SUPREME COURT NO. 102513-1

NO. 83523-8-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHEALOB JOHNSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Bruce I. Weiss, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Michealob Johnson, the appellant below, asks this Court to review his case.

B. COURT OF APPEALS DECISION

Mr. Johnson requests review of the Court of Appeals decision in State v. Johnson, COA No. 83523-8-I, filed October 25, 2023 and attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Sixth Amendment guarantee of competent counsel requires that defense counsel provide defense expert witnesses – retained to determine the defendant's mental state at the time of the charged crimes – with all discovery relevant to that assessment and their testimony at trial.

2. Whether petitioner's counsel were ineffective for failing to provide their expert with discovery relevant to the assessment of premeditation – the only disputed trial issue – subjecting the expert to successful attacks on his

credibility, undermining his opinions, and ensuring petitioner's conviction for the charged crimes.

3. Whether review of this issue is appropriate under RAP 13.4(b)(1) and (b)(2) because the decision of the Court of Appeals conflicts with a decision of this Court and a prior published Court of Appeals decision.

D. STATEMENT OF THE CASE

1. Trial Proceedings

The Snohomish County Prosecutor's Office charged Michealob Johnson with aggravated first degree murder (in furtherance of robbery) and attempted first degree murder for the April 22, 2019 killing of Jae An and physical attack on Carlee Cordes. CP 79-80, 419-428.

As discussed below, the primary disputed trial issue was whether Johnson premeditated the crimes. RP 689, 1623, 1627. The defense contended he had not, but conceded Johnson was guilty of the lesser crimes of

second degree murder and attempted second degree murder. RP 1623, 1627, 1637-1639.

Johnson committed his crimes at the Broadway Grocery in Everett. RP 769; exhibit 358. His opening brief in the Court of Appeals contains a detailed discussion of his actions in the store and afterwards. See Brief of Appellant, at 2-18. For purposes of this petition, however, the Court of Appeals summary suffices:

> Around 10:00 p.m. on April 22, 2019, 25-year-old Johnson entered Broadway Grocery in Everett. Johnson first walked to the refrigerators at the back of the store and grabbed a bottle of water, then he approached the checkout counter. Store security camera footage from behind the register shows Johnson wearing a blue, plastic, make-shift poncho and clear disposable gloves. As he approached the counter, Johnson unsheathed a large dagger with an eight-inch blade from his waist and held it hidden at his side. At the counter, Johnson set down the bottle of water. As the cashier, Jae An, entered his purchase in the register, Johnson stabbed him in the throat with the dagger. As Jae An fell to the floor, Johnson tried to stab him in the throat again but missed. Johnson then hurried toward the front door but "panicked" and

returned inside, trying unsuccessfully to lock the door behind him. When he walked back to the counter, Johnson saw Jae An was still moving, so he stabbed him in the throat two more times. Jae An died from the stab wounds. Johnson then took Jae An's wallet and tried to open the till.

Meanwhile, Carlee Cordes drove her boyfriend's pickup truck into the store parking lot. Her friend Lenny Backstrom waited in the truck while she walked into the store. When Cordes entered the store, Johnson attacked her near the door, grabbing her and attempting to cut her throat. But Cordes grabbed the blade and eventually pulled it out of the handle while she struggled with Johnson. Cordes then swung the blade at Johnson and was able to get away from him. She ran back to the truck and drove away.

Johnson then walked home and confessed to his roommate, Kenneth Haala, and Kenneth's sister, Suzanne Haala, who was at the home visiting her mother. They were surprised to see Johnson because they thought he was in his bedroom all night. Johnson was holding a bloody knife and wearing a poncho "covered in blood." He said, "I just robbed this store" and "murdered the man in the corner store." Johnson said he "made a mistake" and told Kenneth to call 911. But Kenneth had no cell phone reception, so he walked about six blocks to the local fire station, and fire personnel alerted the police.

> Police, who were already en route to Broadway Grocery, arrived at the Haala residence and arrested Johnson.
>
> During police questioning immediately following his arrest, Johnson confessed again to killing Jae An. He told police that he intended only to rob Broadway Grocery, but something " 'just snapped,' " and " 'the next thing I knew my dagger was in [Jae An's] throat.' " Johnson said that when Cordes came in, he " 'knew she would figure it out soon[,] so I turned on her. . . . I snapped.' " The State charged Johnson with aggravated first degree murder of Jae An and attempted first degree murder of Cordes.

Slip Op., at 1-3 (footnotes omitted).

The success of Johnson's trial defense depended on the testimony of Dr. Tyson Bailey, a board certified clinical psychologist, expert on dissociation and other post-traumatic states, and the lone defense witness. RP 1380-1390.

Dr. Bailley's direct examination went well. He testified that he has conducted 300-400 forensic evaluations. RP 1391. The process requires an extensive

interview with the evaluee, administration of psychological assessments, formation of an initial opinion, and review of relevant documents to assess whether they support or challenge that opinion. RP 1390-1393, 1396.

Regarding those documents, Dr. Bailey testified:

> In forensic evaluations, we work to get as many as we can. The discovery documents or documents around the case, and police reports, things like that are very, very common. . . .

RP 1395. He noted the importance of "having as much information as we can" to "utilize all the data together to come to an informed opinion." RP 1395-1396. This includes documents providing "a fairly close-to-the experience account," including behavioral observations. RP 1396.

Dr. Bailey met with Johnson twice, completed the interview and assessment process, formed an initial opinion, and reviewed relevant records he had been provided, including discovery, video of Johnson's police

interview, documents created by CPS and DCYF, and mental health treatment records from two facilities where Johnson had stayed. RP 1398-1400.

Dr. Bailey testified that the documents he reviewed showed that Johnson had a history of childhood trauma and instability, including some evidence his mother had tried to kill him. RP 1401-1403. Prolonged stays in treatment facilities produced diagnoses of bipolar disorder, schizophrenia, psychotic spectrum, and/or post-traumatic stress disorder. RP 1403-1405. He also noted from discovery certain behavioral observations of Johnson near the time of the crimes, including his "blank stare, which can indicate a dissociative state.[1] RP 1400.

Based on his interviews of Johnson, assessments, and review of the materials he had been provided, Dr.

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[1] Both Carlee Cordes and Suzanne Haala described Johnson as having a "blank stare" or "blank look" during and shortly after events at the Broadway Grocery. See RP 759, 880.

Bailey concluded that – at that the time of his assessment – Johnson suffered from complex post-traumatic stress disorder and an unspecified dissociative disorder. RP 1410. These disorders can produce hyperarousal, irregular emotionality, triggered flashbacks, impulsivity, and dissociation. RP 1410-1416.

According to Dr. Bailey, a person can switch to a dissociative state in seconds. RP 1428. That switch is often caused by a threat and may be accompanied by a change in behavior or facial expression, including looking "blank or disconnected." RP 1428-1430.

Dr. Bailey testified that, having watched videos of the incident and police interview of Johnson, Johnson's conduct – including his "blank-faced disconnected affect" in the store and his fluctuating emotions during the interview – was consistent with dissociation. RP 1431.

Dr. Bailey is also familiar with the legal definition of premeditation and, with that definition in mind, was asked

"whether or not Mr. Johnson's actions that night were premeditated." RP 1431. Dr. Bailey responded: "Mr. Johnson appeared to be in a dissociative state at the time of the incident and very likely engaged in the action in an impulsive and non-premeditative manner." RP 1432. This was consistent with the opinion expressed in his supplemental report, which indicated, "Given Mr. Johnson's history and assessment results, it is probable that he responded in a non-premeditated or otherwise impulsive way." RP 1563-1564.

During the State's cross-examination, Dr. Bailey indicated that, following his meetings with Johnson in 2019 and his review of case materials at that time, he produced a report in December 2019 discussing his initial opinion.[2] RP 1433-1435, 1453-1454. In 2021, he was

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[2] For this first report, defense counsel had asked Dr. Bailey to address "if there was a mental disease or defect present, and, if so, what treatment might be most helpful to those issues." RP 1571.

provided additional materials (including store videos and the police interview of Johnson), asked to clarify his opinion on premeditation, and produced an addendum on that subject in April 2021.[3] RP 1435-1437, 1454-1456.

The prosecutor attempted to undermine Dr. Bailey's opinions by focusing on what he had *not* considered. After having Dr. Bailey confirm he had reviewed 269 pages of discovery, the prosecutor asked, "Would you be surprised to learn that the State's discovery in this case exceeded 1600 pages?" RP 1457. Dr. Bailey answered, "It would be new information for me," and defense counsel asked to be heard outside the jury's presence. RP 1457.

In the jury's absence, defense counsel complained that the prosecutor's reference to the total number of discovery pages was misleading, since most of those

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[3] For the addendum, defense counsel had asked Dr. Bailey whether Johnson's "actions could be considered as premeditated." RP 1571.

pages were irrelevant to Dr. Bailey's assessment. RP 1458. The prosecutor indicated it was her intent to find out, since she did not know, what had been included and omitted in the 269 pages provided Dr. Bailey. RP 1458-1459.

Judge Weiss criticized the prosecutor for sharing the total number of discovery pages, which essentially made the prosecutor a fact witness. RP 1459. However, to determine what Dr. Bailey had reviewed, Judge Weiss decided he should be asked. RP 1459.

Dr. Bailey could not recall what part of discovery he reviewed; defense counsel had provided it to him. RP 1460-1461. Defense counsel indicated that Dr. Bailey had been provided the first 269 pages of discovery received from the State; Dr. Bailey was not similarly provided all additional discovery received after he wrote his initial report in 2019. RP 1462.

Defense counsel conceded they had never provided Dr. Bailey the reports of several detectives and other officers who worked on the case, the medical examiner's report, the crime scene report from the Washington State Patrol, crime lab reports, or transcripts of police interviews with Anna Haala, Kenneth Haala, Suzanne Haala, Carlee Cordes, and Lenny Backstrom. RP 1463-1466.

Defense counsel expressed their opinion that Dr. Bailey did not need to review any of these additional materials. RP 1466-1467. Judge Weiss pushed back on that assertion, expressing his belief that it might have been important for Dr. Bailey to consider the interviews with all three members of the Haala family, from Carlee Cordes, and perhaps from Lenny Backstrom. RP 1466. Prosecutors similarly believed Dr. Bailey should have considered the observations of those who had contact with Johnson shortly before, during, and after events in the store as relevant to whether he actually experienced

dissociative symptoms the night of the crimes. RP 1468-1469.

Judge Weiss surmised that, had Dr. Bailey been provided all relevant materials, his opinion on premeditation would not have changed. RP 1470. He suggested requiring the defense to provide him with the materials, have him review them, and return the following day to determine whether his opinion had changed. RP 1470-1471.

Prosecutors expressed concern because a "big part" of their cross-examination was going to focus on Dr. Bailey's failure to consider all evidence relevant to Johnson's premeditation, although they recognized that they still had fodder for cross-examination even if he were provided an opportunity to review the relevant materials at that late date. RP 1471.

Judge Weiss agreed that, minimally, prosecutors could challenge Dr. Bailey because his conclusions were

reached before he reviewed all relevant materials. RP 1472. But he worried that, if Dr. Bailey did not review the additional discovery, there was going to be reversible error and a retrial. RP 1472.

Because they now had fodder for cross-examination either way, prosecutors did not object to requiring Dr. Bailey to look at the additional discovery materials, which they estimated would comprise hundreds of pages. RP 1473, 1481.

Dr. Bailey indicated he was willing to review everything that evening and return the following day. RP 1481-1482. Judge Weiss repeated his inclination to order the defense to provide Dr. Bailey with all discovery the State identified as relevant to his opinions concerning Johnson's ability to premeditate the night of the crimes. The State would then be able to cross-examine him on the fact he had rendered an opinion based on less than complete information. RP 1485-1486.

Prosecutors again indicated they did not object. RP 1486. Initially, defense counsel did not object, either. RP 1486. The plan was then shared with Dr. Bailey and 451 pages of additional discovery identified as necessary for his review. RP 1487-1489. These pages consisted of reports from five detectives, an officer, and a police sergeant; "crime scene reports"; transcripts of interviews with Anna, Kenneth, and Suzanne Haala; transcripts of interviews with Carlee Cordes and Lenny Backstrom; and the crime lab report. RP 1488.

But defense counsel then changed their minds about Dr. Bailey reviewing these documents. Counsel explained that "one of the reasons why we don't provide the entire discovery to our experts is because we can't afford to pay them to review all of our records. So we provide them the records that we think are sufficient for them to maintain their – or create their opinion on." RP 1490. Counsel indicated they had no problem with

prosecutors cross-examining Dr. Bailey on what he did not review, but now argued it was inappropriate to require Dr. Bailey to review additional discovery before continuing with his testimony. RP 1490.

Judge Weiss indicated he would defer to the defense on this, but reminded counsel that the State would rely on what was not provided Dr. Bailey to convince jurors they should not accept his opinion. RP 1490-1491. Regarding defense counsel's comment on costs, Judge Weiss noted that discovery is no longer provided to experts in paper form; it is provided as a less costly electronic file, adding, "But if you really want to take that position, that's fine." RP 1491.

Defense counsel confirmed they simply wished to move forward with the State's cross-examination of Dr. Bailey. RP 1492. Returning to the original reason for excusing the jury, Judge Weiss indicated he would instruct jurors not to consider the prosecutor's revelation

that there were over 1,600 pages of discovery. RP 1492-1493.

Jurors returned, and Judge Weiss told them there was no testimony before them regarding the number of discovery pages. RP 1498.

Prosecutors then impeached Dr. Bailey. After having him confirm that he merely reviewed 269 pages of discovery, prosecutors had him concede that he had not reviewed the additional 451 pages by individually listing each and every report and transcript defense counsel had failed to provide. RP 1498-1500.

Prosecutors also had Dr. Bailey concede that more data can be informative when evaluating patients. RP 1513. And, specific to Johnson's case, they had him expressly concede that discovery items he had not reviewed could have been helpful to determining Johnson's mental state in the store. RP 1564.

Prosecutors also clarified with Dr. Bailey his opinion – on a more probable than not basis – that Johnson acted impulsively rather than with premeditation applied to the first stabbing of Mr. An., although it was also his opinion that this impulsivity possibly continued throughout his subsequent actions in the store. RP 1565-1569.

Unsurprisingly, Dr. Bailey and premeditation were popular topics during closing arguments.

Defense counsel asked jurors to convict Johnson of murder in the second degree and attempted murder in the second degree,[4] but to acquit on the greater charges based primarily on the State's failure to prove premeditation. RP 1623, 1637-1639. Counsel emphasized that Dr. Bailey was the only trial witness who testified to what was going on inside Johnson's mind during the crimes, and his testimony – supported by the evidence – established dissociation, impulsivity, and the

absence of premeditation as to both victims. RP 1623-1639.

Prosecutors took a different view. Consistent with their cross-examination of Dr. Bailey, during closing arguments they criticized both his methods and his conclusions. During their initial closing, prosecutors told jurors, "Dr. Bailey's testimony on cross-examination could be summarized pretty easily as: I don't know, I don't remember, I didn't look, I didn't read, I didn't ask, I didn't consider." RP 1621.

In their rebuttal closing argument, prosecutors began with, "Let's talk about Dr. Bailey." RP 1639. They again criticized and minimized his opinions. RP 1639-1641. They told jurors, "When you're evaluating the weight and credibility to give his testimony, you should look at how knowledgeable he was in his testimony, how complete his review was, his thoroughness, his

[4] Jurors were instructed on both lesser-included crimes.

preparedness, and the type of information he considered." RP 1641. They ultimately asked jurors "to find Dr. Bailey's testimony and his opinion not credible." RP 1641.

Jurors struggled over the issue of premeditation, submitting a question in which they asked whether Johnson could have premeditated after the initial stabbing. Jurors were told they had been provided all instructions on the matter. CP 64.

Jurors eventually found premeditation for both counts and convicted Johnson as charged. CP 29, 31, 33. The Honorable Bruce Weiss imposed consecutive terms of life in prison (count 1) and 240 months (count 2). CP 15.

2. Court of Appeals

On appeal, Johnson argued his attorneys' failure to provide Dr. Bailey with all discovery relevant to his mental defense violated the Sixth Amendment right to competent

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See CP 49-50, 54-56

representation by leaving Dr. Bailey unprepared and vulnerable to legitimate attack, thereby undermining his credibility and ruining Johnson's only trial defense. See Appellant's Opening Brief, at 33-45; Appellant's Reply Brief, at 1-20.

The Court of Appeals disagreed. The Court did not dispute that defense counsel had failed to provide Dr. Bailey with all relevant discovery. Slip op., at 8. But the Court noted the discovery counsel *did* provide, combined with Dr. Bailey's interviews and testing, "was sufficient for him to reach an opinion that Johnson did not act with premeditation." Slip op., at 8. The Court also noted defense counsel had asserted a tactical decision for failing to provide Dr. Bailey with additional discovery, believing the discovery unnecessary for his assessment.[5]

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[5] The Court did, however, caution that "financial concerns alone do not justify inhibiting the rights of indigent criminal defendants." Slip op., at 8 n.8 (citing State v. Wilson, 144 Wn. App. 166, 180, 181 P.3d 887 (2008)).

Slip op., at 8. Because the Court found no deficient performance, it did not reach the issue of prejudice. Slip op., at 10 n.9.

Mr. Johnson now seeks this Court's review.

E. ARGUMENT

REVIEW OF JOHNSON'S SIXTH AMENDMENTCLAIM IS APPROPRIATE UNDER RAP 13.4(b)(1) AND (b)(2).

The federal and state constitutions guarantee an accused person the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defendants demonstrate ineffective assistance when they show (1) that defense counsel's representation was deficient and (2) resulting prejudice. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001) (citing Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). A claim of ineffective

assistance of counsel presents a mixed question of fact and law that this Court reviews de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

This Court will deem counsel's performance deficient if not objectively reasonable under the circumstances. State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). A defendant shows prejudice where there is a reasonable probability the trial outcome would have been different if counsel had not performed deficiently. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Id.

Reasonable attorney conduct includes a duty to prepare for trial, including a full investigation of the relevant facts and law. Strickland, 466 U.S. at 690-91; State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978); see also RPC 1.1 ("Competent representation requires . . . thoroughness

and preparation reasonably necessary for the representation.").

Whether counsel's performance was reasonable "includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time[.]'" Wiggins v. Smith, 539 U.S. 510, 523, 123 S. Ct. 2527 (2003) (quoting Strickland, 466 U.S. at 688-689). And nowhere is counsel's conduct and decision-making more important than when it concerns "the defendant's 'most important defense.'" In re Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (quoting Bragg v. Galaza, 242 F.3d 1082, 1088 (9th Cir. 2001), amended by 253 F.3d 1150 (9th Cir. 2001)).

Generally, counsel's decision to call an expert witness will not support a claim of ineffective assistance of counsel. Thomas, 109 Wn.2d at 230. However, as this Court explicitly recognized in Davis, the presumption of counsel's competence can be overcome by showing, for

example, that counsel failed to conduct appropriate investigations related to the witness or failed to properly prepare the witness for trial. Davis, 152 Wn.2d at 742; see also Thomas, 109 Wn.2d at 230-231 (counsel deficient for failing to discover expert's lack of qualifications prior to trial); In re Monschke, 160 Wn. App. 479, 489, 492-494, 251 P.3d 884 (2010) (addressing whether defense counsel ineffective for failure to adequately interview and prepare defense expert); Dillon v. Weber, 737 N.W.2d 420, 426 (N.D. 2007) (counsel ineffective for failing to properly prepare experts for trial).

In rejecting the argument Mr. Johnson's attorneys performed deficiently, the Court of Appeals reasoned that, despite the failure to provide Dr. Bailey with all discovery relevant to his assessment of premeditation, the incomplete discovery they did provide "was sufficient for him to reach an opinion that Johnson did not act with premeditation." Slip op., at 7.

But Davis and the other cases cited above make clear that the Sixth Amendment requires counsel to adequately prepare defense experts for trial. Davis, 152 Wn.2d at 742. Choosing to provide an expert with just enough discovery to form the desired opinion, but not enough to ensure the opinion is firmly rooted in all relevant evidence, leaves that expert woefully unprepared for the State's cross-examination at trial. Prosecutors in Mr. Johnson's case recognized this and used it to their great advantage. The Court of Appeals decision in Mr. Johnson's case dispenses with the obligation to adequately prepare expert witnesses for trial. It conflicts with Davis.

Moreover, that defense counsel offered reasons for their failure to provide Dr. Bailey all relevant discovery changes nothing. As this Court has indicated, strategic or not, a tactic that would be considered incompetent by lawyers of ordinary training and skill in the particular area

of the law may constitute deficient performance. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); see also Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) ("The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.").

Citing the cost of providing discovery to experts, Mr. Johnson's attorneys explained, "we provide them the records that we think are sufficient to maintain their – or create their opinion on." RP 1490. Defense counsel's mid-sentence correction is notable. The tactic at play was to provide experts just enough discovery (using just enough money) to "create their opinion," but not necessarily maintain it at trial. This is also inconsistent with Davis and the recognized obligation to adequately prepare experts for trial.

On the subject of witness preparation – in what could easily be mistaken as a comment on Johnson's

case – the Ninth Circuit Court of Appeals has said, "when the defense's only expert requests relevant information which is readily available, counsel inexplicably does not even attempt to provide it, and counsel then presents the expert's flawed testimony at trial, counsel's performance is deficient." Bloom v. Calderon, 132 F.3d 1267, 1278 (9th Cir. 1997), cert. denied, 523 U.S. 1145, 118 S. Ct. 1856, 140 L. Ed. 2d 1104 (1998).[6]

In State v. K.A.B., 14 Wn. App. 2d 677, 706, 475 P.3d 216 (2020), Division Two found defense counsel ineffective for failing to properly prepare and present a diminished capacity defense at the defendant's trial for custodial assault. In reaching that conclusion, the Court

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[6] See also Caro v. Calderon, 165 F.3d 1223, 1226 (9th Cir.) ("counsel must present th[eir] experts with information relevant to the conclusion of the expert"), cert. denied, 527 U.S. 1049, 119 S. Ct. 2414, 144 L. Ed. 2d 811 (1999); cf. In re Gomez, 180 Wn.2d 337, 325 P.3d 142 (2014) (counsel not ineffective where, although expert "may have received some materials . . . inconveniently close to her testimony, she was able to

found that defense counsel had failed to provide the lone defense expert with information (reports, records, and a video) relevant to the defense. Id. at 709. And because there was no strategic justification for counsel's failures, counsel's performance was deemed deficient. Id. at 711. Noting that counsel's mistakes undermined "[t]he only defense offered," and that a properly prepared expert could have testified to the defendant's diminished capacity, this Court also found a reasonable probability the trial outcome would have differed and reversed. Id. at 713-716.

Similarly, in Johnson's case, defense counsel failed to provide all discovery documents necessary for Dr. Bailey to competently diagnose Johnson and testify on the only issue that mattered – whether Johnson premeditated his crimes. Instead, counsel chose to call Dr. Bailey based on limited and incomplete information.

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review them, write a complete report, and provide

Like K.A.B., there was a failure of preparation.

In December 2019, Dr. Bailey produced his initial report discussing his opinions that Johnson likely suffered from symptoms of PTSD and dissociation. RP 1435, 1453-1454. For this initial report, defense counsel properly provided Dr. Bailey with all 269 pages of discovery they had received from the State at that time. RP 1462.

In April 2021, Dr. Bailey completed his addendum to the 2019 report focusing on premeditation specifically. RP 1435-1437, 1454-1456. This time, however, defense counsel failed to provide critical discovery documents received from the prosecution after Dr. Bailey's 2019 report. RP 1462. These materials include reports of several detectives and officers and transcripts of police interviews with those who had contact with Johnson the night of the crimes. RP 1463-1466.

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adequate testimony on behalf of the defendant.").

Prior to asking Dr. Bailey for the addendum on premeditation, competent counsel would have determined which relevant discovery materials had not already been provided for his 2019 review and then provided them (regardless of cost). There was no reasonable tactic behind counsel's failure to provide Dr. Bailey with all relevant discovery documents. Counsel performed deficiently.

Because the Court of Appeals opinion conflicts with this Court's decisions in Davis and Osborne and Division Two's decision in K.A.B. concerning the constitutional obligation to prepare expert witnesses for trial, review is appropriate under RAP 13.4(b)(1) and (b)(2).

F. CONCLUSION

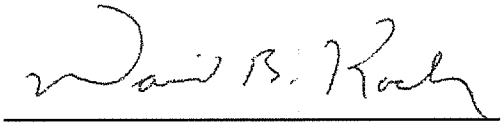
Mr. Johnson respectfully asks this Court to grant his petition and reverse the Court of Appeals decision in his case.

I certify that this petition contains 4,611 words excluding those portions exempt under RAP 18.17.

DATED this 25th day of October, 2023.

Respectfully Submitted,

NIELSEN KOCH & GRANNIS, PLLC



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APPENDIX

FILED
9/25/2023
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. JOHNSON, MICHEALOB IKE, Appellant.	No. 83523-8-I UNPUBLISHED OPINION

BOWMAN, J. — A jury convicted Michealob Ike Johnson of aggravated first degree murder and first degree attempted murder. Johnson appeals, arguing his attorneys were ineffective because they failed to adequately prepare his expert witness. We affirm.

FACTS

Around 10:00 p.m. on April 22, 2019, 25-year-old Johnson entered Broadway Grocery in Everett. Johnson first walked to the refrigerators at the back of the store and grabbed a bottle of water, then he approached the checkout counter. Store security camera footage from behind the register shows Johnson wearing a blue, plastic, make-shift poncho and clear disposable gloves.

As he approached the counter, Johnson unsheathed a large dagger with an eight-inch blade from his waist and held it hidden at his side.[1] At the counter, Johnson set down the bottle of water. As the cashier, Jae An, entered his

[1] Johnson also carried two pocket knives.

purchase in the register, Johnson stabbed him in the throat with the dagger. As Jae An fell to the floor, Johnson tried to stab him in the throat again but missed. Johnson then hurried toward the front door but "panicked" and returned inside, trying unsuccessfully to lock the door behind him. When he walked back to the counter, Johnson saw Jae An was still moving, so he stabbed him in the throat two more times. Jae An died from the stab wounds. Johnson then took Jae An's wallet and tried to open the till.

Meanwhile, Carlee Cordes drove her boyfriend's pickup truck into the store parking lot. Her friend Lenny Backstrom waited in the truck while she walked into the store. When Cordes entered the store, Johnson attacked her near the door, grabbing her and attempting to cut her throat. But Cordes grabbed the blade and eventually pulled it out of the handle while she struggled with Johnson. Cordes then swung the blade at Johnson and was able to get away from him. She ran back to the truck and drove away.[2]

Johnson then walked home and confessed to his roommate, Kenneth Haala, and Kenneth's[3] sister, Suzanne Haala, who was at the home visiting her mother.[4] They were surprised to see Johnson because they thought he was in

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[2] As Cordes ran to the truck, screaming, she dropped the blade, and Backstrom got out of the truck. Johnson picked up the blade and "pop[ped]" it back into the handle, which he was still holding. He then "made a running motion at [Backstrom] with the blade first," and Backstrom quickly turned around and got back in the truck.

[3] We refer to the members of the Haala family by their first names for clarity and mean no disrespect by doing so.

[4] Kenneth and Suzanne's mother, Anna Haala, owns the home. She was also in the living room when Johnson confessed, but she was asleep "[i]n her chair."

his bedroom all night.[5] Johnson was holding a bloody knife and wearing a poncho "covered in blood." He said, "I just robbed this store" and "murdered the man in the corner store." Johnson said he "made a mistake" and told Kenneth to call 911. But Kenneth had no cell phone reception, so he walked about six blocks to the local fire station, and fire personnel alerted the police. Police, who were already en route to Broadway Grocery, arrived at the Haala residence and arrested Johnson.

During police questioning immediately following his arrest, Johnson confessed again to killing Jae An. He told police that he intended only to rob Broadway Grocery, but something " 'just snapped,' " and " 'the next thing I knew my dagger was in [Jae An's] throat.' " Johnson said that when Cordes came in, he " 'knew she would figure it out soon[,] so I turned on her. . . . I snapped.' " The State charged Johnson with aggravated first degree murder of Jae An and attempted first degree murder of Cordes.

The jury trial began in September 2021. Johnson argued that his actions were not premeditated. He presented testimony from Dr. Tyson Bailey, a board-certified clinical and forensic psychologist and expert on trauma, dissociation, and other posttraumatic states. Dr. Bailey testified that he interviewed Johnson twice and conducted psychological assessments. Based on Johnson's interview and assessment responses, Dr. Bailey formed an initial opinion that Johnson experienced mental and physical abuse from caregivers throughout his childhood

[5] Johnson later told police that he snuck out his bedroom window and "left some noise on so they thought I was in my room" while he committed the crimes.

and adolescence and showed symptoms of post-traumatic stress disorder (PTSD) and dissociative disorder.

Dr. Bailey testified that he then reviewed "somewhere between [300] and [400] total" pages of discovery, including the police reports and their interview of Johnson, Johnson's school records, and documents from Child Protective Services (CPS), the Department of Children, Youth, and Families (DCYF), and two mental health facilities that treated Johnson. After reviewing the information, Dr. Bailey issued an initial, written, forensic evaluation on December 17, 2019.

Dr. Bailey testified that defense counsel then asked him to clarify his opinion on whether Johnson's actions were premeditated. So, for the first time, Dr. Bailey reviewed the security camera videos of the incident and a video of Johnson's police interview. He issued an addendum to his report on April 1, 2021. In the addendum, Dr. Bailey diagnosed Johnson with complex PTSD and unspecified dissociative disorder. He noted that the store video showed Johnson had a "blank-faced disconnected affect." And he opined that based on the video, he believed Johnson was in a dissociative state when he killed Jae An and attacked Cordes. Ultimately, Dr. Bailey testified that because "Johnson appeared to be in a dissociative state at the time of the incident," he "very likely engaged in the action in an impulsive and non-premeditative manner."

On cross-examination, the State asked Dr. Bailey to identify which documents he reviewed in preparation for his assessment. After referring to his report, Dr. Bailey explained that he reviewed "approximately 269 pages of

discovery." The prosecutor then asked Dr. Bailey if he would "be surprised to learn that the State's discovery in this case exceeded 1600 pages."

One of Johnson's attorneys objected, arguing that the State's "questioning about the number of pages in discovery is misleading to the jury." She stated that much of the discovery has "nothing to do with" Dr. Bailey's testimony, so she did not send those records to him. The attorney explained that when she sent Dr. Bailey the 269 pages of discovery, it was the first round of discovery defense received and "all we had." She did not receive additional discovery until after Dr. Bailey wrote his initial report. And after receiving the new discovery materials, which included police reports and transcripts of interviews with Kenneth, Suzanne, and Cordes, she did not send them to Dr. Bailey because she did not believe they were relevant to his ability to form an opinion on premeditation.

The court offered to recess trial and give Dr. Bailey time to review the extra discovery, but defense counsel declined. When trial resumed, a portion of the State's cross-examination focused on the discovery that Dr. Bailey did not review. The jury convicted Johnson on both counts as charged, including the aggravating factor that he committed first degree murder in furtherance of committing robbery.[6]

Johnson appeals.

[6] The court also instructed the jury on the lesser included crimes of second degree murder of Jae An and attempted second degree murder of Cordes.

ANALYSIS

Johnson argues he received ineffective assistance of counsel at trial because his attorneys "failed to adequately prepare [Dr. Bailey], thereby ruining [his] sole trial defense."

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011) (citing Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). We review ineffective assistance of counsel claims de novo. State v. K.A.B., 14 Wn. App. 2d 677, 707, 475 P.3d 216 (2020).

To establish ineffective assistance of counsel, a defendant must show that their attorney's performance was deficient and that prejudice resulted from the deficiency. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). An attorney's performance was deficient if "it fell below an objective standard of reasonableness based on consideration of all the circumstances" and the record below. Id. Deficient representation prejudices the defendant if there is a reasonable probability that but for counsel's error, the result of the trial would have been different. Id. at 335.

To determine whether counsel's performance was deficient, we " 'engage in a fact-specific inquiry into the reasonableness of an attorney's actions.' " K.A.B., 14 Wn. App. 2d at 706-07 (quoting In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 99, 351 P.3d 138 (2015)). A defendant alleging ineffective assistance must overcome a strong presumption that counsel's performance was

reasonable. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). If a defendant fails to show deficient performance, we need not reach prejudice, and our inquiry ends. Id.

When counsel's conduct can be characterized as legitimate trial strategy or tactic, it cannot serve as the basis for a claim of ineffective assistance. State v. Prado, 144 Wn. App. 227, 248, 181 P.3d 901 (2008). Generally, an attorney's decision to call a witness is " 'a matter of legitimate trial tactics,' which 'will not support a claim of ineffective assistance of counsel.' " In re Pers. Restraint of Monschke, 160 Wn. App. 479, 492, 251 P.3d 884 (2010) (quoting State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981)). But a defendant can overcome this presumption by showing that their attorney failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses. In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004).

Johnson argues his trial attorneys did not adequately prepare Dr. Bailey for trial because they "failed to provide all discovery documents necessary for [him] to competently diagnose Johnson and testify on the only issue that mattered — whether Johnson premeditated his crimes." We disagree.

The record shows Johnson's attorneys provided Dr. Bailey with all the discovery they had at the time and then supplemented that discovery with videos. And that discovery, combined with Dr. Bailey's interviews and psychological assessments, was sufficient for him to reach an opinion that Johnson did not act with premeditation.

The record also shows that Johnson's attorneys made a tactical decision not to provide Dr. Bailey with all the discovery. While the record does not contain the excluded discovery, the trial transcript shows it included interviews of Johnson's roommate Kenneth, Kenneth's sister Suzanne, their mother Anna, and Cordes.[7] Johnson's attorneys told the trial court that they reviewed the documents and determined they need not provide them to Dr. Bailey. They explained that because Dr. Bailey's opinion on premeditation centered on Johnson's actions before and during the incident, Kenneth, Suzanne, and Anna's accounts about what happened before and after the incident were not relevant to his opinion. And while Cordes was at the store during the incident, one of Johnson's attorneys "made the call" not to give Dr. Bailey Cordes' interview transcript because "there was nothing in there that was different than what had already been summarized in [the] police reports" he reviewed.[8]

Johnson argues that this case is like K.A.B.. There, the State charged a juvenile defendant with custodial assault. K.A.B., 14 Wn. App. 2d at 686-87. Before trial, the defendant's attorney designated the defendant's psychiatrist as an expert witness. Id. at 689. At a pretrial hearing, the attorney said she expected the psychiatrist would testify that the defendant "experience[d]

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[7] The excluded discovery also included several detectives' reports, a sergeant's report, an officer's report, the medical examiner's report, Backstrom's interview transcript, and a report from the Washington State Patrol Crime Laboratory.

[8] We note that Johnson's lawyers also told the court that "one of the reasons why we don't provide the entire discovery to our experts is because we can't afford to pay them to review all of the records. So we provide them the records that we think are sufficient for them to maintain their — or create their opinion on." While it may not always be necessary to provide expert witnesses with "the entire discovery," we caution that financial concerns alone do not justify inhibiting the rights of indigent criminal defendants. See State v. Wilson, 144 Wn. App. 166, 180, 181 P.3d 887 (2008).

excessive aggression and hostility" while in detention because she took a "high dosage of fluoxetine." Id. at 709. The attorney told the court that the expert's testimony was intended to support a defense of diminished capacity. Id.

The psychiatrist had progress notes from previous sessions with the defendant, but the attorney did not provide the doctor with video of the incident or any prior treatment reports. K.A.B., 14 Wn. App. 2d at 709. The trial court twice warned the attorney that she must obtain a forensic report from the expert with an opinion relevant to an element of the crime, and that the progress notes with no forensic analysis lacked any kind of conclusion relevant to diminished capacity. Id. at 709-10. Still, the attorney never asked the psychiatrist to opine on the defendant's ability to form criminal intent either before or during trial. Id. at 710. The juvenile court convicted the defendant of custodial assault. Id. at 693.

In a personal restraint petition, the defendant argued that she received ineffective assistance of counsel because her attorney failed to adequately prepare and present a diminished capacity defense. K.A.B., 14 Wn. App. 2d at 694-95. Division Two of this court agreed. Id. at 711. The court concluded that the attorney performed deficiently because she failed to properly raise the diminished capacity defense despite the juvenile court instructing her on its requirements:

> There is no strategic justification for trial counsel's failure to provide [the psychiatrist] with relevant information or to ask that he opine on [the defendant]'s ability to form intent given the law on diminished capacity and the juvenile court's repeated guidance . . . about what was required to lay the foundation for this defense.

Id.

This case is different than K.A.B. Here, Johnson's attorneys recognized lack of premeditation as a potential defense to the crime. They investigated the defense and retained Dr. Bailey to assess Johnson's mental state. They arranged for Dr. Bailey to interview Johnson and conduct psychological assessments. And they provided Dr. Bailey with police reports, videos of the incident and Johnson's interview with police, Johnson's school records, and documents from CPS, DCYF, and two mental health facilities that treated Johnson. Based on that information, Dr. Bailey formed an opinion that Johnson did not act with premeditation, and he expressed that opinion to the jury at trial. On these facts, Johnson fails to show that his attorneys were deficient.[9]

We affirm Johnson's convictions.

Brennan, J.

WE CONCUR:

Feldman, J.

Hazelrigg, ACJ

[9] Johnson argues that his attorney's deficient conduct prejudiced him by providing "fodder" for cross-examination. Because Johnson fails to show his attorneys were deficient, we do not address prejudice. Kyllo, 166 Wn.2d at 862.

NIELSEN KOCH & GRANNIS P.L.L.C.

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