

No. 42838-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kody Chipman,

Appellant.

Thurston County Superior Court Cause No. 11-1-00491-4

The Honorable Judge Paula Casey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Chipman's two vehicular assault convictions violated his Fifth, Sixth, and Fourteenth Amendment right to notice of the charges against him.
2. Mr. Chipman's two vehicular assault convictions violated his state constitutional right to notice of the charges against him, under Wash.Const. Article I, Sections 3 and 22.
3. The Information was deficient because it failed to properly allege a causal relationship between Mr. Chipman's subpar driving and the harm inflicted.
4. Mr. Chipman's convictions were entered in violation of his Fourteenth Amendment right to due process.
5. The trial judge erred by precluding Mr. Chipman from mentioning self-defense during jury selection.
6. The trial judge erred by precluding Mr. Chipman from mentioning self-defense during opening statements.
7. The trial judge erred by refusing to instruct the jury on self-defense.
8. The trial judge applied the wrong legal standard in rejecting Mr. Chipman's self-defense claim.
9. The trial judge violated Mr. Chipman's Sixth and Fourteenth Amendment right to present a defense by excluding evidence that was relevant and admissible.
10. The trial court violated Mr. Chipman's constitutional right to compulsory process.
11. The trial court violated Mr. Chipman's constitutional right to present a defense.
12. The trial court erred by excluding the testimony of Dr. Trowbridge.
13. The trial court applied the wrong legal standard in ruling Dr. Trowbridge's testimony inadmissible.

14. The trial court erred by imposing an exceptional sentence.
15. The jury's finding that Kitchings's injuries "substantially exceed" the injuries necessary for commission of the crime cannot justify an exceptional sentence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal Information must set forth all essential elements of an offense. The Information charged Mr. Chipman with vehicular assault, but failed to allege a causal relationship between his recklessness (or disregard for safety) and the harm inflicted. Did the Information omit an essential element of the offense in violation of Mr. Chipman's right to adequate notice under the Sixth and Fourteenth Amendments and Wash.Const. Article I, Section 22?
2. Due process requires the court to instruct the jury on all essential elements of an offense. Where an accused person presents some evidence of self-defense, the absence of self-defense becomes an element that the state must prove beyond a reasonable doubt. Did the trial court's failure to instruct the jury on self-defense violate Mr. Chipman's Fourteenth Amendment right to due process?
3. The trial court must instruct the jury on each party's theory of the case if warranted by the facts and the law. Here, the trial court refused to instruct on self-defense, ruling that Mr. Chipman's failure to testify precluded him from asserting the defense. Did the trial court apply the wrong legal standard and violate Mr. Chipman's due process right to have the jury instructed on his theory of the case?
4. An accused person has a constitutional right to present relevant admissible evidence. Here, the trial judge refused to allow Mr. Chipman to present expert testimony relevant to the facts and circumstances surrounding the incident and the reasonableness of his response. Did the trial judge violate Mr. Chipman's

Sixth and Fourteenth Amendment right to present a defense by excluding relevant, admissible evidence?

5. An exceptional sentence may not be based on circumstances contemplated by the legislature in setting the standard range for the underlying offense. The degree of injury inflicted cannot enhance a sentence for vehicular homicide, as life-threatening injury inheres in the crime and was contemplated by the legislature in setting the standard range. Did the trial court err by imposing an exceptional sentence based on a factor considered by the legislature in setting the standard range?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Kody Chipman suffers from Generalized Anxiety Disorder (GAD). He is more fearful than the average person, especially when it comes to being attacked by men or being in a car accident. CP 28-48.

In March of 2010, he was participating in substance abuse treatment through Thurston County's Drug Court program. His involvement with Drug Court stemmed from an arrest for possession of hydrocodone without a prescription. CP 30. Graduating from Drug Court was very important to Mr. Chipman; while in the program, he was focused on maintaining his sobriety and keeping his job. RP 47, 48.

On March 31, 2010, he finished work, and had an hour to wait before his Narcotics Anonymous meeting. He owned a run-down Subaru and was interested in getting a better car, so he decided to look at a lot where used cars are parked for sale. The lot is located in the South Bay area of Thurston County. RP 81, 366. He went to the area, and made a turn at what he thought was a road. RP 79, 81-82, 366, 441. Once he made the turn, he realized that what he'd thought was a road was, in fact, the broad entry to an old fire station. RP 79, 81-82. He came to a very abrupt stop. RP 10-11, 81.

A Boy Scout award meeting was about to start at the fire station. RP 79. Dan Kitchings and his father-in-law Dee Cooper were in attendance to watch Kitchings's son receive an award. RP 12, 15, 83. Kitchings and Cooper approached Mr. Chipman's car, and Cooper asked "What the hell do you think you're doing?" RP 84, 99, 118. Cooper acknowledged that his voice can be frightening to others, and that his demand likely had "an impact." RP 118.

Kitchings told Mr. Chipman to slow down. RP 14, 91. Both Kitchings and Cooper told Mr. Chipman to roll down his window. RP 14, 15. Mr. Chipman couldn't roll down the window because it was broken, so he opened the car door. RP 85, 98, 100, 490; CP 53. According to Kitchings, Mr. Chipman only "cracked" the door open to allow conversation. RP 24. Other witnesses said Mr. Chipman opened the door between five and 24 inches. RP 85, 98, 120-122, 244.

Cooper opened the door further, placed his right hand on the roof of the car, and stepped between the door and the car. RP 15, 24, 86, 96, 98. He and Kitchings both believed (incorrectly)¹ that Mr. Chipman was intoxicated or on drugs. RP 14, 16, 84, 86, 118. Cooper told Mr.

¹ Field sobriety tests, examination by a Drug Recognition Expert, and a blood test all confirmed that Mr. Cooper had no alcohol or controlled substances in his system. RP 435-436, 454-455, 533-537.

Chipman to shut off his engine, and contemplated reaching in to take the key from the ignition. RP 86, 123. Either Cooper or Kitchings may have accused Mr. Chipman of being intoxicated, and one of the two men also told Mr. Chipman he was not “going anywhere.” RP 15, 57-58, 86, 100, 127, 169, 441, 442. According to one person, Cooper and Kitchings “were trying to get the young man out of his car.” RP 176. Another noted the two men gesticulating, and agreed that the interaction was a “confrontation.” RP 324-325. During the confrontation, an unknown person said “Just call the cops.” RP 17, 63.

Mr. Chipman had been beaten up by male strangers before, and he’d also been trapped in vehicles after accidents. These experiences, combined with his Generalized Anxiety Disorder, caused Mr. Chipman to believe he was in jeopardy and needed to flee the area. CP 28-48.

Accounts of what happened next varied significantly.

Mr. Chipman said he pulled the door closed and backed away, and that one of the men opened it as he was moving, and either fell or was knocked down. RP 442, 495.² One witness testified that the door was closed and that it flew open as Mr. Chipman backed away. RP 324-326. According to Cooper and two other witnesses, Mr. Chipman never closed

² See also RP 483.

his door, but drove in reverse and knocked Cooper and Kitchings to the ground. RP 97, 99, 143-144, 168. Another witness was unable to say how or when the door opened. RP 253.

As Mr. Chipman left, he was followed by two vehicles. He believed he was being pursued by the men who had confronted him. CP 34. In fact, the drivers were a scout's parent and a passing motorist, both of whom said Mr. Chipman drove fast while trying to close his door. RP 223-226, 311-332. Police stopped Mr. Chipman four miles away and arrested him. RP 416-417. Mr. Chipman was determined not to be impaired, and was described as hyper, sweaty, and nervous, and his hands were shaking. RP 419, 425, 435.

Kitchings sustained life-threatening injuries from which he may never fully recover. His skull was fractured, his brain injured, and he had broken bones and required multiple surgeries. RP 26-44, 511-530. Cooper's hip was fractured, and he lost several teeth. RP 88, 90, 108, 201-219.

The state charged Kody Chipman with two counts of Vehicular Assault, and Hit and Run with Injuries. CP 11-12. Specifically, with regard to the vehicular assault charges, the Information charged that Mr. Chipman "did operate or drive a vehicle in a reckless manner and/or with disregard for the safety of others; and caused substantial bodily harm to

[Dee Cooper, Daniel Kitchings].” CP 11. The state further alleged that Kitchings’s injuries substantially exceeded the level of bodily harm necessary to satisfy the elements of the offense. CP 11.

Mr. Chipman sought to raise self-defense at trial, arguing that he fled the scene because he was afraid the two men intended to restrain him against his will. RP (9/19/11) 76-88. When interviewed following his arrest, Mr. Chipman told police that he was scared of Kitchings and Cooper, that they were “up in [his] face,” and that he fled because he was “weirded out.” RP 367, 371, 372, 491. Prior to trial, he was evaluated by Dr. Brett Trowbridge and a state expert. RP (9/19/11) 14-15. Both experts concluded that Mr. Chipman suffered from Generalized Anxiety Disorder (GAD). RP (10/3/11) 79.

Mr. Chipman sought to offer Dr. Trowbridge’s testimony at trial to help explain his diagnosis and how it would impact the way he viewed the confrontation. Dr. Trowbridge opined that Mr. Chipman—because he suffered from GAD—would experience more fear than the average person during a confrontation such as occurred in this case, and that his general response to the situation would be to flee. CP 28-48; RP (10/3/11) 64-95. Mr. Chipman also planned to offer the testimony of his mother. Her

proposed testimony outlined the traumatic events Mr. Chipman had suffered and confirmed his history of anxiety.³ CP 49-53.

The court excluded the testimony:

I am not going to permit the use of expert testimony to explain the defendant's subjective fear that he was in danger at the time that this incident occurred. The expert opinion in this case would go to describe a generalized anxiety disorder of the defendant.

That has not yet been approved by the courts as proper expert opinion to explain the defendant's subjective fear, and it won't be used in this case.

RP (10/3/11) 95-96.

The court also excluded Ms. Chipman's testimony. RP 382. At the prosecutor's request, the court directed Mr. Chipman's attorney not to discuss self-defense during jury selection or his opening statement. RP (10/3/11) 89, 91, 95.

Mr. Chipman exercised his right to remain silent at trial. Based on his failure to testify, the court refused to instruct the jury on self defense. RP 543.

The jury found Mr. Chipman guilty of all charges, and agreed with the special allegation. RP 659-667. Mr. Chipman was sentenced to a total of 40 months, and he timely appealed. RP 699-706; CP 94-103.

³ She also would have confirmed that his car window did not open. CP 53.

ARGUMENT

I. MR. CHIPMAN’S CONVICTION VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH.CONST. ARTICLE I, SECTION 22.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wash.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.* at 105. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* at 105-106. If the Information is deficient, prejudice is presumed and reversal is required; no particularized showing of prejudice is required. *State v. Courneya*, 132 Wash.App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wash.2d 420, 425, 998 P.2d 296 (2000).

B. The Information was deficient because it failed to properly allege a causal relationship between Mr. Chipman’s subpar driving and the harm inflicted on Cooper and Kitchings.

The Sixth Amendment to the federal constitution guarantees an accused person the right “to be informed of the nature and cause of the

accusation.” U.S. Const. Amend. VI.⁴ A similar right is secured by the Washington state constitution. Wash.Const. Article I, Section 22. All essential elements—both statutory and nonstatutory—must be included in the charging document. *State v. Johnson*, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992).

RCW 46.61.522 criminalizes Vehicular Assault. The statute provides (in relevant part) as follows:

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle: (a) In a reckless manner and causes substantial bodily harm to another; or... (c) With disregard for the safety of others and causes substantial bodily harm to another.

RCW 46.61.522. An additional nonstatutory element “requires proof of a proximate causal relationship between [the accident] and the driver’s impairment due to alcohol, reckless driving, or disregard for the safety of others.” *State v. Sanchez*, 62 Wash.App. 329, 331, 814 P.2d 675 (1991) (addressing vehicular homicide statute). This nonstatutory element must be included in the charging language. *Id.*

The Information in this case alleged in Counts I and II that Mr. Chipman “did operate or drive a vehicle in a reckless manner and/or with disregard for the safety of others; and caused substantial bodily harm...”

⁴ This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

CP 11. As can be seen, the charging document did not indicate that Mr. Chipman's subpar driving caused the harm inflicted. CP 11.

Because the Information failed to indicate any causal relationship between his driving and the harm inflicted, it did not include all essential elements of vehicular assault. Accordingly, the Information was deficient, and prejudice is conclusively presumed. *McCarty*, at 425. Mr. Chipman's convictions in Counts I and II must be reversed and the charges dismissed without prejudice. *Id.*

II. THE TRIAL JUDGE INFRINGED MR. CHIPMAN'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL BY REFUSING TO INSTRUCT THE JURY ON SELF-DEFENSE.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S.*, at 702. To determine whether an accused person is entitled to instructions on self-defense, a reviewing court takes the evidence in a light most favorable to the accused person. *State v. George*, 161 Wash.App. 86, 96, 249 P.3d 202 (2011). Refusal to give an instruction is reviewed *de novo* when the refusal is based on an issue of law. *State v. Walker*, 136 Wash.2d 767, 771, 966 P.2d 883 (1998).

- B. A person is entitled to use force to prevent an offense against his person, and may use deadly force to resist a felony against his person.

The use of force against another is not unlawful “[w]hen used by a party about to be injured ... in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.” RCW 9A.16.020. An accused person is entitled to use deadly force, either in the actual resistance of a felony against the person, or when there are reasonable grounds to believe a felony is being attempted and there is imminent danger that it will be accomplished. RCW 9A.16.050.

Self-defense is available even when the crime charged is not an intentional assault:

Explicit evidence that a defendant intended to assault a victim is not necessary in order to provide the evidentiary basis for a self-defense instruction. What is necessary is evidence that the action that caused the victim’s injury was not accidental, but rather made in order to protect the defendant.

State v. Dyson, 90 Wash.App. 433, 434, 952 P.2d 1097 (1997); *see also State v. Hanton*, 94 Wash.2d 129, 133, 614 P.2d 1280 (1980), *overruled on other grounds by State v. McCullum*, 98 Wash.2d 484, 656 P.2d 1064 (1983). For example, in *Dyson*, the court reversed a conviction for third-degree assault, committed by means of criminal negligence, because the

trial court refused the defendant's request for instructions on self-defense. The court held that self-defense eliminates the unlawfulness inherent in criminal negligence. *Dyson*, at 438. Similarly, in *Hanton*, the Supreme court noted that

[a] person acting in self-defense cannot be acting recklessly... There can be no recklessness without disregard of risk of a wrongful act, and self-defense, as defined, is not 'wrongful.' Moreover, since self-defense is not wrongful, it cannot be 'a gross deviation from conduct that a reasonable man would exercise in the same situation.'

Hanton, at 133 (quoting RCW 9A.08.010(1)(c)).

Vehicular homicide, as charged in this case, may be committed by two alternative means. RCW 46.61.522; CP 11. One alternative requires proof of recklessness, while the other requires proof of aggravated negligence. CP 11. As in *Hanton* and *Dyson*, self-defense eliminates the unlawfulness or wrongfulness of the accused person's actions. *Dyson*, at 438; *Hanton*, at 133.

C. An accused person is entitled to instructions on self-defense when there is "some evidence" supporting the defense.

Due process requires the state to prove every element of the crime beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 3; *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where self-defense is raised at trial, the absence of self-defense becomes another element of the offense. *State v. Woods*, 138

Wash.App. 191, 156 P.3d 309 (2007). An omission in the court's instructions that relieves the state of its burden to prove every element violates due process. *State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wash.2d 67, 941 P.2d 661 (1997).

In addition, an accused person is entitled to instructions on the defense theory of the case if the evidence supports the instructions. *State v. Werner*, 170 Wash.2d 333, 337, 241 P.3d 410 (2010). A defendant is entitled to self-defense instructions if there is "some evidence" of self-defense. *Id.* The court must draw all reasonable inferences in the light most favorable to the accused person. *State v. Webb*, 162 Wash.App. 195, 208, 252 P.3d 424 (2011). The burden on the defendant is low, and the evidence need not even create a reasonable doubt. *George*, at 96. The erroneous refusal to instruct on self-defense requires reversal if the accused person is prejudiced by the error. *Werner*, at 337.

Self-defense incorporates both subjective and objective components. *George*, at 96-97. The subjective prong requires the jury to "place itself in the defendant's shoes and to view the defendant's actions in light of all the facts and circumstances known to the defendant." The objective prong requires the jury to "determine what a reasonably prudent person would have done in the defendant's situation." *Id.*; *Woods*, at 198.

D. Mr. Chipman was entitled to instructions on self-defense because there was at least “some evidence” supporting the defense.

In this case, taking the evidence in a light most favorable to Mr. Chipman, there was at least “some” evidence that he acted in self-defense.⁵ In particular, he was confronted by two loud men (one of whom was described as quite large). RP 12-15, 83, 84, 91, 118. One of the men pulled open the door to Mr. Chipman’s car, uninvited. RP 15, 24, 86, 96, 98. Mr. Chipman was accused of driving under the influence, and told he wasn’t going anywhere. RP 14-17, 24, 63, 84-86, 96, 98, 100, 118, 127. He was frightened by the men; he believed they intended to keep him against his will (and to make a false accusation to the police). He responded by putting his car in reverse and driving away, either knocking the two men down or—as he believed at the time—causing them to fall. RP 441-442.

When taken in a light most favorable to Mr. Chipman, this evidence amounts to at least “some evidence” of self-defense. The testimony suggested that the two men intended to unlawfully restrain Mr. Chipman because they erroneously believed him to be intoxicated. RP 14-15, 16, 57-58, 84, 86, 100, 118, 123, 127, 169, 441, 442. The 911 caller

⁵ Furthermore, additional evidence was available in the form of Dr. Trowbridge’s expert opinion. See CP 28-48. As argued elsewhere in this brief, the expert testimony was improperly excluded.

said that Cooper and Kitchings “were trying to get the young man out of his car.” RP 176. Mr. Chipman told police he was scared, that the men were up in his face, and that he felt “weirded out.” RP 367, 371, 372, 440-462, 490-501. He later told Dr. Trowbridge that he thought the men were chasing him in a vehicle as he left the scene, and planned to beat him up. CP 62.

A reasonable person under the circumstances might react by attempting to drive away, as Mr. Chipman did. Furthermore, because unlawful imprisonment is a felony,⁶ Mr. Chipman was entitled to use force—including deadly force—to defend against this offense. RCW 9A.16.020; RCW 9A.16.050. It is not necessary that he intended to assault Cooper or Kitchings; all he was required to show is that “the action that caused the victim’s injury”— in this case, the act of driving away— “was not accidental, but rather made in order to protect the defendant.” *Dyson*, at 434.

Accordingly, the trial court erred by refusing to instruct the jury on self-defense. In fact, the trial judge applied an erroneous legal standard when she held that self-defense could not be raised absent testimony from the defendant. RP 543. A defendant’s testimony is not a necessary

⁶ See RCW 9A.40.040 (“(1) A person is guilty of unlawful imprisonment if he or she knowingly restrains another person.”)

prerequisite to a proper claim of self defense. *See, e.g., State v. Walker*, 164 Wash.App. 724, 729, 265 P.3d 191 (2011) (“a defendant must produce some evidence demonstrating self-defense from ‘whatever source’ and that the evidence does not need to be the defendant’s own testimony”); *see also State v. Miller*, 89 Wash.App. 364, 368, 949 P.2d 821, 823-24 (1997) (self-defense properly raised by testimony of third-party witness).

Mr. Chipman’s entire defense to the vehicular assault charges rested on his self-defense claim. The failure to instruct the jury on self-defense necessarily prejudiced him; in the absence of appropriate instructions, his attorney was unable to argue his defense to the jury.⁷ RP 612-641.

The trial judge’s refusal to instruct the jury on self-defense violated Mr. Chipman’s Fourteenth Amendment right to due process because it relieved the prosecution of its burden to disprove the defense and because it deprived Mr. Chipman of the opportunity to argue his theory of the case. *Werner*, at 337; *Woods, supra*; *Winship, supra*. His vehicular assault

⁷ Furthermore, by refusing to allow defense counsel to mention self-defense during jury selection or opening statements, the court precluded Mr. Chipman from ferreting out biased jurors and from framing the case in the best possible light, placing him at a disadvantage from the very outset. RP (10/3/11) 89, 91, 95.

convictions must be reversed and the charges remanded to the trial court for a new trial. *Id.*

III. THE TRIAL COURT VIOLATED MR. CHIPMAN’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY EXCLUDING RELEVANT AND ADMISSIBLE EVIDENCE.

A. Standard of Review

Although evidentiary rulings are ordinarily reviewed for an abuse of discretion,⁸ this discretion is subject to the requirements of the constitution. A court necessarily abuses its discretion by denying an accused person her or his constitutional rights. *State v. Iniguez*, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009). Accordingly, where the appellant makes a constitutional argument regarding the exclusion of certain evidence, review is *de novo*. *Id.*

B. Due process guaranteed Mr. Chipman a meaningful opportunity to present his defense.

A state may not “deprive any person of life, liberty, or property, without due process of law...” U.S. Const. Amend. XIV. The due process clause (along with the Sixth Amendment right to compulsory process)

⁸ A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009).

guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006).

An accused person must be allowed to present his version of the facts so that the jury may decide “where the truth lies.” *State v. Maupin*, 128 Wash.2d 918, 924, 913 P.2d 808 (1996) (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The U.S. Supreme Court has described this right as “a fundamental element of due process of law.” *Washington v. Texas*, at 19.

The right to present a defense includes the right to introduce relevant and admissible evidence. *State v. Lord*, 161 Wash.2d 276, 301, 165 P.3d 1251 (2007). Denial of this right requires reversal unless it can be shown beyond a reasonable doubt that the error did not affect the verdict. *State v. Elliott*, 121 Wash.App. 404, 410, 88 P.3d 435 (2004). An appellate court will not “tolerate prejudicial constitutional error and will reverse unless the error was harmless beyond a reasonable doubt.” *State v. Fisher*, 165 Wash.2d 727, 755, 202 P.3d 937 (2009).

Evidence is relevant if it has “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.” ER 401.

Unless otherwise limited, all relevant evidence is admissible. ER 402.

The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wash.2d 664, 669, 230 P.3d 583 (2010).

C. The trial court erroneously excluded the expert testimony of Dr. Trowbridge.

ER 702 governs testimony by experts, providing:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. Under the rule, expert testimony is admissible if it will be helpful to the trier of fact. “Helpfulness” is to be construed broadly. *Philippides v. Bernard*, 151 Wash.2d 376, 393, 88 P.3d 939 (2004) (citing *Miller v. Likins*, 109 Wash.App. 140, 148, 34 P.3d 835 (2001)). This means the rule favors admissibility in doubtful cases. *Id.*, at 148.

Here, the trial court should not have excluded Dr. Trowbridge’s testimony, because it was relevant to Mr. Chipman’s self-defense claim. As noted above, self-defense requires analysis of both subjective and objective factors. The jury must first place itself in the defendant’s position and view the situation in light of all the facts and circumstances

known to the defendant. *George*, at 96-97. The jury must then objectively analyze the event to determine what a reasonably prudent person would have done in the defendant's situation. *Id*; *Woods*, at 198.

The "facts and circumstances" known to the defendant include any mental health condition(s) that might affect the accused person's perspective. A mental health diagnosis may be relevant not only to establish the subjective prong of self defense (the facts and circumstances), but also to show the reasonableness of the defendant's response (in light of those facts and circumstances). *See, e.g., State v. Allery*, 101 Wash.2d 591, 682 P.2d 312 (1984) (expert testimony on battered women's syndrome admissible in self-defense case); *State v. Janes*, 121 Wash.2d 220, 850 P.2d 495 (1993) (expert testimony on battered child syndrome admissible in self-defense case).⁹

In both *Allery* and *Janes*, the Court approved expert testimony to help explain each defendant's self-defense claim. *Allery*, at 597; *Janes*, at 236. The testimony would have helped explain why a battering victim might perceive threats in circumstances that might seem nonthreatening to the average person, and might respond to a perceived threat with force that

⁹ *Cf. State v. Riker*, 123 Wash.2d 351, 361, 869 P.2d 43 (1994), in which the Supreme Court found that battered women's syndrome was not generally accepted within the scientific community when used to explain a battering victim's behavior outside the battering relationship.

appears disproportionate to the average person. As the *Allery* court put it, testimony about the syndrome “may have a substantial bearing on the [defendant’s] perceptions and behavior at the time of the killing and is central to [the] claim of self-defense.” *Allery*, at 597.

The *Janes* court elaborated, explaining that

Expert testimony regarding the syndrome helps the jury to understand the reasonableness of the defendant's perceptions:

Without the aid of expert testimony on the psychology of battered children, the jury will be unable to appreciate the manner in which the abused child differs from the unabused child. Specifically, the jury will be uninformed as to the difference in the way battered children perceive things in their immediate surroundings and react to those perceptions. Expert testimony can help the jury understand the sense of powerlessness, fear, and anxiety which permeate the battered child's world.

The expert testimony, therefore, will aid the jury in evaluating the manner in which a battered child perceives the imminence of danger and his or her tendency to use deadly force to repel that danger.

...The jury can then use such knowledge to determine whether the defendant's belief that he was in imminent danger of serious bodily injury or loss of life was reasonable under the circumstances.

Janes, at 236 (citation omitted) (quoting Steven R. Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 L. & Psychol.Rev. 103, 104 (1987))

In this case, Dr. Trowbridge’s testimony was relevant and admissible because it helped to establish Mr. Chipman’s subjective mental

state—the “facts and circumstances” known to him at the time of the incident—and because it addressed the reasonableness of his response to the situation. Dr. Trowbridge’s proposed testimony paralleled the testimony approved by the Supreme Court in *Allery* and *Janes*, and should have been admitted.

Dr. Trowbridge outlined the materials he’d reviewed, interviews he’d performed, and tests he’d administered in order to conclude that Mr. Chipman suffered from Generalized Anxiety Disorder (GAD).¹⁰ CP 28-48. He explained that Mr. Chipman fit the criteria for GAD listed in the DSM IV (which he referred to as “the book.”)¹¹ CP 33-34. He opined that Mr. Chipman, as a result of his anxiety disorder, would have experienced more fear than the average person during the confrontation at the firehouse, and that his general response to such situations—as a result (in part) of his mental health condition—would be to flee. CP 39. He also

¹⁰ He outlined a series of incidents that could relate to the diagnosis, including five car accidents (starting when Kody was a small child), a beating administered at daycare, domestic violence between his mother and her boyfriends (including occasions where Kody, as a child, attempted to intervene), bullying incidents, beatings, threats to kill, and other traumatic events. Many of these incidents involved male violence, and Dr. Trowbridge described Mr. Chipman as distrustful of men. He also indicated that Mr. Chipman often responded to his fear by fleeing these violent and potentially violent situations. CP 28-48. The incidents outlined in the transcript were generally confirmed by Kody’s mother. CP 49-53.

¹¹ American Psychiatric Ass’n, *Diagnostic & Statistical Manual of Mental Disorders* (4th ed.1994). The Supreme Court has recognized that the DSM IV reflects the scientific consensus in the mental health field. *State v. Greene*, 139 Wash.2d 64, 71, 984 P.2d 1024 (1999).

confirmed that the scientific basis for his testimony was generally accepted in the scientific community. CP 33, 46. The prosecution did not produce any evidence rebutting this assertion. *See RP, generally.*

The testimony was relevant under ER 401's low threshold, because it would have explained the "facts and circumstances" known to Mr. Chipman at the time of the confrontation, and thus would have helped establish the subjective prong of Mr. Chipman's self-defense claim. *Allery, supra; Janes, supra.* The testimony also would have helped the jury to see that Mr. Chipman's response to the confrontation—putting his car in reverse and driving away—was reasonable under the circumstances as they appeared to him at the time. Given the Supreme Court's broad definition of "helpfulness," the evidence should have been admitted. *Id; Philippides, at 393.*

The superior court applied the wrong legal standard in ruling to exclude the evidence. Instead of determining whether a diagnosis of GAD is generally accepted in the relevant scientific community and analyzing whether or not the evidence would be relevant and helpful to the jury, the judge abdicated her responsibility and excluded the evidence simply because it hadn't yet been approved by a higher court:

I am not going to permit the use of expert testimony to explain the defendant's subjective fear that he was in danger at the time that

this incident occurred. The expert opinion in this case would go to describe a generalized anxiety disorder of the defendant. That has not yet been approved by the courts as proper expert opinion to explain the defendant's subjective fear, and it won't be used in this case.
RP (10/3/11) 95-96.

This was error. The Supreme Court has noted that a diagnosis listed in the DSM IV is, by definition, generally accepted. *Greene, at 71-73*. Furthermore, Dr. Trowbridge testified that there was general acceptance of the disorder, including general acceptance of its forensic application in what he called "subjective self defense." CP 33, 46. The court should have accepted this general acceptance and focused on whether or not the testimony would have been helpful to the jury under ER 702. Because psychiatric conditions such as GAD are not within the common knowledge of the average juror, expert testimony on the subject would have been helpful, and the evidence should have been admitted.
Allery, supra; Janes, supra.

By excluding relevant and admissible evidence, the trial court violated Mr. Chipman's right to present a defense. U.S. Const. Amend. XIV; *Holmes, supra*. His convictions must be reversed and the case remanded for a new trial, with instructions to permit Dr. Trowbridge to testify on Mr. Chipman's behalf. ER 401, ER 402, ER 702; *Philippides, supra*.

D. The trial court erred by excluding Ms. Chipman's testimony.

In a self-defense case, prior incidents that affect the defendant's view of the situation are relevant and admissible to show the "facts and circumstances" known to the defendant. Courts routinely allow the defense to introduce evidence relevant to the defendant's mental state at the time s/he acted in self-defense, even if the prior incidents do not involve a party from the current case. *See, e.g., People v. Montes*, 263 Ill. App. 3d 680, 691, 635 N.E.2d 910 (1994) (previous unrelated violent incident would have helped explain defendant's state of mind); *Jefferson v. State*, 818 So. 2d 1099, 1104 (Miss. 2002) (priest's testimony that he'd told the defendant about "a vision that something bad was going to happen to [him] that day; specifically, that someone was going to try to kill him" held relevant and admissible on the issue of self-defense); *People v. Goetz*, 68 N.Y.2d 96, 114, 497 N.E.2d 41, 52 (1986) ("[T]he defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances").

Here, Ms. Chipman was available to outline prior stressful incidents (and to show that her son had suffered from anxiety all his life). She would have testified that Kody was unable to attend daycare because

he was frightened of daycare workers and other children, that (at age four) he witnessed a bearded man abuse his mother (and, following that incident, cried when approached by bearded men), that he called 911 (at age 10) when his mother's ex-boyfriend violated a restraining order to threaten her with a knife, that he was (also at age 10) beaten repeatedly with a belt by his mother's housemate, that he was trapped in a car following an accident at age 12, that he'd reported his mother's threat to drive the car into a tree while taking him to school, that his dog was injured and his property stolen during a burglary, that he was ridiculed and tormented by schoolmates who'd learned that his grandmother had been arrested and taken to Western State Hospital after attacking an elderly man, that he suffered additional bullying after returning to school following a brief absence, that he'd been home when a man broke in and attempted to rape his mother (and that 14-year-old Kody had chased the man out with a baseball bat), that he was threatened and attacked by strangers during his teen years, and that (at age 19) he'd been grabbed by the throat and forced to the floor after attempting to intervene in an argument between his mother and her then boyfriend. CP 49-53.

All these prior incidents made up the "facts and circumstances" known to Mr. Chipman when he was confronted by Cooper and Kitchings. They were relevant to establish the subjective prong of his self-defense

claim, and to explain the reasonableness of his actions when he put his car in reverse and drove away.¹² *Montes, supra; Jefferson, supra.*

By excluding relevant and admissible testimony, the trial court violated Mr. Chipman's right to present a defense. U.S. Const. Amend. XIV; *Holmes, supra.* His convictions must be reversed and the case remanded for a new trial, with instructions to permit Ms. Chipman to testify on her son's behalf. ER 401, ER 402, *Montes, supra; Jefferson, supra.*

IV. MR. CHIPMAN'S EXCEPTIONAL SENTENCE WAS IMPROPERLY BASED ON FACTORS CONSIDERED BY THE LEGISLATURE IN SETTING THE STANDARD RANGE.¹³

A. Standard of Review

Constitutional issues are reviewed *de novo*. *E.S., at 702.* The legal justification for a sentence is reviewed *de novo*. *State v. Stubbs*, 170 Wash.2d 117, 124, 240 P.3d 143 (2010).

¹² Ms. Chipman's testimony would also have confirmed that the driver's side window of his car did not open. CP 53.

¹³ The Supreme Court has accepted review of this issue. *State v. Pappas*, 164 Wash.App. 917, 265 P.3d 948 (2011) *review granted*, 173 Wash.2d 1026, 273 P.3d 982 (2012).

A. An exceptional sentence may not be based on factors considered by the legislature in setting the standard range.

An element of the charged offense may not be used to justify an exceptional sentence. *State v. Ferguson*, 142 Wash.2d 631, 647-48, 16 P.3d 1271 (2001). The rationale for this rule is that some factors are

inherent in the crime – inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and do not distinguish the defendant's behavior from that inherent in all crimes of that type.

Id. (citing *State v. Chadderton*, 119 Wash.2d 390, 396, 832 P.2d 481 (1992) (alterations in original)). Thus, “[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.” *State v. Gore*, 143 Wash.2d 288, 316, 21 P.3d 362 (2001) , *overruled on other grounds by State v. Hughes*, 154 Wash.2d 118, 110 P.3d 192 (2005).

Courts have repeatedly stricken exceptional sentences where the alleged “aggravating circumstance” inhered in the jury verdict for the underlying offense. For example, in *Ferguson*, the court held that a finding of “deliberate cruelty” inhered in jury’s verdict for assault by

means of intentionally exposing another to HIV with intent to inflict bodily harm.¹⁴

By defining an offense and assigning a certain seriousness level and sentence range to that offense, the legislature necessarily took into consideration the potential for variances in conduct. “[T]he idea of a range, rather than a fixed term . . . , is to allow the judge some flexibility in tailoring the sentence to the person and crime before him; the court may impose any sentence within the range that it deems appropriate.” *Baker*, at 848.

Under RCW 9.94A.535(3)(y), a jury may find an aggravating factor justifying an exceptional sentence where the state proves beyond a reasonable doubt that “[t]he victim’s injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense.” However, this aggravating factor does not necessarily justify an exceptional sentence for a particular offense. Instead, an exceptional

¹⁴ See also, e.g., *State v. Dunaway*, 109 Wash.2d 207, 218-19, 743 P.2d 1237 (1987) (planning is inherent in the premeditation element of first degree murder, thus may not be used to justify an exceptional sentence for the crime of first degree murder); *Gore*, at 320 (same); *State v. Bourgeois*, 72 Wash.App. 650, 662, 866 P.2d 43 (1994) (serious wounds inflicted on victims fell within the scope of the statutory definition of first-degree assault, and could not support sentence outside standard range); *State v. Baker*, 40 Wash.App. 845, 848-49, 700 P.2d 1198 (1985) (planning inherent in verdict for attempted first-degree escape); *State v. Armstrong*, 106 Wash.2d 547, 551, 723 P.2d 1111 (1986) (burns inflicted on the 10-month-old victim by defendant’s throwing boiling coffee on the child and plunging the child’s foot in the coffee were injuries accounted for in the offense of second degree assault and could not justify an exceptional sentence).

sentence may only be imposed if the injuries inflicted are demonstrably outside the range of injuries contemplated by the legislature in setting the standard range. *See, e.g., Ferguson, supra.*

The legislature has criminalized the harm caused by vehicle accidents under certain circumstances. Where death or injury results from reckless driving,¹⁵ the driver may be convicted of (a) vehicular homicide (if the accident results in death within three years), or (b) vehicular assault (if the accident produces injury that is at least substantial bodily harm). RCW46.61.520; RCW 46.61.522. The legislature did not enact an intermediate level of culpability where injury exceeds substantial bodily harm but does not result in death. *See RCW 46.61.500 et seq.*

Because the legislature enacted only two crimes of this type—vehicular assault and vehicular homicide—it necessarily intended vehicular assault to cover a wide range of harm, beginning with the minimal harm that could qualify as substantial bodily harm and ending with harm that falls just short of death. Accordingly, even where a person’s reckless driving causes harm exceeding the minimum level—i.e. if the victim suffers great bodily harm—the driver is guilty of vehicular assault and subject to the penalties for that offense.

¹⁵ Or from driving with disregard for the safety of others, or from driving while intoxicated.

As a result of the legislature’s approach to vehicular assault and vehicular homicide, the seriousness of injuries suffered by a victim of vehicular assault can never justify an exceptional sentence. Any such injuries were necessarily considered by the legislature in setting the standard range for the offense. The Supreme Court recognized this, long before the *Blakely* decision¹⁶ necessitated changing the mechanism for imposing exceptional sentences. *See State v. Nordby*, 106 Wash.2d 514, 519, 723 P.2d 1117 (1986) (seriousness of bodily injuries could not justify exceptional sentence for vehicular assault because injuries were considered by the legislature in setting the standard range for the offense); *State v. Cardenas*, 129 Wash.2d 1, 6-7, 914 P.2d 57 (1996) (“[The victim’s] injuries, while severe, are evidently the type of injuries envisioned by the Legislature in setting the standard range. Consequently, the severity of injuries cannot justify an exceptional sentence.”)

Although *Nordby* and *Cardenas* addressed an earlier version of the statute which referenced “serious bodily injury” rather than “substantial bodily harm,” the underlying principle leads to the same analysis and requires the same result. In setting the standard range for vehicular assault, the legislature took into account all injuries that did not result in

¹⁶ *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

death, including life-threatening injuries; to assume otherwise would be to ignore the fact that such injuries are an inherent risk whenever a collision occurs. Furthermore, if the legislatively-set standard range applied only to the minimum level of injury—the lowest level of injury consistent with substantial bodily harm—exceptional sentences would become the rule rather than the exception.

The exceptional sentence in this case violated these principles and cannot stand. The jury’s finding—that Kitchings’s injuries substantially exceeded those necessary to establish the offense—cannot support Mr. Chipman’s exceptional sentence. *Ferguson, supra; Nordby, supra*. The legislature considered such injuries when setting the penalties for vehicular assault. Accordingly, the sentence must be vacated and the case remanded for resentencing within the standard range. *Id.*

CONCLUSION

For the foregoing reasons, the convictions must be reversed and the charges dismissed without prejudice. In the alternative, the case must be remanded for a new trial, with instructions to allow Mr. Chipman to introduce the testimony of Dr. Trowbridge and Ms. Chipman, and to present his self-defense claim to a properly instructed jury.

If the convictions are not reversed, Mr. Chipman's exceptional sentence must be vacated and the case remanded for resentencing within the standard range.

Respectfully submitted on May 18, 2012,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Kody Chipman, DOC #348585
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Thurston Prosecuting Attorney
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 18, 2012.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

May 18, 2012 - 9:03 AM

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