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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
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DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

VALINDA REYNOLDS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas P. Larkin

No. 08-1-00385-1

BRIEF OF RESPONDENT

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

1. Did the State adduce sufficient evidence to support the finding defendant was guilty of second degree robbery?
2. Did defendant lack the mental capacity to commit the crime when the issue was not raised below and is therefore waived?
3. Did defendant receive effective assistance of counsel when defendant has failed to demonstrate deficient performance?

B. STATEMENT OF THE CASE.

1. Procedure

On January 23, 2008, the Pierce County Prosecutor's Office charged VALINDA REYNOLDS, hereinafter "defendant," with one count of robbery in the second degree. CP 1. The case proceeded to a bench trial on September 16, 2008. 1RP¹ 3. A CrR 3.5 hearing was held where the court found defendant's statements were knowing, voluntary and intelligent. 1RP 24-27; CP 109-111.

¹ The verbatim record of proceedings is contained in multiple volumes which are not paginated consecutively. They will be referred to as follows:
September 16 & 17, 2008 and October 24, 2008 as "1RP"
April 24, 2009 as "2RP"
July 1, 2009 as "3RP"
July 7, 2009 as "4RP"
August 14, 2009 as "5RP"

Midway through the trial, defendant decided she wanted to enter an Alford plea. 1RP 87. Defendant changed her mind between continuing with trial and entering an Alford plea several times. 1 RP 87-113. Based on this lack of understanding what was going on, the defense attorney asked that she be evaluated for competency. 1RP 113. The trial recessed, defendant was evaluated and found not competent to stand trial. 1RP 119. The court declared a mistrial. 1RP 122. Defendant was sent to Western State Mental Hospital for a mental health evaluation and to restore her competency. 1RP 122-127.

Defendant's competency was restored April 24, 2009. 2RP 2. The case proceeded to a second bench trial on July 1, 2009. 3RP 3-7. The court found defendant guilty of all charges. 4RP 150-152. Defendant was sentenced to three months with thirty days served in confinement and 60 days served on electronic home monitoring. 4RP 12-13.

2. Facts

On January 22, 2008, Chris Comstock was wearing plain clothes while working as a loss prevention officer at a Rite Aid located in Tacoma, Washington. 4RP 19. He had been a loss prevention officer for three years and received training and education relating to the job. 4RP 12-19. Mr. Comstock noticed defendant enter the store with a large purse which appeared empty. 4RP 20. He saw her pick up a Rite Aid ad and fold it over in her hands without looking at it. 4RP 21. Mr. Comstock

watched defendant go to the makeup area, pick up tubes of cocoa butter about 2-3 inches in length and roll them into the paper ad. 4RP 12.

Because defendant had seen Mr. Comstock watching her, he went to the backroom so he could monitor defendant on the security video system. 4RP 21. Mr. Comstock watched on the monitor as defendant walked to another aisle and picked up a bag of diapers. 4RP 22-23. She shuffled the diapers around and placed the rolled up ad with cocoa butter tubes in her purse. 4RP 23. Defendant walked up the aisle carrying the bag of diapers, grabbed a lotion bottle and ointment and placed them in her purse. 4RP 23. As she continued along the aisle, she picked up a pack of baby bottle nipples. 4RP 24. She wrapped them up in a single diaper she had removed and placed it back into the diaper pack. 4RP 24.

Defendant walked to the cashier at the front of the store. 4RP 25. Mr. Comstock testified he left the back room and walked to the front of the store. 4RP 26. He saw the sales person ring up only the diapers. 4RP 25. Defendant did not offer up any of the other items that were located in her purse. 4RP 26-27. Mr. Comstock testified she tried to pay with a card that was denied. 4RP 28. She said she needed to go get more money from her car to pay for the diapers. 4RP 28. Taking her purse with her, defendant left the store. 4RP 28.

Mr. Comstock testified he followed defendant outside. 4RP 29. He identified himself as store security and asked defendant to come back in the store. 4RP 29. Defendant turned around looked at Mr. Comstock

while she continued to walk away. 4RP 29. As she got closer to her car, Mr. Comstock identified himself again. 4RP 30. Defendant said multiple times she needed to get some money and began to open the door. 4RP 30. Defendant reached inside the door and Mr. Comstock placed small pressure on the door telling her she could not leave. 4RP 31.

Mr. Comstock said he told defendant to come with him and to move away from the car. 4RP 32. She would not move and eventually, Mr. Comstock grabbed her arm from inside the car and shut the door. 4RP 32. Mr. Comstock held onto her other arm and asked her to come inside because he was going to call the police. 4RP 33. Defendant ran around the car. 4RP 33. Mr. Comstock testified he chased her and grabbed her arm again. 4RP 33-34. Defendant hit and scratched Mr. Comstock on his arms. 4RP 34.

Mr. Comstock pulled defendant towards the door of the store as she pulled away. 4RP 34. Defendant slipped and fell to the ground. 4RP 34. When Mr. Comstock attempted to apprehend her again, she began kicking him. 4RP 34. As defendant kicked Mr. Comstock multiple times, the assistant manager in Rite Aid ran out of the store. 4RP 37. He and Mr. Comstock were able to grab defendant's arms and bring her into the store. 4RP 37.

Once inside the store, defendant continued to flail about violently. 4RP 38. Fearful he was hurting her by holding on to her, Mr. Comstock set defendant on the ground so he could hold her down. 4RP 38. Mr.

4RP 72. Based on Officer Stanley's 27 years of experience and dealing with people, he felt that she knew what she was doing as she remembered the details of her prior arrest and how she had been let out of it before.

1RP 21. He felt that she was trying to make him feel sorry for her so he would let her go and that he did not feel that she suffered from any mental illness. 1RP 20-21. Officer Stanley arrested defendant and transported her to the jail. 4RP 73.

Defendant testified at trial that she is bipolar and takes medications to stabilize her mood. 4RP 82. When defendant does not take her medicine, she testified she cannot think clearly and things get foggy. 4RP 102. She stated that on January 22, 2008, she had not taken her medicine when she went to Rite Aid to get diapers. 4RP 85, 101. Defendant said she was looking at the cocoa butter and placed it in the ad to look at what kind of sales they had. 4RP 85. She said she was not trying to steal anything. 4RP 85. Defendant did not remember ever putting cocoa butter or anything else in her purse. 4RP 86. Her purse was never searched by Officer Stanley or Mr. Comstock. 4RP 86.

Defendant stated that she picked up the diapers to look at the sizes. 4RP 87. She said she never put any bottle nipples in the diapers. 4RP 89. She said took the diapers to the front counter and tried to pay with a credit card. 4RP 90. When the card was declined, defendant said she left the

diapers on the counter with the clerk to go get money out of her car. 4RP 91. Defendant said she walked to her car and never heard Mr. Comstock say anything to her. 4RP 92.

After she opened her door, defendant testified that Mr. Comstock told her to take her hand off the door or he would break her fingers off. 4RP 93. Defendant testified that Mr. Comstock never identified himself as loss prevention. 4RP 93. She stated he warned her again and then grabbed her. 4RP 93. She said she tried to explain she was just getting money to pay for the diapers. 4RP 94. She testified that she was frightened throughout the encounter because she did not know who Mr. Comstock was. 4RP 94-95.

Defendant said that in the midst of pulling one another, she fell backward on the ground. 4RP 98. She testified she did not kick or hit him at all. 4RP 98. She said Mr. Comstock pulled her to her feet and she was very dizzy. 4RP 99. She remembered being in the store, Mr. Comstock pushing her to the ground and her face hitting the floor. 4RP 100. She said Mr. Comstock held her hands behind her back as she asked him to let her go. 4RP 100.

Defendant said Officer Stanley arrived shortly after. 4RP 105. She explained her statement that she had made a mistake because she wished she would have gone home and none of this would have happened. 4RP 105. She testified she asked for a citation because it was the first thing that popped into her head and things were getting escalated. 4RP

106. Defendant testified she was not trying to steal or commit robbery that night and was only defending herself. 4RP 108.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE TO FIND DEFENDANT GUILTY OF SECOND DEGREE ROBBERY.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most

strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

A person is guilty of robbery in the second degree if that person commits robbery. RCW 9A.56.210. RCW 9A.56.190 reads:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

- a. The court had sufficient evidence to find defendant used force or threats to take or retain merchandise.

Any force or threat, even slight is sufficient to sustain a robbery conviction. *State v. O'Connell*, 137 Wn. App. 81, 95, 152 P.3d 349 (2007). Force necessary to support a robbery conviction need not be used in the initial acquisition of the property as it includes violence during flight immediately following the taking. *See State v. Manchester*, 57 Wn. App. 765, 770, 790 P.2d 217 (1990) (shoplift followed by pursuit outside the store and force to retain property sufficient to establish robbery). "Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking." RCW 9A.56.190. The necessary force to constitute robbery can be found in the

forceful retention of stolen property that was peacefully taken. *State v. Johnson* 155 Wn.2d 609, 611, 121 P.3d 91 (2005) (citing *State v. Handburgh*, 119 Wn.2d 284, 830 P.2d 641 (1992)).

In the present case, although defendant did not use force while inside the store, defendant did use force in taking the items. When defendant left the store without paying for the merchandise in her purse, Mr. Comstock identified himself and asked defendant to return to the store. 4RP 29. Defendant turned around looking at Mr. Comstock, but continued to walk away. 4RP 29. Mr. Comstock said he told defendant to come with him and to move away from the car. 4RP 32.

When defendant refused, Mr. Comstock used reasonable force to try to move her away from the car. 4RP 33. Defendant ran around the car. 4RP 33. Mr. Comstock chased her while defendant hit and scratched Mr. Comstock on his arms in an attempt to get away. 4RP 33-34. During the struggle, defendant slipped and fell to the ground. 4RP 34. When Mr. Comstock attempted to apprehend her again, she began kicking him. 4RP 34. Defendant kicked Mr. Comstock multiple times and eventually another Rite Aid employee assisted in getting defendant into the store. 4RP 37.

These facts are similar to those in *State v. Manchester*, where a court found that although no force was used in obtaining the stolen

merchandise in the store, the force used in retaining the property once outside of the store sustained the robbery conviction. In that case, Manchester placed a carton of cigarettes under his coat and walked out of a store. *Manchester*, 57 Wn. App. at 766. The security guard followed Manchester and asked where the cigarettes were. *Id.* Manchester said he had a gun and pulled an ice pick out of his pocket while he backed and then ran away. *Id.* The court held that the language of the robbery statute indicated the legislature's intent to broaden the scope of taking, for purposes of robbery, to include violence during flight immediately following the taking. *Id.* at 770. Thus, although the taking itself may be complete once one exits the store, violence used in the attempt to retain the merchandise during immediate flight constitutes part of the taking for purposes of sustaining the robbery conviction. *Id.* at 770. As such, defendant's acts of kicking and hitting Mr. Comstock satisfied the force element in the robbery statute as they occurred while in an attempt to get away.

Defendant's attempt to compare the present case with *State v. Johnson*, 155 Wn.2d 609, 121 P.3d 91 (2005), is misplaced. In the *Johnson* case, Johnson had abandoned the stolen merchandise and was attempting to escape when he punched one of the guards. *Johnson*, 155 Wn.2d at 610. The court found that the force was not related to the taking

or retention of the property, but rather the attempt to escape and reversed Johnson's robbery conviction. *Id.* at 611.

In contrast, there is no evidence in the case at bar that defendant had abandoned the stolen items in her purse. The testimony of Mr. Comstock supports the inference that defendant had taken items from the store without paying for them. There was no testimony that at any point she abandoned or attempted to abandon the items. Rather, she still possessed the items, unlike Johnson. Therefore, defendant cannot argue that she was simply trying to escape from the situation when she scratched and kicked Mr. Comstock.

- b. The court had sufficient evidence to find defendant took or retained merchandise.

Circumstantial and direct evidence are to be considered equally reliable by the reviewing court in determining the sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Circumstantial evidence is sufficient to sustain robbery conviction. *State v. Ammlung*, 31 Wn. App. 696, 703, 644 P.2d 717 (1982). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In the present case, sufficient evidence existed to find defendant took or retained merchandise. Mr. Comstock is a loss prevention officer with three years experience and training in the area. 4RP 12-19. He testified that he watched defendant enter the store carrying a large purse, pick up a flyer without looking at it and bypass the carrying baskets. 4RP 19-21. Mr. Comstock testified these were triggers that raised his suspicion of defendant's intent in the store. 4RP 20-21.

Mr. Comstock witnessed defendant place several items in her purse. He testified she placed three small tubes of cocoa butter inside the ad, rolled them up and placed it inside of her purse. 4RP 21-23. He testified she also placed some ointment and lotion in her purse. 4RP 23. Mr. Comstock testified defendant only placed a bag of diapers on the checkout counter. 4 RP 24-25. He never witnessed her attempt to retrieve or pay for the items that were in her purse. 4 RP 25-28. Mr. Comstock watched as defendant left the store with her purse after her card was declined. 4 RP 28-29. Based on the testimony of Mr. Comstock, it is reasonable to conclude that defendant took and retained the items she placed in her purse and left the store without paying for them.

Defendant's reliance on *State v. Jaquez*, 105 Wn. App. 699, 20 P.3d 1035 (2001)(*rev'd* because jury saw defendant in shackles during trial, 105 Wn. App. at 712.), is also misplaced. In that case, the court did not discuss an issue regarding the sufficiency of evidence in the appellate review. Here a witness saw defendant take store property and leave

without paying for it. Therefore, it is apparent that there was sufficient evidence to support the trial court's finding that defendant took or retained merchandise from Rite Aid.

2. THE ISSUE OF DEFENDANT LACKING THE MENTAL CAPACITY TO COMMIT THE CRIME OF ROBBERY WAS NOT RAISED BELOW AND IS THEREFORE WAIVED ON APPEAL.

Generally, appellate courts do not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). A "manifest" error is one "truly of constitutional magnitude." *Scott*, 110 Wn.2d at 688. The defendant is responsible for identifying a constitutional error and showing how, in the context of the trial, the alleged error actually affected the defendant's rights. *Id.* This requires a showing of actual prejudice. *Id.* If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Diminished capacity is a defense when either specific intent or knowledge is an element of the crime charged. *State v. Thomas*, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004). Intent to steal is an essential element

of the crime of robbery. *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

To present a diminished capacity defense, expert testimony must establish that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged. *State v. Thomas*, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004). Diminished capacity is a defense that must be declared pretrial. *State v. Harris*, 122 Wn. App. 498, 506, 94 P.3d 379 (2004); CrR 4.7(b)(1), (b)(2)(xiv). The defense, not the court, must obtain a corroborating expert opinion and disclose that evidence to the prosecution pretrial. *State v. Harris*, 122 Wn. App. 498, 506, 94 P.3d 379 (2004); CrR 4.7(b)(1); CrR 4.7(g). It is not enough that a defendant is diagnosed as suffering from a particular mental disorder; the diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime. *State v. Atsbeha*, 142 Wn.2d 904, 918, 16 P.3d 626 (2001); ER 702.

In the present case, defendant did not raise the defense that she lacked the mental capacity to commit the crime. There are no evaluations by mental health experts with respect to this specific portion of her mental capacity. The court is unable to make a determination with regard to defendant's mental capacity without such an evaluation. The issue therefore becomes one of ineffective assistance of counsel for failing to raise this issue below. Counsel has raised this issue in the third section of

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

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

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

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

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

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). There is a strong presumption that counsel's representation was effective and courts should avoid the distorting effects of hindsight. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial

counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

Defense counsel's decision to forego a diminished capacity defense in the present case is supported by the facts of the case and defendant herself. Once it became apparent to the court that defendant might be suffering from some mental disease or defect, defense counsel alerted the court and asked defendant be evaluated for competency to stand trial. 1RP 113. The court ordered defendant undergo a mental health evaluation at Western State Mental Hospital. 1RP 116.

After a 15 day evaluation, defendant was found not competent to stand trial and ordered to undergo treatment to have her competency restored. 1RP 120-123. Along with her treatment, the court specifically asked the hospital to evaluate the state of defendant's mental capacity at the time of the crime. CP 33-35. The April 14, 2009, Forensic Psychiatric Report, upon which defendant's competency was restored, contained the following:

(d) Sanity at the time of the act/diminished capacity

An opinion as to the defendant's sanity at the time of the alleged offense was requested. However, **Ms. Reynolds informed me that she does not intend to enter a plea of Not Guilty by Reason of Insanity at this time due to her insistence that the evaluation and inpatient stay be terminated.** It is the practice at the Center for Forensic Services to withhold an opinion as to the sanity at the time of the alleged offense if the defendant does not wish to

enter a NGRI plea, due to the affirmative nature of that plea.

If, after discussing this issue with counsel, Ms. Reynolds should commit to this legal strategy and decide to enter a Not Guilty by Reason of Insanity plea, I remain available to revisit this issue and respond accordingly.

An opinion as to the defendant's capacity to form the intent required to commit the alleged offense also was requested. As it is stated above, it is the practice standard at the Center for Forensic Services **to refrain from providing opinions regarding one's mental state at the time of the alleged offense if the defendant is not willing to engage in the interview process.** If Ms. Reynolds should decide to (upon advice of her attorney), and if such opinions are still requested by the court, I remain available to revisit these issues and respond accordingly.

CP 43-52 (emphasis added).

The defense attorney acted properly throughout this situation. He questioned defendant's mental health status when she began exhibiting symptoms of confusion. He asked that she undergo a mental health evaluation, including an evaluation about her mental capacity at the time of the crime. Her refusal to participate in the evaluation was not within his control. It must be presumed that defendant and counsel discussed the issue, as suggested by the report. When the defense proceeded without diminished capacity as a defense, it must be presumed that defendant and counsel made the tactical decision not to pursue it.

To present a diminished capacity defense, expert testimony must establish that a mental disorder, not amounting to insanity, impaired the

defendant's ability to form the culpable mental state to commit the crime charged. *State v. Thomas*, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004). It is not enough that a defendant is diagnosed as suffering from a particular mental disorder; the diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime. *State v. Atsbeha*, 142 Wn.2d 904, 918, 16 P.3d 626 (2001); ER 702. Defense counsel in the present case could not raise a diminished capacity defense without evidence and a report from a mental health evaluator that she lacked the mental capacity to commit the crime.

The record reflects that defendant and defense counsel had a well functioning relationship. In the April 14, 2009, Forensic Psychiatric Report defendant described her relationship with him as follows:

With regard to her ability to cooperate rationally with counsel, she knows her attorney's name and the attorney was called at the time of the interview.... When asked how often and for how long she has met with her attorney, she replied "ever since I've been in court, more than 15 times." When asked do you have confidence in your attorney, she replied "yes." When asked do you think he is doing a good job for you, she replied "yes." When asked is there anything you disagree about in the way your attorney I handling your case, she replied "no." ... When asked who raised the issue of your trial competency, she replied "my attorney." When asked how do you feel about that person (for doing so), she replied "he's just doing his job."

CP 43-52 (pg 7).

This suggests that defense counsel represented defendant competently and discussed the trial with her. Based upon the record and the fact that counsel's effectiveness is presumed, there is no evidence of deficient performance by defense counsel in this case.

When a claim is brought on direct appeal, the reviewing court should not consider matters outside the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S. Ct. 2867, 115 L.Ed.2d 1033 (1991). If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition. *McFarland*, 127 Wn.2d at 335. If defendant in the present case wishes to raise a claim of ineffective assistance of counsel based on evidence not in the record before the court, she must do so through a personal restraint petition.

Based on the evidence before the court, it is apparent defense counsel's performance was not deficient. The defense counsel represented defendant to the best of his ability in the given circumstances. The decision to forego the diminished capacity defense can be founded primarily in defendant's refusal to participate in the evaluation. As such, defendant cannot satisfy the first prong of *Strickland* and her ineffective assistance of counsel claim therefore fails.

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D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions and sentence.

DATED: March 12, 2010.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

 Thomas C. Roberts
THOMAS ROBERTS
Deputy Prosecuting Attorney
WSB # 17442

 Chelsey Mclean
Chelsey Mclean
Rule 9 Legal Intern

Certificate of Service:

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

 3/12/10 *Chelsey Mclean*
Date Signature