *Performance Guidelines for Criminal Defense Representation* 24 (2011). In fact, a child may protect himself from a guardian's physical force. *See Graves*, 97 Wn. App. at 57 (juvenile entitled to raise claim of self-defense to father's discipline). No tactical decision can explain why defense counsel failed to investigate or raise this defense. *See, e.g,. A.N.J.*, 168 Wn.2d at 110.

Even if it were tactical, there is "no conceivable legitimate tactic" to explain why counsel would not raise self-defense. *See Reichenbach*, 153 Wn.2d at 130; *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999). There were no alternative theories defense counsel argued that could have resulted in Robert's acquittal.[7] Instead, counsel only argued Robert had been charged with the wrong felony. VR 151-52. Counsel gave no defense to either misdemeanor assault charge other than the assaults may not have been "harmful or

[7] In arguing for a harassment instead of an assault, defense counsel stated "I've done some research, and I can't find the case law that would give you here's the lynch pin. I can't find it. I don't know if it exists. If it does, I missed it. I've looked at the WPICS, and they're clear as mud. It doesn't get us to that point." VR 152.

offensive." VR 152-53. His only other defense to the felony assault charge was that Robert had not made a "forward thrust" with the weapon he was holding. VR 152. These arguments did not provide a defense to the charges. Even if they had, they were not inconsistent with self-defense. There is no legitimate defense strategy that explains why self-defense was not raised with the court.

Had the court been asked to consider self-defense, it is likely Robert would have been acquitted. The court highlighted many facts related to self-defense in her findings. The court recognized Robert suffers "blow-back" from some "horrible abuse that he suffered as a child." VR 156. When his aunt ordered him to "go clean the toilet with a toothbrush", this "obviously made him quite angry." VR 161. He was made angrier when Ms. Ratcliff knocked the bucket he was sitting upon out from under him, then saying "get off your ass and go do your chores." VR 162. The court found Robert did not display the knife until Ms. Ratcliff "grabbed his arm to pull him out of the room." VR 164. The court also found Robert warned her not to further assault him when this 10 year old boy told her not to get in his face. VR 165.

Had the court been provided with an argument that these facts constitute self-defense, it is a reasonable probability the result of this

trial would have been different. The failure of defense counsel to argue self-defense was objectively unreasonable.

iii. Robert was prejudiced by the failure to argue self-defense.

Once a plausible claim of self-defense is made, the state has the burden of disproving the allegation. The facts clearly establish a self-defense claim, especially for a child. *See, J.D.B.,* 131 S.Ct. at 2403. Robert had been verbally and physically abused by his family and had retreated to the bedroom in order to escape further abuse. Had the court considered self-defense, Robert would have had a strong defense to the assault charges. The failure of defense counsel to argue self-defense prejudiced Robert.

c. Robert is entitled to a new trial to correct the error created by counsel's ineffective assistance.

The failure of defense counsel to argue self-defense constitutes error which requires a new trial. The evidence made out a clear claim of self-defense. The failure to argue self-defense falls below an objective standard of effective assistance of counsel. No strategy can explain why defense counsel failed to argue this defense. Had defense counsel argued self-defense, there is a reasonable probability Robert

would have been acquitted of the most serious charge. Counsel's ineffective assistance entitles Robert to a new trial.

F. CONCLUSION

The State failed to establish by clear and convincing evidence Robert had the capacity to commit the crimes charged. The failure to establish capacity requires dismissal.

Defense counsel committed ineffective assistance in failing to allege self-defense, prejudicing Robert's right to a fair trial. Should the court not dismiss this matter, Robert requests a new trial where he may be defended by competent counsel.

DATED this 8th day of June 2015.

Respectfully submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. ROBERT C., Juvenile Appellant.	)))))))))	NO. 32956-9-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF JUNE, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF JUNE, 2015.

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