

FILED
Court of Appeals
Division II
State of Washington
4/2/2019 11:08 AM

NO. 51367-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

BRIAN KEITH TERWILLEGER,

Appellant.

BRIEF OF APPELLANT,
BRIAN KEITH TERWILLEGER

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY
THE HONORABLE STEPHEN E. BROWN, JUDGE

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I. INTRODUCTION

On the morning of September 11, 2016, Brian Terwilleger had a mental health crisis. He and his girlfriend, Alicia Sackrider, were visiting her uncle, Jeff Holloway. Mr. Terwilleger became convinced that the “Mexican Mafia” and the Crips gang were trying to abduct and harm Ms. Sackrider. He also believed that Mr. Holloway was a member of the Crips because he wore blue. Mr. Terwilleger believed that he needed to disable Mr. Holloway’s vehicle in order to thwart the kidnapping. He drove his car into Mr. Holloway’s parked SUV. Mr. Holloway was standing on the other side of his vehicle and was knocked to the ground, sustaining minor injuries.

The state charged Mr. Terwilleger with assault in the third degree and malicious mischief in the second degree. A jury convicted him of both counts. These convictions must be reversed for two reasons. First, Mr. Terwilleger was denied effective assistance of counsel because his trial attorney failed to investigate a mental health defense. Second, his statements to police were improperly admitted into evidence. Mr. Terwilleger could not voluntarily waive his *Miranda* rights, and the statements themselves were involuntary due to his mental illness. This Court should reverse his convictions and remanded for a new trial.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: Mr. Terwilleger was denied effective assistance of counsel when his trial attorney failed to adequately investigate a mental health defense.

Assignment of Error 2: Mr. Terwilleger was denied effective assistance of counsel when his trial attorney failed to move the trial court to acquit him by reason of insanity.

Assignment of Error 3: Mr. Terwilleger was denied effective assistance of counsel when his trial attorney failed to argue at trial that he was not guilty by reason of insanity.

Assignment of Error 4: Mr. Terwilleger was denied effective assistance of counsel when his trial attorney failed to argue at trial that he could not form the intent necessary to convict him of malicious mischief in the second degree and one of the alternative means of proving assault in the third degree due to his diminished capacity.

Assignment of Error 5: Mr. Terwilleger was denied effective assistance of counsel when his trial attorney failed to raise his mental health as a mitigating factor at sentencing.

Assignment of Error 6: The trial court erred by finding that Mr. Terwilleger voluntarily waived his *Miranda* rights when speaking to police.

Assignment of Error 7: The trial court erred by finding that Mr. Terwilleger's statements to police were voluntary.

Assignment of Error 8: The trial court erred by concluding that Mr. Terwilleger's statements to police were admissible at trial.

Assignment of Error 9: There was insufficient evidence to convict Mr. Terwilleger of assault in the third degree.

Assignment of Error 10: There was insufficient evidence to convict Mr. Terwilleger of malicious mischief in the second degree.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Was Mr. Terwilleger denied effective assistance of counsel when his attorney failed to investigate or raise a mental health defense, despite knowing his client's history of mental illness and bizarre statements and behaviors at the time of the car crash?

Issue 2: Did insufficient evidence support Mr. Terwilleger's convictions when his diminished capacity prevented him from forming the necessary intent to commit the charged crimes?

Issue 3: Did the trial court err in finding Mr. Terwilleger's statements to police admissible when he suffered a mental health crisis and endorsed delusions when speaking with police?

IV. STATEMENT OF THE CASE

Brian Terwilleger has a long history of mental health issues. From 2003 to 2016, he had over eight contacts with mental health regional support networks. CP sealed report at 5. Five of those contacts were in 2016 alone. *Id.* He was diagnosed with major depressive disorder and an unspecified psychotic disorder. *Id.* at 5-6. Mr. Terwilleger was prescribed antipsychotic and antidepressant medications. *Id.* at 4.

In 2014, Mr. Terwilleger was injured in a motorcycle accident. *Id.* He lost consciousness and sustained a traumatic brain injury. *Id.*; RP¹ at 58. He also broke his neck in three places and paralyzed his left arm. RP at 58-59. Mr. Terwilleger still has short-term memory loss, confusion, and post-traumatic stress disorder (PTSD) from this accident. RP at 59.

In September 2016, Mr. Terwilleger and his girlfriend, Alicia Sackrider, visited her uncle, Jeffery Holloway, for a family reunion. RP at 114, 141. Mr. Terwilleger and Mr. Holloway met about six to eight months

¹ Unless otherwise specified, citations to the verbatim report of proceedings refer to the transcript covering the following hearing dates: 9/15/16, 9/19/16, 9/26/16, 1/17/17, 1/30/17, 2/6/17, 2/13/17, 2/21/17, 4/10/17, 4/24/17, 5/1/17, 7/12/17, 7/25/17, and 7/26/17.

prior. RP at 149. Ms. Sackrider and Mr. Terwilleger visited Mr. Holloway frequently, often staying overnight, and Mr. Holloway also stayed the night at their residence. *Id.* Mr. Terwilleger and Mr. Holloway got along well; they had no disagreements and were friendly. RP at 152-53.

Mr. Terwilleger arrived at Mr. Holloway's house on September 10, 2016 and stayed overnight. RP at 141. The next morning, September 11, was a Sunday. *Id.* Mr. Terwilleger wanted to go to church and tried to persuade his girlfriend, Ms. Sackrider, to join him. *Id.* Mr. Holloway announced that he was going into town to get cigarettes and started walking to his car, a red Chevy Blazer. *Id.* RP at 74, 142. He made it to the car and started to unlock the driver's door. RP at 142. At that point, Mr. Holloway heard a loud revving sound and was knocked to the ground. *Id.*

Mr. Terwilleger and Mr. Holloway did not argue that weekend. RP at 148. Despite this, Mr. Terwilleger drove his car, a silver Pontiac sedan, into the rear passenger-side corner of Mr. Holloway's Blazer. RP at 74, 76-77, 94. The rear of the Blazer pivoted to the side and knocked over Mr. Holloway. RP at 149-50. Mr. Holloway sustained cuts and bruises but was not permanently injured. RP at 146-47. The Blazer was also damaged, particularly the rear panels and bumper. RP at 129. Repairs cost a little over \$3,000. RP at 132.

After the crash, Ms. Sackrider ran across the yard towards the vehicles. RP at 146. She was angry with Mr. Terwilleger and called the police. RP at 146, 154. Initially, an Elma police officer responded and arrested Mr. Terwilleger. RP at 70. Shortly thereafter, Jeremy Holmes, an officer with the Grays Harbor County Sherriff's Office, arrived at the property. RP at 69-70.

Officer Holmes secured the scene and took photographs. RP at 71. He also spoke with Mr. Terwilleger. RP at 35. Officer Holmes read Mr. Terwilleger his *Miranda* rights off of a card and Mr. Terwilleger agreed to speak with him. RP at 35-36. Later, Officer Holmes transported Mr. Terwilleger to jail. RP at 36. At jail, he read Mr. Terwilleger his rights again, this time off of an advisement of rights form. RP at 37. Mr. Terwilleger declined to speak at that time. RP at 38.

At the scene, Mr. Terwilleger made confusing and contradictory statements. He told Ms. Sackrider that the crash was an accident and he got his foot stuck on the pedal. RP at 149. He told Officer Holmes that his clutch stuck, causing the accident. RP at 86. Ms. Terwilleger's car was an automatic and did not have a clutch. RP at 158. According to Officer Holmes, Mr. Terwilleger appeared "off," raising concerns about his mental health at the time of the crash. RP at 40. Mr. Terwilleger asked his girlfriend, Ms. Sackrider, if she was ok and stated that he was worried for

her safety. RP at 87. Ms. Sackrider appeared confused and did not know what he was talking about. *Id.*

The next day, another police officer interviewed Mr. Terwilleger. Richard Ramirez with the Grays Harbor County Sheriff's Office spoke with him in jail. RP at 111. Officer Ramirez read Mr. Terwilleger his *Miranda* rights off of an advisement of rights form. RP at 44. Mr. Terwilleger agreed to speak with him. RP at 46. Officer Ramirez wrote down the conversation and then had Mr. Terwilleger review and sign the statement that he drafted. RP at 46-47.

According to Officer Ramirez, Mr. Terwilleger was coherent and able to converse. RP at 46. However, he also noticed something off about Mr. Terwilleger's mental health. RP at 48. Mr. Terwilleger appeared anxious, rocked back and forth "a lot," and made some "bizarre statements." RP at 51. He told Officer Ramirez that he was worried the "Mexican Mafia" would kidnap his girlfriend, Ms. Sackrider, and hurt her. RP at 51, 114. He believed that Mr. Holloway was a member of the Crips gang because "he was wearing all blue" that day, and he knew that the Crips worked with the Mexican Mafia. Ex. 30. Mr. Terwilleger said that he wanted to disable Mr. Holloway's vehicle to keep the Mexican Mafia from kidnapping Ms. Sackrider. RP at 114. He denied having any disagreement with Mr. Holloway and said that "Jeff was a really nice guy." RP at 116.

Officer Ramirez asked Mr. Terwilleger about his car, but Mr. Terwilleger said that there was nothing wrong with his vehicle. RP at 116. When asked why he told Officer Holmes that his clutch stuck, Mr. Terwilleger said that he did not trust Officer Holmes and believed that he was also part of the Mexican Mafia. RP at 115.

The state filed charges against Mr. Terwilleger on September 15, 2016. CP 1-3. Four months later, in January 2017, Mr. Terwilleger was ordered to undergo a competency evaluation. CP 27-33. His evaluation noted a history of mental illness and substance abuse. CP sealed report at 4-6. The evaluator diagnosed him with an unspecified psychotic disorder but determined that he was competent to stand trial at that time. *Id.* at 6-7. The record does not reflect that Mr. Terwilleger ever underwent any other mental evaluation, such as to assess his sanity or capacity at the time of the car crash.

The case proceeded to trial on July 25 and 26, 2017. RP at 33, 158. Prior to testimony, the court held a hearing on the admissibility of Mr. Terwilleger's statements to police, pursuant to CrR 3.5. RP at 33-67. Officers Holmes and Ramirez testified about their conversations with Mr. Terwilleger, including his bizarre statements and behaviors. RP at 40, 51-52. However, both officers believed that Mr. Terwilleger understood their conversations. RP at 40, 46. They did not believe he was impaired. *Id.*

Mr. Terwilleger testified that he did not remember being questioned at the scene or the next day in jail. RP at 57-58. He said that he had short-term memory loss from his motorcycle accident and traumatic brain injury. RP at 58-59. Mr. Terwilleger testified that he suffered from PTSD and was in a state of delirium after the car crash. RP at 59. His attorney did not call any mental health professional to testify at the CrR 3.5 hearing.

The trial court judge concluded that Mr. Terwilleger voluntarily waived his *Miranda* rights when he spoke with police. RP at 67. He also concluded that Mr. Terwilleger's statements were voluntary and thus admissible at trial. *Id.* The judge compared Mr. Terwilleger's mental state to an "alcoholic blackout," finding that it "doesn't mitigate" the situation because Mr. Terwilleger still "understood what [he was] doing at the time." RP at 65.

Mr. Terwilleger went to trial on charges of assault in the third degree and malicious mischief in the second degree. CP 1-3. Mr. Terwilleger's attorney did not raise a mental health defense. No mental health professional testified at trial. The jury convicted Mr. Terwilleger of both counts as charged. RP at 187.

Mr. Terwilleger's attorney also failed to raise his mental health as a mitigating factor for sentencing. 9/8/17 RP at 2-21. At the sentencing hearing, the prosecutor stated that "Mr. Terwilleger did not want any mental

health defense.” *Id.* at 5. His attorney agreed with that characterization. *Id.* Mr. Terwilleger was sentenced to a total of 20 months confinement, with 12 months of community custody. CP 271-72. He appeals.

V. ARGUMENT

On September 11, 2016, Brian Terwilleger crashed his car into a parked vehicle. RP at 114. At the time, he endorsed delusions about the Crips and the Mexican Mafia attempting to kidnap his girlfriend. *Id.* Mr. Terwilleger also has a history of mental health problems. CP sealed report at 4-6. Despite this evidence, his attorney did little to investigate a mental health defense. No mental health professionals testified at trial or at the CrR 3.5 hearing. Additionally, the trial court determined that Mr. Terwilleger’s statements to police were voluntary and admissible. RP at 67. This Court should reverse for two reasons. First, Mr. Terwilleger was denied effective assistance of counsel. Second, the trial court erred by admitting his statements at trial despite his psychotic delusions.

A. **Mr. Terwilleger was Denied Effective Assistance of Counsel because his Trial Attorney Failed to Sufficiently Investigate a Mental Health Defense.**

Mr. Terwilleger has a lengthy history of mental illness, including past contacts with mental health professionals, prescriptions for antidepressants and antipsychotic medication, and diagnoses for depression and a psychotic disorder. CP sealed report at 4-6. At the time of his alleged

crimes, Mr. Terwilleger believed that his girlfriend was in danger of being kidnapped by the Mexican Mafia. RP at 114. He also believed that his girlfriend's uncle was a member of the Crips because he wore blue. Ex. 30. Despite this, Mr. Terwilleger's trial attorney did not retain experts to evaluate his sanity or capacity at the time of the car crash. This failure amounted to ineffective assistance of counsel, requiring reversal.

Every criminal defendant has a constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A claim of ineffective assistance presents a mixed question of fact and law reviewed de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). Ineffective assistance occurs when (1) counsel's performance was deficient, and (2) this deficient performance prejudiced the client. *Hendrickson*, 129 Wn.2d at 77. Both requirements are met here.

1. Reasonable trial counsel would have thoroughly investigated a mental health defense for Mr. Terwilleger.

Mr. Terwilleger's trial counsel performed deficiently by failing to investigate a mental health defense. Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Generally, courts

assume that trial counsel is effective. *State v. Crawford*, 159 Wn.2d 86, 98, 147 P.3d 1288 (1999). However, a defendant overcomes this presumption by demonstrating “the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *Id.*

Effective assistance of counsel includes “assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial.” *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010). For this reason, “an attorney’s failure to adequately investigate the merits of the state’s case and possible defenses may constitute deficient performance.” *State v. Fedoruk*, 184 Wn. App. 866, 880, 339 P.3d 233 (2014). Generally, courts will not find counsel ineffective for “strategic choices made after thorough investigation of law and facts relevant to plausible options.” *Strickland*, 466 U.S. at 690-91. However, counsel may be ineffective by making strategic choices “after less than complete investigation.” *Id.*

The duty to adequately investigate includes a duty to assess the need for expert testimony:

Counsel have an obligation to conduct an investigation which will allow a determination of what sort of experts to consult. Once that determination has been made, counsel must present those experts with information relevant to the conclusion of the expert.

In re Pers. Restraint of Brett, 142 Wn.2d 868, 881, 16 P.3d 601 (2001) (quoting *Caro v. Calderon*, 165 F.3d 1223, 1226 (9th Cir.1999)).

Specifically, failing to retain mental health experts and explore a mental health defense can constitute ineffective assistance of counsel. *Fedoruk*, 184 Wn. App. at 871; *see also Brett*, 142 Wn.2d 868.

In *Fedoruk*, the defendant was accused of murder. 184 Wn. App. at 870. Police responded to the scene after receiving reports of his strange behavior. *Id.* at 872. After locating a body, police arrested the defendant and read him his *Miranda* rights. *Id.* at 873. Mr. Fedoruk then made a series of strange and incriminating statements to police. *Id.* at 873-74. These statements were ultimately ruled admissible after a hearing pursuant to CrR 3.5. *Id.* at 875. In jail, the defendant exhibited strange and sometimes dangerous behaviors. *Id.* at 874. He was forcibly administered antipsychotic medication. *Id.*

Mr. Fedoruk had a long history of mental health issues, including hospitalizations. *Id.* at 871-72. He suffered a head injury due to a motorcycle accident as a teenager. *Id.* at 871. He also underwent a mental health evaluation as part of prior criminal charges. *Id.* at 872. A court ultimately found him not guilty by reason of insanity. *Id.*

In his murder case, the trial court ordered Mr. Fedoruk to undergo a competency evaluation. *Id.* at 874-75. The evaluator acknowledged his history of mental illness but found him competent to stand trial. *Id.* at 875. Defense counsel did not obtain any additional mental health evaluation to

assess his sanity or capacity at the time of the alleged murder. *Id.* at 876. Counsel also did not provide advance notice of a mental health defense. *Id.*

Before trial, the state moved to limit evidence of Mr. Fedoruk's mental illness because the defense did not disclose any expert witnesses. *Id.* at 875. Defense counsel acknowledged that Mr. Fedoruk was not presenting a mental health defense but argued that evidence of mental illness was relevant to the issue of intent. *Id.* at 875-76. The trial court excluded evidence of Mr. Fedoruk's mental disease or defect and declined to give a diminished capacity instruction. *Id.* at 876.

Five days later, defense counsel moved for a continuance to pursue a defense of not guilty by reason of insanity. *Id.* Counsel argued that he reviewed Mr. Fedoruk's medical records but did not believe that there was a basis for a mental health defense until he interviewed Mr. Fedoruk after the CrR 3.5 hearing. *Id.* The state acknowledged that there was a basis for such a defense but objected to the continuance because defense counsel was aware of the mental health concerns previously. *Id.* The court denied the continuance and the case proceeded to trial. *Id.* at 876-77. A jury found Mr. Fedoruk guilty of second-degree murder. *Id.* at 870, 879.

The Court of Appeals reversed Mr. Fedoruk's conviction, holding that his defense counsel provided ineffective assistance. *Id.* at 871. The Court held that counsel had a duty to fully investigate a mental health

defense given what he knew about his client's history of mental illness and statements to police. *Id.* at 881-82. Under these circumstances, "the decision not to seek to retain an expert to evaluate Fedoruk until the day before jury selection fell below an objective standard of reasonableness." *Id.* Even if the defendant did not want to pursue a mental health defense, counsel had an obligation to seek expert evaluations in order to fully inform the defendant of the consequences of that choice. *Id.* at 882. A competency evaluation was not sufficient; reasonable trial counsel would have retained an expert to assess the defendant's sanity and capacity at the time of the alleged crime. *See id.*

In this case, like in *Fedoruk*, defense counsel knew that Mr. Terwilleger had a history of mental health issues. According to his competency evaluation, Mr. Terwilleger was previously prescribed antipsychotic medication and antidepressants. CP sealed report at 4. He also suffered a head injury due to a motorcycle accident. *Id.* Since 2003, Mr. Terwilleger has had eight contacts with regional support networks due to mental health issues. *Id.* at 5. Five of these contacts were in 2016 alone. *Id.* King County Regional Support Network diagnosed him with major depressive disorder, recurrent, mild. *Id.* The psychologist who completed Mr. Terwilleger's competency evaluation diagnosed him with an unspecified psychotic disorder. *Id.* at 6.

Also like in *Fedoruk*, Mr. Terwilleger's strange statements and behaviors raised concerns about his mental health at the time of the alleged crime. Mr. Terwilleger did not have any argument or disagreement with Mr. Holloway prior to the car crash. RP at 152. At the scene, Officer Holmes had concerns about his mental health. RP at 40. He testified that Mr. Terwilleger was worried about his girlfriend's safety, but she had no idea what he was talking about. RP at 87.

In jail the next day, Mr. Terwilleger told Officer Ramirez that he thought the Mexican Mafia was going to abduct Ms. Sackrider and hurt her. RP at 114. He said that he believed that Mr. Holloway was a member of the Crips gang because he was wearing blue that day, and the Crips worked with the Mexican Mafia. Ex. 30. Mr. Terwilleger said that he tried to disable Mr. Holloway's car to prevent Ms. Sackrider from being kidnapped. RP at 114. He did not tell this to the officer at the scene because he believed the officer was on the Mexican Mafia's payroll. RP at 115.

Under these circumstances, reasonable defense counsel would have retained experts to evaluate Mr. Terwilleger's mental health at the time of the alleged crime. The record is imperfect but suggests that counsel did not retain such an expert. There is no record of requesting authorization for payment for any expert. Additionally, at the CrR 3.5 hearing, counsel attempted to challenge the voluntariness of Mr. Terwilliger's confessions

due to his mental health but did not call any expert witnesses. RP at 63-64. Presumably, if counsel had retained an expert, that person would have been called to testify.

At sentencing, defense counsel stated that Mr. Terwilleger did not want to pursue a mental health defense. 9/8/17 RP at 4-5. However, this does not absolve counsel of his duty to investigate. In *Fedoruk*, the court held that “[e]ven if Fedoruk told counsel that he was not involved in [the victim’s] death and did not wish to pursue a mental health defense,” counsel could not assist him in making that decision “without first getting an expert opinion regarding Fedoruk’s mental health at the time of the killing.” 184 Wn. App. at 882. Regardless of whether Mr. Terwilleger ultimately decided to pursue a mental health defense, failing to investigate his mental health at the time of the incident was unreasonable given what counsel knew about his client. *See id.* at 881-82. As explained below, counsel’s deficient performance also prejudiced Mr. Terwilleger.

2. Trial counsel’s deficient performance prejudiced Mr. Terwilleger.

To prove ineffective assistance, Mr. Terwilleger must show prejudice in addition to deficient counsel. *Hendrickson*, 129 Wn.2d at 77. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers.*

Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A “reasonable probability” is lower than a preponderance but more than a “conceivable effect on the outcome.” *Strickland*, 466 U.S. at 693-94. It exists when there is a probability “sufficient to undermine confidence in the outcome.” *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

Here, defense counsel’s deficient performance prejudiced Mr. Terwilleger in two ways. First, there is a reasonable probability that Mr. Terwilleger would not have been convicted had counsel raised a mental health defense, either via motion, at the CrR 3.5 hearing, or at trial. Second, Mr. Terwilleger’s mental health was a mitigating circumstance that likely would have resulted in a lesser sentence.

a. Mr. Terwilleger was prejudiced by counsel’s failure to present a mental health defense at or before trial.

Had counsel adequately investigated Mr. Terwilleger’s mental health, there is a reasonable probability that he could have raised a mental health defense and been acquitted. Specifically, Mr. Terwilleger could have argued that he was not guilty by reason of insanity. Alternatively, he could have argued that he acted with diminished capacity, countering the intent necessary to convict. Mr. Terwilleger also could have filed a motion to acquit by reason of insanity or raised his mental health to challenge the admissibility of his statements to police at the CrR 3.5 hearing. Regardless,

Mr. Terwilleger was prejudiced because raising a mental health defense likely would have changed the result in this case. *See Strickland*, 466 U.S. at 693-94.

To establish the defense of not guilty by reason of insanity, a defendant must prove by a preponderance of the evidence that, “as a result of mental disease or defect,” he was (a) “unable to perceive the nature and quality of the act” with which he was charged, or (b) “unable to tell right from wrong.” RCW 9A.12.010. A defendant has two chances to raise this defense. He may file a motion asking the trial court judge to acquit by reason of insanity. RCW 10.77.080. If that motion fails, he may also ask the jury to render an acquittal because of insanity. *State v. Barrows*, 122 Wn. App. 902, 907, 96 P.3d 438 (2004).

A defendant with mental health issues can also argue diminished capacity. To show diminished capacity, “a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant’s ability to form the culpable mental state to commit the crime charged.” *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001); *see also State v. Harris*, 122 Wn. App. 498, 506, 94 P.3d 379 (2004). It is not an affirmative defense but rather negates the mental state element of the crime. *State v. Nuss*, 52 Wn. App. 735, 739, 763 P.2d 1249 (1988). Defense counsel’s failure to present a diminished capacity defense

where the facts support it can amount to ineffective assistance of counsel. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (citing *State v. Thomas*, 109 Wn.2d 222,226, 743 P.2d 816 (1987)).

To show prejudice, the defendant must rely on “the record developed in the trial court.” *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). In *Fedoruk*, the Court of Appeals acknowledged that there was no evidence from experts that could establish legal insanity or diminished capacity. 184 Wn. App. at 884. Despite this, the Court found that Mr. Fedoruk was prejudiced by defense counsel’s failure to investigate a mental health defense. *Id.* at 885. The Court relied on the defendant’s long history of mental illness and his “actions on the night of the killing,” which were “bizarre under any yardstick.” *Id.*

Fedoruk stands in contrast to another case, *State v. West*, 185 Wn. App. 625, 344 P.3d 1233 (2015). In *West*, the defendant argued that his counsel was ineffective by failing to move the court to acquit by reason of insanity. 185 Wn. App. at 638. Unlike in *Fedoruk*, Mr. West’s attorney retained an expert to evaluate his sanity at the time of his alleged crimes. *Id.* at 640. Two mental health experts testified at trial, including the expert retained by Mr. West. *Id.* They both testified that Mr. West understood the nature and quality of the acts with which he was charged. *Id.* The Court of Appeals declined to decide whether defense counsel performed deficiently,

instead holding that counsel's actions did not prejudice Mr. West given this expert testimony. *Id.* at 641; *see also In re Pers. Restraint of Davis*, 152 Wn.2d 647, 732-33, 101 P.3d 1 (2004) (holding that counsel was not ineffective for rejecting a mental health defense *after* conducting a thorough investigation and retaining five mental health experts).

This case differs from *West* and *Davis* because Mr. Terwilleger's counsel failed to properly investigate a mental health defense. Like in *Fedoruk*, Mr. Terwilleger was prejudiced by his counsel's failure to seek expert testimony. Mr. Terwilleger had a long history of mental illness, with regional support network contacts dating back to 2003. CP sealed report at 5. He was prescribed psychotropic medication, including antipsychotics. *Id.* at 4. His competency evaluator diagnosed him with a psychotic disorder. *Id.* at 6. His actions around the time of the car crash were also bizarre. Mr. Terwilleger told officers that he needed to disable Mr. Holloway's car in order to prevent the Mexican Mafia from kidnapping his girlfriend. RP at 114. He believed Mr. Holloway was a member of the Crips because he was wearing blue. Ex. 30.

This evidence raises serious questions about Mr. Terwilleger's sanity at the time of the car crash, including his ability to perceive the nature and quality of his actions and his ability to tell right from wrong. *See* RCW 9A.12.010. In Mr. Terwilleger's mind, he was protecting his girlfriend and

thwarting a kidnapping. He could not appreciate the true nature of his actions or understand that he was wrong about the danger to Ms. Sackrider. Under these circumstances, there is a reasonable probability of a different result had defense counsel argued that Mr. Terwilleger was not guilty by reason of insanity. *See Fedoruk*, 184 Wn. App. at 885.

The evidence also raises questions about diminished capacity and Mr. Terwilleger's ability to form the culpable mental state to commit his charged offenses. *See Atsbeha*, 142 Wn.2d at 914. Mr. Terwilleger faced charges for assault and malicious mischief. Assault in the third degree requires the jury to find that the defendant acted with "criminal negligence," which can be established by several alternative means, including that he acted "knowingly." RCW 9A.36.031(1)(d) (definition of assault in the third degree); RCW 9A.08.010(2) (alternative means of proving criminal negligence). Malicious mischief in the second degree requires the jury to find that a defendant acted "knowingly and maliciously." RCW 9A.48.080. Knowingly means that a defendant is "aware of a fact, circumstance, or result." RCW 9A.08.010(1)(b). Maliciously means with "an evil intent, wish, or design to vex, annoy, or injure another person." RCW 9A.04.110(12).

Here, Mr. Terwilleger did not act maliciously because he did not act with "an evil intent, wish, or design to vex, annoy, or injure another person."

Id. In his mind, he acted in order to prevent a kidnapping. His intent was to protect Ms. Sackrider, not to vex or annoy anyone.

Mr. Terwilleger also did not act knowingly because he was not “aware of a fact, circumstance, or result.” RCW 9A.08.010(1)(b). Specifically, Mr. Terwilleger was not aware that his girlfriend was in no actual danger. His mental condition at the time did not allow him to appreciate the true circumstances preceding the car crash. Mr. Terwilleger thus could not form the culpable mental state for malicious mischief, or the mental state for one of the alternative means of committing assault. *See State v. Ortega-Martinez*,¹²⁴ Wn.2d 702, 881 P.2d 231 (1994) (where a single offense may be committed by two or more means, and multiple means are submitted to the jury, each alternative method of committing the crime must be supported by substantial evidence); CP 213-214 (instructing the jury that “knowingly” is an alternative means of proving criminal negligence). Under these circumstances, there is a reasonable probability of a different result had defense counsel raised a diminished capacity defense.

As explained below, Mr. Terwilleger’s mental state was also critical to determining whether he voluntarily waived his *Miranda* rights and whether his statements to police were voluntary. Had his attorney called mental health experts to testify at the CrR 3.5 hearing, the trial court would

likely have been excluded these statements from evidence. Without evidence of Mr. Terwilleger's changing explanations for the crash and his confession, the jury would have most likely reached a different result. Mr. Terwilleger was thus prejudiced by his attorney's failings, requiring reversal.

b. Mr. Terwilleger was prejudiced by counsel's failure to present mental health as a mitigating factor at sentencing.

Mr. Terwilleger was also prejudiced at sentencing. Had counsel adequately investigated his mental health, Mr. Terwilleger could have raised diminished capacity as a mitigating factor at the sentencing hearing. There is a reasonable probability that this would have reduced his sentence below the standard range.

Generally, a trial court must impose a sentence within the standard range. *State v. Law*, 154 Wn.2d 85, 94, 110 P.3d 717 (2005). A court can impose an exceptional sentence below the standard range if it finds that a "defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired." RCW 9.94A.535(1)(e). The record must show both (1) the existence of the mental condition and (2) the connection between the condition and the defendant's ability to appreciate the wrongfulness of his conduct or conform his conduct to the law. *See State*

v. Rogers, 112 Wn.2d 180, 185, 770 P.2d 180 (1989). Counsel’s failure to investigate factors relevant to sentencing can amount to ineffective assistance. *See Estes*, 188 Wn.2d at 462-63 (counsel was ineffective by failing to adequately investigate the impact of a deadly weapon enhancement on defendant’s sentence).

In this case, Mr. Terwilleger could not present mental illness as a mitigating factor at sentencing because his attorney failed to adequately investigate his mental health. *See RCW 9.94A.535(1)(e)*. Had counsel presented this mitigating factor at sentencing, there is a reasonable probability that Mr. Terwilleger’s sentence would have been reduced pursuant to *RCW 9.94A.535(1)(e)*, for two reasons.

First, it was likely that Mr. Terwilleger suffered from a mental condition at the time of his alleged crimes. *See Rogers*, 112 Wn.2d at 185. His statements at the scene and to police suggested that he was operating under the delusion that his girlfriend was in danger of being kidnapped by the “Mexican Mafia.” RP at 114. His thinking was also disorganized and irrational—he believed that his girlfriend’s uncle was a member of the Crips because he was wearing blue. Ex. 30. Mr. Terwilleger was subsequently diagnosed with an unspecified psychotic disorder. CP sealed report at 6.

Second, this condition likely impacted Mr. Terwilleger’s ability to appreciate the wrongfulness of his conduct or conform his conduct to the

law. *See* RCW 9.94A.535(1)(e); *Rogers*, 112 Wn.2d at 185. Mr. Terwilleger believed that he needed to disable Mr. Holloway's car in order to protect Ms. Sackrider. His delusion impacted his ability to tell that his actions were wrong and not necessary to prevent a kidnapping. Competent counsel would have investigated Mr. Terwilleger's mental health and presented that evidence as a mitigating factor at sentencing. Mr. Terwilleger's convictions should be reversed because he was denied effective assistance of counsel.

B. Mr. Terwilleger's Statements to Police Should Have Been Excluded as Involuntary.

Mr. Terwilleger's due process rights were also violated when the trial court improperly admitted his statements to police as evidence at trial. RP at 67. Before statements by a defendant can be offered into evidence, the court must hold a hearing on their admissibility. CrR 3.5(a). After a CrR 3.5 hearing, the trial court must make written findings of fact and conclusions of law. CrR 3.5(c).

Here, the trial court held a CrR 3.5 hearing to assess Mr. Terwilleger's statements to police. RP at 32. The court determined that his statements were voluntary and admissible. RP at 67. However, the trial court failed to follow enter written findings and conclusions, as required by CrR 3.5. Under these circumstances, the appellate court properly examines

the record and makes an independent determination of voluntariness. *State v. Davis*, 34 Wn. App. 546, 550, 662 P.2d 78 (1983).

The trial court erred in this case for two reasons. First, Mr. Terwilleger did not voluntarily waive his *Miranda* rights. Second, given his mental condition at the time, his statements to police were involuntary. The trial court violated Mr. Terwilleger's due process rights by admitting his involuntary statements as evidence in his trial, requiring reversal.

1. Mr. Terwilleger could not voluntarily waive his *Miranda* rights given his mental condition.

Both the federal and state constitutions provide an accused with the right against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. Due to the coercive nature of police custody, officers must advise a suspect of this constitutional right prior to questioning. *Miranda v. Arizona*, 384 U.S. 436, 467, 86 S.Ct. 1602 (1966).

An individual may knowingly and intelligently waive his constitutional rights and answer questions or provide a statement to the police. *Miranda*, 384 U.S. at 479. The issue is not one of form, but of whether the suspect in fact knowingly and voluntarily waived the right to remain silent. *Fare v. Michael C.*, 442 U.S. 707, 724, 99 S.Ct. 2560 (1979); *North Carolina v. Butler*, 441 U.S. 369, 373, 99 S.Ct. 1755 (1979).

If a suspect waives his constitutional rights without an attorney present, “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination.” *Miranda*, 384 U.S. at 475. The government must establish that the defendant was aware of the “nature of the right being abandoned and the consequences of the decision to abandon it.” *Moran v. Burbine*, 475 U.S. 412, 412, 106 S.Ct. 1135 (1986). Courts must review the totality of the circumstances—including the defendant’s background, experience, and conduct—to ascertain if a waiver of constitutional rights was in fact knowing and voluntarily. *Butler*, 441 U.S. at 374; *Miranda*, 384 U.S. at 475-77.

In this case, three witnesses testified at the CrR 3.5 hearing: two police officers and Mr. Terwilleger. The police officers testified that Mr. Terwilleger was read his *Miranda* rights a total of three times. First, Officer Holmes read him his rights off of a card at the scene of the car crash. RP at 34. Mr. Terwilleger provided a statement at that time. RP at 36. Second, Officer Holmes read Mr. Terwilleger his rights off of an advice of rights form after transporting him to jail. RP at 36. Mr. Terwilleger declined to speak with Officer Holmes. RP at 37-38. Third, Officer Ramirez read Mr. Terwilleger his *Miranda* rights at jail the day after the car crash. RP at 44. Mr. Terwilleger made a statement, which Officer Ramirez transcribed. RP

at 46. Mr. Terwilleger did not have an attorney present for any of these conversations, nor did he request one. RP at 52-53.

Both police officers noted concerns about Mr. Terwilleger's mental health. RP at 40, 48-49, 51-52. Officer Holmes acknowledged that he "seemed kind of off," enough to "question his mental state at the time." RP at 40. Officer Ramirez testified that he "seemed anxious" and "rocked a lot." RP at 51. According to Officer Ramirez, Mr. Terwilleger made "bizarre statements" including talking about the "Mexican Mafia and them wanting to hurt his . . . significant other." RP at 52.

Despite these strange statements and behaviors, both police officers testified that they believed that Mr. Terwilleger understood their questions and was not impaired. RP at 40, 46. Mr. Terwilleger testified that he could not remember any of these conversations. RP at 57-60. He had a traumatic brain injury a few years prior due to a motorcycle accident. RP at 58-59. As a result, Mr. Terwilleger testified that he had short-term memory loss, episodes of delirium, and PTSD. RP at 59. No mental health professionals testified at the CrR 3.5 hearing.

The trial court ruled that Mr. Terwilleger voluntarily waived his *Miranda* rights when he spoke to police. RP at 67. The court compared his mental state with an alcohol or drug-induced blackout. RP at 65. The court erred because Mr. Terwilleger did not choose to take mind-altering

substances. Mr. Terwilleger suffered from a break with reality, a delusion that rendered him anxious, paranoid, and rocking back and forth when speaking to police. RP at 51, 114. He was convinced that the victim, Mr. Holloway, was a member of the Crips because he wore blue. Ex. 30. He believed that the Mexican Mafia was going to kidnap Ms. Sackrider, and that Officer Holmes was on the mafia's payroll. RP at 114-15. These are not the statements or behaviors of a person capable of waiving his constitutional rights. The trial court should have excluded Mr. Terwilleger's statements.

2. Mr. Terwilleger's statements to police were involuntary due to his mental illness.

As explained above, Mr. Terwilleger did not have the capacity to voluntarily waive his *Miranda* rights given his mental state. In addition, his statements themselves were involuntary and must be excluded.

Due process requires that a confession be voluntary and free of police coercion. *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991). Whether a confession is voluntary depends on the totality of the circumstances under which it was made. *State v. Aten*, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996). These circumstances include the location, length, and continuity of the interrogation; the defendant's maturity, education, physical condition, and mental health; and whether the police

advised the defendant of his or her *Miranda* rights. *State v. Unga*, 165 Wn.2d 95, 101, 196 P.3d 645 (2008). A court must exclude a statement when police tactics manipulate or prevent a defendant from making a rational, independent decision about giving a statement. *Id.* at 102.

Here, the trial court concluded that Mr. Terwilleger's statements to police were voluntary and admissible. RP at 67. The court erred because Mr. Terwilleger was in a delusional mental state. RP at 114. He also suffered from short-term memory loss. RP at 59. This made him particularly susceptible to suggestion from police because he could not remember the statements he made or whether they were accurate. Police capitalized on his vulnerability and questioned him even though he was visibly anxious, rocking back and forth, and delusional. RP at 51, 114. Under these circumstances, Mr. Terwilleger's confessions were involuntary and should have been excluded.

VI. CONCLUSION

Brian Terwilleger crashed his car after suffering a mental health crisis. Despite ample evidence of his mental illness, Mr. Terwilleger's trial attorney failed to investigate or raise a mental health defense, denying him effective assistance of counsel. The trial court also erred by admitting Mr. Terwilleger's statements to police. Mr. Terwilleger could not have waived his *Miranda* rights or provided voluntary statements in his delusional state. These errors denied him a fair trial and violated his constitutional rights. Mr. Terwilleger respectfully requests that this Court reverse his convictions and remanded for a new trial.

RESPECTFULLY SUBMITTED this 2nd day of April, 2019.



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Attorney for Appellant, Brian Terwilleger

NEWBRY LAW OFFICE

April 02, 2019 - 11:08 AM

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I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On April 2, 2019, I electronically filed a true and correct copy of the **Brief of Appellant, Brian Terwilleger**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

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SIGNED in Port Orchard, Washington, this 2nd day of April,

2019.


STEPHANIE TAPLIN
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