COA NO. 45103-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY CLARK,

Appellant.

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

The Honorable Kathryn J. Nelson, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to effective assistance of counsel due to counsel's failure to object to jurors being told this was not a death penalty case.

2. The court violated appellant's constitutional right to present a complete defense in excluding evidence of appellant's mental retardation.

3. Cumulative error deprived appellant of his due process right to a fair trial.

4. The court erred in instructing the jury on an uncharged alternative means of committing the crime of first degree robbery.

5. The court violated appellant's constitutional right to a public trial during the jury selection process.

Issues Pertaining to Assignments of Error

1. In a first degree murder case, it is error to inform jurors the death penalty is not at issue. It makes jurors less careful during deliberations and more likely to convict. Here, appellant's attorneys did not object to jurors being told this was not a death penalty case. Where there was no legitimate tactical reason for this mistake, did appellant receive ineffective assistance of counsel?

2. The court barred appellant from eliciting evidence about his mental retardation. This evidence was relevant to show appellant's state of mind

in connection with whether the State proved premeditation, intent or recklessness in fatally shooting the victim. It was also relevant to appellant's credibility. Is reversal required because the court's violation of appellant's constitutional right to present a complete defense was not harmless beyond a reasonable doubt?

3. Whether the "to convict" instruction for first degree robbery contained an uncharged alternative means of committing the crime, requiring reversal of the conviction?

4. Whether the court violated appellant's constitutional right to a public trial when it conducted the peremptory challenge portion of the jury selection process in private without analyzing the requisite factors to justify closure?

B. STATEMENT OF THE CASE

The State charged Anthony Clark with first degree premeditated murder (count I), first degree felony murder (count II), first degree robbery (count III), unlawful possession of a controlled substance with intent to deliver - cocaine (count IV), and second degree unlawful possession of a firearm (count V). CP 183-85. It sought firearm enhancements for counts I through IV. CP 183-84.

1. *State's Case*

Ms. Eller lived in the apartment unit above Clark and his mother. 22RP[1] 833-34. She shared the apartment with Ms. Bassett. 22RP 827, 900. Bassett's boyfriend, Mr. Woods, stayed at the apartment as well. 22RP 835, 901, 996-97. On September 7, 2011, Eller and Bassett heard a sound like a firework while in their apartment. 22RP 838, 901. Bassett's son testified that he heard a pop like a gunshot and told police that he then heard a big boom like someone hit the wall. 22RP 931, 947. Eller later encountered Clark in a yellow shirt as she went down to the laundry room. 22RP 840. Clark had her garbage can and told her he was doing some spring cleaning. 22RP 842. Eller joked about him not filling the can up. 22RP 842. Clark said there would still be room. 22RP 842.

When Eller made her way back upstairs, Clark asked her if she knew about dope. 22RP 844. He told her that he needed help in selling it

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[1] The verbatim report of proceedings is referenced as follows: 1RP -5/8/12 (morning); 2RP - 5/8/12 (afternoon); 3RP - 5/11/12; 4RP - 5/17/12; 5RP - 6/1/12; 6RP - 6/15/12; 7RP - 8/1/12; 8RP - 9/17/12; 9RP - 9/21/12; 10RP - four consecutively paginated volumes consisting of 9/27/12, 10/4/12, 10/8/12, 10/12/12; 11RP - 9/28/12; 12RP - two consecutively paginated volumes consisting of 10/22/12, 10/23/12;13RP - 10/24/12; 14RP - 10/29/12; 15RP - 11/5/12; 16RP - 11/9/12; 17RP - 11/13/12; 18RP - 12/3/12; 19RP - 12/17/12; 20RP - 2/8/13; 21RP - 2/15/13; 22RP - 15 consecutively paginated volumes consisting of 3/7/13, 3/11/13, 3/12/13 (morning), 3/12/13 (subsequent), 3/13/13, 3/14/13, 3/18/13, 3/19/13, 3/20/13, 3/25/13, 3/26/13, 3/27/13, 4/15/13, 4/16/13, 4/17/13; 23RP - 4/26/13; 24RP - 5/24/13; 25RP - 5/28/13; 26RP - 6/14/13.

to get money for school clothes. 22RP 844, 888, 898.[2] Eller took a green M&M bottle from him and poured out 15 individual pieces of crack cocaine into her hand. 22RP 844-46. Eller told him that she did not know anyone that could help him. 22RP 844. She said someone upstairs might know, referring to Bassett and Woods. 22RP 844-45, 897.

Upon returning to her apartment, Eller told Bassett and Woods about her conversation with Clark. 22RP 847-48, 1002-03. Bassett called for Clark to come up. 22RP 848.[3] Clark told the three that he needed to sell the drugs to get money for clothes, and that whoever helped him would get half the profit. 22RP 849, 904-05, 1003-04. Clark said a friend had given him the crack. 22RP 850, 854. Clark emptied the M&M bottle and showed it to them. 22RP 905, 1004-06.[4] They told him they could not help him. 22RP 905-06, 1009.

Clark also asked for help in disposing of a body. 22RP 850-51, 1007-08. He said he killed someone downstairs. 22RP 906. Bassett asked if he was serious. 22RP 906. Clark said he was just playing. 22RP 906. Then he said he was serious. 22RP 907. He was worried about

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[2] Eller knew Clark was no longer in school. 22RP 889.

[3] Contrary to Eller's testimony, Bassett denied calling for Clark. 22RP 904, 922. Contrary to Eller's and Woods' testimony, Bassett denied that Eller told her about Clark wanting to sell crack before he came up. 22RP 904, 922.

[4] Bassett's son testified that he heard the boom sound after Clark had showed them the crack and then left. 22RP 941-43.

moving the body before his mom came home at 5 o'clock. 22RP 853, 907. He did not want to get in trouble with his mom. 22RP 1008.

According to Bassett, Clark said "I called him over to my house, told him to reach for something in my closet . . . When he came up, I popped him in the back of his head with a deuce deuce" (a .22). 22RP 907. According to Woods, Clark said "I shot him in the head." 22RP 1035. According to Eller, Clark said he pointed and popped the gun when the person had reached down in a closet. 22RP 851. Clark said there was only a small amount of blood on the carpet. 22RP 852. He said he tossed the gun in some bushes a couple blocks up. 22RP 852, 908.

Clark said something about "the boy beating up his baby's mom" and that his mom or dad had taught him to never let a man put a hand on his baby's mom. 22RP 850-51, 907, 1035. Eller asked if he was playing a sick game. 22RP 850. Clark said the body was downstairs and she could go look. 22RP 851.

To get Clark out of her apartment, Bassett said she would help him get rid of the body. 22RP 909. Clark left. 22RP 909. Clark came back a few minutes later and politely asked if Bassett was going to help him. 22RP 910-11. Bassett said she would be down in a minute and Clark left again. 22RP 911. After Clark left, Eller went down to ask Clark if he was serious or just playing a game. 22RP 863. Clark said he was just playing.

22RP 863. When she asked him again, he said there was a stain in the room and that she could go look. 22RP 863. He said the body was in a garbage can and he needed to cover the body with something. 22RP 863. Eller still did not believe him. 22RP 863-64. Eller thought it was not in his nature. 22RP 895.

The two went to the alley, where Clark showed Eller the body in the garbage can. 22RP 865-66. He asked her not to say anything to his mom. 22RP 865. Eller went back to her apartment and told Bassett and Woods what she had seen. 22RP 866. They all left. 22RP 866-67, 912-13. Eller and Bassett, after prompting from Eller's friend, contacted police a short time later at a park. 22RP 571-73, 579, 869-70, 914-15, 962-63.

Police responded to the scene and saw the body in the garbage can. 22RP 602-07. Police arrested Clark as he walked outside his residence with a piece of pizza and a phone in his hand. 22RP 610-12. When police entered the residence, an officer saw a bloodstain on the carpet near a closet, underneath a rug. 22RP 616, 631, 647. The carpet was smeared, as though someone had tried to clean up the blood. 22RP 667.

Police found an operable .22 caliber handgun in the toilet tank of Clark's apartment, along with the M&M container of cocaine. 22RP 704, 781, 792, 1218-19. There were 15 plastic packets of cocaine weighing approximately 2.5 grams. 22RP 1392. A shell casing from the gun was

found inside the closet. 22RP 714-16, 808, 1217, 1299-1301. A white towel with red staining that appeared to be blood was recovered from the clothes hamper in the bathroom. 22RP 704, 706, 1220. A yellow shirt with transfer and saturation bloodstains was recovered from a bedroom. 22RP 710, 720-21, 1220-21, 1329-31. There was no blood spatter on the shirt. 22RP 1333.

The body was later identified as that of 16-year-old D.D. 22RP 552-53. DNA from the carpet bloodstain and the shirt stain matched D.D.'s profile. 22RP 1368. D.D. died from a single gunshot wound to the back of the head. 22RP 1127, 1139. Because no gunshot residue was found, the medical examiner opined the shot was fired from at least two feet away, although the presence of thick hair meant the shot could have been taken from slightly less than two feet. 22RP 1129, 1154-55.[5]

2. *Clark's Testimony*

Clark testified in his own defense. 22RP 1590-1687. Clark described his mom leaving for work around 10:30 a.m. on September 7, 2011. 22RP 1617-19. Clark left the apartment shortly thereafter to see a friend. 22RP 1619. On the way there, D.D. (known to Clark as "Shorty") called out to him on the street. 22RP 1591, 1620-21. Clark and D.D. were

[5] The defense expert on firearms opined the shot was taken from at least 36 inches away due to lack of gunpowder particles on D.D.'s shirt. 22RP 1564.

friends; they knew each other from school and hung out in the months preceding September 7. 22RP 1597-1600, 1608. They started talking and Clark told him he was going to his friend's house and then to a barbeque in the park. 22RP 1622. Clark invited D.D. to come along. 22RP 1622. D.D. asked Clark if he had a computer. 22RP 1630. Clark said yes and invited him to his house. 22RP 1623, 1630. Upon arrival, they listened to music on the computer and Clark showed D.D. an update on his Facebook page. 22RP 1630-34.

While there, D.D. opened up his coat pocket and showed Clark a gun and an M&M container of crack cocaine. 22RP 1591-92, 1635, 1642-43. Clark had never seen D.D. with cocaine before. 22RP 1682.[6] D.D. put the gun back in his pocket and asked Clark if he knew anybody that he could sell the drugs to. 22RP 1643-44. Clark brought up Eller's name. 22RP 1674. Clark took the M&M container with its contents to Eller's apartment and talked with her and the others about selling it. 22RP 1667, 1673-76. Clark went back downstairs and gave the cocaine back to D.D. 22RP 1676. Clark told him no one was interested. 22RP 1676.

Clark then told D.D. that his mom had some jewelry. 22RP 1676. The two went to a closet to get the jewelry box. 22RP 1592-93. Clark

[6] He also testified there was a time before September 7 where they had contacted with each other related to crack cocaine. 22RP 1613.

wanted to pawn the jewelry for money so that they could buy some food for the barbeque. 22RP 1593, 1644. The jewelry box was on the top shelf. 22RP 1593. Clark could not reach the box on the shelf without stepping on the first shelf. 22RP 1645, 1647. He explained he was in a hurry and "could not get through." 22RP 1648.

D.D. said he would get the jewelry. 22RP 1648. He pulled his gun out of his pocket, took out the clip and handed the gun to Clark. 22RP 1594, 1648-49. D.D. used the shelf to climb up. 22RP 1594, 1653. Clark sat down on the floor, "messing around with the gun," by which he meant "[a]iming it toward the closet of the ceiling." 22RP 1594-95, 1649, 1651, 1683-84. The gun went off. 22RP 1595. D.D. fell to the ground. 22RP 1596. Clark attempted CPR by pushing on his chest twice and breathing into his mouth. 22RP 1596. His attempt to revive D.D. was unsuccessful. 22RP 1596.

Clark started crying and shaking, then went up to Eller's apartment and told her, Bassett and Woods that he had accidentally shot his friend with a "deuce deuce." 22RP 1666-69.[7] They did not believe him at first and Clark told them to come downstairs and look. 22RP 1668. He also told them the gun was still downstairs. 22RP 1669. There was no conversation about the cocaine at that time. 22RP 1668.

[7] Clark had no children. 22RP 1682, 1690.

After the others expressed no interest in getting involved, Clark went back to his apartment. 22RP 1669-70. He put D.D.'s body in a garbage can. 22RP 1670-72, 1685-86. He knew his mom would be home by 5 o'clock and did not want her to find out what he had done. 22RP 1678. Clark invited Eller to see the body and opened the lid to the can. 22RP 1677-78. He told Eller not to tell his mother. 22RP 1678. He returned to his apartment and put the cocaine and the gun in the toilet tank. 22RP 1673.

Clark maintained he accidentally shot D.D. 22RP 1596, 1657, 1663. He did not know the gun was loaded. 22RP 1595. He saw D.D. unload the clip. 22RP 1660. He did not aim at D.D., although he aimed the gun in D.D.'s area. 22RP 1664. He knew guns are capable of shooting bullets and that the magazine holds the bullets. 22RP 1596, 1659-60. He knew guns could kill people and that he should not presume a gun is unloaded. 22RP 1660.

3. *Outcome*

For the premeditated first murder charge under count I, the jury was given lesser offense instructions for second degree intentional murder, first degree manslaughter and second degree manslaughter. CP 288-96. A jury convicted Clark as charged and returned special verdicts that he was

armed with a firearm. CP 336, 340-47. The court imposed a total of 447 months in confinement. CP 373. This appeal follows. CP 399-414.

C. ARGUMENT

1. CLARK'S COUNSEL WAS INEFFECTIVE IN NOT OBJECTING TO JURORS BEING TOLD THIS CASE DID NOT INVOLVE THE DEATH PENALTY.

The law is well established in Washington. "The question of the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases." State v. Bowman, 57 Wn.2d 266, 271, 356 P.2d 999 (1960). Consequently, in a first-degree murder case, it is error to tell jurors the death penalty is not involved. State v. Townsend, 142 Wn.2d 838, 846-47, 15 P.3d 145 (2001); State v. Murphy, 86 Wn. App. 667, 668, 671, 937 P.2d 1173 (1997), review denied, 134 Wn.2d 1002 (1998).

This is a "strict prohibition" that "ensures impartial juries and prevents unfair influence on a jury's deliberations." Townsend, 142 Wn.2d at 846. Specifically, "if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." Id. at 847.

Despite this established prohibition, the trial court announced prior to jury selection "I just want to share with Counsel, out of an abundance of

caution, my experience in another murder case that I've had, and that is that the voir dire has been confused because when they hear murder they believe it's a capital death penalty case. And so I don't notice anything in your questionnaire, not that there should have been, but in case you haven't thought of that confusion, I thought I'd put it out there so you can handle it however you wish to as things progress." 22RP 38-39.

The prosecutor jumped on the invitation, responding "What I'm presuming, by the Court's comments, you surely wouldn't be opposed to either party identifying for the jury that this was not, in fact, a capital case." 22RP 39. The court replied "I would think that would be appropriate whenever Counsel believes it would be appropriate. And I don't know, you may get a response on your questionnaire that will make it clear that that is one of the confusions, but I felt that you should have that information, if it is a confusion, but at some point, maybe that information needs to be clarified for everyone." 22RP 39.

Defense counsel remained silent during this exchange, and the court continued on to other matters. 22RP 39. During the course of jury selection, the prosecutors told the jury on three separate occasions that the case did not involve the death penalty. 22RP 120-21, 372, 419. Defense counsel did not object at any point.

Every criminal defendant is guaranteed the right to the effective assistance of counsel. 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); U.S. Const. amend. VI; Wash. Const., art. I, § 22. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 225-26. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kyllo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226.

Both deficient performance and prejudice are established here. No reasonable attorney would have allowed jurors to learn the death penalty did not apply. In Townsend, defense counsel failed to object when the court informed jurors of this fact. Addressing that failure, the Supreme Court recognized that, considering the longstanding prohibition against revealing that information, the failure to object fell below prevailing professional norms. Townsend, 142 Wn.2d at 847. The Court also rejected any argument that revealing this information was part of a legitimate strategy: "There was no possible advantage to be gained by

defense counsel's failures to object to the comments regarding the death penalty. On the contrary, such instructions, if anything, would only increase the likelihood of a juror convicting the petitioner." Id. Similarly, there was no tactical advantage when Clark's own attorneys permitted jurors to learn that the case did not involve the death penalty.

In State v. Rafay, counsel was deemed to have embarked on a legitimate strategy to disclose the non-death penalty nature of the case to jurors. State v. Rafay, 168 Wn. App. 734, 778-81, 285 P.3d 83 (2012), review denied, 299 P.3d 1171 (2013), cert. denied, 134 S. Ct. 170, 187 L. Ed. 2d 117 (2013). Rafay is distinguishable from Clark's case.

Rafay involved a unique confluence of factors showing legitimate strategy. Defense counsel agreed to notify jurors in the questionnaire that it was not a death penalty case; during voir dire counsel actively sought to ascertain whether potential jurors' views on the death penalty affected their ability to be fair; counsel's trial strategy included references to the death penalty in contexts not directly connected with the potential punishment in defendants' prosecution, including referral to the death penalty to undermine the credibility of two key State witnesses; and there was a possibility that the death penalty information would otherwise be disclosed in a manner outside of defense counsels' control, resulting in juror confusion and speculation from attempting to conceal that

information and a detrimental effect on the jurors' assessment of counsels' credibility. Rafay, 168 Wn. App. at 776.

Rafay distinguished itself from previous cases such as Townsend and Murphy, "which involved only brief references to the death penalty or defense counsel's half-hearted objection or complete failure to object, the record here indicates that defense counsel made a deliberate and considered legitimate and strategic choice to disclose to jurors the fact that the defendants were not subject to the death penalty." Rafay, 168 Wn. App. at 780. Clark's case is like Townsend and Murphy, not Rafay. Clark's counsel did not affirmatively participate or even agree to disclose to jurors that the case did not involve the death penalty. Counsel simply remained silent and failed to object.

There is a reasonable probability that the mistake affected the jury's verdicts on first degree murder. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 693-94. The State's case for premeditated murder was not overwhelming. Premeditation is "the deliberate formation of and reflection upon the intent to take a human life" and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." State v. Gentry, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995) (quoting State v. Ollens, 107

Wn.2d 848, 850, 733 P.2d 984 (1987)). The State proposed lesser offense instructions for second degree intentional murder, and first and second degree manslaughter because it recognized substantial evidence supported those lesser offense instructions and was aware the jury might not find Clark killed D.D. with premeditation. 22RP 1716-17, 1735.

Clark's testimony about the shooting being an accident provided the basis for a reasonable trier of fact to find Clark committed manslaughter instead of murder. Cf. Murphy, 86 Wn. App. at 672-73 (no prejudice because the jury acquitted Murphy on the charge of first degree murder, whereas the danger presented by the instruction informing the jury that this was a non-death penalty case was its tendency to influence deliberations on the first degree murder charge).

The jury could also have reasonably determined that Clark intentionally killed D.D. instead of killing him with premeditation. There is a fine line between intent and premeditation. Shooting D.D. on impulse, as opposed to reflecting on doing so beforehand, would mean Clark only committed second degree murder. The evidence in this case allowed for either inference. Cf. Townsend, 142 Wn.2d at 848-49 (no prejudice where evidence overwhelmingly supports a finding of premeditation).

The State's proof on the first degree felony murder charge was not overwhelming either. The predicate for the felony murder charge was first

degree robbery. CP 303. The mere taking of goods from an unconscious person, without force or the intent to use force, is not robbery unless such unconsciousness was produced "'expressly for the purpose of taking the property in charge of such person.'" State v. Larson, 60 Wn.2d 833, 835, 376 P.2d 537 (1962), quoting 2 Wharton's Criminal Law 1389, § 1092 (12th ed.)). "Merely demonstrating that the use of force preceded the theft does not amount to robbery." State v. Allen, 159 Wn.2d 1, 10 n.4, 147 P .3d 581 (2006).

The circumstantial evidence allowed for competing inferences on whether Clark killed D.D. in order to steal his drugs versus whether he killed D.D. and then took his drugs as an afterthought. Clark, for his part, denied taking the cocaine from D.D. 22RP 1664. Not wanting his mother to find out what happened, he put the cocaine in the toilet tank after the shooting. 22RP 1673, 1678.

By informing jurors that the case did not involve the death penalty, the court and the parties made the jurors less careful. And less careful jurors are necessarily more prone to convict based on shaky, uncertain, or incomplete evidence. They are less likely to hold out for acquittal on a first degree murder charge. Townsend, 142 Wn.2d at 847. Clark was denied the effective assistance of counsel. His first degree murder convictions should be reversed and his case remanded for a new trial.

2. THE COURT VIOLATED CLARK'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE IN EXCLUDING RELEVANT EVIDENCE ABOUT CLARK'S MENTAL RETARDATION.

Clark is mentally retarded. He has limited cognitive skills. That evidence was relevant to Clark's defense theory that he did not act with premeditation in killing D.D. and was only reckless in so doing. The evidence was also relevant to Clark's credibility because he took the stand. The court's exclusion of mental disability evidence deprived Clark of his constitutional right to present a complete defense, requiring reversal of the first degree murder and robbery convictions.

a. The Trial Court Excluded Evidence Of Clark's Mental Retardation Over Defense Objection.

At a pre-trial CrR 3.5 hearing, Dr. Oneal, a licensed psychologist, testified for the defense. 10RP 256-315. Dr. Oneal had earlier evaluated Clark to determine whether he was competent to stand trial in another case. 10RP 260, 289-91. Review of records showed Clark was in an Individualized Education Program (IEP), a specialized school plan for children with a disability. 10RP 264. Clark was in a special education program. 10RP 264.

In 2008, Clark's intelligence quotient (IQ) was measured at 51. 10RP 268. This score placed him at a 0.1 percentile, meaning more than 99 percent of individuals his age scored higher than he did. 10RP 268. In

2011, Clark's IQ measured at 62. 10RP 271. That placed Clark in the first percentile, meaning 99 percent of adults in a similar age range scored better. 10RP 272.

Testing showed Clark had limited attention, concentration and short term memory. 10RP 280-81. Records showed an extremely premature birth weight resulting in major developmental delays. 10RP 287. Clark had the communication and language skills of an eight or nine year old child — extremely deficient. 10RP 292-94.

The State's psychologist that evaluated Clark's competency diagnosed Clark as mentally retarded. 10RP 298, 312-13.[8] Dr. Oneal opined a person with an IQ score of 62 would appropriately be labeled mildly retarded. 10RP 314. Such individuals have difficulties with regard to reasoning. 10RP 314. Clark had a low score for global assessment of functioning. 10RP 287-88.

Following the CrR 3.5 hearing, defense counsel made it known that he intended to have Clark's mother testify to issues surrounding her son's mental disability. 10RP 385-86. The defense did not claim a diminished capacity or not guilty by reason of insanity defense. 10RP 386.

[8] At the CrR 3.5 hearing, Dr. Hendrickson described Clark as having a developmental disability with an IQ in the mild mental retardation range. 10RP 24, 28.

The State moved to exclude lay and expert testimony related to Clark's mental and intellectual abilities. CP 213-18. According to the State, such evidence should be excluded because the defense was not presenting a diminished capacity or insanity defense. 19RP 15-16. The State contended such evidence was irrelevant to any fact of consequence under ER 401 and expert testimony would not help the jury understand the evidence or determine a fact in issue under ER 702. CP 213-14. The State further argued such evidence should be excluded under ER 403 because it was likely to evoke sympathy and emotion and would be confusing and misleading. CP 214-18; 19RP 17-18.

The defense objected that exclusion of evidence regarding Clark's mental deficits would violate his right to present a defense under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. CP 207, 209. The defense made it clear it was not presenting a diminished capacity defense. CP 210. It argued the evidence was relevant under several theories. CP 207-08, 209-22.

First, defense counsel argued the neighbors would testify to conversations with Clark and that they did not know whether to believe him because he was mentally disabled. CP 207; 19RP 13. The State said it would not elicit any testimony from the neighbors that Clark was "slow" or had a low cognitive ability. 19RP 17.

The defense also argued evidence of Clark's mental condition should be admitted because the jury would notice his "flat" demeanor was different from others when he testified. CP 207.

In addition, the jury would also wonder why Clark stayed home all day and did not work while his mother did. CP 207-08. Juries often heard background information about a defendant's education and work experience. 19RP 13-14.

The defense further argued evidence of Clark's mental condition was relevant to the defense argument that the State could not prove "premeditation" or "intent to kill" on the first degree murder charge. CP 208. As explained by defense counsel, "two of the things that the State is alleging is that there is premeditation and there is intent to kill. I believe that a person's intellectual limitations could also be relevant to those issues." 19RP 13.

On December 17, 2012, the court ruled there was no need for expert testimony on Clark's intellectual ability. 19RP 20-21. The court believed such expert testimony would confuse and mislead the jury because it "will be looking for a diminished capacity case which is not being pled or brought forward in this manner." 19RP 20. The court indicated either side could elicit testimony from lay people that knew Clark that they did not believe him because they considered him slow or

knew he went to special education classes. 19RP 20-21. The defense could elicit the fact that he was getting Social Security as a background fact to explain why he was home and not working. 19RP 22. The question of whether the fact of Clark's mental retardation could be admitted into evidence was put off for another day. 19RP 23-24.

On February 15, 2013, the trial court ruled the defense would be permitted to elicit limited lay testimony that Clark was on an Individualized Education Plan (IEP) while in school and that he received Supplemental Security Income (SSI). 21RP 15-16, 20. The court indicated any mention from any witness that Clark was mentally retarded or disabled would be inadmissible. 21RP 16-17. It rejected the theory that such evidence should be admissible because his mental abilities were relevant to evaluate whether Clark acted recklessly for purpose of an anticipated manslaughter instruction. 21RP 17-22.

On March 13, 2013, the trial court heard further argument regarding Dr. Oneal's proposed testimony. 22RP 496-506. Defense counsel continued to argue that Dr. Oneal's testimony would be relevant to assist the jury in determining whether Clark acted recklessly, an element of an anticipated lesser offense instruction for first degree manslaughter, or negligently, an element of an anticipated lesser offense instruction for second degree manslaughter. CP 223-26; 22RP 496-99, 503-04. The

defense contended the jury needed to know Clark's mental deficiencies to decide whether he acted recklessly or negligently. CP 225-26; 22RP 496-99, 503-04.

The court ruled it would not allow Dr. Oneal's testimony because Clark did not raise a diminished capacity defense. 22RP 504. The court believed that such testimony would amount to bootstrapping a diminished capacity defense into the proceedings without establishing that the requirements for such a defense were satisfied. 22RP 504.

The written order on the motions in limine entered on March 14, 2013 stated in pertinent part "State's motion in limine us granted with the following modifications. Any testimony regarding the defendant's background shall be limited to the fact that the defendant (a) had an Individual Education Plan (IEP) and participated in Special Education classes in school (b) did not work and (c) received SSI benefits. *The testimony of Dr. O'Neal is irrelevant and therefore, excluded. There shall be no mention or reference to developmental disability, mental retardation, intelligent quotient*, premature birth, low birth weight, defendant being born deaf and blind and with perforated intestines that required surgery to close, defendant being hospitalized for six months after birth, delays in sitting, walking, speech, or toileting milestones, use of sign language

before using speech, psychological examinations, and medications administered for ADHD." CP 227-28 (emphasis added).[9]

On March 18, the court ruled Clark could testify that he was on SSI due to mental disability, but agreed with the State that the defense could not attack mens rea without an expert. 22RP 661-62.

In its trial memorandum, the defense continued to press its arguments for why evidence of Clark's mental disability should be admissible. CP 232-35.

The court later ruled it would allow a records custodian from Tacoma Public Schools to testify that Clark was in special education and had an Individual Education Plan, but nothing about why that was. 22RP 1257. The court reiterated it would not allow the reason why Clark was on SSI to be introduced into evidence. 22RP 1268.

There was another round of argument on whether evidence of Clark's mental limitations should be admissible as relevant to the recklessness component of manslaughter. 22RP 1268-1272. The court again denied the defense request because there was no diminished capacity defense. 22RP 1272.

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[9] A motion for discretionary review of the trial court's interlocutory ruling was denied. CP 243-54; 22RP 1543.

On March 26, the defense notified the court that the record custodian had not arrived so Clark's mother, Ms. Horning, would be called as a witness. 22RP 1371. Defense counsel said it intended to elicit testimony from Clark's mother about a number of topics, including (1) when Clark started the IEP and how long he had it; (2) when he first entered special education, if he ever left it, and how often that status was revisited; (3) when he started receiving SSI and how often he was reexamined for it; (4) how long he had a payee for Social Security; (5) whether he drives and if he had attempted to obtain a driver's license. 22RP 1373-74. The State objected to this evidence as outside the scope of the previous ruling. 22RP 1374. The court agreed, ruling Clark's mother could only testify that her son was on SSI to show why he did not have a job and that he finished school after having been a special education student in an IEP. 22RP 1376-77.

As an offer of proof, Horning testified that Clark was in an IEP since he was four years old, which she described as something for "students that cannot be in the same environment in the school system with other children." 22RP 1380. The IEP was updated every year. 22RP 1380-81. Clark was in special education since he was four years old, which meant "he could not be mainstreamed with other children." 22RP 1381. The process of receiving SSI started with the Department of

Developmentally Disabled Division before he was one year old. 22RP 1382-83. His eligibility was periodically reevaluated. 22RP 1382. Clark's mother was his payee — someone that pays his bills, buys his clothes, food, and medication and provides shelter and transportation. 22RP 1382. Clark did not drive and had repeatedly failed to pass the driving test for a license. 22RP 1383. Clark graduated from special education. 22RP 1384. He did not have any real friends; people exploited him. 22RP 1385.

The court did not find any of this information relevant because the defense had not raised a diminished capacity defense. 22RP 1389-90. On March 26, the court summed up the basis for excluding evidence of Clark's mental disability by pointing to ER 403: "the probative nature of the evidence does not outweigh the confusion-type prejudice in the absence of a defense of diminished capacity." 22RP 1419.

After the State rested, the defense put on several witnesses. Clark's former high school teacher testified Clark was in an IEP for two years while in her classroom. 22RP 1549. Clark testified that he graduated from high school when he was 20 years old. 22RP 1684.

After Clark's mother testified, defense counsel renewed the request to have Dr. Oneal testify. 22RP 1694. Counsel argued Dr. Oneal's testimony would enable the jury to know of Clark's developmental

disability and how it affected his decision-making, which was relevant to the recklessness component of the manslaughter instruction. 22RP 1694, 1698. Such testimony also was relevant to Clark's credibility in explaining his affect on the stand and why he would say he remembered something when pushed after saying he did not remember before. 22RP 1694-95. The court denied the motion. 22RP 1699.

During closing argument, the prosecutor commented that the neighbors thought it was a prank because Clark "seemed so calm." 22RP 1766. The prosecutor juxtaposed Clark's "calmness that seemed eerie" with his testimony that he vomited after shooting D.D. 22RP 1766. Clark's actions in putting D.D.'s body in a garbage can, eating a pizza and talking on the phone were the actions of a calm man, not an upset one. 22RP 1766-67. The prosecutor made a later reference to Eller not believing Clark because of his "calm demeanor." 22RP 1776. As part of this theme, the prosecutor further argued Clark had a deliberate plan to lure D.D. into his home in order to shoot him and take his drugs. 22RP 1761-63, 1767, 1771-72.

During a break in the prosecutor's argument, defense counsel moved to reopen its case or declare a mistrial. 22RP 1790-92. The prosecutor argued witnesses did not believe what Clark was telling them because he seemed so emotionless, when in fact excluded evidence would

show Eller did not believe Clark because she thought he was "slow." 22RP 1790-92. The trial court maintained the defense was always allowed to elicit from Eller that she did not believe Clark because he was slow. 22RP 1792-93. According to the court, that topic was "specifically excluded from the motion in limine." 22RP 1793. Counsel had a different understanding of the court's previous ruling. 22RP 1792-94.

Counsel further argued it was unfair that the State was emphasizing Clark's reasoning ability when the defense was not allowed to show Clark's mental limitations on reasoning. 22RP 1794. The court again denied the defense request to reopen the case or grant a new trial. 22RP 1795. The court noted "I do not find Anthony to have a particularly different affect than many, many other defendants that have testified in this courtroom. So when you mentioned that he has some kind of flat effect in testifying, I could not agree that that is the demeanor that is universally observed by all parties present since I, in fact, do not observe anything out of the ordinary with his demeanor as he testified as a defendant." 22RP 1795. The prosecutor finished his closing, arguing Clark killed D.D. with premeditation. 22RP 1796-1800.

b. Standard of Review

The trial court's evidentiary decisions regarding the admissibility of evidence and expert testimony reviewed for an abuse of discretion.

State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007); Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 179, 817 P.2d 861 (1991). A trial court abuses its discretion when applies the wrong legal standard, bases its ruling on an erroneous view of the law, or otherwise fails to adhere to the requirements of an evidentiary rule. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007); State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); Foxhoven, 161 Wn.2d at 174.

Moreover, a court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A claimed denial of a constitutional right, such as the right to present a defense, is reviewed de novo. Iniguez, 167 Wn.2d at 280; State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

c. Evidence Of Clark's Mental Retardation Was Relevant To Which Mens Rea The State Could Prove As Well As Clark's Credibility On The Stand.

Criminal defendants have the constitutional right to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. VI, XIV; Wash. Const. art. 1, § 22. "[T]he 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" is a fundamental element of due process as protected by the Fourteenth

Amendment. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Jones, 168 Wn.2d at 720 (quoting Darden, 145 Wn.2d at 622). That is, the State must demonstrate a compelling state interest to exclude a defendant's relevant evidence. State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983); Darden, 145 Wn.2d at 621. Even so, "[e]vidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. All facts tending to establish a party's theory are relevant. State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000) (citing Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978)).

Mental retardation is an intellectual disability that (1) originates before age 18, (2) is characterized by significant limitations in intellectual

functioning, and (3) is accompanied by significant adaptive functioning limitations in a range of every day social and practical skills. See Am. Ass'n on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Support 36-37 (10th ed. 2002); Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed., rev. vol. 2000).

Clark's mental retardation — his state of mind — was relevant to whether the State proved premeditation for first degree murder or recklessness for first degree manslaughter. It was also relevant to Clark's credibility.

The court excluded evidence of Clark's mental limitations, including expert testimony on the issue, because Clark had not presented a diminished capacity defense. "Diminished capacity is a mental disorder not amounting to insanity that impairs the defendant's ability to form the culpable mental state to commit the crime." State v. Harris, 122 Wn. App. 498, 506, 94 P.3d 379 (2004) (citing State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001)). A defendant is entitled to a diminished capacity instruction when he produces expert testimony establishing that he suffered from a mental disorder and that the evidence "logically and reasonably connects the defendant's alleged mental condition with the

inability to possess the required level of culpability to commit the crime charged." State v. Griffin, 100 Wn.2d 417, 419, 670 P.2d 265 (1983).

Evidence of Clark's mental limitations was not relevant to a diminished capacity defense because no such defense was presented. But undersigned counsel is unaware of any authority that categorically excludes evidence of a defendant's mental retardation unless a mental defense — diminished capacity or insanity — is raised. Evidence that is inadmissible for one purpose can be admissible for a different one.

There is a difference between an *inability* to form the requisite mens rea under the diminished capacity standard and whether the defendant actually had the requisite mens rea at the time of the act. A person can have the ability to form the culpable mental state yet not actually possess the culpable mental state at the time of the offense. The latter is always a question of fact for the jury to decide, taking into account all relevant circumstances. One important circumstance to take into consideration is a defendant's mental limitations. See People v. Larsen, 205 Cal. App.4th 810, 827, 140 Cal.Rptr.3d 762 (Cal. Ct. App. 2012) (recognizing distinction between whether a defendant had the mental capacity to form a specific intent and whether a defendant actually formed a mental state that is an element of a charged offense).

In this regard, State v. Burr, 195 N.J. 119, 948 A.2d 627 (N.J. 2008) is instructive. In that case, the trial judge excluded expert testimony regarding the defendant's Asperger's Syndrome because it did not show diminished capacity, even though such a defense was never advanced by the defendant. Burr, 195 N.J. at 125. In perceiving the expert testimony to be permissible only to establish a mental defect defense that the defendant was not asserting, the trial court employed an approach to analyzing the permissible uses of the testimony that was too narrow. Id. at 127. Evidence of mental defect, illness, or condition has been admitted for other purposes, such as to assess credibility or otherwise evaluate the subjective perceptions of an actor. Id. at 128. "[T]he trial court's focus on whether the disputed evidence was relevant to a diminished capacity defense distracted the court from examining the evidence under general relevance concepts." Id.

Burr was charged with second-degree sexual assault and third-degree endangering the welfare of a child based on allegations that he had touched inappropriately a young female student while teaching her piano. Id. at 122. Testimony on the effects of Asperger's Syndrome would have helped to explain how defendant's actions in allowing children to sit on his lap might have been innocent of a nefarious purpose or motivation. Id. at 128-29. Beyond that, the evidence "would have educated the jury about

oddities in behavior that defendant might exhibit in court or were described in the testimony of witnesses." Id. at 130. The testimony might also "have persuaded defendant to take the stand and testify before the jury, knowing that any odd behaviors or demeanor that he might exhibit would not surprise or inexplicably alienate the jury." Id. The trial court abused its discretion "by failing to consider larger relevancy concepts when evaluating this testimony." Id.

In Clark's case, the trial court was similarly fixated on the idea that evidence of mental retardation was only relevant to a diminished capacity defense. It failed to recognize the expert testimony was relevant for other reasons. Without evidence of Clark's mental limitations, the jury's picture of Clark's state of mind was incomplete. Evidence that Clark was mentally retarded and its effect on his decision-making process was relevant to showing his state of mind on the day in question.

For count I, the State needed to prove Clark killed D.D. with premeditation. CP 287 (Instruction 11). "Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time,

however long or short, in which a design to kill is deliberately formed." CP 286 (Instruction 10).

The jury also received a lesser offense instruction on second degree murder, which requires an intentional killing. CP 290 (Instruction 14). "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 285 (Instruction 9).

Defense counsel was correct that Clark's mental disability was relevant to whether the State carried its burden of proving premeditation beyond a reasonable doubt. CP 208; 19RP 13. The jury was entitled to measure Clark's actions on the day in question in light of his mental limitations. Clark's mental retardation made it less probable that he actually formed the intent to take D.D.'s life based on a deliberate design to kill. Clark had the capacity to premeditate. But whether he in fact did so on the day in question was for the trier of fact to determine based on all relevant evidence, including mental defect evidence. See United States v. Childress, 58 F.3d 693, 730 (D.C. Cir. 1995) ("While [the defendant's] mental capacity does not 'excuse' him from culpability for his activity . . . it may well be relevant to whether the government proved an element" of the crime); State v. Brown, 836 S.W.2d 530, 537 (Tenn. 1992) ("even though the defendant failed to establish insanity as an absolute defense to

homicide in this case, his mental state was nevertheless relevant to the charge of first-degree murder, to the extent that it related to the necessary elements of that offense.").

In closing, the State argued "several times in the course of these elements, you're being required to ask what was inside Defendant's mind, what was he thinking at the time he committed the offense." 22RP 1759. That is precisely why evidence of Clark's mental retardation was relevant. It is part of his state of mind at the time of the charged offenses.

Expert testimony is proper if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. Expert testimony on the issue would have assisted the trier of fact to understand the significance of Clark's mental disability. Dr. Oneal could have explained to the jury the effects of retardation on Clark's mental functioning. From that, the jury would have a more complete picture by which to judge whether Clark actually acted with premeditation. Testing showed Clark had limited attention, concentration and short term memory. 10RP 280-81. Mildly retarded individuals such as Clark have difficulties with regard to reasoning. 10RP 314. That is relevant to the jury's assessment of whether Clark acted with premeditation that day.

Further, "[i]t is well-established in Washington that a lay witness may testify concerning the sanity or mental responsibility of others, so

long as the witness' opinion is based upon facts he personally observed, and the witness has testified to such facts." State v. Crenshaw, 27 Wn. App. 326, 332-33, 617 P.2d 1041(1980). Clark's mother was in a position to do that, but the court excluded her testimony on the subject as well. 21RP 16-17; CP 227-28.

As it turned out, the jury was left with a distorted picture of Clark. The prosecutor deftly argued the sequence of events showed Clark coolly and calculatingly lured D.D. to his death for the purpose of robbing him of his cocaine, and then calmly went about disposing of the evidence. 22RP 22RP 1761-63, 1767, 1771-72, 1796-1800. That argument had force in the absence of countervailing evidence of Clark's mental retardation.

Evidence and testimony on Clark's mental retardation was also relevant to first degree manslaughter, of which Clark was guilty if he acted recklessly in causing D.D.'s death. CP 293 (Instruction 17). "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a death may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." CP 292 (Instruction 16).

Recklessness contains both subjective and objective components, such that it requires the jury to determine "both what the defendant knew and how a reasonable person would have acted knowing these facts."

State v. R.H.S., 94 Wn. App. 844, 847, 974 P.2d 1253 (1999). Evidence of Clark's mental retardation was relevant to whether he subjectively knew and disregarded a substantial risk of death at the time of the shooting. See State v. Sexton, 311 N.J. Super. 70, 88, 709 A.2d 288 (N.J. Super. App. Div. 1998) (evidence of defendant's mental ability relevant to the presence or absence of the requisite reckless state of mind; rejecting argument that such evidence would open a "back door" into the diminished capacity defense), aff'd, 160 N.J. 93, 733 A.2d 1125 (N.J. 1999); Edgmon v. State, 702 P.2d 643, 645 (Alaska Ct. App. 1985) ("the fact that a given defendant did not perceive a risk because he or she was mentally retarded would be irrelevant in proving negligence but highly relevant with regard to recklessness.").

Evidence of Clark's mental retardation was also relevant to "the jury's evaluation of defendant's demeanor and credibility as a witness at trial." Sexton, 311 N.J. Super. at 88 (mother's testimony about son's placement in a special education class, his attendance at a special school, and his impaired classification was relevant to jury's evaluation of defendant's demeanor and credibility as witness). Defense counsel argued jurors in charge of judging Clark's credibility might draw negative inferences from his flat affect or the manner in which he responded to questions. CP 207; 22RP 1694-95. Clark's credibility was crucial to

whether the jury believed his claim of accident in relation to first degree manslaughter.

After Clark finished testifying, the trial court commented that, in her personal observation, Clark did not have an affect different from other criminal defendants. 22RP 1795. What matters is what the jurors could think, not what the judge thought. The jury, as trier of fact, is specifically instructed to consider the manner in which a witness testifies as well as the quality of the witness's memory in judging credibility. CP 276 (Instruction 1). The judge is not the 13th juror. State v. Williams, 96 Wn.2d 215, 221-22, 634 P.2d 868 (1981). In a jury trial, witness credibility determinations are exclusively reserved for the jury. State v. York, 41 Wn. App. 538, 545, 704 P.2d 1252 (1985). Jurors may well have had a different perception of Clark's affect while on the stand.

The State cannot show exclusion of this relevant evidence was necessary to further a compelling interest. Jones, 168 Wn.2d at 720; Darden, 145 Wn.2d at 622; Hudlow, 99 Wn.2d at 15-16. Relevant defense evidence is inadmissible under ER 403 only if it has the capacity to skew the truth-finding process. Hudlow, 99 Wn.2d at 12-13.

The trial court thought the jury would be confused and misled if it heard about Clark's mental retardation because it would expect a diminished capacity defense but none would be forthcoming. 19RP 20.

The court's concern is misplaced. Lay jurors do not know anything about the technical aspects of criminal law. They would not know whether something called a diminished capacity defense even exists. For that reason, they would not be expecting it. Evidence of Clark's mental disability would not have confused or misled the jury.

On the contrary, it would have illuminated the jury's understanding of who Clark is and whether he actually acted with premeditation, intent or recklessness in shooting D.D. Knowing a defendant's mental limitations assists the jury in deciding why a defendant did what he did, an inquiry that is part of the process of deciding what the mental state of the defendant was at the time.

The danger that such evidence would cause the jury to decide the case based on sympathy or emotion was overblown. The jury was instructed to not do that. CP 277. Jurors are presumed to follow instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). Jurors are also expected to bring common sense and deductive reasoning into deliberations to determine the truth from the evidence. State v. Balisok, 123 Wn.2d 114, 119, 866 P.2d 631 (1994); State v. Carlson, 61 Wn. App. 865, 878, 812 P.2d 536 (1991). The judge should have allowed them to do so here in determining the significance of Clark's mental limitations.

d. The Error Was Not Harmless Beyond A Reasonable Doubt.

The denial of the right to present a defense is constitutional error. Crane, 476 U.S. at 690; Jones, 168 Wn.2d at 724. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. Id.; State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997).

The State cannot overcome its burden of overcoming a presumption of prejudice here. There was evidence from which a trier of fact could infer that Clark planned or otherwise deliberately killed D.D. There was evidence that he didn't. Clark testified he did not know the gun was loaded. 22RP 1595. Nothing on the gun would indicate whether there was a round of ammunition in the chamber. 22RP 812-13. According to Clark, the shooting was an accident. 22RP 1596, 1657, 1663. In assessing whether a constitutional error was harmless beyond a reasonable doubt, "[a]n appellate court ordinarily does not make credibility determinations." State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

The State proposed the lesser instructions for second degree intentional murder and first and second degree manslaughter. 22RP 1716-17, 1735. Substantial evidence supported the lesser offense theories of the

case as recognized by the State, which proposed the lesser offense instructions, and the judge who gave them. See State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979) (criminal defendant entitled to jury instruction on his theory of the case if substantial evidence supports it).

The State cannot show the error did not affect the jury's determination of Clark's credibility, both in regard to his testimony that the shooting was an accident and his denial of killing D.D. in order to rob him of his drugs. The State's proof on the first degree felony murder and robbery charges was not overwhelming. As argued in section C. 1., supra, the evidence allowed for competing inferences on whether Clark killed D.D. in order to steal his drugs versus whether he killed D.D. and then took his drugs as an afterthought. The latter scenario does not constitute first degree robbery, which constitutes the predicate for felony murder here. Larson, 60 Wn.2d at 835; Allen, 159 Wn.2d at 10 n.4. Reversal of the first degree murder and robbery convictions is required because the State cannot show beyond a reasonable doubt that error in excluding the evidence could not have possibly contributed to the guilty verdicts.

3. CUMULATIVE ERROR DEPRIVED CLARK OF HIS CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213

(1984); U.S. Const. Amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007).

As discussed above, an accumulation of errors affected the outcome and produced an unfair trial in Clark's case. These errors include (1) improper exclusion of relevant defense evidence regarding Clark's mental condition (section C. 1., supra); (2) and ineffective assistance of counsel in failing to object to the jury being told the death penalty was not involved (section C. 2., supra). The first degree murder and robbery convictions should be reversed for this reason.

4. THE COURT WRONGLY INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING THE OFFENSE OF ROBBERY.

The information charged only one means of committing the crime of first degree robbery, i.e., that "in the commission [of the robbery], or in immediate flight therefrom," Clark "was armed with a deadly weapon." CP 184. The "to convict" instruction for robbery allowed the jury to consider the alternative means, i.e., "that in the commission of these acts or in the immediate flight therefrom the defendant inflicted bodily injury."

CP 304. Reversal of the robbery conviction is required because the jury was allowed to convict Clark based on an uncharged alternative means.

a. It Is Error To Instruct The Jury On Uncharged Alternative Means Of Committing The Offense.

"Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed." State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007).

RCW 9A.56.200 sets forth the elements of the crime of first degree robbery as follows:

> (1) A person is guilty of robbery in the first degree if:
> (a) In the commission of a robbery or of immediate flight therefrom, he or she:
> (i) Is armed with a deadly weapon; or
> (ii) Displays what appears to be a firearm or other deadly weapon; or
> (iii) Inflicts bodily injury; or
> (b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

RCW 9A.56.200(1)(a)(i) (armed with a deadly weapon) and (a)(iii) (inflicts bodily injury) are alternative means of committing the crime of first degree robbery. See State v. Nicholas, 55 Wn. App. 261, 272-73, 776 P.2d 1385 (1989) (RCW 9A.56.200(1)(a)(i) and (a)(ii) are alternative

means). The "to convict" instruction for first degree robbery included both alternative means:

> To convict the defendant of the crime of Robbery in the First Degree, Count III, each of the following six elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about September 7, 2011 the defendant unlawfully took personal property from the person or in the presence of another;
> (2) That the defendant intended to commit theft of the property;
> (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person;
> (4) That the force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge of the taking;
> *(5)(a) That in the commission of these acts or in immediate flight therefrom the defendant was armed with a firearm or*
> *(5)(b) That in the commissionen of these acts or in the immediate flight therefrom the defendant inflicted bodily injury;* and
> (6) That any of these acts occurred in the State of Washington.
> If you find from the evidence that elements (1), (2), (3), (4) and (6), and either of the alternative elements (5)(a), or (5)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a), or (5)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt."

CP 304 (Instruction 28) (emphasis added)[10]

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[10] The jury was also given a definition of robbery that included both statutory alternatives of being "armed with a deadly weapon or displays

The State, however, charged Clark by amended information with first degree robbery by alleging only one alternative means: "in the commission thereof, or in immediate flight therefrom, Anthony Tyrone Clark was armed with a deadly weapon, to-wit: a firearm, contrary to RCW 9A.56.190 and 9A.56.200(1)(a)(i)." CP 184.[11] The information does not allege Clark committed the crime by the statutory alternative of "inflicts bodily injury."

Clark had the constitutional right to be informed of the nature of the charges against him. State v. Laramie, 141 Wn. App. 332, 343, 169 P.3d 859 (2007); U.S. Const. amend. VI; Wash. Const. art. I, § 22. "One cannot be tried for an uncharged offense." State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). The trial court erred in instructing the jury on an uncharged alternative means of committing the crime of robbery while "armed with a deadly weapon."

Although defense counsel did not object below,[12] instruction on an uncharged alternative means is an error of constitutional magnitude that may be raised for the first time on appeal under RAP 2.5(a)(3). State v.

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what appears to be a firearm or other deadly weapon." CP 26 (Instruction 11).

[11] The original information did not charge Clark with first degree robbery. CP 1-2.

[12] 22RP 1738.

Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003); see also State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (instructing jury on an uncharged alternative means violates the defendant's constitutional right to notice of the crime charged); accord Laramie, 141 Wn. App. at 342-43; State v. Roggenkamp, 153 Wn.2d 614, 620, 106 P.3d 196 (2005) (failure to properly instruct on element of charged crime is an error of constitutional magnitude); State v. Vanoli, 86 Wn. App. 643, 646, 937 P.2d 1166 (1997) (instructional error affecting a constitutional right may be raised for the first time on appeal under RAP 2.5(a)(3)).

When an information charges one of several alternative means, it is error to instruct the jury on the uncharged alternatives, regardless of the strength of the evidence presented at trial. Bray, 52 Wn. App. at 34 (citing State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942) (reversible error to instruct the jury on alternative means of committing rape when only one alternative charged)); accord State v. Brewczynski, 173 Wn. App. 541, 549-50, 294 P.3d 825, review denied, 177 Wn.2d 1026, 309 P.3d 505 (2013); State v. Williamson, 84 Wn. App. 37, 42, 924 P.2d 960 (1996); Doogan, 82 Wn. App. at 188.

The "to convict" instruction for first degree robbery in Clark's case was improper because it violated established law on uncharged statutory alternatives. That instruction should have omitted the statutory alternative

that Clark was "inflicted bodily injury" because this alternative was not set forth in the charging document. If an "information alleges only one alternative . . . it is error for the factfinder to consider uncharged alternatives, regardless of the strength of the evidence presented at trial." Williamson, 84 Wn. App. at 42.

b. Reversal Is Required Because The Jury Could Have Convicted On The Uncharged Alternative Means.

Where the instructional error favors the prevailing party, "it is presumed to be prejudicial unless it affirmatively appears the error was harmless." Bray, 52 Wn. App. at 34-35. If it is possible that the jury might have convicted the defendant under the uncharged alternative, then the error is prejudicial. Doogan, 82 Wn. App. at 189; Severns, 13 Wn.2d 542, 549, 125 P.2d 659 (1942); Bray, 52 Wn. App. at 34-35.

The error here was prejudicial because, under the instructions given, the jury could have convicted Clark of first degree robbery based on either the charged or the uncharged alternative means. Laramie, 141 Wn. App. at 343. Indeed, the prosecutor in closing argument invited the jury to convict on either one of the alternate means. 22RP 1752, 1804.

Such error may be harmless where other instructions clearly and specifically define the crime in such a way as to limit the jury's consideration to the charged means. Brewczynski, 173 Wn. App. at 549

(citing Severns, 13 Wn.2d at 549). The definitional instruction for robbery in Clark's case, however, specifies both means of committing the offense. CP 298 (Instruction 22). Neither this instruction nor any other limited the jury's consideration of the means by which Clark committed the crime to that charged in the information.

Instructing the jury on an uncharged alternative means may be harmless if there is otherwise no possibility that the jury convicted the defendant on the uncharged alternative means. Nicholas, 55 Wn. App. at 273. In Nicholas, this Court held that error in instructing the jury on an uncharged alternative means of committing first degree robbery was harmless because there was no possibility that the jury convicted on the uncharged means due to a special verdict form that required a finding of guilt on the charged means. Id. at 272-73.

Unlike Nicholas, no special verdict form in Clark's case ensured the jury reached a verdict based only on the charged alternative means. The possibility that jurors convicted based on the uncharged alternative means therefore remains. Reversal of the robbery conviction is required.

5. THE COURT VIOLATED CLARK'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE.

Peremptory challenges were exercised on a piece of paper in a manner that did not allow for public scrutiny. The court erred in

conducting this portion of the jury selection process in private without justifying the closure under the standard established by Washington Supreme Court and United States Supreme Court precedent. This structural error requires reversal of the convictions.

a. Peremptory Challenges Were Exercised On Paper With No Contemporaneous Announcement Of Those Challenges In Open Court.

The venire panel was questioned on the record in the courtroom. 22RP. Outside the presence of the panel, the court explained how the peremptory challenge process would work. 22RP 293-96. The attorneys were to exercise their peremptory challenges by writing down names on a piece of paper. 22RP 293-94. At the close of questioning, the court announced, "At this time, we are going to engage in what I told you about a little earlier, which is the peremptory challenges, and the rules for this part of the proceeding is that you may stand up and stretch. If you would like, you may speak softly to your neighbor. You can pull out a book and read, but you aren't to move your location because it's important, when the lawyers are exercising the peremptories, that they remember what you told them during this process, and that would be very difficult if you were to switch places. So this is sort of like, I think -- I've never been in the military, but it's sort of like the military at ease. You stay in formation but you can relax. So with that, the attorneys are passing back that piece of

paper that I told you that's going to allow them to exercise their challenges, just because both sides are permitted to remove some jurors if they wish." 22RP 488. Peremptory challenges were exercised in this manner and a side bar was held off the record. 22RP 488-89.

When the process was finished, the court announced on the record who would serve as jurors for the trial and excused the rest of the venire. 22RP 489-91. At no time did the court announce in open court which party had removed which potential jurors. A document containing this information was filed. CP 417. But the public was never told in open court that such a document had been filed or was available for immediate viewing.

b. The Public Trial Right Attaches To The Peremptory Challenge Process Because It Is An Integral Part Of Jury Selection.

The federal and state constitutions guarantee the right to a public trial to every defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Whether a trial court has violated the defendant's right to a public trial is a question of law reviewed de novo. Easterling, 157 Wn.2d at 173-74.

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 5-6.

The trial court violated Clark's right to a public trial in holding peremptory challenges in private. The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 288 P.3d at 1118 (citing State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). "The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends." People v. Harris, 10 Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) (peremptory challenges conducted in chambers violate public trial right, even where such proceedings are reported), review denied, (Feb 02, 1993).

One type of "closure" is "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Physical closure of the courtroom, however, is not the only situation that

violates the public trial right. Another type of closure occurs where a proceeding takes place in a location inaccessible to the public, such as a judge's chambers or hallway. Lormor, 172 Wn.2d at 93 (chambers); State v. Leyerle, 158 Wn. App. 474, 477, 483, 484 n.9, 242 P.3d 921 (2010) (moving questioning of juror to hallway outside courtroom was a closure).

Here, the peremptory challenge portion of the jury selection process was conducted in private. The piece of paper passed between the attorneys was inaccessible to the public at the time the peremptory challenges were exercised. The procedure in this case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Though the courtroom itself remained open to the public, the proceedings were not.

What took place in private should have taken place in open court so that the public could observe the peremptory challenge process as it was taking place. The ultimate composition of the jury was announced in open court. But the selection process was actually closed to the public because which party exercised which peremptory challenge and the order in which the peremptory challenges were made were not subject to public scrutiny. The sequence of events through which the eventual constituency of the jury "unfolded" was kept private. Harris, 10 Cal. App.4th at 683 n.6.

This Court has recognized the right to a public trial attaches to the portion of jury selection involving peremptory challenges. State v. Wilson, 174 Wn. App. 328, 342-43, 346, 298 P.3d 148 (2013) (public trial right not implicated when the bailiff excused the two jurors solely for illness-related reasons before voir dire began, contrasting voir dire process involving for cause and peremptory challenges); State v. Jones, 175 Wn. App. 87, 97-101, 303 P.3d 1084 (2013) (trial court violated the right to public trial when, during a court recess off the record, the trial court clerk drew four juror names to determine which jurors would serve as alternates, comparing to voir dire process involving for cause and peremptory challenges). Both Jones and Wilson applied the experience and logic test set forth in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). Jones, 175 Wn. App. at 96-102; Wilson, 174 Wn. App. at 335-47.

The "experience" component of the Sublett test is satisfied here. Historical evidence reveals "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The criminal rules of procedure show our courts have historically treated the peremptory challenge process as part of voir dire on par with for cause challenges. Wilson, 174 Wn. App. at 342. CrR

6.4(b) contemplates juror voir dire as involving peremptory and for cause juror challenges. Id. CrR 6.4(b) describes "voir dire" as a process where the trial court and counsel ask prospective jurors questions to assess their ability to serve on the defendant's particular case and to enable counsel to exercise intelligent "for cause" and "peremptory" juror challenges. Id. at 343.

This stands in sharp contrast with CrR 6.3, which contemplates administrative excusal of some jurors appearing for service before voir dire begins in the public courtroom. Id. at 342-43. In further contrast, a trial court has discretion to excuse jurors outside the public courtroom under RCW 2.36.100(1), but only so long as "such juror excusals do not amount to for-cause excusals or *peremptory challenges* traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added).

The "logic" component of the Sublett test is satisfied as well. "Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully and fairly." State v. Saintcalle, 178 Wn.2d 34, 74, 309 P.3d 326 (2013) (Gonzalez, J., concurring). "The peremptory challenge is an important 'state-created means to the constitutional end of an impartial jury and a fair trial.'" Saintcalle, 178 Wn.2d at 62 (Madsen,

C.J., concurring) (quoting Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. McCollum, 505 U.S. at 48-50. A prosecutor is forbidden from using peremptory challenges based on race, ethnicity, or gender. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Rivera v. Illinois, 556 U.S. 148, 153, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992).

The peremptory challenge component of jury selection matters. It is not so inconsequential to the fairness of the trial that it is appropriate to shield it from public scrutiny. Discrimination in the selection of jurors places the integrity of the judicial process and fairness of a criminal proceeding in doubt. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

The public trial right encompasses circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny. Brightman, 155

Wn.2d at 514; Leyerle, 158 Wn. App. at 479. An open peremptory process of jury selection acts as a safeguard against discriminatory removal of jurors. Public scrutiny discourages discriminatory removal from taking place in the first instance and, if such a peremptory challenge is exercised, increases the likelihood that the challenge will be denied by the trial judge.

The Supreme Court recently issued an opinion that was fractured on how to deal with the persistence of racial discrimination in the peremptory challenge process, but all nine justices united in the recognition that the problem exists. See Saintcalle, 178 Wn.2d at 49, 60 (Wiggins, J., lead opinion), at 65 (Madsen, C.J., concurring), at 69 (Stephens, J., concurring), at 118 (Gonzalez, J., concurring), at 118-19 (Chambers, J., dissenting). In light of that problem, it cannot be plausibly maintained that the peremptory challenge process, as it unfolds in real time at the trial level, gains nothing from being open to the public. The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6. "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret

proceedings.'" Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The peremptory challenge process squarely implicates those values.

Division Three of the Court of Appeals recently held no public trial violation occurred during the peremptory challenge phase because the record did not show peremptory challenges were actually exercised at sidebar instead of in open court. State v. Love, 176 Wn. App. 911, 920, 309 P.3d 1209 (2013).[13] A panel in Division Two recently adhered to Love without independent analysis. State v. Dunn, __Wn. App.__, __ P.3d __, 2014 WL 1379172 at *3 (slip op. filed April 8, 2014).

Love was wrongly decided and should not be followed for the reasons already articulated in this brief. The experience prong of the "experience and logic" test is met because the relevant court rule envisions both for cause and peremptory challenges taking place in open court. Wilson, 174 Wn. App. at 342-44; Jones, 175 Wn. App. at 98, 101. Division Three ignored what Jones and Wilson have to say on the issue.

Its reliance on State v. Thomas, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976) as a basis to conclude peremptory challenges do not meet the "experience" prong of the "experience and logic" test is misplaced. Love, 176 Wn. App. at 918. Thomas rejected the argument that "Kitsap

[13] A petition for review has been filed in Love.

County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Thomas, however, predates the seminal public trial decision in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) by nearly 20 years.

Moreover, Thomas noted in 1976 that secret peremptories were used "in several counties" according to a Bar Association directory. Thomas, 16 Wn. App. at 13 & n.2. There are 39 counties in Washington. The implication, then, is that only several of the 39 counties used secret peremptories as of 1976.[14] That shows an established historical practice of public peremptory challenges in this state with a few exceptions.

Turning to the "logic" prong, Division Three's bald assertion that the exercise of peremptory challenges "presents no questions of public oversight" is simply wrong. Love, 176 Wn. App. at 919-20. The reasons why it is wrong, including the benefit of public oversight to deter discriminatory removal of jurors during the peremptory process, have already been set forth in this brief.

[14] The source of the court's information is actually dated 1968. Thomas, 16 Wn. App. at 13 n.2.

c. The Convictions Must Be Reversed Because The Court Did Not Justify The Closure Under The Bone-Club Factors.

Before a trial court closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.

There is no indication the court considered the Bone-Club factors before the peremptory challenge process took place in private. The trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The court here erred in failing to articulate a compelling interest to be served by the closure, give those present an opportunity to object, weigh alternatives to

the proposed closure, narrowly tailor the closure order to protect the identified threatened interest, and enter findings that specifically supported the closure. Orange, 152 Wn.2d at 812, 821-22.

The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Wise, 176 Wn.2d at 6, 13-14. The State may try to argue the issue is waived because defense counsel did not object to conducting the peremptory challenge process in private. That argument fails. A defendant does not waive his right to challenge an improper closure by failing to object to it. Id. at 15. The issue may be raised for the first time on appeal. Id. at 9. Clark's convictions must be reversed due to the public trial violation. Id. at 19.

D. CONCLUSION

For the reasons set forth, Clark requests that this Court reverse the convictions.

DATED this 14th day of April 2014

Respectfully Submitted,

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 45103-4-II
	)	
ANTHONY CLARK,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANTHONY CLARK
DOC NO. 365895
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF APRIL 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

April 14, 2014 - 2:09 PM

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Court of Appeals Case Number: 45103-4

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