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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

KENNETH MOORE

BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

1. The second degree assault conviction should be dismissed for insufficient evidence.
2. The trial court erred by refusing to authorize transcription services for attorney-client conferences, thereby interfering with Mr. Moore's Sixth Amendment right to confer privately with his counsel.
3. The trial court erred by denying defense counsel's motion to withdraw due to a breakdown in the attorney-client relationship.
4. The evidence of egregious lack of remorse is insufficient and that aggravating factor should be dismissed.
5. The trial court erroneously relied on an aggravating factor not plead or proved to a jury beyond a reasonable doubt.
6. Mr. Moore did not receive effective assistance of counsel at sentencing.

Issues Relating to Assignments of Error

1. Is the evidence sufficient to sustain a conviction for assault with a deadly weapon when the defendant pointed a disassembled gun barrel at the victim?

2. Did the trial court interfere with Mr. Moore's Sixth Amendment right to confer privately with his counsel when it refused to reasonably accommodate counsel's request that he be provided a "real time" transcriptionist for jail conferences with the hearing-impaired defendant?
3. Did the trial court err by denying defense counsel's motion to withdraw due to a breakdown in the attorney-client relationship when both the attorney and defendant agreed that they were unable to communicate, the court declined to adequately inquire into the nature of the breakdown, and the request was made over a year before trial?
4. Is the evidence of egregious lack of remorse aggravating factor sufficient when the defendant never made any statements concerning the crime and concealment cannot be the basis for lack of remorse?
5. Did the trial court erroneously rely on deliberate cruelty in imposing an exceptional sentence, an aggravating factor not plead or proved to a jury beyond a reasonable doubt?
6. Was Mr. Moore prejudiced at sentencing when his attorneys did not investigate his background and relationship with his mother for possible mitigation evidence?

B. Statement of the Case

Kenneth Moore was charged by Information with Murder in the First Degree with an aggravating factor of egregious lack of remorse and Second Degree Assault while armed with a firearm and with an aggravating factor that the victim was a police officer. CP, 7. A jury found him guilty of both counts and both aggravating factors. CP, 329-34. Mr. Moore appeals. CP, 350.

Substantive Facts

Lisa Holt, who was born on June 13, 1956 (CP, 165), was 14 years old when her son, Kenneth Moore, was born on April 20, 1971 (CP, 158). From this record, little to nothing is known about Mr. Moore's childhood, education, social history, or relationship with his mother and it appears no one made any effort to learn this information. CP, 41.¹ The record says nothing about the identity of his father or his relationship with him. There is a brief mention in the record of the fact Mr. Moore has a daughter, but the record contains little information about her except that she was 18 years old at the time of the murder and she is estranged from her father. RP, 137-38. Mr. Moore has no apparent history of mental health treatment

¹ The record reflects a Western Washington Competency Evaluation which reads, in relevant part, "Social History: Unknown. Family Psychiatric and Medical History: Unknown." CP, 41.

and no hospitalizations at Western State Hospital prior to his arrest. CP, 40.

From this record, the first we know anything of either Ms. Holt or her son after his birth in 1971 is in early 2016 when 60-year-old Ms. Holt was living alone with and taking care of Mr. Moore, 45 years old. RP, 1124. Ms. Holt was working for Hilton Hotels as a waitress. RP, 1123. Although they lived in the same house, Mr. Moore confined himself to his bedroom behind a locked door. RP, 1129. Ms. Holt was very stressed about her son's wellbeing and frequently went home directly after work to care for him when everyone else would go out to socialize. RP, 1124-25.

In January of 2016, Ms. Holt met Jeff Hesterley at the Portland Hilton Hotel where they both worked. RP, 1123. Their relationship quickly became romantic. RP, 1126. By February of 2017, the two of them were acting like young people in love. They were sending romantic text messages such as, "Hello, my love," "I love you," and "See you soon." RP, 908, 911. They would go out to dinner together, go to shows, and did a lot of cooking at home. RP, 1131. They attended a Christmas production of "The Nutcracker" together. RP, 1131. Mr. Hesterley planned a very romantic day for Valentine's Day, which they actually celebrated the day before. After running some errands at Costco, they went to Tangier's Restaurant in Portland. RP, 1134. They then spent the night together at the

Hampton Inn. RP, 1135. The next morning, Valentine's Day, Mr. Hesterley presented her with a big teddy bear and some chocolates. RP, 1135. After having lunch with Mr. Hesterley's parents at a sushi restaurant they separated around 1:30 on February 14. RP, 1136. On her way home, at about 2:00, Ms. Holt stopped at the Banana Republic and purchased a blouse and jewelry. RP, 1117-18. The Banana Republic clerk was the last person to see Ms. Holt alive.

Although he visited the house several times, Mr. Hesterley had never met Mr. Moore. RP, 1128. Mr. Hesterley was under the impression that Mr. Moore was "more or less an invalid" and needed to be taken care of. RP, 1131. The closest he came to meeting him was one time when Ms. Holt asked him to repair her car heater. RP, 1129. Mr. Hesterley examined the heater and told her he believed he could fix it with the proper tools. RP, 1130. At that point he heard a male voice come from Mr. Moore's bedroom saying, "Don't let that fucker use my tools." RP, 1130.

On the morning of February 17, Mr. Hesterley called 911 to request a welfare check. RP, 1143. Mr. Hesterley had not heard from Ms. Holt since Valentine's Day. RP, 1137. Mr. Hesterley also knew, based upon a phone call to her employer that she had not shown up for work and had not called in to explain her absence. RP, 1143. Worried, Mr. Hesterley went to her residence on 18th Street in Vancouver, Washington to

investigate. RP, 1141-42. When no one answered the door after knocking, he used a spare key he had to let himself in. RP, 1142. As he entered, a man confronted him, coming towards him with his fists balled up. RP, 1142. The man had scratches on his face. RP, 1143. The man yelled at Mr. Hesterley to get out and slammed the door in his face. RP, 1143. Mr. Hesterley assumed, but did not know, that the man was Mr. Moore. RP, 1145.

Multiple police officers from the Vancouver Police Department responded for the welfare check. RP, 495. Officers Brian Schaffer and Rocky Epperson were the first to arrive, followed soon thereafter by Officer Brett Bailey and Sergeant Moore. RP, 495,735. After speaking with Mr. Hesterley, Officer Schaffer decided to contact the house, first by knocking and yelling, and then by entering using the key provided to him by Mr. Hesterley. RP, 499-500. Officers Schaffer and Epperson entered through the front door while Officer Bailey went around to the back. RP, 501, 738. Once inside, Officer Schaffer saw a white male standing against the wall of the hallway. RP, 505. Officer Schaffer got the impression the man was preparing to “ambush” them. RP, 505. When Officer Schaffer shined his flashlight on the man, he saw a “metallic shine.” RP, 507-08. He could not be sure, but he believed the “metallic shine” to be the barrel of a rifle. RP, 508. The object was not pointed at him. RP, 509. Officer

Schaffer told Officer Epperson that he thought the man had a gun. RP, 510. Officer Epperson also saw what he thought was the barrel of a rifle. RP, 538. Meanwhile, Officer Bailey decided to enter through a back door. RP, 739. As Officer Bailey entered the kitchen, he saw “what resembled the barrel of a rifle” pointed at his head. RP, 741. The person holding the barrel did not say anything. RP, 745. All of the officers backed safely out of the house. RP, 510, 741. Officer Schaffer contacted his supervisor and the decision was made to call out the SWAT team. RP, 511.

When the SWAT team arrived, they used a PA system to call into the house and request everyone to come out. RP, 759. Soon thereafter, a male exited the house. RP, 759. The male was later identified as the Defendant, Kenneth Moore. RP, 770. The SWAT team then entered the house. RP, 761. Sergeant Bill Sofianos noticed three large garbage bags in the kitchen, two of which were shaped like human legs. RP, 761. Using a knife, he cut open one of the bags and confirmed it contained a human leg. RP, 762. The three bags were later determined to contain one human leg each and bloody bedding respectively. RP, 639, 670-71.

A search warrant was obtained for the residence. RP, 584. In the bathroom shower, detectives discovered the body of Lisa Holt with her legs severed. RP, 581, 641. Under her torso was a cutting board, with various tools and instruments either nearby or on her torso, including a

hammer, drill, straight blade razor, hunting style knife, meat cleaver, dish towel, and rubber gloves. RP, 581, 641, 701-04. Her left hand was tucked into the front of her underwear. RP, 642. The drill, razor, knife, and cleaver all tested positive for blood from Ms. Holt based upon DNA testing. RP, 1146, 1137, 1140, 1154 respectively. DNA testing on a K-bar knife tested positive for both Ms. Holt and Mr. Moore. RP, 1060.

Inside Ms. Holt's bedroom next to the bed law enforcement found a pool of blood. RP, 647. Ms. Holt's bed had been stripped of the bedding, leaving only a white sheet with a tiny bit of blood spatter. RP, 581-82. There was a tear in the bed skirt. RP, 650. On the bed was the Valentine's Day teddy bear she had been given by Mr. Hesterley just three days before. RP, 646.

In Mr. Moore's bedroom, lying on the bed, law enforcement located a "fully disassembled" firearm. RP, 644, 916. The firearm was in three pieces, the wood rifle stock, the rifle barrel, and the rifle magazine tube. RP, 917. These three pieces were admitted as Exhibits 217, 219, and 220. Detective Jeff Kipp determined the firearm was missing some of the parts necessary to "function check" the firearm. RP, 876. Specifically, the firearm was missing some screws. So Detective Kipp returned to the residence the next day to look for the screws. RP, 876. Six screws of

various sizes and lengths, three silver and three black, were found on the bed. RP, 876, 880-81. The screws were admitted as Exhibit 226. RP, 880.

Exhibits 217, 219, and 220 were sent to the Washington State Patrol crime lab for operability analysis by firearm analyst Theunis Brits. RP, 1193. The three exhibits together make up the barrel, receiver, and stock of a Marlin Model 60 rifle. RP, 1189. When the exhibits arrived at the crime lab they were missing the screws necessary to reassemble the firearm. RP, 1189. Specifically, without the missing screws, it was impossible to reattach the stock of the firearm. RP, 1192. Mr. Brits reassembled the firearm using screws from another firearm he had at the crime lab. RP, 1190. The crime lab keeps a collection of different firearms on site and he was able to remove the necessary screws from a different Marlin Model 60 in order to reassemble exhibits 217, 219, and 220 into a single functioning firearm. RP, 1190. He transferred two screws from the Marlin Model 60 in the crime lab collection to the Marlin Model 60 he wanted to test fire. RP, 1190. After reassembling the firearm with the borrowed screws, Mr. Brits fired the firearm three times using ammunition he had at the crime lab. RP, 1192. Mr. Brits testified it would be possible to fire this model of firearm without first attaching the stock, but it is not “preferable. It’s not comfortable and you’re going to hurt yourself.” RP, 1210. Mr. Brits did not attempt to fire the firearm without the stock. RP,

1210. On the witness stand, Mr. Brits testified that three of the six screws found in Exhibit 226 fit the Marlin Model 60. RP, 1195.

Ms. Holt received multiple injuries to her scalp, face, neck, arms and legs. RP, 1230-31. She had four clusters of sharp force injuries to her scalp. RP, 1234. She had two stab wounds to her face. RP, 1243. There were several superficial injuries to the neck. RP, 1248. She also had a fracture on one side of her thyroid cartilage. RP, 1250. Such fractures are rare and are usually caused by compression on the neck, i.e. manual strangulation. RP, 1250. Her arms and hands had multiple superficial wounds consistent with a sharp object coming across the hand. RP, 1255. These injuries are most consistent with someone trying to protect other parts of the body and are often characterized as defensive wounds. RP, 1255. Ms. Holt's legs had been amputated. RP, 1260. The mechanism of death was multi-factorial, caused by either the stab wounds to the scalp and brain, the strangulation, the extreme loss of blood, or some combination thereof. RP, 1264-65.

Procedural History

Normally, a detailed court-date-by-court date account of the procedural history is unnecessary in a criminal appeal. But it is impossible to fully understand the scope of the attorney-client breakdown in this case without reviewing every court hearing leading up to the trial.

Following his arrest on February 17, 2017, Mr. Moore was appointed attorney Louis Byrd, who continued to represent him throughout the entirety of the case. Mr. Moore was supposed to be arraigned on March 7, 2017, but Mr. Byrd continued the arraignment with Mr. Moore's consent. RP, 1. The second arraignment date, April 7, 2017, was also continued with Mr. Moore's consent. RP, 4. At the third arraignment hearing, Mr. Byrd again requested a continuance. RP, 6. The reason for the continuance was to explore the possibility of an insanity plea. RP, 6.

On May 25, 2017, Mr. Moore was finally arraigned and pled "not guilty." RP, 11. The parties also entered into a stipulation that his arraignment would not preclude a plea of not guilty by reason of insanity at a future date. RP, 10.

On August 23, 2017, Mr. Byrd moved for a competency evaluation for Mr. Moore. RP, 14. The Order was signed. CP, 14.

The next hearing took place on September 26, 2017. Starting at that hearing and at every hearing thereafter, Mr. Moore complained of hearing and communication difficulties. RP, 21. The judge, attorneys, and other professionals disagreed whether his hearing loss was real or whether he was fabricating it and the record is replete with discussion about the extent of his hearing problems. For instance, the assigned prosecutor in the

case pointed out Mr. Moore had not had hearing difficulty at any of the prior hearings. RP, 23-24. But what cannot be disputed is that the hearing and communication difficulties substantially slowed down the proceedings, interfered with Mr. Moore's relationship with Mr. Byrd, and increasingly proved to be a source of irritation for the judge.² On September 26, the judge tried to address the issue by providing Mr. Moore with headphones. RP, 21. When that proved inadequate, the judge ordered a transcript prepared of the September 26 hearing to be paid for by "indigent defense." RP, 24-25.

Starting on October 18, 2017, Mr. Moore started communicating almost exclusively by way of written notes, a pattern that continued throughout the case. RP, 28. Defense counsel also suggested it might be necessary to get a court reporter to transcribe all hearings in real time to allow Mr. Moore to read the proceedings as they occurred. RP, 28. The Court ordered such a transcriptionist for all subsequent hearings with "[f]unds to come from indigent defense." RP, 31, 34. The Court ordered defense counsel to "go to indigent defense and get some money for that." RP, 33.

² In one humorous incident, after the defendant complained that his pencil was too long, the judge ordered the pencil to be handed to him and he snapped it in half. Crisis averted. RP, 342.

The next hearing took place on December 7, 2017 without the benefit of the transcriptionist, despite the court's earlier order. RP, 35. The judge and defense counsel got into a conflict over who's responsibility it was to arrange for the transcriptionist. RP, 37. The Court concluded the real time transcriptionist was necessary in the same way any other "interpreter services" would be necessary. RP, 34. The Court expressed a concern that it was "not even sure Mr. Moore even understands what we're saying or hearing or talking about here." RP, 39. The Court also declined to make a ruling on whether Mr. Moore was "feigning" his hearing loss. RP, 39. The purpose of the hearing was to review a competency evaluation from Western State Hospital, dated November 22, 2017. RP, 35, CP, 36. Defense counsel reported he had not had a chance to talk to Mr. Moore about the evaluation. RP, 38.

Western State's competency evaluation opined that Mr. Moore does not suffer from mental disease or defect and was competent. CP, 36. When the psychologist attempted to interview him, he initially requested an attorney. CP, 37. All of the communication was in writing because of Mr. Moore's hearing impairment and his inability to communicate using American Sign Language (ASL). Mr. Byrd was contacted by telephone. CP, 37. When Mr. Moore was told Mr. Byrd was on the phone, Mr. Moore wrote a message asking, "How do I communicate with him?" CP, 37. Mr.

Moore did not think it was wise for him to participate in the interview and asked the evaluator to communicate that to Mr. Byrd. CP, 37. Mr. Byrd's response is not in the record and it does not appear any attempt was made for Mr. Byrd to appear in person to help facilitate the interview. No interview ever took place. CP, 37.

Starting on December 15, 2017, the Court provided Mr. Moore with a transcriptionist at every hearing who used "real time" transcription³ to allow Mr. Moore to read the court proceedings as they happened. RP, 42. The State asked the Court to find Mr. Moore competent based upon the November 22 report. RP, 44. Defense counsel strongly disagreed with the Western State Hospital report, saying, "I don't know how Mr. Moore has been able to assist me in preparing his defense and/or preparing for trial in this matter. He has not had the ability to communicate sufficiently to meet the requirements for competency assistance of the attorney. It's just not there." RP, 44. Mr. Byrd made a motion for an independent competency evaluation. RP, 45. Mr. Byrd also moved to allow him to take a transcriptionist into the jail with him for attorney-client meetings. RP, 46. The Court refused to authorize a transcriptionist, saying, "I'm not

³ The "real time" transcription, or Certified Record of Applicable Proceedings, allowed Mr. Moore to follow along with the proceedings on a computer screen. The first few times it was used, it did not work properly, prompting an exasperated Mr. Byrd at one point to exclaim, "Well, this is CRAP." RP, 84. The parties were able to work the bugs out by the time of trial.

wading into that. That's jail policy – you have to go through your coordinator to get the funds to hire that. I just ordered the State to pay for the court hearing transcriptionist. I am not ordering them to pay for a private jail meeting transcriptionist.” RP, 46.

The next hearing occurred on January 26, 2018. RP, 50. The Court began the hearing by asking Mr. Moore if he was able to “review and read” the real time transcriptions and Mr. Moore gave a thumbs up signal. RP, 51. The defense had hired a defense psychologist, Dr. Stanulis. Mr. Byrd updated the court on Dr. Stanulis’ progress:

So I think the benchmark has been established that Mr. Moore has problems communicating. Why? I don't know. I'm not a audiologist or a psychologist or anything like that. I can tell you that these are very difficult circumstances for one to attempt to defend an individual. So that's obvious. I was talking with Dr. Stanulis last night who has been appointed in this matter. . . He sent me an email. This is an update: Mr. Moore has been minimally cooperative and there are few collateral sources. As you know I asked for an investigator that would look to – would look to shed light on his living and squalor. A marker of major mental illness but not dispositive to help make – and that was in parenthesis – to help make a diagnosis. Unfortunately this was interpreted as looking for mitigation not diagnostic information. I would like to renew and clarify my request that I need historical information for diagnostic purposes – not mitigation. I then need to meet with him again and attempt to make a more definitive diagnosis.

RP, 52-53. Mr. Byrd made an oral motion for a “mitigator because we don't know anything about Mr. Moore, his folks.” RP, 53. Mr.

Byrd continued, “So we don’t know a lot about Mr. Moore. Really this is going to baffling [sic]. . . So the discovery lays out the names of individuals that had limited contact with the mo – Mr. Moore and his mother throughout the course of – I guess – the last decade. And it’s just very little information. We don’t know anything about his youth, about his upbringing.” RP, 53-54. The court responded, “[W]e may never know a lot of that stuff. I mean – I’m not sure how relevant that is to what we’re here today for.” RP, 54. Mr. Byrd then reported, “Indigent defense is [sic] denied any funding for what Dr. Stanulis is asking for.” RP, 57. He then reiterated he was seeking “appointment of a investigator that has expertise in getting background information.” RP, 57. The Court responded, “And I’m not going to tell you you cannot file motions but it’s going to relate to competency.” RP, 57.

The next hearing took place on March 2, 2018. RP, 61. Dr. Stanulis’s report was not yet ready and the case was again continued RP, 67. Again, the issue came up of who was going to pay for the transcriptionist. RP, 63. Defense counsel suggested it should be paid by the District Court rather than indigent defense. RP, 63. The Court again iterated the transcriptionist was “something akin to an interpreter” and indigent defense would pay for it. RP, 63, 66.

The parties were back on April 13, 2018. RP, 69. The hearing began with the Court asking Mr. Moore to confirm his name. RP, 70. The defendant responded by writing, “Your honor” on a piece of paper. The Court said, “That’s not your name. Can you state your name for the record.” RP, 70. The defendant responded, according to the official report of proceedings, “(Guttural sound) Kenneth Moore.” RP, 70. Just as things were starting to be addressed, there was a problem with the real time computer Mr. Moore was using. RP, 71. While the problem was being addressed, Mr. Moore held up a sign that read “something about [wanting] to have a copy of some video of the officer attack on [his] ears.” RP, 72. The Court said, “I don’t know what there is out there that you’re talking about,” and moved on to address competency issues. RP, 72. Mr. Byrd reported he did not get an independent competency evaluation and had “nothing at this point in time to suggest that the evaluation of Western State Hospital is incorrect.” RP, 72-73. The prosecutor moved to have Mr. Moore declared competent based upon the November 22, 2017 evaluation. RP, 73. Mr. Byrd objected saying, “I can advise the court Your Honor that I question the ability to be able to effectively represent Mr. Moore under the current circumstances. I think it would be ineffective assistance of counsel to – to go

forward.” RP, 73. At that point, Mr. Moore interrupted the proceedings with hand gestures and, at the Court’s invitation, wrote a note to the Court. RP, 73-74. The note read, “Can the Court replace Mr. Byrd.” RP, 74. The Court answered, “From what I’ve heard so far the answer is no.” RP, 74. Mr. Byrd interjected, “I would join in the request Your Honor.” RP, 74. The Court responded, “Then I would tell you no as well.” Mr. Byrd emphasized the need to be replaced, “I think the – what is of record today – the use of hand written notes back and forth – I think it establishes my point that it would be ineffective assistance of counsel.” RP, 74. The Court suggested it might be amenable to appointing a second chair attorney at assist Mr. Byrd. RP, 75. The Court continued, “I am not going to allow you to withdraw or substitute as his attorney because it’s not met the threshold requirements of ding [sic] such a thing. I have *sua sponte* pro-offered [sic] to appoint a second attorney to assist you in this defense.” RP, 76.

The Court found Mr. Moore competent and discussed possible trial dates. RP, 77. After determining there were only 38 more days left of speedy trial, there was a break in the proceedings to allow Mr. Moore and Mr. Byrd to discuss speedy trial. RP, 79-80. The verbatim report of proceedings reads, “(Defense is consulting

with client at attorney table using notes from Defendant to attorney. Recording continues – nothing spoken on the record by anyone.)” RP, 80. At the end of the discussion, Mr. Moore signed a speedy trial waiver. RP, 81-82. After picking a trial date, Mr. Byrd again moved to withdraw, saying, “And Your Honor with all due respect I don’t think I can sign off on the Order finding Defendant Competent. I still have reservations about that and his – so –” RP, 83. The Court responded, “I said no.” RP, 83. The colloquy continued:

Mr. Byrd: And – and Your Honor just for the record part of my concern with ineffective assistance of counsel is this – I don’t know if this is going to be the procedure where there’s notes back and forth – yeah –

Judge: Well what is it you want me to do?

Mr. Byrd: - rec – just recognize the difficulty –

Judge: I do! I said that.

Mr. Byrd: - okay. Thank you.

Judge: I put it on the record – I recognize the difficulty.

Mr. Byrd: Thank you.

Judge: But I don’t know what else you want me to do.

Mr. Byrd: Understood.

RP, 83-84.

The parties returned on September 7, 2018. RP, 85. The day before, Mr. Byrd filed a written motion to withdraw. RP, 85; CP, 50. Attached to the motion was a Declaration of Louis Byrd which read, in relevant part:

2.) Due to the voluminous amount of discovery associated with the instant allegations, attorney client communication is crucial!

Defendant has refused to meet with me on recent attempted jail visits (7/10, 7/27, and 8/9). Defendant did meet with me for 5 minutes on August 16, 2018. To my surprise, we had an extended meeting lasting approximately 1.5 hours on August 24, 2018.

3.) Consistent with the record of ongoing court proceedings, defendant's claimed deafness has negatively impacted my representation due to the insistence of nonverbal communication. Defendant's limitation on communication implicates ethical considerations enumerated in RPC 1.16 (b)(4), (6), or (7). As currently postured, I cannot effectively continue representing the defendant without being exposed to a claim of ineffective assistance of counsel.

4.) Based upon my past and ongoing interactions, and attempted interactions with the defendant, I am requesting that the court allow me to withdraw as his attorney of record.

5.) Furthermore, based upon the ongoing communication concern, I do not believe the defendant is competent to assist me in the development of his defense to the instant charges. As such, I am requesting that he be reevaluated by WSH as, to date, he has refused to be evaluated by his court appointed psychologist.

CP, 51. After Mr. Byrd read his declaration into the record, the Court asked Mr. Moore what his position on the new attorney was. The following colloquy occurred:

Judge: I don't want you to say anything about the case Mr. Moore but do you have anything you want to say about the attorney's request to be disqualified?

(Defendant writes note.)

Mr. Byrd: Well I'll show it to [DPA] Mr. Vu first? I don't know.

Judge: The answer –

Mr. Byrd: Just for the record – I guess I can just read it into the 1 record Your Honor?

Judge: - yes.

Mr. Byrd: I did not lose my hearing. An officer attacked my ears.

Judge: So you can hear?

(Defendant writes another note.)

Judge: Can you speak?

Mr. Byrd: If there is an association to my hearing and the ambient sounds it is transposing as clicks maybe.

Judge: Can you speak?

(Defendant writes another note.)

Mr. Byrd: See we can part ways.

Judge: See we can part ways? I've not decided that yet. I – I've just asked if there's anything you want to say about his request. Do you want your trial on October 15th?

(Defendant writes another note.)

Mr. Byrd: New lawyer please.

RP, 92. Defense counsel repeatedly stated he was unable to communicate with his client, at one point saying, “[W]hen he stopped meeting with me that put it into a whole – totally different situation.” RP, 93-96. The judge continually expressed frustration with the request to withdraw, calling it “extraordinary,” (RP, 94) the proceedings, and the note passing, at one point saying, “I don’t know why I’m doing this.” RP, 92. The Court again

offered to appoint a second chair, which Mr. Byrd this time accepted. RP, 97. The Court appointed Greg Schile as second chair. RP, 101. Mr. Byrd again objected to the denial of his motion to withdraw. RP, 101.

There was then an extended discussion about whether Mr. Moore was presently competent. RP, 102. Mr. Byrd reiterated a point from his Declaration that Mr. Moore also refused to meet with his court-appointed psychologist. RP, 103-06. Mr. Byrd stated, “I’m limited in the ability to assist this man in a defense because we just – we can’t communicate and there is no participation with things that could help. Arguably a relevant defense might be insanity and I can’t even explore that because I don’t have the professional involvement of a psychologist. I have him but no one is willing to use him.” RP, 106. The Court denied all motions, including the motion to withdraw and the motion for a second competency evaluation, saying, “I know it puts the attorney in a very difficult position but the attorney is duty-bound to do the best job they can with the – the ability – with the skills and ability they have.” RP, 106-07.

The next hearing was September 28, 2018 for the omnibus hearing. RP, 109. Mr. Byrd indicated the defense was “general denial” while reserving the defense of “insanity.” RP, 110. Mr. Moore continued to be non-communicative. RP, 110. Mr. Byrd continued to believe Mr. Moore was incompetent. RP, 113. At one point, Mr. Byrd said, “There has been

absolutely no communication about the case with Mr. Moore.” RP, 117. He later added, “I can advise the court that I haven’t filed documentation from the investigator, from the psychologist and from the mitigation expert outlining their inability to communicate with Mr. Moore. But the documentation is available.” RP, 122. Mr. Byrd also brought a motion to continue the trial, explaining that the State had endorsed 36 witnesses and the defense had not interviewed any of them. RP, 118. When the Court asked Mr. Moore if he had a position on the proposed continuance, Mr. Moore wrote a note to the Court “indicating that he had asked that this lawyer be fired. [He] was ready more than a year ago.” RP, 120.

On January 31, 2019, the trial was again continued because defense counsel was unprepared RP, 126. Defense counsel had only interviewed four or five of the State’s witnesses. RP, 127. Significantly, Mr. Moore was not advised by his attorneys prior to the hearing of the continuance motion. RP, 126. Mr. Byrd continued to complain about the communication difficulties. RP, 128-29.

The defense filed a suppression motion that was heard on May 7, 2019. RP, 139. CP, 182. The motion was denied. RP, 313.

The Court held a readiness hearing on May 30, 2019 where the attorneys announced they were ready for trial. RP, 313. In the middle of the hearing, Mr. Moore passed up a note asking for new counsel. RP, 320.

When the Court asked if he was seeking to replace one attorney or both, Mr. Moore responded with a note indicating “if that’s what it requires to make Mr. Byrd dismissed – yes.” RP, 320. Mr. Moore further clarified, “I don’t want his lies representing me in Motions or at trial.” RP, 320-21. The Court responded, “Your request for a new attorney is denied. There is not a basis at this point in the process to do that.” RP, 321.

The case was called for trial on June 3, 2019. RP, 323. Mr. Byrd immediately moved to withdraw, which was denied. RP, 323. Later that morning, with the jury venire in the room and the judge giving his opening remarks, Mr. Moore held up a sign for the jury to read. RP, 327. The Court promptly terminated the proceedings and excused the jury. RP, 327. The sign read, in all capital letters, “I ASKED TO REPRESENT MYSELF.” RP, 328. The Court noted that this was the first time Mr. Moore had asked to represent himself; his previous position had been requesting Mr. Byrd be removed, apparently he was content with Mr. Schile. RP, 338. The Court asked Mr. Moore if he wanted to proceed with just Mr. Schile and Mr. Moore wrote a note saying, “I have not time with him to make such a decision.” RP, 340. The Court immediately denied any further motions to change the defense attorneys. RP, 340.

A few minutes later, Mr. Moore wrote a note a note to the judge. Mr. Byrd walked over to counsel table to retrieve the note in order to read it into the record and the following exchange occurred.

Judge: Mr. Byrd could you read his response?

Mr. Byrd: Excuse me.

Judge: Why don't you wait –

Mr. Byrd: Well I'll –

Judge: - why don't you just wait one second.

Deputy Prosecutor: Just – just wait for Mr. Schile.

Judge: Just wait.

Mr. Byrd: - pardon me?

Deputy Prosecutor: Or perhaps the – custody officer –

Mr. Byrd: Excuse me?

Deputy Prosecutor: - I'm sorry.

(Attorney Byrd walks over to Defendant to obtain note to be read to the court – Defendant yanks note away from attorney not allowing him to read same.)

Mr. Byrd: Okay.

Judge: That seemed pretty clear the first go around. Mr. Schile he would like you to read his response – he seems to be at conflict stage with Mr. Byrd and won't even let him read the note.

RP, 343.

During the trial, it was clear Mr. Byrd was the primary attorney with Mr. Schile relegated to a de minimus role. Mr. Byrd gave both the opening statement and closing argument for the defense. RP, 491, 1457. The State called 27 witnesses and Mr. Schile cross-examined none of them. Mr. Byrd cross-examined Brian Schaffer (RP, 513), Rocky Epperson, (RP, 542), David Chamblee (RP, 594), Darren McShea (RP, 716), Brett Bailey (RP, 749), Bill Sofianos (RP, 764), Richard Osborne (RP, 777), Chad Williams (RP, 794), Lawrence Zapata (RP, 818), Christopher LeBlanc (RP, 849), Ryan Junker (RP, 863), Jeff Kipp (RP, 883), Neil Martin (RP, 925), Eric Thomas (RP, 949), Trevor Chowen (RP, 1075), Stuart Yoshinoboy (RP, 1111), Jeff Hesterley (RP, 1159), Chelsea Oliver (RP, 1175, 1179), Theunis Brits, (RP, 1206), Martha Burt (RP, 1266), and Stacey Redhead, (RP, 1306). The defense declined to cross-examine five witnesses, Carole Boswell, Christopher Prothero, Larame Smith, Michael Jones, and Barbara Knoepfel and it was always Mr. Byrd who made the decision. RP, 896, 914, 961, 1278, 1332.

There is also some evidence in this record that Mr. Byrd and Mr. Schile did not get along, such as one point when Mr. Byrd disagreed with a motion Mr. Schile was making to excuse a juror for cause, saying, “I don’t have the ability to improve my co-counsel.” RP, 433. During the suppression motion, after Mr. Byrd completed his cross-examination of

Brett Bailey, Mr. Schile interrupted to conduct further cross-examination. RP, 177. During the CrR 3.5 hearing, Mr. Byrd interrupted Mr. Schile, who was addressing a note from Mr. Moore, prompting the judge to silence Mr. Byrd to hear from Mr. Schile. RP, 830.

From this record, it does not appear that defense counsel was discussing trial strategy with Mr. Moore during the trial. During the CrR 3.5 hearing, which occurred in the middle of trial, Mr. Byrd represented he had not discussed with Mr. Moore his right to testify, and, even after the Court took a recess to allow that to happen, did not discuss it with him. RP, 823-25. The defense team did not discuss jury instructions either with themselves or with Mr. Moore prior to the end of the testimony. RP, 1270.

After the State rested, the Court inquired of defense counsel if they had discussed with Mr. Moore his right to testify and Mr. Byrd answered, "I have not." RP, 1350. The Court then took a one hour and twenty minute recess to allow that to happen. RP; 1352, 1362. After the recess, Mr. Byrd announced Mr. Moore would not be testifying. RP, 1352. The jury was brought back into the courtroom and the defense rested. RP, 1353. The jury was then excused for the day and the court took a recess. RP, 1353. After the recess, Mr. Moore passed up a note saying, "I'd better testify." RP, 1354. This caused a lengthy and detailed discussion about whether the defense should be allowed to reopen its case-in-chief and how Mr. Moore

would testify. The judge granted to motion to re-open and declared that Mr. Byrd would ask the questions while Mr. Schile sat with the defendant and read his written answers to the jury. RP, 1357. After extensive discussion, Mr. Moore declared his final decision was to testify. RP, 1363. The Court then took a recess until the morning. The next morning, Mr. Moore declared he was not going to testify. RP, 1364. Mr. Moore did not testify in the trial. RP, 1366.

Sentencing

At sentencing, Mr. Moore moved to dismiss the lack of remorse aggravating factor. CP, 336. The trial court was unwilling to disturb the jury's finding of the aggravating factor. RP, 1519. Mr. Moore's standard range on Count 1 was 261 to 347 months. CP, 362. His standard range on Count 2 was 12+ to 14 months, plus 36 months for the firearm enhancement. CP, 362.

The Court imposed an exceptional sentence of 360 months on Count 1, a sentence of 50 months on Count 2, with an exceptional sentence requiring the two sentences be run consecutive with each other for a total of 410 months. CP, 363. The Court relied heavily on a third aggravating factor, that the defendant's conduct manifested deliberate cruelty to the victim. CP, 373. In its oral decision, the Court made clear it the exceptional sentence was based primarily on the deliberate cruelty

finding. “So based on all of that I – and – and based on all of the evidence that was presented in this case I believe that based on the jury’s finding of an excep – of an aggravating circumstance and this court’s own finding that there was some manifest – deliberate cruelty to the victim, I am going to give you an exception [sic] sentence on the Murder charge which will be run consecutively to the Assault in the Second Degree.” RP, 1521. The written findings of fact and conclusions of law in support of the exceptional sentence reflect the Court’s thinking. CP, 373.

Defense counsel Schile did not even bother showing up for sentencing. RP, 1481.

C. Argument

1. The second degree assault conviction should be dismissed for insufficient evidence.

Mr. Moore was charged in Count 2 with Assault in the Second Degree – Assault with a Deadly Weapon. Jury Instructions #15 through #18 essentially required the jury to find that Mr. Moore intentionally used a firearm in order to create in Officer Bailey reasonable apprehension and imminent fear of bodily injury. Jury instruction #15 defined assault in the second degree as an assault with a deadly weapon. CP, 316. Jury instruction #16 stated, “An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact

creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.” Jury instruction #17 stated, “A firearm, whether loaded or unloaded, is a deadly weapon.” CP, 318. Jury instruction #18 read, “A ‘firearm’ is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” CP, 319.

Although RCW 9A.04.110(6) has multiple definitions of a deadly weapon, the only definition provided to the jury is that a firearm is a deadly weapon. RCW 9.41.010 defines a firearm as a “weapon or a device from which a projectile or projectiles may be fired by an explosive such as gun powder.” Mr. Moore did not threaten Officer Bailey with a device from which a projectile may be fired by an explosive such as gun powder and the evidence is insufficient to convict him of Count 2.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). Viewing the evidence in the light most favorable to the State, no rational trier of fact could have found beyond a reasonable doubt that Mr. Moore was in possession of an actual firearm during his confrontation with Officer Bailey.

Most of the case law defining the term “firearm” has involved either the offense of unlawful possession of a firearm pursuant to RCW 9.41.040 or the firearm enhancement under RCW 9.94A.533 or its predecessor statutes. For these purposes, a non-functioning firearm still qualifies as a firearm if it can be “rendered operational with reasonable effort and within a reasonable time period.” *State v. Padilla*, 95 Wn.App. 531, 535, 978 P.2d 1113 (1999). In *State v. Raleigh*, 157 Wn.App. 728, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011), an older model firearm with a firing pin that kept sticking that could be made operational quickly and without any tools was determined to be an actual firearm for purposes of the offense of unlawful possession of a firearm. But even for these purposes, the firearm must still be a firearm in fact, and not a “gun-like, but nondeadly, object.” *State v. Pam*, 98 Wn.2d 748, 753-54, 659 P.2d 454 (1983), *overruled on other grounds*, *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989); *State v. Fowler*, 114 Wn.2d 59, 785 P.2d 808 (1990), *overruled on other grounds*, *State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991).

In more recent cases, when a statute requires proof of a functioning, actual firearm, Washington Courts have held that opinion testimony, including lay opinions, and circumstantial evidence is sufficient to sustain a conviction. *State v. Tasker*, 193 Wn.App. 575, 594, 373 P.3d

310 (2016). In *Tasker*, the robbery victim, who had little experience with firearms beyond what she had seen in movies, testified the defendant pointed what appeared to be a firearm in her face, visibility was good, and she heard a clicking sound consistent with the use of a real gun. This was held to be sufficient to prove the defendant possessed a functioning, actual firearm. *Id.* at 595.

Similarly, in *State v. Olsen*, 10 Wn.App.2d 731, 449 P.3d 1089 (2019) the defendant tried to pawn a firearm. The pawn shop owner, who was very familiar with firearms, visually inspected the firearm and determined it was in good condition and appeared to have all the necessary parts. The Court of Appeals held this was sufficient to sustain a conviction for unlawful possession of a firearm.

As noted, all of the cases analyzing the sufficiency of the evidence related to functioning, actual firearms have addressed them in the context of either an offense of unlawful possession of a firearm or a firearm enhancement. But Mr. Moore was not charged with unlawful possession of a firearm. He was charged with second degree assault – assault with a deadly weapon where the sole deadly weapon alleged was a firearm and the firearm only pointed at the victim and never actually fired.

Whether a device qualifies as a deadly weapon depends on the context. The offense of assault with a deadly weapon, which is a crime of

commission, differs significantly from unlawful possession of a firearm, which is a crime of possession. While the word “with” has many possible meanings, the dictionary definition that most aptly applies is when it is “used as a function word to indicate the means, cause, agent, or instrumentality.” *Miriam-Webster Dictionary*. In the context of assault with a deadly weapon, the word “with” has a temporal element, i.e. the device used in the assault must be a functioning firearm at the time of the assault.

A recent unpublished decision discussed a second degree assault where the defendant was accused of placing the victim in reasonable apprehension of harm by pointing a firearm at her. *State v. Arntsen* (unpublished, 76912-0-I, decided January 6, 2020). The victim described the firearm as “a hunting rifle, with a regular metal barrel, but the stock on it was a wood grain.” A passing motorist, who had extensive knowledge of firearms, described it as an AK-47. Relying on *Tasker*, the Court of Appeals concluded the circumstantial evidence was sufficient to sustain a conviction for second degree assault. But the Court in *Arntsen* was not concerned with the temporal element – everyone agreed that the device pointed at the victim had all the appearances of a functioning firearm.

A review of the case law surrounding assault with a deadly weapon indicates there is a temporal element to the assault, i.e. the assailant must

be armed with a deadly weapon at the time of the assault. Although multiple assaults may constitute a course of conduct, each assault is in temporally and spatially fixed. In *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 329 P.3d 78 (2014) the Court held that whether multiple acts constitute multiple assaults requires balancing the length of time over which the assaultive acts took place, whether the assaultive acts took place in the same location, the defendant's intent or motivation for the different assaultive acts, whether the acts were uninterrupted or whether there were any intervening acts or events, and whether there was an opportunity for the defendant to reconsider his or her actions. *Villanueva-Gonzalez* at 985. In *Villanueva-Gonzalez*, the defendant's multiple assaults of head butting and strangling the victim, which occurred at the same time and place, constituted double jeopardy. On the other hand, two assaults were not barred by double jeopardy in *State v. Coryell*, when the defendant assaulted his girlfriend in the living room and pushed her out the front door, and later strangled her in the laundry room after she reentered the house,. *State v. Coryell*, __ Wn.App.2d __ (unpublished, 52369-8-II, March 3, 2020), distinguishing *Villanueva-Gonzalez*. The two assaults did not occur at the same time and place.

In *State v. Knight*, 176 Wn.App. 936, 309 P.3d 776 (2013), the defendant argued her accomplice to first degree robbery conviction and

accomplice to second degree assault conviction should merge. The Court disagreed because the robbery was completed when the principal took the victim's ring at gunpoint and the second degree assault occurred when the principal "*later* assault[ed] [the victim] (with a different firearm and by kicking her in the head)." *Knight* at 955 (emphasis in original). In other words, the offense of assault with a deadly weapon has a temporal element – the alleged deadly weapon must be an actual deadly weapon at the time of the assault. It is insufficient for the offense of assault with a deadly weapon that the device used could be made into a deadly weapon with reasonable effort and within a reasonable time period.

Turning to the evidence of this case, the jury heard both direct and circumstantial evidence of Mr. Moore's alleged assault with a firearm. Three witnesses testified to seeing the barrel of a firearm. Officer Schaffer testified he saw a "metallic shine" which he believed to be the barrel of a rifle. RP, 507-08. Officer Epperson saw what he thought was the barrel of a rifle. RP, 538. Officer Bailey, the victim of the assault, saw "what resembled the barrel of a rifle" pointed at his head. RP, 741. Although the witnesses assumed the barrel was attached to a firearm, no witness testified to seeing anything other than a barrel. The circumstantial evidence points as well to the fact that the item was a naked barrel and not a functional firearm. When the police entered the house with a search

warrant, they discovered a disassembled Marlin Model 60 rifle. The barrel, receiver, and stock of the firearm were in three separate pieces. In addition, the screws necessary to reassemble the firearm were not located with the main pieces. This is circumstantial evidence that what was actually present is only what all three witnesses testified they thought they saw – the barrel of a rifle.

This Court has held that the fact finder may rely on circumstantial evidence to determine whether a device that appears to be a firearm is in fact a firearm. In this case, both the direct evidence and circumstantial evidence indicate that the device was nothing more than a rifle barrel – a non-functioning, gun-like instrument.

The State may argue that it is irrelevant whether Officer Bailey saw the barrel of a firearm or an actual firearm because Mr. Moore was in possession of all the necessary parts to assemble the firearm with a reasonable effort and in a reasonable period of time. Assuming *arguendo* that is true, it is irrelevant to the charge of assault with a deadly weapon, which requires the device to be an actual, functioning firearm at the time of the assault, and not at some hypothetical time thereafter.

Finally, there is a question about the appropriate remedy. It is arguable Mr. Moore's act of pointing a rifle barrel constituted a different crime than second degree assault. But neither party requested a lesser-

included offense instruction and none was given. Because insufficient evidence exists to prove assault with a deadly weapon and because neither party requested a lesser-included offense instruction, the remedy is dismissal with prejudice. *State v. Hummel*, 196 Wn.App. 329, 383 P.3d 592 (2016); *In re Heidari*, 174 Wn.2d 288, 274 P.3d 366 (2012).

2. The trial court erred by refusing to authorize transcription services for attorney-client conferences, thereby interfering with Mr. Moore's Sixth Amendment right to confer privately with his counsel.

Washington has declared a strong public policy interest in ensuring that deaf and hard of hearing persons are provided with a means to participate in legal proceedings. RCW 2.42.010 reads, "It is hereby declared to be the policy of this state to secure the constitutional rights of deaf persons and of other persons who, because of impairment of hearing or speech, are unable to readily understand or communicate the spoken English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them." For purposes of this statute, "impaired person" means, means a "person who, because of a hearing or speech impairment, cannot readily understand or communicate in spoken language; and includes persons who are deaf, deaf and blind, speech impaired, or hard of hearing." RCW 2.42.110(1). RCW

2.42.120(1) requires a qualified interpreter be appointed for any hearing impaired person to be paid for the “appointing authority.” Similarly, RCW 2.43.040(2) requires all foreign language interpreter services in a criminal case to be paid “by the governmental body initiating the legal proceedings.”

In this case, Mr. Moore qualifies, either as a deaf person or hard of hearing person, as an “impaired person” because he could not readily understand or communicate in spoken language. The Court’s first attempt to communicate with headphones proved unsuccessful. RP, 21. The Court was required to provide interpreter services. Under the circumstances, given that Mr. Moore does not communicate or understand ASL, the Court’s decision to have all court hearings transcribed with a “real time” transcriptionist was a reasonable one.

But the Court refused to authorize payment for a “real time” transcriptionist for attorney visits in the jail. RP, 46. The Court repeatedly stated that interpreter services were to be paid by “indigent defense.” This was error. Mr. Moore did not just have the right to participate in the courtroom proceedings. He had the Sixth Amendment right to communicate in a confidential setting with his attorneys. The Sixth Amendment guarantees a criminal defendant the right to assistance of counsel, which includes the right to confer privately with that counsel.

State v. Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014). The trial court in this case refused defense counsel’s reasonable suggestion that a “real time” transcriptionist be provided for his deaf or hearing impaired client in order to accommodate private conferences in the jail.

The Court denied the motion under the mistaken belief that it was not responsible for the costs of such transcription. As RCW 2.42.120(1) makes clear, any costs associated with hearing impairment interpreters are to be shouldered by the “appointing authority,” in this case the Court, and not by “indigent defense.” Even assuming *arguendo* the Court could delegate the cost to “indigent defense,” the issue of who pays is independent of whether the requisition was legally required. Regardless of whether the cost of the “real time” transcriptionist was properly charged to the Court or “indigent defense,” Mr. Moore was entitled by statute and the Sixth Amendment to reasonable accommodations to allow him to communicate with his attorney.

Denial of the Sixth Amendment right to counsel is structural error. *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Reversal is required even absent prejudice.

Nevertheless, this record is replete with evidence that Mr. Moore was actually prejudiced by his inability to effectively communicate with

defense counsel. Over and over, when the trial court inquired whether defense counsel was ready to proceed to the next stage of the case, defense counsel reported he had not communicated with his client. This occurred at a competency hearing (RP, 38), pre-trial motion to continue (RP, 126), the mid-trial CrR 3.5 hearing (RP, 823-5), and the jury instructions colloquy (RP, 1270). It also occurred when Mr. Moore attempted to communicate with Mr. Byrd regarding the competency evaluation at Western State Hospital. CP, 37.

Most significantly, the lack of communication occurred when the State rested its case. When the Court inquired whether the defense was prepared to present its case-in-chief, defense counsel incredibly reported he had not discussed the subject with Mr. Moore. RP, 1350. Defense counsel had an affirmative obligation to ensure that Mr. Moore was properly advised on his right to testify. RPC 1.2(a). Although the Court did its best to accommodate the issue by granting a 100-minute recess, it is clear Mr. Moore still did not understand his right to testify. After the recess, the jury was escorted into the courtroom, heard defense counsel rest, and was released for the day. As soon as they were gone, Mr. Moore expressed an interest in testifying. What followed was a lengthy colloquy on the record about the defendant's right to testify or not testify. RP, 1354-63. What should have been an on-going, private discussion in the jail with

defense counsel turned into a spontaneous, on-the-record, public discussion. At the end of the business day, Mr. Moore was prepared to testify. The next day, he changed his mind again.

The record is clear there was a severe communication breakdown between defense counsel and the defendant. This breakdown was, at least in part, attributable to the Court's failure to reasonably accommodate jailhouse communications using a "real time" transcriptionist. Reversal is required.

3. The trial court erred by denying defense counsel's motion to withdraw due to a breakdown in the attorney-client relationship.

Starting well over a year before the trial date, there was a clear, irreparable, and profound breakdown in the attorney-client relationship between Mr. Moore and Mr. Byrd. Mr. Byrd brought five separate motions to withdraw on April 13, 2018, September 7, 2018, September 28, 2018, May 30, 2019, and June 3, 2019. There was also a written motion filed on September 6, 2018. The motion was repeatedly denied.

On each of the five dates Mr. Byrd brought oral or written motions to withdraw, Mr. Moore communicated in some fashion that he wanted Mr. Byrd replaced. On April 13, 2018, Mr. Moore wrote a note to the Court saying, "Can the Court replace Mr. Byrd." RP, 74. On September 7, 2018, Mr. Moore wrote a note saying, "New lawyer please." RP, 92. On

September 29, 2018, Mr. Moore wrote a note “indicating that he had asked that this lawyer be fired.” RP, 120. On May 30, 2019, Mr. Moore passed up a note asking for new counsel. RP, 320. He also indicated his primary objection was to Mr. Byrd, not Mr. Schile, saying he wanted both counsel replaced “if that’s what it requires to make Mr. Byrd dismissed – yes.” RP, 320. On June 3, 2019, Mr. Moore expressed an interest in self-representation, although it appears he was more interested in having Mr. Byrd removed than actually representing himself. RP, 340.

A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. *State v. Stenson*, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). Factors to be considered in a decision to grant or deny a motion to substitute counsel are (1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings. *Id.*

The first issue for this Court is the reasons given for the dissatisfaction. This factor weighs in favor of Mr. Moore. In this case, Mr. Byrd, not the defendant, was the first person to seek substitute counsel, although Mr. Moore consistently concurred with motion. Although the first motion to withdraw occurred on April 13, 2018, the most complete

record on the issue occurred on September 7, 2018. Mr. Byrd cited three reasons for seeking to withdraw from the case. First, he believed Mr. Moore was refusing to communicate with him. Second, Mr. Byrd expressed frustration with Mr. Moore's "insistence of nonverbal communication." Mr. Byrd was worried he was "being exposed to a claim of ineffective assistance of counsel." Third, Mr. Byrd disagreed with Western State's competency evaluation, but Mr. Moore "refused to be evaluated by his court appointed psychologist." Each of these three reasons, individually or collectively, support the position that there was an irreconcilable conflict between Mr. Byrd and Mr. Moore and a complete breakdown in the attorney-client relationship.

At the outset, it must be conceded Mr. Moore presented as a difficult client with difficult facts. But a close review of the record shows that the difficulty was exasperated, not ameliorated, by Mr. Byrd's refusal to do anything beyond the bare minimum. As Mr. Byrd recognized early on, the facts of this case naturally lend themselves to an insanity plea. Barring an insanity plea, Mr. Byrd should have been preparing for the inevitable sentencing hearing with a comprehensive mitigation presentation. But Mr. Byrd neglected the case and his client for months at a time, resulting in a complete breakdown in the attorney-client relationship.

In the early stages of the case, Mr. Byrd and Mr. Moore appeared to be working sufficiently well together. The first several hearings on March 7, 2017, April 7, 2017, and May 25, 2017 proceeded normally. Mr. Moore signed speedy arraignment waivers without objection and, insofar as the record reflects, was communicating adequately with Mr. Byrd. The problems appear to begin when Mr. Moore showed evidence of hearing loss. The hearing loss is never fully explained in the record, but Mr. Moore believed it was the result of an assault in the jail by a corrections officer. RP, 72. From that point on, Mr. Byrd appears to give up.

The first motion to withdraw was brought on April 13, 2018. According to Mr. Byrd's declaration, between that date and the next court hearing on September 7, 2018, Mr. Byrd apparently attempted to meet with his client a mere five times. Although Mr. Moore refused to see Mr. Byrd on July 10, July 27, August 9, he agreed to meet with him on both August 16, 2018 and August 24, 2018. The latter meeting was a significant meeting, lasting for approximately 90 minutes. Given the difficulties presented by this case, Mr. Byrd's efforts to build trust with and communicate with Mr. Moore were grossly inadequate.

Mr. Byrd's second complaint was Mr. Moore's "insistence of nonverbal communication." As argued elsewhere in this Brief, the communication difficulties presented by Mr. Moore's hearing loss are

attributable at least in part to the Court's refusal to make reasonable accommodations. But Mr. Byrd also bears significant responsibility as well. Communicating by written memos may be slow and cumbersome, but the alternative is to not communicate at all. And this appears to be the avenue Mr. Byrd chose. Over and over, the Court would inquire if Mr. Byrd had discussed a particular issue with Mr. Moore, only to be told he had not. The breakdown in communication is attributable to Mr. Byrd's decision to not communicate. Mr. Byrd's fear that he was being set up for an ineffective assistance of counsel claim is prescient.

The third reason cited by Mr. Byrd is that he disagreed with the competency evaluation and Mr. Moore refused to meet with the defense psychologist. But again, Mr. Byrd bears the responsibility for this problem for two reasons. First, Mr. Byrd declined to do what he needed to do to assist Western State Hospital. When Mr. Moore requested a lawyer during his psychological examination, Western State Hospital called Mr. Byrd. Providing legal counsel over the phone to a client who cannot hear proved instantly impossible. But Mr. Byrd made no attempt to set up an in person meeting. *See State v. Hutchinson*, 135 Wn.2d 863, 873, 959 P.2d 1061 (1998) (defendant has the right to presence of counsel during psychological evaluation). A timely visit to Western State Hospital at that juncture would have allowed Mr. Byrd to communicate effectively

with his client and could have averted the competency finding. It would have also allowed the psychologist to see Mr. Moore and Mr. Byrd work together, which would have aided the determination when Mr. Moore could assist his attorney in his own defense.

Second, Mr. Byrd made no attempt to provide background information to either Western State Hospital or the defense psychologist that would have greatly aided them. Matricidal fury followed by dismemberment is not normal and must have originated somewhere. To the extent that the record reflects anything about Mr. Moore's background, we know that his mother gave birth to him when she was 14 years old. Fast forward 45 years and we know Ms. Holt was caring for her seemingly agoraphobic son, forced to race home every day to care for him while her co-workers socialized over drinks after work. Her commencement of a romantic relationship with Mr. Hesterley seems to have triggered something in Mr. Moore to the point that, when she came home on Valentine's Day after an overnight rendezvous carrying chocolates and a Valentine's Day teddy bear, he savagely attacked her in the style of Norman Bates and systematically cut off her legs. At a minimum, Mr. Moore's estranged daughter was a potential source of background information. Even without Mr. Moore's cooperation, there was available

information that could have and should have been provided to the psychologists.

But Mr. Byrd declined to get this information, even when given the resources to do so. Although the “indigent defense” office apparently appointed both an investigator and mitigation specialist, Mr. Byrd refused to maximize their resources, instead complaining to the judge that they were trying to investigate possible mitigation. RP, 52-53. But issues of competency, insanity, and mitigation are not mutually exclusive and could have been explored simultaneously. A mental condition not rising to insanity or diminished capacity may support an exceptional sentence downward if the defendant can show the existence of a mental condition and “the requisite connection between the condition and significant impairment of the defendant's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of the law.” *State v. Schloredt*, 97 Wn.App. 789, 802, 987 P.2d 647 (1999).

The second issue for this Court is the trial court's own evaluation of counsel. This factor weighs in favor of Mr. Moore. The record here reflects that the judge dismissed both Mr. Byrd’s and Mr. Moore’s concerns out of hand without any meaningful inquiry.

The judge in this case seemed to believe that providing a second attorney cured the problem of the irreconcilable conflict and breakdown in

communication between Mr. Byrd and Mr. Moore. This was error. A review of the record leaves even a casual reader wondering what role Mr. Schile played in the case other than gofer. He did not give the opening statement, closing argument, or cross-examine any of the witnesses. Mr. Byrd clearly did not trust him to perform anything other than a menial task, at one point even stating on the record, “I don’t have the ability to improve my co-counsel.” RP, 433. Other than handing up Mr. Moore’s handwritten notes, Mr. Schile appears to have made no tactical decisions in this case.

Finally, this Court is required to review the timeliness of the request. In *Stenson*, where the request was deemed untimely, the request came after 21 days of voir dire. In Mr. Moore’s case, the first request came 14 months before trial and the written motion was filed nine months before trial. This factor weighs in favor of Mr. Moore.

All three *Stenson* factors weigh in favor of Mr. Moore. Mr. Byrd’s motion to withdraw and substitute counsel should have been granted. Reversal is required.

4. The evidence of egregious lack of remorse aggravating factor is insufficient and should be dismissed.

There is nothing in this record to indicate whether Mr. Moore did or did not feel remorse. Mr. Moore made no statements at the scene, made

almost no statements during the trial, and his allocution at the sentencing hearing is almost nonsensical. RP, 1505-06. There is no basis to conclude Mr. Moore evidenced an egregious lack of remorse.

Cases where the appellate courts have affirmed a finding of egregious lack of remorse have almost universally done so based upon statements made by the defendant after commission of the crime. *State v. Zigan*, 166 Wn.App. 597, 279 P.3d 597, *review denied*, 174 Wn.2d 1014 (2012) (defendant asked victim's husband if he was "ready to bleed?" moments after victim's wife died, defendant was smiling and laughing while talking to officers at crime scene, and defendant, at jail, smiled and waved at inmates and said "if you hit someone on a motorcycle, don't get caught."); *State v. Burkins*, 94 Wn.App. 677, 973 P.2d 15, *review denied*, 138 Wn.2d 1014 (1999) (statements to police officers that he was glad victim was dead and he hoped her death was painful); *State v. Russell*, 69 Wn.App. 237, 848 P.2d 743 (1993) (defendant bragged had fooled the police and wanted to celebrate the victim's death by going "to party"); *State v. Ross*, 71 Wn.App 556, 861 P.2d 473, *as amended*, 883 P.2d 329 (1993) (defendant continued to blame the justice system for his crimes as shown by his comment that if he had not been caught after perpetrating his first robbery so many years ago, he would have enlisted in the army and not been here to kill the victim); *State v. Creekmore*, 55 Wn.App 852, 783

P.2d 1068 (1989) (upon being told by victim he had injured him said, “That's not true, and if you want me to make it true, I'll make it true” and then whipping him further; also, upon the victim’s death, he refused to allow the mother to cry); *State v. Wood*, 57 Wn.App 792, 790 P.2d 220 (1990) (woman who had her husband killed taunted others by imitating the sounds her husband made as he died, “Gurgle, gurgle”); *State v. Stuhr*, 58 Wn.App. 660, 794 P.2d 1297 (1990) (defendant, who claimed that he had killed a dog the same night he killed the victim, told the doctor he felt more sorry for the dog). Because Mr. Moore made no statements at all at the time of his arrest or subsequent to that, there is no basis to conclude he evidenced an egregious lack of remorse.

A recent case by Division II of the Court of Appeals reversed a finding of egregious lack of remorse under facts substantially similar to Mr. Moore’s case. *State v. Fisher*, 188 Wn.App. 924, 355 P.3d 1188 (2015). The defendant in *Fisher* was found guilty of premeditated murder of his father and received an exceptional sentence based upon egregious lack of remorse. The Court of Appeals reversed the sentence finding the evidence insufficient to establish egregious lack of remorse. Additional facts, which are mostly contained in the unpublished portion of the

decision⁴, established that the defendant's father abruptly stopped communicating with other family members and paying his bills, prompting law enforcement to investigate a missing person. Investigation revealed the defendant started financially exploiting his father after he went missing. When contacted by law enforcement, the defendant initially said his father had left the country with a new girlfriend (a story he had previously told the family), but eventually confessed to shooting his father. After killing his father, he claimed he took his father's body out to a burn pile and burned the remains, although forensic examination of the burn pile was unable to corroborate that. He then cut up the bloody carpet and threw the pieces into the woods. As noted the Court concluded these facts were insufficient to establish egregious lack of remorse. The Court noted that concealment of the body cannot be the basis for an exceptional sentence. *Fisher*, citing *State v. Crutchfield*, 53 Wn.App. 916, 771 P.2d 746 (1989).

Comparing the facts of Mr. Moore's case to the defendant in *Fisher*, it is clear the finding of egregious lack of remorse cannot be sustained. Both Mr. Moore and Mr. Fisher committed a premeditated

⁴ The published portion of the case includes the fact that the defendant shot his father, the shooting was premeditated, and the Court's conclusion the evidence was insufficient to support the finding of egregious lack of remorse. The unpublished portion of the decision contains the details of the shooting, the defendant's repeated lies to the family and law enforcement, and the subsequent concealment of the body and carpet.

murder of a parent, disposed of the body in a grizzly fashion⁵, and attempted to dispose of the bloody remnants of the murder (bedding and carpets, respectively), all indicating some failure by both defendants to accept responsibility. If anything, Mr. Fisher's case is more egregious because after the murder he lied to the other family members about his father's whereabouts and financially exploited him. This Court nevertheless reversed, finding the evidence of lack of remorse to not be "egregious." The finding of egregious lack of remorse should likewise be reversed in Mr. Moore's case.

5. The trial court erroneously relied on an aggravating factor not plead or proved to a jury beyond a reasonable doubt.

At sentencing, the trial court imposed an exceptional sentence for both Counts 1 and 2 and ordered the sentences be run consecutive. The exceptional sentence on Count 1 was based upon two aggravating factors: egregious lack of remorse and deliberate cruelty. The alleged egregious lack of remorse is addressed elsewhere in this brief and should be stricken. But regardless of how this Court rules on the egregious lack of remorse issue, remand for resentencing is still required. The State never pled and the jury never found deliberate cruelty.

⁵ The victim's body was never recovered in *Fisher* and forensic investigation showed it was unlikely the defendant burned his father on a burn pile. But the fact the defendant confessed to disposing of his father's body in a grizzly manner, even if untrue, demonstrates some lack of remorse.

Manifesting deliberate cruelty to the victim is a recognized aggravating factor under the Sentencing Reform Act. RCW 9.94A.535(3) (a). Like all aggravating factors listed in RCW 9.94A.535(3), however, the aggravating factor does not apply unless the procedures of RCW 9.94A.537 are complied with. RCW 9.94A.537(1) requires the defendant be placed on actual notice of all alleged aggravating factors. RCW 9.94A.537(4) requires evidence of the aggravating factor be presented to the jury during the trial and for the jury to determine whether the aggravating factor is proven beyond a reasonable doubt. This statute was enacted in response to decisions in the United States Supreme Court and the procedures contained in the statute are mandatory under the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 430 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

In this case, the allegation of deliberate cruelty was neither pled nor proved to a jury beyond a reasonable doubt and must be stricken. A new sentencing hearing is required.

It is possible the State will argue that a new sentencing hearing is unnecessary because the jury did find egregious lack of remorse. Assuming arguendo that this Court sustains the finding of egregious lack of remorse, resentencing is still required. It is clear from the trial court's

oral ruling that it was relying primarily on the deliberate cruelty aggravator and not the lack of remorse aggravator in imposing the sentence. RP, 1521. Additionally, a properly pled and proved aggravator does not require the trial court to impose an exceptional sentence, it merely permits the trial court to do so. RCW 9.94A.537(6). On this record, it is impossible to determine whether the trial court would have imposed an exceptional sentence absent the deliberate cruelty.

6. Mr. Moore did not receive effective assistance of counsel at sentencing.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685–86, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). In order to show that reversal is warranted based on ineffective assistance of counsel, the defendant bears the burden to show (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Failure to make the required showing of either deficient performance or sufficient prejudice defeats an ineffective assistance of counsel claim. *Id.* at 700.

There is much about Mr. Byrd's and Mr. Schile's representation of Mr. Moore that was deficient. They frequently appeared unprepared and they did not adequately communicate with their client about trial strategy or trial procedure. But on this record, it is impossible to say whether Mr. Moore was prejudiced at trial by the deficient performance. It is unknown whether Western State Hospital would have diagnosed a mental disease or defect if Mr. Byrd would have made the trip to the Hospital to communicate directly with his client during the evaluation. Similarly, it is unknown if Dr. Stanulis would have provided the necessary information for an insanity plea if Mr. Byrd had developed a better working relationship with his client. Additionally, even if Dr. Stanulis had opined that Mr. Moore was insane at the time of the offense, it is unknown if Mr. Moore would have agreed to a plea of not guilty by reason of insanity. In sum, there are just too many unknowns to conclude Mr. Moore was prejudiced at trial by the deficient performance.

That is not true at sentencing, however. Mr. Byrd made a decision early in this case not to explore mitigation. His focus was on possible defenses at trial and he never looked ahead to what possible mitigators might exist at sentencing. This case was crying out for explanation. Why would a man of 45 years savagely kill his mother, cut off her legs, and

stage her left hand down the front of her panties? There is a story there, likely a tragic one, that begs to be told.

But nothing appears in this record to tell that story. One small, but highly significant fact illustrates the problem. Neither Mr. Moore's date of birth nor Ms. Holt's date of birth was ever mentioned to the jury at trial or the judge at sentencing. When appellate counsel tried to ascertain their respective ages, he was initially unable to find the information. Appellate counsel was finally able to find their dates of birth in the Search Warrant Affidavit. (CP, 158, 165). It was from these dates of birth that appellate counsel was able to determine that Ms. Holt was barely a teenager when she got pregnant with her son. Who was the father? Why, and under what living arrangements, did she keep the baby? Given the circumstances, what was Mr. Moore's childhood like? This record does not tell the story that should have been told, if not at trial, then at least at sentencing.

In a recent unpublished case, Division III of this Court addressed a claim of ineffective assistance of counsel in the context of a murder case. *In re Alden*, (unpublished, 35548-9-III, decided January 21, 2020). The defendant claimed his attorney failed to investigate adequately whether his attention deficit hyperactivity disorder (ADHD) affected his psychological state at the time of the shooting. The Court of Appeals concluded testimony of the ADHD would not have changed the trial results. On the

other hand, there was a reasonable probability that evidence of ADHD would have been found credible as a mitigating factor by the trial court. The Court remanded for a reference hearing on that point.

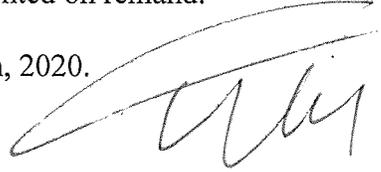
When assessing whether a lawyer's investigation was reasonable, the reviewing court must consider “whether the known evidence would lead a reasonable attorney to investigate further.” *Wiggins v. Smith*, 539 U.S. 510, 527, 123 S.Ct, 2527, 156 L.Ed.2d 471 (2003). In Mr. Moore’s case, the known evidence presented in the bizarre facts itself would lead any reasonable attorney to continue to investigate. Additionally, Mr. Moore was born to a teenage mother, apparently rarely left the house and required his mother to be present to take care of him, and yet somehow had a child of his own from whom he was estranged. It is close to a certainty that there was some aspect of these decidedly odd circumstances that would have given rise to mitigation evidence at sentencing. The decision by Mr. Byrd to cease exploring possible mitigation was unreasonable and prejudiced Mr. Moore at sentencing.

D. Conclusion

The second degree assault charge should be reversed and dismissed with prejudice. The first degree murder charge should be reversed and remanded for a new trial. In the alternative, a new

sentencing hearing is required where the Court cannot consider the aggravating factors of egregious lack of remorse or deliberate cruelty. Different trial counsel should be appointed on remand.

DATED this 24th day of March, 2020.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant/Appellant

THE LAW OFFICE OF THOMAS E. WEAVER

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