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Division III  
State of Washington

NO. 33028-1-III  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**LISA ELAINE THYSELL,**

Defendant/Appellant.

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**BRIEF OF APPELLANT**

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**CONSTITUTIONAL PROVISIONS**

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## **ASSIGNMENTS OF ERROR**

1. The trial court erred when it ruled that defense counsel opened the door to allow the prosecuting attorney to question a witness concerning Lisa Elaine Thysell's use of methamphetamine.
2. The trial court erred in denying a self-defense instruction.
3. The trial court improperly imposed conditions for a substance abuse evaluation and mental health evaluation.

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Did defense counsel's questioning of a witness concerning her use of methamphetamine open the door for the prosecuting attorney to question that same witness about Ms. Thysell's use of methamphetamine?
2. Was Ms. Thysell entitled to an instruction on self-defense?
3. Was there sufficient information in the record to allow the trial court to order Ms. Thysell to undergo an evaluation for substance abuse and mental health?

## STATEMENT OF CASE

Ms. Thysell and her daughter, Ashley Calkins, were involved in a physical altercation on September 6, 2014. Ms. Thysell went to Ms. Calkins' trailer to look for a missing rifle. (12/3/14 RP 35, l. 24 to RP 36, l. 4)

Deputy Guiney of the Kittitas County Sheriff's Office responded to a 9-1-1 call made by Ms. Thysell to the dispatch center. Upon arrival he observed Ms. Thysell with a cloth wrapped around her hand and bleeding profusely. He learned that Ms. Calkins had bit off the tip of Ms. Thysell's index finger. (12/3/14 RP 7, ll. 22-24; RP 9, ll. 19-25; RP 10, ll. 16-18; RP 11, ll. 1-2)

The deputy also observed a red raw bite mark on Ms. Thysell's arm. (12/3/14 RP 25, ll. 15-22)

While awaiting medical aid Deputy Guiney recorded a statement from Ms. Thysell. Ms. Thysell stated that her daughter pushed her when the door to the trailer was opened. She grabbed onto her daughter and her daughter then bit her finger and arm. They were then involved in an exchange of fisticuffs. (12/3/14 RP 14, ll. 6-15)

Deputy Guiney then contacted Ms. Calkins. Ms. Calkins advised the deputy that when Ms. Thysell arrived at the trailer she threatened to

break a window. When the door was opened Ms. Thysell grabbed her leg and pulled her out of the trailer. They then wrestled on the ground. (12/3/14 RP 38, ll. 2-11)

Ms. Calkins had scratches and bruises on her right arm; scratches on her left arm; and red marks under her eyes. (12/3/14 RP 17, ll. 15-18; RP 18, ll. 13-25; RP 19, ll. 1-12)

Ms. Calkins also advised the deputy that Ms. Thysell had hit her in the head with a rock. (12/3/14 RP 40, ll. 6-7)

An Information was filed on September 8, 2014 charging Ms. Thysell with first degree burglary and fourth degree assault. Both offenses carried a domestic violence tag. (CP 1)

During cross-examination of Ms. Calkins defense counsel asked about her boyfriend's use of methamphetamine. (12/3/14 RP 62, l. 21 to RP 63, l. 2)

The prosecuting attorney, on redirect and over defense counsel's objection, then inquired concerning Ms. Thysell's use of methamphetamine. (12/3/14 RP 62, ll. 21-25; RP 65, ll. 8-24; RP 66, l. 19 to RP 67, l. 22; Appendix "A")

The trial court declined to give a self-defense instruction after allowing both counsel to argue their positions. (12/4/14 RP 30, l. 2 to RP 34, l. 8)

The jury found Ms. Thysell guilty of fourth degree assault with the DV tag. (CP 37; CP 28)

Judgment and Sentence was entered on December 15, 2014. The trial court imposed the following condition: “Undergo an evaluation for, and fully comply with, treatment for domestic violence, substance abuse, mental health and anger management.” (CP 39-40)

Ms. Thysell filed her Notice of Appeal on December 16, 2014. (CP 41)

### **SUMMARY OF ARGUMENT**

The combination of testimony concerning methamphetamine use and the denial of a self-defense instruction deprived Ms. Thysell of her right to present a defense and a fair trial.

In the absence of any evidence that Ms. Thysell was under the influence of any substance , or has a mental health problem, the conditions imposed by the trial court must be removed from the Judgment and Sentence.

## ARGUMENT

### I. EVIDENCE OF METHAMPHETAMINE USE

The trial court erred when it ruled that defense counsel opened the door to Ms. Thysell's use of methamphetamine. Defense counsel's questions were directed to Ms. Calkins about her boyfriend. No question was asked that would implicate Ms. Thysell in the use of methamphetamine.

Allowing the prosecuting attorney to question Ms. Calkins about Ms. Thysell's methamphetamine use unduly prejudiced Ms. Thysell and had no relevance to the proceedings. There was no evidence that Ms. Thysell was under the influence of either alcohol or drugs at the time of the incident.

In *State v. Teuber*, 109 Wn. App. 640, 643, 36 P.3d 1086 (2001) the Court ruled:

Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. *State v. Powell*, 126 Wn.2d 244-259, 893 P.2d 615 (1995); ER 401. The decision to admit evidence lies within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Hamlet*, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997). An abuse of discretion exists

when the trial court's exercise of its discretion is manifestly unreasonable or based upon untenable terms or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

The trial court's ruling was based upon defense counsel's allegedly opening the door. No door was opened. The trial court's ruling was both unreasonable and based upon untenable grounds or reasons.

Moreover, defense counsel objected to the testimony. Even though defense counsel based the objection on lack of foundation it was still an appropriate objection. There was no evidence that Ms. Thysell was using methamphetamine on September 6, 2014. There was no evidence that Ms. Thysell was under the influence of alcohol or drugs on September 6, 2014.

It was error for the trial court to allow this prejudicial testimony to be presented to the jury.

## **II. SELF-DEFENSE**

The trial court denied Ms. Thysell's request for a self-defense instruction.

"To be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense; however, once the defendant produces some evidence, the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt." *State v. Walden*, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997)

(citing *State v. Janes*, 121 Wn.2d 220, 237,  
850 P.2d 495 (1993) ....

*State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012).

The State relied upon the *McCreven* case in arguing that either Ms. Thysell needed to testify or that the defense needed to present a witness who would testify concerning the issue of self-defense. The trial court accepted the State's argument. Both the State and the trial court are in error.

None of the cases relied upon by the State in their argument to the trial court require a defendant to testify. None of the cases require that a defense witness testify concerning self-defense. Rather, the cases stand for the proposition that some evidence must be presented to the trial court that would support an instruction on self-defense. The evidence can come through the State's witnesses.

Deputy Guiney testified concerning Ms. Thysell's statements to him that she was acting in self-defense. She was the one injured. She called 9-1-1.

Additionally, the evidence reflected that Ms. Thysell and Ms. Calkins both engaged in assaultive conduct. The precipitating fact was Ms. Thysell's belief that a rifle had been stolen and was inside Ms. Calkins' trailer.

The trial court's ruling deprived Ms. Thysell of her due process right to present a defense. The trial court's ruling violated the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3.

To ensure due process to a criminal defendant, a trial court must provide considerable latitude in presenting his theory of his case; more specifically, a trial court should deny a requested jury instruction that presents a defendant's theory of self-defense **only** where the defense theory is completely unsupported by evidence, which is not the case here. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

*State v. George*, 161 Wn. App. 86, 100, 249 P.3d 202 (2011). (Emphasis supplied.)

Ms. Thysell's theory of self-defense is supported by evidence in the record. The question of who initiated the altercation between Ms. Thysell and Ms. Calkins is a question for the jury. The trial court deprived Ms. Calkins of the opportunity to have the jury make that determination.

### **III. CONDITIONS**

There is no information in the record supporting the trial court's requirement that Ms. Thysell obtain a mental health evaluation.

There is no evidence in the record to support the trial court's requiring Ms. Thysell to obtain a drug and alcohol evaluation.

We review the imposition of crime-related prohibitions for an abuse of discretion. *State*

*v. Ancira*, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001). We will reverse only if the decision is manifestly unreasonable or is based on untenable grounds. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993) ....

*State v. Williams*, 157 Wn. App. 689, 691, 239 P.3d. 600 (2010).

In the absence of any evidence that Ms. Thysell suffers from a mental health problem or is in need of chemical dependency treatment, the trial court's imposition of those conditions has no basis in fact.

Ms. Thysell was convicted of a gross misdemeanor. Thus, sentencing did not occur under the Sentencing Reform Act (SRA). The SRA does not apply to a trial court's authority in connection with the sentencing of a gross misdemeanor. *See: State v. Williams*, 97 Wn. App. 257, 263, 983 P.2d 687 (1999).

The *Williams* Court went on to hold, *supra*:

Probation outside the SRA is not a matter of right but a matter of grace, privilege, or clemency "granted to the deserving, and withheld from the undeserving, as sound official discretion may dictate." *See: State v. Farmer*, 39 Wn.2d 675, 679, 237 P.2d 734 (1951). In this older version of probation, which remains applicable to misdemeanants, a court may impose probationary conditions that bear a reasonable relation to the defendant's duty to make restitution or that tend to prevent the future commission of crimes. *State v. Summers*, 60 Wn.2d 702, 707, 375 P.2d 143 (1962).

No issue of restitution exists. There is no evidence in the record to indicate that Ms. Thysell has prior criminal history. There is no evidence in the record that Ms. Thysell has been previously committed for mental health issues.

The remedy for including erroneous terms in a Judgment and Sentence as it pertains to probation is to remove those erroneous terms. *See: State v. Eilts*, 94 Wn.2d 489, 496, 617 P.2d 993 (1980).

## CONCLUSION

The trial court's ruling allowing the State to introduce testimony of Ms. Thysell's use of methamphetamine was prejudicial. It deprived her of a fair trial under the Fourteenth Amendment to the United States Constitution and Const. art. I, §§ 3 and 22. The remedy is a reversal of her conviction and remand for a new trial.

The trial court's denial of a self-defense instruction deprived Ms. Thysell of due process under the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3. The remedy is reversal of her conviction and remand for a new trial.

In the event that the Court declines to reverse Ms. Thysell's conviction and remand for a new trial, then the erroneous inclusion of

chemical dependency and mental health evaluations and treatment in the  
Judgment and Sentence must be removed.

DATED this 17th day of August, 2015.

Respectfully submitted,

s/ Dennis W. Morgan

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## APPENDIX "A"

**Q.** James would -- isn't it true, and this is important, this is the time to tell the truth, isn't it true that James would steal stuff from their house and then sell it to get methamphetamine?

**A.** No.

(12/3/14 RP 62, ll. 21-25)

**Q.** You know, Mr. Thompson brought up a good topic here. He talked about methamphetamine use. Do you know whether or not your mother uses methamphetamine?

**A.** Yes she does.

**Q.** Do you know if she was using methamphetamine the day that she went to your trailer on September the 6<sup>th</sup>?

**A.** I believe she was.

**Q.** Is there any reason why you suspected it?

**A.** Because of the way she was asking.

MR. THOMPSON: Your Honor, I'd have to ask for

foundation as an expert. I know she --

THE COURT: Overruled. Overruled. Door is wide open.

**MR. AARON CONTINUES**

Q. Interesting. So would it be fair to say that your mother uses methamphetamine regularly?

A. Yes.

Q. How often would you say?

MR. THOMPSON: Your Honor, I'm going to object and I'll --

THE COURT: You need a foundation.

MR. THOMPSON: -- he's trying to intimidate. My client had her finger bitten off and he likes to stand here and try to egg her on.

THE COURT: Okay. Let's -- let's avoid that. I don't think he's doing it on purpose; but let's avoid that. You can certainly be there on the other side of the bar.

MR. AARON: I'm just trying to get my witness to --

THE COURT: I understand and I want you to do that, just don't stand right next to her.

MR. AARON: Sure.

THE COURT: Please continue.

**MR. AARON CONTINUES**

**Q.** Did your mother act in a way different than she does when she's on methamphetamine as to when she's off methamphetamine?

**A.** Yes. Because when she doesn't have any she's always sleeping.

**Q.** I'm sorry? I can't hear?

**A.** When she doesn't have any she's always sleeping.

**Q.** Okay. So she's not -- when she's not -- when she's not using methamphetamine she's sleeping?

**A.** Yes.

**Q.** Does she act in any way unusual in the fact that she becomes accusatory or paranoid or anything?

MR. THOMPSON: Okay. Boy, we're way beyond the scope of --

THE COURT: Overruled.

MR. AARON: Your Honor, I withdraw the question.

THE COURT: I overruled. You can get an answer if you want. I overruled the objection.

MR. THOMPSON: [Inaudible on tape -- muffled].

**MR. AARON CONTINUES**

**Q.** Does she act differently -- like I said, does she act in a paranoid manner or -- accusatory or anything like that?

**A.** Yes.

**Q.** And that's happened to you?

**A.** Yes.

**Q.** More than once?

**A.** Oh yes.

(12/3.14 RP 65, 1.8 to RP 67, 1.22)

**NO. 33028-1-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	KLICKITAT COUNTY
Plaintiff,	)	NO. 14 1 00131 4
Respondent,	)	
	)	
v.	)	<b>CERTIFICATE OF SERVICE</b>
	)	
LISA ELAINE THYSELL,	)	
	)	
Defendant,	)	
Appellant.	)	
_____	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 17th day of August, 2015, I caused a true and correct copy of the *BRIEF OF APPELLANT* to be served on:

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