

COA NO. 45203-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY CLARK,

Appellant.

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

The Honorable John R. Hickman, Judge
The Honorable Bryan E. Chushcoff, Judge
The Honorable John A. McCarthy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in failing to order a second competency evaluation, in violation of RCW 10.77.060 and due process.

2. The court erred in failing to accommodate appellant's inability to understand the testimony, in violation of due process, the right to confrontation and the right to be present.

3. The court violated appellant's constitutional right to present a complete defense in excluding expert testimony on appellant's mental limitations.

4. The court erred in suspending the sentence and imposing probation for counts II and III.

Issues Pertaining to Assignments of Error

1. Where defense counsel's assessment supported by new facts demonstrated a renewed reason to doubt appellant's competency, did the trial court err in failing to order a second competency evaluation as mandated by RCW 10.77.060 and due process?

2. Where appellant was unable to understand the testimony of witnesses due to his mental retardation but no accommodation was made to remedy the problem, did the trial court deprive appellant of his rights to a fair trial, confrontation and to be present?

3. Whether the court violated appellant's constitutional right to present a complete defense in excluding expert testimony on how appellant's mental limitations impacted his confession to police?

4. Where the court ordered confinement for the statutory maximum term under counts II and III, whether the court lacked statutory authority to suspend the sentence and impose probation for those counts?

B. STATEMENT OF THE CASE

The State charged 19-year-old Anthony Clark with residential burglary (count I), third degree malicious mischief (count II) and third degree theft (count III), all involving the residence of Patricia Conine. CP 1-2, 59-60. On February 3, 2011, the court ordered a competency evaluation. CP 5-8. Dr. Hendrickson of Western State Hospital evaluated Clark in May 2011 and concluded Clark understood the proceedings and was capable of assisting in his own defense. Ex. 2. Defense counsel obtained an independent evaluation from Dr. Oneal, who evaluated Clark in August 2011 and opined he was incompetent. 1RP¹ 2; Ex. 3. Dr. Oneal

¹ The verbatim report of proceedings is referenced as follows: 1RP - 2/29/12; 2RP - 3/30/12; 3RP - 4/6/12; 4RP - 5/11/12; 5RP - 5/30/12; 6RP - 8/23/12; 7RP - 11/26/12; 8RP - 2/11/13; 9RP - 2/28/13; 10RP - 4/22/13 and 4/23/13; 11RP - 4/23/13; 12RP - 5/17/13; 13RP - two consecutively paginated volumes consisting of 5/21/13 and 5/22/13 (voir dire); 14RP - six consecutively paginated volumes consisting of 5/21/13, 5/22/13, 5/23/13, 5/28/13, 5/29/13, 7/26/13; 15RP 5/31/13.

reevaluated Clark in February 2012 and concluded Clark understood the proceedings and had a limited basic capacity to assist in his own defense, while recommending accommodations be made to make up for his deficiencies. Ex. 5. A contested competency hearing was held before Judge Cuthbertson on May 11 and May 30, 2012. 4RP; 5RP.

i. *Dr. Hendrickson's Testimony at the Competency Hearing*

Dr. Hendrickson met with Clark for slightly over one hour. 4RP 12; 5RP 12. In preparing his report, the doctor did not speak to anyone in Clark's family. 5RP 14. He did not look at any school records, speak to Clark's former schoolteachers, or contact anyone at the Department of Social and Health Services. 5RP 16.

Clark has a history of developmental disability. 4RP 48. He was born almost two months premature, deaf and blind and weighing only one pound. 4RP 53. He received physical and occupational therapy until age seven. 4RP 53.

In 2008, Dr. Albertson assessed Clark's mental retardation to be in the moderate range on the Wechsler Intelligence Scale for adolescents with a score of 51. 4RP 49-50. Hendrickson found Clark to now be in the mild range for mental retardation, and that he would still qualify for developmental disability (DD) services. 4RP 50. There was an incongruity between the measured IQ of 51 measured in 2008 and the

higher level of cognitive functioning demonstrated during police interrogation connected with the charges and Dr. Hendrickson's evaluation. 4RP 51. But the doctor did not do any testing to measure Clark's suggestibility. 5RP 35-36. Nor did he do any formal testing on Clark's ability to learn or retain information. 5RP 48.

Clark's attorney was present at the May 2011 evaluation, and Clark asked her questions about legal concepts. 4RP 12-14. Dr. Hendrickson believed Clark had a very good understanding of the legal system. 4RP 16. Clark grasped the explanations of legal concepts. 4RP 16-17. When Clark asked his attorney questions, he was able to summarize the answer and apply that information during the interview. 5RP 18.

Clark spontaneously asked his attorney questions and appeared to have a good working relationship with her. 4RP 20-21; 5RP 36. When asked during the evaluation on whether he could follow his attorney's advice, Clark said he would think about it first then talk to her about it. 4RP 23. Such a response was inconsistent with someone who is highly suggestible or who simply follows orders. 4RP 23-24. Clark understood only some of his attorney's suggestions and always asked his attorney to go over the information again, which Dr. Hendrickson interpreted as a demonstration of good reasoning. 5RP 26-27. Overall, Dr. Hendrickson opined Clark's reasoning ability was pretty good. 4RP 30.

Clark's history of being easily led by others, as reported by family, could be significant in terms of his ability to make rational decisions in talking with his attorney. 5RP 50-51. But the doctor still maintained Clark had the capacity to apply reasoning and assist. 5RP 52.

Dr. Hendrickson did not notice any significant impairment in Clark's ability to recall. 5RP 20, 22-23. On the other hand, the doctor did not focus much on memory impairment; he was more focused on whether Clark's cognitive impairment affected his ability to reason. 5RP 20, 23.

Clark demonstrated an understanding of the plea bargain process during the evaluation. 5RP 41. But Clark expressed unfamiliarity with the concept during his subsequent evaluation with Dr. Oneal. 5RP 42-43. Dr. Hendrickson acknowledged this might indicate the presence of a cognitive or memory deficit that suggested his understanding of such concepts was fleeting. 5RP 43.

The doctor agreed Clark processed more slowly than those with a normal IQ. 5RP 32-33. Clark's vocabulary was limited. 5RP 32. People with developmental delays develop coping skills to appear more intelligent than they actually are to others. 5RP 30-31. Dr. Hendrickson nonetheless believed Clark had the capacity to keep up with witness testimony and what happened at trial. 5RP 33. According to Dr. Hendrickson, Clark appeared to understand the nature of the proceedings

against him and was able to assist his attorney despite his mental retardation and developmental disabilities. 4RP 35-37, 54-56.

ii. *Dr. Oneal's Testimony at the Competency Hearing*

Dr. Oneal met with Clark twice, in August 2011 and again in February 2012. 5RP 67-68. Dr. Oneal conducted two evaluations because competency to stand trial is a time sensitive issue, and his first evaluation became stale due to the passage of time. 5RP 69-71.

The cognitive testing results were for the most part consistent with what Dr. Albertson had found in 2008. 5RP 72. Based on the adult version of the Wechsler intelligence scale, Clark scored a 62. 5RP 72. This put him in the range for mild mental retardation. 5RP 72. Clark scored lower than 98 percent of others in his age range on verbal comprehension. 5RP 73. 99 percent of his peers have higher perceptual reasoning. 5RP 74-75. His receptive language skills were commensurate with those of a seven-year-old child and his expressive language skills were those of a nine-year-old child. 5RP 74.

Based on testing, Clark's language skills are markedly deficient, and his ability to express himself and receive language is concerning and problematic. 5RP 75. Testing showed Clark was highly suggestible, most definitely in regard to verbal cues. 5RP 79-80. Clark had a tendency to want to please others with his answers. 5RP 80. He was likely to be

influenced by external factors. 5RP 80. Dr. Oneal talked with Clark's mother in 2011 and his sister in 2012. 5RP 80-81. Their information corroborated what Dr. Oneal had found regarding Clark's adaptive behavior as a result of mental retardation and his suggestibility and vulnerability as a result of intellectual deficiency. 5RP 81.

In 2011, Clark's cognitive deficits combined with his suggestibility led to Dr. Oneal's conclusion that Clark was incompetent. 5RP 76. Dr. Oneal now opined Clark had an improved understanding of court-related processes due to being educated about them from others while in jail. 5RP 69-70, 76-77. Dr. Oneal believed Clark currently possessed the capacity to understand the nature of the proceedings against him. 5RP 86, 88-89, 109. But that did not necessarily extend to being able to assist during trial. 5RP 86. Clark may have difficulty understanding the testimony of witnesses in real time. 5RP 85.

Clark had enough language skills to consult with his attorney during trial. 5RP 101. He may need more time, but he can explain himself and ask questions. 5RP 101. Still, as the complexity of information increases, Clark's capability of working with such information decreases. 5RP 85. His low verbal skills factored into this determination. 5RP 85. Clark has an exceptionally limited verbal comprehension capability. 5RP 83.

Dr. Oneal did not agree with the unqualified assertion that Clark had an ability to assist in his defense. 5RP 109. He opined that Clark had a limited capability of assisting with specific accommodations in place. 5RP 109. Due to ongoing concerns about suggestibility and inability to quickly process information, Dr. Oneal recommended some accommodations be made for trial to account for these concerns. 5RP 78. For example, his attorney would need additional time to explain to Clark what was going on during trial, presenting information both verbally and in written form. 5RP 78. It was quite likely that Clark would get easily confused during the court process and that his attorney would need to "spend additional time and energy that may go outside the scope of what's possible in this matter." 5RP 84.

Further, leading questions on cross examination should be limited because Clark was at high risk to answer questions in a certain way when persuaded to do so when put under even slight pressure. 5RP 78-79, 83. To allow unfettered cross examination would place him at great risk of changing his responses, giving inaccurate information and getting easily confused by language typically used during the court process. 5RP 83.

iii. *Judge Cuthbertson's Competency Ruling*

Judge Cuthbertson found Clark to be competent. CP 41-42; 5RP 112. The judge also found "the Court needs to make some

accommodations to make sure that you have a fair trial." 5RP 113. The court anticipated motions and further discussion of the matter, but intended to slow the trial down enough to allow defense counsel to answer questions and explain what was going on. 5RP 113. The court also considered exercising its authority under ER 611 regarding how questions are asked during examination. 5RP 113-14.

Defense counsel put on the record her belief that Clark's suggestibility posed a problem for cross examination because he was prone to change his responses and that he could not exercise his right to testify with any confidence that he would be able to testify truthfully. 5RP 115. The court said he was concerned about that, which is why he referred to accommodation being made. 5RP 116-17.

On November 26, 2012, defense counsel put on the record that she still believed Clark was incompetent to stand trial. 7RP 3-4. The case was subsequently reassigned to Judge McCarthy. 9RP 3-5.

iv. *Defense Counsel Raises the Competency Issue to Judge McCarthy*

At a hearing on April 22, 2013, defense counsel informed Judge McCarthy of Judge Cuthbertson's intended accommodations. 10RP 4. Clark had just finished up a five-week trial in a separate murder case.²

² That case is on appeal under No. 45103-4-II.

10RP 4. Defense counsel told the court that Clark "didn't really understand anything that happened" and "has little to no understanding of what the testimony was." 10RP 4. Counsel wrestled with whether to raise the competency issue again. 10RP 4. Her concerns had been somewhat alleviated as the process continued and Clark learned more, but after recently meeting with him again those concerns were "renewed with a vengeance because of his inability to follow along at trial; therefore he can't assist." 10RP 4-5.

With regard to Judge Cuthbertson's accommodations, Judge McCarthy said he did not know what decisions Judge Cuthbertson had made. 10RP 8. Judge McCarthy clarified the only written order entered was that Clark was competent. 10RP 8-9. From defense counsel's perspective, Judge Cuthbertson entered an oral ruling in which Clark was "not found competent to proceed as a normal defendant would be competent to proceed, but that with all these accommodations that Judge Cuthbertson carefully listed, that, at that point, he felt comfortable with Mr. Clark going forward to trial." 10RP 13. Judge McCarthy said he did not know what accommodations counsel was talking about and suggested she file a written motion addressing the issue. 10RP 13-14.

In ensuing discussion, counsel said "From the moment I met him, I have felt he is incompetent to go to trial, and that has not changed. It's

only gotten worse." 10RP 18. Her ongoing concern went to the ability to assist: "He is not able to keep up during hearings. He does not understand what goes on as testimony unfolds. He just leans over and asks me, 'Is it going good?' That's the only comments he's ever made. My understanding is in the murder trial, several days into trial, he leaned over to Ms. Melby and asked her when trial starts." 10RP 18.

Judge McCarthy told counsel to discuss the downside of proceeding to trial with her client because a conviction would increase the offender score on his sentence in the murder case. 10RP 18-19. Counsel said she had discussed that with him for "hours and hours" but that he did not understand how the present case played off the other in terms of points. 10RP 19. The prosecutor put on the record that she observed portions of the murder trial and believed Clark had no problem with cross examination or the need for an elongated break. 10RP 21.

Defense counsel told the court "after discussions with my client, I think ethically I have to raise 10.77 at this point and indicate that I don't believe he can -- he can assist. I just tried to ask him some questions about things that we have been discussing for the past half hour, and he is totally lost." 10RP 22.

Judge McCarthy responded that Clark's attorneys for the murder case, Melby and Whitehead, were able to represent him in a five-week

trial. 10RP 22. The judge continued: "for you to throw your hands up and say, oh, I guess I can't communicate, doesn't understand, that, in and of itself, doesn't result in stopping the proceedings. There has already been a competency hearing. He just completed a trial last week." 10RP 22. Judge McCarthy invited counsel to talk with Clark's attorneys in the other case to see if they had a better technique to communicate with Clark. 10RP 23. Defense counsel said she had already talked to them. 10RP 23. Counsel said Melby had offered to be present "in support of my 10.77; that they had the same concerns. They raised the same concerns, and at some point, you know, you just have to try the case. And I understand that. I just want to -- I will raise it every day --" 10RP 23-24.

v. *CrR 3.5 Hearing*

A CrR 3.5 hearing was held. 10RP 37-106. Detective Baker testified that he contacted Clark at his high school. 10RP 40-41. Baker told Clark that he was investigating a burglary. 10RP 43. He read Clark his Miranda³ rights. 10RP 43-45. Clark indicated he understood them. 10RP 44. During the non-recorded portion of the interrogation, Clark made various incriminating statements. 10RP 46, 58-59, 68-75. Clark then directed Baker to the Conine residence. 10RP 47-48. Upon returning

³ Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

to school, Clark made recorded statements related to the Conine burglary after again being advised of his constitutional rights. 10RP 48-51.

Clark's mother, Katherine Horning, testified Clark had been evaluated by the Developmental Disabilities Division (DDD) and had received disability benefits since he was one year old. 10RP 85-86. According to Horning, a detective called her on the phone about wanting to speak with her son and she advised that her son was mentally challenged. 10RP 81.⁴ The court concluded Clark's statements were voluntary and admissible. 10RP 102-06; CP 639-42.

vi. *Defense Counsel Raises the Competency Issue to Judge Chushcoff*

Following the CrR 3.5 hearing, Judge McCarthy told the parties to report back to the criminal presiding judge for reassignment. 10RP 107; 11RP 4. Appearing before Judge Chushcoff, defense counsel again raised her concern that Clark lacked the ability to follow along at trial and assist in his defense. 11RP 4-5. Counsel reported, "We just had a two-hour 3.5 hearing about the statements. About 30 seconds, he leaned over to me and said, when are we going to talk about if the statement comes in? He doesn't follow what is happening in real-time. I'm not a special ed teacher.

⁴ Baker maintained he was unaware that Clark had a significant developmental delay. 10RP 55. He claimed he could not remember if he spoke to Clark's mother that day. 10RP 55.

I'm not able to stop everything to bring him up to speed. He, apparently, was in a murder trial. Two days into trial he asked when trial starts. He just kind of sits there and draws on his paper." 11RP 5.

The prosecutor said Judge McCarthy "found in his discretion that there was not a reason to doubt competency and did not order further evaluations. I'm asking this court to do the same." 11RP 8.

Defense counsel noted competency is fluid and the issue can be raised at any time. 11RP 9. Counsel reiterated her concern about Clark's ability and lack of accommodation: "I'm here telling the court that my client cannot get a fair trial if it is tried as if he were of normal functioning levels. Over the last two days, that has only strengthened." 11RP 10. Counsel believed Clark understood the trial process, but he lacked the ability to assist. 11RP 11.⁵ According to counsel, Clark "cannot follow testimony in real-time; and, therefore, I get no feedback on the testimony, and I am forced to, basically, relive it from him for hours after court when the witnesses have been excused, and it is just -- it is -- for someone to be two days in trial, to have picked a jury, and to not understand that this is, in fact, trial is concerning." 11RP 11-12.

Judge Chushcoff believed nothing had changed since Judge Cuthbertson found Clark competent. 11RP 12-13. Counsel contended the

⁵ The transcript mistakenly attributes the statements to the prosecutor.

new piece of information was that Clark had just undergone a five week trial and demonstrated an inability to process and assist during that trial. 11RP 13. There had not previously been an opportunity to observe how he actually would do in a real trial setting. 11RP 13. Judge Chushcoff said it would be expected that Clark would be slow in processing information because of his intellectual impairment. 11RP 13. The judge summed up by ruling "The defense has not presented anything new that suggests that there was a change of circumstances. I have to presume the original order is still good. I have no reason to think that it isn't." 11RP 15.

Counsel also expressed the need for the accommodations referenced by Judge Cuthbertson. 11RP 15. Judge Chushcoff did not know what Judge Cuthbertson had said about accommodations, noting the competency order did not reference them. 11RP 15. Counsel requested a continuance to look into getting a cognitive aid for Clark as someone who could explain to him what was going on. 11RP 16-17. Judge Chushcoff sent the case out to trial. 11RP 22.

vii. *Defense Counsel Notes Ongoing Competency Objection*

The case was assigned to Judge Hickman for trial. 14RP 3. Defense counsel noted a standing objection to the lack of accommodation. 14RP 20. In the midst of arguing pre-trial motions, defense counsel put on

the record "I don't believe Mr. Clark is competent. He's currently only concerned about whether or not he's going to get lunch because he can't -- his verbal skills are so low he can't follow along in court. He never has any idea what happens." 14RP 52.

On May 23, after the witness portion of Clark's trial was underway, defense counsel again noted her ongoing objection regarding Clark's competency. 14RP 129-30. Counsel informed the court "since this case has started, Mr. Clark is not able to follow along in realtime with any of the testimony. Yesterday, as we were picking the jury, he asked me if Pat was going to testify before we were done with jury selection. He was just in a five-week trial where he went through this entire process, but was not able to follow along well enough to even understand that we seat a jury prior to taking testimony." 14RP 129-30. On May 28, defense counsel again put on the record "as I start every morning, in my discussions with Mr. Clark, he has not been able to follow along with trial. He doesn't have any idea what's going on in realtime, and I have a standing objection to his competency to stand trial." 14RP 310.

viii. *The Trial Court Excludes Expert Testimony on Clark's Mental Limitations*

The State moved to exclude evidence of Clark's mental deficiencies, including Dr. Oneal's testimony regarding Clark's mental

limitations. CP 682-89; 693; 14RP 45-47. The State argued such evidence and testimony would only be relevant to a diminished capacity defense, but no such defense was offered. Id.

Defense counsel argued Dr. Oneal's testimony was admissible to attack the weight and reliability of Clark's statements to the detective. 10RP 25, 28-30; 14RP 47-48, 53.

The court excluded Dr. Oneal's testimony, ruling it would only be admissible if a mental defense of insanity or diminished capacity were being presented. 14RP 55-56. The court viewed Dr. Oneal's testimony as something that would only have been relevant at the CrR 3.5 hearing. 14RP 56-57.

Defense counsel moved for reconsideration, seeking permission for Dr. Oneal to testify regarding Clark's mental deficiencies and the effect those deficiencies may have on the veracity, reliability and overall circumstances the jury may consider when evaluating what weight to place on Clark's statements to Detective Baker. CP 79-94. Counsel argued the exclusion of Dr. Oneal's testimony would violate Clark's constitutional right to present a defense by preventing the trier of fact from considering the surrounding circumstances in assessing the weight and credibility to be given to Clark's statements. CP 85-88, 93. Dr. Oneal would testify as to Clark's specific mental limitations and vulnerabilities in relation to the

statements Clark made. CP 88. Clark's mental deficiencies made him vulnerable to suggestibility. CP 88-90; 14RP 82. Dr. Oneal would opine on the effect a standard interrogation may have had on the reliability of Clark's statements. CP 93. Counsel contended "Dr. [Oneal] is the only mechanism by which Defense can present its theory of the case, which includes what Defense contends is a highly suspect and unreliable statement by Mr. Clark." CP 92-93. Clark's statements were suspect due to his mental retardation. CP 88.

The court denied the motion, reiterating:

The only purpose that I see that Dr. Brent would be -- Dr. [Oneal], excuse me, would be if there was the allegation and attempt to raise the affirmative defense of diminished capacity, and that's not being done in this particular case. And the only reason that I would see that Dr. [Oneal] would be testifying would be to give the jury the same information about his mental status and IQ that would be relevant for a diminished capacity defense. But since the Court -- and that's not being argued. I don't know of any other reason why it would come involved in a CrR 3.5 hearing or 3.5 type of situation other than to put in the mind of the jury the same type of information regarding his diminished capacity that the Court has already indicated is not going to occur because it's not being argued. I have never seen a case where we have an expert psychologist come in post-hearing or post-confession and then do an evaluation of the defendant and argued because he didn't graduate from high school or argue because he has a low IQ, that somehow the confession is no good. And quite frankly, if that was going to happen, it would have to happen at the 3.5 hearing, not after a 3.5 hearing.

14RP 84-85.

The court saw "absolutely no relevancy to Dr. [Oneal] testifying other than to bring up the same type of issues you would bring up on a diminished capacity affirmative defense, which is not at play in this particular case and, therefore, I respectfully deny the motion for reconsideration." 14RP 85.

ix. *Trial and Outcome*

The case proceeded to a jury trial in May 2013. Patricia Conine testified that she came home from work in April 2010 to find the door to her apartment unlocked. 14RP 96, 100. She had locked the door before leaving earlier that day. 14RP 100. A screen had been taken off an open kitchen window. 14RP 109-10. Her TV, purchased two months earlier, had been knocked off its table and damaged. 14RP 101-02. An "On Demand" TV remote control, jewelry, and various other items were missing. 14RP 101-09.

Conine had known Clark since he was a baby. 14RP 97, 131-32. Conine and his mother were friends. 14RP 97. Clark had been to Conine's apartment about two or three times before. 14RP 98-99, 134.

Fingerprint impressions were lifted from the window frame and the side of the television. 14RP 156-57. The impression from the TV

matched Clark's print. 14RP 188-90, 192. The impression from the window frame matched the print of a person named H.E. 14RP 190-91.

Jared Stokes went to high school with Clark, H.E., E.M., S.P. and J.S.⁶ 14RP 238-39. Stokes gave conflicting answers as to whether Clark was part of a conversation that took place in April 2010 amongst several of these individuals. 14RP 239-41. He initially maintained only H.E. and J.S. were part of the conversation. 14RP 240. He did not remember if Clark was a part of it and denied telling the prosecutor minutes earlier in the hallway that he was. 14RP 240. Stokes then said he told a detective that Clark, H.E. and J.S. had bragged about doing a "lick," i.e., stealing from someone. 14RP 241. During that conversation, Clark displayed some jewelry to Stokes. 14RP 242. Clark was in special education classes, and was older than 18 at the time. 14RP 247, 249-50.

Detective Baker, assigned to investigate a burglary at another address, contacted Clark at his high school. 14RP 254, 272. Baker interrogated him in the school resource officer's office for 30 minutes. 14RP 273-74, 278. The interrogation at this point was not recorded. 14RP 278. Baker told Clark he was investigating a burglary. 14RP 274.

⁶ Initials are used because it is unclear from the record whether they were juveniles at the time.

Baker relayed what Clark said to the jury. According to Baker, Clark said he was involved in a burglary with H., J., E. and S. 14RP 274-75. H. removed the window screen from the kitchen window and Clark crawled in, knocking an On Demand remote control to the floor. 14RP 276. Clark took the remote control and put it in his pocket. 14RP 276. Clark then opened the door to the apartment and acted as a lookout. 14RP 277. Baker asked Clark to point out the residence. 14RP 278-79. Clark directed Baker to Conine's apartment as Baker drove his car. 14RP 279-80. Upon arrival, Clark pointed out the window that he entered. 14RP 281. Baker drove Clark back to school, at which time Clark gave an audio-recorded statement regarding the incident in the school resource officer's office. 14RP 282-83. Clark's recorded statement was consistent with what he earlier told the detective. 14RP 286-88, 378-84.

Baker maintained he was not aware that a burglary had taken place at this address until Clark "pointed the apartment out to me." 14RP 281. In response to defense questioning, Baker acknowledged different protocol techniques were used to question children to address concerns of suggestibility. 14RP 387. Baker said "predominately most of it was actually open ended questions." 14RP 387. To counter the suggestibility issue, the prosecutor on redirect elicited Baker's testimony that Clark was 19 years old at the time. 14RP 393.

At some point in time, the school resource officer received some property from school staff. 14RP 322-24. These items were then turned over to Detective Baker. 14RP 324. There was no testimony that the items belonged to Conine, although some items matched the general description of what was taken from her residence (necklace, webcam, DVD). 14RP 410-11.

During closing argument, the prosecutor stressed that Clark's confession showed he committed the crimes. 14RP 419-26. A jury convicted Clark as charged. CP 606-08. The court sentenced Clark to 18 months confinement on the residential burglary conviction and 364 days on the remaining gross misdemeanor counts. CP 650, 665. Clark appeals. CP 671.

C. ARGUMENT

1. THE COURT VIOLATED CLARK'S CONSTITUTIONAL RIGHTS IN FAILING TO ORDER A SECOND COMPETENCY EVALUATION AND IN FAILING TO ACCOMMODATE HIS MENTAL LIMITATIONS.

Whenever there is reason to doubt competency, the trial court must order an evaluation under RCW 10.77.060. In determining whether there is a new reason to doubt competency following an earlier order finding competency, a trial court must give considerable weight to defense counsel's opinion and take new information into account. The trial court

abused its discretion in failing to order a second competency evaluation as required by RCW 10.77.060 and due process because new information showed a reason to doubt competency. Even if another evaluation was not required, the court erred in failing to accommodate Clark's inability to follow testimony through the use of a cognitive aid.

a. Due Process Requires The Court To Follow Mandatory Evaluation Procedures Whenever There Is A Reason To Doubt Competency.

No incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues. State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982). The conviction of an accused while incompetent violates the due process right to a fair trial. Pate v. Robinson, 383 U.S. 375, 378, 385, S. Ct. 836, 15 L. Ed. 2d 815 (1966); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

Competency requires the accused to have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." In re Pers. Restraint of Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001) (citing Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)) (internal quotation marks omitted). "A person is not competent at the time of trial, sentencing, or punishment if he is incapable of properly

appreciating his peril and of rationally assisting in his own defense." State v. Marshall, 144 Wn.2d 266, 281, 27 P.3d 192 (2001).

The failure to observe procedures adequate to protect competency is a denial of due process. State v. O'Neal, 23 Wn. App. 899, 901, 600 P.2d 570 (1979) (citing Pate, 383 U.S. 3; Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)). "Chapter 10.77 RCW provides such a procedure." State v. Heddrick, 166 Wn.2d 898, 904, 215 P.3d 201 (2009). "Whenever . . . there is reason to doubt [a defendant's] competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant." RCW 10.77.060(1)(a). "[S]o long as a defendant maintains a challenge to competency, the chapter 10.77 RCW procedures are mandatory to satisfy due process." Heddrick, 166 Wn2d at 909.

The determination of a reason to doubt competency is different from an actual determination of competency. City of Seattle v. Gordon, 39 Wn. App. 437, 442, 693 P.2d 741, review denied, 103 Wn.2d 1031 (1985). Whether there is a reason to doubt competency is a threshold determination. Gordon, 39 Wn. App. at 442. Under the "reason to doubt"

standard, "the ultimate question for the trial court is whether there is a 'factual basis' to doubt the defendant's competence." State v. Woods, 143 Wn.2d 561, 605, 23 P.3d 1046, cert. denied, 534 U.S. 964, 122 S. Ct. 374, 151 L. Ed. 2d 285 (2001).

Courts consider a variety factors in determining competence, including the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel. Fleming, 142 Wn.2d at 863. Since the lawyer has "the closest contact with the defendant," the court must give considerable weight to the lawyer's representations regarding the client's competency and ability to assist in his defense. State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978) (quoting Drope, 420 U.S. at 177 n.13); accord State v. Harris, 122 Wn. App. 498, 505, 94 P.3d 379 (2004); Gordon, 39 Wn. App. at 442. .

b. Defense Counsel's Opinion Based On New Information Established A Reason To Doubt Competency, Requiring A Second Evaluation Be Ordered.

The issue here is whether the court erred in failing to order a second competency evaluation following an earlier finding of competency based on the Western State Hospital evaluation. If a reason to doubt

doubt competency existed, the court necessarily erred in failing to order a competency evaluation pursuant to RCW 10.77.060.

A determination of whether there is reason to doubt the defendant's competency is within the trial court's sound discretion. State v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991). A court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A claimed denial of a constitutional right is reviewed de novo. Iniguez, 167 Wn.2d at 280. The competency determination is a mixed question of law and fact, so the reviewing court must "independently apply the law to the facts." Marshall, 144 Wn.2d at 281.

Once the trial court makes an initial competency determination, the court should revisit the issue when new information is presented on the issue. State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992). "[A] trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Drope, 420 U.S. at 181.

Judge Chushcoff and Judge McCarthy failed to comply with this legal standard in not recognizing sufficient facts existed to show a reason to doubt competency based on new information. Both judges refused to order a second competency valuation on the ground that no new

information had been presented to warrant one. 10RP 22-23 (McCarthy); 11RP 12-15 (Chushcoff). Judge Hickman, meanwhile, remained impassive in the face of counsel's repeated objections to competency. 14RP 52, 129-30; 310.

As pointed out by defense counsel, the new information casting doubt on competency was Clark's demonstrated inability to understand the testimony during an actual trial. 11RP 13. Clark could not follow the testimony in his murder trial, which occurred after Judge Cuthbertson's competency ruling in May 2012. Clark's trial counsel in the murder case supported the request for a second evaluation. 10RP 23-24. Further, counsel's personal experience with Clark during the present trial confirmed he was unable to follow the testimony. 11RP 5, 10-12; 14RP 52, 129-30, 310. Dr. Hendrickson and Dr. Oneal, in conducting the prior evaluations, did not have this information available to them in formulating their opinions. Neither expert had the benefit of knowing that Clark actually could not understand the testimony as it unfolded during a real trial. Judge Cuthbertson, in making the earlier competency determination, likewise did not have the benefit of this information.

The Washington Supreme Court has concluded a defendant need not be able to help with trial strategy to be competent. State v. Ortiz, 104 Wn.2d 479, 483, 706 P.2d 1069 (1985), cert. denied, 476 U.S. 1144, 106 S.

Ct. 2255, 90 L. Ed. 2d 700 (1986). But an ability to rationally assist is a basic requirement of competency. Marshall, 144 Wn.2d at 281. A defendant must be able to "communicate effectively with defense counsel." Cooper v. Oklahoma, 517 U.S. 348, 368, 116 S. Ct. 1373, 134 L.Ed.2d 498 (1996). A defendant must have "the present mental ability meaningfully to participate in his defense." Johnson v. Estelle, 704 F.2d 232, 237 (5th Cir. 1983), cert. denied, 465 U.S. 1009, 104 S. Ct. 1006, 79 L. Ed. 2d 237 (1984). To this end, the defendant should be able to follow the evidence and discuss it with counsel. Hansford v. United States, 365 F.2d 920, 924 (D.C. Cir. 1966).

Defense counsel had the closest contact with Clark and was in the best position to know whether Clark could assist with his defense. The new information that Clark was unable to understand what was happening in court in real-time, including the testimony of witnesses, was enough to warrant a new competency evaluation. An inability to understand testimony due to mental retardation affects the basic fairness of the trial. Without an understanding of the testimony, a mentally retarded defendant's ability to rationally assist in his defense is undermined.

Comparison with analogous situations is instructive. "[D]ue process concerns are raised when a defendant cannot comprehend the testimony of the trial witnesses and thus cannot meaningfully participate

in his defense." Neugent v. State, 294 Ga. App. 284, 288, 668 S.E.2d 888 (Ga. Ct. App. 2008). A defendant must be able to sufficiently understand the proceedings against him such that he is able to assist in his own defense. Linton v. State, 275 S.W.3d 493, 504 (Tex. Crim. Ct. App. 2009). For example, a defendant who is deaf and unable to understand testimony in real-time due to the lack of a proper interpreter is unable to assist — an inability that is analogous to a person who is mentally incompetent. Linton, 275 S.W.3d at 500-01, 503 n. 13.

If an inability to hear testimony deprives the defendant of a fair trial, the inability to understand it due to a mental defect does the same. See State v. Staples, 121 N.H. 959, 962-63, 437 A.2d 266 (N.H. 1981) (defendant was denied effective assistance of counsel in criminal prosecution where defendant's inability to hear testimony during trial prevented him from participating adequately in his defense, analogizing to situation of incompetent defendant).

Similarly, a defendant who does not understand English and is not given an interpreter is denied a fair trial. State v. Gonzales-Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999). A defendant unable to understand the testimony in real-time due to a mental defect is in the same kind of position. A defendant is deprived of a fair trial when he is unable to understand the testimony against him, regardless of whether that lack of

understanding stems from a language barrier or a mental limitation. See State v. Lopes, 805 So.2d 124, 126-28 (La. 2001) (trial court erred when it denied defendant's motion for the appointment of a translator, analogizing mentally incompetent person and severely hearing-impaired person to one who does not understand the language).

Defense counsel represented that Clark was unable to understand testimony during court proceedings. No accommodation was made to enable such understanding. From this, there was a reason to doubt Clark's ability to assist in his defense, just as a deaf defendant or a defendant who does not understand the language is unable to assist without the benefit of an adequate interpreter.

There need only be a factual basis to doubt competency in order to trigger the mandatory evaluation requirements of RCW 10.77.060. Woods, 143 Wn.2d 561, 605; Marshall, 144 Wn.2d at 279. There was a reason to doubt Clark's ability to assist based on counsel's opinion and facts supporting that opinion. Defense counsel was in a unique position to offer a *current* opinion on Clark's competence based on first-hand information that Clark could not assist in his defense. Since the earlier competency determination, new information in the form of a demonstrated inability to understand testimony in real-time during the course of trial provided a specific factual basis for counsel's concerns related to Clark's ability to

currently assist in his defense. The court failed to be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence. Drope, 420 U.S. at 181.

There were enough facts to prompt a reasonable person to have a legitimate doubt as to Clark's competency. The court abused its discretion in failing to order another competency evaluation given the facts known to the court regarding Clark's mental limitations as well as defense counsel's opinion that her client may be incompetent. The failure to follow mandatory evaluation procedures under RCW 10.77.060 where there is reason to doubt competency requires reversal. Marshall, 144 Wn.2d at 280.

c. Even If Another Competency Evaluation Was Not Needed, The Court Still Erred In Failing To Accommodate Clark's Inability To Follow The Testimony

Even if the court did not err in refusing to order a second competency evaluation, it still erred in failing to take steps to ensure Clark could understand the testimony. Dr. Oneal testified at the competency hearing that Clark had an exceptionally limited verbal comprehension capability and needed accommodation to ensure he understood the testimony of witnesses in real time. 5RP 78, 83-86. Clark scored lower than 98 percent of others in his age range on verbal comprehension. 5RP

73. 99 percent of his peers have higher perceptual reasoning. 5RP 74-75. His receptive language skills were those of a seven-year-old child and his expressive language skills were those of a nine-year-old child. 5RP 74.

Judge Cuthbertson, having presided over the competency hearing, was most familiar with the challenges faced by Clark and believed accommodation was necessary. 5RP 113. Appearing before Judge Chushcoff, counsel later requested a continuance to look into getting a cognitive aid for Clark. 11RP 16-17. Without one, Clark was not able to participate in the trial. 11RP 16. Counsel explained that a cognitive aid — a person with experience with developmental disabilities — could explain to Clark what was going on in language that he understood. 11RP 16-17.

Counsel wanted the court to authorize a cognitive aid at public expense. 11RP 16. Counsel had not yet contacted the person she had in mind to fulfill this function. 11RP 20. Judge Chushcoff, the presiding judge who did not have familiarity with the competency proceeding, questioned the utility of a cognitive aid and ultimately responded that he would send the case out to trial. 11RP 22. After the case was assigned to Judge Hickman for trial, counsel noted a standing objection to the lack of accommodation. 14RP 20.

The court erred in making Clark stand trial without accommodation for his mental disability. Under the Washington Constitution, the accused has a constitutional right to "appear and defend in person." Wash. Const. art. I, § 22. Under the federal constitution, the accused has a right to be present at all critical stages, and a right to confront witnesses at trial. State v. Irby, 170 Wn.2d 874, 880-881, 246 P.3d 796 (2011); U.S. Const. amend. VI, XIV.

Whether accommodation is needed is reviewed for an abuse of discretion. See Gonzales-Morales, 138 Wn.2d at 381 (appointment of an interpreter is a matter within the discretion of the trial court). Claimed constitutional violations are reviewed de novo. State v. Vance, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010).

"[T]he Sixth Amendment right to participate in one's own trial encompasses the right to reasonable accommodations for impairments to that participation." United States v. Crandall, 748 F.3d 476, 481 (2d Cir. 2014). Reasonable accommodations ensure that a defendant facing trial can comprehend the proceedings against him. United States v. McMillan, 600 F.3d 434, 453 (5th Cir. 2010). "The general rule in handling the trial of a criminal defendant who is handicapped by deafness, blindness or other affliction is that a trial judge should afford such a defendant reasonable facilities for confronting and cross-examining the witnesses as

the circumstances will permit." People ex rel. Myers v. Briggs, 46 Ill.2d 281, 287, 263 N.E.2d 109 (Ill. 1970).

The right to be present and confront witnesses includes "the right to have trial proceedings presented in a way that the accused can understand." Linton, 275 S.W.3d at 503. The trial court thus has a duty to explore alternative means and devise a communication solution that provides a defendant with a constitutional minimum understanding of the proceedings. Id.; Ferrell v. Estelle, 568 F.2d 1128, 1133 (5th Cir. 1978), op. withdrawn as moot due to petitioner's death, 573 F.2d 867 (1978).

This standard requires accommodation that allows the accused to "sufficiently understand the proceedings against him such that he is able to assist in his own defense." Linton, 275 S.W.3d at 503-504. It requires accommodation to permit understanding at the time live testimony is given. Id. at 504. "A defendant's inability to spontaneously understand testimony being given . . . would be as though a defendant were forced to observe the proceedings from a soundproof booth or seated out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy." Arizona v. Natividad, 111 Ariz. 191, 194, 526 P.2d 730 (Ariz. 1974).

Issues involving an inability to understand testimony without accommodation frequently arise in the context of non-English speaking

defendants or hearing impaired defendants. A defendant who does not understand English and is not given an interpreter is denied the right to be present and the right to confrontation. Gonzales-Morales, 138 Wn.2d at 379. The right to an interpreter "rests fundamentally on the notion that 'no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.'" State v. Woo Won Choi, 55 Wn. App. 895, 901, 781 P.2d 505 (1989) (quoting United States v. Carrion, 488 F.2d 12, 14 (1st Cir.1973), cert. denied, 416 U.S. 907, 94 S. Ct. 1613, 40 L. Ed. 2d 112 (1974)).

"A hearing-impaired defendant's right to due process may be implicated in the same way that the absence of an interpreter for a non-English speaking defendant's right may be implicated: 'A defendant who cannot hear is analogous to a defendant who cannot understand English, and a severely hearing-impaired defendant cannot be tried without adopting reasonable measures to accommodate his or her disability.'" People v. James, 937 P.2d 781, 783 (Colo. Ct. App. 1996) (quoting State v. Schaim, 65 Ohio St.3d 51, 64, 600 N.E.2d 661, 672 (Ohio 1992)). "Clearly, a defendant who has a severe hearing impairment, without an interpreter, cannot understand the testimony of witnesses against him so as to be able to assist in his own defense." State v. Barber, 617 So.2d 974, 976 (La. Ct. App. 1993).

Clark found himself in the same kind of situation as a hearing impaired defendant or non-English speaker, the difference being his inability to understand testimony stemmed from his mental retardation. The cognitive aid requested by defense counsel was a reasonable measure to accommodate Clark's disability. Yet the court made no accommodation to ensure Clark could understand. This was constitutional error. The failure violated Clark's constitutional rights to be present and to confrontation, as well as his due process right to a fair trial. Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The State cannot overcome its burden of overcoming a presumption of prejudice on this record. Reversal is required.

2. THE COURT VIOLATED CLARK'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE IN EXCLUDING RELEVANT EVIDENCE ABOUT CLARK'S MENTAL RETARDATION AND ITS IMPACT ON THE CREDIBILITY OF HIS CONFESSION TO POLICE.

Clark is mentally retarded. 4RP 49-50; 5RP 72. He has limited cognitive and verbal comprehension skills. 5RP 73-75. Because of these limitations, Clark is suggestible. 5RP 79-80. He is vulnerable to being persuaded by others to say what he thinks they want him to say. 5RP 80.

The defense wanted the jury to know about Clark's mental limitations to attack the weight and credibility to be given to Clark's confession to police. A defense expert who evaluated Clark in relation to the competency proceedings was prepared to testify about Clark's mental limitations and how Clark would be prone to suggestibility during police interrogation. 10RP 25, 28-30; 14RP 47-48, 53; CP 79-94. That evidence was relevant to Clark's defense theory that he falsely confessed to the crimes. The court's exclusion of this evidence deprived Clark of his constitutional right to present a complete defense, requiring reversal of the convictions.

a. Standard of Review

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

A court also necessarily abuses its discretion by denying a criminal defendant's constitutional rights. Iniguez, 167 Wn.2d at 280. A claimed denial of a constitutional right, such as the right to present a defense, is

reviewed de novo. Id.; State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

- b. Expert Testimony On Clark's Mental Retardation Was Relevant To The Credibility Of The Confession And The Trial Court Erred In Ruling Otherwise.

Criminal defendants have the constitutional right to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. VI, XIV; Wash. Const. art. 1, § 22. "[T]he right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies" is a fundamental element of due process. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. All facts tending to establish a party's theory are relevant. State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000).

The court excluded evidence of Clark's mental limitations and expert testimony on the subject on the ground that it was irrelevant. 14RP 55-57, 84-85. The trial court believed evidence of Clark's mental retardation and its effect on suggestibility was only appropriately raised at the CrR 3.5 hearing if at all. 14RP 56-57, 84-85. The court was wrong on both counts. The evidence was relevant to the credibility of Clark's confession and the weight to be given that confession by the jury in determining whether the State had proven its case beyond a reasonable doubt. The court should have allowed the expert testimony to be put before the trier of fact so that it could assess Clark's confession in light of all the relevant circumstances.

In Crane, the trial court denied the defendant's motion to suppress and then rejected any evidence concerning the circumstances of a confession, reasoning that once the confession was deemed voluntary at the suppression hearing, evidence as to voluntariness should not be presented to the jury. Crane, 476 U.S. at 684, 686-87. That ruling, like the ruling in Clark's case, was based on the false premise that once a confession has been found voluntary, the evidence that supported that finding may not be presented to the jury for any other purpose. Id. at 687.

The United States Supreme Court recognized "the circumstances surrounding the taking of a confession can be highly relevant to two

separate inquiries, one legal and one factual." Id. at 688. The manner in which a statement was extracted is relevant to the purely legal question of its voluntariness, a question that most states assign to the trial judge alone to resolve. Id.

"But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be insufficiently corroborated or otherwise unworthy . . . of belief. Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility." Id. at 688 (internal citation and quotation marks omitted).

Crane holds when the credibility of a confession is central to the defendant's claim of innocence, the exclusion of competent, reliable evidence bearing on that issue violates the defendant's constitutional right to present his defense. Id. at 690-91. A criminal defendant must be given the opportunity to explain to the jury the reasons behind his confession. Clark was entitled to present relevant evidence in his own defense, including evidence bearing on the credibility of his confession.

Crane disposes of the trial court's suggestion that Clark's mental limitation evidence was admissible only at the CrR 3.5 hearing. 14RP 56-57, 84-85. Crane makes clear evidence of the circumstances surrounding a confession is not only relevant to the legal question of whether a statement was voluntary but also the factual question, to be resolved by the jury, of whether the statement is worthy of belief. Simply put, "a trial court's determination that a defendant's statement was voluntary and admissible does not preclude the defense from challenging its weight and credibility." Miller v. State, 770 N.E.2d 763, 772 (Ind. 2002) (reversing murder conviction because mentally retarded defendant was precluded from calling expert to testify about police interrogation techniques that could result in false confessions; the psychology of police interrogation and the interrogation of developmentally disabled people were outside the jurors' common knowledge and experience).

The trial court nonetheless excluded expert testimony on Clark's mental limitations as irrelevant because Clark had not presented a diminished capacity defense. 14RP 55-57, 84-85. "Diminished capacity is a mental disorder not amounting to insanity that impairs the defendant's ability to form the culpable mental state to commit the crime." Harris, 122 Wn. App. at 506 (citing State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001)).

Evidence of Clark's mental limitations was irrelevant to a diminished capacity defense because no such defense was presented. Defense counsel made it clear that a diminished capacity defense was not being raised. 14RP 47. That does not mean that testimony on Clark's mental limitations was irrelevant for all purposes. It was relevant to the credibility of Clark's confession. Under the circumstances of Clark's case, expert testimony was admissible to assist the jury in weighing the circumstances giving rise to his confession.

Hannon v. State, 84 P.3d 320 (Wyo. 2004) is instructive. In that case, a defendant with a low IQ made statements to police, which were appropriately deemed voluntary and admissible. Hannon, 84 P.3d at 342-43. The trial court, however, erred in excluding the testimony of defense expert Dr. Wells related to the circumstances of Hannon's confession, e.g.,

his low intelligence, low verbal skills, and suggestibility. Id. at 347, 350-53.

Dr. Wells was the only witness qualified to testify concerning Hannon's low IQ and its probable effect on his behavior during the interview. Id. at 350. Without the doctor's testimony, "the jury had no way of knowing that psychological testing revealed that because of his low cognitive functioning and lack of verbal skills, Mr. Hannon's tendency was to respond to questioning, particularly by those in positions of authority, by saying whatever might be necessary in order to get out of the situation as quickly as possible." Id. Evidence bearing on the credibility of the confession was central to Hannon's defense. Id. at 347. His case stood or fell on his ability to convince the jury that his statements to police were not true. Id. at 351. The exclusion of Dr. Wells' testimony about the factors influencing Hannon's confession deprived him of a fair trial. Id.

Of particular significance for Clark's appeal, the trial court in Hannon excluded the expert testimony in part because it raised an inference of diminished capacity and no such defense was available. Id. at 348. The Wyoming Supreme Court rejected that reason for excluding the expert testimony. Id. at 352. Expert psychological testimony has been admitted in a variety of contexts to assist the jury in deciding a variety of issues. Id. Hannon was entitled to have Dr. Wells testify about the tests

she performed, the interviews she conducted, and her assessment of Hannon from a psychological perspective based on the tests and interviews. She also should have been permitted to testify as to her opinions about how Hannon's psychological traits and cognitive functioning could have affected his behavior during the police interview, including any opinion she may have formed as to his capacity to understand the situation sufficiently to make a free and determined choice to admit the allegations presented to him by the deputy. Id. at 352.

In Clark's case, the trial court was fixated on the idea that evidence of mental retardation was only relevant to a diminished capacity defense. It failed to recognize the expert testimony was relevant for another reason.⁷ Without evidence of Clark's mental limitations, the jury's picture of Clark's confession was incomplete.

Similar to Hannon, the exclusion of Dr. Oneal's testimony left the jury without any knowledge that psychological testing revealed that because of his low cognitive functioning and lack of verbal skills, Clark

⁷ See also State v. Burr, 195 N.J. 119, 128-30, 948 A.2d 627 (N.J. 2008) (trial judge improperly excluded expert testimony regarding the defendant's Asperger's Syndrome ground that no diminished capacity defense was presented; evidence of mental defect, illness, or condition has been admitted for other purposes, such as to assess credibility or otherwise evaluate the subjective perceptions of an actor, and "the trial court's focus on whether the disputed evidence was relevant to a diminished capacity defense distracted the court from examining the evidence under general relevance concepts.").

was vulnerable to suggestibility. As in Hannon, Dr. Oneal was the only witness qualified to testify concerning Clark's low IQ and its probable effect on his behavior during interrogation. Hannon, 84 P.3d at 350. The jury was entitled to measure the weight and credibility of Clark's confession in light of his mental limitations.

The unreliability of Clark's confession to Detective Baker was the heart of Clark's defense. CP 92-93. The exclusion of Dr. Oneal's testimony destroyed that defense.

Expert testimony is proper if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. Expert testimony on the issue would have assisted the trier of fact to understand the significance of Clark's mental disability. Dr. Oneal could have explained to the jury the effects of retardation on Clark's mental functioning. From that, the jury would have a more complete picture by which to judge Clark's confession. Dr. Oneal's testimony would have assisted the jury, which lacked insight into the psychological reasons a person would confess when subjected to police interrogation.

In United States v. Hall, the defendant claimed his confession to kidnapping was false and the result of his desire to please the interrogating police officers. United States v. Hall, 93 F.3d 1337 (7th Cir. 1996). The trial court did not permit the defendant to call social psychologist Dr.

Ofshe to testify that people can be coerced into false confessions and what factors experts in the field rely on to distinguish between reliable and unreliable confessions. Hall, 93 F.3d at 1341. The trial court did allow Dr. Traugott, the examining psychiatrist, to testify about Hall's mental condition (e.g., his attention-seeking behavior and his high level of suggestibility) and to opine that one of the problems for someone interrogating Hall was that Hall could easily be led to give the type of response he believed the questioner was seeking. Id. But the trial court excluded Dr. Traugott's proffered testimony about Hall's susceptibility to various interrogation techniques, the propriety of suggesting answers to Hall, and Hall's capability of confessing to a crime that he did not commit. Id.

The Seventh Circuit reversed, finding Dr. Ofshe's testimony was admissible because it would have assisted the jury in deciding the case and that it went to the heart of the defense. Id. at 1345. Furthermore, the trial court erred in excluding Dr. Traugott's testimony about Hall's susceptibility to various interrogation techniques and his propensity to give a false confession. Id. Dr. Traugott's testimony was needed to link the condition identified by Dr. Ofshe to Hall himself. Id.

Similarly, Dr. Oneal could have testified about Clark's susceptibility to police interrogation methods in light of his mental

limitations. Although Clark's mental retardation was relevant to the credibility of Clark's confession, the trial court prohibited the testimony of the defense expert. Thus, the defense was unable to present evidence at trial that Clark's mental limitations made him susceptible to suggestions by law enforcement. As it turned out, the jury was left with a distorted picture of Clark. The prosecutor argued Clark's confession proved he committed the crimes. 14RP 419-26. That argument had overwhelming force in the absence of countervailing expert testimony on Clark's mental retardation.

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

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

The State cannot overcome its burden of overcoming a presumption of prejudice here. An officer's testimony about a confession has significant impact on a jury. State v. Wilson, 144 Wn. App. 166, 185, 181 P.3d 887 (2008). "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.'" Arizona v.

Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139-40, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (White, J., dissenting)).

Dr. Oneal's testimony would have provided a defense to that confession. Because Dr. Oneal's testimony went to the heart of Clark's defense, its exclusion cannot be considered harmless beyond a reasonable doubt. Boyer v. State, 825 So.2d 418, 420 (Fla. Ct. App. 2002) (adopting reasoning of Hall to reverse murder conviction where defendant not permitted to call expert regarding false confessions). Reversal is required.

3. THE COURT LACKED AUTHORITY TO IMPOSE A SUSPENDED SENTENCE AND CONDITIONS OF PROBATION ON COUNTS II AND III BECAUSE THE COURT SENTENCED CLARK TO SERVE THE MAXIMUM TERM OF CONFINEMENT.

The court imposed a sentence of 364 days on the gross misdemeanor convictions under counts II and III with zero days suspended. CP 662, 665; 14RP 469-70. The court, however, also entered an order entitled "conditions on suspended sentence," which purported to suspend the term of confinement and imposed conditions and provisions on that sentence. CP 662-63. A condition of the suspended sentence is that Clark must pay legal financial obligations as set forth in the felony judgment and sentence. CP 662-63. The order further provides "Revocation of this probation for nonpayment shall occur if defendant wilfully fails to make

the payments having the financial ability to do so or wilfully fails to make a good faith effort to acquire means to make the payment." CP 663.

A court can grant probation by "suspend[ing] the imposition or the execution of the sentence." RCW 9.95.210(1). But if a court imposes a maximum sentence of confinement and actually suspends none of it, the court lacks the authority to impose probation. State v. Gailus, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), overruled on other grounds by State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009).

A gross misdemeanor is punishable by imprisonment for a maximum term of not more than 364 days. RCW 9A.20.021(2). The court imposed the maximum term of confinement of 364 days for counts II and III with zero days suspended. CP 662, 665. But it entered an order that purported to impose a probationary condition. CP 662-63. Because this sentence did not actually suspend any jail time, the suspended sentence and associated probation conditions must be vacated for counts II and III. Gailus, 136 Wn. App. at 201. Defense counsel did not raise this challenge below, but erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

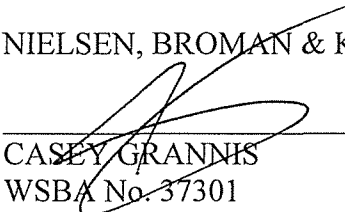
D. CONCLUSION

For the reasons set forth, Clark requests that this Court reverse the convictions and order correction of the judgment and sentence.

DATED this 30th day of June 2014

Respectfully Submitted,

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Stare v. Anthony Clark,
No. 45203-1-II

Today I filed & E-served per agreement the following documents:

Brief of Appellant, in State v. Anthony Clark, 45203-1-II in the Court of Appeals,
Division II, for the state of Washington, to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing
is true and correct.



Jamila Baker
Done in Seattle, Washington

6/30/14
Date

NIELSEN, BROMAN & KOCH, PLLC

July 01, 2014 - 11:09 AM

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