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No. 97183-8

NO. 50415-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT GROTT,
Appellant.

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

The Honorable Bryan E. Chushcoff, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court committed reversible error by limiting Grott's ability to present his defense, where the evidence was relevant and essential to Grott's defense.

2. The trial court erred as a matter of law by ruling that Grott's medical diagnosis from Dr. Moore did not fit the criteria for admission of factual evidence under ER 803(a)(4).

3. The state failed to prove beyond a reasonable doubt the intent element of the murder charge.

4. The state failed to prove beyond a reasonable doubt the intent elements of the assault charges.

5. The state failed to disprove beyond a reasonable doubt, self-defense.

6. The state failed to disprove beyond a reasonable doubt, justifiable homicide.

7. The court's self-defense instruction was constitutionally deficient.

8. The trial court erred by giving the first aggressor instruction when Grott did not commit unlawful or wrongful conduct prior to the shooting.

9. Grott was denied his constitutional right to jury unanimity where the state charged Grott by a single means of assault but argued uncharged alternative means without providing a jury unanimity instruction.

10. The prosecutor committed multiple instances of prejudicial misconduct that undermined the verdict.

11. Grott was denied his constitutional right to effective assistance of counsel by counsel's failure to object to the first aggressor instruction, failure to request an unanimity instruction, failure to object to prejudicial prosecutorial misconduct, and failure to require the state to prove both the *actus reas* and the *mens rea* of the crimes charged.

12. Grott was denied his constitutional right to a fair trial by cumulative error.

Issues Presented on Appeal

1. Did the trial court commit reversible error by limiting Grott's ability to present his defense through the testimony of the doctor who diagnosed Grott with PTSD, where the evidence was relevant and essential to Grott's defense?

2. Did the trial court err as a matter of law by ruling that

Grott's medical diagnosis with Dr. Moore did not fit the criteria for admission of factual evidence under ER 803(a)(4) where ER 803(a)(4) expressly permits a doctor to testify to the patient's statements if the evaluation was made for diagnosis or treatment?

3. Did the state failed to prove beyond a reasonable doubt the intent element of the murder charge where Grott's state of derealization prevented him forming the necessary intent?

4. Did the state fail to prove beyond a reasonable doubt the intent elements of the assault charges where Grott's state of derealization prevented him forming the necessary intent?

5. Did the state fail to disprove beyond a reasonable doubt, self-defense, where Grott reasonably believed he was in imminent danger of being killed?

6. Did the state fail to disprove beyond a reasonable doubt, justifiable homicide where Grott reasonably believed he was in imminent danger of being killed?

7. Was the court's self-defense instruction constitutionally deficient where it omitted instructing the jury to consider Grott's perspective prior to the shooting?

8. Did the trial court err by giving the first aggressor

instruction when Grott did not commit any unlawful or wrongful conduct prior to the shooting?

9. Was Grott denied his constitutional right to jury unanimity where the state charged Grott by a single means of assault but argued uncharged alternative means without providing a jury unanimity instruction?

10. Did the prosecutor commit multiple instances of prejudicial misconduct that undermined the verdict when the prosecutor, commented on Grott's right to silence, altered the state's burden of proof, argued an incorrect definition of assault, argued to the passions and prejudice of the jury, and expressed his personal opinion on Grott's guilt?

11. Was Grott denied his constitutional right to effective assistance of counsel by counsel's failure to object to the first aggressor instruction, his failure to request an unanimity instruction, his failure to object to prejudicial prosecutorial misconduct, and failure to require the state to prove both the *actus reas* and the *mens rea* of the crimes charged?

12. Was Grott denied his constitutional right to a fair trial by cumulative error during all phases of the trial?

B. STATEMENT OF THE CASE

a. Procedural Facts

Robert Grott was charged with murder in the first degree and seven counts of assault in the first degree with intent to inflict great bodily harm involving: Petra Smith, Tannisha McCollum, Jeanette Basher, Robin Lyons, Shawn Chargualaf, Debora Green, and Karmanita Vaca. (RCW 9A.36.011(1)(a)). CP 721-724. Grott was convicted of murder in the second degree and seven counts of assault in the first degree. CP 1040-58, 1092-1106.

Grott raised a diminished capacity defense and self-defense. CP 706-20. The trial court limited the testimony of Grott's diminished capacity/self-defense experts. RP 134-35, 604-08, 1876-80, 1887-89. The court imposed an exceptional sentence downward of 603 months. Supp. CP, Findings and Conclusions on Exceptional Sentence (August 25, 2017). This timely appeal follows. CP 1109.

b. Relevant Trial Facts

Robert Grott is a decorated combat Marine Sergeant who served in Afghanistan. RP 1930-35. Every soldier returning from a combat zone to the United States is supposed to be screened for

PTSD. RP 1935-37. Inexplicably, the military failed to screen Grott for PTSD - possibly an inadvertent error. RP 1935-37. Grott was rated at 50% physical disability on return from his deployment and referred for a mental health evaluation he was unable to pursue, likely do to the stigma Marines attach to PTSD as a weakness. RP 1937, 1940-41.

When Grott returned from Afghanistan he began to display PTSD symptoms. RP 1938. These symptoms escalated after Grott's best friend was killed. RP 1938-39. Shortly after this incident, Grott's cousin was murdered at a gas station in California. RP 1940-41. Grott blamed himself for his cousin's death because his cousin asked for a ride from the airport which Grott was unable to provide and Grott's cousin was shot on the way home from the airport. *Id.* Grott returned from war with "pervasive detachment from others" and never felt like he came home from the war. RP 1957.

After his cousin's death, Grott gave up everything. He felt unsafe in California and moved to Washington to live with his younger brother because Washington seemed safer at the time. *Id.* Grott was particularly fearful of gangs. RP 1842, 1940-43, 1963,

2266. Sadly, Julian Thompson, the deceased, a known gang member, shot at Grott in his home missing his head by inches. RP 1585, 1722, 1842-44, 1940-43, 1963, 2266. Thompson took responsibility for the shooting and told Grott that he was a "dead man walking", and Thomas would "air out the place afterwards" and "it's on sight". RP 1586, 1776, 1811, 1842, 1945.

Thereafter Grott's PTSD increased; he was very afraid and rarely left his home for fear of being killed. RP 1824-25, 1840. Grott became more paranoid, was always on high alert, and constantly checking the house. Relatives and friends knew that Grott returned home from the war a changed man. RP 1918-19, 1929, 1944, 1949, 2041.

c. Expert Testimony PTSD

Dr. Kevin Moore, a Marine forensic psychiatrist with many years of experience dealing with patients with PTSD provided extensive testimony regarding PTSD and its likely impact on Grott. Dr. Moore is a board certified psychiatrist and forensic psychiatrist who served in the Navy Marine Corps in various capacities dealing with soldiers' competency and forensic psychiatry. RP 1891-92. Dr. Moore also graduated from law school. RP 1893. Dr. Moore:

> was assigned to Charleston, South Carolina, as a director where I became director for clinical services while I was also assigned as the department head and a psychiatrist. I covered the joint forces brig that was located in Charleston. I completed my tour at Charleston, and then was selected to become the division surgeon for First Spring Division, which is in Camp Pendleton. I was the First Marine Division Surgeon, the senior medical officer during the invasion of Iraq where I deployed into Iraq at that time. Around that same time, I was assigned as the navy medical specialty -- navy psychiatry specialty leader, so I was advising the navy surgeon general on psychiatric matters. Direct Examination – Kevin was in Guam until I was selected to become the person in command of the Expeditionary Medical Facility of a modified fleet hospital that was located in Kuwait with other detachments throughout the Middle East. I deployed there for a year as the commanding officer. And then I came back to Japan where I was the commanding officer for the Naval Hospital, Yokosuka taking care of the Seventh Fleet and any units assigned. Retired 2013

RP 1893-1894. Dr. Moore is also a combat veteran and specializes in working with combat veterans. RP 1895.

Dr. Moore explained the nature of and manner in which PTSD is diagnosed and how he determined that Grott suffered from PTSD. Dr. Moore explained that when a person is in the midst of a PTSD trigger, this creates an overreaction where the person may feel more threatened than someone without PTSD. RP 1916.

> We have come to realize that there is a perception. Once that perception is received, it is processed.

> Memories, emotions get mixed in, and then there is some sort of action or reaction that occurs. At any of those parts, when someone is attending more to threatening queues, when they are denying other queues, when they have emotion that are not well regulated, so when that stimuli that reminds of a previous trauma is exposed, those emotions now dump in sometimes things that don't apply to that current situation other than the memory or the recollection. All of that then is used to make a decision. All of those points entering that have now interfered with them making that assessment.

RP 1917. Dr. Moore also explained that PTSD is not always recognizable to others, but every person Dr. Moore interviewed noticed that Grott returned from the war, hypervigilant, withdrawn, serious, and disengaged. RP 1918-19, 1929, 1944. 1949. The turning point for Grott's increased PTSD symptoms exploded when he survived Thomas's attempt to kill him on Halloween night. RP 1949.

Dr. Moore explained that after Thomas attempted to kill Grott, Grott lost 50 pounds, and became even more isolated, his concentration was grossly impaired, and he experienced an "increase in reflex anxiety arousal symptoms when he would have certain phenomenon, like, helicopters going over, some of the gunshots that I've mentioned, or if he saw potentially unsafe things;

a bag that was left alone somewhere that nobody was around. And then he withdrew from crowds. He was very nervous when people were behind him. He basically cocooned himself as much as he could within his residence." RP 1952.

Before the shooting, Grott also repeatedly had distressing dreams of Afghanistan where he was unable to save a girl. Grott described the dreams as being similar to panic attacks frequently linked to a trigger. RP 1955.

Dr. Moore explained that Grott experienced "dissociative episodes with derealization". RP 1953, 1952.

Dr. Moore explained that:

> "We know from many studies that there are changes in the functional anatomy, the way parts of the brain in someone that has been diagnosed with posttraumatic stress disorder."

RP 1891-98, 1915-16. Grott smoked marijuana because the marijuana calmed his PTSD symptoms. RP 1951, 1953. Grott also watched mindless TV as a coping mechanism and his concentration was also grossly impaired. *Id.*

The state's hired expert, Ray Hendrickson, a psychologist from Western State who is not an expert in PTSD. RP 2133-34.

Hendrickson handled less than 12 PTSD cases in the past 12 years. RP 2200. Henderson also only met with Grott for 20 minutes or possibly less, and during that time, since he did not see Grott exhibit PTSD symptoms while in Western State custody, Hendrickson did not believe that Grott suffered from PTSD but rather chose a diagnosis of "adjustment disorder and cannabis use disorder". RP 2148-50.

Hendrickson admitted that he had no idea what went on in Grott's mind at any time. RP 2157-58. Hendrickson opined that Grott had the ability to premeditate at the time of the shooting. RP 2164, 2197. Dr. Manley, a psychologist who spent over 10 hours with Grott, and Dr. Moore, who spent more than 6 hours with Grott, disagreed. RP 1893-96, 2197.

d. Limitations on Diminished Capacity Testimony

The court ordered in limine that Dr. Moore could not testify to much of what Grott told the doctor even though the court acknowledged that "some of that is necessary for their diagnosis" and would impact Grott's ability to present self-defense. RP 604, 606-08, 1880, 2032. Nonetheless, the court refused to permit Dr. Moore to testify that Grott could not form general intent and refused

to permit Dr. Moore to explain Grott's experience immediately before the shooting commenced, but ruled that Dr. Moore could only discuss Grott's inability to premeditate. RP 92-105, 104-07, 611-12.

The most critical fact the court suppressed was that when Grott rode by the AM/PM and saw Thomas, Thomas and Grott "locked eyes" and Grott believed Thomas was reaching for a gun to kill Grott, and that this was consistent with PTSD and supported self-defense/justifiable homicide. RP 203, 1880. The trial court limited the expert testimony to patient history and would not allow testimony regarding what Grott told the doctor about the incident. RP 1876–78. The court instructed that the doctor could use hypotheticals regarding people with PTSD but without any context specific to Grott. RP 1876-1880.

In closing argument, the prosecutor attacked the defense for stating in opening statements to the jury that the defense would introduce that Grott and Thomas "locked eyes" even though this was the evidence that state succeeded in suppressing. RP 2314.

e. <u>The State's Case</u>

Thomas stole Grott's gun a few months before Halloween.

RP 1538, 1545-46, 1945-46. Grott was initially upset over the stolen gun. RP 1543, 1767. On Halloween night 2015, Grott and Denzel James, a cousin, went out to a music club and returned home to a party where Jada Thomas, Rashaunda James and Brianna Moore were present. RP 1450, 1769. When Grott saw Jada, Thomas' younger sister, looking in his refrigerator he yelled at her to leave because her family was responsible for stealing his gun. RP 1455, 1457. Witnesses varyingly described Grott threatening to beat Jada and simply yelling at her and telling her to leave and to have her brother return the gun he stole from Grott. RP 1457, 1526-27,1530, 1665, 1769, 1830-31.

Jada was not afraid of Grott because she was willing to return to his home shortly after the yelling incident and thereafter went to parties at Grott's house. RP 1463-54, 1522, 1543, 1769, 1830-34. On Halloween night, Thomas shot at Grott through Grott's house, missing his head by inches. RP 1585, 1948. Thomas also threatened to kill Grott over the Halloween incident because Thomas felt Grott disrespected his sister Jada. RP 1718, 1722, 1769, 1945.

Approximately three months later the AM/PM shooting

incident in this case occurred and the eye witness testimony of the shooting varied.

(i). Tannisha McCollum

McCollum is a friend of Petra Smith. RP 724-25. Before arriving at the AM/PM McCollum drove Smith to Terell Valentine's house. Valentine was Smith's ex-boyfriend, and the father of her daughter. RP 725-26. Valentine answered the door to Smith with a gun he shot in the air while screaming at Smith to leave. RP 725-27. Smith believed that Valentine was dating an ex-friend and smashed that person's car in front of Valentine's house before leaving. RP 728-30, 821.

Smith and McCollum left and Smith called Julian Thomas to meet at the nearby marijuana dispensary and then the AM/PM where Smith had a friend working. RP 731-32. Thomas drove a silver Chevrolet sedan and McCollum drove a blue Yaris. RP 725-26, 732. Smith got out of the car at the AM/PM while McCollum stayed in the car talking to her aunt on the telephone with the windows rolled up. RP 734-35, 738-39. After Smith looked for her friend in the window of the AM/PM, she walked back between McCollum's car and Thomas' car where she and Thomas smoked

marijuana. RP 734-35.

Before hearing shots, McCollum was unaware of any problems because she was on her phone crying to her aunt about the upsetting experience with Petra Smith and Valentine. RP 738-39. After the shooting began, McCollum saw a man near Thomas' car load a magazine into his gun in front of her car and continue to shoot. RP 740, 768-69. McCollum covered her ears and screamed until the shooting stopped. RP 740. After the shooting, she saw a man slowly jog away toward the street. RP 740.

(ii). John Oliver

John Oliver just finished pumping gas in the middle aisle of the AM/PM and was driving on his way out of the gas station when he first heard a pop and then saw a man pull out a gun and start shooting from the south end of the parking lot. RP 675, 678. Oliver saw the man from 20-25 feet away. RP 678.

At one point the shooter was lying on top of the car he was shooting into. RP 688. Oliver saw Thomas sitting in the driver's seat, slump over in his seat, dead. RP 688-90, 696. Despite the screaming, Oliver testified that from 20-25 feet away he heard the shooter say ""Did I get the nigger?" "Did I get the nigger?" And "I'm

going to fucking kill the nigger." RP 691-92, 801. **The shooter and Oliver looked at each other but the shooter did not seem to see Oliver or anyone else at the gas station. RP 693, 703.**

During the shooting Oliver saw a woman near the passenger side of the car leave toward the store. RP 688-89. Oliver did not know if the woman had previously been in the car. RP 678-89.

(iii). Petra Smith

Smith did not go in search of her daughter who had been missing but was located at a daycare. RP 784-85, 821. Instead, Smith talked to Thomas from in between McCollum's car and Thomas' car for 10 minutes while smoking marijuana with Thomas before hearing gun shots. RP 783. Thomas needed change to buy a cigarette to make a Swisher (marijuana cigarette with tobacco) but Smith would not give him any change, so he bent down into the driver compartment and reached for the floor searching for what Smith said was change. RP 785-88.

Smith also testified that Thomas got into the driver seat of the car to leave when Smith leaned into the driver seat to hug Thomas and 30 seconds later bullets struck above the car. RP 787-889. At that point according to Smith, Thomas slid down and told

Smith to lie down RP 789-90.

Smith testified she heard someone say that "Jay wasn't going to get away with shooting at his house and he promised that." RP 790. According to Smith, she left the car at Thomas' insistence, when he acknowledged that he was the likely target. RP 790. Smith ran to hide underneath the car of the owner of the AM/PM. RP 790, 797. According to Smith she also heard the man say ""where the nigger go?" RP 790. Smith alone testified that she saw Grott take off a jacket before the shooting and walk back and forth, but she never told this to the detective who interviewed her. RP 794, 827, 830. Smith gave four different interviews with four different accountings of the incident. RP 831.

(iv). Others

Another person Joseph Gulliford who was near the gas pumps heard the shooter say, "where is that nigger at?" RP 853, 863. Donald Pettie drove past the AM/PM and saw the shooter, shooting from the sidewalk towards a specific target, while a woman ran away. RP 840-41, 849. From across the street at a restaurant, Vitaliy Zaychenko saw a man walk towards a car, shoot, reload and continue to shoot, and then leave with a skateboard. RP

872-873.

(v). Deborah Green

Deborah Green was working at the AM/PM when the glass started breaking on the storefront, but was unaware that a gun caused the damage until a woman came into the store and told her that someone was dead. RP 927-29. When asked if she was afraid, Green testified that she was afraid for everyone's safety. RP 929.

Karmenita Vaca who was working inside the store when the shooting began did not testify, but there was video of her ducking in the store. RP 928, 932. Grott unsuccessfully moved to dismiss the assault case involving Vaca. RP 1741-43.

(vi). Occupants of Adjacent Car

Robin Lyons, Shawn Chargualaf and Jeanette Basher were in a car next to Thomas' car when the shooting began. RP 983, 969. Lyons testified that she needed to "try to look out for my safety" and was scared. RP 986-87. Jeanette Basher was afraid a bullet would hit her car. RP 986, 989. Shawn Chargualaf was afraid of being shot. RP 1250-51.

f. Grott's Case: Facts

(i). Rashaad Grott

Rashaad Grott lived with his brother Robert Grott whom he described as paranoid, staying up many nights looking in every corner and through the windows, afraid that Thomas was coming to get him and the other housemates. Grott smoked marijuana and talked to Rashaad about his ongoing fear of being shot by Thomas and his gang friends. RP 1540, 1544, 1545, 1573, 1577-79, 1581.

(ii). Denzell James/Rashaunda James

Denzell James is Grott's cousin. RP 1763. Since returning from Afghanistan Grott stayed to himself and would not talk about his military experience. RP 1763-65. Rashaunda James is also Grott's cousin. RP 1446, 1802. She too confirmed that Grott did not talk much to others and stayed to himself. RP 1804.

(iii). Grott's Experience

On the day of the shooting, Grott's younger brother encouraged Grott to get outside for some fresh air. RP 1548-59. On a skateboard, Grott went out that morning to pay a utility bill at a nearby Fred Meyer. RP 1631, 1645-48. Video surveillance showed Grott leaving Fred Meyer and traveling on his skateboard in the

direction of the AM/PM minutes before the shooting. RP 1649-55; Exhibits 154, 156, 157, 176.

When Grott rode past the AM/PM, he and Thomas saw each other but Grott was not allowed to introduce evidence that he and Thomas "locked eyes". RP 1880. Dr. Moore explained that Grott's PTSD was triggered and he experienced a fight or flight reaction where he felt he was under attack and had to act to protect himself. RP 1962. Dr. Moore explained this as feeling an intensified threat where the stakes appear much higher. RP 1962. Grott also had trauma and fear associated with gang violence that escalated after Thomas, a gang member, shot at Grott trying to kill him. RP 1963.

Dr. Moore was certain that when Grott shot at Thomas, his perception was impaired so that Grott could not premeditate but simply reacted, feeling he had no other choice but to defend himself. RP 1964-5, 2044, 2046.

(iv). Osama Shofani

Osama Shofani, a 26 year commissioned Marine officer explained Marine combat training. RP 2049. Marine combat tactics require "quick and decisive action in a combat scenario." RP 2053. Marines learn by repetition thousands of times in training to create

muscle memory. This means that "when a marine faces an imminent danger threat, his speed and muscle memory kicks in without any type of action or reaction from his -- he is automatically in an engagement scenario trying to locate close with and kill the target or the enemy." RP 2053. When confronted with an enemy, the Marine is taught to "kill and destroy with the maximum rate of fire". RP 2053.

When Shofani reviewed the video clip of Grott during the shooting, he recognized Grott using defensive and offensive maneuvers, zig zagging in accordance with his Marine training. RP 2054-55, 2062-63. Shofani also recognized that Grott was exposed in open while Thomas was under cover, which for a Marine is the most disfavored training position, and which requires the maximum use of firepower to suppress. RP 2061.

g. Jury Instructions

The court defined assault in the first degree by multiple alternative means, provided a to-convict instruction that only listed intent to inflict great bodily harm with a firearm, and did not provide an unanimity instruction. CP 994-1039. The prosecutor argued an uncharged means: intent to cause fear. RP 2235, 2242.

Jury instruction 22 provided:

"A person commits the crime of assault in the first degree when, with intent to inflict great bodily injury, he assaults another with a firearm." CP 994-1039. Jury instruction 22 provided:

> An assault is an intentional shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A shooting is offensive if the shooting would offend o an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish is accompanied by the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, done with intent to create in another apprehension and feat of bodily injury, and which in fact creates in another person reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury,

CP 994-1039. The to-convict instructions for assault provided in relevant part: "That the assault was committed with a firearm" and "the defendant acted with intent to inflict great bodily harm". CP 994-1039.

h. <u>Prosecutor's Closing</u>

During rebuttal closing, the prosecutor made the following argument to the jury.

> Here is what is required for First Degree Assault: It is assaulting someone with a firearm. **An assault at its core is putting someone in a reasonable apprehension of harm. Putting someone in a reasonable apprehension of harm with a firearm.** Were all of these individuals assaulted that day? Of course they were**. It is really beyond dispute. That fear that they had, that scare that they had** -- the defendant's use of a gun -- was reasonable. They were all assaulted with a firearm that day.

(Emphasis added) RP 2305-06.

The prosecutor continued by arguing that "It should surprise no one that self-defense was going to be the claim here." RP 2306. "What is he going to go with? Self-defense. Where self-defense is waning, what is he going to shore that up with? A claim that he was mentally ill. This should be of no surprise to anyone." RP 2307. The prosecutor continued by arguing that the standard for reasonable doubt subjectively was "what a reasonably prudent person would do." RP 2308. The jury instruction 34 on the lawful use of force provided in relevant part:

> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would

> use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

CP 994-1039.

The prosecutor continued in rebuttal as follows:

> **Something that is extremely important to recognize and acknowledge here is that if you were to conclude that self-defense was lawful here, that conclusion holds no matter how many people could have died that day,** because what you justify -- when you say that something is a lawful act of self-defense, **what you are justifying having a gun out, trained in any given direction, and pulling the trigger. That's what you are justifying is, having the gun trained and pulling the trigger. That act is lawful. Where that bullet goes after it leaves the chamber of that gun is beyond your control. And so if Deborah Green is hit in the head as she comes back up**

RP 2308-09.

The prosecutor also argued in relevant part as follows:

> "If you think about this in reasonable everyday terms, if somebody shot at you, it really wouldn't matter whether or not they intended to hit you or not. That is your level of fear. You would feel the harm. The harm is your fear. What we have in a situation like this -- let me -- it is what's referred to as transferred intent."

RP 2235

You have an instruction regarding self-defense. Now,

> on the surface, that seems pretty out there, but it is your duty to look at that instruction, and it is the State's burden to prove beyond a reasonable doubt that the defendant did not act in self-defense. We are going to go through it. Self-defense requires that the defendant reasonably believed Julian Thomas intended to inflict death or great personal injury and that he reasonably believed that there was imminent danger of such harm being accomplished.
>
> **There is no evidence -- no evidence -- that Julian presented an imminent danger. Imminent being right now, today, right at this moment, in the next two moments. There is no evidence of it. Absent evidence of it, you can't speculate**. Julian -- he had a gun in the car, so he may have been about to pull out the gun. There is no evidence that Julian presented an imminent danger. I will grant you that the defendant may have thought he was -- intended to inflict death or great personal injury at some point in the future. He may have thought it. You don't get to go over to somebody who you think might kill you at some point in the future.

(Emphasis added) RP 2240.

> **There is no evidence Julian even knew that the defendant was there. How can he present an imminent danger if he doesn't even know that the defendant is present? There is no evidence that the defendant saw Julian do anything threatening. There is nothing that tells us that the defendant even believed he had to act in self-defense.**
> We need to conclude whether or not self-defense is appropriate based on the evidence, not on what we would like to speculate. **Absent somebody explaining to us that the defendant -- absent -- there is no evidence that the defendant believed self-defense was necessary. Let's take it one step further, though, because the instruction doesn't**

> **let a defendant act in self-defense just on that alone. The defendant has to employ force and means** as a reasonably prudent person would under the same or similar circumstances as the circumstances appeared to the defendant. Okay. So, reasonable, prudent person

RP 2241.

> In other words, was the force he used reasonable? Was it reasonable to stand at that parking -- at the sidewalk and fire through a parking lot and put down your suppression fire through the windows of a crowded AM/PM. Is that reasonable? Would any prudent person think that is reasonable? No. Was it reasonable to start firing that far away? Was it reasonable to fire 48 rounds, putting all of those people at risk**? If you have any doubt as to whether or not this was not reasonable,** if you think for a moment this was not -- that this was reasonable, look at those videos again. Tell that to Deborah Green. Tell that to Karmenita. Tell it to Petra. **Their fear that he put them in is part of whether or not the force that he used was reasonable. We have to conclude that, if they got hit, it was reasonable because that's the force that he used. It was not reasonable. It wasn't self-defense. There is no reason that you should consider it to be self-defense.**

(Emphasis added) RP 2242.

> I'm going to ask you to pause and think for a second. **I know he is guilty**. At that moment, do you have an abiding belief in the truth of the charge? **You know. I know he is guilty** but I wish that there is something else. I wish Karmenita Vaca would come in and testify.

> Sure, you would like to see more. **If you know that he did it, you have an abiding belief, and you know that he is guilty. You know Robert Grott assaulted** Petra Smith and the six others who lived. **You know** that he did so while attempting to inflict great bodily harm on Julian. You have an abiding belief that he is guilty of Assault in the First Degree. If **you know** Robert Grott killed Julian Thomas intentionally and with premeditation and thought about it just for more than a moment in time, then **you know he is guilty** of Murder in the First Degree. The defendant deserves a fair trial. The State has to prove all of the elements of the crime charged. Nothing less, but nothing more. The evidence supports only one conclusion.

(Emphasis added) RP 2250.

The trial court *sua sponte* objected to the prosecutor's use of "you know" on grounds it relieved the state of its burden to prove the elements of the crimes beyond a reasonable doubt. RP 2252-53.

> THE COURT: I have been stewing about two things that were said during Mr. Sheeran's closing argument and whether I should say anything about it. There were no objections made. Maybe I'm wrong not to be concerned about it. At one part of his closing argument, he suggested that the force wouldn't be reasonable as to the assault victims -- it wouldn't be reasonable if it wasn't reasonable as to the assault victims. In other words, it suggested that this would be measured in terms of what threat the assault victims posed to the defendant. That's how I took it. I don't think that is correct. The other one had to do with this whole thing about the abiding belief. If you know he

> did it, that's an abiding belief. I don't know. I have always had some concerns about the words "abiding belief" personally because I think that a lot of people don't understand the words "abiding belief." I used to test this out on lawyers. They started studying up about what it means, but I don't know if average people understand what it means. I think that just to suggest the word "know" might suggest a lesser standard than beyond a reasonable doubt. "Abiding belief," generally, in my view, means it is an enduring belief, which is something different, I think, than you just know about it. Now, maybe I'm wrong to have these concerns, but I thought it is better to address this now before I go further.

RP 2252-53.

The prosecutor explained that he could tell the jury anything, such as "the sky is purple" because the jury would follow the court's instructions. RP 2253-54. The trial court suggested that the Court of Appeals would disagree. RP 2254. The defense explained that it was more concerned with the prosecutor implying a lack of evidence from the state case which "perked" counsel up "more than anything else". RP 2253. Counsel requested the court provide a curative instruction for the assault argument more than for the abiding belief argument. RP 2255.

After this exchange, the trial court provided the following instruction to the jury.

> I do want to remind everyone that the lawyers'

> remarks, statements, and arguments are intended to help you understand the evidence and to apply the law. The lawyers' statements are not evidence. The law is contained in my instructions to you. You should disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions. **I was concerned that there may have been some confusion about when someone can use -- employ force in defense of a charge of assault. Those are contained in the instructions. I would remind you that at least a portion of those instructions provide that the person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident**.

(Emphasis added) RP 2260. Counsel did not object on grounds that the court commented on the evidence.

C. ARGUMENTS

1. THE TRIAL COURT DENIED GROTT HIS CONSTITUTIONAL RIGHT TO PRESENT HIS DEFENSE BY LIMITING HIS PRESENTATION OF EVIDENCE REGARDING HIS DIMINISHED CAPACITY AND SELF-DEFENSE.

Grott was denied his right to present a meaningful defense by the trial court's suppression of highly relevant probative facts related to Grott's observation immediately before and during the

shooting.

Whether rooted in the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment, the United States Constitution guarantees a criminal defendant "'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) (*internal quotations omitted) (quoting Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)).

The state constitution also guarantees defendants the right to present a defense, including the right to introduce relevant, evidence and to confront adverse witnesses through meaningful cross-examination. Wash. Const. art. I § 22; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 567 (2010). The purpose of the right to present a defense lies in the goal of providing "fairness and reliability in the ascertainment of guilt and innocence". *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the

State's accusations." *Chambers,* 410 U.S. at 294. "[I]n plain terms the right to present a defense [is] the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. "*Taylor v. Illinois*, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (*quoting Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). This right is absolute with respect to admissible, relevant evidence. *Jones*, 168 Wn.2d at 720.

Review of a claim of a denial of Sixth Amendment rights is de novo. *Jones*, 168 Wn.2d at 719.

If the evidence is relevant, to suppress, the state bears the burden of establishing that it is overly prejudicial, and that prejudice to the state outweighs the defendant's need for the evidence. *Jones*, 168 Wn.2d at 720 (*citing State v. Gregory*, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006)). Grott should have been permitted to allow Dr. Moore to explain that Grott was unable to formulate the intent to murder based on his subjective fear that was influenced by his PTSD. RP 2029-31.

"Some [PTSD] patients, especially those who are subsequently subjected to extreme stress, develop a

transient dissociative reaction with episodes of depersonalization or derealization," and that "a person's cognitive or volitional state may be impaired during a dissociative reaction." *State v. Bottrell*, 103 Wn. App. 706, 715, 14 P.3d 164 (2000) (*quoting*, Chester B. Scrignar, *M.D., POST-TRAUMATIC STRESS DISORDER: DIAGNOSIS, TREATMENT, AND LEGAL ISSUES*, 245 (2d ed.1988)).

In *Bottrell*, 103 Wn. App. at 715, the defendant suffered from PTSD at the time of the murder but the trial court suppressed her expert's opinion. The Court held that the court abused its discretion by not permitting Bottrell's expert to discuss her inability to formulate intent because PTSD can negate "the intent necessary for the crime charged, first degree premeditated murder, and for its lesser included offense of second degree murder." *Bottrell*, 103 Wn. App. at 718.

In *Jones,* the Supreme Court reversed the trial court suppression of Jones' testimony that the victim consented to having sex at a sex party. *Jones*, 168 Wn.2d at 721, 724-25. The Supreme Court held that the evidence was highly probative and "[s]ince no State interest can possibly be compelling enough to preclude the

introduction of evidence of high probative value, the trial court violated the Sixth Amendment when it barred such evidence." *Jones*, 168 Wn.2d at 724.

"The trial court's formulation would have allowed testimony of consent, but devoid of any context about how the consent happened or the actual events." *Jones*, 168 Wn.2d at 721. The Supreme Court held that the trial court's ruling prevented Jones from presenting a meaningful defense and the error was not harmless because a reasonable jury hearing Jones' proffered evidence could have reached a different result. *Jones*, 168 Wn.2d at 725.

Jones is analytically indistinguishable from Grott's case. The trial court here gutted Grott's ability to present his self-dense and diminished capacity defenses similarly to *Jones*, by permitting Grott to raise these defenses but prohibiting him from providing the factual basis to understand and apply the defense. The critical information the trial court refused to permit Grott to discuss was his experience prior to and during the shooting incident. RP 1876-80.

The court erroneously believed that the use of a hypothetical was adequate to protect Grott's right to present a defense. But

under *Jones* this was error because Grott's experience prior to and during the shooting formed the basis of the expert opinion not a hypothetical person with PTSD. RP 1855, 1863-80. Grott's experience was essential to Grott's ability to present a meaningful defense. RP 604, 1869, 1876-78, 1880.

In *Jones*, the Supreme Court accepted that Jones version of events was not "airtight" but nonetheless recognized that if the jury had heard Jones' accounting of events, the result could have differed. *Jones*, 168 Wn.2d at 724-25 Similarly here, if the jury heard Grott's version of the incident, the result could have differed because the jury would have understood that Grott had reason to believe he was in imminent threat of death. Under *Jones*, the trial court denied Grott his constitutional right to present a meaningful defense. *Jones*, 168 Wn.2d at 719.

A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. *Jones*, 168 Wn.2d at 724-25. The error was not harmless here because this Court cannot determine that the jury would have returned the same verdict rather than accepting the self-defense and justifiable

homicide if they had been permitted to hear the relevant portions of Dr. Moore's analysis that were suppressed by the trial court. The remedy is to reverse the convictions and remand for a new trial. Id.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY PROHIBITING GROTT'S MEDICAL EXPERT FROM TESTIFYING UNDER ER 803(a)(4) TO THE FACTS IN SUPPORT OF HIS EXPERT MEDICAL OPINION REGARDING GROTT'S DIMINISHED CAPACITY AND SELF-DEFENSE.

The trial court abused its discretion by refusing to permit Dr. Moore to testify to Grott's statements made during their 6 hours of medical diagnostic sessions. The trial court erred because its ruling denied Grott his constitutional right to present a defense. *Jones*, 168 Wn.2d at 719.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Griffin,* 173 Wn.2d 467, 473, 268 P.3d 924 (2012). "An abuse of discretion occurs if the court's decision is manifestly unreasonable or rests on untenable grounds." *Griffin,* 173 Wn.2d at 473. "However, a court 'necessarily abuses its discretion by denying a criminal defendant's constitutional rights.'" *State v. Iniquez*, 167 Wn.2d 273, 280, 217

P.3d 768 (2009) (*quoting State v. Perez*, 137 Wn. App. 97, 105, 151 P.3d 249 (2007)). This Court "review[s] de novo a claim of a denial of constitutional rights." *Iniquez*, 167 Wn.2d at 280.

An out-of-court statement admitted for the truth of the matter asserted is hearsay, which is inadmissible unless an exception applies. ER 801(c); ER 802. The rules of evidence do not specifically prohibit the admission of self-serving statements; but, "self-serving" is a shorthand way of saying that the statement is hearsay and does not fit recognized exceptions to the hearsay rule. *State v. King*, 71 Wn.2d 573, 577, 429 P.2d 914 (1967); *State v. Pavlik,* 165 Wn. App. 645, 653-54, 268 P.3d 986 (2011). Therefore, a statement's admissibility must be addressed under the recognized exceptions to the hearsay rule. *Pavlik,* 165 Wn. App. 645, 654.

Application of the rules against hearsay "may not be applied mechanically". *Chambers*, 410 U.S. at 302. Statements made for medical diagnosis are expressly excluded from the hearsay rule under ER 803(a)(4) which provides in relevant part:

> (4) *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present

> symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment

Id.; *Accord, State v. Woods*, 143 Wn.2d 561, 565, 23 P.3d 1046 (2001).

a. Non-Treating Forensic Physician May Testify to Evaluee's Subjective Statements

The admissibility of a defendant's subjective recollections of his illness extends to forensic evaluations where the expert relies on objective as well as subjective information from the person evaluated. *Kennedy*, 15 Wn. App. at 47.

> "[A]n otherwise qualified physician, whether he was seen by the plaintiff for the purposes of treatment-and possibly to testify-or solely for the purpose of enabling him to testify on plaintiff's behalf, may relate what the plaintiff told him regarding (1) the general nature or cause of the injury insofar as it pertains to treatment and not fault, (2) the plaintiff's past and present subjective complaints and symptoms and (3) the course of medical treatment followed by the plaintiff.

Kennedy, 15 Wn. App. at 47.

This means that "the nontreating physician is not limited in his testimony to objective findings and to answering hypothetical

questions." *Kennedy*, 15 Wn. App. at 47. In *Kennedy*, this Court explained the while the self-interest factor may exist, the doctor should nonetheless be able to testify to what the patient told him/her because "if the rule is strictly applied [] it keeps from the jury information which might be helpful and indeed indispensable to their assessment of the doctor's conclusions." *Kennedy*, 15 Wn. App. at 47-48. The court recognized that there were adequate safeguards for the state by way of the use of hypotheticals and cross examination under oath, which are designed to reveal discrepancies, thus framing the issue as one of the weight to be given to the expert's opinion, not suppression. *Kennedy*, 15 Wn. App. at 47.

For example, in *In re Dependency of Penelope B.,* 104 Wn.2d 643, 709 P.3d 1165 (1985), our state Supreme court expressly held that a forensic psychiatrist was permitted to testify to the substance of his interviews with a child complainant under the medical exception set forth in ER 803(a)(4). *Id.* "This rule applies equally to treating physicians and physicians such as Dr. Freeman who are consulted for the purpose of enabling the physician to testify" *Id.* The only limitation placed on the

admissibility of statements for medical diagnosis requires that the statements are "reasonably pertinent to diagnosis or treatment" and fit within the limitations of ER 403 (not cumulative or prejudicial). *Penelope* B., 104 Wn.2d at 656.

The Court explained that "[w]hat the child told Dr. Freeman when the doctor interviewed her, as conveyed to the court through the doctor's testimony, was not hearsay, was admissible in evidence and was properly before the trial court for consideration." *Penelope B.*, 104 Wn.2d at 656.

In this case as in *Penelope B*, Here, Dr. Moore was retained to determine if Grott suffered from PTSD. RP 1922-24. Dr. Moore's job was to diagnose Mr. Grott. *Id*. After thoroughly interviewing and testing Grott for more than 6 hours, Dr. Moore determined that Grott suffers from PTSD and further that his PTSD impaired his ability to formulate intent. RP 1924-29, 1938, 1949, 1953, 1959-60, 1964. Dr. Moore testified that due to Grott's PTSD, Grott believed he had no choice but to defend himself when he perceived Thomas reaching in the car for a gun. RP 1964-65.

Dr. Moore's statements were not cumulative or prejudicial. Here, Dr. Moore, like Dr. Freeman was hired as a forensic

psychiatrist "consulted for the purpose of enabling the physician to testify". *Id.* Dr. Moore relied on objective criteria to corroborate Grott's explanation by reviewing reports, hospital records, other doctors' reports, the video evidence collected by the state, and interviews with Grott's family and friends. RP 1924-25. Consistent with the reasoning in *Kennedy*, Dr. Moore explained that "[f]or a forensic evaluation, it is essential to obtain collateral information, if that is available, to provide not only a different perspective, but to confirm some of the information we obtained." RP 1924-25.

Contrary to *Kennedy*, the trial court in this case failed to understand that Grott's "historical recitation" by Dr. Moore was not "admitted as proof of the facts recited, but as proof only that the statements were made and utilized in part by the doctor as a basis for reaching his medical conclusions, and as such are not hearsay." *Kennedy*, 15 Wn. App. at 48 (*citing Floyd v. Department of Labor and Indus.*, 68 Wn.2d 938, 940-42, 416 P.2d 355 (1966)); *Smith v. Ernst,* 61 Wn.2d 75, 79, 377 P.2d 258 (1962).

In sum, the reason for the admissibility of the patient/client statement is "for the limited purpose of establishing the basis upon which the doctor premised his opinion." *Smith,* 61 Wn.2d at 79. The

trial court abused its discretion by suppressing what Grott told Dr. Moore about the incident because this information was corroborated and the information was necessary for the jury to be able to assess Dr. Moore's conclusions. *Penelope B.*, 104 Wn.2d at 656; *Kennedy*, 15 Wn. App. at 47-48.

The trial court also erred as a matter of law in denying Grott his ability to present a defense by suppressing the information he provided to Dr. Moore for his diagnosis–because without this information Grott was unable to present a meaningful defense. *Iniquez,* 167 Wn.2d at 280. For these reasons, this Court must reverse and remand for a new trial.

3. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENTS OF MURDER IN THE SECOND DEGREE AND IN THE ASSAULT CHARGES.

Under both the federal and state constitutions, due process requires that the state prove every element of a crime beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Johnson*, 188 Wn.2d 742, 750, 399 P.3d 507 (2017); *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

This Court views the evidence in the light most favorable to the state to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Johnson*, 188 Wn.2d at 751 (*quoting, State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (*plurality opinion*).

The *actus reus* is the wrongful deed that is the physical component of a crime, while the *mens rea* is the state of mind the state must prove that a defendant had when committing a crime. *State v. Eaton*, 168 Wn.2d 476, 481, 229 P.3d 704 (2010) (quoting BLACK'S LAW DICTIONARY 39 (8th ed.2004)).

A recent scholarly article, argued that *actus reas*, like *mens reas* is an element of a crime that the state must prove beyond a reasonable doubt. Melissa Hamilton, *Reinvigorating Actus Reas: The Case for Involuntary Actions by Veterans with Port-Traumatic Stress Disorder*, Berkeley, J. Crim. L. 340, 348, 349 (2011). Our State Supreme Court in *Eaton*, agreed that every crime must contain an *actus reus* and a *mens rea*. *Eaton*, 168 Wn.2d at 480-81.

a. <u>*Actus Reas* Essential Element</u>

"Fundamental to our notion of an ordered society is that

people are punished only for their own conduct. Where an individual has taken no volitional action she is not generally subject to criminal liability as punishment would not serve to further any of the legitimate goals of the criminal law." *Eaton*, 168 Wn.2d at 841-82. This is consistent with our legislature's pronouncement that the provisions of our criminal code must be interpreted "[t]o safeguard conduct that is without culpability from condemnation as criminal." RCW 9A.04.020(1(b).

Under this rule, we do not punish people "who do not have the capacity to choose" because when "the individual has not voluntarily acted, punishment will not deter the consequences. *Eaton,* 168 Wn.2d at 481-82. The crimes of assault and murder contain both an *actus reas* and a *mens reas*. *Eaton*, 168 Wn.2d at 480.

In *Eaton*, the state Supreme Court reversed Eaton's school zone sentencing enhancement for possession of methamphetamine where he did not voluntarily enter the school zone, but was rather taken within the zone by the police. The Court reasoned that the state could not prove the *actus reas*, and without the *actus res,* there was no *mens rea*. *Eaton*, 168 Wn.2d at 481-

87.

By contrast, in *State v. Deer*, 175 Wn.2d 725, 732, 287 P.3d 539 (2012), a strict liability case involving rape of a child in the third degree, citing to *Hamilton's* article, *Reinvigorating Actus Reas:,* the state Supreme Court declined to analyze the *mens reas* of a strict liability crime on grounds that "it remains a relatively insignificant issue in case law," and moreover, "courts are inconsistent on how they treat actus reus as an element." *Deer*, 175 Wn.2d at 732 (quoting *Reinvigorating Actus Reas,* Berkeley, J. Crim. L. at 348, 349).

The Court in *Deer* was wrong and quoted *Hamilton* out of context in the midst of a 49 page article with a thesis that held to the contrary that courts must require states to prove both the *actus* and *mens reas* to protect - in particular the due process rights of military war veterans suffering from PTSD. *Reinvigorating Actus Reas,* Berkeley, J. Crim. L. 340.

"[I]instances exist whereby a combat veteran's PTSD renders him as acting in an automatistic manner--that is cognitively, physiologically, and muscularly responding intuitively to a perceived threat-- and therefore he is not engaged in a voluntary act for the

purposes of criminal law." *Reinvigorating Actus Reas,* Berkeley, L. at 370-72.

> Automatistic actions are generally accepted as a category of involuntary act for purposes of abrogating criminal culpability. A difficulty common to automatism cases is that the individual appears to be acting in a deliberate way, even performing complex tasks.

Actus Reas, Berkeley, L. at 352 (internal citations omitted).

> When one acts reflexively, he may be consciously aware of his body movements but without having the ability to control them. At 353-54. "Automatism has thus been more appropriately defined as the "performance of acts by an individual without his awareness or conscious volition." Perhaps, then, the better view is that automatism does not require complete unconsciousness but rather a sufficiently impaired consciousness".

Actus Reas, Berkeley, L. at 354 (internal citations omitted).

Estimates calculate that between 5-33% of service members returning from Iraq and Afghanistan suffer from PTSD, the "signature" injury related to military service in these areas. *Actus Reas,* Berkeley, L. at 364-65. The explanation for this high rate of PTSD lies in the nature of war in Iraq and Afghanistan where service members spend an inordinate amount of time on constant vigilance, unable to distinguish combat zones from safe areas. *Actus Reas,* Berkeley, L. at 366-67.

For the returning war veteran with PTSD, this means that he or she experiences "' stress-induced fear circuitry disorder' related to reflex-like responses, such as those in which traumatic, fear-inducing stimuli produce autonomic changes." *Actus Reas,* Berkeley, L. at 372.

In other words, the combat veteran's brain is presented with "perceptions of danger", and the brain is "hijacked" to respond with a fight or flight response, regardless of the presence of actual danger. *Actus Reas,* Berkeley, L. at 372-73. Additionally, for a war veteran with PTSD "it takes much longer than normal for the part of his brain (the hippocampus) that rationally assesses the situation and synthesizes data about the environment to override the amygdala and restore a feeling of personal safety. "*Actus Reas,* Berkeley, L. at 373. "Hence, a "stress response [] can be induced in a relatively simple, reflex-like manner" that is advantageous when in danger. Id.

> The nervous system thereby learns from previously successful reactions that promoted survival and thereby further adapts to counter future traumatic stresses that appear to be of similar ilk. Overall, traumatic stress, particularly when it induces fear disrupts the individual's psychophysiology with potentially disabling physical, emotional, and mental consequences.

Actus Reas, Berkeley, L. at 373.

Alterations in the nervous system create a persistent "learned fear response" that PTSD patients are "unable to inhibit even under safe conditions". *Actus Reas,* Berkeley, L. at 374. The combat veteran in this hypervigilant state misconstrues benign stimuli" "as threatening, thereby requiring the body to make a quick response to survive." *Id.*

This is termed hyper-reactivity from PTSD which is helpful in combat but creates a "survival" brain that fixates on automatic non-conscious scanning for threats, but by doing so alters the brain's normal ability to cognitively process the information in terms of making the appropriate response (or nonresponse). *Actus Reas,* Berkeley, L. at 374.

Dr. Moore similarly explained in the abstract much of the import of this article as it relates to Grott's inability to formulate intent in that the neurological function of Grott's brain was so altered that he reasonably believed he was in imminent harm of death, and acted accordingly in survival mode, rather than with intent to kill or harm.

Under *Eaton*, Grott could no more formulate the intent than could Eaton because in both cases, neither defendant had control over their ability to act.

In sum, when reviewing the evidence in the light most favorable to the state, the state failed to prove that Grott possessed the *actus rea* of the crimes of murder on the second degree and assault and accordingly, failed to prove that he also possessed the *mens reas*. On these grounds, this Court should reverse and remand for dismissal of the charges with prejudice.

b. The Evidence Does Not Support Assault in the First Degree

As an alternative argument, without conceding any element of the crimes charged, Grott submits that the facts in this case represent more closely assault in the second degree. *State v. Smith,* 159 Wn.2d 778, 154 P.3d 873 (2007). *Smith* is factually instructive. Smith was charged with three counts of assault in the first degree. *Smith*, 159 Wn.2d at 781. Smith shot into a car with three occupants and shattered the glass and frightened all of the occupants but no one was injured. *Smith*, 159 Wn.2d at 781. The jury acquitted Smith of first degree assault and found her guilty of assault in the second degree. *Smith*, 159 Wn.2d at 782.

Similarly, in Grott's case, he shot at Thomas in a car and bullets sprayed into the AM/PM and nearby area but no one else was harmed. Unlike in *Smith,* here, Grott acted in self-defense which negates the intent element of the charges, making this case stronger than *Smith*. If there is no intent to harm then there is no intent to transfer.

Under these facts, the act of shooting and scaring could constitute assault in the second degree if the state could prove that Grott acted volitionally and intended to cause fear and in fact did so. This is particularly required for the conviction regarding Karmenita Vaca who was working inside the store when the shooting began but who did not testify. RP 928, 932. The state did not present sufficient evidence to establish beyond a reasonable doubt that Vaca experienced reasonable fear.

Accordingly, this Court must reverse and remand all of the charges for dismissal with prejudice.

4. THE COURT'S SELF-DEFENSE INSTRUCTION WAS CONSTITUTIONALLY DEFICIENT.

"[W]hen assessing the impact of an instructional error, reversal is *automatic* unless the error is trivial, or formal, or merely

academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.'" *State v. Townsend*, 142 Wn.2d 838, 848, 15 P.3d 145 (2001) (*emphasis added by Townsend) (quoting State v. Golladay*, 78 Wn.2d 121, 139, 470 P.2d 191 (1970) (*overruled on other grounds by State v. Arndt,* 87 Wn.2d 374, 553 P.2d 1328 (1976) (*quoting State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)).

This Court reviews the sufficiency of jury instructions de novo. *State v. Walker*, 182 Wn.2d 463, 481, 341 P.3d 976 (2015). Jury instructions are sufficient if they allow both parties to argue their theory of the case, are not misleading, and, when read as a whole, properly inform the trier of fact of the applicable law. *State v. Harris*, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011).

Self-defense instructions must make the relevant legal standard "'manifestly apparent to the average juror." *State v. Allery*, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (*quoting State v. Painter,* 27 Wn. App. 708, 713, 620 P.2d 1001 (1980)). The jury must assess evidence of self-defense "from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees." *State v. Janes*, 121 Wn.2d 220,

238, 850 P.2d 495 (1993).

In other words, the self-defense inquiry has both a subjective and an objective portion, *Id.* The subjective portion ensures that the jury fully understands the defendant's actions from the defendant's own perspective, while the objective portion allows the jury to determine what a reasonably prudent person similarly situated would have done. *Id.* The "justification of self-defense is to be evaluated in light of [a]ll the facts and circumstances known to the defendant, including those known substantially before the killing." *State v. Wanrow*, 88 Wn.2d 221, 234, 559 P.2d 548 (1977).

In 1986, the pattern instruction on self-defense was amended to address this requirement. *Allery. See State v. Goodrich,* 72 Wn. App. 71, 77, 863 P.2d 599 (1993). The current version states:

> The person [using][or][offering to use] the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of **[and prior to]** the incident.

(Emphasis added) 11 WASHINGTON PRACTICE: WASHINGTON

PATTERN JURY INSTRUCTIONS: CRIMINAL 17.02, at 253 (3d ed. 2008) (WPIC). The Court of Appeals has since recognized that WPIC 17.02 "correctly instruct[s] the jury on the subjective standard of self-defense." *Goodrich,* 72 Wn. App. at 77.

The current version of WPIC 17.02 provides the missing language in brackets with a note to "use as applicable". WPIC 17.02 (citing *Allery*). WPIC 17.02 and *Allery* require the court to include these points in the jury instruction because the reasonableness of the defendant's belief in imminent harm was based on past experience and PTSD related to the victim's past violence toward the defendant. *Allery*, 101 Wn.2d at 595; CRIMINAL 17.02, at 253.

Here the court's instruction in Grott erroneously failed to include the bracketed portion of the instruction "and prior to". CP 1030. Instead it read as follows:

> The person using or offering to use the force may employ such as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

CP 1030.

Here, Grott had a history of fear of Thomas who stole Grott's gun, shot at him and missed by inches, was known to be a violent gang member, and told Grott that he was a marked, dead man walking. These facts were known to Grott prior to the incident and integral to understanding Grott's self-defense-similar to Allery, *who* was also hypervigilant with fear.

Here as in *Allery*, these prior facts were relevant and essential for the jury to understand what Grott knew and experienced before and during the incident. The force Grott used, like that in *Allery,* was reasonable under the circumstances because of the Grott's prior history with Thompson weighted on top of Grott's PTSD.

Grott was entitled to WPIC 17.02 with the inclusion of the bracketed langue "and prior to". Under *Allery* the instruction was deficient because it did not explicitly inform the jury that it should consider the facts and circumstances known to Grott ***prior to*** the incident, which included Grott's relevant, prior experiences with Thompson and Grott's history of PTSD. *Allery*, 101 Wn.2d at 595. Accordingly, this Court must remand for a new trial. *Allrey,* 101 Wn.2d at 595; *Janes*, 121 Wn.2d at 227.

5. GIVING THE FIRST "AGGRESSOR" INSTRUCTION REQUIRES REVERSAL.

Grott was not the first aggressor in the altercation, but the trial court nonetheless gave a first aggressor instruction without objection from the defense, even though counsel argued to the jury that Thomas, was not the first aggressor, not Grott. RP 2290.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). "It is prejudicial error to submit an issue to the jury that is not warranted by the evidence." *Clausing*, 147 Wn.2d at 627.

As stated in the previous argument section, this Court will reverse the trial court's judgment if it finds the trial court committed prejudicial instructional error. *Townsend,* 142 Wn.2d at 848.

To support a first aggressor instruction the state must offer credible evidence that the defendant provoked the use of force, including provoking an attack that necessitates the defendant's use of force in self-defense. *State v. Riley*, 137 Wn.2d 904, 909-10, 976 P.2d 624 (1999). This means there must be a separate and distinct

act apart from the crime. *Brower*, 43 Wn. App. at 902-03 (*citing State v. Upton*, 16 Wn. App. 195, 204, 556 P.2d 239 (1976)).

The trial court errs if it gives a first aggressor instruction when there is no evidence to support that the defendant's conduct precipitated the need to use self-defense. *State v. Wasson*, 54 Wn. App. 156, 158-59, 772 P.2d 1039 (1989). Whether sufficient evidence justified a first aggressor instruction is a question of law reviewed de novo. *State v. Bea*, 162 Wn. App. 570, 577, 254 P.3d 948 (2011). This Court reviews the evidence in the light most favorable to the party requesting the first aggressor instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2002); *Riley,* 137 Wn.2d at 909.

Our Supreme Court explained that a first aggressor "instruction should 'be given only sparingly and carefully, in cases where the theories of the case cannot be sufficiently argued and understood by the jury without such an instruction.'" *Bea,* 162 Wn. App. at 576; *Riley,* 137 Wn.2d at 909 n. 2, 910 n.2; *State v. Arthur*, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985).

In *State v. Douglas*, 128 Wn. App. 555, 563-64, 116 P.3d 1012 (2005), the defendant pointed a gun at the victim prior to

shooting to keep him from harming him and his wife and to convince the victim to leave. *Douglas*, 128 Wn. App. at 564. This Court held that it was reversible error to give a first aggressor instruction because there was no distinct wrongful or unlawful conduct before the charged crime. *Douglas*, 128 Wn. App. at 563-64.

Similarly, in *Brower*, 43 Wn. App. at 902-03, the appellate court held that the trial court erred in giving a first aggressor instruction because the evidence did not indicate that Brower was involved in prior wrongful conduct which might have provoked the incident. Brower legally armed himself to retrieve his truck which he believed was going to be stolen. *Brower*, 43 Wn. App.at 895-96. Brower displayed his gun for the first time when the alleged assault occurred, when Martin came down stairs and passed Bower aggressively. *Brower,* 43 Wn. App.at at 987.

In *State v. Lauifi*, 141 Wn .App. 1038, not reported in P.3d (2007) (an unpublished case, cited not for precedential value but for factual representation), this Court also reversed Lauifi's conviction for first degree assault where there was no evidence of a separate and distinct act apart from the assault in which she brandished a

knife.

Here, like *Brower,* and *Douglas*, Grott was not involved in any unlawful conduct prior to the alleged murder and assaults. Rather, like the victim in *Brower*, Thomas engaged in aggressive conduct leading up to the shooting and reached for what Grott believed to be a gun - an act of aggression, which preceded the shooting. Thomas' prior aggressions were intentional and reasonably likely to provoke a belligerent response.

Here, the trial court gave both a self-defense instruction and a first aggressor instruction. The state did not make any argument in support of the first aggressor instruction. The state did not assert that the instruction was necessary for the state to present its theory of the case, and did not assert that Grott made an independent, aggressive act prior to the shooting. Here the trial court committed reversible error by giving the first aggressor instruction because: (1) there was no conduct whatsoever prior to the shooting; (2) there was no evidence to support a first aggressor instruction; and (3) the first aggressor instruction relieved the state of its burden to disprove self-defense. *Riley*, 137 Wn.2d at 909-10.

Accordingly, this Court must reverse and remand for a new

trial.

6. GROTT WAS DENIED DUE PROCESS BY THE STATE ARGUING MULTIPLE ALTERNATE MEANS OF COMMITTING ASSAULT WITHOUT PROVIDING AN UNANIMITY INSTRUCTION.

Criminal defendants have a right to an expressly unanimous jury verdict under Wash. Const. art. I, § 21. A criminal defendant's right to a unanimous jury verdict includes the right to have a unanimous jury determine the means by which he committed the crime. *State v. Woodlyn*, 188 Wn.2d 157, 162-63, 392 P.3d 1062 (2017); *State v. Owens*, 180 Wn.2d 90, 95-96, 323 P.3d 1030 (2014).

When reviewing a sufficiency of the evidence challenge based on alternative means, this Court applies "the rule that when there is sufficient evidence to support each of the alternative means of committing the crime, express jury unanimity as to which means is not required." *Owens*, 180 Wn.2d at 95. But if "there is insufficient evidence to support any means, a particularized expression of jury unanimity is required." *Owens*, 180 Wn.2d at 95.

Under RAP 2.5(3), the failure to ensure the jury is

unanimous in its verdict is a manifest constitutional error, and this issue may be addressed in the absence of an objection below. *State v. Watkins*, 136 Wn. App. 240, 244-45, 148 P.3d 1112 (2006); *State v. Gitchel,* 41 Wn. App. 820, 822, 706 P.2d 1091 (1985) ("the right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury, and the issue may be raised for the first time on appeal")(*citing State v. Fitzgerald*, 39 Wn. App. 652, 655, 694 P.2d 1117 (1985)). Grott may challenge the lack of a unanimous verdict for the first time on appeal.

Defining precisely what encompasses an alternate means is no easy task because our courts have not been particularly clear on this point, but rather instruct a case-by–case analysis. *Woodlyn,* 188 Wn.2d at 162-63; *Owen*, 180 Wn.2d at 96. In *Woodlyn*, the Court explained that "[i]n enacting criminal statutes, the legislature may articulate a set of prohibited behaviors as (1) a list of distinct offenses or (2) a single offense with one or more alternative means." *Id*. When the different means themselves are essential terms, they establish alternative means of committing the crime. *Nonog*, 145 Wn. App. at 812-13.

In *Owens*, the Court explained that the legislature did not define alternate means crimes, thus statutory analysis is required to make this determination. *Owens*, 180 Wn.2d at 96. Cases have focused on whether the different underlying acts that constitute the same crime vary significantly. *Owens*, 180 Wn.2d at 96-97.

An 'alternative means crime' is one that has separate and distinct categories for committing a crime, rather than different aspects of committing a crime by a single method. *Owen*s, 180 Wn.2d at 99. There are two distinct means of committing trafficking in stolen property. *Owens*, 180 Wn.2d at 98. RCW 9A.82.050(1) provides: "A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.". *Id*. The alternative means are: (1) knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others; and (2) knowingly traffics. *Owens*, 180 Wn.2d at 96-98.

In *Owens,* the Court held that the state charged two alternative means without providing an unanimity instruction but

since it provided sufficient evidence of each alternative means, there was no error. *Owens*, 180 Wn.2d at 100-01.

In *Nonog,* the Court held that animal cruelty in the first degree was an alternate means crime that set forth three distinct ways of committing the crime by "starvation, dehydration, and suffocation, that are not descriptive or definitional but are essential elements." *Nonog*, 145 Wn. App. at 812-13.

In *Woodlyn*, the Court held that theft in the second degree is an alternative means crime with two separate means of commission: theft by wrongful obtainment and theft by deception are alternate means. *Woodlyn*, 188 Wn.2d at 163.

Assault in the first degree provides as follows RCW 9A.36.011(a), (b), and (c):

> A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
> (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
> (c) Assaults another and inflicts great bodily harm.

Id. This is an alternative means crime that may be committed by

three alternative means because it sets forth distinct acts or categories that amount to the same crime. *Owen*s, 180 Wn.2d at 99; *Nonog*, 145 Wn. App. at 812-13.

Here Grott was charged under subsection (a) of the assault in the first degree statute, but the prosecutor argued exclusively that the facts fit within subsection (c), an uncharged alternative means. CP 994-1039; RP 2235, 2242. The prosecutor argued that Grott committed assault with a firearm by intending to and causing fear. There was however no evidence that Grott intended to cause fear, even though some of the victims of the assault expressed fear. RP 986-87, 989, 1250-51.

The prosecutor effectively presented to the jury an uncharged alternative means of committing assault without sufficient evidence in the record. The jury began deliberating with the prosecutor's final command to the jury to find Grott guilty of assault by causing fear in the victims. This error was compounded by the jury instruction defining assault by alternative means. RP 2235, 2242. CP 994-1039. Additionally, the prosecutor used a hypothetical that misstated the law and confused the jury regarding the alternative means of committing assault by arguing:

> "If you think about this in reasonable everyday terms, if somebody shot at you, it really wouldn't matter whether or not they intended to hit you or not. That is your level of fear. You would feel the harm. The harm is your fear. What we have in a situation like this

RP 2235.

In *Woodlyn*, the Supreme Court disagreed with the Court Appeals harmless error on grounds that a complete lack of evidence of one of the alternate means did not require jury unanimity. *Woodlyn*, 188 Wn.2d at 165-66. Instead, the Supreme Court that held that such a result "defies logic". *Woodlyn*, 188 Wn.2d at 166 (conviction affirmed because sufficient evidence of both alternative means).

Here, Grott was charged with assault in the first degree by a single means, but the jury was presented with argument exclusively defining the uncharged alternative means of intending to cause fear. Because the state failed to present any evidence of Grott's intent to cause fear, and the trial court did not provide a jury unanimity instruction, Grott' was denied his constitutional right to jury unanimity as set forth in *Woodlyn*. *Woodlyn*, 188 Wn.2d at 164.

The state may argue that because the to-convict instruction

only provided a single means for finding guilt, that the court did not err in failing to provide a unanimity instruction but this would defy the reasoning in *Woodlyn,* 188 Wn.2d at 166 *(quoting, Commonwealth v. Plunkett,* 422 Mass. 634, 639-40, 664 N.E.883 (1996)), which understood that jurors follow directions provided by the court. "If the judge tells a jury that they may find the defendant guilty on a theory that is factually unsupported ..., the jurors understandably might believe that there must be evidence to support that theory.'" *Id.*

Plunkett involved the court's instructions to the jury, rather than the prosecutors repeated and exclusive hammering that Grott was guilty of assault by intending to cause the victims' fear. The same logic however applies to Grott's case because it is not reasonable assume that when the jury found Grott guilty of assault it did so without confusion as to the means and with unanimity as to means where the prosecutor repeatedly and insistently argued for guilt based on an uncharged means.

This Court must reverse and remand for a new trial.

7. PROSECUTORIAL MISCONDUCT VIOLATED GROTT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The prosecutor committed prejudicial misconduct which denied Grott his right to a fair trial.

The Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 22 of the Washington Constitution guarantee the right to a fair trial. *In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). A prosecuting attorney is the representative of the community; therefore, it is the prosecutor's duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).

A prosecutor is a quasi-judicial officer whose duty is to ensure each defendant receives a fair trial. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

To establish a claim of prosecutorial misconduct, Grott must

demonstrate that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *Glasmann*, 175 Wn.2d at 704. To establish prejudice, there must be a substantial likelihood that the misconduct affected the jury verdict. *Id.*

a. Impermissible Comment on Silence

The Fifth Amendment to the United States Constitution and Wash. Const. art. I, § 9 guarantee that "'[n]o person ... shall be compelled in any criminal case to be a witness against himself.'" *State v. Pinson*, 183 Wn. App. 411, 416-17, 333 P.3d 528 (2014). Both provisions safeguard a defendant's right to be free from self-incrimination, including the right to silence. *Pinson*, 183 Wn. App. at 417. The right to silence includes both pre-arrest and post-arrest silence, that is, before and after *Miranda* rights are read. *Id.*

Generally, the Fourteenth Amendment's guarantee of due process prohibits impeachment based on post-arrest silence, even if the defendant testifies at trial. *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *State v. Burke*, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). However, both the United States Supreme Court and our Supreme Court have recognized an

exception to this general principle if the defendant opens the door to impeachment by commenting on his own silence *United States v. Robinson*, 485 U.S. 25, 31-32, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988); *State v. Jones*, 111 Wn.2d 239, 249, 759 P.2d 1183 (1988) (Jones II).

The state may not use the defendant's silence as evidence of substantive guilt. *Burke*, 163 Wn.2d at 217. The Courts have noted held that a comment on silence violates the defendant's constitutional right to silence when the state "invites the jury to infer guilt from the invocation of the right of silence." *Burke*, 163 Wn.2d at 217; *Pinson*, 183 Wn. App. at 417; Accord, *State v. Easter,* 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

In *Burke*, the defendant testified, and for impeachment purposes, the prosecutor cross examined Burke on his failure to explain to the police that he believed the young woman he had sex with was 16 years old. *Burke*, 163 Wn.2d at 218. The Court held that this was permissible for impeachment but would not have been admissible as evidence of guilt. Id. Here, Grott did not testify, thus the prosecutor's arguments could not have been for impeachment but rather necessarily were impermissibly designed

to infer guilt.

In *Easter,* the defendant maintained his silence through trial on four counts of vehicular assault. *Easter*, 130 Wn.2d at 231. Easter did not speak to officers at the scene nor did he testify at trial. *Easter*, 130 Wn.2d at 231-32. The investigating officer took the witness stand and described Easter's prearrest silence as that of a "smart drunk" who knew better than to cooperate with the police. *Easter*, 130 Wn.2d at 233-34. The Supreme Court reversed Easter's conviction and concluded that "[t]he use of pre-arrest silence as substantive evidence of guilt implicates the Fifth Amendment and is not merely an evidentiary issue. *Easter*, 130 Wn.2d at 235. The prosecutor in *Easter* impermissibly used Easter's silence as substantive evidence to infer guilt. *Id*.

More recently in *Pinson,* the state unsuccessfully argued that the prosecutor was entitled to infer guilt based on Pinson's refusal to answer questions during custodial interrogation. *Pinson*, 183 Wn. App. at 417. This Court disagreed holding that the prosecutor committed flagrant and ill-intentioned misconduct by inferring guilt by commenting on Pinson's silence when the prosecutor argued to the jury about Pinson remaining silent when

Deputy Nault asked if the fight was physical. *Pinson*, 183 Wn. App. at 415, 419-20. The Court reversed and remanded for a new trial based on the violation of Pinson's right to silence. *Pinson*, 183 Wn. App. at 419-20.

Similarly here, as in *Pinson* and *Easter*, the prosecutor impermissibly used two instances of Grott's silence as substantive evidence of guilt. First, when the prosecutor argued to the jury that Grott did not stay at the AM/PM to explain what happened – an inference that if Grott was innocent, it was his job to explain this to the jury. RP 2232. And second, when the prosecutor argued that if Grott genuinely acted in self-defense he would have explained this to the police. RP 2233. Both of these instances of misconduct impermissibly directed the jury to infer guilt based on Grott's silence.

Here, attacking Grott's lack of testimony, and arguing to the jury that Grott failed to explain his innocence, is practically, indistinguishable to calling a defendant a "smart drunk", or accusing a defendant of failing to explain his thoughts, or identifying his refusal to answer custodial questions, because the prosecutor's statements invited the jury to infer guilt. *Burke*, 163 Wn.2d at 217;

Pinson, 183 Wn. App. at 417; *Easter,* 130 Wn.2d at 236.

The error was not harmless and the error was not waived under the flagrant and ill-intentioned standard reiterated in *Pinson*, 183 Wn. App. at 415, 419-20, because no curative instruction could have undone the harm from the comments. *Glasmann*, 175 Wn.2d at 704.

b. The Prosecutor Misstated the Law

(i). Wrong Beyond Reasonable Doubt

"A prosecutor's argument to the jury must be confined to the law stated in the trial court's instruction." *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011) (Walker II). When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. *Id.*

In *Oxier*, the prosecutor wrongly suggested the concept of proof beyond a reasonable doubt was like an intuition or a gut reaction and admonished the jury not to be mealy-mouthed over the state's proof, but to follow their gut reactions. *State v. Oxier*, 175 W. Va. 760, 764, 338 S.E.2d 360 (W. Va. 1985). The prosecutor's remarks "were directed at having the jury disregard

one of the most fundamental concepts in the criminal law—the State must prove its case beyond a reasonable doubt." *Oxier*, 175 W. Va. at 764. These comments constituted clear misstatements of the reasonable doubt law and were highly prejudicial. *Id.*

Here, the prosecutor in a similar manner committed reversible misconduct by arguing to the jury to follow their gut intuition by stating: "you know that he did it, you have an abiding belief, and you know that he is guilty". RP 2250-52. Although a juror must subjectively believe a defendant has been proven guilty, that subjective belief must be based upon a reasoned, objective evaluation of the evidence, not on a gut intuition. *U.S. v. Hernandez*, 176 F.3d 719, 731-32, 51 Fed.R.Evid. Serv. 1478 (1999).1

Whether the accused is guilty beyond a reasonable doubt

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1 In *Hernandez,* the trial court's initial instructions to the jury suggested that "jurors could convict the defendant based upon what they believed in their own heart, soul and spirit whether or not that belief was based upon a reasoned conclusion that the evidence established Hernandez' guilt beyond a reasonable doubt.: *Hernandez*, 176 F.3d at 731.

The Court held that this was reversible error because it permitted the jurors to decide the case based on "their individual 'gut feeling[]'", in spite of the cour's repeatedly admonishing the jury that it had to hold the state to its burden of proof beyond a reasonable doubt, because "the instructions taken as a whole (including the clarification) were not adequate to "unring" the bell. *Hernandez*, 176 F.3d at 731-33.

does not, as urged by the prosecutor, come down to whether jurors feel the accused is guilty in their gut. Here, the trial court recognized that the "you know" argument lowered the burden of proof. RP 2252-53.

Our Supreme Court in *Lindsay* addressed a similar argument in that case where the prosecutor analogized reasonable doubt to a jigsaw puzzle. *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). The prosecutor argued:

> [O]ne of the simplest [ways to explain reasonable doubt] is the idea of a jigsaw puzzle.... [T]he first thing you do is you get all the pieces that have edges on them, start to lock them together, you're trying to get the outline.... [Y]ou put a few more pieces in ... and you start to get a better idea of what that picture is.... **And then you put in about 10 more pieces and see this picture of the Space Needle. Now, you can be halfway done with that puzzle and you know beyond a reasonable doubt that it's Seattle**. You could have 50 percent of those puzzle pieces missing and you know it's Seattle.

(Emphasis added) *Lindsay*, 180 Wn.2d at 434.

The Court reversed the conviction, applying the Court's analysis in *State v. Johnson*, 158 Wn. App. 677, 682, 243 P.3d 936 (2010) (Johnson II) to hold that "the prosecutor's arguments discussing the reasonable doubt standard in the context of making

an affirmative decision based on a partially completed puzzle trivialized the State's burden, focused on the degree of certainty the jurors needed to act, and implied that the jury had a duty to convict without a reason not to do so." *Lindsay,* 180 Wn.2d at 435 *(citing and quoting, Johnson II*, 158 Wn. App. at 685).

In *Glasmann* too, the prosecutor argued that to reach a verdict, it must decide whether the defendant told the truth when he testified. "Thus, the prosecutor strongly insinuated that the jury could only acquit (or find him guilty of lesser charges) if it believed Glasmann, when the proper standard is whether the evidence established that he was guilty of the State's charges beyond a reasonable doubt." *Glasmann,* 175 Wn.2d at 713-14.

The Supreme Court reversed Glasmann's conviction for prosecutorial misconduct because the prosecutor misstated the law by shifting the burden of proof which created a substantial likelihood that jury returned a verdict based in part on the prosecutor's improper argument. *Glasmann,* 175 Wn.2d at 712-14. "Shifting the burden of proof to the defendant is improper argument, and ignoring this prohibition amounts to flagrant and ill[]intentioned misconduct." *Glasmann,* 175 Wn.2d at 713.

Here, the prosecutor's repeated argument that reasonable doubt existed if the jury knew Grott was guilty provided the jury the opportunity to find guilt based on gut instinct rather than on a measured evaluation of the evidence presented. This is analogous to the reversible error in *Oxier, Hernandez, Glasmann,* and *Lindsay,* because "to know" like, "filling in part of a puzzle and instinctually assuming that the rest of the pieces will fit together," , or "knowing something in your gut" or "heart:, relieves the state of proving its case beyond a reasonable doubt.

The prosecutor committed flagrant and ill-intentioned reversible misconduct when he argued that to simply "know" was sufficient to establish the crime beyond a reasonable doubt because a prosecutor may not diminish the burden of proof. *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008); *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). The remedy is to reverse and remand for a new trial. *Hernandez*, 176 F.3d at 731-33; *Glasmann*, 175 Wn.2d at 712-14; *Oxier,* 175 W. Va. at 764.

(ii). Misstatement of Law on Intent Element Relieved the State of Proving an Element of Assault

The prosecutor committed reversible error by misstating the law on intent in the assault charges. RP 2235. The prosecutor argued that it proved Grott's intent to cause serious bodily injury "[i]f you [the jury] think about this in reasonable everyday terms, if somebody shot at you, it really wouldn't matter whether or not they intended to hit you or not. That is your level of fear. You would feel the harm. The harm is your fear. What we have in a situation like this -- let me -- it is what's referred to as transferred intent." *Id.*

The state was required to prove Grott intentionally assaulted another with a firearm with intent to inflict great bodily harm under RCW 9A.36.011(1). CP 994-1039. The prosecutor's argument however, directed the jury to find Grott guilty of a different non-existent method for establishing assault based exclusively on the alleged victims' fear. RP 2235. This was error under RCW 9A.36.011(1). *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994).

Additionally, this was error because Grott was not charged with causing fear or intending to cause fear. CP 994-1039;

Davenport, 100 Wn.2d at 761-763. "The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." *Davenport*, 100 Wn.2d at 761-66.

In *Davenport*, without objection from the defense, the prosecutor argued "it doesn't make any difference actually who went into the house ... they are accomplices", but the state did not charge Davenport as an accomplice. *Davenport*, 100 Wn.2d at 761-763.

The Supreme Court held that the comment by prosecutor in rebuttal closing argument that the jury could convict the defendant as an accomplice, denied Davenport a fair trial, because the jury was not instructed on accomplice liability, "and the jury clearly considered the improper statement to be a proper statement of the law during its deliberations as shown by its request to the court to define the term "accomplice." *Davenport*, 100 Wn.2d at 763-74.

Here, the prosecutor argued the jury could find Grott guilty of assault if the alleged victims experienced fear, rather than requiring the jury to find that Grott intended to inflict serious bodily injury, the only method charged for the assault crimes. RP 2235. Grott was

denied his right to a fair trial because the prosecutor here, like in *Davenport*, argued for conviction based on an uncharged element of assault, and additionally, the argument here was based on a misstatement of the law that would have permitted conviction based only on the victim's fear. Grott was prejudiced because there is a substantial likelihood that the misconduct affected the jury verdict. *Glasmann*, 175 Wn.2d at 704.

(iii). Self-Defense Argument Erroneous

In *Walker II*, 164 Wn. App. 724, this Court reversed a conviction for prosecutorial misconduct where the prosecutor misstated the law by arguing that the reasonableness standard for self-defense, was whether the jury would have acted as the defendant. *Walker II*, 164 Wn. App.at 736. This is not correct the law on self-defense in *Walker II*, provided:

> a person may "employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident."

Id. The prosecutor's argument in *Walker II*, prejudicially invited the jury to "make its decision personal". *Walker II*, 164 Wn. App.at 736.

Here too, the prosecutor impermissibly misstated the law on self-defense by arguing that if the victims' experienced fear, Grott was guilty because he would have been guilty if they had been struck by a bullet: "if they got hit, it was reasonable because that's the force that he used. It was not reasonable. It wasn't self-defense. There is no reason that you should consider it to be self-defense." RP 2242.

This is not as the argument in *Walker II,* because self-defense, does not depend on the state of mind of the victim, it depends on whether the force used was reasonable from the defendant's perspective including. RCW 9A.16.020*; Goodrich,* 72 Wn. App. at 77; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 17.02, at 253 (3d ed. 2008) (WPIC). RCW 9A.16.020 provides in relevant part:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> ....
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, 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;

Id.

Here, in addition to *Walker II*, Grott challenged the self-defense instruction as not stating the correct standard, thus, the prosecutor's arguments are even more prejudicial because the jury was never correctly instructed on self-defense. The prosecutor's argument here, like the argument in *Walker*, was reversible error because in both cases, the prosecutors argued contrary to the law on self-defense. *Walker II*, 164 Wn. App.at 736.

There is a substantial likelihood that the prosecutor's misstatements of the law affected the jury verdict, which requires this Court to reverse and remand for a new trial.

(iv). Error to Shift Burden of Proof of Justifiable Homicide/Self-Defense

The prosecutor shifted the burden of proof on self-defense and justifiable homicide by arguing to the jury that "[t]here is no evidence -- no evidence -- that Julian presented an imminent danger." RP 2240. In this case, the prosecutor impermissibly argued:

> There is no evidence Julian even knew that the defendant was there. How can he present an imminent danger if he doesn't even know that the defendant is present? There is no evidence that the defendant saw Julian do anything threatening. There is nothing that tells us that the defendant even believed he had to act in self-defense. We need to conclude whether or not self-defense is appropriate based on the evidence, not on what we would like to speculate. **Absent somebody explaining to us that the defendant -- absent -- there is no evidence that the defendant believed self-defense was necessary**. Let's take it one step further, though, because the instruction doesn't let a defendant act in self-defense just on that alone. The defendant has to employ force and means as a reasonably prudent person would under the same or similar circumstances as the circumstances appeared to the defendant. Okay. So, reasonable, prudent person

(Emphasis added) 2241.

"[A] prosecutor generally cannot comment on the lack of defense evidence because the defense has no duty to present evidence." *McCreven*, 170 Wn. App. at 471 (*citing State v. Thorgerson*, 172 Wn.2d 438, 467, 258 P.3d 43 (2011)).

In *McCreven*, 170 Wn. App. at 469-70, this Court addressed a remarkably similar argument, involving the same prosecutor's office. This Court held that the prosecutor committed reversible error by arguing to the jury "[w]hat I want to say is this, for the State to disprove self-defense, first there must be proof of self-

defense." *McCreven*, 170 Wn. App. at 470.

> , "How do I disprove that the Defendant reasonably believed that there was imminent danger, when there has been no evidence that the Defendant reasonably believed that there was imminent danger? Ladies and gentleman, there is nothing to disprove that because there is no evidence of it." 21 RP at 2936.
>
> "So if there is no evidence of self-defense, how is it that they even get to argue it?" 21 RP at 2937. The codefendants objected and the trial court again ruled, "[T]he jury has been instructed on the law of the case, and the jury will decide the facts of this case." 21 RP at 2937.

McCreven, 170 Wn. App.at 470.

In *McCreven* the prosecutor's misleading comments suggested that the codefendants were required to first prove self-defense to the jury, and that the state could not disprove the affirmative defense because there was "no evidence" of self-defense. *McCreven*, 170 Wn. App.at 470-71. This Court in *McCreven* reversed the conviction explaining that the prosecutor impermissibly shifted the burden of proof on self-defense explaining that this argument lowered the state's burden of proof and could not be considered harmless error because it was impossible determine beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. *McCreven*,

170 Wn. App. at 471. The trial court also provided an erroneous jury instruction on self-defense that required the defendants to fear harm from a weapon. *McCreven*, 170 Wn. App. at 466-67.

In Grott's case, the prosecutor made similar burden shifting arguments by informing the jury that the defense did not present any evidence of self-defense which meant the state had nothing to disprove which suggested that Grott was required to first prove self-defense to the jury. This argument also instructed that the state could not disprove the affirmative defense because there was "no evidence" of self-defense. RP 2240-41.

This argument like that in *McCreven*, "is not the law in Washington" and constitutes reversible error, even without an erroneous jury instruction because it permitted the jury to disregard the self-defense instruction on grounds that Grott did not properly present that defense. *McCreven*, 170 Wn. App. at 471. The error here, like that in *McCreven* was prejudicial, reversible error.

c. Prosecutor Impermissibly Appealed to Passions and Prejudice of Jury

The prosecutor impermissibly appealed to the passions and prejudice of the jury by arguing they needed to find Grott guilty of assault or else they would be sending a message to the world that

it is ok to shoot a gun "no matter how many people could have died that day". RP 2308-09.

> Something that is extremely important to recognize and acknowledge here is that if you were to conclude that self-defense was lawful here, that conclusion holds no matter how many people could have died that day, because what you justify -- when you say that something is a lawful act of self-defense, what you are justifying having a gun out, trained in any given direction, and pulling the trigger. That's what you are justifying is, having the gun trained and pulling the trigger. That act is lawful. Where that bullet goes after it leaves the chamber of that gun is beyond your control. And so if Deborah Green is hit in the head as she comes back up

RP 2308-09.

It is improper for prosecutors to "'use arguments calculated to inflame the passions or prejudices of the jury'" because these arguments exhort to the jury "to send a message to society about" the general criminal issue at hand rather than based on the facts of the specific case. *Glasmann*, 175 Wn.2d at 704; *State v. Thierry*, 190 Wn. App. 680, 690, 360 P.3d 940 (2015); *State v. Bautista-Caldera*, 56 Wn. App. 186, 195, 783 P.2d 116 (1989).

For example, the Court reversed convictions for misconduct where the prosecutor exhorted the jury to send a message to society about the general problem of child sexual abuse. *Bautista-*

Caldera, 56 Wn. App. at 195. Similarly, in *State v. Powell*, 62 Wn. App. 914, 918, n 4, 816 P.2d 86 (1991), the Court held it was improper to argue to the jury that acquittal would send a message to child sex crime victims that they would not be believed. *Powell*, 62 Wn. App. at 918, n 4.

More recently in *Thierry*, this Court reversed for misconduct where the prosecutor argued that, if defense counsel's argument concerning JT's credibility "has any merit, ... the State may as well just give up prosecuting [child sex abuse] cases, and the law might as well say that '[t]he word of a child is not enough'" *Thierry*, 190 Wn. App. at 690-92. The Court held that even without a direct "send the message" statement, the prosecutor's message impermissibly appealed to the passions and prejudices of the jury by arguing that the state may as well give up prosecuting child sex abuse cases if JT were not believed and Thierry acquitted. *Thierry*, 190 Wn. App. at 690-92.

Similarly the Court has held as reversible error, a prosecutor appealing to passion and prejudice by arguing that the jury should convict in order to protect the community from drug dealing. *State v. Ramos,* 164 Wn. App. 327, 338, 263 P.3d 1268 (2011).

In *Pierce*, this Court held it was reversible error to appeal the passion and prejudices of the jury by arguing that the jury needed to put themselves in the shoes of the two victims. *State v. Pierce*, 169 Wn. App. 533, 554-56, 280 P.3d 1158 (2012). In *State v. Belgarde*, 110 Wn.2d 504, 507-10, 755 P.2d 174 (1988), our state Supreme Court to appeal to jury's passion and prejudice by addressing defendant's ties to group that prosecutor characterized as terroristic based on facts outside the evidence. *Id*.

The prosecutor's argument to the jury impermissibly encouraged the jury to find guilt based on a fear of guns, like a fear of drugs, an abhorrence of child sex crimes, association with terrorists, and the pain a victim feels, rather than on the facts of Grott's case. Under the cases cited herein, this was reversible error. Accordingly, This Court must reverse and remand for a new trial.

d. <u>Prosecutor's Personal Opinions on Guilt</u>

The prosecutor argued to the jury Grott was guilty based on his personal opinion. "There is really not a doubt about any of this." RP 2234. This argument invaded the province of the jury and constituted flagrant and ill-intentioned misconduct. The prosecutor

could have permissibly argued that Grott was guilty based on the evidence, but he was not permitted to argue his personal opinion on guilt. *Glasmann*, 175 Wn.2d at 706-07.

In *Glasmann,* without objection from the defense the prosecutor used a slide show with photos of the defendant with the words "GUILTY, GUILTY, GUILTY." *Glasmann*, 175 Wn.2d at 706. The Court acknowledged that prosecutors know that they "cannot use their position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case." *Glasmann*, 175 Wn.2d at 706 (*citing,* The Commentary on *American Bar Association Standards for Criminal Justice* std. 3–5.8 emphasizes).

The Supreme Court reversed Glasmann's conviction because the prosecutor, notwithstanding this knowledge, committed flagrant and ill-intentioned misconduct by repeatedly showing the slide show that depicted the prosecutor's personal opinion on Glasmann's guilt. *Glasmann,* 175 Wn.2d at 707-11. In *Monday*,171 Wn.2d at 678-80, the Supreme Court reversed a conviction where the prosecutor made racist arguments.

Here, the prosecutor's personal opinion that Grott was guilty

constitutes reversible error because the prosecutor abused his power to sway the jury with the prestige of his office to inform the jury that he knew Grott was guilty, rather the permitting the jury to evaluate the facts with jury instructions to reach their own decisions. As in *Glasmann*, even without an objection, this argument denied Grott his right to a fair trial. This Court must reverse and remand for a new trial.

e. Flagrant and ill-Intentioned

Because Grott did not object at trial, his arguments are waived unless he can establish that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Id*. This Court review allegations of prosecutorial misconduct under an abuse of discretion standard. *Lindsay*, 180 Wn.2d at 430. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Toth*, 152 Wn. App. 610, 615, 217 P.3d 377 (2009).

The Court in *Glasmann*, couched the issue in terms of whether the comments deliberately appealed to the jury's passion and prejudice" and whether the prosecutor "encouraged the jury to base the verdict on the improper argument "'rather than properly

admitted evidence.'" *Glasmann*, 175 Wn.2d at 711 (*quoting State v. Furman,* 122 Wn.2d 440, 468-69, 858 P.2d 1092 (1993) (*quoting and discussing Belgarde*, 110 Wn.2d at 507-08)). "The focus must be on the misconduct and its impact, not on the evidence that was properly admitted." *Glasmann*, 175 Wn.2d at 711.

In *Glasmann*, the court stated that "Prejudicial imagery may become all the more problematic when displayed in the closing arguments of a trial, when the jury members may be particularly aware of, and susceptible to, the arguments being presented" *Glasmann*, 175 Wn.2d at 708-709. The court further found that "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect". *Glasmann*, 175 Wn.2d 696.

To no avail, our Supreme Court has repeatedly warned the prosecutorial community to stop committing misconduct. *Glasmann*, 175 Wn.2d at 711. "In spite of our frequent warnings that prejudicial prosecutorial tactics will not be permitted, we find that some prosecutors continue to use improper, sometimes prejudicial means in an effort to obtain convictions. *Id.*

Here individually and cumulatively, the prosecutor's flagrant

and ill-intentioned misconduct affected the jury's verdict, requiring reversal and remand for a new trial.

8. THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO EXERCISE ITS DISCRETION TO RUN GROTT'S FIREARM ENHANCEMENTS CONCURRENTLY.

Generally, firearm enhancements must be run consecutively to each other and to the standard range sentence. RCW 9.94A.533(3)(e), (4)(e). *State v. Conover*, 183 Wn.2d 706, 713, 355 P.3d 1093 (2015). However, the United States Supreme Court and our state Courts have recognized that when diminished capacity impacts culpability, this can violate the Eighth Amendment. *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *Roper v. Simmons*, 543 U.S. 551, 569-71, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *State v. Houston-Sconiers*, 188 Wn.2d 1, 24-26, 391 P.3d 409 (2017).

In *Miller*, the Court addressed the fact that because the juvenile brain is not fully developed in a youth, the court may exercise its discretion not to impose firearm enhancements consecutively, even when a youth is tried as an adult because otherwise, the sentences may constitute cruel and unusual

punishment in violation of the Eighth Amendment. *Houston-Sconiers*, 188 Wn.2d at 24-26.

The Court's reasoning in *Houston–Sconiers*, following *Roper*, 543 U.S. at 569-71 and *Miller*,132 S.Ct. at 2465-2471, accepted and applied the premise that youth have a diminished capacity for culpability due to their lack of full brain development that does not mature until an average of 26 years of age. *Houston-Sconiers*, 188 Wn.2d at 19-20.

In *State v. O'Dell*, 183 Wn.2d 680, 690-91, 358 P.3d 359 (2015), our state supreme court explained that sentencing courts may exercise discretion to impose an exceptional downward sentence for an adult, (18 years old) notwithstanding any other consideration of age in the crimes charged because "neurological differences make young offenders, *in general,* less culpable for their crimes:

> "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences[;] ... [b]ecause 'the heart of the retribution rationale' relates to an offender's blameworthiness, 'the case for retribution is not as strong with a minor as with an adult."

O'Dell, 183 Wn.2d at 692 (*citing, Roper,* 543 U.S. at 569-71;

Graham v. Florida, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); and *Miller,* 132 S.Ct. at 2458, 2465.

In discussing hypervigilance in the context of battered child syndrome, the court recognized that a hypervigilant child "perceive[s] danger in subtle changes in the parent's expressions or mannerisms" causing him or her to constantly monitor the environment for subtle changes or signals which suggest danger is imminent. *Janes*, 121 Wn.2d at 234 (citing Steven R. Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 L. & Psychol. Rev. 103, 111 (1987)).

Similarly, a battered woman defense permits the defendant to explain and establish the reasonableness of his or her defense base on "the defendant's actions are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable." *State v. Kelly*, 102 Wn.2d 188, 197, 685 P.2d 564 (1984) (*citing Wanrow*, 88 Wn.2d at 240).

Dr. Moore explained that a person suffering from PTSD has a brain that is anatomically and functionally altered. RP 1915-16, 1961-65. This alteration is functionally indistinguishable from a youthful, undeveloped brain because in both cases, the actor is

less culpable due to a neuro-anatomical brain alteration. *O'Dell*, 183 Wn.2d at 696.

For example, Grott's combat veteran brain was neuro-anatomically altered when he was engaged in the shooting in this case when he perceived danger, with a fight or flight response, regardless of the presence of actual danger, in part because a person his brain with PTSD takes much longer than normal for the hippocampus to rationally synthesizes data about the environment to override the amygdala and restore a feeling of personal safety. *Actus Reas,* Berkeley, L. at 373-74. Hence, similar to a juvenile with an underdeveloped brain, a person with PTSD responds with a "relatively simple, reflex-like manner" rather than based on the actual threat presented. *Actus Reas,* Berkeley, L. at 372-73.

In *O'Dell*, the Court held that because the legislature did not consider young adults diminished culpability when enacting the SRA, the trial court was required to exercise its discretion to consider youthful diminished capacity as a mitigating factor. *O'Dell*, 183 Wn.2d at 693, 696-99. "There was no way for our legislature to consider these [age] differences when it made the SRA sentencing ranges applicable to all offenders over 18 years of age." *O'Dell*, 183

Wn.2d at 693.

Accordingly, the Court in *Houston-Sconiers*, held that a sentencing judge must have the discretion not to impose consecutive flat time for crimes committed with a firearm when the defendant has youthful diminished capacity. *Houston-Sconiers*, 188 Wn.2d. at 8-9, 24-25.

Since, diminished capacity based on youth versus PTSD, is diminished capacity regardless of the neurologic origins, the sentencing courts should be able to exercise discretion for the adult with PTSD to make sure that the sentence relates to the offender's blameworthiness. *O'Dell*, 183 Wn.2d at 692; *Accord, Houston-Sconiers*, 188 Wn.2d at 19-20

This Court should determine that under the Eighth Amendment, and the cases cited herein, because diminished capacity is diminished capacity regardless of its origin, it is cruel and unusual punishment to sentence Grott, a person with diminished capacity, like any other defendant and order that the "sentencing courts must have absolute discretion to depart as far as they want below otherwise applicable SRA ranges and/or sentencing enhancements" when sentencing people with

diminished capacity" *Houston-Sconiers*, 188 Wn.2d. at 8-9.

Here Grott requests this Court find that the imposition of flat time violates Grott's Eight Amendment rights, and remand for a new sentencing where the sentencing court considers whether consecutive flat time is appropriate in this case

9. GROTT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Grott was denied his constitutional right to effective assistance of counsel due to counsel failing to object to the prosecutor's prejudicial misconduct; for failing to request a jury instruction requiring the state to prove the *actus reas* of the crimes charged; and for failing to object to the first aggressor instruction.

The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross,* 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied,* 549 U.S. 1022 (2006); *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington,* 466 U.S. 668, 684–86, 104

S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and art. I, § 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that: (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness; and (2) the deficient performance prejudiced the defendant. *State v. Sutherby,* 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins,* 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), *review denied,* 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33; citing, *State v. Reichenbach,* 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho,* 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999).

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. "The relevant

question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols,* 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726, *review denied,* 162 Wn.2d 1007 (2007).

a. Failure to Object to Prosecutorial Misconduct

In Grott's case, counsel did not object to the many instances of prejudicial misconduct, a minimal requirement for effective assistance of counsel. *Horton*, 116 Wn. App. at 921-22. Reversal is required where defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome. *Horton*, 116 Wn. App. at 921-

22.

Courts are not required to "wink" at prosecutorial misconduct under the guise of harmless error analysis. *State v. Neidigh,* 78 Wn. App. 71, 79-80, 95 P.2d 423 (1995). When asked at oral argument why prosecutors continue to engage in clear misconduct, the prosecutor responded, "it's always been found to be harmless error" when no objection is raised). Without a remedy, there is little incentive for prosecutors to avoid intentional misconduct).

The Court in *Horton* reversed for ineffective assistance of counsel where defense counsel failed to object to the prosecutor's improperly expressing his personal opinion about defendant's credibility during closing argument. *Horton*, 116 Wn. App. 909, 921-22.

Here, counsel did not object to any of the prosecutor's repeated and prejudicial misconduct during closing argument, that, at a minimum, misstated the law, and relieved the state of its burden of proof. Grott was denied his right to a fair trial because had counsel made the correct objections, it is likely, the outcome would have differed.

b. Prejudicial Error not to Request "Conditioned Response" Defense instruction

Reasonable attorney conduct includes a duty to investigate and research the relevant law. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. Woods*, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). For example, in homicide prosecutions, when the theory of conditioned response is used as a defense, it is implied that the defendant's actions were not the results of reflection, but rather were learned physical reactions to external stimuli which operated automatically. *State v. Utter*, 4 Wn. App. 137, 138-41, 479 P.2d 946 (1971). The Court in *Utter*, held that when the defense presents evidence that the defendant was in an automatistic state, a jury instruction should be given to explain "conditioned response" as a defense. *Utter*, 4 Wn. App. at 141-43. "The absence of consciousness ['the want or defect of will'] not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability. *Utter*, 4 Wn. App. at 142.

In *Utter,* the defendant was charged with murder in the second degree. The jury convicted the defendant of

manslaughter. *Utter*, 4 Wn. App. at 138. At trial, the defendant testified that as a result of jungle warfare training, he reacted violently towards people approaching him unexpectedly from behind. *Utter*, 4 Wn. App. at 139. The defendant presented expert witness testimony about "'conditioned response.'" *Id*. The expert defined conditioned response as " 'an act or a pattern of activity occurring so rapidly, so uniformly as to be automatic in response to certain stimulus.'" *Id*.

On appeal, the Court held that while the defendant's theory that he acted automatically is similar to diminished capacity, "it is nevertheless distinct from that concept" and relates to the *actus reus* necessary to commit the crime. *Utter*, 4 Wn. App. at 141. "An 'act' committed while one is unconscious is in reality no act at all. It is merely a physical event or occurrence for which there can be no criminal liability." *Utter*, 4 Wn. App. at 143. Because the evidence did not show that the defendant was unconscious or in an "automatistic" state at the time of the crime, the Court affirmed the trial court's refusal to give a jury instruction on involuntarily committing the crime. *Utter*, 4 Wn. App. at 143.

Here, in contrast to *Utter*, Dr. Moore explained that Grott acted in an automatistic, involuntary capacity when he shot at Thompson. RP 1952-53. Under *Utter,* if counsel had noted a conditioned response defense distinct from diminished capacity, and requested a jury instruction, the trial court would have been required to give the instruction because Grott presented evidence in support of this defense. Here, counsel was prejudicially ineffective ineffective for failing to research this area of the law. *Kyllo*, 166 Wn.2d at 862.

In *State v. Thomas*, 109 Wn.2d 222, 227-28, 743 P.2d 816 (1987), trial counsel failed to request diminished capacity instruction based on voluntary intoxication where the evidence supported the instruction. The state supreme court reversed the conviction based on ineffective assistance of counsel because it reasoned counsel's failure to request the defense instruction "would have better enabled [defendant's] counsel to argue the defense's theory of the case," and because the lack of such instruction—in light of the defense theory—resulted in the state and defense arguing conflicting rules of law in closing. The Court held that defense counsel's failure to offer a voluntary intoxication instruction

was prejudicial, deficient performance. *Thomas*, 109 Wn.2d at 227-28.

Similar to *Thomas,* here there was no conceivable, tactical reason for counsel not to raise the conditioned response defense where the evidence supported the defense that negated the willfulness of Grott's actions. Counsel ineffectively failed to understand the difference between a diminished capacity defense and a "conditioned response" when he argued both under the guise of diminished capacity.

Here, if counsel requested a conditioned response defense instruction, the court would have given it, and the instruction would have explained to the jury that the shooting was the result of a "learned physical reaction to external stimuli that operates automatically." *Utter*, 4 Wn. App. at 141. Grott was denied his constitutional right to effective assistance by counsel's prejudicially deficient performance. This Court must reverse and remand for a new trial.

10. CUMULATIVE ERROR DENIED GROTT HIS RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, even where no single

error standing alone merits reversal, an appellate court may find that the combined error denied the defendant a fair trial. U.S. Const. Amend. XIV; art. I, § 3; *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S.Ct.1495, 146 L.Ed.2d 389 (2000) (considering the accumulation of trial counsel's errors in finding cumulative error); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) ("the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cumulative error doctrine mandates reversal when the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Each of the errors set forth above, standing alone, merits reversal. Viewed together, the errors created a cumulative and enduring prejudice that was likely to have materially affected the jury's verdict. Even if this court does not find that any single error merits reversal, the court should conclude that cumulative error rendered Grott's trial fundamentally unfair and remand for a new trial.

D. CONCLUSION

For the reasons stated herein, Robert Grott respectfully request this Court reverse and dismiss his convictions for insufficient evidence. In the alternative, he requests reversal of his convictions and remand for a new trial, and with instructions for the sentencing court to exercise its discretion regarding the imposition of flat time.

DATED this 13th day of February 2018.

Respectfully submitted,

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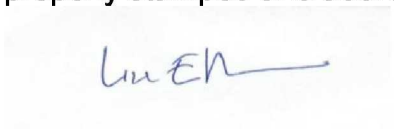
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcecf@co.pierce.wa.us and Robert Grott/DOC#399611, Washington State Penitentiary, 1313 North 13th Ave, Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed on February 13, 2018. Service was made by electronically to the prosecutor and Robert Grott by depositing in the mails of the United States of America, properly stamped and addressed.



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LAW OFFICES OF LISE ELLNER

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