SUPREME COURT NO. 92021-4
COA NO. 45103-4-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY CLARK,

Petitioner.

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

The Honorable Kathryn J. Nelson, Judge

# PETITION FOR REVIEW

CASEY GRANNIS
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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RULES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Anthony Clark asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Clark requests review of the decision in State v. Anthony Clark, Court of Appeals No. 45103-4-II (slip op. filed June 23, 2015), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether defense counsel provided ineffective assistance in failing to object to jurors being informed this first degree murder case did not involve the death penalty, and in particular, whether the Court of Appeals misapplied the prejudice prong of the ineffective assistance analysis in looking at the evidence in the light most favorable to the State and deliberately disregarding defense evidence to the contrary?

2. Whether the trial court violated Clark's constitutional right to present a complete defense in excluding evidence of Clark's mental retardation, which was relevant to show his state of mind in connection with the charged murder?

3. Whether cumulative error violated Clark's due process right to a fair trial?

D. STATEMENT OF THE CASE

The State charged Clark with first degree premeditated murder, first degree felony murder, and several other offenses. CP 183-85.

1. *State's Evidence*

On September 7, 2011, neighbors in the apartment building where Clark lived with his mother heard a loud noise. 22RP 833-35, 838, 900-01, 931, 947. One of the neighbors, Ms. Eller, later encountered Clark with a garbage can downstairs. 22RP 840-42. Clark asked her if she knew about dope and told her that he needed help in selling it to get money for school clothes. 22RP 844, 888, 898.[1] Eller took an M&M bottle from him and poured out 15 pieces of crack cocaine. 22RP 844-46. Eller told him that she did not know anyone that could help but that someone upstairs might know, referring to her roommate Ms. Bassett and Bassett's boyfriend, Mr. Woods. 22RP 844-45, 897.

At Bassett's request, Clark went to their apartment, where he asked them to help him sell the cocaine. 22RP 848-49, 904-05, 1003-04. They declined. 22RP 905-06, 1009. Clark also asked for help in disposing of a body, saying he killed someone. 22RP 850-51, 906, 1007-08. He was worried about moving the body before his mom came home because he did not want to get in trouble. 22RP 853, 907, 1008.

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

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 also said something about "the boy beating up his baby's mom" and that he had been taught to never let a man put a hand on his baby's mom.[2] 22RP 850-51, 907, 1035. Eller eventually went to the alley, where Clark showed her the body in a garbage can. 22RP 865-66. He asked her not to say anything to his mom. 22RP 865.

Police responded to the scene and saw the body, later identified as that of 16-year-old D.D. 22RP 552-53, 602-07. D.D. died from a single gunshot wound to the back of the head. 22RP 1127, 1139. Police found a handgun in the toilet tank of Clark's apartment, along with the M&M container of cocaine. 22RP 704, 781, 792, 1218-19.

2. *Clark's Testimony*

Clark testified in his own defense. 22RP 1590-1687. He described leaving his apartment to see a friend that day. 22RP 1619. On the way, D.D. called out to him on the street. 22RP 1591, 1620-21. Clark and D.D.

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

were friends; they knew each other from school and had hung out. 22RP 1597-1600, 1608. Clark told him he was going to a friend's house and then to a barbeque. 22RP 1622. Clark invited D.D. to come along. 22RP 1622. During the conversation, 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 to 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. D.D. asked Clark if he knew anybody that he could sell the drugs to. 22RP 1643-44. Clark took the cocaine to Eller's apartment and talked with her and the others about selling it. 22RP 1667, 1673-76. Clark then went back downstairs and gave the cocaine back to D.D., telling him no one was interested. 22RP 1676.

Clark then told D.D. that his mom had some jewelry. 22RP 1676. Clark wanted to pawn the jewelry for money so that they could buy some food for the barbeque. 22RP 1593, 1644. The two went to a closet to get the jewelry box, which was on the top shelf. 22RP 1592-93. When Clark had difficulty reaching the jewelry, D.D. offered to get it. 22RP 1645-48. He handed the gun to Clark after taking out the clip. 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 D.D.'s chest and breathing into his mouth, but was unsuccessful in reviving D.D. 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. 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 coming home and did not want her to find out what he had done. 22RP 1678. He then 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 did not aim the gun at D.D. 22RP 1664.

3. *Outcome and Appeal*

For the premeditated first murder charge, 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. CP 336, 340-47. The court imposed a total of 447 months in confinement. CP 373.

On appeal, Clark raised several arguments, including (1) defense counsel was ineffective in failing to object to jurors being told this was not a death penalty case and (2) the trial court violated his right to present a defense in excluding evidence of his mental retardation. Brief of Appellant 11-17, 18-42; Reply Brief at 1-17. The Court of Appeals disagreed, holding Clark did not establish prejudice on his ineffective assistance claim and that the trial court properly excluded evidence of mental retardation because he did not present a diminished capacity defense. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS' MISAPPLICATION OF THE PREJUDICE PRONG OF CLARK'S INEFFECTIVE ASSISTANCE CLAIM PRESENTS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

The Court of Appeals erected an improper standard for showing prejudice on an ineffective assistance claim. The Court of Appeals viewed the evidence in the light most favorable to the State in determining the deficient performance had no effect on the murder verdict. Instead of viewing the evidence in its totality as mandated by the United States Supreme Court, the Court of Appeals disregarded Clark's exculpatory

testimony on the theory that credibility determinations are for the jury to make. This serious distortion of the prejudice prong of Clark's ineffective assistance claim presents a significant question of constitutional law under RAP 13.4(b)(3).

"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. Hicks, 163 Wn.2d 477, 481, 181 P.3d 831 (2008); 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.

Before voir dire, the trial court nonetheless invited counsel to tell jurors that the death penalty was not involved. 22RP 38-39. Seizing the opportunity, prosecutors told jurors on three occasions during the course

of jury selection that the case did not involve the death penalty. 22RP 120-21, 372, 419. Defense counsel did not object.

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); 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. Consistent with precedent, the Court of Appeals held defense counsel was deficient failing to object to jurors being told Clark's case did not involve the death penalty. Slip op. at 11-12; Townsend, 142 Wn.2d at 847; Hicks, 163 Wn.2d at 481. But it mangled the prejudice prong of the analysis.

Clark argued the evidence against him on the first degree murder charge was not overwhelming because his testimony provided a basis for jurors to find he did not act with premeditation and did not kill D.D. in the course of committing a robbery. Slip op. at 12.

The Court of Appeals concluded Clark's argument "requires this court to weigh the evidence and determine the credibility of the witnesses, both of which are within the province of the jury." Slip op. at 13. It refused to consider the exculpatory force of Clark's testimony as having any place in the prejudice analysis, citing State v. Andy, 182 Wn.2d 294,

303, 340 P.3d 840 (2014) and State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Slip op. at 13-14. Andy and Myers, however, applied the proposition that a reviewing court will not weigh the evidence or determine the credibility of witnesses to a sufficiency of evidence claim. Andy, 182 Wn.2d at 303-04; Myers, 133 Wn.2d at 37-38.

Clark argues ineffective assistance, not insufficiency of evidence. The different claims trigger different legal standards for reviewing the evidence. Compare Strickland, 466 U.S. at 694 ("the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution") with In re Pers. Restraint of Stenson, 174 Wn.2d 474, 487, 276 P.3d 286 (2012) (sufficiency of evidence is not the test in determining whether prejudice results from the State's withholding of exculpatory evidence).

The Court of Appeals made a serious error in assessing prejudice. The evidence against Clark is overwhelming only if the reviewing court ignores the exculpatory aspects of Clark's testimony. But in assessing whether an error affected the verdict, "[a]n appellate court ordinarily does not make credibility determinations." State v. Maupin, 128 Wn.2d 918, 929, 913 P.2d 808 (1996). This means the reviewing court will not presume one side's witnesses are credible and the other side's witnesses are not. What the Court of Appeals did was find the testimony of the State's

witnesses credible and drew the most unfavorable inferences available from Clark's testimony, while relegating the available exculpatory effect of Clark's countervailing testimony to oblivion.

The salient question is whether there is a reasonable probability that, absent the error, "the factfinder would have had a reasonable doubt respecting guilt." Strickland, 466 U.S. at 695. More pointedly, the question in Clark's case is whether there is a reasonable probability that the error affected the jury's credibility determinations such that confidence in the outcome is undermined.

Crucially, Strickland mandates "a court hearing an ineffectiveness claim must consider the totality of the evidence before the . . . jury." Id. at 695. The totality of evidence includes Clark's exculpatory testimony, from which reasonable inferences favorable to Clark could be drawn. Errors stemming from counsel's deficient performance can affect how the trier of fact resolves the case. Id. at 695-96. The ineffective assistance standard thus requires the reviewing court to view the evidence from the standpoint of a reasonable jury and consider how the error may have affected its resolution of the factual issues before it. The Court of Appeals worked backwards from the verdict, instead of envisioning how jurors, absent the error, may have viewed the evidence in reaching a verdict.

Taking into account Clark's testimony, the State's proof on the first degree felony murder charge was not overwhelming. 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). Clark's testimony provided a basis for a reasonable jury to find Clark took the cocaine as an afterthought so that his mother would not find it, and therefore did not cause D.D.'s death during the course of a robbery. 22RP 1664, 1673, 1678.

Taking into account Clark's testimony, the State's case for premeditated murder was also far from overwhelming. 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. 22RP 1596, 1657, 1663.

State witnesses testified that Clark told them, in some form, that he shot D.D. in the head and something about the boy beating up his baby's

mom. 22RP 850-51, 907, 1035. One witness maintained that Clark said he had called the boy over to his house and told him to reach for something in the closet. 22RP 907.

But Clark's testimony painted a different picture. According to Clark, his invitation for his long-time acquaintance D.D. to come over to his house flowed from a chance encounter on the street and D.D.'s interest in Clark's computer, not some sinister plot to lure D.D. to his death. 22RP 1622-23, 1630-34. Clark further testified that he sat down on the floor, "messing around with the gun," "[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 and breathing into his mouth. 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.

Which version of events is accurate? That was for the jury to decide, but its deliberation was rendered unreliable by the knowledge that this was not a death penalty case: "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." Townsend, 142 Wn.2d at 847.

2. WHETHER THE COURT VIOLATED CLARK'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE IN EXCLUDING EVIDENCE ABOUT CLARK'S MENTAL RETARDATION IS A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW.

Clark's case presents an issue of first impression in Washington: is an asserted diminished capacity defense the only means by which to admit evidence of a defendant's mental limitations? Or do mental limitations that fall short of outright preventing someone from forming the requisite state of mind remain relevant to the issue of whether the State proved the mens rea element of its case?

In this case, the trial court excluded proposed testimony that Clark was mentally retarded on the ground that Clark did not plead a diminished capacity defense. Whether that exclusion violated Clark's right to present a complete defense presents a significant question of constitutional law under RAP 13.4(b)(3).

During the CrR 3.5 hearing, testimony showed Clark was mildly mentally retarded. 10RP 314. Such individuals have difficulties with regard to reasoning. 10RP 314. 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. Clark had the communication and language skills of an eight or nine year old child — extremely deficient. 10RP 292-94.

The State subsequently moved to exclude any testimony related to Clark's mental and intellectual disabilities from the trial. CP 213-18. The defense objected that exclusion of evidence regarding Clark's mental deficits would violate his constitutional right to present a defense. CP 207, 209. The defense made it clear it was not presenting a diminished capacity defense. CP 210. It argued evidence of mental limitation was admissible under several theories, including (1) such evidence was relevant to the defense argument that the State could not prove "premeditation" or "intent to kill" on the first degree murder charge; (2) such evidence was relevant to whether Clark acted recklessly, which was an element of the lesser offense of manslaughter on which the jury was to be instructed; and (3) Clark's mental condition should be admitted because the jury would notice his "flat" demeanor was different from others when he testified. CP 207-08, 209-22, 223-26; 19RP 13 22RP 496-99, 503-04, 1694-95.

The trial court ruled testimony regarding Clark's mental retardation was inadmissible because it was not relevant without a diminished capacity defense. CP 227-28; 19RP 20-21; 21RP 16-17; 22RP 504, 1699. The court believed 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.

Criminal defendants have the constitutional right to present a complete defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); 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. 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." Darden, 145 Wn.2d at 622.

The Court of Appeals agreed with the trial court's exclusion of evidence of Clark's mental limitations, including expert testimony on the issue, because Clark did not plead a diminished capacity defense. Slip op. at 8. According to the Court of Appeals, "Clark argues that his mental retardation affected his ability to form the required mens rea. But this is precisely a diminished capacity defense—which Clark did not plead." Id.

The Court of Appeals misunderstands the scope of the diminished capacity defense. The diminished capacity defense means the defendant lacked the capacity or ability to form the requisite mens rea. State v. Griffin, 100 Wn.2d 417, 419, 670 P.2d 265 (1983); State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

But a person can have the capacity or ability to form a mens rea but not actually have the mens rea at the particular time an alleged offense occurred. The crux of Clark's argument is that 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. The latter should always be a question of fact for the jury to decide, taking into account all relevant circumstances.

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. The applicable substantive law, and the ultimate issue here, is whether the State proved the existence of the required state of mind as an element of its case. Clark's mental retardation, with its effect on reasoning skills, makes it less probable that he acted with premeditation or intent at the time of the alleged criminal acts.

No Washington court has ever held evidence of mental abnormality is relevant *only* if a diminished capacity defense is established. The Court of Appeals decision, like the trial court's ruling, betrays an unduly restrictive approach to relevancy and the right of a defendant to present a complete defense to the State's charges.

Other jurisdictions in which a diminished capacity defense is unavailable as a matter of law recognize evidence of mental disability can

still be relevant and admissible when used to attack the mens rea element of the government's case.[3] Consistent with those courts that have squarely addressed the issue, the question raised by Clark's excluded defense is not whether Clark lacked the capacity to form the requisite mens rea, but whether the criminal acts were actually committed with the requisite mens

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[3] See United States v. Peterson, 509 F.2d 408, 417 (D.C. Cir. 1974) ("An abnormal mental condition may influence the probability that a defendant premeditated and deliberated — and so be taken into account by a jury in determining whether those states of mind existed in fact (beyond a reasonable doubt) — even though it did not eliminate the capacity for premeditation."); United States v. Pohlot, 827 F.2d 889, 890, 897, 905 (3d Cir. 1987), cert. denied, 108 S. Ct. 710, 98 L. Ed. 2d 660 (1988) (although defense of diminished capacity is prohibited under federal statutory law, evidence of mental abnormality is still admissible to disprove an element of the crime by showing the defendant actually lacked the mens rea in committing the charged crime); United States v. Cameron, 907 F.2d 1051, 1066-67 (11th Cir. 1990) (under federal law, psychiatric evidence that a defendant "lacked the capacity" or was "incapable" of forming the intent necessary for the crime charged is inadmissible, but psychiatric evidence offered to negate specific intent is admissible when such evidence focuses on the defendant's specific state of mind at the time of the charged offense); State v. Burr, 195 N.J. 119, 127-30, 948 A.2d 627 (N.J. 2008) (in failing to consider larger relevancy concepts when evaluating testimony on the defendant's mental defects, trial court abused discretion in excluding such on ground that no diminished capacity defense was presented); 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 was 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); 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; at issue "is the actual formation of intent in light of the defendant's mental disorder, not the capability to do so.").

rea. 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.

The Court of Appeals' rule — that evidence of mental retardation is only relevant if a diminished capacity defense is raised — is unconstitutional because it deprives a mentally retarded defendant from challenging the mens rea element through the use of relevant evidence. State evidentiary rules that infringe upon a weighty interest of the accused to present evidence in his defense are not controlling when they are arbitrary or disproportionate to the purposes they were designed to serve. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). "If the 'mechanical' application of such a rule would 'defeat the ends of justice,' then the rule must yield to those ends." Jackson v. Nevada, 688 F.3d 1091, 1096 (9th Cir. 2012) (quoting Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

Under ER 702, expert testimony would have assisted the trier of fact to understand the significance of Clark's mental disability in relation to the mens rea elements of the State's case. The defense expert could

have explained to the jury the effects of retardation on Clark's mental functioning. From that, the jury would have a complete picture by which to judge whether Clark actually acted with premeditation, intent, or recklessness. 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 or intent that day.

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. Under these circumstances, the ends of justice required the admission of evidence on Clark's mental limitations.

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). The combined prejudicial effect of (1) improper exclusion of relevant defense evidence regarding Clark's mental condition (section E.2., supra); and (2) defense counsel's failure to object to the jury being told the death penalty was not involved (section E.1., supra) produced an unfair trial.

F. CONCLUSION

For the reasons stated above, Clark requests that this Court grant review.

DATED this 23rd day of July 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Petitioner

# APPENDIX A

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ANTHONY TYRONE CLARK,<br><br>Appellant. | No. 45103-4-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

LEE, J. — Anthony Clark appeals his conviction of first degree murder, first degree robbery, unlawful possession of a controlled substance with intent to deliver, and second degree unlawful possession of a firearm. Clark argues that (1) the trial court erred by excluding evidence of his mental capacity, absent a diminished capacity defense, (2) he received ineffective assistance of counsel because his trial counsel failed to object to the jury learning that the death penalty was not an issue, (3) the trial court erred by instructing the jury on an uncharged alternative means of first degree robbery; (4) the trial court violated Clark's right to a public trial by allowing parties to exercise peremptory challenges in writing; and the cumulative effects of the errors deprived him of his due process right to a fair trial.

We hold that the trial court did not err by excluding evidence of Clark's mental capacity, Clark has not shown that his trial counsel's deficient performance prejudiced him, and the trial court did not violate Clark's right to a public trial. Finally, because there was only one error committed in this case, the cumulative error doctrine is not applicable. Accordingly, we affirm

Clark's convictions for first degree murder, unlawful possession of a controlled substance with intent to deliver, and second degree unlawful possession of a firearm. However, because the trial court erred by instructing the jury on an uncharged alternative means of first degree robbery, we reverse Clark's conviction for first degree robbery and remand.

FACTS

In 2011, Clark was walking to a friend's house when he encountered D.D.,[1] someone that he knew from school. Clark and D.D. walked to Clark's home, where he lived with his mother, and listened to music on the computer.

Clark then suggested that he and D.D. sell some of his mother's jewelry to buy food for a barbeque. Clark told D.D. that his mother kept her jewelry box in the spare room and led D.D. to the room. Then, because Clark could not reach the top shelf where the jewelry box was kept, D.D. offered to climb in the closet and Clark instructed him where to look. Although D.D. was slightly taller than Clark, D.D. had to climb on a shelf in the closet to reach the top shelf. Before climbing in the closet, D.D. removed a gun from his pocket, removed the magazine from the gun, and handed the gun without the magazine to Clark.

As D.D. was climbing in the closet, Clark aimed the gun towards the ceiling of the closet and shot D.D. in the back of the head, killing him. Clark then went to his neighbors' home and told them that he killed D.D. because D.D. "beat his baby's mom up . . . real bad, real bad." 8 Verbatim Report of Proceedings (VRP) at 907. Clark then told his neighbors that he "called [D.D.]

[1] D.D. was a minor at the time—initials are used to protect the minor's privacy.

over to [his] house, told [D.D.] to reach for something in [his] closet" and "popped [D.D.] in the back of his head" with a .22 caliber gun. 8 VRP at 907.

After leaving his neighbors' home, Clark wheeled a garbage can from the street into his home, and put D.D.'s body, shoes, and jacket in the can. Clark then wheeled the garbage can back out to the street.

Clark's neighbors reported what Clark told them to police. Police officers went to Clark's home, where they discovered D.D.'s body in the garbage can, and arrested Clark. The State charged Clark by amended information with five crimes: first degree murder (count I), first degree felony murder (count II), first degree robbery (count III), unlawful possession of a controlled substance with intent to deliver (count IV), and second degree unlawful possession of a firearm (count V).

During voir dire, outside the presence of the jury venire, the trial court raised the issue of telling the jury that the death penalty was not an issue. Clark did not object. During voir dire, the State disclosed to the venire that the death penalty was not an issue. Clark did not object.

The State's psychiatrist, Dr. Brent Oneal, testified at Clark's CrR 3.5 hearing about his evaluation of Clark to determine his competency to stand trial in a different court proceeding. Dr. Oneal testified that Clark was mildly mentally retarded.

The State moved to exclude the expert's testimony about Clark's "intellectual deficits," "mental retard[ation]," or "developmental disabil[ities]," arguing that the evidence was not relevant because the defendant's mental health and cognitive functioning were not at issue. Clerk's Papers (CP) at 213-15. The State argued that admitting evidence of Clark's mental deficits would "essentially bootstrap some form of mental defense." VRP (Dec. 17, 2012) at 15. Clark argued

that his mental capacity was relevant to whether premeditation and an intent to kill existed, and to the juror's perception of Clark's credibility.

The trial court ruled that evidence "about the fact that [Clark] was a special education student or that people [who] knew him considered him slow or tended to discount his testimony," and that he was had an individual education program while in school was admissible and could be raised by either party. VRP (Dec. 17, 2012) at 20. The trial court also ruled that the facts that Clark received disability and social security income were admissible, noting that it was "not sure exactly how relevant they are, but they're the kind of, perhaps, background facts that would present the picture that balances things for the jury so they don't make assumptions that he's lazy." VRP (Dec. 17, 2012) at 22. However, the trial court ruled that expert testimony regarding Clark's IQ, developmental delays, low birth weight, and mental capacity was inadmissible because it was not relevant without a diminished capacity defense.

A jury found Clark guilty as charged in the amended information. At sentencing, the trial court sentenced Clark for first degree murder, first degree robbery, unlawful possession of a

controlled substance with intent to deliver, and second degree unlawful possession of a firearm.[2] Clark appeals.[3]

## ANALYSIS

Clark argues that (1) his constitutional right to present a complete defense was violated by the trial court erroneously excluding evidence of his mental capacity, (2) his trial counsel was ineffective because counsel failed to object to allowing the venire to know that the death penalty was not an issue, (3) the trial court erred by instructing the jury on an uncharged alternative means of first degree robbery, (4) his right to a public trial was violated by the trial court allowing the parties to exercise peremptory challenges on paper, and (5) cumulative errors in the trial deprived him of his due process right to a fair trial. We affirm Clark's convictions except for the first degree robbery conviction. The trial court erred by instructing the jury on an uncharged alternative means of first degree robbery, and therefore, we reverse that conviction.

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[2] The jury found Clark guilty of first degree felony murder (count II). At sentencing, Clark moved to vacate the conviction of either first degree murder (count I) or first degree felony murder (count II) pursuant to double jeopardy. The State argued that the trial court should merge the two convictions into one for purposes of the judgment and sentence. The record does not contain an order vacating the felony murder conviction. Further, the judgment and sentence does not contain reference to the felony murder conviction. However, whether the trial court vacated the felony murder conviction or merged that conviction with the first degree murder conviction does not affect our analysis.

[3] Although the State charged Clark with unlawful possession of a controlled substance with intent to deliver and unlawful possession of a firearm, and the jury convicted Clark of these crimes, Clark does not raise any specific challenges to these convictions.

A. EVIDENCE OF MENTAL CAPACITY, ABSENT A DIMINISHED CAPACITY DEFENSE

Clark argues that the trial court deprived him of his constitutional right to present a complete defense by excluding evidence of mental capacity.[4] Clark claims that the evidence was relevant to (1) his defense theory that he did not act with premeditation, intent, or recklessness; and (2) his credibility as a witness. Clark did not claim that he was not competent, or assert an insanity or diminished capacity defense.

The trial court did an ER 403 balancing analysis, and determined that any probative value of evidence regarding Clark's mental capacity was substantially outweighed by the danger of confusing and misleading the jurors because the diminished capacity defense was not raised. The trial court found that beyond "facts that are readily apparent to lay people," evidence of Clark's mental capacity was inadmissible, and that Clark was "not allowed to bootstrap a diminished capacity defense into this case without properly pleading it and establishing the requisite threshold." VRP (Dec. 17, 2012) at 21-22. Accordingly, the trial court ruled that evidence related to Clark's mental capacity was inadmissible because Clark did not assert a diminished capacity defense.

We review a trial court's decision to exclude evidence for an abuse of discretion. *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). A trial court abuses its discretion when its decision is based on untenable grounds or untenable reasons. *Lord*, 161 Wn.2d at 283-84. An

[4] The trial court ruled that evidence that Clark was in an Individualized Education Program, that he received supplemental security income from the State, and witnesses' perception that Clark was "slow" was admissible. VRP (Dec. 17, 2012) at 20. The trial court also ruled that testimony from Dr. Oneal, who performed an evaluation of Clark's competency to stand trial in a different proceeding; evidence of Clark's IQ and other test results regarding Clark's mental capacity; and Clark's history of developmental delays and difficulties at birth was inadmissible.

abuse of discretion is found when "no reasonable person would take the view adopted by the trial court." *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). "Appellate courts cannot substitute their own reasoning for the trial court's reasoning, absent an abuse of discretion." *Lord*, 161 Wn.2d at 295.

Criminal defendants have a constitutional right to present evidence in their own defense. *State v. Hawkins*, 157 Wn. App. 739, 750, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). But, the evidence must be relevant; there is no constitutional right to present irrelevant evidence. *Lord*, 161 Wn.2d at 294. Relevant evidence is "evidence having any tendency to 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. For expert testimony to be admissible under ER 702, expert testimony must be helpful to the trier of fact to be admissible. *In re Pers. Restraint of Morris*, 176 Wn.2d 157, 169, 288 P.3d 1140 (2012). Expert testimony is only helpful if it is relevant. *Morris*, 176 Wn.2d at 169. To be relevant, expert testimony must have the tendency to make a fact of consequence to the trial's outcome more or less probable. ER 401; *Atsbeha*, 142 Wn.2d at 918.

1. Mens rea

Clark claims that the evidence of his mental capacity was relevant to understanding his ability to assess risks, and to his argument that although he was capable of forming the required mens rea, he did not form it. Clark argues that evidence of his mental capacity and "decision-making process was relevant to showing his state of mind on the day in question." Br. of Appellant at 34. We disagree.

A diminished capacity defense allows a defendant to show that his ability to form the required mens rea was impaired because of a mental disorder. *Atsbeha*, 142 Wn.2d at 918; *State v. Johnson*, 150 Wn. App. 663, 670-71, 208 P.3d 1265, *review denied*, 167 Wn.2d 1012 (2009). The defense must be declared pretrial. *State v. Harris*, 122 Wn. App. 498, 506, 94 P.3d 379 (2004). A diminished capacity defense requires the defendant to present expert testimony "that a mental disorder . . . impaired the defendant's ability to form the culpable mental state to commit the crime charged." *Atsbeha*, 142 Wn.2d at 914.

Here, Clark contends that the evidence of his IQ, diagnosis of "mental retardation," low birth weight, and developmental delays are relevant to because the evidence could help the jury understand his decision making process and decide whether he possessed the required mens rea. Br. of Appellant at 30. Effectively, Clark argues that his mental retardation affected his ability to form the required mens rea. But this is precisely a diminished capacity defense—which Clark did not plead. *See Atsbeha*, 142 Wn.2d at 918-19, 921 (holding that under a diminished capacity defense, evidence that the defendant is diagnosed with a mental disorder is not relevant unless expert testimony demonstrates that the defendant's mental disorder affected his ability to form the required mens rea). Accordingly, the trial court did not abuse its discretion by ruling that, absent a diminished capacity defense, the evidence of his mental capacity was inadmissible.

Clark has not offered any Washington authority for his argument that the evidence is relevant absent a diminished capacity defense. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Clark cites *State v. Burr*, 195 N.J. 119, 948 A.2d 627 (2008), as support for the proposition that evidence of mental defect is properly admitted to help the jury assess the defendant's credibility and subjective perceptions, even in the absence of a diminished capacity defense. However, in *Burr*, the evidence specifically related to the defendant's mental disorder and how the related characteristics manifest, and would have explained how those characteristics affected the issues. *Burr*, 195 N.J. at 129. Here, however, beyond stating that the evidence is relevant, Clark has not identified *how* the evidence (from an expert or layperson) would be relevant to the issues of premeditation, intent, or recklessness in the absence of a diminished capacity defense.

Clark also relies on *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987). There, the applicable federal law prohibited evidence that Washington expressly allows when a diminished capacity defense is pleaded. *Pohlot*, 827 F.2d at 905-07. *Pohlot* held that that the defendant "offered his evidence of mental abnormality in support of a legally unacceptable theory of lack of mens rea that amounts covertly to a variation of the partially diminished capacity defense precluded" by federal law. *Pohlot*, 827 F.2d at 906-07. Contrary to federal law, Washington permits evidence of a mental disorder not amounting to insanity as a diminished capacity defense. *Atsbeha*, 142 Wn.2d at 914. However, Clark did not plead a diminished capacity defense. *Pohlot* in inapplicable.

Here, the trial court was well within its discretion to exclude evidence it found irrelevant. *See Lord*, 161 Wn.2d at 295. We hold that the trial court did not abuse its discretion by excluding Dr. Oneal's testimony and other evidence of Clark's developmental delays.

2. Credibility as a witness

Clark also claims that evidence of his mental capacity was relevant to his credibility as a witness. At trial, he argued that jurors "might draw negative inferences" from the way he responded to questions while testifying. Br. of Appellant at 38. We disagree.

Clark has not offered any Washington authority to support his argument that evidence of mental capacity is relevant to credibility.[5] As noted, "[w]here no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer*, 60 Wn.2d at 126.

Clark relies on *State v. Sexton*, 311 N.J. Super. 70, 709 A.2d 288 (App. Div. 1998) to support his argument. However, in *Sexton*, the court held that the defendant's mother's testimony about the defendant's placement in special education was relevant to the jury's evaluation of the defendant's demeanor. *Sexton*, 311 N.J. Super. at 88. Here, the trial court expressly allowed Clark to present evidence that he was in special education, as well as evidence that people who knew him considered him "slow." VRP (Dec. 17, 2012) at 20. Given the absence of a diminished capacity defense, the trial court did not abuse its discretion in excluding evidence of Clark's mental capacity.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Clark argues that his defense counsel was ineffective by failing to object to the jury learning that the death penalty was not an issue. Specifically, Clark argues that informing the jury that the death penalty was not an issue made them less likely to pay attention, and that because the State's

[5] We note that ER 608 limits evidence attacking or supporting a witness' credibility to evidence in the form of reputation for truthfulness or untruthfulness. ER 608(a).

evidence "was not overwhelming," there is a reasonable probability that the error affected the jury's verdict. Br. of Appellant at 15. Although Clark's trial counsel's performance was deficient, Clark has not met his burden of demonstrating that the deficient performance prejudiced the outcome of his case. Thus, we hold that Clark did not receive ineffective assistance of counsel based on counsel's failure to object to the jury being told that the death penalty was not an issue.

We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700.

1. Deficient performance

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *Grier*, 171 Wn.2d at 33.

Washington courts have routinely held that "it is error to inform the jury during voir dire in a noncapital case that the case is not a death penalty case." *State v. Townsend*, 142 Wn.2d 838, 840, 15 P.3d 145 (2001). The jury's function is to determine the defendant's guilt or innocence as a fact-finder. *Townsend*, 142 Wn.2d at 846. With the exception of capital cases, the jury should

make its determination without regard to punishment, which is an issue of legislative policy. *Townsend*, 142 Wn.2d at 846. Defense counsel's representation fails to meet the standard of prevailing professional norms when she or he fails to object to either the State or the trial court informing the jury that the death penalty is not an issue. *Townsend*, 142 Wn.2d at 847; *State v. Mason*, 160 Wn.2d 910, 929-30, 162 P.3d 396 (2007), *cert. denied*, 533 U.S. 1035 (2008); *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831, *cert. denied sub nom. Babbs v. Wash.*, 555 U.S. 919 (2008).

Defense counsel's failure to object to the State informing the jury that the death penalty was not an issue was deficient performance. Defense counsel's failure to object could not be part of a legitimate tactic because there was "no possible advantage to be gained." *See Townsend*, 142 Wn.2d at 847; *see also Hicks*, 163 Wn.2d at 487.

2. Prejudice

For the defendant to prove that the deficient performance prejudiced the defense, the defendant must "prove that, but for counsel's deficient performance, there is a 'reasonable probability' that the outcome would have been different." *Hicks*, 163 Wn.2d at 486. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Clark argues that there is a reasonable probability that counsel's failure to object affected the jury's verdict. Clark contends that the "State's case for premeditated murder was not overwhelming," and that the jury could have found that Clark intentionally killed D.D. or committed manslaughter instead of finding that he committed a premeditated killing. Br. of Appellant at 15.

"Premeditation is the 'deliberate formation of and reflection upon the intent to take a human life.'" *Townsend*, 142 Wn.2d at 848 (quoting *State v. Gentry*, 125 Wn.2d 570, 597; 888 P.2d 1105 (1995)). Here, the State presented ample evidence of premeditation. Clark testified that the clip had been removed, but he still did think that he could fire a bullet out of it. Clark also testified that he knew guns were dangerous and could kill people, and he knew that he should not presume a gun is unloaded. Clark further testified that while D.D. was in the closet, Clark was sitting on the ground, "aiming [the gun] towards the [inside] ceiling of the closet," where he knew D.D. was. 13 VRP at 1595. Clark was "messing around with the gun" while aiming the gun towards the inside ceiling of the closet and shot D.D., killing him. 13 VRP at 1595. Also, Clark's neighbors testified that Clark told them that D.D had beat "up his baby's mom and that his mom had taught him to never let a man put hands on his baby's mom." 8 VRP at 850. Clark's neighbor also testified that Clark told her that he had killed a man by calling "[D.D.] over to [his] house, told [D.D.] to reach for something in [his] closet" and "just pointed it and popped the gun." 8 VRP at 851, 907. He just "popped him in the back of his head" with a "[d]euce deuce."[6] 8 VRP at 907. Based on the evidence, Clark has not demonstrated that the trial outcome would have differed if his trial counsel had objected to the State's disclosure.

Clark claims that his own testimony could lead to an inference that the shooting was an accident. This argument requires this court to weigh the evidence and determine the credibility of the witnesses, both of which are within the province of the jury. *State v. Andy*, 182 Wn.2d 294,

[6] A "[d]euce deuce" is a .22 caliber gun. 8 VRP at 907.

303, 340 P.3d 840 (2014). We will not weigh the evidence or determine the credibility of witnesses. *See State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

Clark also claims that the jury was less careful because it knew that the death penalty was not an issue. However, Clark fails to point to anything in the record showing that the jurors were "less attentive during trial, less deliberative in their assessment of the evidence" because the death penalty was not an issue. *Townsend*, 142 Wn.2d at 847.

We hold that Clark's trial counsel was deficient for failing to object to the jury learning that the death penalty was not an issue, but that Clark has not demonstrated that the outcome would have been different. Because Clark has not demonstrated that the error prejudiced him, his claim of ineffective assistance of counsel fails.[7]

C. UNCHARGED ALTERNATIVE MEANS OF COMMITTING FIRST DEGREE ROBBERY

Clark argues, and the State concedes, that the trial court committed reversible error by instructing the jury on an uncharged alternative means of committing robbery. Defense counsel did not object below. Although defense counsel did not object, instructions to the jury on uncharged alternatives are a manifest error affecting a constitutional right that we will address for the first time on appeal. *State v. Laramie*, 141 Wn. App. 332, 342, 169 P.3d 859 (2007); *State v. Chino*, 117 Wn. App. 531, 538, 72 P.3d 256 (2003); RAP 2.5. We accept the State's concession.

[7] Clark contends that his counsel's performance prejudiced him because the State's evidence of first degree felony murder predicated on first degree robbery was not overwhelming. Pragmatically, this argument does not affect the outcome. At sentencing, first degree felony murder merged into first degree murder, and Clark's was sentenced for first degree murder—not first degree felony murder.

It is fundamental that the State inform an accused of the criminal charges to be met at trial, and the State cannot try an accused for an uncharged crime. *Laramie*, 141 Wn. App. at 342. When a crime may be committed in alternative ways or by alternative means, but the State elects to charge only one of the alternatives, a trial court errs by instructing the jury that it may consider the uncharged means by which the accused could have committed the crime. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). Instructing a jury on an uncharged alternative means violates the defendant's right to be informed of the charges against him or her. *Laramie*, 141 Wn. App. at 342 (citing U.S. CONST. amend. VI; WASH, CONST., art. 1, § 22).

"An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless." *Bray*, 52 Wn. App. at 34-35. Because a jury instruction that contains uncharged alternative means is presumed prejudicial, "[o]n direct appeal, it is the State's burden to prove that the error was harmless." *In re Brockie*, 178 Wn.2d 532, 536, 309 P.3d 498 (2013).

Here, the amended information charged Clark with taking property from D.D. while "armed with a deadly weapon, to-wit: a firearm." CP at 184. The court's instruction to the jury provided that the jury could "convict the defendant of the crime of Robbery in the First Degree, Count III," if either "(5)(a) [t]hat in the commission of these acts or in immediate flight therefrom the defendant was armed with a firearm *or* (b) . . . in the commission of these acts or in the immediate flight therefrom the defendant inflicted bodily injury." CP at 304 (Jury Instruction 28) (emphasis added).

The jury did not receive further instructions that clarified the appropriate grounds for finding Clark guilty of first degree robbery. Further, in closing arguments, the State argued that

the jury could find Clark guilty based on either ground. Because the jury did not receive other clarifying instructions and the court instructed the jury on an uncharged alternative (i.e., the defendant inflicted bodily injury during the commission of the act or in the immediate flight therefrom), it is possible that the jury convicted Clark based on the uncharged alternative. *See Laramie*, 141 Wn. App. at 343. The State concedes error, and it has not met its burden to demonstrate that the error was harmless. Accordingly, we accept the State's concession that the instructional errors constitute reversible error. *See Chino*, 117 Wn. App. at 541 (holding that the instructions on an uncharged crime required reversal).

D. PUBLIC TRIAL RIGHTS—PEREMPTORY CHALLENGES

Clark argues that the trial court violated his right to a public trial by allowing peremptory challenges to be made in writing in open court. In *State v. Webb* and *State v. Dunn*, we held that the trial court did not violate the defendant's right to a public trial when peremptory challenges were made on paper or during a side bar. *State v. Webb*, 183 Wn. App. 242, 247, 333 P.3d 470 (2014), *review denied*, 182 Wn.2d 1005 (2015); *State v. Dunn*, 180 Wn. App. 570, 574, 321 P.3d 1283 (2014), *review denied*, 181 Wn.2d 1030 (2015).

A defendant has a constitutional right to a public trial. *Dunn*, 180 Wn. App. at 574. We review alleged violations of the public trial right de novo. *Id.* "The threshold determination when addressing an alleged violation of the public trial right is whether the proceeding at issue even implicates the right." *Id.* In *Dunn*, we held that "[t]he public trial right does not attach to the exercise of challenges during jury selection." *Id.* at 575. In *Webb*, we held that the defendant's right to a public trial was not violated by counsel conducting peremptory challenges on paper. *Webb*, 183 Wn. App. at 246-47 (citing *Dunn*, 180 Wn. App. 575).

Clark argues that his right to a public trial was violated because counsel for both parties made peremptory challenges in writing and in private. The parties wrote their peremptory challenges on paper in open court and that writing was subsequently filed with the court. Although Clark invites us to disregard the case law, *Dunn* and *Webb* control this issue, and the public trial right does not apply to peremptory challenges during jury selection. We hold that Clark's right to a public trial was not violated.

E. CUMULATIVE ERROR

Clark argues that he is entitled to a new trial under the cumulative error doctrine based on ineffective assistance of counsel and the trial court excluding evidence of his mental capacity. Br. of Appellant at 42-43. Cumulative errors may merit reversal even when each error alone could be considered harmless. *In re the Pers. Restraint of Yates*, 177 Wn.2d 1, 65-66, 296 P.3d 872 (2013). Courts apply the cumulative error doctrine to cases of repetitive or frequent errors—one instance is neither repetitive nor frequent. *See Yates*, 177 Wn.2d at 66.

Here, we hold that Clark did not receive ineffective assistance of counsel and that the trial court did not err by excluding the evidence of Clark's mental capacity. However, the court erred by instructing the jury on an uncharged alternative means of committing first degree robbery. Under these circumstances, we hold that the cumulative error doctrine does not apply.

We affirm Clark's conviction of first degree murder, unlawful possession of a controlled substance with intent to deliver, and second degree unlawful possession of a firearm; we reverse Clark's conviction of first degree robbery and remand.

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:

Bjorgen, A.C.J.

Sutton, J.

## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON<br><br>Respondent,<br><br>v.<br><br>ANTHONY CLARK,<br><br>Petitioner. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | SUPREME COURT NO. _____<br>COA NO. 45203-1-II |

**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 23RD DAY OF JULY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY 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 23RD DAY OF JULY 2015.

X Patrick Mayovsky

## NIELSEN, BROMAN & KOCH, PLLC

## July 23, 2015 - 4:19 PM

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