NO. 45103-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY TYRONE CLARK, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 11-1-03699-7

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Brian Wasankari
Deputy Prosecuting Attorney
WSB # 28945

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether Defendant failed to show ineffective assistance of counsel where he failed to show that his counsel's performance, even if deficient, prejudiced his defense.

2. Whether Defendant's right to present a defense was sustained where the trial court properly excluded irrelevant evidence of the defendant's "mental limitations."

3. Whether the defendant's convictions should be affirmed because there was only one, isolated error committed and therefore, the cumulative error doctrine is inapplicable.

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

5. Whether Defendant's right to a public trial was sustained where the ***Sublett*** experience and logic test confirms that the trial court did not close the courtroom by hearing peremptory challenges at sidebar.

B. STATEMENT OF THE CASE.

1. Procedure

On September 9, 2011, the State charged Anthony Tyrone Clark, hereinafter referred to as "Defendant," by information with premeditated first degree murder in count I, second degree unlawful possession of a firearm in count II, and unlawful possession of a controlled substance with intent to deliver in count III. CP 1-2. Counts I and III alleged that "the defendant, or an accomplice, was armed with a firearm." CP 1-2.

On October 24, 2012, the State filed an amended information, which changed count II to felony first degree murder, changed count III to first degree robbery, and added count IV, unlawful possession of a controlled substance with intent to deliver, and count V, second degree unlawful possession of a firearm. CP 183-85. *See* 10/12/12 RP 376[1]. Counts I through IV alleged that "the defendant, or an accomplice, was armed with a firearm." CP 183-85. *See* 10/12/12 RP 376. The defendant was arraigned on that information and entered pleas of not guilty. 10/24/12 RP 64-65.

On September 27, 2012, the court conducted a CrR 3.5 hearing at which Dr. Ray Hendrickson, 09/27/12 RP 10-56, Tacoma Police Officer Shelbie Boyd, 09/27/12 RP 56-74, Deputy Walton Fields, 09/27/12 RP 74-81, Tacoma Police Detective Steven Reopelle, 09/27/12 RP 81-93, 100-68, Tacoma Police Officer Jennifer Strain, 09/27/12 RP 94-100, Tacoma Police Officer Robert Baker, 10/4/12 RP 172-87, Tacoma Police Officer Joshua Boyd, 10/4/12 RP 187-203, and Detective Daniel Davis, 10/4/12 RP 203-54, testified. The defendant called Dr. Brent Oneal, 10/4/12 RP 255-315, but did not testify himself. 10/4/12 RP 315-16. After hearing

[1] The 15 consecutively-paginated volumes of the verbatim report of proceedings are cited RP [Page Number]; all others are cited [Date] RP [Page Number].

argument from the parties, 10/08/12 RP 321-68, the court held that defendant's statements were admissible at trial. 10/12/12 RP 374-75; CP 186-97. *See* 10/22/12 RP 113-32.

The court conducted a CrR 3.6 hearing. 10/22/12 RP 4-110, 10/23/12 RP151-292, 10/24/12 3-58. The State called Tacoma Police Sergeant Chris Karl, 10/22/12 RP 5-40, Tacoma Police Officer Joshua Boyd, 10/22/12 RP 41-67, Tacoma Police Officer Randy Frisbie, 10/22/12 RP 67-96, and Tacoma Police Sergeant Barry Paris, 10/22/12 RP 96-110. The defendant made an opening statement, 10/23/12 RP 151-55, and called Officer Frisbie, 10/23/12 RP 155-65, Katherine Horning, 10/23/12 RP 166-78, Noccoa Eller, 10/23/12 RP 178-95, and Tacoma Police Detective Gene Miller. 10/23/12 RP 196-200. After argument, 10/23/12 RP 221-92, 10/24/12 RP 3-55, the court held the police search of the garbage bin was lawful, and the subsequent search warrant properly issued, and denied the defendant's motion to suppress evidence obtained as a result. 10/24/12 RP 55-58; CP 198-204.

On December 17, 2012, the court heard the parties' motions in limine. 12/17/12 RP 11-22. After hearing argument, the court ruled that it

> s[aw] no ground for putting on an expert to go into detail with respect to Defendant's intellectual ability. I think that it's not relevant and it would be – it would not meet the needs of judicial economy in this case. And for those reasons alone, I think it is kept out,

> With respect to whether it qualified under ER 403, I do believe that parts of that rule apply in that, by putting on an expert, the jurors will be confused and misled, and in a sense, will be looking for a diminished capacity case which is not being pled or brought forward in this manner, so that bootstrapping would cause the juror confusion, and that would be another basis for excluding it.
>
> Now, I guess [the deputy prosecutor] can elect not to elicit testimony about the fact that [Defendant] was a special education student or that people that knew him considered him slow or tended to discount his testimony. However, those are facts and circumstances of the case, and schooling is of a nature that is allowed. So those things, if either party wants to raise them, they can be raised, but we're not going to have an expert in here and put undue emphasis on it. Mr. Clark is who Mr. Clark is.
>
> ....
>
> He's on disability and he's getting Social Security. Those are facts. I'm 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. On the other hand, there are lots of people that have disabilities for lots of different combinations of reasons, and we don't need to go through that.

12/17/12 RP 19-22. *See* 02/15/13 RP 19-22, RP 1417-19.

However, the court allowed further briefing, 12/17/12 RP 23-24, and on February 15, 2013, again heard the State's motion to exclude testimony regarding the defendant's alleged "mental deficiencies" as not relevant and unduly prejudicial. 02/15/13 RP 4-22.

The court clarified its earlier ruling, indicating that it would allow testimony that the defendant "did participate in special education and had

individual education programs," and that "he does receive SSI, and that is a reason why he doesn't work." 02/15/13 RP 15.

On March 13, 2013, the defendant again raised the issue, RP 496-504, and the court again affirmed its earlier ruling, holding that "I see no basis and no relevance in the expert's testimony absent a diminished capacity defense, which doesn't exist and has not been pled or brought forward." RP 504-05. The defendant again asked to "be able to get into why [he] is on SSI" during the trial itself, and the court again denied this motion. RP 564-68.

On March 7 2013, the parties began selecting a jury. RP 15.

After *voir dire*, the parties exercised peremptory challenges in open court by writing them on a piece of paper, and handing it to the court. RP 488-89. The courtroom was never closed. *See* RP 15-547. A jury was empanelled, sworn, and given initial instructions. RP 490-91, 539-47.

The parties gave their opening statements. RP 548, 551.

The State called Lashawnda Posey, RP 551-57, Tacoma Police Officer Randy Frisbie, RP 568-95, Tacoma Police Officer Joshua Boyd, RP 595-637, Tacoma Police Sergeant Barry Paris, RP 638-52, 664-85, Crime Scene Technician Shea Wiley, RP 685-738, Sergeant Chris Karl, RP 751-66, Forensic Scientist Johan Schoeman, RP 767-819, Noccoa Eller, RP 825-98, Tanya Bassett, RP 898-925, J.M., RP 926-48, Antionette

Williams, RP 949-77, Fred Woods, RP 995-1036, Tacoma Police Detective Terry Krause, RP 1037-46, Crime Scene Technician Lisa Rossi, RP 1049-1116, Pierce County Medical Examiner Dr. Thomas Clark, RP 1116-58, Tacoma Police Detective Gene Miller, RP 1166-1253, Tacoma Police Sergeant Peter Habib, RP 1272-80, Tacoma Police Detective Stephanie Avery, RP 1280-1314, Forensic Scientist Kristopher Kern, RP 1316-34, Forensic Scientist Susan Wilson, RP 1334-48, and Forensic Scientist Marion Clark, RP 1356-69.

During the State's case, the defendant moved to call Tacoma Public Schools records custodian Michaela Reeder to testify that the defendant had an individual education plan (IEP) and was in special education. RP 1255-56. The State offered no objection and the court granted the motion. RP 1257. The defendant also again moved to allow Reeder to testify as to why he was "on SSI." RP 1258.

The court again held that it would allow evidence that Defendant receives SSI to explain why he did not work, but would not allow testimony as to "the reasons why he receives SSI" because such testimony "would be confusing to the jury" in that "without pleading to diminished capacity and having the appropriate forensic testimony," such testimony would allow the defendant to "bootstrap into a defense that [he was] not pleading." RP 1268. The court concluded that "[i]f you wanted Oneal to

come in to talk about those issues, you should have pled diminished capacity." RP 1272.

The defendant filed a motion for discretionary review in this Court of some of the trial court's pretrial rulings, but that motion was denied. RP 1543-44.

After allowing the court to read stipulations into the record, the State rested. RP 1391-1394.

The defendant moved to dismiss count II, felony first degree murder, and count III, first degree robbery for insufficient evidence, but the court denied this motion. RP 1396-1406, 1410-17. *See* RP 1718.

The defendant called Detective Daniel Davis, RP 1430-52, Patrick Pitt, RP 1453-97, 1503-27, Corey McBride, RP 1548-49, and Kay Sweeny. RP 1550-1588.

The defendant testified. RP 1590-1687.

During his case in chief, the defendant made an offer of proof of Katherine Horning's proposed testimony. RP 1378-86. The court again held that

> Because we are not dealing with diminished capacity defense, I do not find any of this relevant. My motion (sic) in limine will allow you to indicate that [Defendant] graduated from high school and it was special ed. and that he does not work and he is on SSI and that's the reason he doesn't work or that – that comes together with not

> working. But you're not allowed to testify to anything in addition to that, except that my motion (sic) in limine did allow you to explain that, when he was in special ed. He was on an IEP, and that's an Individualized Education Plan.

RP 1389.

The defendant called Katherine Horning, RP 1688-93, and rested. RP 1700.

The court considered the State's proposed jury instructions. RP 1702-09, 1733-37. The defendant did object to giving instructions on felony murder and first degree robbery on the basis that such instructions were "not supported by the evidence," but did not object to the form of those instructions. RP 1705, 1717, 1718, 1728-32. The court gave those instructions. RP 1732; CP 274-335. The defendant noted that he

> objects to the Court not having dismissed the crime of robbery, but since the Court has already ruled that, I approve of the instructions pursuant to the Court's ruling.

RP 1737.

The court then turned to the defendant's proposed instructions and took the State's exceptions. RP 1709-13. The next day, the defendant requested instructions on excusable homicide, but the court refused those. RP 1717-28.

The court formulated its instructions, RP 1744-45, CP 274-335. Defendant did not take exception to the court's proposed instructions regarding first degree robbery. *See* RP 1745-47.

The court read its instructions to the jury, RP 1748; CP 274-335.

The parties gave their closing arguments. RP 1749-90, 1796-1808 (State's closing), RP 1813-33 (Defendant's closing), 1834-56 (State's rebuttal).

On April 17, 2013, the jury returned verdicts of guilty to first degree murder as charged in count I, first degree felony murder as charged in count II, first degree robbery as charged in count III, possession with intent to deliver a controlled substance as charged in count IV, and second degree unlawful possession of a firearm as charged in count V. RP 1864-68; CP 336-43. The jury also returned special verdicts indicating that the defendant was armed with a firearm at the time of the commission of the crimes charged in counts I through IV. RP 1368-72; CP 344-47.

On June 14, 2013, the court sentenced Defendant to 291 months in total confinement on count I, 57 months on count III, 20 months on count IV, and 12 months and one day on count V, plus 60 months for the firearm enhancement on count I, 60 months for the firearm enhancement on count III, and 36 months for the firearm enhancement on count IV for a total of 447 months in total confinement. CP 368-82; 06/14/13 RP 22-23. There

was no sentence for or reference made to count II. *See* CP 368-82.

On July 10, 2013, the defendant filed a timely notice of appeal. CP 399-414.

2. Facts

D.P. was sixteen years old when he was shot and killed on September 7, 2011. RP 552, 571. Detectives came to the home of his mother, Lashawnda Posey, to tell her the news. RP 552. She testified that she had just spoken to him the day before. RP 555. Posey went to the medical examiner's office and confirmed that her son had, in fact, been killed. RP 553-54.

On September 7, 2011, Noccoa Eller lived at 512 East 36th Street in Tacoma, Washington with Tanya Bassett and Bassett's three children. RP 826-27, 900, 926, 996-98. Fred Woods would also visit Bassett at the apartment and sometimes spend the night. RP 835, 900-01, 996-98. Eller testified that the defendant lived downstairs from her with his mother, Katherine Horning. RP 833-34.

She testified that after meeting with a social worker on September 7, she returned home at about 12:25 – 12:30 p.m. RP 836, 875. When she got back, one of Bassett's children was listening to the radio loudly while cleaning the kitchen. RP 837. Eller began to clean the bathroom, during which time she heard a "popping sound" like that of a firework. RP 838,

878-79. This occurred about 30 minutes after she started cleaning, at about 1:00 to 1:30 p.m. RP 889-90.

Bassett, who also described the noise as a "pop," like that of an exploding firework, testified that it woke her up. RP 901.

J.M., Bassett's son, testified that it sounded "like a gunshot." RP 931. He also told police it sounded like a gunshot or multiple gunshots and then someone hitting the wall and falling. RP 946-47.

Eller estimated that less than an hour later, while she was walking to the basement laundry room via an external staircase, she encountered the defendant. RP 839-40. He was wearing a yellow shirt and gloves at the time. RP 840-41. He had her garbage bin in the back doorway and told her that he was doing some spring cleaning. RP 842.

Eller continued to the laundry room, worked there for about ten minutes and returned up the stairs, encountering the defendant in the same position. RP 844. He asked her if she knew about "dope." RP 844. He told her that he needed help selling drugs to get money for school clothes. RP 844-45. He showed her some crack cocaine that he was keeping in a green M&M bottle. RP 844-45, 905, 928-29, 1004-05 (exhibits 40, 43). Eller estimated that the defendant had about 15 pieces of crack cocaine. RP 845-46.

She told him that she didn't know anybody, but that she would check with the people in her apartment upstairs. RP 844-45. When Eller returned to her apartment, she stopped at the open door of the room in which Bassett and Woods were located, and told them about her conversation with the defendant. RP 847-48. The defendant then came up to the apartment.[2] RP 848, 904, 1002

The defendant stated that a friend had just given him the cocaine and offered to give half of the profit from its sale to whomever helped him sell it. RP 849-50, 904-05, 1005. Woods testified that he looked at the crack, told the defendant he didn't know anyone that could help, and then warned the defendant about the defendant's potential criminal liability in possessing it. RP 849. Woods told him something like, "You get a bunch of deliveries for that." RP 1006.

The defendant then stated that he needed help getting rid of a body. RP 850, 1007-08. He said that a boy had "beat[] up his baby's mom and that his mom [and/or dad] had taught him to never let a man put his hands on his baby's mom." RP 850, 907. The defendant told them that he shot the boy in the guest room, in front of the closet. RP 851-52.

[2] Eller testified that Bassett had called out an open window for the defendant, RP 848, but Bassett denied this. RP 904.

He told them that he called the boy over to his house, told him to reach for something in his closet, and "popped him in the back of his head" with a "[d]euce deuce." RP 907. *See* RP 852. The term "deuce deuce" is street slang used to refer to a .22-caliber firearm, such as a pistol. RP 574, 907. The defendant told them that he had tossed the weapon in some bushes a couple blocks up. RP 852, 908.

When Eller asked him if he was playing a "sick game," he told her that the body was downstairs and she could go look. RP 850-51. He said there was only a small amount of blood on the carpet. RP 852. He said he wanted to get rid of the body before his mother got home at 5:00. RP 853, 907, 1008.

Bassett told the defendant to give him about ten minutes to gather her thoughts and that she would come down and help him in an effort to get him out of their apartment. RP 909. The defendant said "okay," and walked out the back door, at which time Bassett locked it. RP 909.

Eller's cousin, Antinoette Williams, arrived in the parking area just before this, at just before 3:00, to take Eller grocery shopping. RP 861, 910, 956-59. When Eller came out to Williams' car, Eller appeared nervous. RP 960. Williams asked her what was wrong, and Eller told her about what the defendant had said. RP 862.

While Eller was speaking with Williams, the defendant briefly returned to the apartment to confirm that Bassett was going to help him dispose of the body. RP 911. Bassett told him she would be there in a minute and he left. RP 912.

Eller then returned to her apartment and then the laundry room. RP 863. As she was going to the laundry room, the defendant opened his door. RP 863. Eller again asked him about what he had told them. RP 863. The defendant initially said he was just joking, but when asked again, he said there was a stain in the room. RP 863. He told her the body was in the garbage can, but that he needed something to put over it. RP 863.

Eller went to the laundry room and the defendant followed her. RP 864. Not taking him seriously, she suggested that he use the box of trash and lint his mother kept in the laundry room to place over the body. RP 864. Eller testified that she didn't believe the defendant because "it just didn't seem like something that would be in his nature to ever do." RP 895.

She then walked with him to the garbage bins to dispose of an empty bottle of laundry detergent. RP 865. The defendant took the box from the laundry room and opened the bin. RP 865.

When he did, Eller saw a body inside the garbage can. RP 865-66. There was "an arm that might have been bent back" and feet without

shoes. RP 866. The body was clothed in dark blue pants. RP 866. Eller later realized that she knew the victim's family from when she and they had lived at the Widmark Apartments. RP 871-72.

She told Defendant that if anyone asked, he didn't tell her. RP 865. The defendant asked her not to say anything to his mother. RP 865.

When Eller returned to her apartment, she was "frantic, screaming, and banging on the door." RP 912. *See* RP 1012. She told Bassett that they needed to leave. RP 912.

Woods left the apartment, and Eller, Bassett, and Bassett's children left the apartment along with Williams, in Williams' car soon thereafter. RP 867-69, 966, 1021-22. They ultimately went to McKinley Park, where they saw police officers on the opposite side of the park. RP 869, 967.

Tacoma Police Officer Randy Frisbie testified that he was at the park assisting members of the narcotics unit, including Sergeant Karl, in a vehicle stop. RP 571-73, 577.

Eller, Bassett, and Williams contacted Sergeant Karl, and Karl had Frisbie step over. RP 571-72, 577-78, 870, 914-15, 928, 968-70. According to the police officers, the women reported a possible homicide that had occurred at an apartment complex at 510 and 512 East 36th in Tacoma, RP 572-73, indicating that a neighbor had borrowed their garbage can and placed a body in it. RP 754.

The women identified the suspect as "Anthony," a mixed-race male who was about 19 years of age, with a tattoo of his name on his left arm, who was possibly wearing a yellow shirt. RP 573. Frisbie ultimately transported Eller and Bassett to headquarters for interviews by detectives. RP 591-94, 870-71, 915, RP 1439, 1449.

Tacoma police Sergeant Karl and Officer Boyd responded to that apartment, arriving there at about 4:29 p.m. RP 573, 578, 683, 754.

They learned that the body had been placed in a garbage can at 510/512 East 36th Street in Tacoma that had a "512" printed on top. RP 599-605, 756. Sergeant Karl found and opened that bin. RP 605-06, 757.

Inside, officers saw a body with the feet sticking out of the top of the bin. RP 606-07, 640, 757. Detective Miller specified that the bin contained "a bleach container, [a] couple of detergent boxes, miscellaneous stuff, dryer lint, and.... in the corner, what looked to be a couple of feet that were there wearing socks, and then the body below that." RP 1179-80. *See* RP 1200. Officers called for the fire department and secured the scene, by among other things, putting up crime scene tape. RP 607, 643, 757.

Emergency medical personnel checked the body for a pulse and determined that the person in the garbage bin was deceased. RP 642.

Officer Boyd subsequently saw the defendant step out of 510 East 36th Street holding a telephone and a piece of pizza. RP 611. *See* RP 1180-82. Officers instructed him, at gun point, to lay down on the ground. RP 610. The defendant was then handcuffed, taken into custody, and placed in Officer Brown's patrol car. RP 610-12. Officer Boyd gave him ***Miranda*** warnings, but did not question or speak to him further. RP 612. Detectives Davis and Reopelle subsequently interviewed the defendant. RP 1446-51.

At about 5:00 p.m., officers performed a security sweep of the defendant's apartment to assure that there were no other victims or suspects inside. RP 613, 628-29, 635, 645-46, 684, 760, 1275. Sergeants Karl, Habib, Paris, and Officers Boyd and Joseph conducted that sweep. RP 760, 1275-76. They found a locked closet door in the corner of one room. RP 646, 1276. It had a throw rug in front of it, which was higher than the bottom of the door. RP 647. Sergeant Paris moved it so that he could open the door. RP 647, 676, 1276-77. When he did so, he saw what appeared to be three different blood stains on the carpet underneath that rug. RP 647-49. *See* RP 616-19, 630-31 (Exhibits 11, 12, 13). The blood on the carpet "was smeared as though someone had tried to mop it up or clean it up." RP 667. *See* RP 1246.

Paris then pried the door open with a pocketknife, looked inside, and finding no victims, left. RP 649-50. No suspects or victims were found inside the apartment. RP 650-51, 761-62, 1182, 1277-78.

After the sweep was complete Sergeant Karl briefed homicide Sergeant Durocher as to what had occurred thus far. RP 762.

At about 7:00 p.m., Detective Miller, lead homicide detective, asked Detective Avery to obtain a search warrant for the apartment and the surrounding area, which she did, shortly before 8:30 p.m. RP 1192-95,

Crime Scene Technician Shea Wiley was called to the scene at approximately 6:08 p.m. RP 689, 725. She was joined by Crime Scene Technician Lia Rossi. RP 690, 1049-50. They split duties: Wilely took photos of the crime scene and prepared crime scene diagrams, and Rossi took video and collected the evidence. RP 726, 1054.

Wiley first took photographs of the exterior of the residence and garbage containers, which were admitted and published at trial. RP 691-700 (exhibits 19-32).

Detective Miller, assisted by Wiley and Rossi removed the items in the garbage bin on top of the body, and photographed, and documented these. RP 692-93, 700, 1059, 1199-1200. Among these items were bleach containers, detergent containers, and a pair of shoes. RP 692-93, 700, 1059.

Medical Examiner Investigator Ryann Thill and Detective Miller then removed the body, and placed it on a sheet. RP 1200. The victim was shoeless and had an apparent gunshot wound to the back of his head. RP 1201. Bags were placed on the hands and the body was rolled in the sheet, placed in a body bag, and transported to the Medical Examiner's office. RP 1201. The victim's shoes, a black jacket, and a white garbage bag containing miscellaneous garbage was found underneath the body and collected. RP 1202

Detectives Miller and Avery, assisted by Wiley and Rossi then searched the interior of the apartment. RP 1202-03. Avery found a red substance on a mat in the back hallway, but it tested negative for blood. RP 1203-04, 1289. Detectives Avery and Miller noticed the blood in the doorway in the bedroom, RP 1205, 1294, and Detective Miller noticed apparent blood spatter on the door. RP 1205-07. Miller removed the portion of the carpet which was stained by cutting it out with a knife and requested that forensics personnel evaluate the spatter. RP 1208, 1213. Miller searched for but did not find any additional bullet strikes. RP 1209.

Avery found a fired cartridge casing on the floor of the closet near the blood stain. RP 1299, 1302-04. *See* RP 715-16, 720.

Miller also noticed one spot in the living room and two in the hallway where the normal carpet color was "extremely light in comparison

to the carpet around them." RP 1211-12. Given the bleach bottles in the garbage, he believed there could have been an attempt to "clean up evidence." RP 1212. However, there was no smell of bleach in these areas. RP 1212.

Miller found a yellow shirt in the small bedroom with apparent blood staining and a pair of black gloves. RP 1220-21. In the bathroom "affiliated" with that bedroom, Miller found medicine bottles in the name of "Anthony Clark." RP 1221.

Wiley took photographs of the interior of the residence, beginning at 11:09 p.m., and at least some of these were admitted and published at trial. RP 701-06 (exhibits 33-44). Among the things Wiley photographed were the carpet with the apparent blood stains, which was subsequently removed from the residence (exhibit 105), a handgun and a green container, which were found inside the tank of a residence toilet, and a towel with reddish stains found in a clothes hamper. RP 703-06, 1218-19. Miller believed these stains to be blood. RP 1220.

The green container held "a number of individually wrapped pieces of what [Miller] believed to be rock cocaine." RP 720, 1218-19. Finally, Wiley took several photographs of two bedrooms that were admitted and published at trial. RP 708-13 (exhibits 12, 45-52, 55).

Among the objects photographed were a pair of gloves and a cartridge casing. RP 711-16, 1299-1301.

Wiley prepared crime scene diagrams depicting the location of evidence found that were admitted and published at trial. RP 717-21, 1062-64 (exhibit 53, 54). This included taking measurements of the scene. RP 727, 1062.

Rossi took video of both the exterior and interior of the apartment. RP 1055-58, 1061 (exhibit 16). She then collected items of evidence including empty bottles of bleach (exhibits 20, 75, 77, 79), bottles of detergent (exhibits 78, 80), apparent lint from a clothes dryer, a box, and other miscellaneous trash (exhibit 81), a McDonald's restaurant receipt and wrapper (Exhibit 82), a black jacket (exhibit 83), a baseball cap (exhibit 84), two shoes (exhibit 85), a white trash bag that had held the items recovered from the garbage bin (exhibit 86), a piece of the carpeting containing the apparent blood stain (exhibit 87), a white bath towel (exhibit 89), a bat with screws through it (exhibit 91), a Jennings .22-caliber semiautomatic handgun (exhibit 90, 96), a plastic M&Ms container (exhibit 88), a yellow t-shirt (exhibit 91), a pair of jeans (exhibit 93), a pair of black gloves (exhibit 94), and a cartridge casing (exhibit 95). RP 1065-82, 1085-91, 1096, 1220. The casing was recovered from inside the closet. RP 1091.

Rossi performed a presumptive blood test on the apparent blood stain on the carpet and found that it contained blood. RP 1098.

Tacoma Police drug unit Detective Terry Krause examined the substance found in the green container, and found that there were 15 pieces of crack cocaine, worth about $20 a piece if sold on the street. RP 1038, 1045 (exhibit 88). Moreover, the parties stipulated "[t]hat Plaintiff's Exhibit Number 88 contained 15 plastic packets, each containing off-white chunkie material. The total weight of the material was approximately 2.5 grams. The material from one packet was analyzed by Washington State Patrol Forensic Scientist Maureena Dudchurs [sic] and found to contain cocaine. Cocaine is a controlled substance." RP 1392.

Forensic Scientist Johan Schoeman of the Washington State Patrol Crime Laboratory, examined the firearm recovered from the defendant's residence, marked at trial as exhibit 109, and found it to be a fully-functional, single-action, semiautomatic Jennings .22-caliber pistol, RP 780, 783-84, 786-92. *But see* RP 1570. That pistol had an operable safety and ejected spent cartridge casings to the right side of the weapon. RP 782-83, 789, 1571. The pistol had a trigger pull of approximately 8.5 pounds, which Schoeman testified was a relatively "heavy trigger pull for a single action pistol." RP 790-91.

Schoeman also examined the spent cartridge case, fired bullet, and bullet fragment found at the scene. RP 795 (exhibit 95, 97). He found that the spent cartridge case had been fired from the pistol found at the scene. RP 808. Schoeman also concluded that the bullet was .22-caliber but testified that it was damaged too badly to conclusively identify it as having been fired from the pistol recovered at the scene. RP 800-01.

Finally, Schoeman testified that the pistol, given its caliber, was not as loud when fired as compared to other higher caliber firearms. RP 816-17.

The parties stipulated "[t]hat on September 7, 2011, the defendant... was free on personal recognizance pending trial for a serious offense." RP 1392.

Washington State Crime Laboratory Forensic Scientist Kristopher Kern examined the pistol, after stripping it, for blood staining, but found none. RP 1325-27. However, he testified that submerging the pistol in water could have washed away any staining. RP 1327.

He did find "a small, kind of curly brownish-black hair" inside the slide of the weapon, and retained it for further analysis. RP 1327-28.

Forensic Scientist Susan Wilson, an expert on trace evidence, performed that analysis. RP 1335-36, 1338-39. She found that the hair had no root, and therefore that nuclear DNA testing would not be possible. RP

1339, 41, 44. *See* RP 1362-63. However, she testified that mitochondrial DNA analysis might be possible, and the hair was later sent for such analysis. RP 1344-46. Wilson testified that the hair's visible characteristics were consistent with "Negroid" hair, though she noted that this was an anthropological classification and not necessarily related to what is commonly known as race in humans. RP 1342-43.

Kern also examined the yellow t-shirt, found two areas of blood stains on the lower back of that shirt, and concluded that one was a contact transfer stain and one was a saturation stain. RP 1329-30. A contact transfer stain is a blood stain formed when a blood-bearing source comes into contact with a "clean source." RP 1330-31. A saturation stain is a contact transfer stain with a volume of blood sufficient to saturate the entire fabric. RP 1331-32.

Forensic Scientist Marion Clark obtained a DNA profile of the blood taken from the carpet and the yellow t-shirt and compared them to a reference sample from the victim RP 1368. She found that they matched. RP 1368. Clark testified that "[t]he estimated probability of selecting an individual at random from the United States population with a profile matching that of the evidence is approximately one in 13 sextillion." RP 1369.

Pierce County Medical Examiner Dr. Thomas Clark testified that his office performed an autopsy on D.D.'s body on September 11, 2011. RP 1124. Dr. Clark found a single gunshot wound located on the back of D.D.'s head. RP 1125. He found a single entrance wound on the back of the head six and a half inches from the top of the head and one-half inch to the left of midline. RP 1127. There was no exit wound. RP 1127. Dr. Clark found that the bullet moved forward and upward, passing through and fracturing the left occipital bone, continuing through the left cerebellum, one of the back lobes of the brain, through the brain stem, which connects the brain and spinal cord, and continued along the base of the brain through the left parietal lobe, and came to rest at a junction between the parietal lobe and the frontal lope. RP 1131-32.

Dr. Clark removed the small copper-washed bullet and preserved it as evidence. RP 1132, 1223 (exhibit 97). According to Dr. Clark, the "gunshot wound caused extensive damage to the brain as well as the skull" and "would have caused immediate unconsciousness, and death would have ensued shortly thereafter." RP 1139. He testified that the manner of D.D.'s death was homicide. RP 1142.

The defendant introduced testimony from his high school teacher that he was in special education and had an IEP or Individual Education Plan. RP 1549.

The defendant testified that D.D., whom he knew as "Shorty," came to his residence on September 7, 2011 to listen to music and to log onto Facebook. RP 1591-92, 1630. After showing D.D. his Facebook profile, the defendant prepared a pizza for himself. RP 1634.

The defendant testified that D.D. then opened his coat and showed him an "M&M container with dope in it" and a gun. RP 1635, 1642. The defendant specified that he believed the dope was crack cocaine. RP 1643. The defendant identified exhibit 42 as the handgun that D.D. had in his possession. RP 1643. He identified the pistol's magazine as a "magazine" or "clip." RP 1643.

The defendant testified that they went into the spare bedroom to steal jewelry from his mother's jewelry box, which was stored in the closet in the spare bedroom. RP 1592-93, 1674. He was planning to pawn the jewelry without his mother's permission. RP 1593. The defendant testified that, while in the bedroom, D.D. again took out the pistol, removed its magazine, and handed the weapon to the defendant. RP 1594, 1648-49. The defendant testified that D.D. then went into the closet to get the jewelry box. RP 1594. He testified that he was sitting on the ground, "messing around with the gun." RP 1595, 1652, 1659. The defendant testified that, during this time, "the gun went off," and D.D. fell to the ground. RP 1595-96, 1658. He testified that he went over to him, checked

for a pulse, and attempted cardiopulmonary resuscitation. RP 1596, 1658. The defendant testified that he then tried to clean up the blood on the carpet with the white towel police found in the bathroom hamper. RP 1680-81.

He testified that he did not intend to shoot D.D. RP 1596, 1657, 1663-64. However, the defendant admitted that he aimed the pistol at the ceiling of the closet, where D.D. was located, and thus that D.D. was directly in his line of fire. RP 1664.

The defendant denied taking the crack cocaine from D.D. after he shot him. RP 1664-66. He then testified that he did take the green M&M container containing the crack to Eller's apartment. RP 1667.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE HAS FAILED TO SHOW THAT HIS COUNSEL'S PERFORMANCE, EVEN IF DEFICIENT, PREJUDICED THE DEFENSE.

"Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X)." ***State v. Yarbrough***, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009); ***State v. Johnston***, 143 Wn. App. 1, 177

P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed *de novo*. ***Yarbrough***, 151 Wn. App. at 89.

"Washington has adopted the ***Strickland*** test to determine whether a defendant had constitutionally sufficient representation." ***State v. Cienfuegos***, 144 Wn.2d 222, 25 P.3d 1011 (2001) (*citing* ***State v. Bowerman***, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also* ***State v. McFarland***, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "First, the defendant must show that counsel's performance was deficient" and "[s]econd, the defendant must show that the deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687; ***Cienfuegos***, 144 Wn.2d at 226-27. 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. Hendrickson***, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); ***In Re Personal Restraint of Rice***, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). "A failure to establish either element of the test defeats an ineffective assistance of counsel claim." ***Riofta v. State***, 134 Wn. App. 669, 693, 142 P.3d 193 (2006).

The first prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. "To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness." ***Johnston***, 143 Wn. App. at 16. "The reasonableness of trial counsel's performance is reviewed in light of all the circumstances of the case at the time of counsel's conduct." *Id.*; ***State v. Garrett***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). "Competency of counsel is determined based upon the entire record below." ***State v. Townsend***, 142 Wn.2d 838, 843, 15 P.3d 145 (2001) (*citing* ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); ***State v. Gilmore***, 76 Wn.2d 293, 456 P.2d 344 (1969)).

"To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective." ***Yarbrough***, 151 Wn. App. at 90. This presumption includes a strong presumption "that counsel's conduct constituted sound trial strategy." ***Rice***, 118 Wn.2d at 888-89. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." ***Yarbrough***, 151 Wn. App. at 90 (*citing* ***State v. McNeal***, 145

Wn.2d 352, 362, 37 P.3d 280 (2002), ***State v. Adams***, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

An ineffective assistance of counsel claim must not be allowed to "function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the ***Strickland*** standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." ***Harrington v. Richter***, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011). "It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Id.* (*quoting* ***Strickland***, 466 U.S. at 689). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.* (*quoting* ***Strickland***, 466 U.S. at 690).

This Court "defer[s] to an attorney's strategic decisions to pursue, or to forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances." ***Riofta***, 134 Wn. App. at 693. If reasonable under the circumstances, trial counsel need not investigate lines of defense that he has chosen not to employ." *Id.*

With respect to the second prong, "[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the

outcome would have differed." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Cienfuegos***, 144 Wn.2d at 229.

In the present case, the defendant argues that his conviction for first degree murder should be reversed because his trial counsel was ineffective in failing to object "to jurors being told this case did not involve the death penalty." BOA, p. 11. The record shows otherwise.

Prior to jury selection, the following exchange occurred between the court and the parties:

> THE COURT: All right. I just want to share with counsel, out of an abundance of caution, my experience in another murder case that I've had, and that is that the voir dire has been confused because when they hear murder they believe it's a capital death penalty case. And so I didn't notice anything in your questionnaire, not that there should have been, but in case you haven't thought of that confusion, I thought I'd put it out there so you can handle it however you wish to as things progress.
> [DEPUTY PROSECUTOR]: What I'm presuming, by the Court's comments, you surely wouldn't be opposed to either party identifying for the jury that this was not, in fact, a capital case.
> THE COURT: I would think that would be appropriate whenever counsel believes it would be appropriate. And I don't know, you may get responses on your questionnaire that will make it clear that that is one of the confusions, but I felt that you should have that information, if it is a confusion, but at some point, maybe that information needs to be clarified for everyone.
> Okay. Is there anything else that Counsel has for the Court?

RP 39.

During individual questioning of Juror number 11, which took place outside the presence of the remainder of the venire. Juror 11 expressed some concern about sitting in judgment of another person, stating that s/he may not be comfortable if the defendant is found guilty. RP 119-20. The following exchange took place, again outside the presence of the remainder of the venire:

> [DEPUTY PROSECUTOR]: What causes you concern. I mean, your role as the juror –
>
> JUROR NO. 11: Right.
>
> [DEPUTY PROSECUTOR]: --is to be the fact finder, the trier of fact in the case. And in the event of a conviction, ***you have nothing whatsoever to do with punishment, if any, that could be imposed.*** And that would not be your responsibility. So—
>
> JUROR NO. 11: Oh, the punishment part is not?
>
> [DEPUTY PROSECUTOR]: ***One thing we haven't told all of you early on is this is not a capital punishment case. It's not a death penalty case.*** So, but as juror, you don't have a role, except for in that world, of figuring out what the punishment. Your job is to determine that the State proved the facts to you beyond a reasonable doubt.
>
> So knowing that, does that change it in any way for you, or do you still have reservations about, gosh, I maybe –whatever the verdict I gave, you know, did I do the right thing? Are you going to be wondering.
>
> JUROR NO. 11: Possibly. Yeah, possibly. Because you're talking about someone's life, you know, from that day forward that you give the verdict. So, yeah, I possibly could have.

RP 120-21.

During voir dire of the entire panel, a deputy prosecutor made the following statement to the venire:

> Everybody heard when these charges were read that murder is alleged in this case. ***This is not a death penalty case, and this jury will never be asked to decide punishment, if anybody was concerned about that.***
>
> So as we go forward, my first questions to you individually will really be about how you feel about being a juror in a murder case, even though you wouldn't decide punishment, and I'm going to start with some of the back row people.

RP 372. He then inquired of specific members of the venire regarding their feelings about serving as a juror in a murder trial. *See* RP 372-81.

Later, the other deputy prosecutor assigned to the case stated, in conversation with a venire member during general voir dire, that

> [i]n our system, the jury has nothing whatsoever to do with the punishment except in a capital case. We've talked about how that's not at issue here.

RP 419.

The defendant's attorney did not object to these statements. *See* RP 120-21, 372, 419. There was no further mention of the possible punishment. *See* RP 1-1876.

Because "'[t]he question of the sentence to be imposed by the court is never a proper issue for the jury's deliberation, except in capital cases,'" "the jury in a noncapital case may not be informed about the penalty for the charged crime" ***State v. Townsend***, 142 Wn.2d 838, 846, 15 P.3d 145

(2001) (*quoting* ***State v. Bowman***, 57 Wn.2d 266, 271, 356 P.2d 999, 1002 (1960)); ***State v. Hicks***, 163 Wn.2d 477, 487, 181 P.3d 831 (2008). Moreover, the Supreme Court has "declined to recognize a distinction between a court or counsel-initiated and a juror-initiated discussion of the inapplicability of the death penalty." ***State v. Hicks***, 163 Wn.2d 477, 181 P.3d 831 (2008) (*citing* ***State v. Mason***, 160 Wn.2d 910, 929, 162 P.3d 396 (2007)).

Hence, trial "counsel's failure to object to [an] instruction" that a case "does not involve a death penalty," may "f[a]ll below prevailing professional norms. ***Townsend***, 142 Wn.2d at 844-47. *See* ***Mason***, 160 Wn.2d at 488. *But see* ***State v. Rafay***, 168 Wn. App. 734, 774-81, 285 P.3d 83 (2012).

In the present case, even assuming *arguendo* that counsel's failure to object to the deputy prosecutor's statements during *voir dire* that this was not a death penalty case was deficient performance, Defendant has and can not show prejudice for at least two reasons.

First, although the defendant argues that "[t]he State's case for premeditated murder was not overwhelming," BOA, p. 15-16, here as in ***Townsend***, "[t]here was ample evidence of premeditation," such that there is no "reasonable probability that the outcome [of the trial] would have differed," ***Riofta***, 134 Wn. App. at 693, even had trial counsel objected.

"Premeditation is 'the deliberate formation of and reflection upon the intent to take a human life' and involves 'the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." ***Townsend***, 142 Wn.2d at 848 (*quoting* ***State v. Gentry***, 125 Wn.2d 570, 597-98, 888 P.2d 1105 (1995) (*quoting* ***State v. Ollens***, 107 Wn.2d 848, 850, 733 P.2d 984 (1987))). *See* CP 274-335 (instruction no. 10).

Three witnesses heard the defendant say something to the effect that a boy had "beat[] up his baby's mom and that his mom [and/or dad] had taught him to never let a man put his hands on his baby's mom." RP 850, 907. The defendant told them that he called the boy over to his house, told him to reach for something in his closet, and "popped him in the back of his head" with a "[d]euce deuce," that is, a .22-caliber pistol. RP 907, RP 574, 907. *See* RP 852.

The defendant himself testified that although he could have stepped on the shelf in the closet and accessed jewelry that he intended to steal at anytime, he had the victim come to his apartment, enter the closet, turn his back to him, and climb up the shelves of the closet, all while the defendant was holding a pistol. RP 1647-53.

The defendant admitted that he then aimed the pistol at the ceiling of the closet, where the victim was then located, and that the victim was "directly in his line of fire" when he fired that pistol. RP 1664.

Thus, the defendant, at least in his conversation with Eller, Bassett, and Woods disclosed his "'the deliberate formation of and reflection upon the intent to take a human life.'" ***Townsend***, 142 Wn.2d at 848. Moreover, given that Defendant called the victim to his house, apparently formulated a rouse to have the victim turn his back to him, and only then shot him, he indicated that he engaged in "'the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." ***Townsend***, 142 Wn.2d at 848. Therefore, "[t]here was" here, as in ***Townsend***, "ample evidence of premeditation." *Id.*

Given such evidence, there is no "reasonable probability that the outcome [of the trial] would have differed," ***Riofta***, 134 Wn. App. at 693, even had the defendant's attorney objected to the deputy prosecutor's statements in voir dire.

This is particularly evident when one considers that the objectionable statements amounted to four sentences, only three of which were heard by the actual trial jury, CP 418-22 (jury panel selection list), in a trial the transcript of which spans 1,859 pages. *See* RP 15-1874. Given the evidence discussed above and the fact that "[c]ompetency of counsel is

determined based upon the entire record below," ***Townsend***, 142 Wn.2d at 843, there is simply no "reasonable probability that the outcome [of the trial] would have differed." ***Riofta***, 134 Wn. App. at 693.

The second reason there was no prejudice in this case is that the court's instructions to the jury eliminated any real possibility of such prejudice. The Court instructed the jury that "the lawyers' statements are not evidence," and that it "must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 274-335 (instruction no. 1). In the same instruction, the jury was told

> You have nothing whatsoever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

Because jurors are presumed to follow the court's instructions, *see, e.g.*, ***State v. Stein***, 144 Wn.2d 236, 247, 27 P.3d 184 (2001), the jury must be presumed to have followed these instructions. If they did, they would have disregarded the prosecutor's statements regarding this not being a death penalty case, and not allowed those statements to affect their decision.

Therefore, there is no "reasonable probability that the outcome [of the trial] would have differed," ***Riofta***, 134 Wn. App. at 693, had the

defendant's attorney objected to the deputy prosecutor's statements in voir dire. As a result, even assuming his trial counsel's performance was deficient, the defendant cannot show "that the deficient performance prejudiced the defense." ***Strickland***, 466 U.S. at 687.

Thus, Defendant cannot show ineffective assistance of counsel, *see* ***Riofta***, 134 Wn. App. at 693, and his convictions should be affirmed. *But see* § C(4) *infra*.

2. DEFENDANT'S RIGHT TO PRESENT A DEFENSE WAS SUSTAINED BECAUSE THE TRIAL COURT PROPERLY EXCLUDED IRRELVANT EVIDENCE OF THE DEFENDANT'S "MENTAL LIMITATIONS."

The Sixth Amendment to the United States Constitution and Article 1, Section 22 of the Washington State Constitution "grant criminal defendants two separate rights: (1) the right to present testimony in one's defense, and (2) the right to confront and cross-examine adverse witnesses." ***State v. Hudlow***, 99 Wn.2d 1, 14, 659 P.2d 514 (1983) (internal citations omitted). Although a defendant "does have a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence." ***State v. Aguirre***, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010).

In other words, "'[a] defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence

that is not otherwise inadmissible.'" ***State v. Rafay***, 168 Wn. App. 734, 795, 285 P.3d 83 (2012) (*quoting* ***State v. Rehak***, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)).

Hence, "a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." ***State v. Mee Hui Kim***, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (*quoting* ***State v. Thomas***, 150 Wn.2d 821, 857, 83 P.3d 970 (2004) (*quoting* ***State v. Hudlow***, 99 Wn.2d 1, 15, 659 P.2d 514 (1983))); ***Washington v. Texas***, 388 U.S. 14, 16, 87 S. Ct. 1920 (1967).

If properly preserved for appeal, a trial court's decision regarding the admissibility of testimonial evidence will only be reversed for a manifest abuse of discretion. ***State v. Aguirre***, 168 Wn.2d 350, 361, 229 P.3d 669 (2010).

However, such a decision may be affirmed on any ground the record adequately supports even if the trial court did not consider that ground. ***State v. Costich***, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

In the present case, the defendant argues that "[t]he court's exclusion of mental disability evidence deprived [him] of his constitutional right to present a complete defense." BOA, p. 18, 18-42. The record shows otherwise.

First, it shows that the trial court did not entirely exclude such evidence. The court ruled that it

> ***s[aw] no ground for putting on an expert to go into detail with respect to Defendant's intellectual ability. I think that it's not relevant*** and it would be – it would not meet the needs of judicial economy in this case. And for those reasons alone, I think it is kept out,
>
> ***With respect to whether it qualified under ER 403, I do believe that parts of that rule apply in that, by putting on an expert, the jurors will be confused and misled, and in a sense, will be looking for a diminished capacity case which is not being pled or brought forward in this manner, so that bootstrapping would cause the juror confusion, and that would be another basis for excluding it.***
>
> Now, I guess [the deputy prosecutor] can elect not to elicit testimony about the fact that [Defendant] was a special education student or that people that knew him considered him slow or tended to discount his testimony. However, those are facts and circumstances of the case, and schooling is of a nature that is allowed. So those things, if either party wants to raise them, they can be raised, but we're not going to have an expert in here and put undue emphasis on it. Mr. Clark is who Mr. Clark is.
>
> ....
>
> He's on disability and he's getting Social Security. Those are facts. I'm 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. On the other hand, there are lots of people that have disabilities for lots of different combinations of reasons, and we don't need to go through that.

12/17/12 RP 19-22 (emphasis added). In its ultimate written order, the court held, in relevant part that:

> ***Any testimony regarding the defendant's background shall be limited to the fact that the defendant (a) had an Individual Education Plan (IEP) and participated in Special Education classes in school (b) did not work and (c) received SSI benefits***. The testimony of Dr. O'Neal is irrelevant and therefore, excluded. There shall be no

> mention or reference to developmental disability, mental retardation, intelligent quotient, premature birth, low birth weight, defendant being born deaf and blind and with perforated intestines that required surgery to close, defendant being hospitalized for six months after birth, delays in sitting, walking, speech, or toileting milestones, use of sign language before using speech, psychological examinations, and medications administered for ADHD.

CP 227-28 (emphasis added).

Thus, evidence that the defendant has an IEP and was in special education, which implied, if not entailed, that he suffered from a "mental disability" was ruled admissible, and in fact admitted at trial.

The record also shows that the trial court's ruling was proper.

Under ER 402, "[e]vidence which is not relevant is not admissible." '"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.

While the defendant contends that evidence of his mental retardation "was relevant to whether the State proved premeditation for first degree murder, intent for second degree murder, or recklessness for manslaughter, BOA, p. 31-39, the procedural posture of this case dictated otherwise. The only way in which such evidence would have been relevant is if defendant had asserted a diminished capacity defense.

A diminished capacity defense is one in which the defendant "produce[s] expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." ***State v. Atsbeha***, 142 Wn.2d 904, 914, 16 P.3d 626, 631-32 (2001). *See* ***State v. Cienfuegos***, 144 Wn.2d 222, 227, 25 P.3d 1011 (2011) (*quoting* ***State v. Griffin***, 100 Wn.2d 417, 418-19, 670 P.2df 265 (1983)).

In this case, the defendant admits that evidence of his "mental limitations was not relevant to a diminished capacity defense because no such defense was presented," but nevertheless argues that it was relevant to whether he "actually had the requisite mens rea at the time of the act." BOA, p. 32. He contends that his mental limitations "made it less probable" that he actually formed the requisite mental states for the crimes charged. BOA, p. 32-39. The problem with this argument is that the only way in which Defendant's "mental limitations" could have made it less probable that he formed the requisite mental states is by diminishing his capacity to form such states, and this, regardless of how defendant characterizes it here, is a diminished capacity defense.

Because defendant never asserted such a defense, evidence of his mental limitations was not relevant and not admissible. *See* BOA, p. 32. This is particularly true given that defendant never proffered or presented

evidence beyond the mere existence of his mental limitations. *See* RP 15-1874. To make evidence of a mental limitation relevant, the defendant must do more than show that he had that limitation; he must show, through expert testimony, that this limitation diminished his capacity to form the requisite *mens rea*. As the Supreme Court has stated:

> It 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. The opinion concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged.

State v. Atsbeha, 142 Wn.2d at 921. *See* ***State v. Greene***, 139 Wn.2d 64, 73-74, 984 P.2s 1024 (1999).

Because defendant failed to present such an opinion here, the trial court properly excluded the evidence in question as not relevant under ER 402.

Although the defendant argues that "[e]vidence of [his] mental retardation was also relevant to 'the jury's evaluation of [his] demeanor and credibility as a witness at trial," RP 31, 38, sufficient evidence of this condition was before the jury to allow it to evaluate his demeanor and credibility.

The jury heard that the defendant had been in special education and had an IEP or Individual Education Plan while in school. RP 1549.

The jury heard his mother's testimony that, despite being twenty years of age, he was not allowed to have anyone at home with him when she was not present. RP 1691. These are factors from which a jury could quite reasonably infer a mental limitation sufficient to explain an unusual demeanor on or off the stand. In fact, defense counsel used such evidence in closing to make this point apparent to the jury: "Would I characterize [the defendant] as a man? No. You're talking about a 20 year old who had just graduated from special education." RP 1816.

The admission of the excluded testimony, that is evidence of "developmental disability, mental retardation, intelligent quotient, premature birth, low birth weight, defendant being born deaf and blind and with perforated intestines that required surgery to close, defendant being hospitalized for six months after birth, delays in sitting, walking, speech, or toileting milestones, use of sign language before using speech, psychological examinations, and medications administered for ADHD," would have *not* have made Defendant's credibility "more probable or less probable than it would be without the evidence." ER 401. Therefore, it was not relevant under ER 401, and hence, not admissible under ER 402, and properly excluded by the court below.

However, even if the excluded evidence were to be considered relevant, it would have been properly excluded under ER 403.

Under that rule,

> [a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by ***the danger of unfair prejudice, confusion of the issues, or misleading the jury***, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403 (emphasis added).

The trial court here held that "[w]ith respect to whether it qualified under ER 403, I do believe that parts of that rule apply in that, by putting on an expert, the jurors will be confused and misled, and in a sense, will be looking for a diminished capacity case which is not being pled or brought forward in this manner, so that bootstrapping would cause the juror confusion, and that would be another basis for excluding it." RP 12/17/12 RP 19-22.

The court was correct. It's not necessary, as Defendant asserts, that jurors "know anything about the technical aspects of criminal law" or diminished capacity, BOA, p. 39-40, to be confused by evidence of mental deficiencies without expert testimony as to the impact of those deficiencies on the relevant mental states.

Evidence that the defendant suffers mental limitations in the absence expert testimony that this decreased the probability of him forming the relevant mens rea, may induce jurors to make the conceptual link that the former necessarily causes the latter. This is not a leap lay jurors are qualified to make. *See* ***Atsbeha***, 142 Wn.2d at 921; ***State v.***

Greene, 139 Wn.2d 64, 73-74, 984 P.2d 1024 (1999). Indeed, the fact that Defendant must resort to citing books outside the record rather than the record itself, BOA, p. 30-31, illustrates the confusion evidence of mental limitations in the absence of evidence concerning their affect on mens rea would have caused the jury.

Such evidence would have been more likely to evoke sympathy, and hence, "unfair prejudice" under ER 403, than a reasoned analysis of whether the elements of the crimes charged had been proven beyond a reasonable doubt.

Hence, the court properly excluded this evidence.

Because a defendant in a criminal case only "has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible,'" ***Rafay***, 168 Wn. App. at 795, and the evidence at issue here was inadmissible under ER 402 and 403, the defendant's right to present a defense was not compromised.

Therefore, his convictions should be affirmed. *But see* § C(4) *infra*.

3. THE DEFENDANT'S CONVICTIONS SHOULD BE AFFIRMED BECAUSE THERE WAS ONLY ONE ISOLATED ERROR COMMITTED AND THEREFORE, THE CUMMULATIVE ERROR DOCTRINE IS INAPPLICABLE.

Under the cumulative error doctrine a court "may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant her [or his] right to a fair trial, even if

each error standing alone would be harmless." ***State v. Venegas***, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). The "cumulative error doctrine" is "limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." ***State v. Greiff***, 141 Wn. 2d 910, 929, 10 P.3d 390 (2000). However, the doctrine does not apply where the errors are few and have little or no effect on the trial's outcome." ***Venegas***, 155 Wn. App. at 520.

As explained in the remainder of this brief, there was only one error committed in the present case. *See specifically* § C(4) *infra*. Because the "cumulative error doctrine" is "limited to instances when there have been ***several*** trial errors," ***Greiff***, 141 Wn.2d at 929 (emphasis added), it is not applicable here.

Therefore, Defendant's argument fails and his convictions should be affirmed.

4. THE COURT ERRED IN INSTRUCTING THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING FIRST DEGREE ROBBERY.

The Sixth Amendment to the United States Constitution and Article I, §22 of the Washington State Constitution both require that "the jury be instructed on all essential elements of the crime charged." ***State v.***

Chino, 117 Wn. App. 531, 538, 72 P.3d 256, 260 (2003). "The manner of committing a crime is an element [of the crime charged] and the defendant must be informed of this element in the information in order to prepare a proper defense," ***State v. Bray***, 52 Wn. App. 30, 34, 756 P.2d 1332, 1334 (1988).

Hence, "[w]hen the information alleges solely one statutory means of committing a crime, it is error for the trial court to instruct the jury on uncharged alternatives, regardless of the strength of the trial evidence." ***State v. Chino***, 117 Wn. App. 531, 539, 72 P.3d 256 (2003) (*citing* ***State v. Severns***, 13 Wn.2d 542, 125 P.2d 659 (1942); ***State v. Williamson***, 84 Wn. App. 37, 42, 924 P.2d 960 (1996); ***State v. Nicholas***, 55 Wn. App. 261. 272-73, 776 P.2d 1385 (1989); ***State v. Bray***, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988)).

While generally, "[n]o error can be predicated on the failure of the trial court to give an instruction where no request for such an instruction was ever made," ***State v. Kroll***, 87 Wn.2d 829, 843, 558 P.2d 173 (1977); ***State v. Lucero***, 140 Wn. App. 782, 787, 167 P.3d 1188 (2007) (*quoting* ***McGarvey v. City of Seattle***, 62 Wn.2d 524, 533, 384 P.2d 127 (1963)), RAP 2.5(a), a jury instruction that instructs the jury on uncharged alternatives constitutes "a manifest error affecting a constitutional right,"

and an appellate "court may consider the issue for the first time on appeal." ***Chino***, 117 Wn. App. at 538 (*quoting* RAP 2.5(a)(3)).

This is because such an instruction violates due process by "omit[ting] an essential element of a crime," i.e., the manner by which it is committed, ***Bray***, 52 Wn. App. at 34, and thus, "relieves the State of its burden of proving each element of the crime beyond a reasonable doubt." ***Chino***, 117 Wn. App. at 538.

First degree robbery is an alternative means crime. *See* ***State v. Nicholas***, 55 Wn. App. 261, 273, 776 P.2d 1385 (1989).

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

RCW 9A.56.200.

In the present case, as in ***Chino*** "the information and [the court's instruction relating thereto] pertain to the same core crime... but differed in alternative means." ***Chino***, 117 Wn. App. at 539.

The information stated, in relevant part:

> That [the defendant], in the State of Washington, on or about the 7th day of September, 2011, did unlawfully and

> feloniously take personal property belonging to another with intent to steal from the person or in the presence of D.D., the owner thereof or a person having dominion and control over said property, against such person's will by use or threatened use of immediate force, violence, or fear of injury to D.D., said force or fear being used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, and ***in the commission thereof, or in immediate flight therefrom, [Defendant] was armed with a deadly weapon, to: wit: a firearm, contrary*** to RCW 9A.56.190 and ***9A.56.200(1)(a)(i)***.

CP 184 (emphasis added). Hence, the information charged Defendant only under one alternative: RCW 9A.56.200(a)(i).

However, the court's instruction pertaining to that charge stated, in relevant part, that the jury could "convict the defendant of the crime of Robbery in the First Degree, Count III," if either (a) "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 274-335 (instruction no. 28).

Thus, the court instructed the jury that it could convict on either the charged alternative of RCW 9A.56.200(a)(i) or the uncharged alternative of RCW 9A.56.200(a)(iii). *Compare* RCW 9A.56.200 *with* CP 184 *and* CP 274-335. This appears to be error. *See, e.g.,* ***Chino***, 117 Wn. App. at 539.

Although Defendant did not object to the instruction in the trial court, *see* RP 1745-47, a jury instruction that instructs the jury on uncharged alternatives constitutes "a manifest error affecting a constitutional right" and a "court may consider the issue for the first time on appeal." ***Chino***, 117 Wn. App. at 538 (*quoting* RAP 2.5(a)(3)).

> 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. An error in instructing the jury on an uncharged method of committing a crime may be harmless if "in subsequent instructions the crime charged was clearly and specifically defined to the jury.

Bray, 52 Wn. App. 34-35 (citation omitted). *See* ***Chino***, 117 Wn. App. at 540; ***Severns***, 13 Wn.2d at 549; ***Nicholas***, 55 Wn. App. at 273.

There were no subsequent instructions that more clearly and specifically defined the crime for the jury. *See* CP 274-335. Nor was there an instruction requiring its unanimity on only the charged alternative means or a special verdict form indicating that it convicted on only this means. *See* CP 274-335.

Moreover, in its closing argument, the State noted, with respect to the first degree robbery count that

> First degree robbery, here there were two options in the Court's instructions explaining to you that it can be committed with either a firearm or by causing bodily injury. It just so happens, like with the first degree murder by premeditation and the felony first degree murder, that

> you had both in this case. A firearm was used and it caused bodily injury. In fact, it killed D[.]D[].

RP 1752. Later, the deputy prosecutor repeated this argument:

> Robbery first degree. Firearm or bodily injury
> ....
> It just so happens, like the felony murder, the robbery and the murder, we've got both. He used the firearm and he inflicted bodily injury.

RP 1804-05.

Therefore, the err does not appear harmless, and defendant's first degree robbery conviction should be reversed.

5. THE DEFENDANT'S RIGHT TO A PUBLIC TRIAL WAS SUSTAINED BECAUSE THE ***SUBLETT*** EXPERIENCE AND LOGIC TEST CONFIRMS THAT THE TRIAL COURT DID NOT CLOSE THE COURTROOM BY HEARING THE PEREMPTORY CHALLENGES AT SIDEBAR.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington State Constitution, and the Sixth Amendment to the United States Constitution: both provide a criminal defendant the right to a "public trial by an impartial jury."

The state constitution also provides that "[j]ustice in all cases shall be administered openly." Wash. Const. article I, section 10.

This provision grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the federal constitution. ***State v. Lormor***, 172 Wn.2d 85, 91, 257 P.3d 624

(2011); ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); ***Press–Enter. Co. v. Superior Court***, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." ***State v. Sublett***, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). "There is a strong presumption that courts are to be open at all trial stages." ***Lormor***, 172 Wn.2d at 90. The right to a public trial includes voir dire. ***Presley v. Georgia***, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010). However, "case law does not hold that a defendant's public trial right applies to every component of the broad 'jury selection' process," but "only to a specific component of jury selection –i.e., the 'voir dire' of prospective jurors who form the venire." ***State v. Wilson***, 174 Wn. App. 328, 338, 298 P.3d 148 (2013). *See* ***State v. Love***, 176 Wn. App. 911, 309 P.3d 1209, 1213, fn 5 (2013).

The right to a public trial is violated when: (1) the public is fully excluded from proceedings within a courtroom, ***State v. Bone–Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (no spectators allowed in courtroom during a suppression hearing), ***State v. Easterling***, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); (2) the entire voir dire is closed to all spectators, ***State v. Brightman***, 155

Wn.2d 506, 511, 122 P.3d 150 (2005); and (3) when individual jurors are privately questioned in chambers, *see* ***State v. Momah***, 167 Wn.2d 140, 146, 217 P.3d 321 (2009), and ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the ***Bone–Club*** factors). In contrast, conducting individual voir dire in an open courtroom without the rest of the venire present does not constitute a closure. ***State v. Erickson***, 146 Wn. App. 200, 189 P.3d 245 (2008).

"The right to a public trial, however, is not absolute, and a trial court may close the courtroom under certain circumstances." ***Wilson***, 174 Wn. App. at 334. "To protect the public trial right and to determine whether a closure is appropriate, Washington courts must apply the ***Bone-Club*** factors and make specific findings on the record to justify the closure." Id. at 334-35.

The ***Bone–Club*** factors are as follows:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
> 4. The court must weigh the competing interests of the proponent of closure and the public.
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Wilson, 174 Wn. App. 328, 335, fn 5, 298 P.3d 148 (2013) (*quoting* ***State v. Bone-Club***, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (*quoting* ***Allied Daily Newspapers of Washington v. Eikenberry***, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

"Failure to conduct a ***Bone-Club*** analysis before closing a proceeding required to be open to the public is a structural error warranting a new trial." ***Wilson***, 174 Wn. App. at 335.

However, "not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public." ***Sublett***, 176 Wn.2d at 71. Rather, as this Court has noted, the Supreme Court's decisions in ***State v. Paumier***, 176 Wn.2d 29, 288 P.3d 1126 (2012), ***State v. Wise***, 176 Wn.2d 1, 288 P.3d 1113 (2012), and ***State v. Sublett***, 176 Wn.2d 58, 292 P.3d 715 (2012)

> appear to articulate two steps for determining the threshold issue of whether a particular proceeding implicates a defendant's public trial right, thereby requiring a ***Bone–Club*** analysis before the trial court may "close" the courtroom: First, does the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy ***Sublett***'s "experience and logic" test?

The ***Sublett*** "experience and logic" test, first formulated by the United States Supreme Court in ***Press–Enterprise Co. v. Superior Court***, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986), proceeds as follows:

> The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." If the answer to both is yes, the public trial right attaches and the ***Waller*** or ***Bone–Club*** factors must be considered before the proceeding may be closed to the public.

Sublett, 176 Wn.2d at 73.

Applying that test, the ***Sublett*** Court held that no violation of the right to a public trial occurred when the trial court considered a jury question in chambers. *Id.* at 74–77. "None of the values served by the public trial right is violated under the facts of this case.... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." *Id.* at 77.

The defendant has the burden to satisfy the "experience and logic" test. *See* ***In re Personal Restraint of Yates***, 177 Wn.2d 1, 29, 296 P. 3d 872 (2013); ***State v. Love***, 176 Wn. App. 911, 309 P.3d 1209, 1214 (2013).

"Whether a defendant's constitutional right to a public trial has been violated is a question of law, which [appellate courts] review de novo on direct appeal." ***State v. Wilson***, 174 Wn. App. 328, 298 P.3d 148 (2013); ***State v. Momah***, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of

the court's ruling, not by the ruling's actual effect. ***In re Personal Restraint of Orange***, 152 Wn.2d 795, 807-8, 100 P.3d 291 (2004).

In the present case, the defendant argues that "[t]he trial court violated [his] right to a public trial in holding peremptory challenge in private." BOA, p. 52, 51-61. The record shows otherwise.

It shows that, after *voir dire*, the parties exercised peremptory challenges in open court by writing them on a piece of paper, and handing it to the court. RP 488-89. The courtroom was never closed. *See* RP 488-89. The sheet upon which the parties recorded their challenges was filed in open court the same day. CP 417. A jury was then empanelled, sworn, and given initial instructions. RP 490-91, 539-47.

Division Three of this Court has very recently considered and rejected an argument similar to that made by the defendant here. In ***State v. Love***, 176 Wn. App 911, 309 P.3d 1209 (2013), it applied the "experience and logic" test of ***Sublett*** and held "that the trial court did not erroneously close the courtroom by hearing the defendant's for cause challenges at sidebar, nor would it have been error to consider the peremptory challenge in that manner if the court had done so." ***Love***, at 1213-1214.

Division Two of this Court reached the same conclusion. ***State v. Dunn,*** 180 Wn. App. 570, 575, 321 P.3d 1283 (2014).

With respect to the experience prong of the ***Sublett*** test, the Court in ***Love*** found no authority to require challenges for cause to be conducted in public. Indeed, it found that "there is no evidence suggesting that historical practices required these challenges to be made in public." ***Love***, 309 P.3d at 1213. Hence, the Court concluded that "[o]ur experience does not require the exercise of these challenges," whether for cause or peremptory, "be conducted in public." *Id.* at 1214.

With respect to the logic prong, the Court found that the purposes of the public trial right

> [s]imply are not furthered by a party's actions in exercising a peremptory challenge or in seeking a cause challenge of a potential juror. The first action presents no questions of public oversight, and the second typically presents issues of law for the judge to decide.

Love, 309 P.3d at 1214.

Thus, the Court in ***Love*** concluded, "[n]either prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public." *Id.*

Therefore, exercise of peremptory challenges at sidebar, as was done in this case, could not have violated defendant's right to a public trial, and his convictions should be affirmed. *But see* § C(4) infra.

While the defendant asserts that ***Love*** was wrongly decided and should not be followed for the reasons articulated in [his] brief," BOA, p. he is mistaken for at least two reasons.

First, ***Love*** and ***Dunn*** are binding, recently decided authority and the doctrine of stare decisis demands that they not be so quickly disregarded by this Court.

Second, an independent analysis confirms the validity of their shared conclusion.

Application of the experience prong of the ***Sublett*** test shows, as the Court in ***Love*** concluded, that "our experience does not require that the exercise of these challenges be conducted in public." ***Love***, 309 P.3d at 1214.

Seven years after statehood, the Washington Supreme Court issued its opinion in ***State v. Holedger***, 15 Wash. 443, 448, 46 Pac. 652 (1896). Holedger had complained that his attorney was asked in open court and in front of the jury panel whether there was any objection to the jury being allowed to separate. The Supreme Court did not find any evidence that Holedger was prejudiced by this action, but did indicate that the better practice would be for the court to ask this question in a sidebar so as to avoid incurring the displeasure of jurors who might be upset if there was an objection.

The decision in ***Holedger*** was authored by Justice Dunbar and concurred with by Chief Justice Hoyt. Chief Justice Hoyt was the president of the 1889 constitutional convention, and Justice Dunbar was a delegate to the constitutional convention. *See* B. Rosenow, The Journal of the Washington State Constitutional Convention, at 468 (1889; B.

Rosenow ed. 1962); C. Sheldon, The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991, at 134-37 (1992).

Thus, at least two of the justices signing this opinion had considerable expertise in the protections given under the state constitution, yet neither found certain trial functions being handled in a sidebar to be inconsistent with the public's right to open proceedings.

In 1904, the Court upheld the actions of a trial court that utilized the "best-practice" recommended in ***Holedger. State v. Stockhammer,*** 34 Wash. 262, 264, 75 P. 810 (1904) (*noting* that consent for the jury to separate was given by defense counsel at the bench out of the hearing of the defendant and the jury).

Moreover, there is some authority that the public announcement of a peremptory challenge in open court by the party exercising the challenge is not a widespread practice. When the United States Supreme Court decided that it was just as improper for a criminal defendant to excuse a potential juror for an improper reason as it was for a prosecutor to do so, the court commented that "it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors[.]" ***Georgia v. McCollum***, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348 (1992) (*citing* Underwood, Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum.L.Rev. 725, 751, n. 117 (1992)).

Thus, as the Court in ***Love*** concluded, "our experience does not require that the exercise of these challenges be conducted in public." ***Love***, 309 P.3d at 1214.

The defendant has failed to make any showing to the contrary. Although he cites a case from California to support his argument, ***People v. Harris***, 10 Cal. App. 4th 672, 12 Cal.Rptr.2d 758 (1992), BOA, p.53, even were this case otherwise authoritative, it would be distinguishable. In ***Harris***, the peremptory challenges were exercised in chambers then announced in open court. This is not what happened here. *See* RP 488-89; CP 417.

While Defendant argues that the Court in ***Love*** "ignored what ***State v. Jones***[, 175 Wn. App. 87, 303 P.3d 1084 (2013)] and ***State v. Wilson*** [, 174 Wn. App. 328, 298 P.3d 148 (2013)] had to say on the issue," BOA, p. 58, his argument ignores the text of ***Wilson*** itself. The ***Wilson*** Court explicitly stated that "case law does not hold that a defendant's public trial right applies to every component of the broad 'jury selection' process," but "only to a specific component of jury selection –i.e., the 'voir dire' of prospective jurors who form the venire." ***Wilson***, 174 Wn. App. at 338.

Finally, while the defendant argues that ***State v. Thomas***, 16 Wn. App. 1, 553 P.2d 1357 (1976), cited by the ***Love*** Court, actually implies "an established historical practice of public peremptory challenges in this state with a few exceptions," BOA, p. 58-59, his argument fails for at least two reasons.

First, it is based on poor logic. The defendant seizes on imprecision in the language in ***Thomas*** "that secret peremptories were used 'in ***several*** counties,'" and infers from the fact that there are 39 counties, that the process undertaken here is the exception rather than the general practice. BOA, p. 59 (*citing* ***Thomas***, 16 Wn. App. At 13 & n2). Of course, the word "several" is by its nature imprecise, and does not tell us how many of the 39 counties actually had a practice requiring parties to announce their peremptory challenges in open court. It could very well have been most if not all of them.

Second, defendant's argument ignores that the United States Supreme Court's statement that "it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors[.]" ***McCollum***, 505 U.S. at 53.

Hence, an independent analysis of the experience prong of the ***Sublett*** supports the conclusions of this Court in ***Love*** and ***Dunn***.

The same is true of the logic prong. Although Defendant argues that it is necessary to exercise peremptory challenges on the record rather than at sidebar "to deter discriminatory removal of jurors during the peremptory process," BOA, p. 59, 56-58, *see, e.g.,* ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), his argument is ultimately unsupportable.

Whether a party exercises a peremptory challenge at sidebar, as in this case, or on the record, the opposing party may object to that challenge

as discriminatory under ***Batson*** and its progeny. Since voir dire was conducted on the record and the sheet used to make the peremptory challenges filed in open court, there would be a sufficient record upon which to review the use of peremptory challenges. Moreover, because the voir dire of the venire was conducted in open court, and the judge then explained that the parties were exercising their peremptory challenges while they did so at sidebar, RP 488-89, "the public's mere presence" continued to "passively contribute[] to the fairness of the proceedings." BOA, p. 56.

Thus, the Court in ***Love*** was correct that the public trial right "[s]imply [is] not furthered by a party's actions in exercising a peremptory challenge" ***Love***, 309 P.3d at 1214, on the record as opposed to at sidebar.

Hence, here, as in ***Love***, the experience and logic test of ***Sublett*** confirms that the trial court did not close the courtroom by hearing the peremptory challenges via a sheet of paper passed forward at sidebar. *See* ***Love***, 309 P.3d at 1214. The public trial right did not attach, ***Sublett***, 176 Wn.2d at 73, and no violation of that right occurred when the court heard the peremptory challenges at sidebar.

Therefore, the defendant's remaining convictions should be affirmed.

D. CONCLUSION.

Defendant failed to show ineffective assistance of counsel because he failed to show that his counsel's performance, even if deficient, prejudiced his defense.

Because a defendant in a criminal case only has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible, and the evidence he sought to admit here was inadmissible under ER 402 and 403, the defendant's right to present a defense was not compromised.

Defendant's right to a public trial was sustained because the ***Sublett*** experience and logic test confirms that the trial court did not close the courtroom by hearing peremptory challenges at sidebar.

However, the trial court erred in instructing the jury on an uncharged alternative means of committing first degree robbery. Because this err does not appear harmless, his first degree robbery conviction should be reversed.

Defendant's remaining convictions should be affirmed because there was only one, isolated error committed and therefore, the cumulative error doctrine is inapplicable.

Therefore, although Defendant's conviction of first degree robbery in count III should be reversed, his remaining convictions should be affirmed.

DATED: August 22, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney

BRIAN WASANKARI
Deputy Prosecuting Attorney
WSB # 28945

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.

8/22/14
Date Signature

PIERCE COUNTY PROSECUTOR

August 22, 2014 - 2:51 PM

Transmittal Letter

Document Uploaded: 451034-Respondent's Brief.pdf

Case Name: STATE V. ANTHONY TYRONE CLARK

Court of Appeals Case Number: 45103-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

SLOANEJ@NWATTORNEY.NET