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Court of Appeals
Division I
State of Washington

NO. 74124-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

MITCHELL RAMM,

Appellant.

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

The Honorable Timothy Bradshaw, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	10
1. THE TRIAL COURT ERRED IN EXCLUDING RAMM’S OUT-OF-COURT STATEMENTS TO POLICE AT THE TIME OF HIS ARREST THAT WERE HIGHLY RELEVANT TO HIS STATE OF MIND.	10
a. <u>Relavant facts</u>	10
b. <u>Ramm’s statement was not hearsay because it was a command and went to his state of mind.</u>	12
c. <u>In the alternative, Ramm’s statement was an excited utterance.</u>	17
d. <u>Erroneous exclusion of Ramm’s statement to police was not harmless.</u>	21
2. APPEAL COSTS SHOULD NOT BE IMPOSED.....	24
D. <u>CONCLUSION</u>	25

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>Staats v. Brown</u> 139 Wn.2d 757, 991 P.2d 615 (2000).....	28
<u>State v. Adamy</u> 151 Wn. App. 583, 213 P.3d 627 (2009).....	24
<u>State v. Crowder</u> 103 Wn. App. 20, 11 P.3d 828 (2000).....	16, 17
<u>State v. Fish</u> 99 Wn. App. 86, 992 P.2d 505 (1999).....	17
<u>State v. Hawkins</u> 70 Wn.2d 697, 425 P.2d 390 (1967).....	18
<u>State v. Kelly</u> 102 Wn.2d 188, 685 P.2d 564 (1984).....	15
<u>State v. King</u> 71 Wn.2d 573, 429 P.2d 914 (1967).....	21
<u>State v. Kylo</u> 166 Wn.2d 856, 215 P.3d 177 (2009).....	24
<u>State v. Neal</u> 144 Wn.2d 600, 30 P.3d 1255 (2001).....	25
<u>State v. Pavlik</u> 165 Wn. App. 645, 268 P.3d 986 (2011).....	20, 23, 26
<u>State v. Shaver</u> 116 Wn. App. 375, 65 P.3d 688 (2003).....	24
<u>State v. Sinclair</u> 192 Wn. App. 380, 367 P.3d 612 (2016).....	28

<u>State v. Stenson</u> 132 Wn.2d 668, 940 P.2d 1239 (1997).....	24, 25
---	--------

<u>State v. Woods</u> 143 Wn.2d 561, 23 P.3d 1046 (2001).....	21, 22
--	--------

FEDERAL CASES

<u>Michigan First Credit Union v. Cumis Ins. Soc., Inc.</u> 641 F.3d 240 (6th Cir. 2011)	17
---	----

<u>Strickland v. Washington</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	24
--	----

<u>United States v. Thomas</u> 451 F.3d 543 (8th Cir. 2006)	17, 24
--	--------

RULES, STATUTES AND OTHER AUTHORITIES

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.20 (3d ed. 2008).....	13
--	----

5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW & PRACTICE § 801.3, at 320 (5th ed. 2007)	17
--	----

Alexes Harris et al. <u>Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States</u> , 115 AM. J. SOC. 1753 (2010).....	29
---	----

ER 801	16, 20
--------------	--------

ER 803	16, 18, 21
--------------	------------

RCW 9A.36.021	5
---------------------	---

U.S. Const. amend. VI	24
-----------------------------	----

Const. Art. I, § 22	24
---------------------------	----

WPIC 17.02	20
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding appellant's out-of-court statement that was relevant to his state of mind.

2. Appellant was denied effective assistance of counsel when his attorney failed to argue that his statement to police at the time of arrest was an excited utterance.

Issues Pertaining to Assignments of Error

1. Did the trial court err in excluding appellant's statement to police at the time of arrest that went to his state of mind that he believed he was defending himself from attack, which was relevant to his diminished capacity defense?

2. Was appellant denied effective assistance of counsel where his attorney failed to argue his statement to police at the time of arrest was an excited utterance?

B. STATEMENT OF THE CASE

On June 5, 2015, the State charged Mitchell Ramm by amended information with one count of second degree assault with a deadly weapon enhancement. CP 11. The State alleged that on May 18, 2014, Ramm intentionally assaulted John McKissick with a deadly weapon—wooden clubs—and thereby recklessly inflicted substantial bodily harm on McKissick, contrary to RCW 9A.36.021(1)(a) and (1)(c). CP 11.

Ramm is schizophrenic and chronically homeless. RP 334, 422-23. He was originally found incompetent to stand trial and was sent to Western State Hospital for competency restoration. Supp. CP__ (Sub. No. 17, Order Finding Defendant Incompetent and Committing for First Restoration Period). It took nearly a year to restore Ramm's competency, and he was not found competent to stand trial until April 13, 2015. CP 7-9. The case proceeded to a jury trial in September 2015. The facts of the incident were largely undisputed.

McKissick is a security officer for the Woodland Park Zoo. RP 105. McKissick is not armed, but does carry a large flashlight. RP 118-19. On the morning of May 18, 2014, he received a report that a homeless person was camping in the woods near the Zoo rose garden. RP 110-16, 281. McKissick found Ramm sleeping at a campsite he had made. RP 115-16. McKissick told Ramm was not authorized to camp there and asked him to leave. RP 115-18. When Ramm refused, McKissick told Ramm he would have to call the police. RP 117-18. McKissick also testified Ramm told him he should be paying Ramm rent for being in Ramm's space. RP 117.

McKissick walked away from Ramm's campsite and called 911. RP 118-19. Ramm emerged from the trees and started yelling at McKissick, calling him a chicken. RP 119-20. When McKissick refused to engage with Ramm, Ramm "started getting more aggressive, more verbal, he started

approaching.” RP 120. McKissick recalled Ramm saying something about having been a Navy Seal and killing Osama bin Laden. RP 139-40. Ramm also asked McKissick, “Do you want to go to church?” RP 140. McKissick said Ramm then “started swinging” at him with his fists, but he was able to avoid Ramm’s punches. RP 120-21.

McKissick explained Ramm became “extremely frustrated because he couldn’t engage me.” RP 122. Ramm “stepped back, pulled out two billy clubs out of his back pocket that were concealed underneath his sweatshirt or jacket and then proceeded to raise them and attempt to hit me in the head several times.” RP 122. Officer Michael Larned described the sticks as wooden dowels approximately 15 inches long. RP 189-90. Ramm later explained the sticks were made for beating fish. RP 436. McKissick believed Ramm struck him about six times with the sticks. RP 122. McKissick’s forearm was broken and he needed several stitches on his head. RP 127-28, 234-38.

As McKissick backed away from Ramm, he tripped over a curb and fell into a ditch, where he found bicycle parts that he used as a weapon. RP 126-27. Ramm picked up a wooden pallet nearby and threw it on McKissick. RP 127. McKissick then used the pallet as a shield as Ramm attempted to throw a chunk of cement at McKissick’s head. RP 127.

About this time, several people began congregating. RP 127-28. McKissick testified Ramm “noticed that all the people were standing around, then he proceeded to the picnic bench across from Animal Health and sat down.” RP 128. When the police arrived “[a]pproximately 30 seconds later,” McKissick said Ramm “got off the bench, got on his knees, and he got to the ground,” putting his hands behind his back. RP 128. Officer Larned testified they found Ramm sitting on a park bench and he was “compliant” as they took him into custody. RP 185-87. Another officer likewise testified Ramm was “pretty calm” as they arrested him: “I think he protested a little verbally; but as far as physically, he was compliant and we didn’t have to use any force on him.” RP 318.

Several zoo employees came to the scene when they heard McKissick’s calls for help over the radio. All of them testified to Ramm’s strange, disorganized behavior. Zookeeper Erin Martin recalled Ramm “mumbling mostly” and “muttering things.” RP 151, 154. Bruce Walling said Ramm “seemed agitated, upset,” and “definitely deranged.” RP 165. Walling could not remember what Ramm said but recalled he was ranting and raving. RP 160, 165.

Ashley Pittman recalled Ramm “yelling things . . . about being a veteran, not wanting to return overseas.” RP 245. She said Ramm did not make any sense and she “didn’t seem to understand what he was saying.”

RP 251. Sonja Rosas testified Ramm “was very upset” and “there was a lot of yelling.” RP 259. She remembered him “yelling specifically about being in the war,” which had nothing to do with the current situation. RP 265.

Zoo employee Pauline Griffith explained:

He didn’t -- he was saying like a lot of stuff about Iraq. We weren’t exactly sure what we were picking up. He wasn’t really making any sense . . . there wasn’t any formulated sentences. It just seemed like he was pacing, he was agitated definitely, and he just kept saying something about Iraq.

RP 272-73. Griffith further explained “[i]t didn’t see[m] really like it was behavior that would be consistent with somebody that was with it.” RP 274. Rather, “[i]t seemed very apparent that there was something going on, that there wasn’t normal conscious sentence structure or anything like that, just definite like aggression, agitation, but that was about it.” RP 274-75.

Ramm’s defense at trial was diminished capacity. Dr. Wayne Winters and Dr. Kenneth Muscatel testified on his behalf. Dr. Winters is a psychologist with Western State Hospital. RP 324. He conducted a clinical observation of Ramm on July 18, 2014, and reviewed Ramm’s mental health records from jail and Western State Hospital. RP 329-33, 342. The jail records noted Ramm refused to take antipsychotic medication; “his thinking was off-topic, . . . it was tangential; delusional, grandiose”; and “his grooming and hygiene were noticeably poor.” RP 342. Based on his

evaluation, Winters concluded Ramm met the diagnostic criteria for schizophrenia, which is characterized by delusions, hallucinations, as well as disorganized speech and behavior. RP 334-35.

Winters explained Ramm refused to meet Winters with his attorney present, because his attorney had not fought al-Qaeda and was not a JAG (Judge Advocate General) lawyer. RP 344-45. Winters explained this itself was “pretty irrational.” RP 344. Ramm then talked almost nonstop for the entire two-hour evaluation. RP 351-52. This consisted of grandiose content and delusions, which Winters explained “[o]n the whole . . . didn’t seem very reality-based.” RP 346-52. For instance, Ramm said he attended dental school in California with Cameron Diaz and planned to build a home for Kurt Cobain’s daughter. RP 346-39.

Winters was sometimes able to redirect Ramm’s thinking, but usually not for long. RP 370. Ramm denied having mental health problems, which Winters noted Ramm had a history of doing. RP 352-54. Winters explained that for someone like Ramm “who does not follow through with the medication or work with the doctor on finding a medication that works for them and they can tolerate it, the prognosis is pretty poor.” RP 361. Winters could not offer any opinion as to Ramm’s mental state at the time of the offense. RP 383.

Dr. Muscatel is a licensed psychologist and also conducted a psychological evaluation of Ramm. RP 401, 407-08. He reviewed witness statements, medical records, jail psychiatric records, and met with Ramm in person on February 27 and March 19, 2015. RP 208-13. Muscatel explained “the clinical picture was pretty consistent throughout all the evaluations” that Ramm suffered from paranoid schizophrenia. RP 413.

On February 27, Muscatel found Ramm “to be in a pretty agitated and disorganized state.” RP 412. More specifically, Ramm “was agitated, very tangential, difficult to keep on track, responsive to questions, sometimes overly responsive. A lot of information would come out, and it would come out sometimes in a jumbled fashion.” RP 416. Muscatel described Ramm’s behavior as manic, which tends to be characterized by tangential, pressured, and disorganized speech, as well as being irritable and emotionally labile. RP 416. Muscatel explained “labile” means “up and down, that you could be very sad or unhappy or angry and then all of a sudden, pretty quickly, you’re elated or you’re feeling grandiose and then your voice can get louder and then you can switch back and forth.” RP 417.

Based on Ramm’s manic behavior combined with his disturbed and delusional thinking, Muscatel concluded schizoaffective disorder was the most appropriate diagnosis. RP 427. Schizoaffective disorder has qualities of bipolar disorder, as well as “disturbance in reality testing, judgment

reasoning.” RP 427. Whatever the diagnosis, Muscatel explained, Ramm “has a chronic severe mental illness, no question about it.” RP 427.

Muscatel explained Ramm has been homeless for years. RP 422-23. Ramm described being homeless as scary, threatening, and terrible, and “he was always nervous about it.” RP 423, 438. Ramm “said he had been victimized and the implication was that it was really violent, that people could be really violent towards him.” RP 439. Because of his mental illness, “[s]tress is difficult for him to deal with . . . and he’s just not equipped psycholog[ically] to deal with it.” RP 433. As a result, Ramm “can be very irritable, easily threatened, he can get angry and then happy, and he can become very disorganized.” RP 432-33.

Ramm had difficulty recounting exactly what happened on May 18, but told Muscatel:

Basically, he said that somebody jumped out and he was confronted by [t]his individual, and he was told he had to leave. He said at first he tried to engage the person, and that he felt threatened by the person. And he said the person had swung at him or hit him with a Maglight, a flashlight -- although, whether that actually happened or how that happened wasn’t completely clear. He was very disorganized.

RP 436. Ramm explained he ended the altercation when noticed the man’s shirt said “staff” and Ramm realized “the guy actually wasn’t just a guy.”

RP 438. Then, “right in the midst” of discussing the May 18 incident,

Ramm started talking “about Native American empowerment” and told Muscatel “a long story about the battles with Jeffrey Dahmer and Robert Rodriguez that he had.” RP 437.

Muscatel concluded Ramm was chronically mentally ill and not taking his medication on May. RP 440-41. However, Muscatel ultimately could not conclude whether Ramm was acting with the specific intent to assault McKissick. RP 460, 469. Muscatel also could not opine whether Ramm subjectively believed he was acting in self-defense that day. RP 470. Muscatel testified, however, someone with schizophrenia can act on the delusional belief he is under attack. RP 443-44. Muscatel acknowledged Ramm felt threatened by McKissick and said McKissick hit him with a flashlight. RP 457-59. Muscatel accordingly thought it was possible Ramm believed he was acting in self-defense “in part because of his emotional regulation, you know, irritability, and feeling threatened, and being aggressive, and confused, this is all mixed together, and that’s the reality of who he is.” RP 447.

The jury was given the standard diminished capacity instruction: “Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to inform intent or knowledge.” CP 67; 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL. 18.20, at 286 (3d ed. 2008) (WPIC). In

closing, defense counsel argued “the key to this case” was Ramm was “not intending unlawful force” because he “thought he was acting in self-defense, that he was threatened.” RP 528-29.

The jury found Ramm guilty of second degree assault and returned a special verdict form finding he was armed with a deadly weapon at the time of the offense. CP 51-52. The court sentenced Ramm to nine and a half months with an additional 12 months for the deadly weapon enhancement, for a total of 21.5 months. CP 81. Ramm timely appealed. CP 91.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN EXCLUDING RAMM’S OUT-OF-COURT STATEMENTS TO POLICE AT THE TIME OF HIS ARREST THAT WERE HIGHLY RELEVANT TO HIS STATE OF MIND.

- a. Relevant facts

Upon arrest, immediately after the altercation ended with McKissick, Ramm told the police: “You should not arrest me, you should arrest the other guy.” RP 54. Ramm may also have said, “He attacked me.” RP 57. The State moved in limine to exclude these statements as “self-serving hearsay of the defendant.” Supp. CP__ (Sub. No. 83, State’s Supplemental Trial Memorandum, at 5).

Defense counsel argued “Ramm’s statement goes to his state of mind and, therefore, the Defense’s position is that it’s not hearsay, it’s not being

offered for the truth of the matter; it's being offered for Mr. Ramm's state of mind and his subjective belief." RP 53-54. Ramm told Muscatel that McKissick hit him with a flashlight and, given Ramm's paranoid delusions, he may have thought he was defending himself. RP 54. Ramm's request for police to arrest McKissick instead of him corroborated his self-defense theory and was relevant to his "subjective mental state." RP 54.

The trial court excluded Ramm's statements, finding:

So on its face this, of course, is not a statement that one would view as unusual or without more evidence of a diminished capacity. It has the hallmarks of an out-of-court assertion that hangs one's self in a better light, and is offered for the truth of the matter; but it's not his fault, it's the other guy's fault. So, with that, I do not find that the state of mind exception would allow this to be admissible.

RP 57. The party who loses a motion in limine has a standing objection and does not need to make further objections. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984).

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons, "such as misconstruction of a rule." Id. Interpretation of an evidentiary rule is a question of law reviewed de novo. Id.

- b. Ramm's statement was not hearsay because it was a command and went to his state of mind.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). It is inadmissible unless an exception or exclusion applies. ER 802. One exception to the hearsay rule is the statement goes to the declarant's state of mind:

Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

ER 803(a)(3).

Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay. State v. Crowder, 103 Wn. App. 20, 26, 11 P.3d 828 (2000). A statement providing circumstantial evidence of the speaker's state of mind "is not technically hearsay in the first place because it is not being offered to prove the truth of the matter asserted." 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW & PRACTICE § 803.16, at 57 (5th ed. 2007).

Similarly, “questions, requests, and statements of advice” are not hearsay.¹ 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW & PRACTICE § 801.3, at 320 (5th ed. 2007) (emphasis added). For instance, a passenger’s requests that the driver “pull over and drop them off” were not assertions of fact, but commands,” and were therefore not hearsay. State v. Fish, 99 Wn. App. 86, 96, 992 P.2d 505 (1999). Likewise, an instruction to remove a particular indirect loan from the “exceptions” section of an audit report was “not hearsay because it is a command, a verbal act without truth value.” Michigan First Credit Union v. Cumis Ins. Soc., Inc., 641 F.3d 240, 251 (6th Cir. 2011); see also United States v. Rodriguez-Lopez, 565 F.3d 312, 314 (6th Cir. 2009) (holding a command like “bring me some heroin” is not hearsay because it is not “assertive speech”); United States v. Thomas, 451 F.3d 543, 548 (8th Cir. 2006) (“Questions and commands generally are not intended as assertions, and therefore cannot constitute hearsay.”).

In Crowder, 79-year-old Vincent Burns hired Holofa Crowder as his caretaker to make meals and clean house for him. 103 Wn. App. at 22. Over the next several years, Burns transferred nearly all his assets to Crowder, legally adopted her as his daughter, and designated her the sole beneficiary

¹ Tegland explained Washington courts admit such statements “either on the theory that implied assertions are not hearsay, or on the theory that a statement is not hearsay if offered as circumstantial evidence of the declarant’s state of mind.” 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW & PRACTICE § 801.3, at 320-21 (5th ed. 2007) (footnotes omitted).

of his will. Id. at 23-24. The State eventually charged Crowder with theft by embezzlement, alleging she exerted unauthorized control over Burns's estate over a five-year period. Id. at 25.

At issue on appeal was the admissibility of several out-of-court statements made by Burns. Id. at 26. For instance, Burns's neighbor testified that in response to her inquires about his welfare, Burns said, "my adopted daughter has taken care of everything." Id. The appellate court held this statement was not hearsay under ER 803(a)(3). Id. It was not admitted to prove Crowder had actually taken care of everything, but rather "went to Burns' state of mind, his reliance on Crowder's supervision of his affairs." Id. It was therefore properly admitted at trial. Id.

Similarly, Burns told a legal assistant in regards to Crowder's spending that he was going to "pull in the purse strings" after she purchased a condominium with his money. Id. The statement was not offered to prove Burns pulled the purse strings, which he did not do, but rather to serve as circumstantial evidence of Crowder's influence. Id. The statement was therefore also "admissible as evidence of the existing mental or emotional condition, showing the intent of the declarant at the time spoken." Id.

State v. Hawkins, 70 Wn.2d 697, 425 P.2d 390 (1967), is also instructive. There, the trial court admitted three photocopies of letters Hawkins sent to his mother while he was detained in jail awaiting trial. Id. at

704. The supreme court held the letters were admissible to rebut Hawkins's defense of insanity because they established his "state of mind and mental competency." Id. at 705.

Contrary to the trial court's conclusion, Ramm's command that the police "should not arrest me," but "should arrest the other guy," was not hearsay because it was both a command and went directly to his state of mind. RP 54. Ramm told Dr. Muscatel "that somebody jumped out and he was confronted by [t]his individual, and he was told he had to leave." RP 436. Ramm explained "he felt threatened by the person" and "the person had swung at him or hit him with a Maglight." RP 436. Ramm's reaction was consistent with his intense fear of physical violence while homeless, because he had been attacked before while living on the streets. RP 438-39. Ramm's statement about arresting McKissick instead of him suggested he subjectively felt threatened by McKissick and was defending himself from attack, even though that was objectively not true. It plainly went to his state of mind.

As such, the trial court's reasoning that Ramm's statement "has the hallmarks of an out-of-court assertion that hangs one's self in a better light, and is offered for the truth of the matter; but it's not his fault, it's the other guy's fault," is clearly erroneous. RP 57. But Ramm was not seeking to admit the statement to argue that he did not actually attack McKissick. Nor

was he seeking to admit the statement to claim objective self-defense. In fact, defense counsel did not propose a self-defense instruction because he acknowledged it included an objective standard of reasonableness, which was clearly not met. RP 64; see also WPIC 17.02 (requiring reasonable belief that the person is about to be injured). Rather, he sought admission of the statement to show his state of mind that, because of his mental illness, he believed he was defending himself. This was not for the truth of the matter asserted, and was therefore not hearsay.

Furthermore, “there is no ‘self-serving hearsay’ bar that excludes an otherwise admissible statement.” State v. Pavlik, 165 Wn. App. 645, 651, 268 P.3d 986 (2011). The Pavlik court explained the erroneous “self-serving hearsay” rule arose from the admission by a party opponent hearsay exclusion. Id. at 651-53. Specifically, a statement is not hearsay if: “The statement is offered against a party and is (i) the party’s own statement, in either an individual or a representative capacity.” ER 801(d)(2)(i).

This exclusion means “a party’s statements could be offered against him, but the party could not offer statements on his own behalf.” Pavlik, 165 Wn. App. at 653. But it does not create an independent hearsay limitation. Id. Instead, the Pavlik court noted the Washington Supreme Court “hit the rhetorical nail on the head in King when discussing the topic: “‘self-serving’ seems to be a shorthand way of saying that it was hearsay and did not fit into

any of the recognized exceptions to the hearsay rule.” Id. at 654 (quoting State v. King, 71 Wn.2d 573, 577, 429 P.2d 914 (1967)). Therefore, hearsay that benefits the offering party is admissible so long as it meets a hearsay exception. Id. at 653-64. Such is the case here.

The trial court erroneously excluded Ramm’s statements to police on the basis that they were self-serving hearsay offered for the truth of the matter asserted. Instead, Ramm’s statements were not hearsay because they demonstrated his subjective state of mind—that he believed he acted in self-defense when he felt threatened by McKissick.

c. In the alternative, Ramm’s statement was an excited utterance.

Another exception to the hearsay rule is an excited utterance—“[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” ER 803(a)(2). Three “closely connected requirements” must be met in order for a hearsay statement to qualify as an excited utterance: (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress or excitement of the startling event or condition, and (3) the statement related to the startling event or condition. State v. Woods, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001). “Often, the key determination is whether the statement was made while the declarant was still under the influence of the

event to the extent that the statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.” Id.

All three requirements are met here. First, the startling event was the altercation between Ramm and McKissick. The record is plain that Ramm is schizophrenic and suffers from intense delusions and disorganized thoughts. Homelessness is very stressful for him and he lives in constant fear of physical attack. RP 438-39. He was startled awake by McKissick and reacted violently. His incoherent rantings about the Iraq war and Osama bin Laden demonstrate he was not acting with full awareness of what he was doing. RP 139-40, 272-73. Muscatel testified Ramm is “just not equipped” to handle stress, like someone invading his campsite. RP 433. There can be no dispute this was a startling event for both individuals.

Second, police arrived at the scene “[a]pproximately 30 seconds” after the altercation between McKissick and Ramm ended. RP 128. The police immediately took Ramm in custody, at which time he told them: “You should not arrest me, you should arrest the other guy.” RP 54, 128. Ramm made this statement so soon after the altercation that there can be no dispute he was still “under the influence of the event.” Woods, 143 Wn.2d at 597. This is especially true given his mental illness, which makes him manic, irritable, and emotional labile. RP 416-17.

Finally, Ramm made the statement in direct relation to the altercation that just occurred. He knew there had been violence, felt threatened by McKissick, believed McKissick should be arrested instead of him, and instructed the cops as such. The third requirement is met.

Pavlik provides a useful analogy. There, Pavlik got into an altercation with two bicyclists. Pavlik, 165 Wn. App. at 647-48. One of the cyclists saw a gun sitting on the passenger seat of Pavlik's car and reached through the window for it. Id. at 647-48. A struggle ensued and Pavlik shot the cyclist. Id. at 648. A police officer saw the shooting and arrived at the scene immediately after. Id. Pavlik yelled to him, "You saw it, it was self-defense." Id. On appeal, the court concluded "the evidence would have permitted a trial judge to find that [Pavlik's] statement qualified as an excited utterance." Id. at 654-55.

Ramm's statements are similar to Pavlik's because, like Pavlik, Ramm made them within moments after the altercation with McKissick ended. Simply because they benefit Ramm does not mean they are inadmissible for that reason, as demonstrated in Pavlik. This Court should therefore hold, in the alternative, that Ramm's statements to police were excited utterances.

The State may argue Ramm cannot now assert his statements were excited utterances because he failed to argue that alternative theory below. If

this Court agrees Ramm's statements were excited utterances, then Ramm's counsel was ineffective for failing to argue that hearsay exception.

Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Ineffective assistance claims are reviewed de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Defense counsel argued Ramm's statement was not hearsay because it went to his state of mind. RP 53-54. There was no reason Ramm's counsel could not have advanced the alternative theory that even if hearsay, Ramm's statement was an excited utterance. Either should have resulted in admission of the statement. Failure to recognize and cite appropriate case law constitutes deficient performance. State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009); see also State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (counsel has a duty to know the relevant law).

There can be no reasonable strategic reason for failing to argue an alternative theory of law that would result in admission of evidence.

Prejudice occurs when there is a reasonable probability the outcome would have been different had the representation been adequate. Stenson, 132 Wn.2d at 705-06. Ramm's statement to police was highly relevant to his state of mind and critical to his defense that he believed he was defending himself from attack. See infra section 1.e (discussing prejudice). Counsel's unreasonable failure to argue Ramm's statement was an excited utterance therefore prejudiced the outcome of Ramm's trial, necessitating reversal.

d. Erroneous exclusion of Ramm's statement to police was not harmless.

A conviction must be reversed when evidentiary error results in prejudice. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). An evidentiary error is prejudicial if, within reasonable probabilities, it materially affected the trial's outcome. Id.

Ramm's defense was that his mental illness diminished his ability to form the requisite intent to assault McKissick; specifically that Ramm subjectively believed he was defending himself from McKissick. Ramm told Dr. Muscatel that McKissick hit him with a flashlight and he felt threatened by McKissick. RP 436. This was consistent with Ramm's paranoid delusions, his difficulty dealing with stress, as well as his intense

fear of physical violence. RP 432-33, 439. Dr. Muscatel believed it was possible Ramm thought he was acting in self-defense that day. RP 447. Ramm's counsel likewise argued in closing "the key to this case" was Ramm was "not intending unlawful force" because he "thought he was acting in self-defense." RP 528-29.

Aside from Ramm's statements to Dr. Muscatel almost a year after the incident, though, there was very little evidence of Ramm's state of mind at the time of the offense. Several onlookers testified to Ramm's incoherent and deranged ranting during the altercation. But none of that ranting specifically suggested Ramm thought he was defending himself. The only statement Ramm made that directly went to his state of mind was the police should arrest McKissick instead of him. RP 54. The evidence was incredibly important for Ramm's subjective self-defense theory. It also would have shown he did not fabricate the self-defense theory belief after-the-fact. The jury was improperly deprived the opportunity to consider that evidence.

Pavlik again provides a useful distinction. There, the court held erroneous exclusion of Pavlik's statement to police at the scene that he was defending himself was harmless. 165 Wn. App. at 656-57. An officer saw the end of the confrontation and his testimony largely supported Pavlik's version of events. Id. at 656. There was no allegation that Pavlik only

recently claimed to have acted in self-defense. Id. “The statement was not a necessary component of its case, or even a particularly helpful piece of information.” Id. Further, other evidence significantly undercut Pavlik’s self-defense theory. Id. “The self-defense claim failed on the facts of this case, not the absence of one statement.” Id.

By contrast, Ramm needed the statement to support his subjective self-defense claim. Given Ramm’s mental illness, it was nearly impossible to discern his thought process during the incident. His statement to police demonstrated he thought he was defending himself and felt threatened by McKissick. No other evidence from the time of the offense did so as directly as Ram’s statement to the police. Because he made this statement immediately after the altercation, it also would have significantly bolstered his later explanation to Dr. Muscatel that he felt threatened by McKissick and was defending himself.

With a diminished capacity defense, state of mind is everything. The jury was instructed Ramm’s mental illness “may be taken in consideration in determining whether the defendant had the capacity to form intent or knowledge.” CP 67. But the most critical piece of evidence going to Ramm’s state of mind during the altercation was excluded. Given the overwhelming evidence of Ramm’s mental illness and its impact on his thinking and behavior, the jury could have reasonably found he believed was

acting in self-defense had it heard that additional evidence. The trial court's error in excluding the evidence therefore prejudiced the outcome of Ramm's trial. This Court should reverse and remand for a new trial.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

If Ramm does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) provides that appellate courts “may require an adult . . . to pay appellate costs.” (Emphasis added.) The word “may” has a permissive meaning. Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). This Court has ample discretion to deny the State's request for appellate costs. See State v. Sinclair, 192 Wn. App. 380, 387-93, 367 P.3d 612 (2016) (exercising discretion and denying State's request for appellate costs).

Ramm suffers from schizophrenia and has been homeless for much of his life. RP 334, 422-23. He has received social security for his mental illness in the past. RP 354. It is unclear from the record whether Ramm has ever held a steady or even temporary job. See Supp. CP__ (Sub. No. 100A, Declaration of Defendant) (reporting no employment, income, or assets). What *is* clear is that his mental illness is debilitating and impacts every aspect of his life. He lives in constant fear and paranoia. There is no realistic possibility he will ever be able to pay appellate costs.

Imposing appellate costs would, as the saying goes, be like trying to draw blood from a stone. See generally Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. Soc. 1753 (2010). One hopes the State would not seek costs in such circumstances. Regardless, this Court has discretion to deny them and should do so.

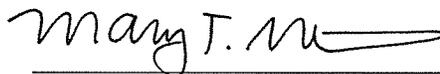
D. CONCLUSION

For the aforementioned reasons, this Court should reverse Ramm's conviction and remand for a new trial.

DATED this 13th day of June, 2016.

Respectfully submitted,

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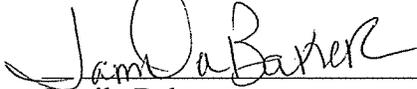
State v. Mitchell Ramm

No. 74124-1-I

Certificate of Service of brief of appellant by Mail

No service to client, not in custody. Per trial attorney, client is homeless without a mailing address.

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



Jamila Baker

Done in Seattle, Washington

6/13/16

Date