

NO. 48104-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH CLARK,

Appellant.

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

The Honorable Kathryn Nelson and Vicki Hogan, Judges

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Clark's due process rights were violated by the 96 day delay in jail waiting for a competency evaluation at Western State Hospital.

2. Government mismanagement required dismissal under CrR 8.3(b).

3. Clark was denied effective assistance of counsel's failure to raise a diminished capacity defense.

4. Clark was denied effective assistance of counsel by his attorney introducing evidence of his prior assaults.

5. The trial court abused its discretion by imposing LFO's on Clark without determining his current ability to pay under RCW 9.94A.777.

Issues Pertaining to Assignment of Error

1. Were Clark's due process rights violated by the 96 day delay in jail waiting for a competency evaluation at Western State Hospital?

2. Did government mismanagement require dismissal under CrR 8.3(b)?
3. Was Clark denied effective assistance of counsel by his attorney failing to raise a diminished capacity defense?
4. Was Clark denied effective assistance of counsel by his attorney introducing evidence of his prior assaults?
5. Did the trial court abuse its discretion by imposing LFO's on Clark without determining his current ability to pay under RCW 9.94A.777?

B. STATEMENT OF THE CASE

a. Procedural Facts

On August 6, 2014 Kenneth Clark was arrested and sent to the Pierce County Jail. CP 4-5, 56, 135-47. Clark was charged with Assault in the First degree, Assault in the Second degree, Unlawful Imprisonment and Felony Harassment. CP 1-3, 195. Clark was convicted by the bench as charged. CP 251-65. On August 19, 2014, the trial court ordered a competency evaluation at Western State. CP 6-10. On August 28, 2014, a

Western State evaluator determined that Clark was not competent to stand trial and Clark was returned to jail. RP 13-19, 33-54; 150-179; CP 91-96.

b. Competency Evaluation Delays

On September 3, 2014 the court ordered a 90 day restoration treatment for Clark. CP 27-29. Western State Hospital (WSH) did not have any available beds at the time restoration was ordered and did not admit Mr. Clark until December 8, 2014. CP 74-76. The mental health forensic report that was prepared on March 5, 2015, determined Clark to be competent to stand trial. CP 86-91. The trial court denied Clark's motion to dismiss for the 96 day delay between the September 3, 2014 trial court hearing finding Clark incompetent and the December 8, 2015 admission to WSH for restoration. CP 33-35; 78-79, 135-137. The trial court denied the defense motion to dismiss for due process violations, and speedy trial violations under CrR 8.3(b). CP 135-47.

c. Trial Facts

Pretrial, the defense objected to admission of Ms. Epps' statement to the police that Mr. Clark had assaulted her two months prior. RP 35-36. The court reserved ruling. RP 37. During cross examination of Ms. Epps, the defense twice asked Ms. Epps about her prior report to the police about an

alleged assault. RP 118, 123. Ms. Epps testified that she lied to the police before when she said that Mr. Clark had not assaulted her in the past, and then confirmed the assault when counsel asked a second time. RP 118, 123.

Ms. Epps informed Mr. Clark that she was leaving their relationship. RP 49-50. During an argument between Mr. Clark and Ms. Epps, Mr. Clark asked Mr. Epps to hit him or hurt him or to do anything else except to leave him. RP 55, 92, 115, 126. Ms. Epps insisted that she was leaving and the argument became physical with Ms. Epps striking Mr. Clark with a can opener, Mr. Clark holding Ms. Epps and refusing to release her and ultimately biting off part of her ear. RP 55-68, 72-73, 111.

Ms. Epps stated that Mr. Clark had been using drugs the day of the incident and for a couple weeks before. RP 49-51. She believed that Mr. Clark was under the influence during the incident and that he was shocked afterwards. RP 51, 65, 117. Ms. Epps reported that after the incident, Mr. Clark left the house in silence with a shocked look on his face. RP 51, 65, 117.

d. Ineffective Assistance of Counsel.

(i) Diminished capacity defense.

The defense did not raise a diminished capacity defense.

e. LFO's

The Trial court imposed LFO's as follows:

\$200 court costs, \$500 crime victim penalty assessment, \$100 DNA testing fee "I've heard, Mr. Clark, that you have no employment history. I also am aware that you will not be employed for quite a few years. Do you have any other income or assets that you can use to pay non-mandatory fees? Do you have any income or assets to pay non-mandatory fees?"

MR. CLOWER: He doesn't have anything, Your Honor. And we're going to file an appeal today, and I've got a declaration and a motion for indigency.

THE COURT: All right. Based on the defendant's stated indigency, the Court will not impose the \$1,500 DAC recoupment fee as it is not a mandatory fee.

RP 24-25 (sentencing).

This timely appeal follows. CP 285.

C. ARGUMENTS

1. APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE 96 DAY DELAY IN OBTAINING A COMPETENCY EVALUATION AT WESTERN STATE.

"Confinement in jail ...while awaiting either placement in a treatment program ...pursuant to this chapter is permitted for no more than

seven days. RCW 10.77.220. Individuals detained pretrial, have a fundamental liberty interest in being free from incarceration prior to criminal conviction. *U.S. v. Trueblood*, 73 F.Supp. 1311, 1314 (2014) (citing *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014)). ‘The Due Process Clause ... provides heightened protection against government interference with certain fundamental rights and liberty interests,’ ... ‘forbid[ding] the government to infringe certain “fundamental” liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest’’. *Id.*

Mentally incapacitated criminal defendants have liberty interests in both freedom from incarceration and in restorative treatment. *Oregon Advocacy Ctr. V. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003); *Trueblood v. WA. DSHS*, 73 F.Supp.3d 1311, 1315 (2014).

“[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future.

Trueblood, 73 F.Supp. 3d at 1314.

The test for determining if a mentally ill accused's due process rights have been violated requires a balancing between the accused's right to be free from incarceration and the right to restoration, against the state's interests in "efficient", "organized" and "cost-effective" competency services to determine the accused's competency to stand trial. *Mink*, 322 F.3d at 1121; *Ohlinger, v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980); *Trueblood*, 73 F.Supp.3d at 1315.

Insufficient funding cannot "justify the State's failure to provide" rehabilitative services. *Mink*, 322 F.3d at 1121. "Like the *Mink* court, this Court can discern no legitimate state interest in "keeping mentally incapacitated criminal defendants locked up in county jails for weeks or months." *Trueblood*, 73 F.Supp.3d at 1315-16 (quoting, *Mink* 322 F.3d at 1211).

A prolonged pretrial detention in jail of a mentally ill violates the individual's due process rights. *Trueblood*, 72 F. Supp. at 1316. The State's "failure to provide a service in a 'reasonable' amount of time violates the Due Process Clause of the Fourteenth Amendment." *Trueblood*, 72 F. Supp. 3d at 1316-17. Services are presumed timely if provided within seven days. Thereafter, any delay beyond seven days is

“suspect” and “depends on facts to be proven at trial.” *Trueblood*, 72 F.Supp 3d at 1317-18; RCW 10.77.220. The remedy is dismissal of the charges. *Id.*

The average amount of time in jail for defendant’s suspected of being incompetent ranges from “two weeks at the low end to almost two months on the high end.” *Trueblood*, 72 F.Supp 3d at 1312. In *Trueblood*, the Court granted the motion for summary judgment dismissing the charges against the defendants who languished in county jails for an average wait time of twenty nine days for the evaluation and fifteen days for the restoration (44 days). *Trueblood*, 72 F.Supp 3d at 1313.

Here, Clark was in county jail for 96 days before his evaluation at Western State, and then at Western State between December 8, 2015 and February 9, 2016 for an additional 63 days. CP 27-29, 56. This delay violated Clark’s due process rights under *Trueblood* and requires reversal and dismissal of the charges with prejudice. *Trueblood*, 72 F.Supp 3d at 1313.

2. THE TRIAL COURT ERRED BY FAILING TO DISMISS THE CHARGES UNDER CRR 8.3(b) BASED ON STATE MISMANAGEMENT WHICH CAUSED A 96 DAY PERIOD OF INCARCERATION IN VIOLATION OF CrR 3.3 AND THE

SIXTH AMENDMENT.

a. Violation of Speedy trial
Rules CrR 3.3

Clark timely objected to violation of his speedy trial rights and timely filed motions to dismiss under CrR 3.3(d)(3)1. RP 4 (April 10, 2015); CP 56, 135-47. Both the United States Constitution and the Washington Constitution provide a criminal defendant with the right to a speedy public trial. U.S. Const. amend. VI; Wash. Const. art. I section 22. Our state constitution “requires a method of analysis substantially the same as the federal Sixth Amendment.” *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009).

This Court reviews de novo speedy trial right violations under CrR 3.3. *State v. Ollivier*, 178 Wn.2d 813, 826, 312 P.3d 1 (2013). A defendant who is in custody pending trial is entitled to be tried within 60 days of arraignment. CrR 3.3(b)(1)(i), (c)(1). Under CrR 3.3(h), “[a] criminal charge

1 a) party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within

not brought to trial within the time period provided by this rule shall be dismissed with prejudice." CrR 3.3(h). The purpose of CrR 3.3 is to protect a defendant's constitutional right to a speedy trial. *State v. Kenyon*, 167 Wn.2d 130, 216 P.3d 1024 (2009). *State v. Kingen*, 39 Wn.App. 124, 692 P.2d 215 (1984).

Generally, the time between when a competency examination is ordered and when a competency determination is made is excluded from this 60-day calculation. CrR 3.3(e)(1). The first clause of the rule, exempting all proceedings related to a defendant's competency, presumes that competency proceedings actually occur. Incarcerating the defendant while his case languishes due to State mismanagement is not a proceeding relating to his competence to stand trial. If the State obtains an order for a competency evaluation but fails to take the steps necessary to effectuate the evaluation, it may not toll the resulting period of incarceration under CrR 3.3(e)(1).

This reading of the rule is borne out by the language and purpose of CrR 3.3(e)(1), as well as the purpose of the Criminal Rules. Despite the

the time limits prescribed by this rule.

trial court's order for a competency evaluation, the State did commence an evaluation until 96 days after it was ordered and 68 days after the time for trial had passed. CP 27-29, 74-76. The broadly drafted tolling provision accounts for variation and unpredictability in the evaluation process, but it does not justify inordinate delay in pursuing the case. *State v. Harris*, 122 Wn.App. 498, 505, 94 P.3d 379 (2004) (the parties cannot prepare for trial until the defendant is found competent and the evaluation process can be unpredictable); *State v. Cox*, 106 Wn.App. 487, 492, 24 P.3d 1088 (2001) (evaluations can involve a protracted length of time and require review in the trial court before a final determination of competency can be entered).

To interpret this rule otherwise would contradict CrR 1.2 which requires the Court to construe the rules to secure "simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay." Accordingly, CrR 3.3(e)(1) must be interpreted to impose a duty on the State to diligently initiate the evaluation so that defendants are not incarcerated indefinitely for no good cause.

Finally, this interpretation is consistent with this Court's previous

decision in *Cox* where this Court construed former CrR 3.3(g)(1) (1995) and held that competency proceedings commence with an oral or written motion for a competency evaluation, thereupon tolling the time for trial. *Cox*, 106 Wn.App. at 491. But determining when competency proceedings begin presupposes that competency proceedings occur. When the State, through mismanagement or misconduct, fails to initiate the evaluation despite obtaining an order, no proceedings occur and CrR 3.3(e)(1) does not apply.

Because CrR 3.3(e)(1) does not toll the period of Clark's 96 days of incarceration, the State's failure to bring him to trial within 60 days of arraignment deprived him of a speedy trial contrary to CrR 3.3(b)(1)(i). The trial court therefore abused its discretion in denying the motions to dismiss the charges under CrR 3.3(h) and CrR 8.3(b).

b. CrR 8.3(b)

CrR 8.3(b) provides in relevant part:

(b) On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused

which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

Id. Accordingly, to obtain the extraordinary remedy of dismissal under CrR 8.3(b), a defendant must demonstrate (1) arbitrary action or governmental misconduct and (2) actual prejudice affecting his right to a fair trial. *State v. Rorich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); *State v. Michelli*, 132 Wn.2d 229, 241, 937 P.2d 587 (1997).

The trial court's decision, regarding a motion to dismiss based on governmental misconduct, is reviewed under the manifest abuse of discretion standard. *Rorich*, 149 Wn.2d at 654; *Michelli*, 132 Wn.2d at 24. The reviewing court will find an abuse of discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Blackwell*, 120 Wn.2d 822, 830, 845, P.2d 1017 (1993); *Michelli*, 132 Wn.2d at 240.

CrR 8.3(b) does not require evil or dishonest actions; simple mismanagement, coupled with resulting prejudice that affects the right to fair trial, will suffice. Here Clark established mismanagement and prejudice under *Trueblood*. *Trueblood*, 72 F.Supp 3d at 1313. Accordingly, this

Court must dismiss under both ER 8.3(b) and CrR 3.3(h).

3. CLARK WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO PURSUE A DIMINISHED CAPACITY DEFENSE AND INTRODUCED PRIOR UNCHARGED ASSAULTS.

Mr. Clark received ineffective assistance of counsel because his trial counsel failed to pursue a diminished capacity defense after learning that Clark was found incompetent during his initial evaluation at Western State, at a time closely linked to the incident in this case. CP 13-19. Washington has adopted the *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) two-part test for evaluating claims of ineffective assistance of counsel. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987), *citing*, *Strickland*, 466 U.S. at, 687. In order to satisfy the *Strickland* test, a defendant must prove

(1) that defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.

State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The

purpose of this test is to "ensure a fair and impartial trial." *Thomas*, 109 Wn. 2d at 225, 743 P.2d 816; (citations omitted).

“[G]enerally, legitimate trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel.” *In re Personal Restraint of Hubert*, 138 Wn.App. 924, 928, 158 P.3d 1282 (2007), *citing*. *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). The appellate Court reviews an ineffective assistance of counsel claim de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006).

a. Failure to Pursue Diminished Capacity

The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. *Thomas*, 109 Wn.2d at 225. A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland* 466 U.S. at 684–86; Sixth Amendment to the U.S. Constitution and Washington article I, section 22. More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn.App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by

demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *Grier*, 171 Wn.2d at 33; citing, *Reichenbach*, 153 Wn.2d at 130; *Aho*, 137 Wn.2d at 745–46.

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). “The remedy for lawyer's ineffective assistance is to put defendant in position in which he would have been had counsel been effective.” *State v. Hamilton*, 179 Wn.App. 870, 879, 320 P.3d 142 (2014). In this case, the failure to raise a diminished capacity defense constitutes ineffective assistance of counsel. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

The Washington Pattern Jury Instruction on diminished capacity

states: “Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form ---- (fill in requisite mental state).” 11 Washington Pattern Jury Instructions: Criminal 18.20, at 224 (2d ed.1994). Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from forming the necessary mental state to satisfy the elements of the crime charged. *State v. Harris*, 122 Wn.App. 498, 506, 94 P.3d 379 (2004). Importantly, this defense must be declared pretrial. *Id.* (citing CrR 4.7(b)(1), (b)(2)(xiv)).

Although the failure to request a diminished capacity instruction is not ineffective assistance of counsel per se, it is ineffective assistance when it is not based on sound trial strategy. *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). In determining whether counsel's failure to request such an instruction constituted ineffective assistance of counsel, the court proceeds through a three-step analysis:

First, we must determine whether [the defendant] was entitled to a diminished capacity instruction. Second, we must decide whether it was ineffective assistance of counsel per se not to have requested the instruction. Finally, we must decide whether ineffective assistance of counsel prejudiced

his defense under the *Strickland* standard.

Id. at 227.

A defendant is entitled to a jury instruction supporting his theory of the case when there is substantial evidence in the record supporting his theory. *State v. Washington*, 36 Wn. App. 792, 793, 677 P.2d 786, review denied, 101 Wn.2d 1015 (1984).

In the context of an ineffective assistance of counsel claim, defense counsel is ineffective when she fails to request an instruction on the defense theory of the case that the court would have given. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009).

For a trial court to give a jury instruction on diminished capacity “there must be substantial evidence of such a condition, [and] the evidence must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the required specific intent.” *State v. Griffin*, 100 Wn.2d 417, 418, 670 P.2d 265 (1983) quoting *State v. Ferrick*, 81 Wn.2d 942, 944-45, 506 P.2d 860, cert. denied, 414 U.S. 1094 (1973).

For a diminished capacity defense to be successful, the defendant must show that his diminished capacity negated the mens rea required for

the offense. *Thomas*, 109 Wn.2d at 227; *State v. Coates*, 107 Wn.2d 882, 889, 735 P.2d 64 (1987) (using intoxication as an example of diminished capacity).

In *Thomas* the petitioner claimed she was denied effective assistance of counsel because her assigned trial counsel failed to competently present a diminished capacity defense based on voluntary intoxication to a charge of attempting to elude a police vehicle. *Thomas*, 109 Wn.2d at 223. The Supreme Court concluded that "defense counsel's representation fell below an objective standard of reasonableness." *Thomas*, 109 Wn.2d at 227-29, 232; citing, *Strickland*, at 688, 104 S.Ct. at 2065.

The Court in *Thomas* held that petitioner was prejudiced because "[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases." *Thomas*, 109 Wn.2d at 229.

In *Tilton*, the State Supreme Court held that despite a limited record, counsel was ineffective for failing to raise a diminished capacity defense where there was evidence that Tilton smoked marijuana and could not remember the incident. *Id.* The Court acknowledged that the "[f]ailure

of the 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.” *Tilton*, citing, *Thomas*, 109 Wn.2d at 226-29. 2

In Mr. Clark’s case, there was substantial evidence to connect Mr. Clark’s inability to control his behavior when this incident occurred to his mental health condition. *Ferrick*, 81 Wn.2d at 944-45. Western State determined that Clark was not competent to stand trial within several days of the incident. CP 13-19. Ms. Epps testified that Clark had been using methamphetamines on the day of the assault and for a few weeks prior, and looked shocked after the incident. RP 51, 65, 117. This is similar to *Tilton*, where the defendant had smoked marijuana and could not remember the incident.

If counsel had pursued a diminished capacity defense, he would have been able to argue that Mr. Clark’s mental state negated the mens rea required for all of the offenses. *Thomas*, 109 Wn.2d at 227; *Coates*, 107 Wn.2d at 889 (using intoxication as an example of diminished capacity).

Specific intent either to create apprehension of bodily harm or to

² The Court in *Tilton*, reversed on other grounds because the record was insufficient as reconstructed.

cause bodily harm is an essential element of assault in the second degree. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); *See also State v. Dukowitz*, 62 Wn.App. 418, 424, 814 P.2d 234 (1991) (by definition assault is an intentional act), *review denied*, 118 Wash.2d 1031, 828 P.2d 563 (1992); *State v. Tunney*, 77 Wn.App. 929, 934, 895 P.2d 13 (1995) (“[I]t is implicit that assault is a knowing, intentional act.”), *aff’d*, 129 Wn.2d 336, 917 P.2d 95 (1996).

Similarly, felony harassment requires the actor knowingly make a threat. RCW 9A.46.020; *State v. Kilburn*, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004). And Unlawful imprisonment too requires the mens rea knowingly. RCW 9A.40.040; *State v. Warfield*, 103 Wn.App. 152, 156, 5 P.3d 1280 (2000).

Powell and *Hubert* are analogous and provide additional support for Mr. Clark’s case. In *Powell*, defense counsel failed to request a “reasonable belief” instruction in a rape case. In *Powell*, the defense presented sufficient evidence to warrant giving the instruction and defense counsel argued the “reasonable belief theory, but defense counsel inexplicably did not request the instruction. *Powell*, 150 Wn. App. at 153-

154. Citing to *Hubert, supra*, the Court held there was no tactical reason to fail to request the instruction and Powell was prejudiced by that decision because a jury instruction would have legitimized the defense theory of the case with an authoritative jury instruction to the jury. *Powell*, 150 Wn. App. at 156-158.

In *Hubert*, the Court held that counsel was ineffective to Mr. Hubert's prejudice when in circumstances similar to *Powell*, counsel failed to investigate the "relevant law" and propose a "reasonable belief" defense theory. *Hubert*, 138 Wn. App. at 926-930. The Court's in both *Powell* and *Hubert*, reversed the convictions and remanded for new trials based on counsel's deficient performance in failing to pursue relevant defense theories and propose adequate jury instructions to support the defense theories. *Powell*, 150 Wn. App. at 157-158; *Hubert*, 138 Wn. App. at 932.

Here, within days of his arrest, the trial court sent Mr. Clark to Western State for a competency evaluation where he was found to be not competent to stand trial. CP 13-19. After a 90 day commitment and restoration period Mr. Clark was determined competent to stand trial, but the issue of his competency was glaring - particularly in light of the allegations. At a minimum, this information should have served as a red

flag indicating that Mr. Clark suffered mental illness at the time of the incident and should have served as a spring board for pursuing a diminished capacity defense.

There was substantial evidence of a mental health condition that logically and reasonably connected Mr. Clark's mental condition with his inability to form the required specific intent for assault in the second degree, felony harassment and intimidating a witness. Defense counsel should have proposed a diminished capacity defense and argued this to the bench because: (1) Mr. Clark had a history of mental health issues; (2) he was determined to be incompetent after a Western State evaluation some days after the incident in this case, for competency; and (3) he appeared to be in shock after the incident.

Despite all of this information, defense counsel never pursued a diminished capacity defense, never asked for an expert to explore this defense and never elicited any testimony regarding Mr. Clark's mental health issues. Mr. Clark was denied effective assistance of counsel. And as in *Thomas, supra, Tilton, supra, Powell, supra, and Hubert, supra,* there was no logical or tactical basis to fail to pursue a diminished capacity defense when trial counsel was aware of the issue. As in these cases,

counsel's performance was ineffective and Clark was prejudiced because an expert could have established that Clark was unable to formulate the requisite intent. *Tilton*, citing, *Thomas*, 109 Wn.2d at 226-29. Accordingly, Mr. Clark's convictions should be reversed on this basis and the matter remanded for a new trial.

b. Prior Assaults.

In this case there was "no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33. No reasonable attorney would introduce the allegations of a prior assault against the same victim because it was not relevant, highly prejudicial under ER 403, and tended to establish propensity, which is forbidden under ER 404. *State v. McCreven*, 170 Wn.2d 444,447-48, 284 P.3d 793 (2012). Here the court did not conduct an ER 404(b) analysis, but rather deferred ruling and counsel introduced the inadmissible evidence himself.

State v. Hamilton, 179 Wn.App. 870, 880, 20 P.3d 142 (2014), and *Reichenbach*, 153 Wn.2d at 131-37, 101 P.3d 80 (2004), are instructive. In *Hamilton*, this Court reversed Hamilton's conviction based on ineffective assistance of counsel where counsel failed to move to suppress items in a purse based on an issue related to the validity of the search

warrant. *Hamilton*, 179 Wn.App. at 880 This Court held that “[m]oving to suppress the evidence would not have involved any risk to Hamilton. If she prevailed, the charges would be dismissed. If the motion was denied, she could proceed to trial. There was no strategic reason not to file a motion to suppress the most crucial evidence in the case.” *Id.*

In *Reichenbach*, the court reversed when counsel failed to bring a motion to suppress a search incident to an invalid warrant that the court would have granted. *Reichenbach*, 126 Wn.2d at 130-31.

The same reasoning applies to Clark’s case. If Clark had followed through with his initial motion to suppress the assaults, he would have prevailed because the evidence was inadmissible propensity evidence and the prejudice outweighed any probative value. ER 403, ER 404(b) Here, counsel did not have any reasonable tactical or strategic reasons for introducing prejudicial inadmissible evidence of a prior similar assault.

Epps did not discuss the prior assaults on direct examination. Accordingly, there was no reason for counsel to ask Epps about a different incident where she told police that the prior assault did not take place. Even if some strategic reason could be found for initially asking this question, once Epps said that Overly did assault her and bite her in the

past, counsel had no reason to ask about this incident a second time. Counsel asking twice served no other purpose but to hammer home this inadmissible propensity evidence.

Under *Hamilton*, this Court must find deficient performance and prejudice to Clark. The remedy is to remand for a new trial.

4. THE TRIAL COURT ERRED IN IMPOSING LEGAL FINANCIAL OBLIGATIONS AFTER DETERMINING THAT MR. CLARK COULD NOT PAY.

The trial determined that Mr. Clark did not have an ability to pay costs and struck the DAC recoupment costs, but nonetheless imposed court costs, the crime victim fee and the DNA fee, notwithstanding that DOC already had Mr. Clark's DNA based on his prior felonies. CP 251-65. Mr. Clark preserved the issue for review when his attorney informed the trial court that Mr. Clark did not have "anything" RP 24 (Sentencing). *State v. Houston-Sconiers*, __P.3d __ WL 7471791 at page 22 (November 24, 2015) (attorney stating that defendant cannot pay preserves issue for appeal).

Under RCW 10.01.160(1), a trial court can only order a defendant convicted of a felony to repay court costs as a part of a judgment and if he

defendant is or will be able to pay them. During sentencing the court first considers the defendant's specific financial ability to pay. RCW 10.01.160(3) provides:

The court shall not order a defendant to pay costs determining the amount and method of payment of costs; the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

In *Blazina*, trial counsel did not object to the imposition of LFO's under RCW 10.01.160(3). The Supreme Court held that the failure to comply with the mandatory requirement to determine the defendant's ability to pay before imposing LFO's was error requiring reversal of the imposition of the LFO's until such time as the trial court made the proper determination. *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.2d 680, 685 (2015).

- a. The court exceeded its authority under RCW 9.94A.777 by imposing LFOs.

The legislature has imposed obligations upon a trial court before it can order a person with a mental health condition to pay LFOs:

Before imposing any legal financial obligations upon a defendant who suffers from a mental health

condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.

RCW 9.94A.777(1).

This language stands in contrast to that of other statutes permitting the imposition of LFOs upon anyone who has the present ability to pay *or* will be able to pay *in the future*. See e.g. RCW 10.01.160(3). In cases involving an offender with mental health conditions, the court must find that s/he has the ability to pay at the time of sentencing. RCW 9.94A.777(1).

Here, the court knew that Mr. Clark suffered from significant mental health conditions. CP 13-19. Mr. Clark had been previously hospitalized for mental health issues and was deemed incompetent to stand trial earlier on in this case. CP 13-19. Despite this information, the trial court imposed \$800 in LFO's even after it concluded that he did not have the ability to pay. CP 251-265. Accordingly, this Court must remand for a new sentencing without the imposition of LFO's.

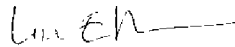
D. CONCLUSION

Mr. Clark was denied his due process rights by a 96 day pretrial incarceration waiting for a bed at Western State. Mr. Clark was also denied his right to a fair trial because his attorney was ineffective to his prejudice for failing to pursue a diminished capacity defense. Mr. Clark respectfully requests this Court reverse his convictions and remand for dismissal with prejudice or in the alternative for a new trial and for a new sentence without the imposition of LFO's.

DATED this 16th day of March 2016.

Respectfully submitted

LAW OFFICES OF LISE ELLNER



Lise Ellner, WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor pcpatcef@co.pierce.wa.us and Kenneth Clark DOC # 731727 Clallam Bay Corrections 1830 Eagle Crest Way Clallam Bay, WA 98326 a true copy of the document to which this certificate is affixed On March 16, 2016. Service was made electronically to the prosecutor and via U.S. Postal to Mr. Clark.

lunch

Signature

ELLNER LAW OFFICE

March 16, 2016 - 12:41 PM

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