

NO. 35240-1-II

FILED  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

JAMES NORMAN CLASSEN, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE JOHN P. WULLE  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-00408-8

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BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

Because of the limited nature of the issues raised on appeal, the necessary Statement of Facts will be included in the argument sections.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the trial court restricted the impeachment of the State's rebuttal witness, Dr. Ward. The claim is that Dr. Ward had talked to the defendant's son and had told him that he thought this should be charged as a murder in the second degree rather than a murder in the first degree.

The defense made an offer of proof to determine whether or not Dr. Ward had ever made these statements to the defendant's son. Dr. Ward was quite clear in his answer to the offer of proof that he had not had this conversation with the defendant's son.

QUESTION (Defense Attorney): This was in the process of your evaluation.

During the course of that conversation, do you recall telling Maurice Classen that the more appropriate charge in this case was murder two rather than murder one?

ANSWER (Dr. Ward): I do not.

QUESTION: You don't recall saying that.

ANSWER: I -- I -- I would not have -- have not made that statement.

QUESTION: Well, let's – let's be clear. Are you – are you saying that you recall that conversation and you're sure you didn't say that?

ANSWER: I – I do recall that conversation, and I know that I would not have said that.

QUESTION: Well, I mean, I just – I don't want to (inaudible) words. You say, I know I would not have said it. Are you meaning that you say it you're (inaudible), I did not say that?

ANSWER: I did not say that murder two is the more appropriate charge, I'm certain I did not say that.

(RP 842, L.19 – 843, L.13)

After this offer of proof, the court prevented the defense from bringing on the son to “impeach” the doctor. The trial court entered specific Findings of Fact and Conclusions of Law Regarding the State’s Motion to Limit the Defense from Presenting Impeachment Testimony of the State’s Expert Witness. (CP 254). A copy of these findings are attached hereto and by this reference incorporated herein.

The impeachment of a prior inconsistent statement requires that there be a prior statement. In any event, the focus is really on the trial testimony. *TEGLAND*, § 256, at 310 (citing *Kuhn v. United States*, 24 F.2d 910 (9<sup>th</sup> Cir. 1928)). This is because the purpose of using prior inconsistent testimony to impeach is to allow an adverse party to show that

the witness tells different stories at different times. 1 MCCORMICK ON EVIDENCE § 34, at 114 (John William Strong, Ed., 4<sup>th</sup> Edition 1992). From this, the jury may disbelieve the witness' trial testimony. TEGLAND, § 255, at 300. "If a witness does not testify at trial about the incident, whether from lack of memory or for another reason, there is no testimony to impeach." TEGLAND, § 256 at 310. This is consistent in our case with the fact that the witness is not indicating a lack of memory but is adamantly denying that any statement was ever made to the son.

Prior inconsistent statements are admissible to impeach a witness. ER 613. They are hearsay and, unless they are admissible under another exception or made under oath, they are not admissible to prove the truth of the matter asserted. ER 801(d); ER 802. Inconsistency between the prior statement and the witness' testimony at trial is determined "not by individual words or phrases alone, but the whole impression or effect of what has been said or done." State v. Newbern, 95 Wn. App. 277, 294, 975 P.2d 1041 (1999).

The defendant in his appellant brief also maintains that the questioning was appropriate to show the bias of the witness. Yet, there is nothing in the record to support that this particular witness, an expert called by the State who had evaluated the defendant at Western State Hospital, was bias either for or against the defendant. A court's limitation

of the scope of cross examination will not be disturbed unless it is the result of manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984). This discretion includes denial of cross examination if the evidence is vague, argumentative, or speculative. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965).

In State v. Dolan, 118 Wn. App. 323, 73 P.3d 1011 (2003), the question of bias was raised at the trial court level. The Court of Appeals examined the question and felt that bias includes that which exists at the time of trial and can be used by the jury to test the witness' accuracy while the witness was testifying. Yet, the court made it very clear that there has to be some showing that there is some legitimate reason for the witness to be bias. In the Dolan case, there was evidence that the witness and the defendant were embroiled in a custody dispute at the time of trial. Generally, the trial court has broad discretion to admit or exclude evidence. State v. Swan, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). There is nothing in this record to support an allegation that the independent expert from Western State Hospital has a bias towards the defendant that would justify the admission of unsupported or unsubstantiated evidence from the defendant's son that the expert had a motive to fabricate, falsify, or minimize his opinion.

Moreover, the evidence would have been properly excluded under the rule that extrinsic evidence cannot be used to impeach a witness on collateral issues. State v. Harp, 13 Wn. App. 273, 276, 534 P.2d 846 (1975). This rule applies even when, as here, the extrinsic evidence may have some indirect bearing on motive, bias or prejudice. State v. Reed, 25 Wn. App. 46, 52, 604 P.2d 1330 (1979).

The State submits that there was simply nothing to impeach here. Dr. Ward testified that the defendant had the ability to premeditate. (RP 836-837). He gave his opinion based on reasonable probabilities. He further made it quite clear that under no circumstances had he discussed his opinions with the defendant's son nor had he ever told the defendant's son anything that was inconsistent with what he had testified to. (RP 845). Thus, there is nothing to impeach. Further, there is absolutely nothing to indicate that this witness had any type of bias or ill will directed towards the defendant or the defendant's family. All of this is in line with the Findings of Fact and Conclusions of Law that were entered by the trial court after having an offer of proof made on behalf of the defendant. ER 613 allows the admissibility of evidence of a prior inconsistent statement to impeach a witness. For evidence of a prior statement to be admitted for impeachment, the witness must testify to a statement which is inconsistent with a prior statement.

The State submits that the trial court made a proper determination concerning this evidentiary matter.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is that the trial court committed constitutional error by denying the defense motion in limine to exclude testimony by three jail guards concerning the defendant's appearance while in custody.

The trial court entered Findings of Fact and Conclusions of Law Regarding Evidence of Defendant's Pre-Trial Custody Status. (CP 260). A copy of the Findings and Conclusions are attached hereto and by this reference incorporated herein. The trial court makes mention in those Findings and Conclusions that it had balanced the prejudice against the probative value of this information. In State v. Mullin-Coston, 115 Wn. App. 679, 64 P.3d 40 (2003), the defense objected to testimony that the defendant was in custody. The defendant argued that his right to a fair trial was violated when the jury was allowed to hear that he was in jail during certain conversations he had had with witnesses after his arrest. In affirming the conviction, Division I discussed the probative nature of the evidence versus the prejudice and indicated as follows:

But although references to custody can certainly carry some prejudice, they do not carry the same suggestive quality of a defendant shackled to his chair during trial. Jurors must

be expected to know that a person awaiting trial will often do so in custody. Many factors go into the determination of whether a defendant will be released pending trial, including the seriousness of the charged crime and the person's ability to pay bail. In this case, a reasonable juror would know that a defendant in a First Degree Murder trial was not likely to be released pending trial unless he had paid a substantial amount of bail, regardless of whether he was later found to be innocent. In contrast, shackling a defendant during trial sends the message to the jury that the judge, corrections officers, and security personnel present fear the defendant or think he might leap from his chair at any point and cause harm to someone in the courtroom. That is a much stronger prejudice than a reference to the fact that the defendant was in jail on the same charge for which he was being tried.

- State v. Mullin-Coston, 115 Wn. App. at 693-694.

In our situation, there were legitimate reasons for the information to be given to the jury. Two experts testified for the defense, Dr. David Shapiro and Dr. Robert Julian. Both doctors testified about the defendant being in a bi-polar manic state at the time of the murder. Dr. Shapiro stated on cross-examination that evidence of a defendant's behavior over the fourteen months between the date of the murder and the trial would be important collateral source information in making a correct diagnosis. (RP 716).

Dr. Barry Ward and Dr. Nitin Karnik testified for the State. Both doctors testified that information regarding the defendant's behavior in custody over the last fourteen months was important collateral source

information in making a correct diagnosis. Both testified that a person who is in a manic state while in custody will almost certainly have behavioral problems. Dr. Ward and Dr. Karnik explained a person in a manic state will act out in a jail setting and will almost invariably receive infractions in jail due to behavioral problems. (Agreed Report of Proceedings Pursuant to RAP 9.4 (CP 229) P.3; P.6). The Agreed Report of Proceedings Pursuant to RAP 9.4 is attached hereto and by this reference incorporated herein. Thus, the State called three custody officers to testify regarding their observations of the defendant. The officers testified they observed the defendant while in custody and they never saw him have any sort of behavioral problems in the jail setting. (Agreed Report of Proceedings Pursuant to RAP 9.4 (CP 229) – Chris Anderson, P.6-7; Ryan Ashworth, P.7-8; Victoria McKenzie, P.8).

The trial court balanced the interests of the defendant against probative value of the information being sought and found that any prejudicial effect of the evidence that the defendant was in custody pre-trial was outweighed by the probative value of the evidence. The defense made the evidence of the defendant's behavior while in custody relevant through the testimony of their expert witnesses who testified that evidence of the defendant's behavior in custody would be useful collateral source data in making a correct diagnosis of the defendant's mental disorder.

The State submits that the trial court properly balanced these matters and made a correct evidentiary ruling.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is a claim that the prosecutor committed misconduct during closing argument by arguing that manslaughter did not apply under the circumstances of the case. No objection was made to the argument by counsel.

A defendant who fails to object to a claim of an improper remark waives the right to assert prosecutorial misconduct unless the remark was so flagrant and ill intentioned that it caused enduring and resulting prejudice that a curative instruction could not have remedied. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

In order to establish prosecutorial misconduct, the defendant must prove that the prosecutor's conduct was improper and that the prosecutor's conduct prejudiced his right to a fair trial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established only where there is a substantial likelihood the instances of misconduct affected the jury's verdict. Dhaliwal, 150 Wn.2d at 578; State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). An appellate court reviews a prosecutor's comment during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.

State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). Absent an objection by defense counsel to a prosecutor's remark, the issue of prosecutorial misconduct cannot be raised on appeal unless the misconduct is so flagrant and ill intentioned that no curative instruction could have obviated the prejudice engendered by the misconduct. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990); State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The State submits that the prosecutor's closing statement here does not reach the threshold articulated in Ziegler, 114 Wn.2d at 540. Because of that, this matter should not be allowed to be raised for the first time on appeal.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

The fourth assignment of error raised by the defendant is that the trial court did not prepare a proper transcript for purposes of appeal.

This becomes extremely problematic to the State because the parties entered into an Agreed Report of Proceedings Pursuant to RAP 9.4. (CP 229). All the parties signed off on this particular document as being correct and accurate and it was approved by the trial court. Now on appeal, the defendant is trying to maintain that there was not an adequate

record when in fact he had stipulated that the record was sufficient for purposes of appeal.

RAP 9.4, Agreed Report of Proceedings indicates as follows:

The parties may prepare and sign an agreed report of proceedings setting forth only so many of the facts averred and proved or sought to be proved as are essential to the decision of the issues presented for review. The agreed report of proceedings must include only matters which were actually before the trial court. . . . An agreed report of proceedings may be prepared if either the court reporter's notes or the video tape of the proceeding being reviewed are lost or damaged.

Matters which are not included in the agreed report of proceedings are not considered on appeal. Hammel v. Rife, 37 Wn. App. 577, 682 P.2d 949 (1984). It is undisputed that a criminal defendant is entitled to a record of sufficient completeness to permit effective appellate review of his claims. State v. Thomas, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993). But that does not always necessarily translate automatically into a complete verbatim transcript. There are other methods of reporting trial proceedings which may be constitutionally permissible if they permit effective review. State v. Jackson, 87 Wn.2d 562, 565, 554 P.2d 1347 (1976). A record is sufficient if it allows appellate counsel to determine which issues to raise and it places before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. State v. Tilton, 149 Wn.2d 775, 781, 72 P.3d 735 (2003).

It is interesting to note that when the court and counsel got together to discuss the record for purposes of appeal, the defense was, at that time, arguing exactly what has been raised on this appeal. In other words, the matters had already been framed in the minds of the defense attorneys concerning the approach they were going to take. The four areas were set out in colloquy with the court:

THE COURT: So we're really talking about three issues that you're looking at in terms of the appeal, the question of my denial of the – the impeachment testimony of Dr. Ward by virtue of his son's statement that it shouldn't be murder one, murder two, allegedly Dr. Ward said.

You have the issue of the jail guards being allowed to testify.

And now you have potentially this alleged prosecutorial misconduct during closing arguments.

Mr. Maybrow (Defense Attorney): Right, and then there's the overarching issue about whether the record is so incomplete that Mr. Classen's right to a fair appeal is compromised at this point.

(RP 1068, L.14 – 1069, L.2)

The parties at that point proceeded on to a discussion concerning arriving at an agreed report of proceedings for purposes of appeal. The trial court noted that they had additional information from one of the local television stations, KGW, that had preserved the pool camera taping of testimony. The judge commented that . . . “What they have taped for us is

a very accurate reflection and done in a more professional manner than we usually see with our own tapes.” (RP 1074, L.15-18). The court then advised the attorneys to get together and work on putting together an agreed narrative report of proceedings. (RP 1076).

That particular hearing was on May 24, 2006. On June 16, 2006, the attorneys reported to the court that they had been working on the agreed report of proceedings and believed that they had been able to reconstruct the areas of concern.

This matter was then reviewed again by the trial court, counsel again worked on it and it was brought back on August 2, 2006, for purposes of re-review and signing off on the Agreed Report of Proceedings.

On August 2, 2006, the parties submitted the Agreed Report of Proceedings Pursuant to RAP 9.4. (CP 229). They indicated that all parties had signed off on the agreement and the documentation then was approved by the trial court. (RP 1124-1125). The record is clear that the defendant was present at the time that the Agreed Report of Proceedings was presented by the parties and approved by the trial court.

In our case, the parties agreed that the information supplied in the Agreed Report of Proceedings Pursuant to RAP 9.4 was accurate information and would allow a proper review of the issues on appeal. As

indicated in the preamble, the parties not only reviewed their own notes and recollections on the examination of the witnesses, but also reviewed clerk's notes and minutes, the bailiff's notes, and video recordings provided by local news media that had a media pool camera available for all purposes in the courtroom. The parties then agreed that it was accurate to the best of their recollections and knowledge and all of this was agreed and approved by the trial court.

Finally, there is nothing that has been produced in the appellate arguments that would indicate that there was an insufficiency of information supplied in the report of proceedings. In other words, all indications are that the defendant was able to present his arguments on appeal. The RAP's allow a narrative or agreed report of proceedings be submitted. The burden of reconstructing the record would be on the party raising the issue for which that part of the record is needed. RAP 9.3. The usual remedy for a defective record is to supplement it with affidavits and have the judge that heard the case resolve the discrepancies. Tilton, 149 Wn.2d at 783. A defendant waives the right to a complete record by failing to obtain affidavits from the trial court and counsel concerning the missing portions of the record. State v. Miller, 40 Wn. App. 483, 488, 698 P.2d 1123 (1995). Because that was not done in this case, it is obvious that a sufficient record was reconstructed by the parties to allow full and

complete review of the issues on appeal. The State submits that this record is sufficient because it allows the defendant the ability to argue on appeal the issues that he feels are important for the Court of Appeals to consider.

VI. CONCLUSION

The trial court should be affirmed in all respects.

DATED this   /  /   day of April, 2007.

Respectfully submitted:

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By:

  
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**APPENDIX "A"**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING  
STATE'S MOTION TO LIMIT DEFENSE FROM PRESENTING  
IMPEACHMENT TESTIMONY OF STATE'S EXPERT WITNESS**

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**FILED**  
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JoAnna McBride, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

JAMES NORMAN CLASSEN,

Defendant.

No. 05-1-00408-8

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW REGARDING STATE'S MOTION  
TO LIMIT DEFENSE FROM PRESENTING  
IMPEACHMENT TESTIMONY OF STATE'S  
EXPERT WITNESS

**FINDINGS OF FACT**

Dr. Ward testified in the State's case as a rebuttal witness. Dr. Ward testified it was his opinion the defendant had the capacity to act intentionally and the capacity to premeditate when he killed his wife. The defense made an oral offer of proof stating Dr. Ward told the defendant's son, Maurice Classen, in a pre trial interview that he thought this case was more appropriately charged as a Murder in the Second Degree rather than as a Murder in the First Degree. The defense sought to call Maurice Classen to

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1 testify to the alleged prior statement by Dr. Ward as impeachment of Dr. Ward.

2 A testimonial offer of proof was taken of Dr. Ward regarding whether he made  
3 the alleged prior statement to Maurice Classen. In the offer of proof, Dr. Ward testified  
4 he did not tell Maurice Classen he thought the case should be charged as a Murder in  
5 the Second Degree.  
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7 Dr. Ward testified before the jury only to his opinion that the defendant had the  
8 capacity to act intentionally and to premeditate. Dr. Ward did not testify regarding an  
9 opinion about whether the defendant did in fact premeditate or act intentionally. Dr.  
10 Ward only gave an opinion that the defendant had the ability to act intentionally and the  
11 ability to premeditate at the time the defendant killed his wife.  
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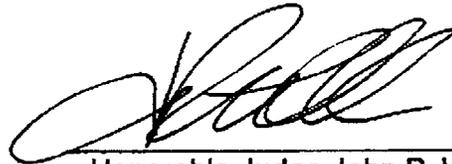
13 The State moved to limit the defense from calling Maurice Classen to testify  
14 about the alleged prior statement by Dr. Ward. The court granted the State's motion.  
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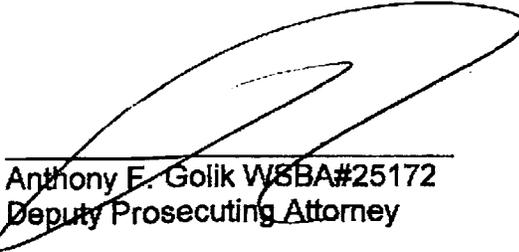
### 16 17 CONCLUSIONS OF LAW

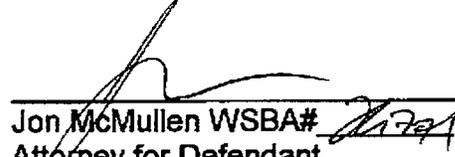
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19 Admissibility of extrinsic evidence of a prior inconsistent statement is governed  
20 by Evidence Rule 613. ER 613(b) allows for admissibility of evidence of a prior  
21 inconsistent statement to impeach a witness. For evidence of a prior statement to be  
22 admitted for impeachment, the witness must testify to a statement which is inconsistent  
23 with the alleged prior statement. In this case, to allow testimony about Dr. Ward's  
24 alleged prior statement to Maurice Classen, Dr. Ward would have to first testify that he  
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1 believed the defendant committed Murder in the First Degree. To allow expert  
2 testimony regarding an opinion about what specific degree of crime the defendant  
3 committed would be an invasion of the province of the jury. Such testimony would be in  
4 admissible. Since Dr. Ward's testimony was not inconsistent with the alleged prior  
5 statement to Maurice Classen, evidence of the alleged prior statement is not admissible.  
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9 DATED this 2 day of <sup>August</sup> ~~June~~, 2006

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13 \_\_\_\_\_  
14 Honorable Judge John P. Wulle

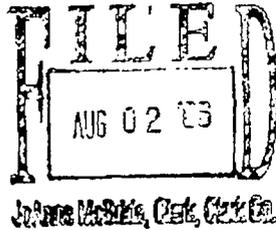
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25 Attorney for Defendant  
26 Approved as to form

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\_\_\_\_\_  
Todd Maybrow WSBA# 10337  
Attorney for defendant  
Approved as to form

**APPENDIX "B"**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING  
EVIDENCE OF DEFENDANT'S PRE TRIAL CUSTODY STATUS**



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

JAMES NORMAN CLASSEN,

Defendant.

No. 05-1-00408-8

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW REGARDING EVIDENCE OF  
DEFENDANT'S PRE TRIAL CUSTODY  
STATUS

**FINDINGS OF FACT**

The State sought to present testimony regarding the defendant's behavior over the fourteen months the defendant was in custody pending trial in this matter. The defense expert, Dr. Shapiro testified the defendant is bi-polar and he was in a manic state at the time of the murder. The defense presented evidence that the defendant was taking anti depressant medication without mood stabilization medication at the time of the murder. Dr. Julian testified for the defense. Dr. Julian testified anti depressant medication can flip a bi-polar person into mania if the person does not take mood stabilizing medication. Dr. Shapiro testified he made his diagnosis based in large part on collateral source information regarding how the defendant had behaved prior to the

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1 murder. Dr. Shapiro stated on cross examination that evidence of the defendant's  
2 behavior over the fourteen months between the date of the murder and the trial would  
3 be important collateral source information in making a correct diagnosis.

4 Dr. Ward and Dr. Karnik testified for the State in this matter. Dr. Ward and Dr.  
5 Karnik both testified that information regarding the defendant's behavior in custody over  
6 the last fourteen months was important collateral source information in making a correct  
7 diagnosis. Dr. Karnik testified the defendant took only anti depressant medication with  
8 no mood stabilizing medication in the fourteen months he was in custody. Dr. Karnik  
9 agreed that a bi-polar person who takes antidepressants without a mood stabilizer can  
10 be flipped into a manic state. Dr. Ward and Dr. Karnik both testified that a person who  
11 is in a manic state while in custody will almost certainly have behavioral problems. Dr.  
12 Ward and Dr. Karnik explained a person in a manic state will act out in a jail setting and  
13 will almost invariably receive infractions in jail due to behavioral problems.  
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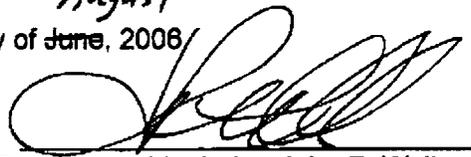
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17 The State called three custody officers to testify regarding their observations of  
18 the defendant. The officers testified they observed the defendant while in custody and  
19 they never saw him have any sort of behavioral problems in jail. The custody officers  
20 testified the defendant received no infractions for behavioral problems in the jail.  
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### 23 CONCLUSIONS OF LAW

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25 The Court engaged in a balancing and found that any prejudicial effect of the evidence  
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1 that the defendant was in custody pre trial was out weighed by the probative value of  
2 the evidence. The defense made the evidence of the defendant's behavior while in  
3 custody relevant through the testimony of their expert witnesses who testified that  
4 evidence of the defendant's behavior in custody would be useful collateral source data  
5 in making a correct diagnosis of the defendant's mental disorder.  
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9 *2 August*  
10 DATED this 16<sup>th</sup> day of ~~June~~, 2006

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12 \_\_\_\_\_  
13 Honorable Judge John P. Wulle

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15 \_\_\_\_\_  
16 Anthony F. Golik WSBA# 25172  
17 Deputy Prosecuting Attorney

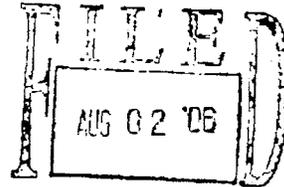
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21 Attorney for Defendant  
22 Approved as to form

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24 \_\_\_\_\_  
25 Todd Maybrown WSBA# 18257  
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27 Approved as to form

**APPENDIX "C"**

**AGREED REPORT OF PROCEEDINGS  
PURSUANT TO RAP 9.4**

25



JoAnne H. Stone, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

JAMES NORMAN CLASSEN,

Defendant.

No. 05-1-00408-8

AGREED REPORT OF PROCEEDINGS  
PERSUANT TO RAP 9.4

The parties have agreed to the following reconstruction of the record in this matter. The following reconstruction of the record covers the portions of the trial that were not recorded by either the court's recording equipment or the recordings of the proceedings which have been provided to the court by the news media which were recorded by the media pool camera which was recording in the courtroom. To assist in creating this reconstruction, the parties have reviewed the clerk's notes and minutes, the bailiff's notes, the video recordings provided by the news media, and the party's own notes and recollections on the examination of the witnesses.

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1  
2 **DIRECT EXAMINATION OF DR. WARD**

3 The State called Dr. Barry Ward on April 19, 2008. Dr. Ward testified on State's  
4 direct examination from 10:29 AM to 11:06 AM, from 11:29 AM to 11:56 AM, and from  
5 1:40 PM to 1:58 PM. The afternoon session of Dr. Ward's direct examination was  
6 captured on the news media video tape. The morning sessions were not recorded.  
7 During the 64 minutes of direct examination not recorded, Dr. Ward testified in summary  
8 to the following:  
9

10 Dr. Ward is a psychologist employed at Western State Hospital. The defendant  
11 was admitted to Western State Hospital pursuant to a court order for a fifteen day  
12 evaluation for an opinion regarding the defendant's capacity to form the required mental  
13 state to commit the crime charged. Dr. Ward interviewed the defendant four times.  
14 Prior to each interview, the defendant was informed of the non-confidential nature of the  
15 evaluations. The defendant willingly participated in the interview process. During his  
16 admission to the ward, the defendant was subject to twenty four hour observation. The  
17 sanity commission consisted of Dr. Ward, and Dr. Nitin Kamik. Dr. Ward spent eight  
18 hours in face to face interviews with the defendant.  
19

20 The data base for the examination of the defendant consisted of police reports,  
21 video tape recorded and transcribed statements given by the defendant, transcripts of  
22 police interviews with Maurice Classen, Marcel Classen, Eugene Sakai, Karen  
23 O'Malley, Stanley Grenz, Kathleen Misovetz, Bruce Adams, and numerous summaries  
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1 of witness interviews conducted by police officers. The data base further included a  
2 criminal history report, a forensic report from defense expert Dr. Shapiro with  
3 accompanying raw data, and telephonic interviews of Stanly Grenz and Maurice  
4 Classen.

5 Dr. Ward diagnosed the defendant as suffering from Major Depressive Disorder.  
6 Dr. Ward was aware Dr. Shapiro had diagnosed the defendant as suffering from bi-polar  
7 disorder. Dr. Ward disagreed with Dr. Shapiro's diagnosis. Dr. Ward stated data Dr.  
8 Shapiro relied upon did not support the diagnosis of bi-polar disorder. Dr. Ward stated  
9 there was no evidence the defendant engaged in spending spree behavior that would  
10 be consistent with manic behavior.  
11

12 Dr. Ward stated the evidence of defendant's recent purchases of a truck, new suits and  
13 a computer did not appear to be the type of spending that would indicate manic  
14 behavior.  
15

16 Dr. Ward stated evidence of the defendant's behavior over the last fourteen  
17 months since the incident is important evidence in diagnosing the defendant. Dr. Ward  
18 stated evidence of how a criminal defendant has acted while in jail is always important  
19 data in making a diagnosis. Dr. Ward stated a person who experiences a manic  
20 episode while in custody will invariably have problems in custody. Dr. Ward stated a  
21 manic person will not respond well to authority in a custody setting and a manic person  
22 will likely have problems with guards and other inmates.  
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1 Dr. Ward was asked about the difference between hypo manic and manic states.  
2 Dr. Ward testified a hypo manic state is basically an elevated mood that last for at least  
3 four days. Dr. Ward stated a manic person's behavior is much more intense than that of  
4 a hypo manic person's. Dr. Ward stated it is obvious when a person is in a manic state.  
5 Dr. Ward testified a person in a manic state acts similar to a person who is under the  
6 influence of methamphetamine. Dr. Ward stated he found no data from his evaluation  
7 of the defendant or from his review of Dr. Shapiro's report to support a finding that the  
8 defendant suffers from bi-polar disorder.  
9

10 Dr. Ward was asked to explain what dissociation is. Dr. Ward stated dissociation  
11 is a defense mechanism to trauma that usually includes memory loss. Dr. Ward  
12 explained dissociation can occur in normal life experience when a person is  
13 preoccupied. Dr. Ward stated he would expect to see a person who goes through a  
14 divorce to experience mild dissociation. Dr. Ward stated dissociation is not a mental  
15 disorder. Dr. Ward testified he reviewed Dr. Shapiro's report and agreed that the tests  
16 Dr. Shapiro administered showed evidence the defendant had experienced dissociation.  
17 Dr. Ward stated the test scores did not indicate when the defendant experienced the  
18 dissociation. Dr. Ward testified he would expect the defendant would have experienced  
19 dissociation after the incident in this matter as a response to experiencing trauma.  
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**DIRECT EXAMINATION OF DR. KARNIK**

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3 The state called Dr. Nitin Karnik on April 19, 2006. Dr. Karnik testified from 9:53  
4 AM to 10:27 AM. Dr. Karnik testified to the following:

5 Dr. Karnik is a psychiatrist employed at Western State Hospital. He is a board  
6 certified forensic psychiatrist. Dr. Karnik was a member of the sanity commission  
7 assigned to examine the defendant. The sanity commission consisted of Dr. Karnik and  
8 Dr. Ward. The sanity commission examined the defendant pursuant to a 15 day  
9 commitment order and the sanity commission issued a report on March 10, 2006.  
10

11 Dr. Karnik and the sanity commission diagnosed the defendant as suffering from  
12 major depressive disorder. Dr. Karnik stated the defendant's depression was in  
13 remission when Dr. Karnik saw the defendant at Western State Hospital. Dr. Karnik  
14 stated the defendant was taking anti-depressant medication when he was at the  
15 hospital. Dr. Karnik did not see any need to change the defendant's medications as the  
16 defendant had been on the medications prior to admission to the hospital and the  
17 defendant was doing well on the medication.  
18

19 Dr. Karnik stated the defendant was taking Serzone and Welbutrin while he was  
20 in custody in this matter until October 14, 2005. Dr. Karnik testified after that date, the  
21 defendant took Welbutrin and Paxil while in custody. Dr. Karnik testifies Welbutrin,  
22 Serzone and Paxil are all anti depressants. Dr. Karnik testified the defendant took no  
23 mood stabilizing drugs during the entire time he was in custody pending trial in this  
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1 matter. Dr. Karnik testified if a person who is bi-polar is given anti depressants without  
2 a mood stabilizing drug such as lithium, the anti depressants can flip the bi-polar person  
3 into a manic state.

4 Dr. Karnik was asked about what time criteria is required to qualify behavior as  
5 manic with respect to bi polar disorder. He stated the episode has to last for at least  
6 seven days to qualify as mania. Dr. Karnik stated a manic episode must last for at least  
7 four days to qualify as a hypo mania. Dr. Karnik testified he is familiar with rapid cycling  
8 bi polar disorder.  
9

10 Dr. Karnik testified when a person who is suffering a manic episode is admitted  
11 to the hospital, it usually takes several days in the hospital with medication and often  
12 physical restraints to bring the person out of the manic episode. Dr. Karnik stated a  
13 person who experiences a manic episode while in custody will act out. Karnik stated a  
14 manic person will not respond well to authority in a jail setting and such a person will  
15 have behavioral issues that usually result in jail infractions.  
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### 19 DIRECT EXAMINATION OF CHRIS ANDERSON

20 The State called Chris Anderson on April 19, 2006. This witness testified from  
21 5:03 pm to 5:14 pm. Mr. Anderson testified to the following:  
22

23 Mr. Anderson is employed as a custody officer in the Clark County jail. Anderson  
24 was the officer assigned to the jail pod in which the defendant was housed for ten  
25 months in the year 2005. Officer Anderson worked a day shift in the jail during that  
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27

1 time. Each day during the ten month period Anderson was assigned to the pod in which  
2 the defendant was housed, the defendant entered the day room from 8:00AM to  
3 11:30AM. When the defendant was in the day room, there were generally nine inmates  
4 in the day room including the defendant. When the defendant was in the day room, he  
5 was twelve to fourteen feet away from Anderson. Anderson could hear the defendant  
6 speak if Anderson keyed his microphone in his area. Anderson keyed his microphone  
7 often. Anderson's desk faces the day room area. When the defendant was not in the  
8 day room, Anderson could not see the defendant any better than he could see the other  
9 inmates in the pod. Inmates are housed in cells 360 degrees around Anderson's desk.  
10 Anderson never observed the defendant acting out, having problems with other  
11 inmates, or having any type of behavioral problems of any sort during the ten month  
12 period he was in the same pod with the defendant.  
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#### 17 DIRECT EXAMINATION OF RYAN ASHWORTH

18 The State called Mr. Ashworth on April 19, 2006. Mr. Ashworth testified from  
19 5:14PM to 5:19PM. Mr. Ashworth testified to the following:

20 Mr. Ashworth is employed as a custody officer at the Clark County Jail. When  
21 the defendant was initially incarcerated after his arrest in this case, he was placed in  
22 suicide watch at the jail. The defendant remained in the suicide watch area for less  
23 than one week. Mr. Ashworth was one of the guards in the suicide watch area for two  
24 of the days that the defendant was in the suicide watch area. There were a total of  
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1 eight inmates in the suicide watch area when Ashworth was in that part of the jail with  
2 the defendant. Ashworth's job was to watch the eight inmates closely during that time.  
3 Ashworth worked twelve hour shifts for the two days he was in the suicide watch area  
4 with the defendant. Ashworth did not observe the defendant exhibit any type of  
5 behavioral problems of any sort during the time he observed the defendant in the  
6 suicide watch area of the jail.  
7

8 Mr. Ashworth was assigned to the pod in the jail where the defendant was  
9 housed for the last month prior to the trial in this matter. This is the same pod officer  
10 Anderson was assigned to for ten months in the year 2005. Ashworth did not observe  
11 the defendant have any type of behavioral problems while he was assigned to the pod  
12 in which the defendant was housed.  
13

#### 14 15 **DIRECT EXAMINATION OF VICTORIA McKENZIE**

16  
17 The State called Victoria McKenzie on April 19, 2006. Ms. McKenzie testified  
18 from 5:20PM to 5:22 PM. Ms. McKenzie testified to the following:

19 Mrs. McKenzie is a sergeant in the Clark County jail. Sergeant McKenzie  
20 explained inmates receive infractions in the jail if they have behavior problems. She  
21 stated inmates receive minor infractions for behavior such as saving food at meals or  
22 not making their beds, and they receive major infractions for behavior such as fighting.  
23 Sergeant McKenzie testified that during the fourteen months the defendant was in  
24 custody pending trial in this matter, he received no infractions.  
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1  
2 **CROSS-EXAMINATION OF DR. WARD**

3 Dr. Ward testified under cross examination on the afternoon of April 19, 2006. In the  
4 portions of cross examination not recorded by the news media pool camera, Dr. Ward  
5 testified to the following:  
6

7 Dr. Ward agreed that it was important to present accurate testimony to the jury and the  
8 court. Defense counsel then asked Dr. Ward to review certain aspects of his direct  
9 testimony.  
10

11 First, Dr. Ward agreed that he only spoke with one of the children: Maurice Classen.  
12 After reviewing his notes, Dr. Ward acknowledged that he did not discuss James  
13 Classen's clothing purchases during this interview. Rather, Dr. Ward stated that he  
14 obtained this information when reviewing Dr. Shapiro's report.  
15

16 Second, defense counsel asked Dr. Ward about the DAPS test that was administered  
17 by Dr. Shapiro. Dr. Ward acknowledged that he did not administer the test and that he  
18 was not very familiar with the test. Dr. Ward agreed that he was discussing the wrong  
19 test during his direct testimony.  
20

21 Third, defense counsel questioned Dr. Ward's direct testimony regarding the statistics  
22 for bipolar disorder. Dr. Ward noted that there was a genetic component to bipolar  
23 disorder. Dr. Ward then agreed that a person was eight to ten times more likely to  
24 suffer bipolar disorder where there was a history of the disorder in his family. Dr. Ward  
25 was aware that there was a history of bipolar disorder in the Classen family. Dr. Ward  
26  
27

1 knew that James Classen's father suffered from bipolar disorder and that other family  
2 members had serious mental health conditions.

3  
4 Dr. Ward acknowledged that he was not stating an opinion whether, Dr. Classen did, in  
5 fact, premeditate the acts for which he is charged. Dr. Ward agreed that he was not  
6 stating any opinion whether, in fact, he did intend to kill his wife. He agreed that these  
7 are ultimate factual questions left for the jury. Dr. Ward also agreed that he was in no  
8 better position than the members of the jury to answer these questions.

9  
10 Dr. Ward has worked as a staff psychologist at the Western State Hospital since  
11 September 2004. Dr. Ward previously worked at the Western State Hospital as an  
12 intern and then fellow. As an intern and fellow, he was supervised by a more  
13 experienced psychologist. Dr. Ward has no individual clinical practice and he has never  
14 treated patients.

15  
16 Before beginning his work at the Western State Hospital, Dr. Ward worked as an  
17 attorney. Defense counsel asked Dr. Ward whether he has worked as a public  
18 defender. The prosecutor objected to this question and all counsel then conferred with  
19 the Court.

20  
21 Dr. Ward obtained his PhD in 2001. Dr. Ward has no publications to his credit. Dr.  
22 Ward is not board certified in forensics. Defense counsel asked Dr. Ward whether he  
23 did not obtain his board certification because he did not have enough experience as of  
24 yet. Dr. Ward disagreed with this suggestion and claimed that he could obtain his  
25 certification if he chose to. Dr. Ward stated that he did not need this certification to work  
26 at the Western State Hospital.

1  
2  
3 Dr. Ward is currently employed and paid by the State of Washington. In that capacity,  
4 Dr. Ward often works closely with prosecutors. Dr. Ward claimed that he would often  
5 work with the attorney that intended to present his testimony at trial. Dr. Ward cannot  
6 be retained by any defendant to conduct a forensic evaluation.

7  
8 In this case, Dr. Ward worked closely with Mr. Golik to prepare for his testimony. Dr.  
9 Ward spoke to the prosecutor about his findings and conclusions before testifying at  
10 trial.

11 Dr. Ward denied that he spoke to Mr. Golik about his conclusions before he completed  
12 his report

13  
14 Dr. Ward has worked at the Western State Hospital for approximately 3 ½ years. Dr.  
15 Ward conducted somewhere about 180 forensic evaluations while employed at the  
16 Western State Hospital. Dr. Ward estimates that he has been asked to consider the  
17 question of diminished capacity in approximately 20 percent of these examinations.  
18 In all of those examinations, Dr. Ward has never concluded that any defendant was  
19 suffering from diminished capacity. Dr. Ward confirmed that he has never once  
20 concluded that any defendant met the definition for diminished capacity.

21  
22  
23 Dr. Ward noted that he saw James Classen while he was at the Western State Hospital  
24 from January 27, 2006 to February 7, 2006. Dr. Ward stated that he interviewed JC on  
25 four occasions during those 10 days: January 27, January 31, February 1, and  
26 February 7.

1  
2 Dr. Ward noted that James Classen cooperated with the interview process. James  
3 Classen answered all of the questions that you posed to him. Dr. Ward noted that  
4 James Classen was emotional at times. Dr. Ward also noted that James Classen was  
5 tearful at times. Dr. Ward took handwritten notes during the course of these interviews.  
6 These notes were made contemporaneously with the interview. Dr. Ward tried his best  
7 to take notes that were complete and accurate. Dr. Ward relied upon these notes in  
8 reaching his opinions. Dr. Ward relied upon these notes when completing his report.

9  
10 As reflected in his report, Dr. Ward agreed that James Classen had cooperated with the  
11 investigators since the time of arrest on February 8, 2005. Dr. Ward noted that his  
12 subsequent explanations of the offense were consistent with his report to the police. Dr.  
13 Ward agreed that James Classen provided some additional details in response to the  
14 questions that he was asked by Dr. Ward.

15  
16 Dr. Ward explains what is meant by the term "malingering." Dr. Ward had recently  
17 given a talk on this topic. Dr. Ward agreed that, in the case of James Classen, there  
18 was no evidence of malingering whatsoever. Dr. Ward also agreed that there was no  
19 evidence that James Classen was over-reporting symptoms. Dr. Ward agreed that  
20 James Classen appeared to be forthcoming even when the answers did not seem to be  
21 in his best interest.

22  
23 Defense counsel asked Dr. Ward questions about his forensic interviews. Dr. Ward  
24 agreed that he asked James Classen no questions regarding the offense on January  
25 27, 2006. Dr. Ward also agreed that he asked James Classen no questions regarding  
26 the offense on January 31, 2006.

1  
2 It was during the interview of February 1, 2006 that Dr. Ward focused upon the offense  
3 conduct and the evening of the incident. James Classen told Dr. Ward that he "felt like  
4 an observer" at the time of the incident. James Classen told Dr. Ward that he "felt like  
5 he was going through the motions" at the time of the incident. James Classen told Dr.  
6 Ward that he was "acting like a robot" on the night of the incident. James Classen told  
7 Dr. Ward that he had never felt that way before. Dr. Ward noted that James Classen  
8 described a "certain amount of detachment" when discussing the incident. Dr. Ward  
9 noted that James Classen claimed that he began to feel this way while he was still at his  
10 apartment. Dr. Ward agreed that James Classen claimed to be in a "dreamlike" state at  
11 the time of the incident. Dr. Ward noted that James Classen was not sure why he  
12 stopped at his home. Dr. Ward agreed that James Classen claimed that he had no  
13 "purpose" for stopping at the home. Dr. Ward noted that James Classen state that he  
14 hadn't given any thought or planning to this event. Dr. Ward agreed that James  
15 Classen said, "I just had no idea – it seemed almost like a dream." Dr. Ward also  
16 agreed James Classen stated that he could see the event "in snippets." Dr. Ward  
17 agreed that James Classen stated that "it didn't register what I had done." Dr. Ward  
18 also agreed that James Classen stated that he didn't think about killing his wife. Dr.  
19 Ward noted that James Classen told him that on the night before the incident he was  
20 feeling more hopeful and he was going to meet an attorney to talk about filing for  
21 divorce. Dr. Ward also noted that James Classen told him that it was "the first time I felt  
22 up in five weeks."

23  
24 Dr. Ward asked James Classen about his thoughts at the time of the incident. Dr. Ward  
25 noted that James Classen stated that it "was like I was going through the motions –  
26 scripted behavior." Dr. Ward also noted that James Classen stated he "had no sense  
27

1 of what I was going to do" on the date of the incident. Dr. Ward stated that James  
2 Classen told him he had "no thoughts about what might happen" when he entered the  
3 house. Dr. Ward agreed that James Classen said it was like he was in a dream. Dr.  
4 Ward stated that James Classen told him that he was not sure why he took the scissors  
5 with him into his wife's bedroom.

6  
7 Dr. Ward asked James Classen some questions regarding the incident on February 7,  
8 2006. Dr. Ward agreed that James Classen told him that he was "not planning" the  
9 incident. Dr. Ward noted that James Classen stated that, in reflection, he" thought of  
10 himself as going into a psychotic thing" at the time of the incident.

11  
12 Dr. Ward conducted no testing of any type. Dr. Ward was aware that Dr. Shapiro  
13 conducted some psychological testing. Dr. Ward reviewed his test results and he was  
14 provided the raw data from Dr. Shapiro's tests. Dr. Ward agreed that the tests used by  
15 Dr. Shapiro were appropriate in a case of this sort. Dr. Ward didn't mention any of  
16 these tests in his own report. Dr. Ward claims that he didn't see any reason to mention  
17 these test result in his own report.

18  
19 Dr. Ward agreed that it was appropriate to interview collateral sources when completing  
20 a forensic evaluation. Dr. Ward interviewed just two collateral sources: Maurice  
21 Classen and Stanley Grenz. Dr. Ward noted that he had limited time to work on this  
22 case because he is assigned several cases to work on each week.

23  
24 Dr. Ward completed his report on February 10, 2006. Dr. Ward claims that he found no  
25 evidence of delusions or hallucinations. Dr. Ward stated that he had reviewed a  
26 transcript of James Classen's interview by the police. Dr. Ward did not view the video  
27

1 of that interview. Defense counsel asked Dr. Ward to review a portion of the transcript  
2 from that interview. In that portion, James Classen told the police the following:

3  
4 Defense counsel asked Dr. Ward whether, based on his experience and common  
5 sense, he would agree that Ms. Classen did not make these statements during the  
6 stabbing incident. Dr. Ward stated that he did not know whether Ms. Classen made  
7 these statements, although they may be inaccurate. Dr. Ward would not agree that  
8 these statements showed evidence that James Classen was hearing voices at the time  
9 of the incident.

10  
11 Dr. Ward completed his report on March 10, 2005. He based his clinical assessment  
12 upon his interviews and the other review of records. Like all psychologists, Dr. Ward  
13 relied upon the Diagnostic and Statistical Manual (DSM – IV) in describing his findings.  
14 Dr. Ward confirmed that some version of this manual has been in use since the 1970s.  
15 Dr. Ward agreed that this tool to allow some uniformity within his field of practice.

16  
17 Dr. Ward agreed that the DSM-IV created a "multiaxial system." This means that  
18 assessments are generally made on five separate axes. Dr. Ward noted that Axis 1  
19 describes certain clinical disorders, that Axis II describes certain personality disorders,  
20 that Axis III describes general medical conditions, that Axis IV describes certain  
21 psychosocial and environmental problems, and Axis V describes a global assessment  
22 of functioning. Dr. Ward acknowledged that the disorders listed under Axis I are the  
23 most serious types of disorders recognized by his profession.

24  
25 Dr. Ward acknowledged that, based upon his assessment, James. Classen was  
26 suffering from a significant Axis I disorder. Dr. Ward agreed that this was a serious

1 clinical disorder known as Major Depressive Disorder. Dr. Ward noted that this disorder  
2 was not to be confused with a depressed mood or period of sadness. Dr. Ward  
3 described Mr. Classen's condition as a significant mood disorder and that he  
4 experienced a clinically significant distress or impairment. Dr. Ward agreed that, during  
5 the time period prior to the offense, James Classen's mood disorder was exacerbated  
6 by sleep disturbances. Dr. Ward also agreed that, because of this disorder, James  
7 Classen had reduced mental control and poor judgment during acute phases of his  
8 disorder. Dr. Ward also acknowledged that James Classen suffered from dysfunctional  
9 thinking on account of his condition.

10  
11 **BEGINNING AT THIS POINT, A PORTION OF THE REMAINING CROSS-**  
12 **EXAMINATION IS CAPTURED ON VIDEOTAPE**

13  
14 The videotape does not include some of the cross-examination regarding Dr. Ward's  
15 concluding opinion.

16  
17 Dr. Ward agreed that James Classen had some periods of dissociation during the  
18 offense, but he stated that he was unsure whether this was "pathological dissociation."

19 Dr. Ward agreed that some of this data is consistent with dissociation. Dr. Ward also  
20 agreed that it was possible that he was suffering from a dissociative disorder at the time  
21 of the offense. But, Dr. Ward would not agree that James Classen was in a dissociative  
22 fugue as described in the DSM-IV.

23  
24 Dr. Ward noted that in the years prior to the offense other doctors had diagnosed James  
25 Classen as suffering from bipolar disorder. Dr. Ward put little weight in such a  
26  
27

1 diagnosis since he had no opportunity to review the prior records. Dr. Ward was  
2 unaware that records could not be reviewed because they were no longer in existence.

3  
4 Dr. Ward agreed that people suffering from bipolar disorder often have a pretty low  
5 insight during an acute manic phase. Dr. Ward also agrees that people suffering from  
6 bipolar disorder are manic generally find the manic state itself to be a perfectly  
7 agreeable place to be. Dr. Ward noted that such an elevated mood is preferred to the  
8 depressive state. Dr. Ward also noted that, during the acute phase, a person suffering  
9 from this disorder is very often resistant to treatment.

10  
11 Dr. Ward stated that it is his claim that James Classen did not have the "classical  
12 presentation" for manic depressive disorder. Dr. Ward agreed that not everyone is  
13 going to have the identical presentation in mania. Dr. Ward relied primarily on his  
14 interviews of James Classen in reaching the conclusion that he was not bipolar.

15  
16 Defense counsel reviewed certain portions of these interviews with Dr. Ward. Dr. Ward  
17 agreed that on January 27, 2006, James Classen stated that he didn't think he was  
18 bipolar, but he was not sure. Dr. Ward agreed that on January 31, 2006, James  
19 Classen told him that he had understood himself as chronically depressed and he  
20 described it as a "cyclical thing." Dr. Classen also told Dr. Ward that he wasn't aware of  
21 manic phases, but that some others have seen his behavior as tilting in that direction.  
22 Dr. Ward noted that James Classen didn't think that he was like his father. Dr. Ward  
23 agreed that James Classen told him that he felt to be in an upbeat mood just prior to the  
24 offense. Dr. Ward also agreed that James Classen told him that his wife was  
25 wondering about ADD. Based on this, Dr. Ward acknowledged that other persons were  
26 concerned that James Classen had some type of hyperactivity.

1  
2 Defense counsel reviewed certain portions of the DSM-IV with Dr. Ward. After  
3 reviewing the manual, Dr. Ward agreed that a hypomanic episode typically begins  
4 suddenly and has a rapid escalation of symptoms. At defense counsel's request, Dr.  
5 Ward read the list of criteria for hypomania to the jury. After reviewing the DSM-IV, Dr.  
6 Ward agreed that a diagnosis of Major Depressive Disorder is only appropriate if he can  
7 also state that there has never been any manic episode or hypomania. At defense  
8 counsel's request, Dr. Ward then read portions of the DSM-IV regarding major  
9 depressive disorder to the jury.

10  
11 Dr. Ward agreed that, on February 7, 2006, James Classen told him that he wasn't sure  
12 if he was getting 2-3 hours sleep during the month from Jan 5 to date of incident. Dr.  
13 Ward also agreed that racing thoughts could be evidence of irritable manic thinking. Dr.  
14 Ward agreed that stressors and lack of sleep are the types of things that can move a  
15 person into a manic phase.

16  
17 Dr. Ward described the medications that James Classen was taking prior to the offense.  
18 Dr. Ward noted that James Classen was prescribed Wellbutrin just a few months prior  
19 to incident. Dr. Ward also noted that, at first, James Classen was resistant to taking this  
20 medication. Dr. Ward also stated that James Classen told him that his wife thought the  
21 medication was necessary because it appeared that he was suffering from ADD and  
22 that he was having problems with concentration. In reviewing notes, Dr. Ward  
23 acknowledged that James Classen had previously taken Wellbutrin with some negative  
24 side effects. Dr. Ward noted that James Classen reported that the medication had an  
25 "agitating effect."  
26  
27

1 Dr. Ward agreed that, before the incident James Classen's medical management was  
2 being maintained by a nurse practitioner. Dr. Ward agreed that this medical  
3 management would likely have been different if James Classen had been seen by a  
4 psychiatrist. In saying this, Dr. Ward agreed that, given James Classen's diagnosis of  
5 bipolar disorder, he should have been taking a mood stabilizer.

6  
7  
8 Dr. Ward agreed that he was being asked to evaluate the question whether James  
9 Classen was suffering from diminished capacity at the time of the offense. Dr. Ward  
10 agreed that there is a level of subjectivity in the application of the test for diminished  
11 capacity in any case. Dr. Ward also agreed that he sees the test as asking a very  
12 limited and narrow question. Dr. Ward agreed that some experienced therapists do not  
13 see the test in such a narrow fashion.

#### 14 15 **CROSS EXAMINATION OF DR. KARNIK**

16 The State called Dr. Karnik, staff psychiatrist at Western State Hospital, on April 19,  
17 2006. Clerk's notes indicated that Dr. Karnik on 9:53a.m. to 10:30a.m. Dr. Karnik was  
18 asked a number of questions, some of which I am able to remember as I have notes  
19 outlining the questions; others of which I recall making contemporaneous notes for  
20 during the direct examination Dr. Karnik and, unfortunately, do not have a recollection of  
21 those particular questions. The following is to the best of my recollection:

22  
23 1. Dr. Karnik was asked what the medication lithium is used for and he responded  
24 that it is used to treat bi-polar disorder. He also indicated that in cases of extreme  
25 depression, lithium is sometimes also used when other psychiatric medication has not  
26 worked.

1  
2 2. He is next asked if in his entire career prior to April 19, 2006 he had ever been  
3 asked to testify in a court of law in a criminal case regarding diminished capacity. He  
4 indicated that he had not.

5  
6 3. He was asked if he personally interviewed Dr. Classen regarding the actual  
7 incident and he responded that he had only interviewed him for the purpose of obtaining  
8 background on his medical conditions, etc.

9  
10 4. He was asked if Dr. Ward would be the evaluator of the diminished capacity  
11 issued and he responded that, yes, that would be the case.

12  
13 5. He was asked if he sat in on any of the interviews that Dr. Ward performed and  
14 he indicated that he had not.

15  
16 6. He was asked whether he would or would not be able to say either way in terms  
17 of diminished capacity in this specific incident and he indicated he would not be able to,  
18 as he did not do that background work previously discussed.

19  
20 7. He was asked who would be in the best position at Western State to speak on  
21 the issue of diminished capacity in this particular case and he indicated that Dr. Ward  
22 would be the person.

23  
24 8. He was asked if he would consider himself to be an expert in pharmacology and  
25 he indicated that he was not.

1 9. He was asked if the published reports on the class of antidepressants called  
2 Tricyclic reported that the use can increase manic episodes – the number of manic  
3 episodes – and he indicated that yes, they could.

4  
5 10. He was then asked if they could increase the severity of a manic episode in bi-  
6 polar patients and he again indicated that, yes, they could.

7  
8 11. He was asked if treating physicians have to be extremely cautious when  
9 prescribing drugs like Wellbutrin or Serazone to a bipolar patient, and he indicated to  
10 me that, yes, in fact they do, especially when there is no mood stabilizer prescribed as  
11 well.

12  
13 12. He was asked whether bipolar was a long term cyclical mental disorder that  
14 came and went throughout the course of people's lives, and he indicated yes.

15  
16 13. He was then asked whether the fact that Dr. Classen had not shown any manic  
17 symptoms for the short time that he was at Western State for the purpose of evaluation,  
18 meant that he was not bipolar and he indicated that, of course, it did not, as the  
19 definition of bipolar is one manic episode in a lifetime and the fact that one wouldn't  
20 show that in a two week stay certainly did not indicate that he wasn't bipolar.

21  
22 14. Finally, he was asked hypothetically, that if someone was really suffering from a  
23 manic episode, could that be the basis for diminished capacity and he indicated that,  
24 yes, a true manic episode could be the basis for diminished capacity.



1  
2 He stated there were over one hundred inmates in the pods he was responsible for  
3 observing. He stated one roving guard would also often be in Anderson's pod area.  
4 He described the lay out of the pods in relation to his viewing tower. He stated his  
5 tower was in the center of the pods and the pods were 360 degrees around him. He  
6 stated he could not see inmates that were to the side or behind him without turning and  
7 looking in their direction. Anderson stated he could not hear what inmates said through  
8 the glass around his tower unless he keyed his microphone in the tower to listen.

9  
10 Anderson stated he never spoke to the defendant. Anderson stated his only contact  
11 with the defendant was when he would hand him toiletries or toothpaste.

12 Anderson stated he could not see the defendant at night when it was dark.

13  
14 Anderson stated he had no training in identifying mental illness such as bipolar disorder.

15  
16 **CROSS EXAMINATION OF RYAN ASHWORTH**

17  
18 Ashworth stated on cross he had no training in identifying mental illness such as bipolar  
19 disorder

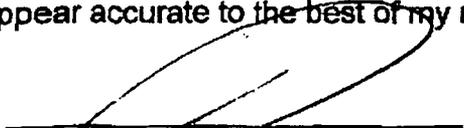
20  
21 **CROSS OF VICTORIA MCKENZIE**

22 McKenzie stated it would be a major infraction if the defendant attempted to leave the  
23 jail to get medications.

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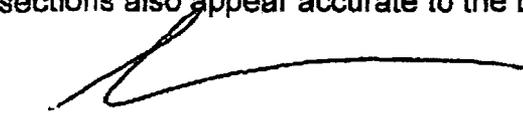
I, Anthony F. Golik, swear or affirm the following:

I prepared the sections of this report of the proceedings entitled direct examinations of Dr. Ward, Dr. Karnik, Chris Anderson, Ryan Ashworth and Victoria McKenzie. These sections are accurate to the best of my recollection. I have reviewed the portions of this report of proceedings prepared by Mr. McMullen and Mr. Maybrown and those sections also appear accurate to the best of my recollection.

  
Anthony F. Golik WSBA# 25172  
Deputy Prosecuting Attorney

I Todd Maybrown swear or affirm the following:

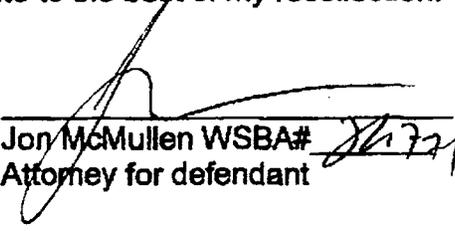
I prepared the section of this report of the proceedings entitled cross examination of Dr. Ward this section is accurate to the best of my recollection. I have reviewed the portions of this report of proceedings prepared by Mr. Golik and Mr. McMullen and those sections also appear accurate to the best of my recollection.

  
Todd Maybrown WSBA# 18557  
Attorney for defendant

I, Jon McMullen swear or affirm the following:

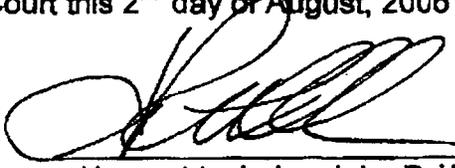
I prepared the section of this report of the proceedings entitled Cross examinations of Dr. Karnik, Chris Anderson, Ryan Ashworth and Victoria McKenzie. These sections are accurate to the best of my recollection. I have reviewed the portions of the report of the

1 proceedings prepared by Mr. Golik and Mr. Maybrown and those sections also appear  
2 accurate to the best of my recollection.

3  
4   
5 Jon McMullen WSBA# 21721  
6 Attorney for defendant

7 The above agreed reconstruction of the proceedings pursuant to RAP 9.4 is approved  
8 by the Court.

9  
10 Done in open Court this 2<sup>nd</sup> day of August, 2006

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13 Honorable Judge John P. Wulle  
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