

42314-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington

v.

Charlie W. Dodd

42314-6

On Appeal from the Superior Court of Cowlitz County

Cause No. 10-1-01133-9

The Honorable Michael H. Evans

REPLY BRIEF

**Jordan B. McCabe, WSBA No. 27211
For Appellant, Charlie W. Dodd**

MCCABE LAW OFFICE
P.O. Box 6324, Bellevue, WA 98008
425-746-0520•mccabejordanb@gmail.com

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II. SUMMARY OF THE CASE

Please see Appellant's Brief for a complete statement of facts.

Combat veteran Charlie W. Dodd became distraught and threatened to kill himself. A SWAT team arrived to find Dodd armed and holed up in a shed and trailer at his rural home, where Dodd refused to surrender. During the stand-off, Dodd fired a three-shot volley in the direction of a SWAT vehicle. He eventually gave himself up and was charged with three counts of first degree assault with a firearm.

Mr. Dodd asserted the defense of general denial by virtue of diminished capacity to form the requisite intent as reflected in unrefuted foundational evidence.

The prosecution was conducted, however, under the insanity defense statute. This relieved the State of its burden regarding intent and erroneously required Dodd to prove a degree of mental impairment sufficient to establish a plea of not guilty by reason of insanity. As a result, defense counsel abandoned the diminished capacity defense despite the strong supporting evidence.

His counsel also failed to request an instruction on the lesser offense of reckless endangerment which would have eliminated the consecutive firearm enhancements that added nine years to Dodd's 20-month sentence. Mr. Dodd asks this Court to grant him a new trial.

III. ARGUMENTS IN REPLY

1. THE TRIAL COURT ERRONEOUSLY APPLIED THE INSANITY DEFENSE STATUTE.

The State begins by arguing the facts. BR 5. This court does not resolve disputes regarding facts. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997). It will decide the case solely from the record. *Belli v. Shaw*, 98 Wn.2d 569, 578, n.3, 657 P.2d 315 (1983). Specifically, the State denies that the trial court applied Chapter 10.77 RCW, the insanity defense statute. BR 5 (fn).¹ The record speaks for itself.

The court ordered Mr. Dodd evaluated at Western State Hospital to determine his “capacity.” CP 5. The order invokes RCW 10.77.030 and RCW 10.77.060. CP 5. A second order cites RCW 10.77.020 in instructing the defense expert “to determine whether or not she [sic] is competent and/or responsible to stand trial.” CP 75.

Chapter 10.77 RCW is entitled: **Criminally Insane – Procedures**. It is the sole legislative authority for compulsory mental evaluations. It authorizes evaluation of a defendant’s competency and sanity. The sections relied on by the court here address solely procedures in insanity defense proceedings. Mr. Dodd did not assert the insanity defense.

¹ The State is correct that the trial court requested an evaluation on motion of the State, not on its own motion. CP 5.

By its terms, RCW 10.77.020 applies solely to evaluations of competency and insanity under Chapter 10.77. RCW 10.77.020(4), (5). RCW 10.77.030 makes insanity an affirmative defense that a defendant must establish by a preponderance of the evidence. RCW 10.77.030(2). Moreover Chapter 10.77 RCW applies only upon written notice of intent to plead insanity. RCW 10.77.030(1). Dodd filed no such written notice.

RCW 10.77.060 limits the court's authority to those cases in which "a defendant has pleaded **not guilty by reason of insanity**, or there is **reason to doubt his or her competency**[".]” RCW 10.77.060(1)(a) (emphasis added). It requires the court to obtain reports from at least two experts. By statutory definition, "competency" means "the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(15). Neither Dodd's sanity nor his competency was at issue.

The State concedes (BR 6) that the trial court ordered the evaluation under RCW 10.77.060. BR 6. Section (3)(e) of that statute authorizes evaluation of the capacity to form intent. But RCW 10.77.060 limits the application of all its provisions to cases in which "a defendant has pleaded not guilty by reason of insanity." RCW 10.77.060(1)(a). Accordingly, capacity under § (3)(e) must be viewed in that context.

The State claims the experts were clear as to their role. BR 7. But Dr. Ronnei believed the purpose of her evaluation was report on Dodd's "need of an evaluation for civil commitment under RCW 71.05, and his danger to others and likelihood of committing future criminal acts." CP 8. Ronnei cited the statutory requirement for two examiners which is found in RCW 10.77.060(1)(a), and is restricted to insanity defense cases. CP 8.

A plainer application of the insanity statute cannot be conceived.

For the first time on appeal, and without citation to the record, the State claims the trial court relied on CrR 4.7. BR 6. If true, this was error.

CrR 4.7 permits the court to require defendants to submit to a psychiatric examination. CrR 4.7(b)(2)(viii). This authority, however, is subject to the proviso: "Except as is otherwise provided as to matters not subject to disclosure" CrR 4.7(b)(1). Here, RCW 10.77.060 does provide otherwise as to compelled psychiatric evaluations. Chapter 10.77 limits the information evaluators may receive to that directly affecting the defendant's mental condition. RCW 10.77.060(1)(a). Here, Dr. Ronnei received details of alleged facts comprising the criminal charges, which led her to usurp the province of the jury. CP 8. *Please see Issue 2.*

Unless insanity is pleaded, the State's rights under CrR 4.7 are limited to discovery of any experts' mental examination reports along with any other expert testimony the defense intends to use at trial. CrR 4.7(g).

2. THE FAILURE TO DISTINGUISH BETWEEN
INSANITY AND DIMINISHED CAPACITY
DENIED DODD A FAIR TRIAL.

The State next claims that RCW 10.77.060 divests the jury of the power to decide the issue of diminished capacity in favor of decisions by expert witnesses. BR 6. This is wrong.

Chapter 10.77 RCW: If RCW 10.77.060(1)(a) permits an insanity determination, the court may ask for the expert's opinion as to "the capacity of the defendant to have a particular state of mind which is an element of the offense charged." RCW 10.77.060(3)(e). The inquiry is whether the defendant is categorically incapable of forming intent, in which case he is legally insane. This is a yes or no question that does not weigh the particular circumstances of the offense.² Rather, a finding of lack of capacity means that the defendant's mental capacity was so deteriorated that he lacked the ability to form criminal intent under any circumstances. *State v. Carter*, 5 Wn. App. 802, 804, 490 P.2d 1346 (1971). In that case, the court may acquit. RCW 10.77.080.

By contrast, if the defendant is not categorically incapable of forming intent, then the trial proceeds, and Chapter 10.77 requires that the matter be "submitted to the trier of fact in the same manner as other issues of fact." RCW 10.77.080. The jury will then determine whether, on the

² The expert is not supposed to receive this information, which the statute limits to facts relevant to mental state. RCW 10.77.060(1)(a).

particular occasion and under the circumstances then prevailing, the defendant's underlying mental or emotional condition materially reduced the probability that he did in fact form the requisite state of mind that constitutes an essential element of the crime. *State v. White*, 60 Wn.2d 551, 558, 374 P.2d 942 (1962).

Thus, even if 10.77.060(3)(e) was applicable, which it was not, unless the experts concluded that Dodd was incapable of forming culpable intent under any circumstances, only a jury could decide whether the particular circumstances prevailing on November 7, 2011, acted upon his documented mental vulnerabilities so as to diminish his capacity to a degree sufficient to create a reasonable doubt whether he in did or did not intend to accomplish the specific harm constituting the alleged crime.

Diminished Capacity: To maintain a diminished capacity defense, the defendant need only present evidence of the existence of a mental or emotional condition and evidence sufficient to permit the jury to find a connection with the events constituting the offense. The State has the burden to establish a culpable state of mind, beyond a reasonable doubt. *State v. Farley*, 48 Wn.2d 11, 19, 290 P.2d 987 (1955); *State v. Davis*, 6 Wn.2d 696, 714, 108 P.2d 641 (1940). The jury then determines whether, under the particular circumstances prevailing at the time, it is beyond reasonable doubt that the defendant's capacity to form the

requisite intent was undiminished. *Carter*, 5 Wn. App. at 805. By contrast with the insanity defense, the role of the mental health expert is governed, not by statute, but by the common law.

Under the insanity defense statute, moreover, the scope of the question presented to the expert is confined to the area of his or her expertise: whether the defendant does or does not suffer from one or more recognized mental or emotional infirmities (or a potentially aggravating physical condition.) RCW 10.77.060(1)(a).

If the defense decides to claim diminished capacity, they will call the expert as a witness to establish the existence of qualifying infirmities, and the prosecutor may cross examine. At the close of the evidence, the court must instruct the jury on diminished capacity. The jury then decides whether (a) at the time of the alleged offense, the defendant did indeed suffer from qualifying mental infirmities, and (b) whether the particular circumstances prevailing at that time acted upon his mental condition in such a way as to create a reasonable doubt as to whether the State has met its burden to prove that he in fact manifested the mens rea — the state of mind necessary to convict him of the crime. *Carter*, 5 Wn. App. at 806-07.

Here, two experts concluded that Mr. Dodd suffered from serious mental challenges as well as a potentially aggravating physical condition.

The prosecutor conceded that evidence of Dodd's mental illness would have served to establish a defense of diminished capacity. The State claimed his mental infirmities became irrelevant, however, once defense counsel abandoned that defense. RP 12, 14-15.

Experts Exceeded Scope: In addition to their mental health evaluations, however, both experts weighed the factual evidence regarding the alleged assaults. CP 8-9; 16-17; CP 116-17. Each then concluded that Dodd did not, under the circumstances of the offense, "lack the capacity" to act purposefully and with intent. RP 12; CP 20.

First, this exceeded the proper scope of expert opinion. Only the jury gets to weigh evidence. Second, the question is not whether capacity was lacking, but whether it was sufficiently diminished to call Dodd's culpability into question. The State claims the experts said that Dodd's "capacity was not diminished." BR 4. This is false. They merely said he "did not lack capacity." RP 12; CP 20.

This failure to distinguish between "lacking" and "diminished" denied Dodd a fair trial. This Court should remand for a new trial so that a jury can decide (a) whether the facts alleged by the State are indeed the facts, and (b) whether Mr. Dodd's ability to form the requisite intent was or was not diminished by reason of his proven mental illness under the particular facts found by the jury, not a State's witness.

3. THE RECORD CONTAINS SUFFICIENT EVIDENCE TO SEND THE ISSUE OF DIMINISHED CAPACITY TO THE JURY.

When a defendant presents substantial evidence of a mental illness or disorder and evidence logically and reasonably connecting his mental condition with his ability at the relevant time to form the necessary mental state necessary, the court must give the jury a diminished capacity instruction. *State v. Marchi*, 158 Wn. App. 823, 833, 243 P.3d 556 (2010), *review denied*, 171 Wn.2d 1020 (2011), citing *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001); *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003). For example, in a forgery prosecution in *State v. Griffin*, 100 Wn.2d 417, 670 P.2d 265 (1983), instructing the jury solely on the elements of forgery and giving them a separate instruction on the definition of intent did not suffice where the defendant claimed that diminished capacity prevented him from forming the requisite intent. *Griffin*, 100 Wn.2d at 418.

Accordingly, the Washington Pattern Jury Instructions include the following instruction: “Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form [the requisite mental state].” *Washington Practice: Washington Pattern Jury Instructions: Criminal* 18.20 at 286 (3d ed. 2008) (WPIC).

Failing to give Mr. Dodd's jury this instruction was reversible error. Dodd presented unrefuted evidence of several mental disorders, and the evidence connected his alleged mental condition with his ability on November 7, 2011, to achieve a mental state constituting deliberate intent to commit three assaults.

The State's psychologist Marilyn Ronnei diagnosed Posttraumatic Stress Disorder (PTSD); Recurrent Major Depression; Personality Disorder Not Otherwise Specified; and Chronic Pain. CP 15. She determined that Dodd manifested "active symptoms of major mental illness and impulsivity." CP 20.

Brett Trowbridge reported:

In my opinion, Mr. Dodd suffers from PTSD as well as bipolar disorder, currently depressed. It appears that he has been suicidal many times in his life and it appears that he was suicidal on the day of the alleged incident. During the incident he was highly intoxicated, although he had not had a drink since 1984."

CP 116. Dr. Trowbridge noted that Dodd received a permanent disability allowance because of chronic mental problems, and that his constant tinnitus made him particularly sensitive to noise. CP116.

The diminished capacity defense functions as a rule of evidence that allows a defendant to introduce otherwise inadmissible evidence relevant to his subjective state of mind. *State v. Stumpf*, 64 Wn. App. 522,

525 n. 2, 827 P.2d 294 (1992). The instruction allows the jury to take that evidence into account when determining whether the defendant actually formed the requisite mental state. *Stumpf*, 64 Wn. App. at 524–25.

The diminished capacity defense asserts that the defendant was unable to form what used to be called the “specific intent” required to commit the charged crime. It is an essential element of the crime, and evidence regarding it is, therefore, always material. *State v. Nuss*, 52 Wn. App. 735, 738, 763 P.2d 1249 (1988). Any competent evidence that “tends logically, naturally and by reasonable inference to prove or disprove a material issue is relevant and should be admitted unless it is specifically inadmissible by reason of some affirmative rule of law.” *Carter*, 5 Wn. App. at 805.

The decision reversing the conviction in *Carter* is illustrative. The defendant was charged with burglary and claimed he had not intended to commit a crime when he unlawfully entered the building. It was error to preclude Carter from introducing evidence of his mental condition. Like *Dodd*, Carter offered the testimony of a psychiatrist who had examined him and reviewed his history of psychiatric treatment. *Carter*, 5 Wn. App. at 805. As in *Dodd*’s case, the psychiatric evidence would not support a

finding of insanity.³ But, also as in Dodd's case, the evidence was still relevant for the legitimate defense purpose of a jury determination whether Carter did in fact manifest sufficient mental capacity at the relevant time to form the intent to commit the crime. *Carter*, 5 Wn. App. at 805.

It is not disputed that Mr. Carter had the capacity to know the difference between right and wrong, and to understand that difference, nor is it disputed that he was competent to assist in his own defense. The question is whether his capacity to form an intent to commit the crime was diminished. **Whether the offered testimony rebutted the presumption of intent ... is a question for the jury when and if the proper foundation for the introduction of the testimony is laid.** The offer of proof was sufficient to carry the question of whether Mr. Carter had 'psychiatric problems' to the jury but this was not in issue. The offered evidence must provide a basis for a lay jury to at least infer that the alleged condition, if it existed, could reasonably affect the capacity of Mr. Carter to form an intent to commit the crime charged. The law inquires not into the peculiar constitution of mind of the accused, or the mental weaknesses or disorders or defects with which he may be afflicted, but solely into the question of his capacity, **at the time he committed a forbidden act**, to have a criminal intent.

Carter, 5 Wn. App. at 806-07 (emphasis added.) Contrast this with Dr. Ronnei's opinion that a finding of diminished capacity required that a mental disorder have rendered the defendant incapable of forming the mental state that is an element of the charged crime. CP 16. To repeat, the Court held **that it was for the jury to decide** whether the alleged

³ I.e. that he lacked the capacity to form intent. RCW 10.77.060(3)(e).

condition existed, and whether that condition could reasonably have affected the ability to form an intent to commit the crime charged.⁴

A mental health expert who performs a pretrial evaluation lacks testimonial competence regarding either the events or the defendant's state of mind at the time of the alleged offense. *State v. Upton*, 16 Wn. App. 195, 201, 556 P.2d 239 (1976) (doctor's opinion regarding defendant's mental state at the time of the shooting inadmissible absent testimonial knowledge), *review denied*, 88 Wn.2d 1007 (1977); *State v. Fullen*, 7 Wn. App. 369, 382-83, 499 P.2d 893, *review denied*, 81 Wn.2d 1006 (1972), *cert. denied*, 411 U.S. 985, 93 S. Ct. 2282, 36 L. Ed. 2d 962 (1973); *State v. Craig*, 82 Wn.2d 777, 779-80, 514 P.2d 151 (1973) (opinion testimony of doctor who was not a witness to the crime and lacked first hand knowledge of defendant's state of mind at time of charged offense was properly excluded); *State v. Moore*, 61 Wn.2d 165, 172-73, 377 P.2d 456 (1963) (psychiatrist's opinion that defendant was incapable of forming intent not sufficient to require a manslaughter instruction); *State v. Cogswell*, 54 Wn.2d 240, 248, 339 P.2d 465 (1959) (testimonial knowledge of demeanor of defendant at proximate time of offense is required for admission of testimony as to defendant's capacity to form specific intent). This is precisely the dispositive issue here.

⁴ The State offers no authority to refute this argument, but merely denigrates Appellant's arguments as "specious" and "incredible."

The State legitimately could have alleged that the cause of Dodd's inability to form the requisite intent was voluntary intoxication, fear or anger, rather than a mental disorder. RCW 9A.16.090;⁵ See, *State v. James*, 47 Wn. App. 605, 608, 736 P.2d 700 (1987); *Moore*, 61 Wn.2d 165. Or that the mental disorder was causally connected merely to reduced perception, overreaction or some other irrelevant mental state rather than ability to form intent. *State v. Edmon*, 28 Wn. App. 98, 103, 621 P.2d 1310 (1981).

With the proper foundation such as existed here, however, the proper course was to pursue the diminished capacity defense in order to create reasonable doubt as to the mental state element of the offense, which would have led to acquittal or conviction of a lesser included offense. *Marchi*, 158 Wn. App. at 833. The jury may consider diminished capacity evidence when it determines whether the accused "was able to form the requisite mental state to commit the crime." *Marchi*, 158 Wn. App. at 836, citing *Stumpf*, 64 Wn. App. at 524; *James*, 47 Wn. App. at 608.

⁵ No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state. RCW 9A.16.090.

The Sixth Amendment and Const. art. 1, § 22 guarantee the right to have the essential elements of criminal charges determined by a jury. *State v. Robinson*, 24 Wn.2d 909, 917, 167 P.2d 986 (1946). Accordingly, courts should not interpret statutory language in such a way as to take a jury question away from the jury. *State v. Hachaney*, 160 Wn.2d 503, 528, 158 P.3d 1152 (2007), Johnson, J. (concurring and dissenting in part.)

Here, the combined errors by the judge, prosecutor and defense counsel defeated Mr. Dodd's constitutional right for a jury to decide whether the evidence permitted reasonable doubt as to whether, under the prevailing circumstances, he acted with a culpable mental state. It was error to exclude unrefuted evidence that Dodd suffered from serious mental and emotional conditions compounded by severe tinnitus. Absent the error, a properly-instructed jury may have found that the State failed to prove that these facts did in fact diminish his ability to form criminal intent. The Court should reverse and remand for a new trial.

4. DEFENSE COUNSEL WAS INEFFECTIVE
IN ABANDONING DODD'S VIABLE
DIMINISHED CAPACITY DEFENSE.

The State claims that Dodd received effective assistance of counsel. BR 11. This is wrong. Absent a plausible strategic reason, a disastrous tactical decision not to offer important defense evidence is

ineffective assistance. *State v. Alvarado*, 89 Wn. App. 543, 548, 949 P.2d 831 (1998).

The prosecutor conceded the existence of mental illness: “Dr. Trowbridge indicates that in his opinion somehow the root cause of all these items was Mr. Dodd’s preexisting mental illness or conditions.” RP 12. Moreover, the prosecutor went so far as to concede that Dodd’s PTSD, depression and other mental health issues would have served to establish a defense of diminished capacity, but once defense counsel abandoned diminished capacity (at the urging of the prosecutor), the prosecutor brazenly argued that Dodd’s mental condition was irrelevant. RP 14-15.

Moreover, the court agreed that Dodd’s PTSD and depression did “inform and provide some context of why Mr. Dodd may have done what he did.” RP 22. The court ruled that the defense could “raise the issue that he’s been diagnosed with PTSD and he suffers from depression. I think that provides context of why sometimes people do what they do.” “And as far as weighing the probative value, I think that goes to help explain why Mr. Dodd allegedly did what he did.” RP 22. The judge expressly stated that the defense was free to argue that intent was diminished by alcohol and depression. RP 315-16.

It was error for the court not to recognize that sufficient foundation had been laid to permit the jury to decide the issue of diminished capacity and to receive an instruction on the elements of diminished capacity, and counsel rendered deficient performance by abandoning Dodd's only plausible defense.

Counsel was clearly conflicted about conceding the State's claim that Dodd's mental and physical impairments could not have affected his ability to form intent. Defense counsel understood that evidence of Dodd's mental health problems and depression was relevant to "whether or not he intended to cause the harm the State's required to prove." RP 17, 19. In other words, if believed by the jury, it established diminished capacity. RP 19-20. Counsel repeatedly argued that withholding this evidence would allow the jury to make false assumptions about the cause of Dodd's bizarre conduct, including that he was on drugs and persisted in arguing that Dodd's mental, emotional, and physical impairments prevented him from forming the intent "to cause the harm the State's required to prove." RP 19, 20; 312-13. Counsel was aware that Dr. Trowbridge "believed the mental health issues were the cause; that's what his report was." RP 314. And, when the prosecutor moved, in light of counsel's having withdrawn the diminished capacity defense, to exclude

any reference to Dodd's mental condition or intoxication, defense counsel responded:

My position is there's a difference between arguing that he was unable to formulate intent based on mental issues — that's diminished capacity, and both experts indicated that's not present — between issues affecting a person at the time the crime is alleged to have been committed that impact whether or not they intended to commit the crime.

RP 312.

Unfortunately, counsel failed to recognize that this constituted a valid diminished capacity defense. RP 5, 13. The decision to abandon the diminished capacity defense was a tactical blunder, based on a misunderstanding of the law, and for which no plausible strategic justification can be conceived. Abandoning the diminished capacity defense was not a legitimate strategy, but a blunder resulting from a misunderstanding of the law.

Prejudice: A tactical blunder is prejudicial if this Court is satisfied that there is a reasonable probability the outcome of the trial otherwise would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This Court will reverse and remand where the record discloses no legitimate reason for counsel's conduct. *State v. Saunders*, 91 Wn. App. 575, 578, 581, 958 P.2d 364 (1998).

Because defense counsel conflated diminished capacity with insanity, he failed to present a coherent and complete defense to the jury. But for this error, a reasonable jury could have found that Mr. Dodd experienced a lapse of capacity as a foreseeable consequence of the combined effect of his mental and emotional infirmities and the punishing clamor of his neighbor's ATVs. The prevailing circumstances raise serious questions about Dodd's ability to form the requisite intent to support a conviction for assault.

Thus, the erroneous introduction of the insanity statute, and the associated gratuitous experts' opinions regarding the facts, caused defense counsel to abandon Mr. Dodd's most persuasive defense. Counsel believed he could no longer contend that the evidence was sufficient to create reasonable doubt that, under the circumstances at the time of the police action, Dodd's ability to form criminal intent was diminished, despite uncontroverted opinion from two experts that Dodd suffered from PTSD, debilitating depression, and excruciating tinnitus as a result of his military combat service.

The error denied Dodd the right to present all relevant testimony in his defense as guaranteed by the United States and the Washington Constitutions. *See State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514

(1983).⁶ Even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). A defendant's right to present relevant evidence may be limited to protect the State's interest only if the evidence is "so prejudicial as to disrupt the fairness of the trial." *Darden*, 145 Wn.2d at 621. But even then, the State's interest in excluding evidence must be balanced against the benefit to the defense of introducing the information to the jury. Only if the State's interest outweighs that of the defendant can relevant evidence be withheld. *Darden*, 145 Wn.2d at 622.

The remedy is to reverse and remand for a new trial.

5. EVIDENCE OF DODD'S COMBAT SERVICE
WAS ERRONEOUSLY EXCLUDED.

As soon as the diminished capacity defense was withdrawn, the prosecutor successfully argue that Dodd's mental and emotional illness constituted no more than "background or historical conditions" such that their root cause in Dodd's combat injuries was not relevant. RP 13-15, 21. The State erroneously denies that the court did not err in keeping this evidence from the jury. BR 13. This is wrong.

⁶ The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." Similarly, Const. art. 1, § 22 guarantees that "[i]n criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf."

Evidence that Dodd's condition was a legacy from his combat service was essential defense evidence, because it tended to establish a plausible inference about the likely existence and severity of his PTSD and tinnitus, the foundational mental conditions sufficient to permit a properly-instructed jury to consider the extent to which Dodd should be deemed culpable. This made it relevant under ER 401.⁷ Without the causation evidence, the jury could have assumed that Dodd's hearing loss and mental and emotional difficulties were self-inflicted as the result of poor diet, reckless or profligate life choices, or too many rock concerts. Indeed, this is more likely than not, because a reasonable juror would expect the defense to present such evidence if it existed.

Dodd's only cogent and comprehensible defense was that his capacity to form the intent to assault anyone or harm anyone was diminished by his chronic impairments, exacerbated by the intolerable conditions giving rise to his mental breakdown. No legitimate tactical purpose could possibly have been served by failing to dispute the State's claim that unsworn and uncross-examined pretrial testimony by expert witnesses could decide the ultimate fact question of whether Mr. Dodd's

⁷ "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

proven disorders could have diminished his ability to form the requisite intent at the relevant time. The remedy is to reverse.

6. THE JURY SHOULD HAVE RECEIVED A RECKLESS ENDANGERMENT INSTRUCTION.

The State wrongly claims that counsel was not in effective for failing to seek a reckless endangerment instruction. BR 16.

Washington statutes assure the “unqualified right” to have the jury instructed on a lesser included offense if there is “even the slightest evidence” that he may have committed only that offense. RCW 10.61.006; RCW 10.61.010; *State v. Bowerman*, 115 Wn.2d 794, 805, 802 P.2d 116 (1990); *State v. Parker*, 102 Wn.2d 161, 163-64, 683 P.2d 189 (1984), quoting *State v. Young*, 22 Wash. 273, 276-77, 60 P. 650 (1900).

A two-pronged test determines the need for a lesser-included-offense instruction. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Each element of the lesser offense must be a necessary element of the offense charged (the legal prong), and the evidence must support an inference that the lesser included crime was committed (the factual prong). *Workman*, 90 Wn.2d at 447-48. “If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given.” *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). In

deciding whether sufficient evidence supported a lesser included offense instruction, this Court views the evidence in the light most favorable to the defendant — not the State. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

The facts of Mr. Dodd’s case meet the “slightest evidence” test, and both the legal and factual prongs of *Workman* are satisfied.

Reckless Endangerment: Reckless endangerment is a gross misdemeanor. RCW 9A.36.050(2). The elements are engaging in conduct that creates a substantial risk of death or serious physical injury to another person. RCW 9A.36.050(1).

Had Dodd’s jury received this instruction, it is highly probable that they would have opted to convict Dodd on this charge. They acquitted him of first degree assault, which is assaulting someone with intent to inflict great bodily harm. Instr. 7, CP 40. So they found no more than that he intentionally fired shots in a manner that was offensive. Instr. 11, CP 44.

Washington recognizes a hierarchy of mental states: Intent, knowledge, recklessness and criminal negligence. RCW 9A.08.010(1); *State v. Soto*, 45 Wn. App. 839, 841, 727 P.2d 999 (1986). A mental state lower on the culpability can substitute for a higher one. *State v. Tucker*, 46 Wn. App. 642, 645, 731 P.2d 154 (1987).

Here, recklessness may substitute for intent because it is of lower culpability. It is likely the jury would have convicted Mr. Dodd on the lesser charge of reckless endangerment, because the jury could have found that same evidence that established second degree assault comprised “conduct that created a substantial risk of death or serious physical injury” to others.

Ineffective Assistance: Failing to request a jury instruction constitutes ineffective assistance if the instruction should have been given and likely would have been given if requested, and if prejudice results from the lack of the instruction. *Cienfuegos*, 144 Wn.2d at 227.

Deficient Performance: The decision not to request a lesser included instruction cannot be viewed as a legitimate all-or-nothing strategy where counsel presents a defense that leaves the jury with no choice but to convict of the greater offense. *State v. Smith*, 154 Wn. App. 272, 278, 223 P.3d 1262 (2009).

Prejudice: Omitting a reckless endangerment option was prejudicial. A properly instructed jury might have found that the best fit for Dodd’s conduct was an act that recklessly created a substantial risk of death or serious physical injury to another person. RCW 9A.36.050(1).

Reckless endangerment is a gross misdemeanor. RCW 9A.36.050(2). Therefore, a verdict of reckless endangerment would have

spared Dodd nine years of firearm enhancements. RCW 9.94A.010; *State v. Snedden*, 149 Wn.2d 914, 922, 73 P.3d 995 (2003). The error increased Dodd's sentence from a maximum of three years in the county jail on an exceptional sentence of consecutive misdemeanor maximums to more than ten years in State prison. RCW 9A.20.021(2).

Moreover, trial courts have much broader discretion in sentencing gross misdemeanors than felonies. *State v. Anderson*, 151 Wn. App. 396, 402, 212 P.3d 591 (2009). The court here might well have been moved to run one or more of the sentences concurrently.

Reversal is the proper remedy.

IV. **CONCLUSION.** For the reasons stated, Charlie Dodd asks the Court to reverse his convictions and grant him a new trial.

Respectfully submitted, this 30th day of March, 2012.

Jordan B. McCabe WSBA No. 27211
Counsel for Charlie W. Dodd

CERTIFICATE OF SERVICE

Opposing counsel was served by e-mail via the Division II portal:
Susan I. Baur, Cowlitz County Prosecutor at sasserm@co.cowlitz.wa.us

A paper copy was deposited in the U.S. mail, first class postage prepaid, addressed to:

Charlie W. Dodd DOC #350239, Stafford Creek Corrections Center
19 Constantine Way, Aberdeen, WA 98520

Jordan B. McCabe Date: March 30, 2012
Jordan B. McCabe, WSBA No. 27211, King County, Washington

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