NO. 32956-9-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT C.,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES (continued)

PAGE

Federal Cases

Additional References

TABLE OF AUTHORITIES (continued)

PAGE

Rules and Statutes

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant has raised two issues, they can be summarized as follows;

Issues listed in Appeal:

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.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The State established capacity of Appellant by clear and convincing evidence.

2. Trial counsel was not ineffective, self-defense was not a factually arguable defense in this case.

II. STATEMENT OF THE CASE

Appellant sets forth extensive testimony from the trial and the capacity hearing. However the information set forth focuses to a great extent on the history of an obviously troubled youth. The problem with that focus is, it is not what the trial court was tasked to look at when determining whether this youth had capacity.

CAPACITY HEARING

Robert[1] was born on January 30, 2004 at the time of the capacity hearing and adjudicatory hearing he was ten years old. (RP 5, 9, 14, 38) He was charged by a third amended information with two counts of fourth degree assault and one count of assault in the second degree, one count of fourth degree filed alleging that it was a domestic violence offense. (CP 26-8, RP 55-6)

There was only one witness who testified at the capacity hearing, Mr. Steven Driscoll a juvenile probation counselor for the Yakima County Juvenile Probation Department. (RP 17) Mr. Driscoll was the staff person who prepares pre-sentence investigative reports and appeared in court to give recommendations on behalf of the Department. (RP 18) In this case Mr. Driscoll prepared a report regarding Robert's capacity. That report was admitted as an exhibit in the capacity hearing and has been designated as a portion of the record in this court. (RP 18-19, SE-A)

In that report Mr. Driscoll sets forth a brief history of Robert to include his prior offenses, "active Diversion agreement from Jefferson County Montana for assault against his mother." SE-A That report sets forth the current case law that sets out the standard for determination of capacity for and individual of Roberts age. That report cites to "State v. QD" and lists the factors that must be considered to determine if an

[1] Because Appellant is a juvenile the State shall refer to him by his first name, no disrespect is intended.

individual has the capacity to commit an offense. The only testimony taken in the capacity hearing is from this one witness, the report that he generated as well as the two police reports. The State filed as a supplemental record before this court the two police reports which were considered by the court in determining capacity of Robert. (SE-A, SE-B, 2, RP 18-35, 49) Mr. Driscoll also refers to the court revisiting QD in 1998, clearly a reference to State v. J.P.S, infra. Mr. Driscoll sets forth all of the criterion from these to controlling cases. In the conclusion section of his report he then discusses the criterion from those two cases as applied to Robert and Robert's actions. (SE-A) That section begins by stating;

> Using the factors listed and upheld by the Washington State Supreme Court, it is the opinion of the Yakima County Probation department that Robert Collins did have the proper capacity at the time of the alleged offense(s), and recommends the case to proceed through the Juvenile Court process. (SE-A)

Mr. Driscoll then sets forth facts and information that he had obtained that comport with the test set forth in "QD." Mr. Driscoll's report is a portion of the record before this Court.

The court took a break from the capacity hearing to read the two police reports. (RP 32-3) Counsel for Robert agreed that the court could and should read and consider the police reports. "…Judge, I'll let the

police reports speak for themselves." (RP 36)

The State presented the trial court with a Memorandum of Authorities RE: Juvenile Capacity. (CP 5-8) All parties, trial counsel for Robert, the State and the trial court were well aware with the statute pertaining to Robert's capacity as well as the case law that has controlled this type of determination for decades. The court when making its ruling referred to State v. Q.U.D. and to State v. J.P.S. clearly these reference are to, State v. Q.D, 102 Wash.2d 19, 21, 685 P.2d 557 (1984); and State v. J.P.S., 135 Wn.2d 34, 37, 954 P.2d 894 (1998).

The court states at the beginning of its ruling;

> Well, I think from a standpoint of the statute and the case law, my conclusion is that this young man did have the capacity at the time of the alleged violation to understand that it was wrong. (RP 45)
>
> …
>
> You know, not each factor has to be proven by clear and convincing evidence. But taken as a whole, I do find capacity by clear and convincing evidence on this particular case. (RP 49)

The trial then court set forth its ruling which covers five pages of the verbatim report of proceedings. (RP 45-49) This ruling addresses the factors set out in State v. Q.D. and State v. J.P.S. and applies the facts of Roberts's case to those standards set forth in those two cases.

TRIAL

The trail testimony was elicited from five State's witnesses, two

police officers and the three victims.

The two officers primarily testified regarding the knife that was recovered and the chain of custody for that knife. (RP 67-79)

The first victim to testify was Irene Smith who is Appellant's aunt. She has what she testified to as dementia and had one of her arms in as sling from a recent surgery. She was living in the residence with Robert and his mother. (RP 83-87)

She was chronologically the first victim who was assaulted on the day these three crimes were committed. She testified that her assault was the result of her telling Robert that he need to leave the TV alone because Robert's three year old sister was watching the TV and Robert was changing the channels with the remote control. (RP 81-3) Ms. Smith indicated to Robert that he needed to hand her the remote then she reached for the remote and Robert hit and kicked her. (RP 84) The defendant hit this victim on her arm, an arm that was in a sling due to recent surgery. (RP 85) She testified that Robert kicked her in the stomach. (RP 85-6)

Ms. Smith left the residence crying after she was assaulted and then returned to the interior of the house when she heard Robert yelling. (RP 87-89) Ms. Smith also testified that she observed Robert come out of the bedroom with a knife. (RP 87, 88-90) After the police came this weapon was found hidden behind the bed. (RP 137) Ms. Smith testified

that this portion of the assault that she observed lasted a short time but Robert was very upset, upset, mad, he's got a little temper. (RP 92)

The next victim who testified was Robert's mother, Tina Collins. She testified that Robert had assaulted both of his aunts and her and that one assault involved a knife. (97) Ms. Collins testified that she first became aware there was a problem when she heard Robert yelling and cussing at his Aunt Irene, indicating that Robert had called Irene (Smith) a bitch and told her that "it's none of your fucking business" (RP 97-98) Ms. Collins inserted herself between Aunt Irene and Robert telling to stop what he was doing. She told Robert that what Ms. Smith had told him was correct because he was "grounded" from TV. With no other provocation Robert jumped up and hit his mother, with a closed fist, in the stomach. (RP 98-99) Ms. Collins exited the house based on instructions from Roberts's counselors. (RP 99-100)

Ms. Collins indicated that at one point she and Robert had lived in Montana and that there were only "two problems while we were over there, and both time I called the cops on him." (RP 108)

Robert came out and went to an area that was his safe place and calmed down. He said he was done and that he was ready to discuss his actions. He was outside in this area and calming down for about ten minutes. But soon he got mad again because he was told that he had to do

his chores and his homework. (RP 101-3) Robert started to use a bunch of foul language and then went back into the house. There was specific discussion amongst Robert, his mother and his aunts regarding his method of dealing with things, that hitting was not the answer to problems. Robert stated calling the women "the B word" as saying he could do what he wanted to. (RP 103)

Ms. Collins testified that she specifically did not use physical means to control Robert (RP 107) Robert's mother testified that at one time when they lived in Yakima that Robert had abused her on a daily basis. (RP 110) Robert has a history of striking people that his first reaction when he gets mad is to hit and that it was not unusual for Robert to his people. (RP 112)

The final victim to testify was Karissa Ratliff another one of Robert's aunts. She lived at the same address but in a room that was not in the main house. She first became aware that there was a problem when she Robert's mother and aunt screaming at Robert. (RP 117-18) She testified that when she came in she observed he Aunt Irene crying and very upset and Tina (Robert's mother) asking Robert what had happened. She described Robert as in his "pissed off mode" sitting with his face red, his fists clenched and breathing hard glaring at his mother. (RP 120) Soon after this Robert went out to his time out area outside and calmed

down. He apologized to the three ladies for getting mouthy and he hugged his "Auntie" and his mother. (RP 121-2) She stated that Robert started to get mad again when he was told he could not watch TV, had to do his chores and could not visit his friends. She stated that Irene, the aunt with dementia joked that because of the present outburst he should clean the toilet with a toothbrush. This apparently made Robert even angrier and his went into the house. (RP 121-2) Ms. Ratliff told Robert that she had had enough and told him to do as his mother said, and do his homework and his chores. Robert's response to this was to tell Ms. Ratliff and his mother that he was not going to fucking do anything. (RP 123)

Eventually Robert went into the house and it was then that Ms. Ratliff heard something that sounded like Robert was hitting something. She entered the house and found Robert sitting on his mother's bed. Ms. Ratliff continued to tell him to do as he was told and get outside the house. She was at first away from Robert but eventually testified to "getting into his face." She then backed away. (RP 125-7) Robert was sitting on the bed with his hands visible. He then stated that "the next person that touches me or says anything to me is, if I'm correct, it was either going to get their ass beat or get killed." (RP 128) Ms. Ratliff specifically recalls that Robert then moved his hands under his legs. She testified that she screamed at him that he needed to get outside and Robert continuing to

say he was not going to do a fucking thing. She then reached out for his arm and the next thing she knew was that there was a knife coming at her. (RP 128) She testified that she saw a pencil on the bed at this time too.

Robert stated to her "I told you so." RP 130

Karissa Ratliff, the victim named in the second degree assault charge, was the person who searched for and found the knife after the officers took Robert into custody. The knife was found hidden behind the bed Robert has been sitting on. Ratliff and an officer searched the top of the bed and found nothing so upon suggestion of the officer they moved the bed away from the wall and found the knife lying on the ground with the point into the carpet. (RP 137)

The court found Robert guilty of all three counts. The courts very lengthy and specific oral ruling addresses all areas of this conflict, from Robert's mental issues to the assaults as well as the mechanisms employed in an attempt to deescalate Robert's rage. (RP 156-168)

III. ARGUMENT

There are two issues that were raised: Whether the state had rebutted the presumption that Robert at the age of 10 was in incapable of committing a criminal act and; Whether as trial counsel was ineffective because he had not argued that Robert had the right raise the defense of self-defense.

RESPONSE TO ASSIGNMENT OF ERROR ONE CAPACITY.

The law addressing capacity has remained unchanged for years. There is a statutory presumption that children between 8 and 11 years old lack capacity to commit a crime applies in juvenile proceedings. RCW 9A.04.050. To rebut this presumption, the State in this case had to convince the trial judge that Robert had sufficient capacity to understand his acts and to know that they were wrong. State v. J.P.S., 135 Wn.2d 34, 38, 954 P.2d 894 (1998); State v. Erika D.W., 85 Wn.App. 601, 605, 934 P.2d 704 (1997).

> State v. Ramer, 151 Wn.2d 106, 86 P.3d 132 (Wash. 2004);
>
> Under RCW 9A.04.050, the State has the burden to rebut the presumption of incapacity by clear and convincing evidence. The standard on review is whether there was evidence from which a rational trier of fact could find capacity by clear and convincing evidence. J.P.S., 135 Wash.2d at 37, 954 P.2d 894; State v. K.R.L., 67 Wash.App. 721, 840 P.2d 210 (1992).

The trial court must decide whether the State has rebutted the incapacity presumption by considering the following factors:

(1) the nature of the crime, (2) the child's age and maturity, (3) whether the child evidenced a desire for secrecy, (4) whether the child told the victim (if any) not to tell, (5) prior conduct similar to that charged, (6) any consequences that attached to that prior conduct, and (7) whether the child had made an acknowledgment that the behavior is wrong and could

lead to detention. J.P.S. at 38-9

Capacity in this context is the determination that the person, Robert in this case, understands the nature or illegality of his acts. *43 C.J.S. Infants § 197 (1978).* Stated another way, the court must determine that Robert was able to entertain criminal intent. Id. A "sense of moral guilt alone, in the absence of knowledge of legal responsibility, is not sufficient," although actual knowledge of the legal consequences is not necessary. Ramer, 151 Wn.2d at 115, Citing J.P.S, supra.

The State does not need to show, and the court does not need to find that Robert understood that his acts would be punishable under the law. J.P.S., 135 Wn.2d at 38. "The focus is on 'whether the child appreciated the quality of his or her acts at the time the act was committed,' rather than whether the child understood the legal consequences of the act." Ramer, 151 Wn.2d at 114 (quoting State v. T.E.H., 91 Wn.App. 908, 913, 960 P.2d 441 (1998)).

This court will review the trial court's determination that Robert had capacity to commit the crimes here by examining the record to determine whether the State produced substantial evidence to rebut the presumption of incapacity. Ramer, 151 Wn.2d at 112-13. This courts inquiry is whether the State produced sufficient evidence to meet its burden of proof and, necessarily, this court will not pass on whether the

State's showing was persuasive. State v. Huff, 64 Wn.App. 641, 655, 826 P.2d 698 (1992). The burden of persuasion is a matter for the trier of fact (here the juvenile court judge) to resolve. Id. Huff addresses these two burdens as follows:

> The argument confuses the burden of production with the burden of proof. The phrase "substantial evidence" describes the burden of production in all cases, In re Dependency of C.B., 61 Wash.App. 280, 286, 810 P.2d 518 (1991), while the phrase "beyond a reasonable doubt" describes the burden of persuasion in criminal cases. The burden of production is applied by the judge, while the burden of persuasion is applied by the jury. In re Dependency of C.B., 61 Wash.App. at 282-83, 810 P.2d 518. It follows that the question of "substantial evidence" is for the judge, not the jury, and that the judge in this case correctly declined to include it in the instructions that he gave to the jury. The instruction needed by the jury was one describing the burden of persuasion, and the judge gave such an instruction in appropriate form.

The juvenile court judge here considered the testimony of and the written report the juvenile officer whose job it was to prepare reports pertaining to capacity. (SE-A,) In addition the court was given the reports of the two police officers who responded to the 911 call and then issued appropriate findings based on the tried and true cases that cover this area of the law. (SE-B) The court's oral ruling is set out in totality in Appendix A. The testimony and evidence presented to the trial court when set forth with the seven factors outlined in Ramer:

Factor 1: Nature of the Crime: There are three separate crimes, two

gross misdemeanors, one is a Class B Felony and a serious offense. Robert has assaulted three family members and one of the counts alleged the crime was a domestic violence crime.

Factor 2: The Child's age and maturity: The child, at the time of the incident, was approximately 10 years old. The juvenile officer indicated that Robert's maturity was at least average for a 10 year old. The court specifically mentions that fact that Robert is getting was or was getting "A's and B's" as opposed to the child in J.P.P. who was "a mentally retarded child." RP 48

Factor 3: Whether the child exhibited a desire for secrecy: Robert requested that no action be taken, he also clearly hid the knife that he assaulted his aunt as well as lied about the weapon when he told listeners that the item he was in possession of was a pencil. The court also pointed out the conflicting reports of the two officers on scene evidenced Robert's attempt to "obfuscate the facts as opposed to simply admitting what the alleged facts were…" The court also pointed out the in Mr. Driscoll's report that

Factor 4: Whether the child told the victim not to tell: Robert did not want the police to be called and there were three separate victims all family members who were assaulted including one whose physical capacity was suspect due to recent surgery that was clearly evident due to

the sling she was wearing on her arm.

Factor 5: Prior conduct similar to that charged: The recent history of violence in in Montana, the two action described as "diversions" as well as what was described by Robert's mother as daily abuse that was of an assaultive nature. Mr. Driscoll's report also indicates there were at least three other occasions where the police were called because Robert had beat her up. Officers spoke to about how his actions could lead to legal issues and/or jail.

Factor 6: Any consequences that attached to the prior conduct: The prior consequence was two prior "diversions" the second was some sort of exception to the usual rule in Montana. The incidents in Washington resulted in the police being called and speaking to Robert about the consequences of his actions.

Factor 7: Whether the child acknowledged that the his behavior was wrong and could lead to detention: Robert apparently initially acknowledged the wrongfulness of his behavior. When he exited his timeout in the backyard and apologized to those who had been assaulted. But he then subsequently committed the premeditated assault using a knife, about which he lied regarding what the weapon was. He stated that the weapon was a mechanical pencil. Robert also stated that he was "scared shitless" to go to jail, clearly manifesting his knowledge of that is

actions were wrong and that there would be consequences for his acts.

All of the factors were found present in a form that supported the trial court's determination that at the time of the assaults Robert had the capacity to commit these criminal acts.

Robert made a specific effort to acknowledge that his previous actions were wrong, that the assaults on his mother and his aunt were wrong. He then grew angry again and assaulted the second aunt. He cannot now argue that his did not know that his assaultive behavior was criminal given the fact that he had previously been charged for his assaultive behavior in the court in Montana.

The past history of Robert life from the testimony given was horrible. However, as the court so correctly stated when it was ruling on this issue;

> You know, unfortunately what's not on trial is the repetitive cycle of violence passed down from father to son. That's not on trial, and it's not at issue before me today. It's a factor, but I don't think it's one that comes into the issue of capacity; although, a future court might look at that and might make it a factor or a feature.
> The diagnosis also of operational [sic] defiance disorder and post traumatic stress disorder are according to the testimony I think the terms that Mr. Driscoll used were spot on or something to that effect that this was the result of the cycle of violence, which unfortunately in certain families perpetuates itself.
> …
> So that's -- you know, it's a reality of certain families and a societal blight that's passed from one generation to the

> other that might be addressed in some other part of this process but not dispositive of the capacity issue before the Court. RP 48-9

The testimony and exhibits that were presented to the trial court established the seven factors needed to determine if Robert had the capacity to committee the alleged crimes at the time they were alleged. The court properly found that Robert had the capacity to commit these crimes.

APPEAL ISSUE TWO – SELF DEFENSE – INEFFECTIVE ASSISTANCE

This entire argument is negated by the one sentence testified to by Ms. Ratliff, a statement that was never refuted. She testified that just as she saw the knife coming at her Robert stated "I told you so." (RP 130) This statement demonstrates that this was not an act of self-defense, it was a premeditated attack on his aunt. The third such attack in a short period of time. These assaults were cut into two acts, the first half encompassed the two fourth degree assaults on his "Auntie" and his mother and the second separated by the period of time where he was calm and apologized for his actions and the second attack in the house with the paring knife. Clearly these were not the actions of person who was defending himself, they were plain and simply three separate assaults.

Appellant argues for the first time on appeal that trial counsel

should have presented the trial court with defense of self-defense. This issue would not be properly before this court if raised solely as the failure to give the self-defense instruction or raise this as a defense. It has been raised under the guise of ineffectiveness of counsel. Robert has not address how raising this issue now comports with RAP 2.5. Obviously raising an ineffectiveness of counsel argument is allowed for the "first time" on appeal. However this ineffectiveness claim raises the secondary issue of the alleged failure to raise a very specific defense. A defense that is not supported by the facts and was never mention except one singular use of the phrase "self-defense" in closing argument.

State v. Naillieux, 158 Wn.App. 630, 638-9, 241 P.3d 1280 (2010);

> Mr. Naillieux argues that we should review his assignments of error in the first instance because these errors are manifest constitutional errors. Appellant's Br. at 12, 23. He, thus, essentially invites us to review his case de novo. See State v. Walters, 146 Wash.App. 138, 144, 188 P.3d 540 (2008) (" We review de novo claims of manifest constitutional error"). The problems this argument presents are spelled out clearly by Judge Marshall Forrest in his thoughtful opinion in State v. Lynn, 67 Wash.App. 339, 342-46, 835 P.2d 251 (1992). And given the increasing frequency with which these assignments of error show up in this court, the problems bear repeating.
>
> We sit as a court of review which, of course, means that we do not preside over trial proceedings de novo. Our function is to review the validity of claimed errors by a trial judge who presided over a trial. That function assumes that counsel preserve the error by objecting to something the trial judge did or did not do. We do not, and should not, be in the business of retrying these cases. It is a wasteful use of

> judicial resources. Id. at 344, 835 P.2d 251; State v. Bashaw, 169 Wash.2d 133, 146, 234 P.3d 195 (2010); State v. Labanowski, 117 Wash.2d 405, 420, 816 P.2d 26 (1991). And it encourages skilled counsel to save claims of constitutional error for appeal so a defendant can get a new trial and second chance at a not guilty verdict if the first trial does not end in his favor. Lynn, 67 Wash.App. at 343, 835 P.2d 251. Most errors in a criminal case can be characterized as constitutional. Id. at 342-43, 835 P.2d 251.
>
> Mr. Naillieux is entitled to a new trial only if his claimed errors are manifest constitutional errors. RAP 2.5(a)(3); see Lynn, 67 Wash.App. at 345, 835 P.2d 251 (setting forth four-part manifest constitutional error test). Even if the claimed error is constitutional in nature, we will not review it unless it is also manifest. Lynn, 67 Wash.App. at 345, 835 P.2d 251. An error is manifest when the defendant shows "the asserted error had practical and identifiable consequences in the trial of the case." Id. "'[M]anifest' means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. ' Affecting' means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient." Id. (footnote omitted). We conclude that, while Mr. Naillieux's claims of manifest constitutional error might well implicate constitutional due process rights, they are not manifest.

There literally is no other mention of self-defense anywhere in the record except the one statement in closing argument that is set out below. Robert now claims this one mention of that phrase manifests trial counsels knowledge that self-defense was a viable option and therefore it was ineffective assistance to not present that as a defense to these charges.

> We don't have before the Court an explanation for where the knife came from, but I would suggest that the evidence would at least leave a reasonable doubt as to whether it was available in a defensive posture.
>
> But even without the issue of **self-defense** coming into

> this, this to me is always about the word imminent and what that means. And Your Honor will either convict Robert, or you won't when the testimony is he simply held a knife up. (Emphasis mine.)

The court in In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015) addressed Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) as follows:

> When determining whether a defense attorney provided effective assistance, the underlying test is always one of "reasonableness under prevailing professional norms." Id. at 688. While simple to state in theory, this test can be complicated to apply in practice. The court must engage in a fact-specific inquiry into the reasonableness of an attorney's actions, measured against the applicable prevailing professional norms in place at the time. Id. at 690. It is thus impossible to "exhaustively define the obligations of counsel [ ]or form a checklist for judicial evaluation of attorney performance." Id. at 688. Nevertheless, effective representation "entails certain basic duties, " such as a duty of loyalty, a duty to avoid conflicts of interest[,] ... the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. Id.

Denial of a defendant's right to effective assistance of counsel is an error of constitutional magnitude. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). To prove ineffective assistance of counsel, Robert must show with a preponderance of the evidence that his counsel's performance fell below an objective standard of reasonableness and that this deficiency

prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Under the prejudice prong, he must show a reasonable probability that if counsel had not been deficient, the result of the trial would have been different. In re Pers. Restraint of Grace, 174 Wn.2d 835, 843, 280 P.3d 1102 (2012). Counsel is presumed to be effective, and Robert must show an absence of legitimate strategic reasons to support his counsel's challenged conduct. McFarland, 121 Wn.2d at 335; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). "While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error." State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737, cert. denied, 103 S. Ct. 94 (1982).

Here trial counsel focused Robert's defense strategy on Robert's past and the abusive nature of that past as well as the reaction to the past abuse. The strategy of trial counsel was to demonstrate that this was in effect a battered person who had a legitimate reason for striking out. The problem that arises with the litany of testimony regarding the past abuse is that there is not one single piece of evidence which points to any of these three victims having been an abuser. If that was a fact that had been

presented it might justify Robert's actions and allowed the use of a self-defense strategy. The only evidence is that Robert on a regular basis beat his mother, as she stated on an almost daily basis.

Robert now claims that because his attorney used the words self-defense that that implies trial counsel knew of the defense and was just too inept raise it. The State can just as easily posit that what occurred is that trial counsel did understand the possibility of raising self-defense but realized on the facts that were to be presented there was no chance that a claim of self-defense would be allowed, mainly because there is not one shred of evidence that Robert acted in self-defense. State v. Read, 147 Wn.2d 238, 242-3, 53 P.3d 26 (Wash. 2002);

> To determine whether a defendant is entitled to an instruction on self-defense or entitled to have a judge consider it in a bench trial, the trial court must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees. Walker, 136 Wash.2d at 772, 966 P.2d 883. Accordingly, when assessing a self-defense claim, the trial court applies both a subjective and objective test. Walker, 136 Wash.2d at 772, 966 P.2d 883.
>
> When subjectively assessing a defendant's self-defense claim, the trial court 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. Walker, 136 Wash.2d at 772, 966 P.2d 883. When objectively assessing a defendant's claim, the trial court must determine what a reasonable person would have done if placed in the defendant's situation. Walker, 136 Wash.2d at 772, 966 P.2d 883.

It is nearly impossible to address a complicated issue such as self-defense when it is raised in this manner. There is no record for anyone to refer to and there is no determinations made by the trial court that can be reviewed. Having no request to be allowed to present this defense, no facts that would support the use of this defense and therefore no ruling that either allow or deny the use of this defense are the very definition of why RAP 2.5 is often cited.

One of the most fundamental principles of appellate litigation is that a party may not assert on appeal a claim that was not presented at trial. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1953). This rule has been a part of Washington's legal landscape since territorial days. See Code of 1881, § 1088 (provisions of the civil practice act with regard to taking exceptions would also govern in criminal cases); Blumberg v. H. H. McNear & Co., 1 Wash. Terr. 141, 141-42 (1861) (court will not review claims to which error was not assigned).

State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) "Parties raising constitutional issues must present considered arguments to this court. We reiterate our previous position: "'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.' "In re Rosier, 105 Wash.2d 606, 616, 717 P.2d 1353 (1986) (quoting United States v. Phillips, 433 F.2d 1364, 1366 (8th Cir.1970))."

This rule is also recognized by the United States Supreme Court. See, e.g. Yakus v. United States, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944) "No procedural principle is more familiar to this Court than that a ... right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

It is a defense to the charge of assault that the force used was lawful. See State v. McCullum. 98 Wn.2d 484, 494, 656 P.2d 1064 (1983) (self-defense negates the intent element of a crime). Proof of self-defense requires evidence (1) that the defendant had a subjective fear of imminent danger of bodily harm, (2) that this belief was objectively reasonable, and (3) that the defendant exercised no more force than was reasonably necessary. State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010); see RCW 9A. 16.020(3).

The standard for self-defense incorporates both subjective and objective elements. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The trier of fact considers all the facts and circumstances subjectively known to the actor and then determines what a similarly situated reasonably prudent person would have done. Walden, 131 Wn.2d at 474. Once the defendant provides evidence of self-defense, the burden shifts to the State to prove the absence of self-defense beyond a reasonable

doubt. State v. Acosta. 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984); Walden, 131 Wn.2d at 473.

There are cases such as State v. Graves, 97 Wn.App. 55, 982 P.2d 627 (1999) cited by Appellant where the court has indicated that a child is allowed to use the defense of self-defense. Graves is however, factually distinguishable; there a father and a son had an argument about household chores that turned into an actual physical confrontation initiated by the father in fact the father had grabbed Graves face and later placed his son head lock. The defendant, Graves, was the son who was charged with assaulting his father. Graves like Robert was competent and involved in an altercation with his parent. As the court in Graves states "[t]o raise the claim of self-defense, the defendant must first offer credible evidence tending to prove self-defense. State v. Dyson, 90 Wash.App. 433, 438, 952 P.2d 1097 (1997). The burden then shifts to the State to prove the absence of self-defense beyond a reasonable doubt. State v. Miller, 89 Wash.App. 364, 367-68, 949 P.2d 821 (1997). Id 61-2

First, Robert never "offered" any evidence or argument that self-defense was an issue, secondly it is apparent that no evidence was offered because none existed. Also Robert now appears to paint all three assaults with the brush of self-defense where the only count that trial counsel even mentions the possible issue is with the one felony count.

Graves states "To establish self-defense, a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that that belief was objectively reasonable." Dyson, 90 Wash.App. at 438-39, 952 P.2d 1097. Evidence of self-defense is viewed "from the standpoint of a reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." State v. Janes, 121 Wash.2d 220, 238, 850 P.2d 495 (1993). This approach incorporates both subjective and objective characteristics. Id. (Id at 62)

At no point was Robert acting in a defensive manner. The actions were those of an out of control aggressive you man who had a very long history of assaultive behavior. There is no denying that Robert's past was from all descriptions terrible. But the law allowing the use of this defense is clear, there must be some evidence that Robert had a good faith belief that he needed to stab his aunt. He presented nothing. There was testimony elicited that indicated that the aunt had "gotten into his face" but there is nothing that would indicate that this aunt had ever been a threat to Robert. There was no testimony that he and she had some sort of history that would set in motion his need to defend himself.

The information that he reacts with assaultive acts because he thinks someone is his father is anecdotal. The testimony from "Auntie" the victim with the dementia and her arm in a sling is that she believed

that he thought she was going to hit him when she reached for the remote control however there was a considerable period of time including the time-out in the backyard and the apology for his actions before the final premeditated assault with the knife.

It cannot be overstated that there is not one single allegation that any of the three victims had ever assaulted or abused Robert. In fact Robert's mother had removed him from his abusive father and done anything she could do to insulate Robert from that abuse. And yet Robert continued to abuse and assault and beat his mother on what was describe as an almost daily basis. (RP 110, 112)

As was so appropriately stated in State v. Janes, 121 Wn.2d 220, 240-41, 850 P.2d 495 (1993) where there was testimony from an expert regarding abuse and a defendant's reasonable actions towards his abuser;

> As Dr. Varley testified in the current case, after undergoing years in an abusive relationship, a battered child develops a heightened sense of awareness regarding the pattern of abuse which the average person might overlook.
>
> Nonetheless, testimony that a defendant suffers from the battered child syndrome, standing alone, does not ensure that the defendant's belief in imminent harm was reasonable. "That the defendant is a victim of a battering relationship is not alone sufficient evidence to submit the issue of self-defense to a jury." State v. Walker, 40 Wash.App. 658, 665, 700 P.2d 1168, review denied, 104 Wash.2d 1012 (1985); Whipple, 523 N.E.2d at 1367; Gallegos, 104 N.M. at 250, 719 P.2d 1268. In short, the existence of the battered child syndrome does not eliminate the defendant's need to provide some evidence that his or

her belief in imminent danger was reasonable at the time of the homicide. (Emphasis mine.)

The plain and simple fact is that Robert was angry. The facts here vitiate any claim of self-defense. Robert had apologized for his earlier assault then he became angry again when he was told to do his chores and his homework. He then left the timeout area and went into the house and retrieved a weapon. Before the final assault Robert purposefully armed himself and set in to play a plan to stab whomever might come into that room. According to the victim his statement preceding the assault makes it clear that his was not in fear of an assault, he stated that "the next person that touches me or says anything to me,…was either going to get their ass beat or get killed." (RP 127)

A further issue that must be addresses is the fact that in a case where there is no allegation that anyone assaulted Robert he did not hit back or push the other person or strike them with some blunt object. What Robert did was arm himself with a deadly weapon. Robert did not use a force that was necessary to counter the alleged actions of the victims. See RCW 9A.16.010(1) ("necessary" means "no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended"). Trying to stab your aunt with a knife is not the use of the reasonable amount of

force necessary to effect the lawful purpose, here defense of self, intended. State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010); RCW 9A. 16.020(3).

A reasonably prudent person, knowing what Robert knew and seeing what Robert had seen would not get a knife and attempt to stab anyone least of one of his Aunts or his mother.

IV. CONCLUSION

The hearing conducted to determine whether Robert had the capacity or stated as the law dictates a hearing at which the State must rebut the presumption that Robert did not have the capacity to commit a crime was done in a manner that mirrored the case law that has been used by all courts in the state since those opinions were issued. The same can be said about the written report and the testimony of the juvenile probation officer tasked with the job of researching and reporting to the court the nonbiased report regarding Robert's capacity. The totality of the information placed before the trial court at the capacity hearing more than satisfied the criterion set forth in Ramer, J.P.S., and Q.D. The determination by the trial court that Robert had the capacity to commit these crimes should not be disturbed.

The actions of the trial attorney are presumed to be effective. There was no proposal in the trial court to submit to the court the defense

of self-defense. This defense was never discussed at any other early hearings, it was not raised at the capacity hearing. While true that defense counsel raised the issue of Robert's past and the abuse he had suffered this was done as a trial strategy to negate the intent not to demonstrate that he had the "right" to strike his mother and his two aunts. Clearly that was done because there is nothing in this record that would support this defense.

For the reasons set forth above this court should deny allegations set forth in both this appeal and this appeal should be dismissed.

Respectfully submitted this 19th day of October 2015,

By: s/ David B. Trefry
DAVID B. TREFRY WSBA# 16050
Senior Deputy Prosecuting Attorney
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
Fax: 1-509-534-3505
E-mail: David.Trefry@co.yakima.wa.us

APPENDIX A

THE COURT: Well, I think from a standpoint of the statute and the case law, my conclusion is that this young man did have the capacity at the time of the alleged violation to understand that it was wrong.

I'll go through the factors and then acknowledge and speak briefly to the issue properly raised by Mr. Klein in that regard.

The State versus Q.U.D. and the other case that I mentioned that I drew from, State versus J.P.S., which came out of this very Court, talks about a number of factors for the Court to address, one being the nature of the crime.

The nature of the crime was a succession of events

RP 45

involving alleged assaults and an alleged threat with a knife in a home. And this may be slightly out of order, but this wasn't a first occurrence. This had been after a succession of similar occurrences my understanding being both in Washington state in early 2014 and then one or more occasions in Montana in the late spring or summer of 2014. And I'll come back to that because of the way these elements are set out.

The child's age is 10. The statute talks about between 8 and under 12, so we've got an age right in the median of that spread. Maturity, the evidence was that this young man was the appropriate maturity for his age, which I think is what I'm being asked to determine, not that he has the maturity of a 16 year old but to address whether his maturity is that of somebody significantly of a lesser age. I think his maturity is right on for a 10 year old of his age.

The desire for secrecy I could address in two respects. The evidence on prior occasions by the mother's comments in Mr. Driscoll's report of being scared shitless about going to detention coupled with what I understood to be conflicting reports to the two different reporting officers on the scene and then within each report an attempt to obfuscate the facts as opposed to simply admitting what the alleged facts were, which would be an

RP 46

indicia that there was not an understanding that those actions were wrong. There was no evidence in this case that the victim was asked not to tell in

this particular circumstance, but there had been evidence that it had occurred on a prior occasion and that he would adjust his behavior.

The prior conduct -- No. 5, any prior conduct by a child that is similar to the charged conduct, this is where it most strongly weighs in favor of capacity because of the reoccurring identical conduct, being assaultive to mom or other family members.

The consequences that attached to the prior conduct, he was entered into a diversion or deferred or some similar approach in Montana. Knew that -- knew the consequences from the testimony of Mr. Driscoll having spoken to the prior probation officer and the mom.

And again going to, 7, whether the child acknowledged the conduct was wrong and could lead to detention, the scared shitless comment about going to detention is a clear indicia of the appreciation of the consequences and the comments about trying to calm down indicate -- and again the efforts to tell a story that was different from the alleged facts indicate that he knew -- or at least he indicates that he knew it was wrong.

The Court also talked about, and this is where we get

RP 47

to the issues raised by Mr. Klein and legitimately so, the child's mental capacity and the effect of mental retardation on the child's ability to understand the wrongfulness of the conduct. In the J.P.S. case, they talk about J.P. in that case, and he -- that individual was a mentally retarded child who tested at a first grade level. In this case, we have a young man who's getting As and Bs, and there's no evidence of mental retardation.

You know, unfortunately what's not on trial is the repetitive cycle of violence passed down from father to son. That's not on trial, and it's not at issue before me today. It's a factor, but I don't think it's one that comes into the issue of capacity; although, a future court might look at that and might make it a factor or a feature.

The diagnosis also of operational [sic] defiance disorder and post traumatic stress disorder are according to the testimony I think the terms that Mr. Driscoll used were spot on or something to that effect that this was the result of the cycle of violence, which unfortunately in certain families perpetuates itself.

Let's find out who's calling.

So that's -- you know, it's a reality of certain families and a societal blight that's passed from one

RP 48

generation to the other that might be addressed in some other part of this process but not dispositive of the capacity issue before the Court. The last two -- the last two are the degree to which the child has been educated with regard to the conduct.

I think he's had that with the prior diversion, and again I'm sorry if I'm not using the right term, but out of Montana, as well as likely the therapy, which resulted in the prescription for Prozac taken for the depression and aggression. The -- whether the child admitted the wrongfulness of the act, I don't think in reading the police reports or anything in this particular instance there was a direct admission. There was a reference to being slapped and a kick in response.

You know, not each factor has to be proven by clear and convincing evidence. But taken as a whole, I do find capacity by clear and convincing evidence on this particular case.

RP 49

DECLARATION OF SERVICE

I, David B. Trefry state that on October 19, 2015 emailed a copy, by agreement of the parties, of the Respondent's Brief, to Mr. Stearns at wapofficemail@washapp.org

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

DATED this 19th day of October, 2015 at Spokane, Washington.

By: s/David B. Trefry
DAVID B. TREFRY WSBA# 16050
Senior Deputy Prosecuting Attorney
Yakima County
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
Fax: 1-509-534-3505
E-mail: David.Trefry@co.yakima.wa.us