

SUPREME COURT NO. \_\_\_\_\_  
COURT OF APPEALS NO. 75217-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

V.

LEONEL CRUZ ROCHE,

Petitioner.

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

The Honorable Laura Jean Middaugh, Judge

PETITION FOR REVIEW

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DANA M. NELSON  
Attorney for Petitioner

NIELSEN, BROMAN & KOCH  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

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A. IDENTITY OF PETITIONER

Petitioner Leonel Cruz Roche asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court of appeals decision in State v. Roche, COA No. 75217-1-I, filed on September 25, 2017, attached as an appendix to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. Where Roche sought a continuance to obtain an expert to address newly discovered evidence and investigate a potentially viable defense, did the court's denial of the motion to continue constitute an abuse of discretion and deprive Roche of his right to present a defense and to compulsory process?

2. To the extent defense counsel contributed to the error by not anticipating the necessity of obtaining an expert at an earlier juncture, did Roche receive ineffective assistance of counsel?

D. STATEMENT OF THE CASE

Petitioner Leonel Roche is appealing from the appellate court decision affirming his convictions for rape, assault and harassment stemming from allegations made by his former girlfriend, Tammie Traugher. CP 144-58.

On the afternoon of March 27, 2015, Traugber called 911 from her room at the Kent Valley Motel to report that she had been raped. She told police that when she was coming back to her room the day before, her former boyfriend Leonel Roche came up behind her, pushed her into the room and then beat her up and raped her. RP 321, 826-27.

Traugber later admitted she lied, however. RP 763, 827. Roche did not come up behind her or push her into the motel room. RP 826-27. Rather, Roche came over several days earlier at Traugber's invitation. RP 716. In fact, Traugber threatened that if Roche did not come over, she would kill him; at the time, Traugber was jealous Roche might have a new romantic interest. RP 715, 804.

Nonetheless, Traugber claimed that after five days together at the motel doing drugs, drinking and having consensual sex, Roche became jealous that final night and beat and raped her. RP 340-41, 731-52, 764.

Traugber was living at the motel through the Law Enforcement Assisted Diversion (LEAD) program, which helps persons in need access community resources. RP 612-14, 619-21. Through the program, Traugber was also involved in an outpatient treatment program for drug addiction. RP 670. In fact, she had an appointment with her caseworker Danny Garcia scheduled for the afternoon of March 27 (RP 621); Garcia

was going to help Traughber move into the sober housing residence he had secured for her at the Marlene House. RP 622, 679.

It was the defense theory that Traughber concocted the rape story to explain her disheveled appearance and cover up the fact she had been on a five-day bender so she wouldn't risk losing her newfound financial assistance and housing. RP 880-84. Before her involvement with LEAD, Traughber had been homeless and living in a tent on Western Avenue in Seattle. RP 648-49, 653.

While that was the defense theory presented at closing, Roche was prevented from presenting a potentially viable alternative defense of diminished capacity.

A question of Roche's competency arose during trial and the court recessed to provide for a competency evaluation. RP 447-48. The evaluator opined Roche was competent, but noted Roche had an extensive history of documented mental illness, particularly episodes of depressive psychosis. RP 479-80. This was new information to defense counsel as the documentation for Roche's mental illness was contained in his department of correction (DOC) records, to which the evaluator – but not defense counsel – had been given access. RP 481.

In light of this new information, defense counsel moved for a continuance to obtain an expert to evaluate Roche for diminished capacity

at the time of the charged crimes or an insanity defense. RP 480-81, 489-90.

Defense counsel heretofore had not seen this as a viable defense. RP 490. But an off-hand remark Traugher said during the defense interview suddenly took on new meaning. RP 480-81. Traugher said Roche consistently claimed to see people in his tent. Defense counsel previously believed this off-hand remark related to real, as opposed to imagined, people. Under the circumstances, defense counsel questioned his previous belief. RP 480-81.

The court denied the motion, reasoning defense counsel should have anticipated the need for an expert – at the time of the recess for the competency evaluation – and that there was no good cause for a continuance. RP 482-83; CP 53.

Following a jury trial, Roche was convicted as charged. RP 898-99. At sentencing, for counts one and two, the court sentenced Roche to life without the possibility of parole under the Persistent Offender Accountability Act; the state presented evidence Roche had two prior second degree assault convictions. CP 126-39; RP 910-972.

On appeal, Roche argued the court abused its discretion and violated his right to present a defense when it denied his request for a continuance to obtain an expert to address newly discovered evidence



concerning Roche's mental illness at the time of the charged offenses. Brief of Appellant (BOA) at 22-30; Reply Brief (RB) at 3-10. Roche further argued that defense counsel's failure to anticipate the need for an expert at the time of the recess for the competency evaluation constituted ineffective assistance of counsel. BOA at 31-32; RB at 10-11.

The court of appeals dismissed these claims on grounds there was no evidence Roche was suffering from delusions or hallucinations at the time of the alleged crimes. Appendix at 11-12.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

BECAUSE THE COURT OF APPEALS DECISION INVOLVES SIGNIFICANT QUESTIONS OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS, THIS COURT SHOULD ACCEPT REVIEW.

Contrary to the appellate court's opinion, there was evidence supporting an inference of a diminished capacity defense and/or insanity at the time of the alleged crimes. The charges were alleged to have occurred on March 27, 2015. Prior thereto, Roche was receiving mental health services at Sound Mental Health. CP 170. Records from Sound Mental Health indicate that between May 2013 and February 2015, Roche was regularly seeking refills on his prescriptions for imipramine for depression and anxiety and perphenazine for psychotic symptoms. Id. Sound Mental Health had diagnosed Roche with major depressive disorder with

psychotic features; Roche reported auditory and visual hallucinations. Id. Specifically, when starting treatment on May 14, 2013, Roche reported “a bad guy on his right side who tells him bad things, and the guy to his right is the good guy.” Id.

When Roche was booked on the current charges, no symptoms of signs of psychosis were noted. Id. Shortly thereafter, however, it was noted:

A Psychiatric Services PES Progress Note dated 04/15/2015 indicated Mr. Roche’s caseworker from SMH had called requesting he be seen “ASAP” and that he was “not doing well.” A subsequent Psychiatric Provider Review Noted dated 4/22/2015 indicated Mr. Roche was reporting an increase in symptoms, primarily auditory hallucinations, and requesting to be restarted on his medication.

Id.

Thus, the evaluation confirms Roche was experiencing symptoms related to his depressive disorder with psychotic features at, or near the time of, the current charges; it also suggests he was not on his medications since February, a month before the current charges.

Whether or not the psychologist from Western State Hospital believed Roche was malingering or exaggerating his symptoms at the time of the competency evaluation does not answer the question of whether he likely was suffering from psychotic delusions at the time of the charged

offenses and/or whether those delusions affected his ability to know right from wrong.

Contrary to the appellate court's opinion, the circumstances show that – had Roche been given the opportunity to undergo a forensic psychological examination to determine his mental state at the time of the offenses – it is likely the evaluation would have provided a mental health defense of some nature. This is evidenced by Traugher's testimony and Roche's documented mental health diagnosis of major depressive disorder with psychotic features and his history of delusions.

1. THE COURT'S DENIAL OF ROCHE'S MOTION FOR A CONTINUANCE CONSTITUTED AN ABUSE OF DISCRETION AND DEPRIVED ROCHE OF HIS RIGHT TO PRESENT A DEFENSE AND TO COMPULSORY PROCESS.

In both criminal and civil cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. State v. Miles, 77 Wn.2d 593, 597, 464 P.2d 723 (1970). This Court reviews decisions to grant or deny a motion for a continuance under an abuse of discretion standard. State v. Hurd, 127 Wn.2d 592, 594, 902 P.2d 651 (1995).

The courts will not disturb the trial court's decision unless the appellant or petitioner makes "a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds,

or for untenable reasons.” State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. State v. Ellner, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); RCW 10.46.080.

In this case, Roche sought a continuance of three to four weeks to secure expert testimony to address new evidence of Roche’s longstanding mental health issues and to investigate whether he may have been suffering from diminished capacity due to his documented depressive psychosis at the time of the charges. Thus, on review, this Court compares the reasons for granting the continuance and allowing Roche to pursue a potentially viable defense against the reasons for denying the motion to determine if the trial court abused its discretion. See State v. Downing, 151 Wn.2d 265, 87 P.3d 1169 (2004).

The court abused its discretion because defense counsel made a sufficient showing of surprise by the new evidence, diligence in securing an expert and materiality of the expert’s proposed testimony.

First, defense counsel made a sufficient showing of surprise upon learning of Mr. Roche’s extensive history of documented mental health illness, which “suggests he has at some point, and may continue, to

experience episodes of depression psychosis.” RP 480. It was not until the parties received the report from Western State Hospital that defense counsel was made aware of Roche’s documented mental health issues spanning twenty years. RP 481. He previously did not have access to the DOC records.

Although the court chastised defense for not anticipating the need for an expert once the competency evaluation was first underway, counsel had no reason to suspect – without knowledge of the DOC records – that Roche’s mental health issues included psychosis or went as far back as the incident in question. As indicated, defense counsel previously did not see diminished capacity as a viable defense until receiving the Western State Hospital report. It was not until then that Traughber’s off-hand comment about Roche claiming to see people in his tent that counsel realized Roche could have been suffering from paranoid delusions at the time of the incident. Thus, defense counsel was legitimately surprised.

Defense counsel was also diligent in securing an expert. Upon receiving the report, counsel immediately moved for leave to consult his social worker to see how long it would take to obtain funding for an expert and to schedule an evaluation. He immediately informed the court the defense could accomplish this task within three to four weeks. And although the court criticized counsel for not already having an expert on

board, defense counsel explained that without the Western State Hospital report, it was unlikely he would have been able to make the required showing for expert funding. As indicated, he previously did not have access to the DOC mental health records.

The trial court abused its discretion in denying the motion to continue based on lack of diligence. See e.g. State v. Williams, 84 Wn.2d 853, 855, 529 P.2d 1088 (1975) (holding it is an abuse of discretion to deny a continuance based on a lack of due diligence when the defense has shown it exercised due diligence).

The proposed expert testimony was material. Traugher testified that whenever Roche is high, “he would always swear up and down I had an invisible boyfriend in the tent, so he would move things around[.]” RP 657. She testified this is exactly what happened that night in January, when she alleged Roche raped her. RP 657-680. And on the evening of the charged offenses, Traugher admitted they had been smoking cocaine and claimed Roche became jealous. Considering the similarity of Traugher’s prior and current allegations and the fact she said Roche always had delusions of invisible boyfriends when he was high, it is likely he was suffering from depressive psychosis on the night in question, as documented in his DOC records. It is therefore likely expert testimony would have established a diminished capacity defense.

Considering Traughber's corroborating testimony that Roche suffered from paranoid delusions, it is likely the presentation of such a defense would have led to a different outcome in the trial. In this circumstance, the court's determination that the maintenance of orderly procedure, *i.e.* not risking losing the jury, outweighed the reasons favoring a continuance, such as surprise, due diligence and materiality, was manifestly unreasonable.

It also violated Roche's due process rights. A defendant in a criminal trial has a constitutional right to present a defense. State v. Rehak, 67 Wn.App. 157, 162, 834 P.2d 651 (1992). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

However, a criminal defendant's right to present a defense is not absolute; a defendant seeking to present evidence must show that the evidence is at least minimally relevant to a fact at issue in the case. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

A trial court's denial of a continuance motion may infringe on a defendant's right to compulsory process and right to present a defense “if the denial prevents the defendant from presenting a witness material to his defense.” Downing, 151 Wn.2d at 274–75. The Court determines whether a trial court's denial of a continuance motion violated a criminal defendant's constitutional right to present a defense on a case-by-case basis, examining “the circumstances present in the particular case.” Downing, 151 Wn.2d at 275 n. 7 (quoting State v. Eller, 84 Wn.2d at 96). The Court reviews the trial court's decision to grant or deny a continuance motion for an abuse of discretion. Downing, 151 Wn.2d at 272. And the Court reviews de novo claims of a denial of Sixth Amendment rights, including the right to present a defense. See e.g., Jones, 168 Wn.2d at 719.

Contrary to the court of appeals decision, it is evident the trial court violated Roche's right to present a defense. As indicated above, Roche suffered prejudice resulting from the trial court's denial of his continuance motion. Considering that: Traughber testified that whenever



Roche is high, “he would always swear up and down I had an invisible boyfriend in the tent;” Roche was high on the night in question; and the Western State Hospital report substantiated episodes of depressive psychosis experienced by Roche, it is likely expert testimony would have established a diminished capacity defense. As a result of the court’s denial of the continuance motion, however, Roche was left with the sole defense of challenging the complainant’s credibility. This amounted to an outright denial of Roche’s right to present a defense.

2. ROCHE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The trial court’s primary concern in denying the motion to continue was its fear of losing its jurors. The court already recessed from late January to early March to allow for the competency evaluation. When defense counsel moved to further continue the trial to pursue a diminished capacity defense, the court criticized counsel for failing to anticipate the need for a defense expert at the time of the recess for the competency evaluation:

THE COURT: No, sir, you should have anticipated the issues with your client. You should have anticipated and started looking into getting experts instead of waiting until the last minute. You know, it’s quite – you – you had a 50/50 chance of your client being declared comp – competent to stand trial. You knew he had a history. It would have behooved you to start saying, well, I better get on this so that we can deal with this issue in a timely

fashion. So how long to you anticipate you want another continuance for?

RP 483; see also RP 484-85.

The courts comments indicate that had defense counsel anticipated the need for a defense expert at the time of the recess for the competency evaluation, it would have allowed the expert to testify. It was only because the court did not want to recess for an additional three to four weeks that it denied the request for a continuance.

Had defense counsel already had an expert on board, however, there likely would have been no need for a continuance, or at least no need for one as lengthy as three to four weeks. Therefore, to the extent defense counsel's failure to secure an expert during the late-January to early-March recess caused Roche to lose his right to present a diminished capacity defense, Roche received ineffective assistance of counsel.

Roche had the right to effective assistance of counsel at trial. U. S. Const. amend. 6; Const. art. 1, § 22. To prevail on an ineffective assistance claim, trial counsel's conduct must have been deficient in some respect, and that deficiency must have prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

As the court's comments make clear, defense counsel was deficient in failing to anticipate the need for a defense expert. Roche was prejudiced because his attorney's failure resulted in the denial of his right to present a diminished capacity defense. As indicated in the preceding section, this was a viable defense that likely would have led to a different result in the trial.

F. CONCLUSION

The trial court's denial of the motion to continue to obtain an expert to investigate a viable diminished capacity defense and/or a viable insanity plea deprived Roche of his right to compulsory process and to present a defense. RAP 13.4(b)(3). That defense counsel failed to anticipate the need for an expert in a timely fashion constituted ineffective assistance of counsel because it deprived Roche of an alternative viable defense. As a result of counsel's deficiency, Roche's only defense was to attack the credibility of the complainant. This Court should accept review. RAP 13.4(b)(3).

Dated this 17<sup>th</sup> day of October, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

  
DANA M. NELSON, WSBA 28239

Office ID No. 91051

*Attorneys for Petitioner*

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

THE STATE OF WASHINGTON, )  
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 Respondent, )  
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 v. )  
 )  
 LEONEL CRUZ ROCHE, )  
 )  
 Appellant. )

No. 75217-1-1

UNPUBLISHED OPINION

FILED: September 25, 2017

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COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
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SCHINDLER, J. — Leonel Cruz Roche seeks reversal of the jury convictions of rape in the second degree domestic violence, assault in the second degree domestic violence, and felony harassment domestic violence. Roche claims the trial court abused its discretion and violated his constitutional right to due process by denying his mid-trial motion to continue the trial to investigate whether to assert a diminished capacity defense. In the alternative, Roche claims his attorney provided ineffective assistance of counsel.<sup>1</sup> We affirm.

Charges

Beginning in 2012, Leonel Cruz Roche and Tammy Traugber were in a romantic relationship. Although not legally married, Roche and Traugber considered

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<sup>1</sup> Roche also asserts the sentence exceeded the statutory maximum and requests denial of appellate costs. Because the trial court amended the judgment and sentence to correct the statutory maximum and the State does not seek appellate costs, we need not address these issues.

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themselves husband and wife. Roche and Traughber were homeless, lived in a tent, and frequently used alcohol and cocaine.

One evening in late January 2015, Roche and Traughber drank alcohol and used cocaine. Roche referred to an "invisible boyfriend" in the tent and accused Traughber of cheating on him. Roche told Traughber, "[I]f you leave me, I'll find you and I'll kill you." Roche asked Traughber if she wanted to know "how it feels to be raped." Traughber said, "No," but Roche covered her mouth, held her down, and forcibly penetrated her vagina. Roche threatened to kill Traughber if she told anyone.

The next day, Traughber went to the King County Law Enforcement Assisted Diversion (LEAD) office to get help and find housing. LEAD located temporary housing at a motel in Kent while Traughber waited for placement in clean and sober housing.

On March 22, Traughber felt lonely and called Roche. When a woman answered the phone, Traughber left angry messages accusing Roche of cheating and threatening him. Traughber later realized she had initially dialed the wrong number and the woman she spoke to was not associated with Roche. Traughber called Roche and invited him to come to the motel in Kent. Over the next four days, Roche and Traughber used alcohol and cocaine and engaged in consensual sex.

On March 26, Traughber and Roche bought drugs. The couple then returned to the motel and smoked crack cocaine and drank alcohol. When Traughber called her brother-in-law, Roche got angry. Roche took the phone and yelled at the man, "[W]ho are you, where are you at, . . . how do you know my wife?" Traughber explained the man on the phone was her brother-in-law but Roche accused her of cheating. Roche punched Traughber, threw her down, got on top of her, and began to strangle her.

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Roche told Traughber, "You're fixing to die, bitch. You're gone." Traughber lost consciousness.

When Traughber regained consciousness, Roche was still on top of her and she struggled unsuccessfully to push him off. Traughber finally said, "I give up. Please stop. I give up." Roche got off of Traughber and told her he wanted to have anal sex. Traughber said, "No." Roche responded, "Bitch, you dead. You — you gonna die anyway. It's mine." Because she believed Roche would kill her, Traughber took off her clothes. Roche held Traughber on the bed with his arm on her neck and raped her, first anally and then vaginally.

After Roche left the motel room the next morning on March 27, Traughber contacted LEAD case manager Daniel Garcia. Garcia told her to call the police and he was on his way. Traughber called the police and reported the assault and rape. The police interviewed Traughber, collected evidence, and took photographs of Traughber's injuries. Because Traughber was afraid she would lose her housing, she lied to the police. Traughber told the police that Roche found the motel, surprised her, pushed her into the room, and attacked and raped her.

Motel employee Robert Romero watched Roche leave Traughber's motel room "really quick and scurry around the building." Later, Romero saw Roche across the street from the motel at a store. The police arrested Roche while he was eating popcorn and drinking coffee at the store. "[A] couple days" later, Traughber told the investigating detective that she had invited Roche to her motel room.

On April 1, 2015, the State charged Roche with rape in the second degree domestic violence and assault in the second degree domestic violence. On September 2, the State amended the information to include felony harassment domestic violence.

At the time of his arrest on March 27, Roche was taking medications for major depressive disorder with psychotic features. Roche did not receive his medications for the first three months in jail. Roche reported auditory hallucinations and requested medication. On June 22, King County Correctional Facility Psychiatric Services diagnosed Roche with major depressive disorder with psychotic features and prescribed medications. In July and October, Roche told jail psychiatric services the medication was effective and he was well. But in December, Roche told jail staff that auditory hallucinations interfered with his ability to sleep and concentrate. Jail psychiatric services increased the medication dosage.

### Trial

At a pretrial hearing on January 11, 2016, defense counsel told the court that Roche was not getting his medications on time. On January 12, Roche refused to go to court because he had not received his medications. Jail health services agreed to administer the morning medications at 7:00 a.m., and the court agreed to recess by 4:00 p.m. so Roche could receive his afternoon medications.

The jury trial began January 19. The State called four witnesses to testify on January 19: Kent Police Department Officer Matt Stansfield, Harborview Medical Center (Harborview) emergency room social worker Christina Heideman, Harborview Sexual Assault Nurse Examiner Courtney Walker, and Harborview emergency room physician Dr. Bryce Meeker.

Officer Stansfield testified that he located Roche after the assault and rape in a store across the street from the motel, drinking coffee. When the officers approached him, Roche asked the officers to examine his hands and his clothing to see "if there was

any evidence of . . . an assault or any injury.” Officer Stansfield testified that Roche then played the angry voice mails he had received from Traugher.

Social worker Heideman testified that during the intake interview, Traugher admitted that she invited Roche to her motel room, that they used drugs, and that they engaged in consensual sex for several days. Traugher told Heideman that on March 26, Roche became angry, accused her of cheating on him, and then raped her anally and vaginally.

Nurse Walker testified that she conducted a sexual assault examination and collected DNA<sup>2</sup> samples. During the examination, Traugher admitted she called Roche and invited him to the motel. Walker testified that Traugher had bruises consistent with “cutting off the blood supply around your neck.”

Dr. Meeker testified Traugher had bruising on her neck and inner thigh and an abrasion on her face. Dr. Meeker testified that X-rays showed a bone fracture near her eye and nose.

At the end of the first day of trial, Roche told the corrections officers that he would not return to court. After the corrections officers told Roche the court could issue an order forcing him to attend, Roche said, “[N]ot if I’m dead, you can’t do that if I’m dead.” The jail placed Roche on suicide watch. On January 20, jail psychiatric services removed Roche from suicide watch.

#### Competency Evaluation

When the trial resumed on January 21, defense counsel told the court that Roche reported auditory hallucinations before trial and after the trial began. Defense counsel

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<sup>2</sup> Deoxyribonucleic acid.



requested the court order a competency evaluation and continue the trial. The court granted the request and scheduled trial to resume on March 1.<sup>3</sup>

Western State Hospital (WSH) psychologist Dr. Cynthia Mundt issued a competency evaluation report on February 22. In the evaluation, Dr. Mundt cites Washington State Department of Corrections Health Services records to describe Roche's mental health history between 1991 and 2012.

In 1991, Roche was diagnosed by jail mental health services (MHS) with adjustment disorder with mixed emotional features and antisocial personality disorder. MHS prescribed medication for depression and anxiety. After receiving medication, MHS described Roche as "grossly normal with no evidence of thought disorder or other psychotic symptoms." In 1993, MHS notes his symptoms of depression are in remission and Roche requested MHS reduce and discontinue his prescriptions for medication. In 1995, MHS conducted a "full mental status examination" and described his mental state as "unremarkable."

After Roche reported experiencing persecutory delusions and auditory and visual hallucinations in 2005, he received psychiatric services in the community. MHS prescribed antidepressants and antipsychotics. MHS again noted that after receiving medication, Roche's mental state was "unremarkable." MHS reports between 2006 and 2011 describe Roche as "having no signs of psychosis and being polite and cooperative," "normal" with "no current symptoms of mental illness," calm and cooperative in interviews, and stable on medication.

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<sup>3</sup> The court expressed concern about the availability of the jurors and issued questionnaires to the jury to determine any conflicts. The court was able to retain the sworn jurors to return for the remainder of the trial in March.

After his release from jail in 2012, Sound Mental Health diagnosed Roche with major depressive disorder with psychotic features. Roche engaged in services at Sound Mental Health and regularly obtained medications until his arrest on March 27, 2015.

According to Dr. Mundt, during her interview with Roche, he made “a poor effort to respond appropriately,” engaged in “unusual behaviors,” and did not cooperate. Roche told Dr. Mundt that he heard two voices on either side of him, one telling him to do good things and the other telling him to do bad things. Dr. Mundt described his description of hallucinations as “unusual” and “similar in nature to those reported by people attempting to malingering mental illness.” Dr. Mundt stated that while Roche attempted to “suggest his psychotic symptoms were impairing him,” he showed “little difficulty functioning” when on medication. Dr. Munt concluded:

Overall, it is my clinical opinion that Mr. Roche was attempting to exaggerate his symptoms of mental illness in an effort to appear more impaired and achieve a desired outcome to his present legal circumstances. **In conclusion, it is my opinion that there was no evidence of current mental impairment that would prevent Mr. Roche from understanding the nature of the proceedings against him or assisting in his own defense.**<sup>[4]</sup>

On February 29, the court held a hearing to address the competency evaluation. Defense counsel told the court that based on the WSH competency report, “[t]he concern that I have is whether at this point I need to obtain an expert to be able to dispute the finding of competency.” Defense counsel also noted his “concern” that a comment Traugher made during the defense interview about the January 2015 rape

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<sup>4</sup> Emphasis in original.

now appeared significant.

But also, more importantly, in light of testimony that it is anticipated the State will be presenting, at the time it did not appear of great significance when [Traughber] indicated that she believed my client was seeing people in her tent. At the time, I believed that she was referencing that he — that there was a physical person in her — in her tent that related to an assault, which this — which the Court has indicated the State was going to be . . . allowed to offer as [ER] 404(b) type evidence. The concern as it — I can — it — this witness's statements, now it appears, relate to his . . . hallucinations and paranoid beliefs, which Defense was not aware of the extent and the long standing nature of . . . his mental health history.

Defense counsel requested another continuance of three to four weeks to investigate whether to pursue a diminished capacity defense.

I believe it is incumbent upon the Defense to request the appointment of an expert to determine if . . . there would be expert testimony that I could lay a foundation for as it relates to both the hallucinations and the paranoid delusions that apparently Mr. Roche may have been suffering from at the time of these incidents. Based upon that, I would be having to ask for a continuance of the trial date which is currently scheduled to . . . resume tomorrow.

The State objected to the continuance. The court reserved ruling to review the WSH competency evaluation report.

The next day, the court denied the request for a continuance of the trial "for an additional 3-4 weeks so that [Roche] could obtain an expert to review the [competency] report and investigate" whether to assert a diminished capacity defense. The order states, in pertinent part:

The Court considered the oral Motion, the COMPETENCY EVALUATION REPORT . . . , the trial briefs filed in this matter, pertinent testimony already given in the case about the defendant's actions and demeanor on the date of the alleged incident, and the defendant's demeanor and statements in open court and finds:

1. The defendant is competent to stand trial in this matter;
2. The motion for a continuance is denied as . . . untimely and there is no good cause to permit the late filing of such a defense and the defense has not established a basis for

needing expert testimony to address potential testimony of the alleged victim about any past acts.

The trial resumed on March 2. Washington State Patrol Crime Laboratory forensic scientist Jennifer Reid, motel employee Robert Romero, Detective Derrick Focht, LEAD case manager Daniel Garcia, and Traughber testified. The jury found Roche guilty as charged. Roche appeals.

#### Motion for Continuance

Roche argues denial of his mid-trial motion for a three to four week continuance was an abuse of discretion and violated his right to due process and compulsory process.

We review a trial court's denial of a motion to continue for abuse of discretion. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). CrR 3.3(f) governs a request for a continuance. "[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." Downing, 151 Wn.2d at 272. The trial court abuses its discretion when its decision is " 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' " Downing, 151 Wn.2d at 272 (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

A criminal defendant has a constitutional right to present a complete defense. State v. Armstrong, 188 Wn.2d 333, 344, 394 P.3d 373 (2017). The due process right to present a defense is the right to offer testimony and compel the attendance of a witness. State v. Atsbeha, 142 Wn.2d 904, 923, 16 P.3d 626 (2001). But the right to compulsory process is not absolute. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). "[T]he right to present evidence in one's own defense is not utterly unfettered. That evidence must be relevant. There is no constitutional right to introduce

irrelevant evidence.” State v. Ellis, 136 Wn.2d 498, 528, 963 P.2d 843 (1998) (citing Maupin, 128 Wn.2d at 925)).

In deciding whether to grant or deny a continuance, the court considers a number of factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974). The existence of some factors does not require reversal. Downing, 151 Wn.2d at 274.

Roche contends the WSH competency evaluation contained new evidence about his mental history and the attorney acted with due diligence to investigate and obtain an expert on diminished capacity. Roche claims the description of his mental health history in the report combined with Traugher’s comment about a statement Roche made about an “invisible boyfriend” in January 2015 supported the motion for continuance and created an inference for a diminished capacity defense. The record does not support his argument.

The WSH competency evaluation report does not contain new evidence to support a diminished capacity defense. The report consistently notes that when taking medication, Roche is stable with no symptoms of mental illness or signs of psychosis. The undisputed record shows Roche was taking prescribed medications when he was arrested on March 27. The King County jail records also describe Roche at booking as “fully oriented.” The record shows defense counsel and the court were aware that Roche needed to take medications. Although the court granted the motion for a competency evaluation because Roche reported hallucinations, Dr. Mundt stated that Roche was competent to stand trial and he was attempting to feign psychotic symptoms.

The court also cited the testimony on the first day of trial in support of the denial of the motion for another continuance. Officer Stansfield described Roche at the time of arrest as lucid. Officer Stansfield also testified Roche did not say anything suggesting he experienced delusions or hallucinations.

The court did not abuse its discretion in denying the request to continue to investigate and determine whether to pursue a diminished capacity defense.

#### Ineffective Assistance of Counsel

In the alternative, Roche argues he received ineffective assistance of counsel because his attorney did not timely pursue a diminished capacity defense.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011).

We review claims of ineffective assistance of counsel de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). "Ineffective assistance of counsel is a fact-based determination, and we review the entire record in determining whether a defendant received effective representation at trial." State v. Carson, 184 Wn.2d 207, 215-16, 357 P.3d 1064 (2015); Grier, 171 Wn.2d at 34.

To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient and (2) that the deficient representation prejudiced the defendant. Grier, 171 Wn.2d at 32-33. If a defendant fails to establish either prong, we need not inquire further. Strickland, 466 U.S. at 697; State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). "Deficient performance is performance falling 'below an objective standard of reasonableness

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based on consideration of all the circumstances.’ ” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

There is a strong presumption of effective representation of counsel and that counsel’s conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689. The defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 335-36.

Roche cannot show ineffective assistance of counsel. The record establishes that Roche did not experience delusions or hallucinations on March 26. Nothing in the competency evaluation supports a diminished capacity defense or suggests Roche was suffering from psychosis when he attacked Traughber on March 26.

Further, Roche denied the charges and claimed Traughber was not credible because she lied to the police. A diminished capacity defense admits that the defendant committed the crime. See State v. Clark, 187 Wn.2d 641, 649-51, 389 P.3d 462 (2017) (diminished capacity defense undermines a specific element of an offense—a culpable mental state). Roche cannot meet his burden of establishing ineffective assistance of counsel.

#### Statement of Additional Grounds

In his pro se statement of additional grounds, Roche also claims his attorney provided ineffective assistance of counsel. Roche argues his attorney failed to obtain evidence to support his assertion that Traughber suffered from mental illness and “instability.” Roche states his attorney interviewed Traughber and decided not to pursue

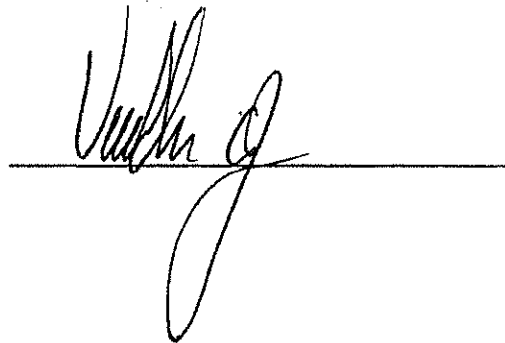
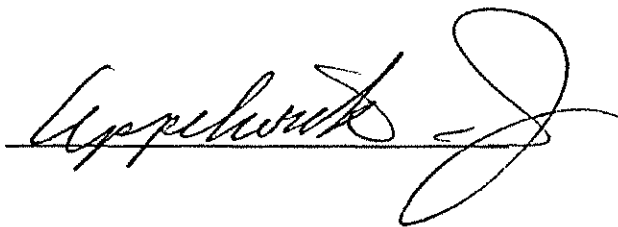
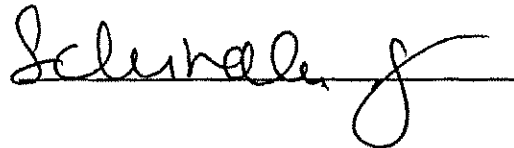
the issue further. But Roche cannot show the absence of any legitimate strategic or tactical reason.

Roche also challenges his attorney's decision not to excuse three jurors. Without a sufficient record, Roche cannot show the absence of a legitimate strategic or tactical reason to excuse the jurors.

The record does not support Roche's argument that his attorney did not cross-examine Traugber on her motive to lie. The record shows defense counsel conducted a thorough cross-examination of the victim. An attorney's decision to pursue a particular line of questioning falls squarely in the realm of trial strategy. In re Pers. Restraint of Davis, 152 Wn.2d 647, 720, 101 P.3d 1 (2004) ("Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel.").

We affirm.

WE CONCUR:





**NIELSEN, BROMAN & KOCH P.L.L.C.**

**October 18, 2017 - 9:11 AM**

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**Appellate Court Case Title:** State of Washington, Respondent v. Leonel Cruz Roche, Appellant  
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