NO. 48104-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH CLARK, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson and Vicki Hogan, Judges

No. 14-1-03081-1

BRIEF OF RESPONDENT

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1. Procedure

On August 6, 2014, the Pierce County Prosecutor's Office charged KENNETH CLARK, hereinafter "defendant" with one count of assault in the first degree, one count of assault in the second degree, one count of unlawful imprisonment, and one count of felony harassment, all domestic

violence related incidents[1]. CP 1-3. On August 19, 2014, an order for a preliminary competency evaluation was entered by the court. CP 6-10. A forensic psychological report written on August 26, 2014, detailed that defendant was not competent to stand trial at that time, but could likely regain competency after a restoration period at Western State Hospital ("WSH"). CP 13-19. On September 3, 2014, an order was entered committing defendant to WSH for not more than 90 days for an attempt at competency restoration. CP 27-29.

Because no beds were available, defendant remained in the Pierce County Jail on a waitlist to be transported to WSH until he was transported on December 8, 2014. CP 82. He was returned to the Pierce County Jail and found competent to stand trial on March 5, 2015. CP 84-85. Defendant filed a motion to dismiss based on speedy trial violations and governmental misconduct under CrR 8.3. CP 135-147. The State responded and after hearing argument, the trial court denied defendant's motion. CP 101-127, 150-179, 180-181.

The case proceeded as a bench trial before the Honorable Kathryn Nelson on July 20, 2015. RP 3. During motions in limine, the State moved to admit multiple prior incidents of domestic violence between the defendant and the victim under ER 404(b). CP 185-191; RP 7-10, 35-37.

[1] An amended information was later filed which added a deadly weapon enhancement to the in the alternative count of assault in the second degree. CP 195-197; RP 16-17.

Defense objected and the court reserved ruling on the issue until the victim had testified. RP 9-10, 37-38.

The court found defendant guilty of assault in the first degree, assault in the second degree with a deadly weapon enhancement, unlawful imprisonment with a deadly weapon enhancement, and felony harassment with a deadly weapon enhancement. RP 270-71; CP 274-84. The court also found all the crimes were domestic violence related incidents. RP 271; CP 274-84. Findings of fact and conclusions of law following the bench trial were entered and defendant was sentenced to a total of 288 months of confinement. SRP[2] 24; CP 251-65, 274-84.

2. Facts

On August 3, 2014, Marie Epps was living in Lakewood, Washington with her boyfriend, Kenneth Clark, the defendant. RP 44-48. That morning, they got into an argument about defendant's drug use and Ms. Epps told him she did not want to be with him anymore. RP 49-53. They got into an argument and defendant attempted to change Ms. Epps' mind. RP 54-56. He held her very tightly, asked her to pray with him and said she could hit him if she wanted to as he hit himself with a can opener. RP 54-56. She attempted to get him to let go of her by scratching his eye,

[2] The verbatim record of proceedings from the sentencing hearing on September 25, 2015, is contained in a separate volume which will be referred to as "SRP" followed by the page number.

pulling his hair and hitting him once with the can opener. RP 115-16, 122-23.

At one point, defendant took Ms. Epps' wallet and laptop and was attempting to leave with her items when the two of them began wrestling. RP 57. Ms. Epps got a knife from the kitchen hoping to scare defendant so he would leave. RP 57-58. Defendant grabbed a different knife and said that if she stabbed him he would kill her. RP 66-68. Defendant then slammed Ms. Epps on the ground, sat on top of her and threatened to beat her in the face with a metal bar from a shoe rack. RP 58-61. Ms. Epps believed it was very possible defendant was going to kill her. RP 68-69, 105.

They continued to struggle as defendant held the bar horizontally towards Ms. Epps' face like he was going to choke her, but Ms. Epps was able to get the bar away from him and threw it to the side. RP 61-62. Defendant was laying on top of Ms. Epps pinning her arms to her side with his head next to her face when Ms. Epps noticed a lot of blood on her neck. RP 62-65. Ms. Epps saw defendant looked shocked and had blood on his shirt and forehead. RP 65, 70. He picked up one of the knives they had dropped that was on the floor, walked out of the house and ran down the street. RP 65-68.

Ms. Epps felt her right ear and realized a part of it was missing. RP 72-73. She called the police and a recording of her 911 call was played in court. RP 70-79. She told the police that her boyfriend had bit

off her ear. RP 81. Ms. Epps testified that she could not actually see defendant bite off her ear, but that was what she believed had happened based on their positioning, his reaction afterwards and the fact that he had bitten her on the forehead on a previous occasion. RP 71-72, 81-83. She found her ear on the carpet and placed it on the counter. RP 73, 87.

Ms. Epps told the officers her boyfriend had bit off her ear, struck her with a bat, held a pipe from a shoe rack across her neck, and tried to stab her with a knife. RP 148-49. Officers observed a large portion of her ear was missing and she was bleeding on her neck and clothes. RP 142-43. They took photographs of her and her home that were shown in court. RP 86-92, 144. Defendant was apprehended at a neighboring apartment complex shortly after the incident. RP 159-60, 171-73. The officers also took photographs of him and observed he had shallow superficial cuts on his left cheek, right midback, and left arm that were not bleeding. RP 161, 164-165, 175.

Ms. Epps was eventually transported to Harborview hospital where doctors were unable to reattach her ear and her outer ear remains missing. RP 94-96, 100, 233-36. The doctors testified during the trial that Ms. Epps' injury was consistent with someone biting off her ear and it would have taken a lot of force given that cartilage is relatively tough tissue. RP 210-12, 232. They also testified that they observed bruising on her neck and collarbone, upper arms and a skin tear on her right finger. RP 213-14.

Ms. Epps testified that throughout the struggle with the defendant she felt like she could not leave because he kept following her in spite of her telling him to leave. RP 74. She also testified that at some point during the fight, defendant had grabbed an aluminum bat and threatened to beat her face in with it. RP 78, 91-92. Defendant chose not to testify during the trial. RP 238.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW THAT HIS SUBSTANTIVE DUE PROCESS RIGHTS WERE VIOLATED BY THE PROSECUTORIAL AGENCY THAT FILED CRIMINAL CHARGES AGAINST HIM.

The due process clause of the Fourteenth Amendment provides that the State shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This clause confers both substantive and procedural protections. ***Amunrud v. Bd. of Appeals***, 158 Wn.2d 208, 216, 143 P.3d 571 (2006). The substantive component of the due process clause protects against certain government actions "regardless of the fairness of the procedures used to implement them." ***Daniels v. Williams***, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). Where government conduct satisfies substantive due process, the procedural component of the due process clause requires that government action be implemented in a fundamentally fair manner. ***United States v. Salerno***, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d

697 (1987). The level of review applied in a substantive due process challenge depends on the nature of the interest involved. ***Amunrud***, 158 Wn.2d at 219. Interference with a fundamental right is subject to strict scrutiny and requires a showing that the infringement is narrowly tailored to serve a compelling state interest. *Id.* at 220. If no fundamental right is involved, the standard of review is rational basis. ***In re Det. of Morgan***, 180 Wn.2d 312, 324, 330 P.3d 774 (2014).

A person has a liberty interest in being free from incarceration absent a criminal conviction. *See* ***Meachum v. Fano***, 427 U.S. 215, 224, 96 S. Ct. 2532, 2538, 49 L. Ed. 2d 451 (1976) (once defendant is convicted, he is constitutionally deprived of the liberty interest in being free from confinement). Pretrial detainees, whether or not they have been declared unfit to proceed, have not been convicted of any crime; consequently, constitutional questions regarding the conditions and circumstances of their confinement are properly addressed under the due process clause of the Fourteenth Amendment, rather than under the Eighth Amendment's protection against cruel and unusual punishment. ***City of Revere v. Mass. Gen. Hosp.***, 463 U.S. 239, 244, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983).

The United States Supreme Court has addressed the due process issue of how long an incapacitated criminal defendant may be held "solely on account of his incapacity to proceed to trial." ***Jackson v. Indiana***, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). The Supreme

Court stated that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed" and held that the individual "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." ***Jackson v. Indiana***, 406 U.S. 715, 738, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

At issue in ***Jackson***, was an Indiana statute that allowed a defendant to be indefinitely committed solely because he was incompetent to stand trial. Jackson was a developmentally disabled deaf-mute with a mental capacity of a pre-school child. By the time the Supreme Court decided his case, Jackson had been confined for three and a half years, yet the record showed a "lack of substantial probability" that he would ever be found competent to stand trial. *Id.* at 738-39. The court stated that "even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal." *Id.* at 738. Prior to ***Jackson***, criminal defendants found to be incompetent could be confined until their competence was restored, even if there was little to no probability of that occurring. The Court in ***Jackson*** did not articulate a hard and fast time limitation on commitment to attain competency, requiring only that commitment be for a reasonable period of time. *Id.* at 733.

Jackson also sought dismissal of his criminal charges arguing that he had shown enough for a complete insanity defense. The Court noted that determination of competency was a distinct issue from criminal responsibility at the time of the offense and that the state court proceedings had not addressed criminal responsibility. The Court also noted:

> Dismissal of charges against an incompetent accused has usually been thought to be justified on grounds not squarely presented here: particularly, the Sixth-Fourteenth Amendment right to a speedy trial, or the denial of due process inherent in holding pending criminal charges indefinitely over the head of one who will never have a chance to prove his innocence. Jackson did not present the Sixth-Fourteenth Amendment issue to the state courts.

Jackson, 406 U.S. at 740. The Court then remanded the case to the state courts.

The United States Supreme Court has not yet dealt with a substantive due process claim based upon a delay in transporting a defendant to a facility for competency restoration, such as is raised in this case. The jurisdictions that have examined such a claim have done so in the context of a civil suit and have relied, in part, upon the framework set forth in ***Jackson***, but also upon ***Bell v. Wolfish***, 44 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), and ***Youngberg v. Romeo***, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1980). *See* ***Oregon Advocacy Center v. Mink***, 322 F.3d 1101 (9th Cir. 2003); ***Trueblood v. Washington State DSHS***, 101 F. Supp. 3d 1010 (W.D. Wash 2015), vacated in part at ___

F.3d ___(9th Cir. 2016) (2016 WL 2610233); ***Disability Law Center v. Utah***, ___ F. Supp. 3d ___ (C.D. Utah, 2016) (2016 WL 1389592, issued April 7, 2016); ***Advocacy Ctr. for Elderly & Disabled v. La. Dep't of Health & Hosps.***, 731 F.Supp.2d 603, 609 (E.D.La.2010); ***Weiss v. Thompson***, 120 Wn. App. 402 85 P.3d 944 (2004); ***In re Loveton***, 244 Cal. App. 4th 1025, 198 Cal. Rptr. 3d 514 (2016); *see also* ***Terry ex rel. Terry v. Hill***, 232 F.Supp.2d 934, 941–44 (E.D.Ark.2002) (applying ***Bell*** and state law in finding a due process violation).

The nature of the civil action in the above list of cases varies from actions brought alleging a violation of a federal statute, to those seeking injunctive relief, to those filed as habeas corpus actions. Consequently the named defendant/respondent in the civil suit is usually the governmental agency, or its director, that is responsible for the care and treatment of the mentally ill; on occasion it was the person in charge of the detention facility where the plaintiff was being held. None of these cases were brought against the prosecuting authority that initiated criminal charges against the defendant.

The proper test for determining whether there has been a substantive due process violation is to balance the individual's interest in liberty against the government's asserted reasons for restraining individual liberty. ***Youngberg v. Romeo***, 457 U.S. 307, 321, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

As alluded to above, two governmental agencies are involved when a criminal defendant is found incompetent to stand trial in Washington. The prosecutorial agency pursuing criminal charges against the defendant ("prosecution") and the governmental agency that is responsible for overseeing competency evaluations and any following restorative services care and treatment of the mentally ill ("treatment agency"), which in Washington is the Department of Social and Health Services ("DSHS").

A prosecuting agency has legitimate interests in bringing accused persons to trial and protecting the public from arrested persons who present a demonstrable threat to the community. ***United States v. Salerno***, 481 U.S. 739, 749–50, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). As one justice put it: "The safeguards that the Constitution accords to criminal defendants presuppose that government has a sovereign prerogative to put on trial those accused in good faith of violating valid laws. Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace." ***Illinois v. Allen***, 397 U.S. 337, 347, 90 S. Ct. 1057, 1063, 25 L. Ed. 2d 353 (1970) (Brennan, J. concurring). Thus, even with all the constitutional protections afforded a criminal defendant, the United States Supreme Court has recognized that a government's "regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest" because the "government's interest in preventing crime by arrestees is both legitimate

and compelling." ***Salerno***, 481 U.S. at 748-49; *see also* ***De Veau v. Braisted***, 363 U.S. 144, 155, 80 S. Ct. 1146, 1152, 4 L. Ed. 2d 1109 (1960).

The United States Supreme Court has also upheld governmental civil detention of mentally unstable individuals who present a danger to the public, ***Addington v. Texas***, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979), as well as the continued detention of dangerous defendants who become incompetent to stand trial, ***Jackson***, 406 U.S. at 731–739; ***Greenwood v. United States***, 350 U.S. 366, 76 S. Ct. 410, 100 L. Ed. 412 (1956). Although without a criminal conviction, a showing of dangerousness by clear and convincing evidence is required. ***Addington***, 441 U.S. at 432.

While a prosecution agency has no interest – indeed, no ability - to pursue criminal charges against an incapacitated defendant, it maintains an interest in: 1) seeing if the defendant's competency can be restored; 2) its ability to pursue its prosecution if competency is achieved, and 3) assuring the safe custody transfer of a dangerous incapacitated offender to a treatment agency. Once it is established that the incapacitated defendant is unlikely to ever regain competency, then its interest in prosecution ends. Both the prosecution and treatment agencies have an interest in preventing any mentally ill and dangerous person from being released into the community. DSHS, as a treatment agency, has no interest in the

prosecution of criminal charges, but does have an interest in providing restorative treatment and care to the mentally ill.

Defendant asserts that his substantive due process rights were violated by the delay between the time the court signed the order for transfer to WSH for restoration of competency and the date that he was actually transported and further argues that the trial court should have dismissed his case because of this delay. Defendants only authority for this claimed substantive due process violation are the decisions in ***Mink*** and ***Trueblood***, *supra*. Both ***Mink*** and ***Trueblood*** concerned federal civil lawsuits filed against the governmental agencies and officials responsible for the treatment of the mentally incapacitated.in Oregon and Washington, respectively. Although both cases involved incapacitated criminal defendants, the prosecuting agencies were not named as defendants. Neither case balanced the incapacitated individual's interest in liberty against a prosecution agency's asserted reasons for restraining individual liberty or its interest in seeing violations of the law prosecuted. Thus, although those decisions found a substantive due process violation by a treatment agency for the delay in providing restoration treatment, the cases do not provide authority that a there was a substantive due process violation by a prosecution agency.

There is also considerable difference in the remedies sought by the plaintiffs in ***Mink*** and ***Trueblood***, which were injunctive and declaratory relief, as opposed to defendant in the present case who seeks dismissal of

his criminal charges. Although defendant may be in a similar factual situation as some of the plaintiffs in ***Mink*** and ***Trueblood***, his legal posture is completely different as his case is a criminal prosecution not a civil action. ***Mink*** and ***Trueblood*** are inapposite as neither stand for the proposition that his rights have been violated by a prosecution agency or that he is entitled to a dismissal of his criminal charges as a remedy. Defendant has provided no authority to support his argument that dismissal is appropriate. The State has looked for a case similar to the facts presented here, but has found none on point.

Defendant has failed to show a substantive due process violation where he relies entirely upon federal cases which engage in a substantially different analysis of the interests at issue as they involve different parties seeking different remedies. He has neglected to engage in any analysis of his own other than to direct this court to authority which is inapposite to his situation and he has provided no authority to this court for the remedy he seeks. Defendant has failed to show his substantive due process rights were violated in the present case.

2. THE TRIAL COURT DID NOT ERR IN DENYING DEFENDANT'S MOTIONS TO DISMISS WHEN HE HAS FAILED TO SHOW HE PRESENTED ANY VIABLE LEGAL BASIS TO SUPPORT HIS MOTION.

a. Defendant's CrR 3.3 time for trial rights were not violated when the rule excludes the time period from the date the court orders a competency examination.

CrR 3.3(b)(1)(i) and CrR 3.3(c)(1) provide that the trial of a criminal defendant detained pending trial must commence within 60 days after arraignment. CrR 3.3(e)(1) excludes from the 60 day period "[a]ll proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding defendant to be competent." The plain meaning of "all proceedings" encompasses oral and written motions by counsel or the court and oral or written orders by the court. ***State v. Cox***, 106 Wn. App. 487, 491, 24 P.3d 1088 (2001). CrR 3.3(h) holds that "[a] charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice." An appellate court reviews the trial court's application of the time for trial rule, CrR 3.3, de novo. ***State v. Kindsvogel,*** 149 Wn.2d 477, 480, 69 P.3d 870 (2003).

Defendant argues that CrR 3.3(e)(1) does not apply and should not be considered an excluded period until it is shown that evaluation proceedings have actually begun. Brief of Appellant at 9-12. Because of

this, he argues the trial court erred in denying the motions to dismiss under CrR 3.3(h). However, defendant's argument concerning the excluded period is contrary to the explicit text of the rule and case law interpreting the rule and thus, the trial court did not err in denying the motion to dismiss under CrR 3.3(h).

Courts interpret court rules as they do statutes drafted by the legislature. ***State v. George***, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007). Initially, the appellate court looks to the plain language of the rule and if the plain language is unambiguous, the court does not need to look further into the rule in interpreting it. ***Gourley v. Gourley***, 158 Wn.2d 460, 466, 145 P.3d 1185 (2006); ***Spokane County v. Specialty Auto & Truck Painting, In.***, 153 Wn.2d 238, 249, 103 P.3d 792 (2004).

In the present case, the rule itself explicitly states that the time for trial begins to toll "on the date the competency examination is ordered." CrR 3.3(e)(1). The text of the rule is unambiguous and there is no question that the time for trial begins to toll on the date the court orders the competency examination. This interpretation is also consistent with how other courts have read and interpreted the rule in the past. *See* ***State v. Harris***, 122 Wn. App. 498, 505, 94 P.3d 379 (2004)(An order for evaluation under the competency statutes automatically stays the criminal proceedings until the court determines that the defendant is competent to stand trial); *see also* ***State v. Cox***, 106 Wn. App. 487, 491, 24 P.3d 1088

(2001)(Under former CrR 3.3(g)(1)[3], competency proceedings commence no later than when a party or the court makes an oral or written motion for a competency evaluation, and no later than when the court makes an oral or written order for a competency evaluation). Defendant's argument that the rule suggests the excluded time for trial period begins on the date the actual competency evaluation begins to take place is contrary to the explicit text of the rule and without merit.

Case law has also recognized the public policy reasons for starting the excluded period on the date the competency evaluations are ordered as opposed to when the actual evaluation takes place. In 1975, this Court recognized that the time for trial rule excluding competency proceedings "is broad in scope because competency proceedings can involve a protracted period of time." ***State v. Setala***, 13 Wn. App. 604, 606, 536 P.2d 176 (1975). The Washington Supreme Court has also recognized that "[t]olling is necessary because neither side can go forwards with trial preparation until the defendant is found competent to proceed." ***State v. Harris***, 122 Wn. App. 498, 505, 94 P.3d 379 (2004)(*citing* ***State v. Jones***, 111 Wn.2d 239, 245, 759 P.2d 1183 (1988)). Once a defendant's competency is called into question and a competency evaluation is ordered, moving forward with any substantive work by either party on the trial becomes questionable. The explicit text of the rule and courts have

[3] Later recodified as CrR 3.3(e)(1)

recognized this and therefore toll the time for trial accordingly. Defendant's argument that the time for trial did not toll until actual competency evaluations and proceedings took place is contrary to the text of the rule and the public policy reasons behind excluding the time beginning on the date the competency evaluation is ordered. The trial court did not err in denying defendant's motion to dismiss.

Underlying much of his claim regarding a time for trial violation, defendant argues that he was not brought to trial in a timely fashion due to "mismanagement or misconduct" by the State. Brief of Appellant at 12. But such a claim is not contemplated by the text of CrR 3.3(e)(1). The text of CrR3.3(e)(1) is plain on its face and reads that competency proceedings are excluded from the time for trial period beginning on the date the trial court orders a competency evaluation. Any claim related to "mismanagement or misconduct" by the State in the evaluation proceedings is more appropriately brought under CrR 8.3(b) which explicitly contemplates that type of action (this argument is addressed below).

b. Defendant has failed to show the trial court abused its discretion in denying his motion to dismiss under CrR 8.3(b) as defendant has failed to provide the necessary record for review.

CrR 8.3(b) states:

> The court, in the furtherance of justice, after notice and hearing may dismiss any criminal prosecution due to

> arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

The dismissal of charges under CrR 8.3(b) is an "extraordinary remedy" that is only proper in truly egregious cases of misconduct that materially prejudice the rights of the accused. ***State v. Rohrich***, 149 Wn.2d 647, 658, 71 P.3d 638 (2003). A trial court may dismiss charges under CrR 8.3(b) if the defendant shows by a preponderance of the evidence (1) arbitrary action or governmental misconduct and 92) prejudice affecting the defendant's right to a fair trial. *Id.* at 654.

Governmental misconduct does not need to be evil or dishonest and simple mismanagement is sufficient. ***State v. Blackwell***, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). But the defendant must show actual prejudice, not simply speculative prejudice affected his right to a fair trial. ***Rohrich***, 149 Wn.2d at 657. Thus, "the requirement for a showing of prejudice under [CrR] 8.3(b) is not satisfied merely be expense, inconvenience or additional delay within the speedy trial period; the misconduct must interfere with the defendant's ability to present his case." ***City of Kent v. Sandu***, 159 Wn. App. 836, 841, 247 P.3d 454 (2011).

An appellate court reviews a trial court's decision to deny a motion to dismiss under CrR 8.3 for an abuse of discretion, meaning whether the decision was manifestly unreasonable, based on untenable grounds or

made for untenable reasons. ***State v. Michielli***, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

Defendant in the present case argues the trial court abused its discretion in denying his motion to dismiss under CrR 8.3(b) as he established mismanagement and prejudice under ***Trueblood***, *supra*. Brief of Appellant at 13. But this court is unable to review that decision as defendant has failed to transcribe the portion of the proceedings which contain the argument and the trial court's ruling on this motion to dismiss.

The party presenting an issues for review has the burden of providing an adequate record to establish such error. RAP 9.2(b). When the record is incomplete, the appellate court may "decline to address a claimed error when faced with a material omission in the record" or affirm the challenged decision if the incomplete record is sufficient to support the decision or fails to affirmatively establish an abuse of discretion. ***State v. Sisouvanh***, 175 Wn.2d 607, 619, 290 P.3d 942 (2012) (*quoting* ***State v. Wade***, 138 Wn.2d 460, 465, 979 P.2d 850 (1999)). In this case, the clerk's notes reflect that the arguments and ruling on the motion to dismiss took place at a hearing on June 12, 2015, but no transcription from that proceeding was produced. CP 180-81. Without knowing what the basis for the trial court's ruling was, the record is incomplete and this court is unable to review whether that decision was an abuse of discretion. This court should decline to review the issue.

In addition, for the reasons described above, defendant's claim of a substantive due process violation fails and his reliance on ***Trueblood*** and ***Mink***, *supra,* in support of such a claim is misplaced. The trial court likely found that for those reasons defendant had failed to establish governmental misconduct entitling him to dismissal under CrR 8.3(b), but without the record discussing the reasons for the court's ruling, it is unclear. It should also be noted that dismissal under CrR 8.3(b) is an extraordinary remedy and is improper absent material prejudice to the rights of the accused. ***State v. Blackwell***, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Defendant presents no argument about how such governmental mismanagement materially prejudiced his rights other than to say he "established mismanagement and prejudice under ***Trueblood***." Brief of Appellant at 13. Defendant is unable to show the trial court abused its discretion in denying his motion to dismiss as he has failed to provide the record for review and failed to show he presented any viable legal basis to support his motion.

3. DEFENDANT IS UNABLE TO SATISFY EITHER PRONG OF THE ***STRICKLAND*** TEST AND SHOW HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80

L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case,

viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or

objection, defendant must demonstrate not only that the legal grounds for such a motion or objection was meritorious, but also that the verdict would have been different if the motion or objections had been granted. ***Kimmelman***, 477 U.S. at 375; ***United States v. Molina***, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. ***Cuffle v. Goldsmith***, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the ***Strickland*** test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

a. Defense counsel was not ineffective for failing to pursue or argue a diminished capacity defense when the record indicates he investigated the defense, but there was no evidence to support it.

On appeal, defendant contends that his attorney was ineffective for failing to argue a diminished capacity defense. Diminished capacity is a defense when either specific intent or knowledge is an element of the crime charged. ***State v. Warden***, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). Assault in the first degree[4] includes a specific intent as an element

[4] The State is not including defendant's other crimes in this portion only for purposes of brevity, but does not dispute that they also included specific intent or knowledge elements.

as the State has to prove defendant intended to inflict great bodily harm. RCW 9A.36.011(1).

To present a diminished capacity defense, substantial evidence in the form of expert testimony must establish that a "mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." ***State v. Atsbeha***, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). The expert testimony must "logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the required [mental states] to commit the crime charged." ***State v. Ferrick***, 81 Wn.2d 942, 945, 506 P.2d 860 (1973); *see also* ***State v. Griffin***, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983) (diminished capacity instructions should be given when there is substantial evidence that the defendant has a mental condition and the evidence logically and reasonably connects the condition with an inability to possess the requisite level of culpability). Along these lines,

> [i]t is not enough that a defendant may be diagnosed as suffering from a particular mental disorder. The diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime.

Astebha, 142 Wn.2d at 921. The prosecution must be notified of such a defense prior to trial. CrR 4.7(b)(1), (b)(2)(xiv).

Defendant appears to make two arguments in regard to the diminished capacity defense. First, he argues counsel was ineffective for

failing to pursue or raise such a claim prior to trial. Brief of Appellant, 15-16. But there is nothing in the record to suggest defense counsel did not investigate or pursue such a claim during his preparation for the trial and defense has failed to present any evidence in support of this claim. *See* ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ("If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition...."). To the contrary, the record actually reveals that defense counsel did have defendant evaluated prior to trial to determine whether any mental defense was available. During the sentencing hearing, the defense attorney stated "I had him evaluated also prior to trial. And while there was nothing suggesting a viable mental defense or incompetency to stand trial, it is clear that he's got some mental health problems." SRP 20. Appellate courts apply 'a heavy measure of deference to counsel's judgments' in the matter of investigating possible mental impairment defenses. ***Strickland v. Washington***, 466, U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Given this, defendant is unable to show his counsel's performance was deficient for failing to pursue a diminished capacity defense when he clearly did so and determined that such a defense was not viable.

Defendant also appears to allege that his counsel was ineffective for failing to request a diminished capacity instruction, or in the case of a bench trial, asking the court to consider such a defense at the conclusion of

the case. Brief of Appellant, at 20-24. The failure to request a diminished capacity instruction is not ineffective assistance of counsel per se. ***State v. Cienfuegos***, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). To determine whether counsel's failure to request such an instruction constituted ineffective assistance of counsel, the court proceeds through a three-step analysis:

> First, we must determine whether [the defendant] was entitled to a diminished capacity instruction. Second, we must decide whether it was ineffective assistance of counsel per se not to have requested the instruction. Finally, we must decide whether ineffective assistance of counsel prejudiced his defense under the ***Strickland*** standard.

Id. at 227.

Defendant points to his various competency concerns and examinations, history of mental health issues, and look of shock after the incident as support for why such a diminished capacity defense would have been warranted in his case. Brief of Appellant, at 23. But, as case law makes clear, evidence of mental health issues or a mental health condition is not enough to warrant a diminished capacity defense. ***Astebha***, 142 Wn.2d at 921. Substantial evidence, usually expert testimony, must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the required mental states to commit the crime charged. ***Ferrick***, 81 Wn.2d at 945.

In the present case, there was simply no evidence presented to the court which warranted a diminished capacity defense. No expert testified about defendant's mental state and the defendant himself chose not to testify. As described above, it was not for lack of trying as to why a diminished capacity defense was not presented as defense counsel had defendant evaluated prior to trial in an attempt to be able to pursue such a defense. But when there is no evidence to support the defense, the defendant is not entitled to present such a defense. Because defendant was not entitled to a diminished capacity defense, the defense attorney's failure to request an instruction or ask the court to consider a diminished capacity defense was not deficient.

Defendant is unable to show his counsel was ineffective for failing to pursue a diminished capacity defense when the record indicates otherwise and when acting in accordance with case law, there was no evidence to support arguing such a defense to the court.

b. Defense counsel's decision to question the victim about prior incidents of domestic violence was not ineffective as it was part of an offer of proof done for strategic reasons and defendant is unable to show any prejudice.

In general, evidence of a defendant's prior crimes, wrongs or acts are inadmissible to demonstrate the person's character or general propensities. However, such evidence may be admissible for other

purposes such as proof of "motive, opportunity, intent preparation, plan, knowledge, identity or absence of mistake or accident." ER 404(b).

To admit evidence of other wrongs under ER 404(b), the trial court must "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." ***State v. Thang***, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Prior bad acts are admissible if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs the prejudicial effect. ***State v. Boot***, 89 Wn. App. 780, 788, 950 P.2d 964 (1998) (*citing* ***State v. Saltarelli***, 98 Wn.2d 358, 362, 655 P.2d 697 (1982)). A danger of unfair prejudice exists when evidence is likely to stimulate an emotional response rather than a rational decision. ***State v. Barry***, 184 Wn. App. 790, 801, 339 P.3d 200 (2014).

The admission or refusal of evidence lies largely within the sound discretion of the trial court and its decision will not be reversed on appeal absent an abuse of discretion. ***State v. Stubsjoen***, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). An abuse of discretion occurs when there is a clear showing the trial court's decision was manifestly unreasonable, or based on untenable grounds, or for untenable reasons. ***State ex rel. Carroll v. Junker***, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

During motions in limine in the present case, the State moved to admit several prior incidents of domestic violence between the parties under ER 404(b). CP 185-191. Defense objected and the State explained that its reason for seeking to admit the evidence depended in large part upon what the victim's testimony was. CP 185-191; RP 7-9. The court reserved ruling on the issue until a later time when the parties presumably knew more about the victim's testimony. RP 9.

Shortly thereafter, defendant waived his right to a jury trial and the case proceeded by bench trial. RP 33-34. The parties readdressed the State's request to admit prior incidents of domestic violence. RP 35-38. Defense counsel suggested the following:

> I think that maybe you should hear her testimony and treat her testimony as an offer of proof simultaneous since we don't have a jury here, because the first thing you have to decide before admissibility is whether or not by preponderance, the prior acts occurred, and then where or not it's more probative than prejudicial. But – and the reason I'm raising that is because there was an incident in June of 2014 where the police got called but the reports I've been given of the incident say that she told police at that time that nothing happened, and so I'd prefer the Court wait on that ruling, allow her to testify, knowing I'm objecting, until you've heard the testimony,...

RP 37. The court held that it was going to "continue to reserve under that framework." RP 38. The victim testified during the trial and during her testimony, the defense attorney questioned her about whether her previous

reports to the police in June of 2014 about defendant biting her had been true. RP 118-119.

On appeal, defendant argues that the defense attorney was ineffective for asking Ms. Epps about the prior incidents of domestic violence when the prosecutor did not address them in her questions. Brief of Appellant, at 24-26. However, the record described above reveals that the defense attorney questioned Ms. Epps about the prior incident because her testimony was serving a dual purpose as substantive testimony and as an offer of proof as it was a bench trial and the court was able to differentiate the two.

Defense counsel's questions about the prior incidents were part of an offer of proof to challenge the admissibility of those incidents later under ER 404(b). His questioned her about them so that he might be able to argue later that the State had failed to meet their initial burden of proving the prior incidents occurred by a preponderance of the evidence standard. This is supported by the defense attorney's comments to the court wherein he states that first the evidence has to be proven by a preponderance of the evidence and only then do you get to their admissibility, and by the questions themselves which suggest the victim told differing stories about the incident. Choosing to question the victim about the prior incidents was a strategic decision to later argue that the

State had failed to meet its burden under a preponderance of the evidence standard if possible. Because it was a strategic decision, defendant has failed to show his attorney's performance was deficient under the first prong of ***Strickland*** and he is unable to show he received ineffective assistance of counsel.

Additionally, defendant is also unable to satisfy the second prong of ***Strickland*** and show any error in discussing the prior domestic violence incidents prejudiced him in any way. The record reflects that after the victim testified and during the remainder of the trial, the State never moved to admit the prior incidents under ER 404(b). The State also never mentioned the prior incidents of domestic violence in its closing or rebuttal, nor did defense counsel. RP 239-269. The court never discussed the prior incidents in making its ruling on the verdicts and they are not mentioned in the findings of fact and conclusions of law that were entered. RP 270-71; CP 274-284.

As a result, although the court was aware of the prior incidents of domestic violence, nothing indicates the trial court admitted, considered or relied in any way on those incidents in rendering its verdict. Courts acknowledge the unique demands of bench trials and recognize that "[i]n bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions." ***State v. Read***, 147 Wn.2d

238, 245, 53 P.3d 26 (2002)(*quoting* ***Harris v. Rivera***, 454 U.S. 339, 346, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981). Because the evidence was never admitted, we can presume the court ignored it. Furthermore, there is no evidence which suggests the trial court relied on the inadmissible evidence in making its findings. *See* ***State v. Read***, 147 Wn.2d at 245-46 (a defendant can rebut the presumption that the trial court ignored the inadmissible evidence by showing that it relied on the inadmissible evidence to make essential findings that it otherwise would not have made)(*citing* ***Greater Kan. City Laborers Pension Fund v. Superior Gen. Contractors, Inc.***, 104 F.3d 1050, 1057 (8th Cir. 1997)). Defendant is thus also unable to satisfy the second prong of ***Strickland*** and show the defense attorney's decision to discuss the prior acts of domestic violence prejudiced him in any way. Defendant did not receive ineffective assistance of counsel.

4. DEFENDANT HAS WAIVED ANY ISSUE REGARDING LEGAL FINANCIAL OBLIGATIONS BY FAILING TO OBJECT.

RCW 9.94A.777 requires that prior to imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the crime victim penalty assessment, the court must first determine that the defendant, under the terms of the section, has

the means to pay such additional sums. RCW 9.94A.777(1). The statue also explicitly details that:

> For purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

RCW 9.94A.777(2).

a. Defendant failed to object to the imposition of legal financial obligations on this basis and has therefore waived this issue on appeal.

Failure to object precludes raising an issue on appeal. ***State v. Guloy***, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A defendant may only appeal a non-constitutional issue on the same grounds that he objected on below. ***State v. Thetford***, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); ***State v. Hettich***, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). Objecting to an issue promotes judicial efficiency by giving the trial court an opportunity to fix any potential errors, thereby avoiding unnecessary appeals. *See* ***State v. Lindsey***, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

An appellate court may grant discretionary review of three issues raised for the first time on appeal: (1) lack of jurisdiction, (2) failure to

establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. RAP 2.5(a). To fall under the exceptions provided in RAP 2.5(a), defendant would need to claim there was a manifest error—requiring actual prejudice—affecting a constitutional right. *See* ***State v. Lynn***, 67 Wn. App. 339, 345, 835 P.2d 251 (1992); ***State v. Gordon***, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Only if a defendant proves an error that is both constitutional and manifest does the burden shift to the State to show harmless error. ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Defendant in the present case did not preserve the issue regarding legal financial obligations at the trial level. On appeal, he has not shown the requisite manifest error affective a constitutional right to invoke discretionary review under RAP 2.5(a). The issue of whether the trial court erroneously imposed the legal financial obligations is not properly before this court and the court should decline to review it for the first time on appeal.

b. <u>If the court were to reach the issue, remand would likely be the appropriate remedy</u>.

If however this court were to reach the issue, it does appear that RCW 9.94A.777 is applicable to defendant's situation. During sentencing, the trial court imposed only the mandatory fees of $500 in crime victim's penalty assessment, $200 in court filing fees and the $100

DNA database fee. SRP 24-25. The court did this after inquiring into the defendant's ability to pay and determining that it would waive all non-mandatory fees that were being requested. SRP 24-25.

In spite of this inquiry into ability to pay, RCW 9.94A.777 appears to contemplate that the court must specifically consider and evaluate the defendant's mental health condition prior to imposing even mandatory fees except for the crime victim penalty assessment and restitution. Thus, although the trial court considered defendant's ability to pay and discussed defendant's mental health condition, it did not address his ability to pay within the confines of RCW 9.94A.777. As a result, it does appear that if this court were to reach this issue, remand would be appropriate on the issue of legal financial obligations with an order to consider RCW 9.94A.777 as it relates specifically to the $100 DNA fee and $200 court filing fee.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm defendant's conviction and sentence.

DATED: July 19, 2016

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Prosecuting Attorney

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WSB # 42892

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/19/16
Date Signature

PIERCE COUNTY PROSECUTOR

July 19, 2016 - 11:01 AM

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