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Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEPHEN MARK REICHOW, Appellant,	No. 50289-5-II
STATE OF WASHINGTON, Respondent, v. STEPHEN MARK REICHOW, Appellant.	Consolidated with: No. 51212-2-II UNPUBLISHED OPINION

LEE, J. — Stephen M. Reichow appeals his conviction for first degree premeditated murder, arguing that the trial court erred by (1) refusing his proposed cautionary jury instruction on eyewitness identification testimony, (2) excluding expert testimony on diminished capacity, and (3) using the general concluding jury instruction rather than the concluding instruction for lesser included/lesser degree offenses. Reichow also appeals the trial court's imposition of legal financial obligations (LFOs), arguing that the trial court violated his Sixth Amendment right to confront witnesses during the restitution hearing and that the trial court should have engaged in an individualized inquiry into his ability to pay before imposing LFOs.

We affirm Reichow's conviction and the trial court's order imposing restitution, but remand for the trial court to impose LFOs in accord with the 2018 legislative amendments to the LFO statutes.

FACTS

On August 1, 2015, Reichow killed Brandon Maulding by beating him with a baseball bat. The State charged Reichow with first degree premeditated murder (Count I), second degree intentional murder (Count II), and second degree felony murder (Count III). All the charges included deadly weapon enhancements and aggravating circumstances.

Before trial, Reichow was evaluated at Western State Hospital for competence and diminished capacity. The trial court found Reichow competent to stand trial. Then, the State filed a motion to exclude expert testimony regarding diminished capacity.

Dr. Nicole Zenger, the forensic psychologist who completed Reichow's diminished capacity evaluation, testified at the hearing on the motion to exclude. Dr. Zenger diagnosed Reichow with a psychotic disorder characterized by paranoid beliefs about being stalked. Dr. Zenger testified that she did not believe that Reichow acted with premeditation or intent. Dr. Zenger explained,

> And in ad—in addition when we're talking about intent according to how my community—professional community would look at that, that's a consideration of what the mental state was. Now what the act was. And any behavior—ninety-nine point nine percent of the time is going to have some kind of intention.
>
> But that does not speak to what the mental state—or for the court's purposes—mense rea (ph) is. That speaks to the act itself so Mr. Reichow—using a bat to strike the victim was inten—was a volitional act.
>
> That's not what I'm asked to address. I'm asked to address what his mental state was and so I do need to consider the context within which this took. And I'm

> asked because of his mental illness and me as a profess—professional in the mental health field to look at how that would have affected the context of his mental state.
>
> And so when I'm looking at intent and from what I unde—what I understand outside of needing an attorney and of course I'm going to have some weaknesses there—that when I'm looking at intention I'm looking at the mental state of what someone intends.
>
> And that involves cognitive thinking—not a volitional act. And so—I mean—I'm just providing some context of I think there's some confusion about simply the act of assault—meaning that he did it with some—
>
> I—I don't want to use the word intention because that's not—he—it was a volitional act of striking someone—he knew he was striking someone.
>
> But that's not what I'm being asked to address. I'm being asked to address what was the purpose or intention of it.

Verbatim Report of Proceedings (VRP) (Jan. 6, 2017) at 63-64. Dr. Zenger also testified that at the time of the incident Reichow's mental illness caused a state of "fear and believing he was in danger in the situation." VRP (Jan. 6, 2017) at 66.

The trial court also considered Dr. Zenger's report which concluded,

> The available evidence is consistent with the conclusion that Mr. Reichow was suffering from a mental disorder at the time of the alleged offense. Although he knowingly struck the victim, his delusional beliefs were guiding his assessment of the situation and negatively affected his ability to make a rationally informed decision and respond with intentional behavior. There is no reasonable indication that he had the specific intention to commit a crime (unlawful assault), as his claim of self-defense—in response to paranoid delusions—is consistent with his lack of violent history and the behavior of immediately seeking emergency services for the victim.

Clerk's Papers (CP) at 69.

The trial court granted the State's motion to exclude Dr. Zenger's testimony regarding diminished capacity. The trial court explained,

> This—our Supreme Court said to maintain a diminished capacity defense the Defendant must produce expert testimony demonstrating that a mental disorder—not [amounting] to insanity—impaired the Defendant's ability to form the culpable mental state to commit the crime charged.
>
> And I looked from that to the culpable mental state here as really set forth under RCW 9A.08.101(1)(a) which is the definition of acting with intent or intentionally. And that's when a person acts with the objective or purpose to accomplish a result which constitutes a crime.
>
> And it is concerning reading Dr. Zenger's report that the gist of this seems to be that this is justifiable homicide or self-defense which certain of those claims are valid but that does not rise to a—a diminished capacity defense on—on any of these facts.
>
> We have very much goal directed activity here and based on the totality of it I am going to exclude the evidence under ER 702.

VRP (Jan. 6, 2017) at 105-06.

At Reichow's jury trial, the State presented the testimony of two eyewitnesses, Jacqueline Olson and Chelsea Sutherland. On the night of the murder, Sutherland was driving herself and Olson back to Sutherland's house when Olson looked out the window and saw two men, one of whom was holding a long cylindrical object. Olson testified that it seemed like "two guys who had probably been fighting and then just going their separate ways." VRP (Apr. 6, 2017) at 181. The women stopped briefly at Sutherland's home and then returned the way they had come. When they passed the area again, Olson saw one of the men on the ground and the other kneeling over him with his hands around the other man's neck. Olson testified it looked "[l]ike he was choking him." VRP (Apr. 6, 2017) at 183. Olson called 911. Sutherland's testimony was substantially similar to Olson's.

Olson was not able to identify either man by clothing or race. Neither woman knew Reichow or Maulding. Neither woman identified Reichow before or during trial.

Ann Tanninen testified that she had been with Reichow and Maulding immediately before the murder. The three spent some time together at Tanninen's storage unit, when Tanninen received a prank phone call that she found unsettling. After Tanninen received the prank call, Reichow began acting strangely. Tanninen stated that she wanted Reichow to leave. At first Reichow was cooperative, but then he became hostile. Suddenly, Reichow's expression changed and he ran from the storage unit. Maulding ran after Reichow. Tanninen did not see them again.

Reichow testified in his own defense. Reichow testified that, after Tanninen received the prank call, Maulding became aggressive towards him. Maulding began threatening Reichow with a baseball bat. Reichow panicked and ran from the storage unit. At first, Reichow tried to hide under a nearby trailer, but he did not feel safe. Reichow saw Tanninen's vehicle come around the corner. Maulding got out of Tanninen's vehicle with the bat. Reichow took the bat from Maulding and "instinctively" defended himself. 6 VRP (Apr. 13, 2017) at 1091. Reichow admitted that he struck Maulding several times in the head with the bat.

Reichow proposed a jury instruction regarding eyewitness testimony based on Washington Pattern Jury Instruction (WPIC) 6.52. The proposed instruction stated:

> Eyewitness testimony has been received in this trial on the subject of the identity of the perpetrator of the crime charged. In determining the weight to be given to eyewitness identification testimony, in addition to the factors already given you for evaluating any witness's testimony, you may consider other factors that bear on the accuracy of the identification. These may include:
>
> - The witness's capacity for observation, recall and identification;
> - The opportunity of the witness to observe the alleged criminal act and the perpetrator of that act;
> - The emotional state of the witness at the time of the observation;
> - The witness's ability, following the observation, to provide a description of the perpetrator of the act;

- The period of time between the alleged criminal act and the witness's identification;
- The extent to which any outside influences or circumstances may have affected the witness's impressions or recollection; and
- Any other factor relevant to this question.

CP at 118. Reichow argued that the instruction was relevant to Olson's and Sutherland's testimony. The trial court declined to give the instruction because neither Olson nor Sutherland actually identified Reichow.

The trial court instructed the jury on self-defense. The trial court also instructed the jury that a separate crime is charged in each count and that the jury must decide each count separately. And the trial court gave the standard concluding instruction, which included the following language:

> You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.
>
> Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

CP at 219-20.

The jury found Reichow guilty as charged. The trial court imposed 288 months of confinement for the first degree premeditated murder. The trial court also imposed LFOs and set a restitution hearing.

Shannon Hendrickson, Brandon's sister, testified at the restitution hearing. During Hendrickson's testimony, the State moved to admit a funeral home invoice. Reichow objected because Hendrickson did not prepare the invoice. The trial court overruled the objection and admitted the invoice. Hendrickson testified the invoice for $7,936 was an accurate statement of

what the family paid for Maulding's funeral. Hendrickson also testified the cemetery plot and gravestone cost an additional $600 and $949.45, respectively. The trial court imposed $9,466,41 in restitution.

Reichow appeals.

ANALYSIS

A. EYE WITNESS IDENTIFICATION JURY INSTRUCTION

Reichow argues that the trial court erred by refusing to give his proposed instruction regarding eyewitness identification based on WPIC 6.52, relying on *State v. Allen*, 176 Wn.2d 611, 294 P.3d 679 (2013). We disagree.

In *Allen*, a witness identified the subject by race, height, weight, and clothing in his 911 call. 176 Wn.2d at 614. Later, the witness identified the subject in a single-subject show-up. *Id.* And, at trial, the witness did not identify the defendant and noted he looked different because of his clothes. *Id.* at 625. The defendant proposed an instruction regarding cross-racial identification, which the court declined to give. *Id.* at 614.

Our Supreme Court reviewed the trial court's decision to refuse to give the proposed instruction for an abuse of discretion. *Id.* at 624, 626. The court identified various safeguards that already operate in jury trials: cross-examination, expert testimony, and arguments to the jury. *Id.* at 622. The court declined "to adopt a general rule requiring the giving of a cross-racial instruction in cases where cross-racial identification is at issue." *Id.* at 626. And the court held that the trial court did not abuse its discretion because "[p]roviding a cautionary cross-racial identification instruction would not have added to the safeguards operating in [the defendant's] case, a case

involving an eyewitness identification based on general physique, apparel, and sunglasses, and not on facial features." *Id.* at 624.

Here, the witnesses' testimonies to which Reichow sought to apply the proposed eye witness instruction, Olson and Sutherland, did not identify Reichow. Both were subject to cross-examination about the accuracy of their memory and their ability to perceive the events. And Reichow was able to argue during closing that their testimony was unreliable. The same safeguards that made the proposed cross-racial identification instruction unnecessary in *Allen* were present in Reichow's case. Therefore, the trial court did not abuse its discretion by refusing to give Reichow's proposed eye witness identification instruction.

B. DIMINISHED CAPACITY TESTIMONY

Reichow argues that the trial court violated his right to present a defense by excluding expert testimony regarding diminished capacity.[1] Because the expert testimony Reichow proffered did not establish an inability to form the necessary intent, the testimony was irrelevant and inadmissible. Therefore, the trial court properly excluded the expert testimony as to diminished capacity and did not violate Reichow's right to present a defense.

Criminal defendants have a constitutional right to present evidence to support their defense. *State v. Hawkins*, 157 Wn. App. 739, 750, 238 P.3d 1226 (2010). However, the evidence must be relevant—criminal defendants have no right to present irrelevant evidence. *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). Relevant evidence is "evidence having any tendency to

[1] Reichow also seems to argue that the trial court erred by excluding Dr. Zenger's testimony because it was relevant to his self-defense claim. But Reichow did not attempt to introduce Dr. Zenger's testimony to support his self-defense claim. A party may not raise an issue for the first time on appeal. RAP 2.5(a). Therefore, we decline to address this issue.

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. We review the trial court's decision to exclude evidence for an abuse of discretion. *Lord*, 161 Wn.2d at 294.

A defendant may assert diminished capacity as a defense when either specific intent or knowledge is an element of the crime charged. *State v. Thomas*, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004). If specific intent is an element, the jury may consider evidence of diminished capacity to determine whether the defendant had the capacity to form the required specific intent. *Id.*

First degree premeditated murder and second degree intentional murder require the specific intent to kill. RCW 9A.32.030(1)(a), .050(1)(a). And second degree felony murder requires the specific intent to commit assault. RCW 9A.32.050(1)(b).

For a diminished capacity defense, a defendant must produce expert testimony "demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). Expert testimony must be relevant under ER 401 and admissible under ER 702. *Id.* at 917. Under ER 702, expert testimony must be helpful to the jury. *Id.* at 917-18. Expert testimony is only helpful if it is relevant. *Id.*

Here, Dr. Zenger's testimony was not relevant or helpful to the trier of fact because it did not establish that Reichow lacked the *capacity* to form specific intent. Instead, Dr. Zenger's testimony established that Reichow was capable of forming intent, but she opined that the Reichow's intent was not criminal because his delusion caused him to believe he was in danger for his life. Therefore, Dr. Zenger's testimony did not establish grounds for presenting diminished

capacity as a defense. Accordingly, it was not relevant and the trial court did not abuse its discretion by excluding Dr. Zenger's testimony on diminished capacity.

C. CONCLUDING JURY INSTRUCTION

Reichow argues that the trial court erred by failing to instruct the jury using the concluding instruction for lesser included or lesser degree offenses. But Reichow did not propose the alternative concluding instruction, nor did he object to using the general concluding instruction.

Under RAP 2.5(a) a party may not raise an issue for the first time on appeal. RAP 2.5(a)(3) contains an exception for a manifest error affecting a constitutional right. Reichow does not argue that the trial court's alleged failure to use a lesser included/lesser degree concluding instruction is a manifest error affecting a constitutional right. Therefore, we decline to address whether the alleged error is a manifest error affecting a constitutional right. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). And we decline to address Reichow's alleged error for the first time on appeal.

D. RIGHT TO CONFRONTATION AT RESTITUTION HEARING

Reichow argues that the trial court violated the Sixth Amendment by accepting invoices without allowing him to confront the people who prepared the invoices. However, we have already rejected the argument that the Sixth Amendment right to confront witnesses applies to restitution hearings. *State v. Fambrough*, 66 Wn. App. 223, 226-27, 831 P.2d 789 (1992).

Like in *Fambrough*, Reichow only cites to cases involving a loss of liberty interest. Reichow has offered no argument or authority that supports deviating from the precedent set in *Fambrough*. *See Fambrough*, 66 Wn. App. at 226-27 (rejecting the right to confront witnesses at restitution hearings because there is no liberty interest at stake at restitution hearings).

Accordingly, we reject Reichow's argument that the Sixth Amendment right to confront witnesses applies to restitution hearings.

E. INDIVIDUALIZED INQUIRY TO IMPOSE LFOS

Reichow argues that the trial court erred by imposing legal financial obligations, including restitution, without conducting an individualized inquiry into his ability to pay under RCW 10.01.160(3) and *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). The individualized inquiry required under RCW 10.01.160(3) and *Blazina*, is not required by the court to impose mandatory LFOs, including restitution. *State v. Seward*, 196 Wn. App. 579, 585-86, 384 P.3d 620 (2016), *review denied*, 188 Wn.2d 1015 (2017); *State v. Mathers*, 193 Wn. App. 913, 920-22, 376 P.3d 1163, *review denied*, 186 Wn.2d 1015 (2016); *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

Here, the trial court imposed LFOs at sentencing.[2] However, 2018 legislative amendments to the LFO statutes prohibit the superior courts from imposing the $200 criminal filing fee upon indigent defendants and the $100 DNA collection fee if the offender's DNA has already been collected as the result of a prior conviction.[3] RCW 36.18.020(2)(h); RCW 43.43.7541. Our Supreme Court has recently held that the 2018 legislative amendments to the LFO statutes apply prospectively to cases pending on appeal. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714

[2] We note that at the time of sentencing, the criminal filing fee and DNA fee were mandatory. *Lundy*, 176 Wn. App. at 102. We also note that the trial court imposed a $250 jury demand fee, which is discretionary. However, because we reverse the imposition of LFOs and remand for the trial court to apply the recent legislative amendments, we do not separately address the imposition of the jury demand fee.

[3] The legislative amendments do not affect the imposition of restitution. *See* LAWS OF 2018, ch. 269.

(2018). Therefore, we reverse the imposition of LFOs and remand to the trial court to impose LFOs consistent with the 2018 legislative amendments.

We affirm Reichow's conviction and imposed restitution, but we reverse the imposition of LFOs and remand for the trial court to impose LFOs consistent with the 2018 legislative amendments to the LFO statutes.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, J.

We concur:

Johanson, J.P.T.

Maxa, C.J.