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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DUSTIN R. KELLEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 06-1-00938-1

BRIEF OF RESPONDENT

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

1. Has defendant failed to meet his burden of showing deficient performance or resulting prejudice stemming from his attorney's failure to raise, at trial, a diminished capacity defense due to mental illness?

2. Under well-settled law, could the trial court properly impose, based upon jury findings, additional time for firearm enhancements pertaining to defendant's assault in the second degree conviction, even though one of the elements of that offense required the jury to find the defendant committed the assault with a deadly weapon?

B. STATEMENT OF THE CASE.

1. Procedure

On February 27, 2006, the Pierce County prosecutor's office filed an information charging appellant, DUSTIN ROSS KELLEY ("defendant"), with one count of murder in the first degree. CP 1-3. The State also alleged a firearm enhancement. Id. The information was later amended so that the charges at the time of trial were murder in the first degree, unlawful possession of a firearm in the second degree, and assault

in the second degree . CP 21-22. The State also alleged two firearm enhancements on the charges of murder and assault. Id.

The matter was assigned to the Honorable Bryan Chushcoff for trial. After hearing the evidence, the jury convicted defendant as charged and returned four special firearm verdicts – two pertaining to the murder, and two pertaining to the assault. CP 65, 67, 68, 69, 70, 71, 72.

At the sentencing on February 9, 2007, the court determined that defendant had an offender score of 12 on the murder and assault convictions, and an offender score of 11 on the unlawful possession of a firearm conviction. CP 77-89. The court imposed a standard range sentence of 524 months on the murder, plus an additional 120 months for the two enhancements, a standard range sentence of 60 months on the unlawful possession of a firearm, and a standard range sentence of 48 months on the assault, plus an additional 72 months for the two enhancements. CP 77-89. The base sentences were to run concurrently, but the enhancements were ordered to run consecutively to each other and the base sentence for a total confinement time of 716 months. Id.

Defendant filed a timely notice of appeal from entry of this judgment. CP 73.

2. Facts

On February 22, 2006, at approximately 5:30 p.m., Tacoma Police Officers Larsen and Watters were dispatched to 4527 South "L" Street, Tacoma, Washington, with regard to a shooting. RP 227-228. At the

residence, Officer Watters stayed in the front yard, while Officer Larsen walked to the north side of the residence where he encountered Klaus Stearns and his mother, Petra Scholl. RP 230. Mrs. Scholl was upset and appeared to be in shock; her hands were bloody. RP 230. Officer Larsen directed her to contact Officer Watters, then proceeded to a travel trailer that was parked behind the house; other officers were already there. RP 231, 233-235. Inside the trailer, lying on his back on the bed, was a deceased white male with obvious gunshots wounds to his head and torso. RP 235. There was considerable blood spatter inside the confined trailer. RP 236. Fire department personnel responded to the scene and confirmed the death. RP 238. The body was not moved. RP 236. After this was done, the trailer was cleared and locked so as to preserve the crime scene. RP 238. The victim was later identified as Beau Pearson. RP 304, 542, 643.

One officer- assigned to monitor the yard and maintain the crime scene log – observed that a blue Acura parked in the alley at the rear of the residence had a magazine or clip of .45 caliber rounds in the driver's side door pocket. RP 253-254, 280-282. The officer used crime scene tape to include the car within the boundaries of the taped off area. RP 255. This clip was later recovered pursuant to a search warrant, and a forensic technician verified that it contained thirteen .45 caliber rounds. RP 414-419, 429.

Police recovered ten .45 caliber casings inside the trailer, and one 9mm casing. RP 318-319, RP 389-401. Numerous bullet fragments were also recovered from the area surrounding the body. RP 407-415.

A forensic technician tried to locate fingerprints on numerous items inside the trailer, including the shell casings. RP 421-422. He found usable fingerprints on two of the items, a Diet Pepsi Can and a glass ashtray. RP 422. The technician also processed the Blue Acura, the ammunition in the clip, and the clip itself for fingerprints. RP 423. He found usable prints only on the vehicle. RP 423-424. He checked the recovered prints against known prints belonging to defendant, Beau Pearson, Molly Matlock, Klaus Stearns, Kelly Kowalski, Val Greenfield and Chris Summers, but did not find any matches. RP 422-423.

Klaus Stearns, who is 28 years old, testified that he lived at 4527 South "L" with his parents. RP 531-532. He was acquaintances with Beau Pearson, who would occasionally come over to Stearns's house to visit. RP 532. Mr. Stearns was friends with Kelly Kowalski and the defendant. RP 532-534. Defendant had the nickname of "Drama," which was also tattooed on his neck. RP 534, 347. Mr. Stearns thought that the victim might have brought Valerie Greenfield to the house on one previous occasion, but other than that, he did not know her. RP 533. Mr. Stearns testified that on February 22, 2006, the victim came over to his house and asked if he could use the trailer in the backyard. RP 535.

Later that day, Mr. Stearns went out to the trailer to socialize and talk with the victim, Ms. Kowalski and Ms. Greenfield, who were also there. RP 536, 539. Ms. Kowalski arrived by herself and drove a dark blue Jeep Cherokee which she parked in the back alley. RP 552-553. While he was out in the trailer, his mother paged him and wanted to talk to him. RP 539. He left the trailer to go to the house to talk to his mother, leaving the victim, Ms. Kowalski and Ms. Greenfield behind. RP 539. After talking to his mom, he got a call on his cell phone and walked to the back porch to answer the call. RP 540. While talking on the phone, he heard some loud popping and banging noises coming from the trailer. RP 540. He then saw the defendant, Ms. Greenfield and Ms. Kelly, in that order, come out of the trailer. RP 540. The defendant walked from the trailer to the back gate. RP 541. Mr. Stearns testified that Ms. Greenfield looked "zombied out" and did not make eye contact with him as she walked right by him. RP 541. He testified that Ms. Kowalski very upset when she came out. RP 542. Mr. Stearns went into the trailer and found Mr. Pearson sitting on the bed, leaning or slumped forward, with his feet on the floor; there was blood. RP 542. He called 911. RP 542, 554. He walked outside to find his mother yelling at Ms. Greenfield. RP 543. His mother then went into the trailer to check on the victim as well. RP 543. The police arrived shortly thereafter. RP 543-544.

Mrs. Scholl testified that she is Klaus Stearns's mother, and that she lives at 4527 South "L" with him. RP 511-512. She was acquainted with the victim and Kelly Kowalski as friends of her son. RP 511-513. She testified on February 22, 2006, she drove home after work and paged her son so she could talk to him about his day. RP 513-514. He responded that he was in the back yard and would be right in. RP 514. After she finished talking with her son she went upstairs; as she looked out the window, she saw someone that she didn't recognized wearing a ski hat walk past the shed in her backyard. RP 515-516. A few minutes later she heard some very loud bangs. RP 517. She testified that she went downstairs to see what was going on. RP 517. She opened her front door, which faces the neighbor's house and not the street; she saw a woman with long blondish hair, walk very quickly past her. RP 518-519. Ms. Scholl asked her what was going on, but the woman did not respond. RP 518-520. She testified that while the woman looked right at her, she felt that the woman did not see her. RP 519, 528. Ms. Scholl went to the back of the house and saw her son talking on the cell phone saying that somebody had been shot. RP 519-520. She asked her son who had be shot and he told her "Beau." RP 520. She went to the trailer because she did not believe him. RP 520. She saw the victim sitting on the bed, slumped forward; blood was dripping off both arms and pooling on the floor. RP 521. He was not moving or breathing. RP 522. Ms. Scholl testified that she screamed his name several times, but that she knew he

was dead. RP 522. She came out of the trailer and told her son to call 911, but he was already on the phone. RP 522-523. She grabbed the phone and told the operator that someone was dead. RP 523. The operator instructed her to go back in and see if she could help. RP 523. Mrs. Scholl, a registered nurse, testified that she went back into the trailer, pushed the victim back on the bed, and checked for a pulse; there was none; he was dead. RP 523-524. Ms. Scholl could see a hole where his eye had been and another gunshot wound in his forehead. RP 524-525.

Kelly Kowalski testified that she is friends with Klaus Stearns and the defendant. RP 574-575. On February 22, 2006, she went over to Mr. Stearns's house in the afternoon and was in the back, in the travel trailer. RP 575-576. The victim and Ms. Greenfield also showed up at the trailer. RP 576-577. Ms. Kowalski describes Mr. Stearns as being "in and out" of the trailer. RP 578. The defendant showed up at the trailer later that day. RP 578. At one point when Mr. Stearns was out, she was in the trailer with defendant, Ms. Greenfield and the victim. RP 578. Ms. Kowalski testified that she was facing the wall and talking on her phone when she heard the defendant and the victim speaking loudly to each other. RP 580-581. She heard a couple of loud bangs; she turned around and saw the victim slumped over on the bed. RP 582. Ms. Greenfield was next to the victim "freaking out." RP 583. Ms. Kowalski testified that by the time she turned around, defendant had left the trailer. RP 584. Ms. Kowalski denied shooting the victim. RP 584.

Valerie Greenfield testified that she went with the victim to the Stearns residence the day of the shooting because the victim said that he was owed money, and was going to collect it there. RP 603, 614-615. Just prior to the shooting, she and the victim were sitting on the bed; another woman, whom she did not know, was in the trailer near the stove. RP 605-607. A man that Ms. Greenfield did not know came into the trailer and began talking to the victim; he asked the victim whether he had been shot before. RP 608-609. The victim continued to talk to the man; the man walked toward the door then turned and walked back pulling out two guns. RP 609. The man said "I smoke you and your bitch, too." RP 609. The victim pushed Ms. Greenfield to the side with some force as the man started shooting. RP 609-610. There were several shots; Ms. Greenfield testified that she thinks he just used one gun to fire the shots, but cannot be sure. RP 612. Ms. Greenfield testified that he pointed a gun at her and she was fearful that she was going to be shot. RP 620-621. When the man finished shooting, he left the trailer. RP 612. Ms. Greenfield testified that she could not identify the man because she had never seen him before; the police showed her several photographs but she was unable to make an identification. RP 605-606, 613. Ms. Greenfield could recall few details about the shooter other than that he "seemed young" and was wearing a hat. RP 606.

Phillip Griffin lives at 4526 South "K" Street, and the back of his house is across the alleyway from the house at 4527 South "L" Street. RP 556, 504. On February 22, 2006, he was in his backyard, playing with his two daughters between 3:30 and 5:30 p.m. RP 562. He saw a light blue Acura pull into the alley and park behind the Stearns's residence. RP 556. There were two people in the car. RP 556. He went on with his activities until one of his daughters mentioned that the man in the car was staring at them. RP 556. Mr. Griffin then went to the fence and looked over to see what was happening. RP 556. He testified that he saw a man and a woman get out of the car. The man was a white male, early 20's, 6' to 6'2", skinny, goatee, with a word tattooed on his neck. RP 558-559. He was wearing a black beanie cap, a sweater and blue jeans. RP 559. Mr. Griffin could not read what the tattoo said, but indicated that it was about three inches high, in black ink and covered his neck from the bottom of his chin to under his shirt. RP 559, 564. The man got out of the passenger side of the car. RP 564. The female was talking on a phone; after she got done with her call, they went into the yard. RP 560. Mr. Griffin saw the man come back out to the car, get a sweater and tie it around his neck then go back into the yard. RP 561. Mr. Griffin spent about twenty more minutes in the year before he went inside. RP 561. He was contacted later that night by police. RP 561. Mr. Griffin identified the Acura in photographs taken by the police as the Acura he had seen that day. RP 557. He also identified the defendant as the man he saw that day. RP

559-560. The court directed defendant to pull his shirt down to reveal his tattoo, and Mr. Griffin identified it as looking the same as it did on February 22, 2006. RP 564-565.

After Klaus Stearns identified a picture of defendant from a photo montage, detectives obtained a bench warrant for the arrest of defendant in conjunction with the murder of Mr. Pearson. RP 344, 475, 505-506. Defendant was arrested on the warrant near Bakersfield, California, and held at the Kern County Jail. RP 345-346, 475. Detectives Vold and Yerbury met with defendant at the jail; he did not appear to be intoxicated or under the influence of drugs. RP 347-348, 476-478. After introducing themselves and explaining why they were there, defendant said something to the effect of "I'm going away for the rest of my life." RP 348, 477. The detectives also met with Molly Matlock, a friend of defendant's, who was with him at the time of his arrest. RP 348, 475-478. The car that defendant had been in at the time of his arrest was searched and a single 9mm cartridge was located in the back cargo area. RP 350, 478-481. During defendant's transport back to Washington, he made statements to the deputies assigned to guard him that he had been attempting to get to Mexico. RP 699-700, 702-704.

Dr. Roberto Romoso testified that he was an associate medical examiner for Pierce County, and that he had performed the autopsy on Beau Pearson. RP 636-638, 643. Dr. Romoso determined that the cause of death was multiple gunshot wounds. RP 651. The victim had eight

gunshot wounds to his body. RP 651. He also had an injury to one of his fingers that might also be a gun shot wound. RP 651. The doctor testified that Gunshot Wound "A" entered the top of the victim's head, and traveled in a downward trajectory through the skull, lodging in the cerebellum. RP 653. The doctor recovered a bullet and jacket from the victim's body relating to this wound. RP 653-654. This wound would be rapidly or immediately fatal. RP 656. Gunshot Wound "B" entered just above the left eyebrow and, traveling downward, penetrated the frontal bone, damaging the right eye and collapsing the orbital bone before fracturing the jaw and exiting the cheek. RP 657-658. This is a serious wound, but not necessarily lethal. RP 658. The doctor recovered many bullet and jacket fragments near the entry point, but could not be certain whether they were related to this wound or Gunshot Wounds "C." RP 658-659. The entry wound for Gunshot Wound "C" was on the left side of the face, just to the left of the eyebrow. RP 659. The wound went sharply downward through the face, neck, chest, and into the abdomen, ultimately lodging in the liver. RP 660. A bullet and a fragment of a jacket were recovered from this wound. RP 660-661. This wound was a serious injury and potentially fatal. RP 662-663. The entry point for Gunshot Wound "D" was on the left side of the face, just in front of the left ear. RP 663. The wound penetrated the neck and check, and also ended up in the liver. RP 663-664. A bullet and fragment were recovered from this wound. RP 665. The doctor recovered many fragments from

the victim's head that could not be clearly attributed to a particular wound. RP 665-668. This wound damaged the right lung, the ascending aorta and the liver; it is a very serious injury and is rapidly fatal. RP 669. The entry wound for Gunshot Wound "E" was on the back of the victim's left shoulder; the wound penetrated the chest cavity, injured the stomach and ended up in the backbone in the lumbar area. RP 675. The bullet causing the wound was recovered from the victim's body. RP 675-676. This wound was a serious injury and potentially fatal. RP 677. The entry point for Gunshot Wound "F" was on the victim's left upper arm. RP 677. The bullet exited the back of his arm in a slightly downward trajectory. RP 677-678. This wound is a relatively minor wound and not immediately fatal. RP 679. The entry point for Gunshot Wound "G " was on the left side of the victim's chest above the breast. RP 679. The wound traveled through the chest to the abdominal cavity, damaging the intestines, and ended in the right upper hip. RP 679-680. A bullet was recovered from this wound. RP 680. This wound was very serious and potentially fatal. RP 681. Finally, Gunshot Wound "H" entered on the right side of the abdomen, traveled through the abdominal cavity exiting in the buttocks. RP 682. This too was a very serious injury and potentially fatal. RP 683. After examining the victim's clothing, the doctor recovered two bullets from the victim's jacket. RP 684. The doctor opined that it is likely that wounds F, G and H were inflicted prior to the wounds inflicted to the head and the one shot to the back. RP 689-691.

A firearms examiner employed by the Washington State Patrol testified that it is not possible to fire a 9mm cartridge from a .45 caliber gun, nor a .45 caliber cartridge from a 9mm gun. RP 705-707, 723. She testified that she examined all of the .45 casing recovered from the trailer, and determined that they had all been fired from the same gun. RP 729-730. She also determined that the 9mm casing recovered at the trailer could not have been fired or been ejected by the same gun that fired the .45 casings. RP 731. The firearms examiner examined 3 spent .45 caliber bullets recovered from the trailer, and determined that they were all fired from the same gun. RP 731-733. She also examined three .45 caliber bullets recovered by the medical examiner during the autopsy and concluded that they were fired by the same gun. RP 733-735. The expert examined Exhibit 49, a 9mm bullet fragment found near the trailer with Exhibit 64, the 9mm bullet that lodged in the victim's backbone, and determined that they were fired from the same gun, but a different gun that had fired the .45 caliber rounds. RP 735-737.

The defendant stipulated that as of February 22, 2006, he had been previously convicted of a felony. RP 222.

The defendant recalled Kelly Kowalski to the stand to testify that it seemed to her that the defendant was high on drugs on February 22, 2006, although she did not see him use any drugs that day.

Defendant also called Molly Matlock to testify that she was the defendant's girlfriend, and that she had known him for ten months at the time she testified.[1] She testified that she and the defendant were consuming a considerable amount of methamphetamine for the two week period preceding February 22, 2006. RP 785. During that time, the defendant would sometimes stay at her apartment and his behavior was nothing out of the ordinary on February 22, 2006. RP 786. Ms. Matlock testified that she has seen the defendant with a gun, and that he frequently carries large quantities of drugs on him. RP 786-787. On the stand she could not describe the gun that she has seen him with at times, and could not be certain that it was always the same gun. RP 787. She acknowledged that when she spoke to detectives in Bakersfield, she provided a description of a gun that she had seen the defendant carry. RP 788-789. Ms. Matlock acknowledged that she had been to Klaus Stearns's residence but denied being there the day of the shooting. RP 787, 795. On cross examination, Ms. Matlock testified that she had strong emotional feelings for the defendant, and that she had visited him twice in jail and

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[1] Ms. Matlock testified on November 17, 2006, which means that she would have met defendant approximately a month before the murder. RP 752, 782. Later she testified that she thought she had known defendant about three months at the time of the murder. RP 789.

had several phone conversations. RP 789-790, 792-793. She denied ever talking about the case. RP 793. Ms. Matlock acknowledged that when she talked to the detectives in Bakersfield, that she described defendant's drug use as "casual" and "nothing major." RP 791. She did not recall telling them that she did not think that he was under the influence at all on the day in question. RP 792. Ms. Matlock testified that when he left her apartment around noon on February 22, that she did not know where he was going. RP 784, 793. She did not recall telling detectives that just prior to leaving, he had received a phone call regarding a stolen stereo, and that he was going to Stearns's house to deal with the person over the stolen stereo. RP 794. She did acknowledge telling the detectives that she thought the defendant was rational and clear-headed, and that when he feels that he has been wronged, that he takes it to heart. RP 795.

Detective Yerbury was recalled to the stand to testify that when he interviewed Ms. Matlock in Bakersfield, she described defendant's drug use as "casual." RP 811. On the day of the murder she described defendant as appearing pretty serious, and said that he did not appear to her to be under the influence of drugs. RP 811-812. Detective Yerbury also testified that Ms. Matlock had told them that right before the

defendant left that he had received a phone call saying that someone had found his friend's stereo equipment and that he was going right over to Klaus house to confront the person. RP 812, 814

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW ANY DEFICIENT PERFORMANCE OR RESULTING PREJUDICE BASED UPON HIS ATTORNEY'S FAILURE TO RAISE AT TRIAL A DIMINISHED CAPACITY DEFENSE DUE TO MENTAL ILLNESS.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S.

668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); see also, State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also, Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.").

There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d 858 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that

defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

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

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

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L.Ed.2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a

question which the courts must decided and "so admissions of deficient performance by attorneys are not decisive." Harris v. Dugger, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." Strickland, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, defendant seeks to show ineffective assistance of his trial counsel based upon the failure to present evidence of defendant's mental illness at trial to help support a voluntary intoxication defense.[2] The record before this court does not demonstrate either deficient performance or resulting prejudice.

Failure of defense counsel to present a diminished capacity defense where the facts support such a defense has been held to satisfy both prongs of the Strickland test. Thomas, 109 Wn.2d at 226-29. A diminished capacity defense requires evidence of a mental condition, which prevents the defendant from forming the requisite intent necessary to commit the crime charged. State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). An intoxication defense is a type of diminished capacity as it allows the jury to consider of the effect of voluntary intoxication by alcohol or drugs on the defendant's ability to form the requisite mental state. State v. Coates, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). Most of

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[2] Defense counsel proposed a voluntary intoxication instruction but it was refused as the court found that there was no evidence that defendant was intoxicated at the time of the shooting. CP 23-28; RP 816-820.

the cases finding deficient performance for failure to present a diminished capacity defense involve the failure to present an involuntary intoxication defense when the factual basis for this defense appears in the trial record. Thomas, 109 Wn.2d at 226-29 (failure to investigate potential expert witness's qualifications held to be deficient performance when court did not allow witness to testify); State v. Kruger, 116 Wn. App. 685; 67 P.3d 1147 (2003); see also, State v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003) (reversed because the reconstructed record was insufficient to determine if a claim for ineffective assistance of counsel for failure to raise an intoxication defense or diminished capacity defense was an appealable issue).

But when a claim of ineffective assistance of counsel is premised on the failure of counsel to present a diminished capacity defense based upon mental illness, the record must show that defendant had a mental illness that would impair his ability to formulate the intent necessary for the charged crime. State v. Griffin, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983)("Diminished capacity instructions are to be given whenever there is substantial evidence of such a condition and such evidence logically and reasonably connects the defendant's alleged mental condition with the inability to possess the required level of culpability to commit the crime charged.") To show deficient performance, defendant must show that his attorney failed to investigate a potentially viable defense or failed to request appropriate instructions based on the evidence admitted at trial.

Here the record does not indicate any failure to investigate the potential defense. It does indicate that defense counsel sought defendant's records from the department of corrections, but did not receive those until mid-trial. RP 907. The record also indicates that defense counsel requested defendant's records from the juvenile rehabilitation administration, but that he did not receive any of these documents until the week before the initial sentencing date. RP 907. The record indicates that counsel had been attempting to receive this information for "weeks if not months." RP 907. Most of the evidence relied upon by defendant to establish that he had a "mental illness" appears to have come from the JRA records. See, Appellants brief at pp. 6-7; CP 100-105. Defendant fails to identify anything in the record which indicates that defense counsel had any reason to believe that defendant had mental health issues prior to receipt of the JRA records. Consequently, the record indicates that defense counsel took steps to investigate defendant's personal history, and presented what evidence he could find of defendant's mental health issues as soon as he could. Because this information was not received until after trial, the information was presented at sentencing. CP 95-109. This record does not demonstrate deficient performance.

But even if this court were to assume that defense counsel's failure to investigate was deficient, defendant cannot establish on the record before this court that he was prejudiced, because it is unclear whether he actually has a mental illness that would support a defense or otherwise

affect the jury's verdict. The JRA records indicate that defendant was twice diagnosed with a conduct disorder and once diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). CP 95-109. The most recent of these assessments was done in early in 2003. CP 102. There is nothing to indicate that these issues were present three years later when defendant committed the crime. This is critical because "[i]n the majority of individuals, the [conduct] disorder remits by adulthood." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed 2000) ("*DSM-IV-TR*"), Conduct Disorder at p. 97. There is a similar remission of ADHD. *DSM-IV-TR*, Attention-deficit/Hyperactivity Disorder, at p. 90 ("In most individuals, symptoms... attenuate during late adolescence and adulthood..."). There is nothing to indicate that defendant suffered from these mental conditions at the time of the crime.

More critical however, is the lack of any evidence that these mental conditions are ones "that would impair his ability to formulate the intent necessary for the charged crime." State v. Griffin, 100 Wn.2d at 418-19, ADHD "is a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequent and severe than is typically observed in individuals at a comparable level of development." *DSM-IV-TR*, Attention-deficit/Hyperactivity Disorder, at p. 85. "The essential feature of Conduct Disorders is a repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or

rules are violated." *DSM-IV-TR*, Conduct Disorder, at p. 93. There is nothing in the record[3] before this court to indicate that either condition impairs a person's ability to form intent. Without there being evidence linking a mental condition to an impaired ability to form intent, the evidence of a mental condition is not relevant to a diminished capacity defense. In short, the fact that defendant was once diagnosed with a Conduct Disorder and ADHD, does not establish that he had a viable diminished capacity defense for the crime with which he was charged. Defendant has failed to establish that he was prejudiced by the failure to raise a diminished capacity defense at trial because he has failed to establish that it was a viable defense that could have been raised on his behalf.

On direct appeal, the appellate court does not consider matters outside the trial record. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). When alleging ineffective assistance of counsel, the appellant bears the burden of showing deficient representation and resulting prejudice based on the record established in the proceedings below. McFarland, 127 Wn.2d at 335. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial

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[3] The description of diagnostic features in the *DSM-IV-TR* indicates that a Conduct Disorder has no effect on the ability to act intentionally as adolescents affected with this disorder frequently initiate aggressive behavior and engage in "bullying, threatening or intimidating behavior," or deliberately destroy the property of others and frequently lie to obtain goods or favors or to avoid debts or obligations. *DSM-IV-TR* at 93-94.

record, the appropriate means of doing so is through a personal restraint petition (PRP), or through an order for relief from judgment under CrR 7.8(b). McFarland, 127 Wn.2d at 335; CrR 7.8(b). Neither method was employed in this case. Based on the record before this court, defendant cannot demonstrate either deficient performance, or that he was prejudiced by his attorney's failure to raise a diminished capacity defense at trial.

2. THE WELL -SETTLED RULE THAT A CRIMINAL DEFENDANT IS NOT PLACED IN DOUBLE JEOPARDY BY AN IMPOSITION OF A FIREARM SENTENCE ENHANCEMENT WHEN THE UNDERLYING OFFENSE HAS USE OF A DEADLY WEAPON AS AN ELEMENT IS UNAFFECTED BY BLAKELY.

Washington courts have repeatedly rejected arguments that weapons enhancements violate double jeopardy. State v. Huested, 118 Wn. App. 92, 95, 74 P.3d 672 (2003) (citing State v. Claborn, 95 Wn.2d 629, 636-38, 628 P.2d 467 (1981)); see also, State v. Nguyen, 134 Wn. App. 863, 868, 142 P.3d 1117 (2006) review pending 2007 Wash. LEXIS 102 (Wash. Jan. 30, 2007). In State v. Claborn, the defendant received separate weapons enhancements for burglary and theft convictions arising from the same event. 95 Wn.2d at 636-38. On appeal, Claborn argued that separate enhancements for the "single act" of being armed with a deadly weapon during the burglary and theft violated double jeopardy. Noting that burglary and theft have separate elements and that the

enhancement statutes did not themselves create criminal offenses, the Claborn court held that the enhancements did not create multiple punishment for the same offense.

Courts have also rejected double jeopardy challenges to deadly weapon enhancements where the use of a deadly weapon was an element of the crime charged. See, State v. Caldwell, 47 Wn. App. 317, 319, 734 P.2d 542, rev. denied, 108 Wn.2d 1018 (1987); State v. Pentland, 43 Wn. App. 808, 811, 719 P.2d 605, rev. denied, 106 Wn.2d 1016 (1986); State v. Harris, 102 Wn.2d 148, 160, 685 P.2d 584 (1984), overruled on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988). These cases make clear that, for purposes of sentence enhancements, "the double jeopardy clause does no more than prevent greater punishment for a single offense than the Legislature intended." Caldwell, 47 Wn. App. at 319 (quoting State v. Pentland, 43 Wn. App. 808, 811-12, 719 P.2d 605 (1986) (citing Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673, 74 L.Ed.2d 535 (1983)). That court concluded that the Legislature had clearly expressed its intent that a person who commits certain crimes while armed with a deadly weapon will receive an enhanced sentence, notwithstanding the fact that being armed with a deadly weapon was an element of the offense. Caldwell, 47 Wn. App at 320.

It is also clear that the Legislature intended to impose separate enhancements for each crime committed with a firearm, regardless of whether the crimes involved the same weapon. RCW 9.94A.533(3) provides in part:

> (3) The following additional times shall be added to the standard sentence range for felony crimes . . . if the offender or an accomplice was armed with a firearm . . . and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements . . . . If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. . . .
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> . . .
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> (e) Notwithstanding any other provision of law, any and all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.
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> (f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony

The "statute unambiguously shows legislative intent to impose two enhancements based on a single act of possessing a weapon, where there

are two offenses eligible for an enhancement." Huested, 118 Wn. App. at 95 (evaluating the deadly weapon enhancement section of chapter 9.94A RCW, which contains the same language as the firearm enhancement section). No exceptions are contemplated.

In the case before the court, defendant was convicted of murder in the first degree, assault in the second degree, and unlawful possession of a firearm. The jury found two firearm enhancements on the murder and two firearm enhancements on the assault as the shooter was armed with two guns. Thus, defendant's sentence included four firearm enhancements for a total of 192 months of enhancement time added to the standard range. CP 77-89.

Defendant now challenges the 72 months of firearm enhancements he received on his conviction for assault in the second degree, arguing that in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), this court must reexamine the well-settled rule that a sentence enhancement imposed for being armed with a firearm does not violate double jeopardy where the use of a deadly weapon is also an element of the offense. This same claim has been raised and rejected in Division One. In State v. Nguyen, 134 Wn. App. 863, 869, 142 P.3d 1117 (2006), review pending, 2007 Wash. LEXIS 102 (Wash. Jan. 30, 2007), Division One found that "nothing in Blakely gives reason to question prior Washington cases holding that double jeopardy is not

violated by weapon enhancements even if the use of the weapon is an element of the crime." The court relied on legislative intent in reaching its decision:

> [U]nless the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent. The intent underlying the mandatory firearm enhancement is unmistakable: the use of firearms to commit crimes shall result in longer sentences unless an exemption applies.

Nguyen, 134 Wn. App. at 868. This analysis follows the holdings of the United States Supreme Court pointing out that the Blockburger test is a tool used to discern legislative intent; when the legislature has made its intent clear, however, then the Blockburger test is irrelevant.

> Our analysis and reasoning in Whalen and Albernaz lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in Whalen is not a constitutional rule requiring courts to negate clearly expressed legislative intent. Thus far, we have utilized that rule only to limit a federal court's power to impose convictions and punishments when the will of Congress is not clear. Here, the Missouri Legislature has made its intent crystal clear. Legislatures, not courts, prescribe the scope of punishments.

Missouri v. Hunter, 459 U.S. 359, 368, 103 S.Ct.673, 74 L.Ed.2d 535 (1983).

The Washington Legislature specifically exempted certain crimes from being eligible for enhancement. The Legislature did not include crimes on this list that had use of a deadly weapon as an element of the crime, such as assault in the second degree or robbery in the first degree. RCW 9.94A.533(3)(f). Because the intent of the Legislature is unambiguous in its desire to authorize additional punishment on crimes committed with a firearm, even when such crimes include the use of a deadly weapon as an element, double jeopardy is not violated. Nguyen, 134 Wn. App. at 868.

The court also rejected a claim similar to the one that defendant makes here- that the firearm allegation essentially is duplicative of an element of the crime.

> Nguyen's argument is essentially based upon semantics, and he assigns an unsupportable weight to the Blakely Court's use of the term "element" to describe sentencing factors. But the meaning of the Court's language in Blakely was made clear in Recuenco, wherein the Court pointed out that "elements and sentencing factors must be treated the same for Sixth Amendment purposes." Nguyen does not contend his Sixth Amendment rights to a unanimous jury and proof beyond a reasonable doubt were violated.

Nguyen, 134 Wn. App. at 869 (citations omitted). Defendant provides no persuasive argument why this court should not follow Division I and the analysis in Nguyen. Any legislative redundancy in mandating enhanced sentences for offenses involving the use of a firearm is intentional.

Imposition of additional time for the enhancement does not violate double jeopardy principles or Blakely.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the judgment and sentence entered below

DATED: December 13, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

Kathleen Proctor

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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

12-18-07
Date Signature

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