

No. 35240-1-II

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

STATE OF WASHINGTON

Respondent

vs.

JAMES NORMAN CLASSEN

Appellant

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DIVISION II
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ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY
The Honorable John Wulle
Superior Court No. 05-1-00408-8

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court committed constitutional error by restricting the cross-examination of state's expert witness, Dr. Ward, and by excluding impeachment testimony by Maurice Classen.
2. The trial court committed constitutional error by denying the defense motion *in limine* to exclude testimony by three jail guards concerning Dr. Classen's appearance while in custody.
3. Appellant assigns error to the prosecutor's misconduct during his rebuttal closing argument.
4. Appellant has been denied his constitutional right to appeal and due process of law because the record of the trial is not sufficiently complete to allow appellate review.
5. Appellant assigns error to the trial court's oral finding that the record is sufficiently complete to allow appellate review.
6. The trial court erred by denying the motion for a new trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err by restricting the cross-examination of Dr. Ward, and by excluding impeaching testimony by Maurice Classen? (Assignments of Error 1 and 6)

2. Was appellant denied his right to a fair trial with the presumption of innocence when the trial court allowed the state to call three jail guards to testify about Dr. Classen's behavior and demeanor while in custody for 14 months awaiting trial? (Assignments of Error 2, and 6)

3. Did the trial court err in ruling that evidence concerning Dr. Classen's behavior and demeanor while in custody while awaiting trial was more probative than prejudicial under ER 403? (Assignments of Error 2 and 6)

4. Did the prosecutor commit misconduct during his rebuttal argument by telling the jury that a manslaughter verdict would mean that the death of Eveann Classen was accidental? (Assignment of Error 5)

5. When the court's recording system failed to capture the audio portions of three days worth of testimony, including most of the

state's rebuttal and expert testimony, has appellant been denied due process of law, under the Fifth and Fourteenth Amendments to the United States Constitution, and Const. art. I, §3 of the Washington Constitution? (Assignment of Error 4)

6. Has appellant been denied his state constitutional right to appeal under Const. art. I §22 because the trial court did not maintain a record of sufficient completeness to allow appellate review? (Assignment of Error 4)

III. STATEMENT OF THE CASE

A. Synopsis of Lay Witness Testimony

Appellant Dr. James Classen was a practicing dentist who lived and worked in the Battle Ground area of Clark County Washington. He was married to Eveann Classen. He had two sons, Marcel Classen and Maurice Classen, both in their twenties. RP VIII 755, 770.¹ At the time of

¹ The report of proceedings in this case is a hybrid of the court's own record, and videotape which was shot by the TV pool cameras during the course of the trial. The latter portions of the trial record are from the pool cameras only, and as indicated by the transcriptionist, contain numerous instances where testimony begins in the middle of either direct or cross-examination. The parties also prepared a report of proceedings for portions of the record for which there is neither audio from the court's own recording, nor audio from the pool camera. See CP 229-253.

The record will be referred to as follows:

RP I	3.5 hearing held March 9, 2006
RP II	Continuation of 3.5 hearing, held March 16, 2006
PR III	Hearing on Motions <i>in limine</i> , held, March 31, 2006
RP IV	Hearing on motions <i>in limine</i> , held April 11, 2006
RP V	Trial proceedings, held April 12, 2006
RP VI	Trial proceedings, held April 13, 2006
RP VII-A	Trial proceedings, held April 17, 2006
RP VII-B	Trial proceedings, held April 17, 2006
RP VIII	Trial proceedings, held April 18, 2006
RP IX-A	Trial proceedings held April 18 and 19, 2006 (TV Pool camera)
RP IX-B	Trial proceedings held April 19 (TV Pool camera)
RP X	Trial proceedings, held April 20 (closing arguments)

trial, Marcel was a contractor living in Stevenson, Washington. Maurice was a deputy prosecuting attorney in King County, Washington. RP VIII 755, 775.

His sons had both known for a long time that their father was mentally ill. Marcel first discovered this in 1995 when his father attempted suicide. His mother thought it would be a good idea if they all understood the family's history of mental illness and his father's struggles with depression. Maurice recalled a day when he saw his dad in bed all day, and then found him on the floor of the family room, crying, and curled up in a fetal position. RP VIII 775. A few weeks later, his mother told him that his father had tried to commit suicide. RP VIII 776. After his release from the hospital in Vancouver after this incident, Dr. Classen's mental illness was a topic of conversation in the family for the next ten years. RP VIII 776. Maurice learned about the fact that his grandfather had been mentally ill as well. RP VIII 777. Maurice knew his father was getting clinical help, taking various drugs and getting help through the church. RP VIII 777. He could tell that his father's mental illness caused problems with his parents' relationship. RP VIII 778.

RP XI	Instructions regarding media (during jury weekend recess)
RP XII	Jury verdict April 24, 2006
RP XIII	"Penalty phase" proceedings, held April 26, 2006
RP XIV	Hearing on reconstruction of record, held May 4, 2006
RP XV	Hearing on reconstruction of record, held May 24, 2006
RP XVI	Hearing on motion for new trial, and on reconstruction of record, held June 16, 2006
RP XVII	Sentencing hearing, held August 2, 2006

The staff at his dental clinic was also aware that Dr. Classen had mental problems. Kim Benson worked with him as an assistant, and observed his work on a daily basis. The quality of his work had been fluctuating up and down like a roller coaster, but was on a downward spiral in the last few years. She had actually sent her own husband to another dentist, because she was concerned about Dr. Classen doing his work. RP IX-A 801-804. Martha Linberg also saw a general deterioration of his work. He had trouble focusing during exams, which was a change from what she had seen over the years. She had kept a list of patients whose work had to be redone. RP IX-A 809-810. Pam Anderson, who had been employed by Dr. Classen for thirteen years, noticed his roller coaster moods. The staff never knew what kind of mood he would be in until the day started. RP IX-A 825. The office staff had noted that over the course of the last several months, his precision and carefulness with dental work had been deteriorating. He actually had to redo some routine work. At times seemed very confused and they would have to direct him to the exam room he was supposed to be going into. RP VII-B 666. Despite his problems, however, he had a successful practice. RP IX-A 807.

By January of 2005, both Maurice and Marcel became aware that their parents were going to get a divorce. RP VIII 757, 783. To Marcel, his father seemed to be going through a heavy bout of depression, and his mother was very worried about his mental health. He had been missing days of work, which was extremely unusual for him. RP VIII 757. When

Marcel went to church with him on a visit one weekend, Dr. Classen broke down sobbing in the middle of the sermon, cried on the way home, and also back at the house. RP VII 757-78.

The next weekend they had a meal out and his father was jumping from subject to subject in conversation and was unable to follow the conversation. This was very odd because usually he was a good conversationalist. This made Marcel very concerned. RP VIII 759-60.

Shortly after that Dr. Classen's behavior completely changed. He seemed excited, happy, and seemed to be making plans for the future, which relieved Marcel a bit. Dr. Classen started calling a lot more frequently. He seemed extremely upbeat. He called three times in one day, which was very unusual. But he was speaking very quickly and did not have a whole lot to say. RP VII 761.

Dr. Classen made plans to go on an exotic fishing trip. They had fished before, but never on a trip like the one his dad was discussing, which was either to be in Costa Rica or British Columbia. RP VII 762.

Dr. Classen began purchasing things. He had a new suit on the day he and Marcel went to church. He also bought a full size pick up truck, which seemed a bit excessive for his needs. He also bought a computer with a lot of software that Marcel thought he would not use, along with warranty packages and service agreements. He even started sending e-mail. RP VIII 763-765. The last one Marcel received before his father's arrest was rather jumbled. It was unlike the previous ones he had sent,

which had good punctuation and spelling. It was so odd Marcel decided to keep it. RP VIII 766.

Maurice thought his dad was having a hard time with the impending divorce. RP VIII 783. His mother was worried about his mental health. RP VIII 784. In late January and early February 2005, it seemed like he was doing better, but in hindsight he was acting too well. RP VIII 785. He purchased a computer. This was new, since he had not been particularly savvy in a technical way. He bought a PDA. Maurice thought that this rapid spending was odd because his father was usually so frugal. RP VIII 786.

In the last two weeks before February 8, 2005, Maurice was having trouble tracking with his dad's conversation on the phone. His dad was not making any sense. He was too optimistic, it was odd and out of the ordinary. Before January, he had even lost his way a few times while driving. RP VIII 787-88. Events like this seemed to be happening with greater regularity. RP VIII 788.

Doug Bratt was Dr. Classen's attorney for his business corporate matters, and also knew him from a choir they were both in. RP VII 591. He also consulted with him concerning his divorce from Eveann. RP VII-A 592. They spoke about the divorce on February 3, and 7th. Dr. Classen indicated he wanted to do mediation and to try to minimize the role of the lawyers. RP VII-A 595-97. Bratt also saw Dr. Classen at church on February 6, and he seemed to be in a very good mood. RP VII –A 598-99.

They talked the next day, and Dr. Classen set up an appointment on February 10 to talk further about the divorce. RP VII-A 599-600. It seemed to Mr. Bratt that Dr. Classen wanted things to remain amicable so that he and Eveann could remain friends. Dr. Classen did mention that Eveann had started a relationship with another dentist. RP VII-A 603.

Stan Grenz was a long time friend of Dr. Classen's. They had know each other as kids and continued to see him in college. After they served in the military, they shared an apartment together. RP VII-A 538-539.

He became aware that Dr. Classen was having mental health problems. Once when he went to visit, Dr. Classen was lying on the floor on his side, with his knees to his chest, not moving. He did not respond initially, but eventually did when he was shaken. RP VII-A 544. He knew Dr. Classen was taking medication, and was seeking out counseling, but Dr. Classen did not speak much about his mental health problems to him. RP VII-A 545-546.

On the morning of February 8, 2005, Stan Grenz received a call from Dr. Classen at 5 AM. Classen was totally distraught, in a panic. He sounded out of his mind. He told Grenz he had just killed Eveann, and was at his cabin in Skamania County. Grenz called their other best friend, Bruce Adams, to go with him to the cabin. RP VII –A 549-551. They drove to the cabin and found Dr. Classen sitting in his pickup truck. He did not react when they arrived and they thought he might be dead. When

Grenz rapped on the window, Dr. Classen nearly went through the roof of the truck. RP VII-A 553. They went into the cabin with him and Dr. Classen had a total emotional meltdown. RP VII-A 554. Bruce Adams asked Dr. Classen some questions, such as whether he thought Eveann might still be alive and Dr. Classen said he did not know. So they called 911 to have emergency vehicles sent to her house. RP VII-A 555. When they talked with the police, Stan Grenz agreed to meet them at the Skamania store and guide them to the cabin. RP VII-A 555.

Bruce Adams had known Dr. Classen for 40 years and was a very good friend. He had gone snow camping with Dr. Classen and Stan Grenz for 25 years. RP VII-A 565-66.

He was awakened on the morning of February 8 by Stan Grenz who told him about Dr. Classen's call. They got up and went to the cabin. His wife started to call around to the police. They were very worried that Dr. Classen would commit suicide. RP VII-A 570-71. When they arrived at the cabin, Dr. Classen was slumped over the wheel of his truck, motionless. They thought he was dead. RP VII-A 572-73. They called 911 and Bruce stayed on the line with them while Stan went down to SR 14 to guide the police up to the cabin. RP VII-A 575-76.

When Bruce talked with Dr. Classen in the cabin, he was "catatonic", but would respond to suggestions and answer questions in a minimalist way. RP VII-A 576, 580. Bruce relayed information from the

dispatcher to Dr. Classen, who was able to answer questions. RP VII-A 588.

Tim Converse was a Skamania County deputy sheriff who received a call about a person who wanted to turn himself in for a crime done in Clark County. He went toward the location where the caller was, but he and another deputy had to get guidance in getting to Dr. Classen's cabin from a friend who had been with him. They met this man, Stan Grenz, at the Skamania store. RP V 302-304. When they got to the cabin, Dr. Classen was sitting quietly. A third man who was present, Bruce Adams, was upset, agitated and distraught. RP V 308. The police arrested Dr. Classen, read him his Miranda rights and transported him to the Skamania County jail. RP V 309, 311-313. They asked him if he had changed clothes and where they were. They also asked for the location of the scissors he had used, and he told them they were at the cabin. RP 313-314.

Deputy John Horch was dispatched to 500 NE 154th Street with other police to the residence of Eveann Classen, appellant's wife. The found a woman laying on her back with a lot of blood on her and blood on the carpet and her bed. A paramedic called to the scene confirmed she was dead. RP 334, 337, 338.

Deputy Cynthia Bull was responsible for evidence collection at the scene. After a search warrant was procured, she did a walk through of the

residence and then videotaped and photographed the scene.² RP V 340, 342-43.

Dr. Dennis Wickham, the Clark County Medical examiner, examined the body at the scene and took his own set of photographs. RP V 439, 441. He concluded that Eveann Classen had died of multiple sharp force injuries. The mechanism of death was loss of blood and asphyxia. There was no major wound, just a combination of wounds. RP V 451, 452. The asphyxia was due to the fact that one of the stab wounds was in her back, which caused a collapse of the left lung. RP V 453. She also had an injury to her trachea which could have been fatal over a period of time. The blood loss from her injuries would have taken a period of time to cause death, due to the fact that no major artery or vein was hit. RP V 459. The medical examiner testified death would not have been within 30 seconds, but it could have been within minutes. RP V 504.

Detective Rick Buckner was called to the Skamania County Sheriff's office to take a statement from Dr. Classen. He advised Dr. Classen of his rights, and then did what he called a "pre-interview," during which most of the topics later explored on the taped statement were reviewed. The "pre-interview" process took 25 minutes and the actual videotaping took 45 minutes. Dr. Classen was subdued and passive. He did not ask for a lawyer and did not assert his right to remain silent. Exhibit 53 is a copy of the videotape that was made from this

² Exhibits 1-30, all scene photos, were admitted without objection.

interrogation. RP 269-70.³ Dr. Classen told them that he did not realize what was going on, and what he had done earlier. It was as if he was in a fog. But when asked what he was thinking at the time of the stabbing, he also told them, "I don't know what I was thinking, I was just full of rage, wanting to get back, I guess." RP V 289, 291. He was also asked if he knew what he was going to do when he retrieved the scissors from the sewing room before going to his wife's bedroom, and told the police he guessed he did know what he was going to do at that point. RP V 300-301.

Deputy Monty Buettner was a Skamania County deputy sheriff who was monitoring the audio and video taping of the interrogation of Dr. Classen. He had contact with Dr. Classen for 3-4 hours that day. RP VI 402-403. Dr. Classen, in his opinion, did not have any difficulty understanding what was going on. RP VI 404. At times he was somber, and at others emotional. RP VI 418.

Deputy Buettner also went to the Classen cabin and recovered some scissors on the ground near the cabin, and also recovered some pants with brown or red stains on them. RP VI 409. There was also a Ziploc bag with a washrag or dish towel with reddish brown stains inside, and a shirt and socks in the same general area. RP VI 411-413. Dr. Classen had told them where the clothes were to be found, and they had not been buried in any way. RP VI 420.

³ The transcriptionist notes that the videotape was played for the jury, but due to the sound quality, was not reproducible for the report of proceedings. The videotape will be designated as part of the record on appeal.

B. Expert Testimony Regarding Diminished Capacity

Dr. David Shapiro is a board certified clinical psychologist who specializes in forensic psychology. RP VII-B 637-38. He did an evaluation of Dr. Classen, reviewed his psychiatric records from 1994 to 2006 and reviewed the police reports, including appellant's videotaped statement. RP VII-B 661. He met with the appellant for two days doing a clinical interview and psychological testing. It was his opinion that Dr. Classen was suffering both from bi-polar disorder and that he was at the time of the offense in a dissociative state. RP VII-B 663. This opinion was based on the family history of bi-polar illness, the results of the psychological tests he conducted⁴ and the observations of the office staff, and Dr. Classen's sons and friends, Mr. Grenz and Mr. Adams. RP VII- B 659-660, 665.

Bi-polar illness is a mood disorder. There is a particular form called rapid cycling bipolar disorder where the mood swings are in very rapid sequence, and Dr. Classen fit this diagnosis. RP VII-B-669-70. The fact that he was able to perform routine dental work did not mean he was not suffering from mental illness. RP VII-B 677. The manic state would diminish his ability to premeditate because persons in an acute manic state do not consider consequences and are doing things impulsively. Since premeditation requires thinking something over, it is the opposite of a manic state. RP VII-B 679. It was Dr. Shapiro's opinion that at the time of

⁴ The results of the testing showed that Dr. Classen was not malingering, or faking his symptoms. RP VII-B 646, 647, 649, 654.

the homicide, Dr. Classen was in a severe manic state, although he did not appear manic by the time of the video taped statement. RP VII-B 680. This was the result of rapid cycling. At the time of the making of the statement, he was in a state of depression. RP VII-B 681.

Dissociation is a temporary alteration in awareness or consciousness so that a person is not fully aware of what it is that they are doing. Examples are dissociative amnesia or multiple personality disorder, now called dissociative identity disorder. RP VII-B 683. There is also dissociative fugue, a briefer interval of amnesia. RP VII-B 684.

Dr. Classen suffered from depersonalization, brought on by severe stress. People in this type of dissociative episode go into a dreamlike state. Dr. Classen had had several previous episodes like this, witnessed by his office staff and his sons. RP VII-B 684, 685. When a person is in a dissociative state, he is on automatic pilot, not thinking or planning, not deliberating. A person in this state has a sense of standing and watching his body do something. RP VII-B 685. Dr. Classen peaked on two tests that measured dissociation RP VII-B 686.

Dr. Shapiro testified that Dr. Classen's mental illness was so pervasive that it prevented him from being able to premeditate or form specific intent. RP VII-B 695. It was also his opinion that Dr. Classen did not act with intent, based on diminished capacity. RP VII-B 699.

Dr. Robert Julien is an anesthesiologist who was called by the defense to discuss pharmacology and drug interaction. RP IX-A 815, 817.

At the time of the homicide, Dr. Classen was taking Serzone, and Welbutrin. Both are antidepressants. In general, antidepressants are not administered to people who are bipolar because although they relieve depression, they can cause a “manic flip”. Welbutrin should only be used for bi-polar patients who are also getting a mood stabilizer. Dr. Classen, however, was not getting a mood stabilizer. RP IX-A 817-819. There are studies which describe anti-depressant induced mania in bi-polar patients, the bipolar “manic flip” which he had described earlier. Lithium is still the drug of choice for treatment of bipolar disorder. RP VIII 821.

In rebuttal, the state called Dr. Nitin Karnik.⁵ Dr. Karnik was employed by Western State Hospital. He and Dr. Barry Ward examined Dr. Classen there. They diagnosed him as suffering from major depressive disorder.

Dr. Classen was taking Serzone and Welbutrin while he was in custody until October 14, 2005, when Paxil was switched for the Serzone. Dr. Classen took no mood stabilizing drugs during the entire time he was in custody pending trial. Dr. Karnik agreed with Dr. Julien that if a person who is bi-polar is given anti-depressants without a mood stabilizer such as lithium, the anti-depressants can “flip” the person into a manic state.

Dr. Karnik stated that a manic episode has to last at least seven days to be classified as mania, and four days to qualify as hypo-mania. He

⁵ Dr. Karnik’s testimony was not recorded, and was not part of the TV pool coverage. The summary of his testimony is from the reconstructed report of proceedings prepared by the trial lawyers, CP 229-253.

was familiar with the phenomena of rapid cycling bi-polar disorder. He agreed that even if Dr. Classen had not had any manic symptoms while at Western State Hospital, it did not mean he was not bi-polar. He thought that a true manic episode could be the basis for diminished capacity. But he was not able to express an opinion about whether Dr. Classen was suffering from diminished capacity at the time of the offense.

Chris Anderson was also called as a rebuttal witness.⁶ He was a custody officer in the Clark County Jail in the “pod” where Dr. Classen was housed during 2005. Anderson never saw Dr. Classen “acting out” or having any behavioral problems while he was in custody. However, there were over 100 inmates in the pods Anderson was responsible for, and they were spread out in a 360 degree arc around him, so he could not see all the inmates at one time, and not hear them unless he “keyed” his microphone to listen to sound in the pod. He never spoke to Dr. Classen, and had no training in the diagnosis of mental illness.

Ryan Ashworth is also a custody officer at the Clark County Jail.⁷ When Dr. Classen was first incarcerated, he was placed on a suicide watch. It was Ashworth’s job to monitor such inmates closely. He did not observe any behavioral problems with Dr. Classen during the time he was

⁶ Anderson’s testimony was not recorded. The summary is from the reconstructed report of proceedings. CP 229-257. This testimony was admitted over defense objection, made during motions *in limine*, CP 16, 29 and CP 201-203. The court’s ruling admitting this evidence is found at CP 260-262.

⁷ This summary is from the reconstructed report of proceedings. CP 229-257

on suicide watch, nor later in the pod to which the doctor was assigned in 2005.

Victoria McKenzie is a sergeant in the Clark County Jail.⁸ She explained the procedure for infractions for misconduct in the jail. She also said that during the 14 months that Dr. Classen was in the jail, he did not receive any infractions.

Dr. Barry Ward is a psychologist employed by Western State Hospital.⁹ Dr. Ward interviewed Dr. Classen in Western State Hospital on four occasions for about a total of eight hours. He diagnosed Dr. Classen as suffering from major depressive disorder.

Dr. Ward testified that a defendant's course of conduct in jail is an important part of making a diagnosis. He stated that a person who has manic episodes while in custody would invariably have problems in custody. A person who is manic would be likely to have problems with guards and other inmates.

Dr. Ward differentiated between hypo-manic and manic states. A hypo-manic state would be an elevated mood that lasts for at least four days, which a manic state would be much more intense, like that of a person under the influence of methamphetamine.

⁸ This summary is also from the reconstructed report of proceedings. CP 229

⁹ Significant portions of Dr. Ward's testimony were not recorded. Those portions of the summary which do not bear page numbers from the RPs are from the reconstructed report of proceedings. CP 229-257. The recorded portion of his direct testimony begins midstream. A significant portion of the cross-examination was not recorded, and again the summary is from the reconstructed report of proceedings.

Dr. Ward stated that dissociation is not a mental disorder, but a defense mechanism to mental trauma. He agreed that the tests Dr. Shapiro had administered to Dr. Classen showed he had experienced dissociation, but they did not indicate when this had happened. Dr. Ward testified that he would expect Dr. Classen would have experienced dissociation as a response to experiencing trauma, after the incident.

Dr. Ward testified that in the mania portion of bi-polar illness, there are periods of sleeplessness and reduced need for sleep. He noted however, that Dr. Classen reported feelings of fatigue associated with periods of sleeplessness. RP IX-B 832. Also, while memory loss was a typical diagnostic criterion for dissociative disorder, Dr. Classen was able to produce a narrative that was generally consistent with the other available data about what happened. RP IX-B 835. Dr. Ward defined an intentional act as goal directed behavior, and understood premeditation to require the ability to form a plan. He did not see any evidence that dissociation made Dr. Classen unable to act intentionally or premeditate. RP IX-B 836-37.

On cross-examination¹⁰ Dr. Ward noted that there is a genetic component to bi-polar disorder, and a person was 8-10 times more likely to suffer from this illness if there was a history of the disorder in the family, as there was in Dr. Classen's family.

¹⁰ This summary is taken from the reconstructed report of proceedings, CP 229-257, except as noted.

Dr. Ward had only worked as a staff psychologist at Western State since 2004. He had no individual clinical practice, and has never treated patients. He has never concluded that any defendant he examined was suffering from diminished capacity. Dr. Ward conducted no psychological testing of any type.

Dr. Ward acknowledged that Dr. Classen's ability to think rationally and exercise mental control was almost certainly impacted by his mental illness. But he felt that his capacity to form intent, now matter how poorly chosen, remained intact. RP IX-B 857. It was not clear to him to what degree Dr. Classen's symptoms would interfere with his capacity to premeditate or form intent. RP IX-B 857-58. He did agree that there were indications of dissociation going on that the time of the events of the homicide: Dr. Classen had described being in a dreamlike state, he said he did not know why he had stopped off at his wife's house and said he did not know what he was going to do when he got there. RP IX-B 861. Dr. Ward agreed that there is a certain level of subjectivity in the application of the legal test for diminished capacity, and that some experienced therapists would not interpret the test as narrowly as he did.

Outside of the presence of the jury, Dr. Ward was also asked about a conversation he had with Maurice Classen. He understood the difference between first degree murder and second degree murder. RP IX-B 841-42. He remembered having a discussion with Maurice Classen about the case. RP IX-B 843. But he denied telling Maurice that he thought murder in the

second degree was the more appropriate charge. RP IX-B 843. Dr. Ward agreed that if he had said that, it could be inferred to mean that he did not think there was sufficient proof of capacity to premeditate. RP IX-B 843. He did not recall the exact scope of the conversation, but thought that it had been Maurice Classen who had expressed the “hope” that the outcome would be a “murder two” instead of a “murder one.” RP I-X-B 848.¹¹

C. Procedural History

Appellant Dr. James Classen was charged by an information filed on February 11, 2005 with one count of first degree murder, RCW 9A.32.030 (1)(a). CP 1. The state filed a notice of special punishment at the same time. CP 3. An amended information was filed on March 23, 2006, which did not involve any substantive change in the charge. CP 10.

A hearing was held pursuant to CrR 3.5 on March 9 and March 16. The court admitted Dr. Classen’s videotaped statement, and also out of court statements that had not been videotaped. RP III140-142.

The court held hearings on March 31, and April 16 regarding defense motions *in limine*. The defense sought to offer statements by Dr. Classen’s son Maurice, himself a prosecuting attorney, concerning his recollection of a conversation he had held with Dr. Ward, the state’s mental status expert. Mr. Classen would have testified that Dr. Ward had told him that Dr. Ward thought the case was more appropriately

¹¹ Maurice Classen would have testified that Dr. Ward had told him that he (Ward) did not really think Dr. Classen would have the capacity to premeditate. RP III 196, CP 198.

categorized as a second degree murder rather than first degree murder. This would be offered to impeach Dr. Ward's anticipated testimony that Dr. Classen's mental illness did not prevent him from having the capability both to premeditate and intend the charged offense. RP III 194-196. The court reserved ruling, and the matter was taken up again later in the trial. RP III 196-199 and CP 197-99, 254-256.¹²

The case was tried before the Honorable John Wulle and a jury beginning on April 12, 2006 and finishing on April 20, 2006. The jury returned a verdict of guilty as charged on April 24, 2006. CP 159; RP XII 982.

On April 26, the jury was given instructions and argument on aggravating factors. RP XIII (generally). After its deliberation, the jury found there were no aggravating factors. RP XIII 1031.

The court discovered after the jury's verdict that due to a computer error, the audio portion of the last three days of the trial had not been recorded on the court's record of the trial. RP XIII 1010. In subsequent hearings, the parties investigated what parts of the record had been recorded by the TV pool camera, and what parts were totally without a record. The court's own notes from the trial had also been recycled. RP XV 1080.

¹² The arguments of counsel and the trial court's ruling were part of the record that was not picked up by the court's equipment, or the TV pool cameras. The parties discussed this during the hearing on the motion for new trial, RP XVI 1106-07.

The trial court directed the parties to try to reconstruct the record. This reconstruction is in the Clerk's Papers. CP 229-257. The trial court made an oral "finding" that the reconstructed record was sufficient for appellate review. RP XVI 1094.

The trial court heard Dr. Classen's motion for a new trial on June 16, 2006. The motion focused on the admissibility of testimony of jail guards concerning Dr. Classen's appearance while in custody, the restriction the court had placed on cross-examination of Dr. Ward, the prosecution's expert on Dr. Classen's mental condition, and the prosecutor's argument that equated the *mens rea* of manslaughter with "accident." RP XVI 1102. The court denied the motion for a new trial. RP XVI 1104-1106.

After the filing of the reconstructed report of proceedings on the portions of the trial for which there was otherwise no record, the case proceeded to a sentencing hearing on August 2, 2006. The court imposed a midrange sentence of 280 months. RP XVII, 1166, CP 229, 267. The parties also filed findings of fact and conclusions of law regarding the issues raised in the motion for a new trial. CP 254, 260.

IV. ARGUMENT

A. The trial court erred in restricting the impeachment of Dr. Ward.

Dr. Ward was the state's key rebuttal witness. He furnished the ammunition for the prosecutor's closing argument that an expert who had

spent time with Dr. Classen had concluded that despite his significant mental illness, he was fully capable of premeditation and intentional action on the night of Eveann Classen's death. The defense sought to offer evidence through Maurice Classen, appellant's son (who was himself a prosecutor), that Dr. Ward told him he thought that murder in the second degree was the more appropriate charge. During Dr. Ward's testimony outside the presence of the jury on this point, he acknowledged that he had had a discussion about the case with Maurice Classen. He also acknowledged if he had said that murder in the second degree was the more appropriate charge, it could be inferred to mean he did not think there was sufficient proof of capacity to premeditate. RP IX-B 843-844.

The state moved *in limine* to exclude the proposed testimony of Maurice Classen, and the court granted the motion. The court's written decision reveals a cramped view of the constitutional right of confrontation guaranteed by Sixth Amendment to the United States Constitution and Const. art. I, §22. It was error to exclude this cross-examination and error to exclude the proposed impeaching testimony of Maurice Classen.

Article I § 22 of our Washington Constitution gives a person accused of a crime the right to confront the witnesses against him face to face. The right to confront the witnesses necessarily includes the right to cross-examine them. *State v. Temple*, 5 Wn. App. 1, 485 P.2d 93 (1971). This is true as well under the Sixth and Fourteenth Amendments to the

United States Constitution. *Smith v. Illinois*, 390 U.S. 129, 19 L.Ed.2d 956, 88 S. Ct. 748 (1968) ; *Pointer v. Texas*, 380 U.S. 400, 13 L.Ed.2d 923, 85 S. Ct. 1065 (1965). While “the right to cross-examine is not absolute, its denial or significant diminution calls into question the ultimate integrity of the fact-finding process.” *Chambers v. Mississippi*, 410 U.S. 284, 295, 35 L.Ed.2d 297, 93 S. Ct. 1038 (1973). An accused person is denied his right to cross-examination if reasonable latitude is not allowed. “Prejudice ensues from a denial of the opportunity to place the witness in [his] proper setting and put the weight of [his] testimony and [his] credibility to a test, without which the jury cannot fairly appraise them.” *Alford v. United States*, 282 U.S. 687, 75 L. Ed. 624, 51 S. Ct. 218 (1930) ; *State v. Temple, supra* at 4.

When a particular witness is essential to the state's case, a defendant is given extra latitude in cross-examination to show bias, interest, or motive. *State v. Whyde*, 30 Wn. App. 162, 632 P.2d 913 (1981); *State v. York*, 28 Wn. App. 33, 621 P.2d 784 (1980); *State v. Roberts*, 25 Wn. App. 830, 611 P.2d 1297 (1980); *State v. Peterson*, 2 Wn. App. 464, 469 P.2d 980 (1970); *State v. Tate*, 2 Wn. App. 241, 469 P.2d 999 (1970).

It is also reversible error to deny the defense the opportunity to show the chief prosecution witness is biased through an independent witness. *State v. Spencer*, 111 Wn. App. 401, 45 P.3d 209 (2002); *State v. Jones*, 25 Wn. App. 746, 751, 610 P.2d 934 (1980).

The trial court here wrongly concluded that in order to allow Maurice Classen to testify about his conversation with Dr. Ward, it would first have had to allow Dr. Ward to testify that he believed Dr. Classen was guilty of first degree murder. The court was faced with no such dilemma. Dr. Ward had already testified, fairly unequivocally, that Dr. Classen had the ability to premeditate. The defense theory of the case, and the thrust of its expert testimony, was that Dr. Classen's mental illness diminished his capacity to do so. The trial court completely missed the point of the impeachment, a point which Dr. Ward himself¹³ clearly grasped: if he had said to Maurice Classen during their interview that murder in the second degree was the appropriate charge, it could reasonably be inferred that he had doubts about Dr. Classen's ability to premeditate. Since Dr. Ward was testifying for the government that Dr. Classen *had* the ability to premeditate, evidence that called his opinion into question was clearly impeaching, clearly relevant, and clearly admissible. Whether the jury would have considered the impeachment a fatal blow to his credibility is not the issue. The court, as gatekeeper of the evidence, should not have closed the door to Maurice Classen's recollection of his conversation with the state's expert, any more than it could exclude the statement if it had been made to a defense investigator.

The resolution of this case required the jury to delve into Dr. Classen's ability to form the requisite mental states required for liability

¹³ Dr Ward had worked as a lawyer before going to work at Western State. CP 238.

for the various forms of homicide. Maurice Classen's testimony, if allowed, would have cast doubt on Dr. Ward's opinion that Dr. Classen could premeditate. The trial court unfairly restricted the scope of cross-examination of Dr. Ward, and improperly restricted the proposed impeachment of this key witness, in violation of the Sixth Amendment and Art. I, §22. This court should reverse and remand for a new trial.

B. The trial court erred in allowing the three jail guards to testify about Dr. Classen's behavior while in custody.

Over a defense objection, CP 16, 29, the court allowed three jail guards to testify in the state's rebuttal case about their observations about Dr. Classen's behavior while in custody. This issue was also raised in appellant's post-trial motion for a new trial. CP 201-203.

The record of the arguments of counsel on this issue were not captured by the court's recording system, nor were they recorded by the TV pool camera. The court's ruling made in the hearing on the motion for new trial on this issue were recorded. The court indicated that the evidence was more probative than prejudicial, relying in part on the supposition that most jurors would probably conclude that a person on trial for murder would be in custody. RP XVI 1104, CP 260-62.

The testimony from the jail guards that Dr. Classen was held in custody for months while his case was pending denied him a fair trial by denigrating the presumption of innocence. The right to a fair trial includes the right to the presumption of innocence. *Estelle v. Williams*, 425 U.S.

501, 503, 96 S. Ct 1691, 48 L. Ed. 2d 126 (1976); *State v. Crediford*, 130 Wn. 2d 747, 927 P.2d 1129 (1996). This constitutionally guaranteed presumption is the bedrock foundation in every criminal trial. *Morissette v. United States*, 342 U.S. 246, 275, 72 S. Ct. 240, 96 L. Ed. 288 (1952). It is the duty of the court to give effect to the presumption by being alert to any factor that could “undermine the fairness of the fact-finding process.” *Williams*, 425 U.S. at 503. The courts review violations of the right to an impartial jury and presumption of innocence *de novo*. *State v. Johnson*, 125 Wn. App. 443, 457, 105 P.3d 85 (2005). The presumption of innocence guarantees every criminal defendant all “the physical indicia of innocence,” including that of being “brought before the court with the appearance, dignity, and self-respect of a free and innocent man.” *State v. Finch*, 137 Wn. 2d 792, 844, 975 P.2d 967 (1999). In cases where the jury has seen a defendant in shackles, the courts have held that this appearance in restraints “ ‘may reverse the presumption of innocence by causing jury prejudice,’ ” and thus deny a defendant due process. *State v. Hutchinson*, 135 Wn. 2d 863, 959 P.2d 1061 (1998). Courts have been alert to any factor that may “undermine the fairness of the fact-finding process.” *Williams*, 425 U.S. at 503. Due process requires the trial judge to be “ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.” *Smith v. Phillips*, 455 U.S.209, 217 102 S Ct.940, 71 L. Ed. 2d 78 (1982).

In *State v. Gonzales*, 129 Wn. App. 895,120 P.3d 645 (2005), the

defendant was not able to make bail prior to trial. The trial judge announced to the jury that it might see him brought to court in handcuffs and that there would be uniformed custody officers in court with him. The court then instructed the jury members that Gonzales was still presumed innocent, and that they could not draw any negative inference from the fact that he was being brought to court in custody. Defense counsel moved for a mistrial, but the motion was denied.

Even though no juror actually saw Mr. Gonzales in restraints or shackles, the Court of Appeals held that the court's announcement to the jury, even coupled with its cautionary instructions, denied him a fair trial. His conviction was reversed. The court also held that this was constitutional structural error, and not subject to review for harmless error.

In the present case, the court did not make an announcement such as the one made in *Gonzales*. The testimony of the three jail guards, however, made it abundantly clear to the jury that Dr. Classen was being held in custody all throughout the proceedings, which according to their testimony had been around 14 months.¹⁴ Like the jury in *Gonzales*, the message sent to the jury here was that Dr. Classen was too dangerous a person to remain at large in the community. The effect of this testimony completely shattered the presumption of innocence.

Assuming *arguendo* that the admission of this testimony about Dr.

¹⁴ Courts from other states have held that the presumption of innocence is violated by reference to a defendant's in-custody status. See, e.g., *Haywood v. State*, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991) (per curiam).

Classen's demeanor in custody is reviewable only as an error in the admission of evidence, it nevertheless would warrant reversal. Errors in the admissibility of evidence under ER 402 are reviewed under the abuse of discretion standard. *State v. Rivers*, 129 Wn. 2d 697, 921 P.2d 495 (1996); *Radford v. City of Hoquiam*, 54 Wn. App. 351, 354, 773 P.2d 861 (1989). A trial court abuses its discretion if its decision is exercised on untenable grounds, or for untenable reasons. *State ex. rel. Carroll v. Junker*, 79 Wn. 2d 12, 482 P.2d 775(1971).

The trial court's stated basis for its ruling shows that its discretion in admitting this evidence was exercised on untenable grounds. The state's ostensible reason for offering this testimony by the guards was to furnish the springboard for the argument that Dr. Classen was not bi-polar because he had not behaved badly in the closely controlled conditions of the Clark County Jail. The defense, however, had never claimed that Dr. Classen had experienced a manic episode while in custody. Moreover, the jail guards could not claim to have kept him under constant surveillance, and none of them were trained in psychiatric diagnosis. Their testimony thus had marginal relevance at best, even in rebuttal. The prejudicial impact of the testimony, however, was as large as if Dr. Classen had been brought into court in shackles. The court's "balancing" of the probative value versus the prejudicial impact under ER 403 demonstrates its discretion was abused:

As to the issue of the custody officers, I made a ruling at the time of trial. Part of that ruling was---and this was more an observation---I have

nothing to base it on other than the fact that jurors in a murder trial would conclude that someone is in custody, and I didn't see it as a ---as a big issue. RP XVI 1104.

Like the trial judge in *Gonzales*, the trial judge in this case was blind to the possibility that the jury would be affected by testimony the defendant had been in custody for more than a year, and that this would affect how the jurors would apply the presumption of innocence. Such an attitude would allow shackling and restraints of defendants accused of serious crimes on a routine basis on the theory that the jury would assume they were in custody anyway. Our courts, however, have only allowed shackling of defendants under severe circumstances, and only after the court has made a record of a compelling threat to persons in the courtroom, extreme unruly conduct, or the strong threat of an escape by the defendant. See, e.g. *State v. Hartzog*, 96 Wn. 2d 383, 396, 635 P.2d 694 (1981). Certainly, none of these factors was present in this case, and shackling would have been an abuse of the court's discretion. Likewise, its decision to admit testimony that Dr. Classen was in custody was an abuse of its discretion, and should require a new trial as a remedy.

C. The prosecutor committed misconduct in closing argument.

The trial court instructed the jury that if they found Dr. Classen not guilty of either murder in the first or second degree, or if they were unable to reach a verdict on those crimes, they could consider the lesser included offenses of manslaughter in the first or second degree. The court gave the

jury instructions on each of these lesser offenses. CP 146-148, 150-52, 154-156.

During his rebuttal closing argument, the prosecutor ridiculed the idea that the jury could consider the homicide in this case a manslaughter:

Manslaughter instructions? Manslaughter. The defendant actually is trying to say that he should be convicted only of manslaughter. *Manslaughter is an accident*. You look at the instructions on manslaughter, it talks about acting recklessly for the first degree, or negligently for the second degree. Those are concepts of accident. Where's the accident here? This is not an accident. RP X 951. (Emphasis added).

Defense counsel did not object during closing, but did raise this issue during their motion for a new trial. CP 203-205.

Prosecutorial misconduct during argument can deny a fair trial to an accused person. Only a fair trial is a constitutional trial. *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984); *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984). Prosecutorial misconduct during argument requires a new trial where there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. *State v. Davenport, supra* at 762. If the reviewing court "is unable to say from the record whether the [appellant] would or would not have been convicted but for the comment, then [the court] may not deem the error harmless." *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978); *Davenport, supra*, at 765. When the misconduct is so flagrant that no instruction could have cured it, no objection is even necessary. *State v. Belgarde*, 110 Wn. 2d 504, 507 755

P.2d 174 (1989); *State v. Charlton*, *supra* at 661; *State v. Claflin*, 38 Wn. App. 847, 690 P.2d 1186 (1984).

In *State v. Davenport*, *supra*, the defendant was being prosecuted for burglary. No evidence placed him in the house, and no witness testified to seeing him enter or exit. There was evidence that the defendant had been seen near a car in the vicinity of the house in possession of property which had been taken from the burglarized house, however. Defense counsel argued that there was not sufficient evidence that Davenport had entered or remained unlawfully in a building. In rebuttal, the prosecutor stated that it did not matter if Davenport had been in the house or not, because he was an accomplice to someone who had gone in. The jury had not been instructed on accomplice liability. Defense counsel objected, but was overruled by the trial court. The prosecutor finished her argument without ever mentioning the word “accomplice” again. The jury later requested an instruction on accomplice liability, but the court did not supply one, sending back a note that the jury should rely on the instructions given. Davenport was convicted.

The conviction was affirmed by the Court of Appeals (Division One) but the Supreme Court reversed. The court noted that the prosecutor’s comments about accomplice liability were an incorrect statement of the law, and therefore not harmless under the facts of the case.

The prosecutor in this case committed a similar type of misconduct by telling the jury that a manslaughter verdict was equivalent to saying that the homicide was accidental. If the homicide had been accidental, there would have been no crime at all.¹⁵ To find manslaughter in either the first or the second degree, the jury would have to find that Dr. Classen had recklessly caused Eveann Classen's death, or that he had caused her death with criminal negligence. RCW 9A.32.060, RCW 9A.32.070. Either required a type of criminal intent, and neither could be classified as an "accident." Recklessness would require awareness of a substantial risk of a wrongful act could occur and disregard of that risk in a way that would be a gross deviation from conduct that a reasonable person would exercise in a similar situation. Negligence would require the same gross deviation from a reasonable person's conduct, but with lack of awareness of the substantial risk of the wrongful act. RCW 9A.08.010(c) and (d).

Consequently, the prosecutor's argument was a deliberate misstatement of the law, designed to deter the jury from considering the lesser included offenses which the court had instructed upon. Since the defense in this case revolved around whether Dr. Classen's mental illness had diminished his ability to act with criminal intent and/or premeditation, an argument which equated criminal recklessness and criminal negligence with "accident" was particularly improper and deprived him of a fair trial.

¹⁵ RCW 9A.16.030 provides that: "Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, with ordinary caution and without any unlawful intent."

- D. The record is not sufficiently complete to allow appellate review consistent with the due process clause of the Washington and United States Constitution.

In *State v Larson*, 62 Wn.2d 64, 381 P.2d 120 (1963), our Supreme Court held that in order to satisfy due process of law, there must be a “record of sufficient completeness” for appellate review of the potential errors in a criminal case. Accord, *State v Atteberry*, 87 Wn.2d 556, 554 P.2d 1053 (1976); *State v. Woods*, 72 Wn. App. 544, 865 P.2d 33 (1994). In *Larson*, the court reporter who was attending the trial had lost his notes, and was unable to find them. A narrative report of proceedings was prepared based on the trial court’s notes, but as appellate counsel had not been present at the trial, he was unable to test the accuracy of this format of the record.

In *State v. Tilton*, 149 Wn.2d 775, 72 P.3d 735 (2003), a prosecution in juvenile court, the court’s tape recording system failed to record the defendant’s own testimony. He argued that the reconstructed record, which consisted of the joint recollection of both trial counsel and the trial judge was insufficient for purposes of appellate review. The court of appeals affirmed the conviction, but the Supreme Court reversed. The court noted that the portion of the record which was missing was the most important piece of the record, since it was possible that diminished capacity might have been presented as a defense. Without the missing parts of the record, which the Supreme Court characterized as “inadequate”, the court was unable to determine the viability of these

defenses, and hence whether Tilton had received effective assistance of counsel.

The present case has similar significant problems with the record, particularly with regard to the state's rebuttal case. The only record of the testimony of the three jail guards is that reconstructed report of proceedings prepared from the memory the three trial lawyers. A substantial portion of the direct testimony and cross-examination of the state's chief rebuttal witness, Dr. Ward, exists only in the reconstructed report of proceedings. Dr. Karnik's rebuttal testimony is also dependent in whole on this reconstructive effort by the trial lawyers. While defense counsel both indicated that the reconstructions were accurate to the best of their recollections, CP 252-53, both also indicated in separate affidavits that since they were relying on recollection, rather than contemporaneous notes, the reconstructed record was not sufficiently complete to satisfy due process concerns. CP 220, 225. The trial judge did not retain his own notes, so his observations are again dependent on the reconstructive process of memory. As in *Larson* and *Tilton*, appellate counsel has no way of independently verifying the accuracy of their collective recollections.

Also missing from the court's own record of proceedings are the arguments of counsel and the trial court's oral rulings on the exclusion of the jail guards testimony and the prohibition on cross-examining Dr. Ward on his conversation with Maurice Classen, and the prohibition on presenting this impeaching testimony. What is available on these two

points are the court's after the fact written rulings on these issues. CP 254, 260.

Even with these sincere attempts to reconstruct a day and half worth of testimony, argument, and rulings, appellant submits that the record is not sufficiently complete to permit the full appellate review required by the Due Process clauses of the United States and Washington constitutions, and to satisfy the right to appeal embodied in Const. Art. I, §22. The trial court's oral finding that the record was sufficient for appellate review, which is really a conclusion of law, should be rejected in view of the significant gaps in the record, which are worse than the one deemed insufficient by the Supreme Court in *Tilton*. This court should therefore reverse and remand for a new trial.

V. CONCLUSION

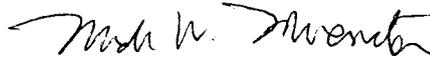
The trial court restricted the cross-examination and impeachment of the state's key rebuttal witness, Dr. Ward. This was constitutional error requiring a new trial. The court also erred in allowing testimony by three separate jail guards that Dr. Classen had spent the last 14 months in custody. This eroded the presumption of innocence, and denied Dr. Classen a fair trial. The prosecutor committed misconduct in closing argument by equating the mental state for both degrees of manslaughter to an "accident." In a case where *mens rea* was a crucial issue due to the defense of diminished capacity, this argument also denied Dr. Classen a fair trial. Finally, Dr. Classen has been deprived of due process of law by

not being able to present this appeal with a “record of sufficient completeness” because of the failure of the trial court’s recording mechanism to capture significant portions of the last two days of the trial.

This court should reverse appellant’s conviction and remand this matter for a new trial on the basis of the errors enumerated above.

Dated this 9th day of FEBRUARY, 2007

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