

NO. 45203-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY CLARK, APPELLANT

**Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman**

No. 11-1-00052-6

Brief of Respondent

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

1. Did the trial court err by not ordering a second competency evaluation when no evidence was presented showing that the appellant's mental health had changed after he was found competent?
2. Did the trial court err by ruling that the defendant's case would be assigned for trial, when during two years of pre-trial proceedings, the appellant had not contacted or retained a communication assistant?
3. Did the appellant preserve for review a claim of error regarding the exclusion of expert opinion testimony when the substance of the expert's testimony was not made known to the trial court in an adequate offer of proof?
4. Did the trial court err by excluding expert opinion testimony concerning the credibility of the appellant's statements to the police?
5. Did the trial court err in the entry of a written judgment that was consistent with its oral ruling that the appellant would not be on probation?

B. STATEMENT OF THE CASE.

1. Procedural History.

On January 4, 2011, appellant Clark ("defendant") was charged by Information with residential burglary, malicious mischief third degree, and theft third degree. CP 1-2, 59-60.

Approximately a month after the charges were filed the defendant was ordered to be evaluated for competency. CP 5-8. The fifteen day evaluation order was entered on February 3, 2011, but the competency hearing was not held until more than a year later. 4 RP 3¹. In the intervening year, while released on bail, the defendant committed and was charged with first degree murder². 10 RP 6-7.

The competency hearing in this case took place while the murder case was pending. At the competency hearing, both the prosecution and defense experts agreed that the defendant was competent. 4 RP 36. 5 RP 52, 69-70. The court entered an order finding that the defendant was competent on May 30, 2012. CP 41-42. The case was set for trial.

¹ The verbatim report of proceedings is referenced in this brief as follows: Volumes 1 - 13 refer to pre-trial proceedings on thirteen separate dates in chronological order starting with February 29, 2011. Volumes 14 - 20 refer to trial and post-trial proceedings on seven separate dates in chronological order starting with May 21, 2013. Volumes 21 and 22 refer to two volumes of *voir dire* proceedings on May 21st and 22nd, 2013.

² The defendant was convicted of first degree murder, first degree robbery and possession of a controlled substance with intent to deliver on April 17, 2013, more than a month before the trial in this case. His appeal is pending before this court under docket No. 45103-4-II.

Eleven months after the competency hearing, pre-trial motions hearings were held in three separate departments. The case was initially assigned to department eleven and a pre-trial motions hearing was held on April 22nd and 23rd, 2013. 10 and 11 RP. Following the pre-trial motions, the case was re-assigned to the criminal presiding department for a re-assignment. 12 RP 4.

During the hearing in the presiding department, the defendant made an oral motion for a second competency evaluation. 12 RP 5-6. He offered no report or other evidence showing that his mental status had changed. The motion was denied. 12 RP 12-13. The defendant also orally requested that he be assisted at trial by a particular disability communications specialist. 12 RP 20. Because the defendant had not actually contacted the specialist in question, that request was not ruled upon. 12 RP 20, 22.

The presiding court did not grant the defendant's motions, and ruled that the case would be assigned out for trial. 12 RP 22. Nevertheless the defendant's case was not called for trial until approximately a month later on May 21, 2013. 14 RP 3. During preliminary matters the court ruled on a prosecution motion to limit the defendant from calling his competency expert as a trial witness. 14 RP 45-46. That motion was granted. 14 RP 56-57.

Jury selection commenced on May 21, 2013. 14 RP 69. On May 29, 2013, the defendant was convicted of all three offenses. CP 646-658, 662-666. On July 26, 2013, the court sentenced the defendant to a mid-range sentence of 18 months in prison on count one, and 364 days on counts two and three. CP 662-666, and 646-658. The court ruled that the sentences would run concurrently with the sentence that the defendant had received in the murder case. 20 RP 470. The court did not order probation or other post conviction supervision for counts two and three either orally or in writing. CP 662-666, 20 RP 471-72.

2. Competency And Other Pretrial Hearings.

The defendant's mental capabilities was the subject of testimony by two experts at a two day competency hearing in May 2012. Dr. Ray Hendrickson from Western State Hospital conducted the initial evaluation and testified that the defendant was competent. 4 RP 10, 52. His interview and mental status evaluation took place on May 11, 2011, in the presence of defense counsel. 4 RP 12.

Dr. Hendrickson's evaluation included discussion of court-related procedural issues. The defendant was asked to discuss his knowledge of a variety of topics related to trial proceedings, including the right to a jury trial, evidentiary issues and plea bargaining. 4 RP 16. During the interview, the defendant displayed a good understanding of the criminal

justice system and a good working relationship with his attorney. 4 RP 16, 20. Furthermore, the defendant displayed the ability to deal with unanticipated trial issues. He said, during Hendrickson's interview, that if he was unsure about an issue, "I'd think about it first and then talk to [defense counsel] about it." 4RP 23.

The defendant was also evaluated by a defense psychologist, Dr. Brent Oneal. Dr. Oneal evaluated the defendant twice. 5 RP 67. The first evaluation was completed in August 2011, and included a finding that the defendant was not then competent. 5 RP 68. This was a little less than a month before the defendant committed, and was charged with, murder under a separate cause number. 10 RP 8. The second evaluation was completed approximately seven months later while the murder charge was pending. 5RP 68. In that evaluation, Dr. Oneal concluded that the defendant was competent. 5 RP 69-70.

In addition to finding that the defendant was competent, both experts testified about accommodations that the defendant would find beneficial at trial. Dr. Hendrickson viewed the defendant as having the ability to participate in trial proceedings with assistance from his attorney that would include normal attorney client interaction such as talking about the case during breaks. 5 RP 34. Accommodation could also include written questions to be answered by the attorney when time permitted. 5

RP 38. Such accommodations "would be helpful for anybody, but certainly it would be worthwhile in his case." 5 RP 34. Concerning communication through written questions, Dr. Hendrickson observed that, "most people who are deemed competent would be doing the same thing." 5 RP 39.

Dr. Oneal offered similar suggestions concerning accommodations. He opined that written communication would be helpful. 5 RP 78. In response to a question from the court, Dr. Oneal agreed that, "Mr. Clark has enough language skills to consult with Ms. Martin during trial. He may need more time, but he can explain himself and ask questions." 5 RP 101.

Trial accommodations involving attorney client communication were also referenced during the pretrial motions hearing on April 22nd and 23rd, 2013. 10 RP 13. The court invited the defense attorney to file any motion she deemed necessary for specific accommodations and commented, "But, you know, for you to throw your hands up and say, oh, I guess I can't communicate, doesn't understand, that, in and of itself doesn't result in stopping the proceedings. There has already been a competency hearing. He just **completed** a [murder] trial last week." 10 RP 13-14, 22-23. No motion was ever filed. Furthermore, while the defendant's attorney alleged that the trial attorneys in the murder case

would support a new competency evaluation, no declarations from them were filed and they did not appear to testify in person. 10 RP 18, 23.

The pre-trial motions hearing was concluded on April 23, 2013. 11 RP 108. Defendant's statements to the police were ruled admissible. CP 639-42. Due to scheduling issues however, the case was re-assigned to the criminal presiding department. 11 RP 107. The defendant's case was not actually called for trial until a month later on May 21, 2013. 14 RP 3.

3. Pretrial Motions To Trial Judge.

On the first day of trial, during preliminary matters, the court ruled on the prosecution's motion concerning Dr. Oneal. 14 RP 56. Defense counsel submitted a memorandum which indicated that Dr. Oneal would opine that the defendant's statement to the police was not credible because his mental deficiencies had an effect "on the veracity, reliability, and overall circumstances the jury may consider when evaluating what weight to place on the statement." CP 79-141. However, in the attached declaration, defense counsel advised that Dr. Oneal's testimony would be offered concerning the defendant's capacity to answer questions on cross examination at trial. CP 83-84. The defense contention was that the statements to the police and statements that the defendant might make on cross examination were not believable because the defendant was susceptible to suggestion. 14 RP 47.

Defense counsel did not make an offer of proof regarding specific testimony to be elicited from Dr. Oneal about the police statement. 14 RP 47-48. In the defense memorandum, the defendant stated, "This doctor, when questioned regarding the interview of Mr. Clark by police, specifically noted that without a videotape of the interview, he could not assess whether Mr. Clark was voluntarily providing officers with accurate information, or whether he was merely responding to verbal and non-verbal clues taking place during the questioning." CP 89-90.

The only evidence in the record from Dr. Oneal about the police statement was from the competency hearing. Dr. Oneal testified that (1) he had hardly read the statement; (2) that it had little bearing on his evaluation; and (3) that "[the defendant] was able to communicate just fine with me, yes." 5 RP 93-94 and 103. No offer of proof was made regarding what Dr. Oneal would testify regarding the statement's truthfulness or lack thereof or of the defendant's susceptibility to suggestion or of specific police questioning techniques used during the police statement. 14 RP 48.

Not having an offer of proof regarding the content of Dr. Oneal's testimony, the trial court did review the defendant's police statement. 14 RP 54. After reviewing the statement, the court excluded Dr. Oneal's testimony. 14 RP 56.

4. Facts Related to Trial.

At the conclusion of preliminary matters, the defendant's case was tried to a jury. The burglary victim, Patricia Conine, testified that she was acquainted with the defendant through his mother, and that he had been to her apartment before. 15 RP 98-99. She described details of her apartment having been burglarized on April 19, 2010, while she was at work. 15 RP 100. When she returned home she found that the apartment had been broken into and things "were just upside down, like a tornado had just been through there." 15 RP 100. In addition to her apartment having been ransacked, Ms. Conine found that a number of items of personal property, including jewelry, had been stolen. 15 RP 103-05.

The defendant was identified as a suspect by a friend, Jared Stokes. Mr. Stokes testified that in April 2010, he saw the defendant with two other friends, that they bragged about having committed a "lick" and that the defendant showed off jewelry that they'd stolen. 16 RP 241-42.

The police investigation included forensic processing of the Conine apartment and the interview of the defendant. The forensic officer processed the apartment for latent fingerprints. 16 RP 155. From inside the apartment, a latent palm print was recovered from a television that had

been moved during the burglary. 16 RP 156. The palm print was identified as from the defendant's right palm area. 16 RP 158-59. 16 RP 190.

The police interview of the defendant took place on April 26, 2010. The detective, Robert Baker, contacted and interviewed the defendant at school. 16 RP 272. During the interview the defendant admitted having entered the Conine apartment through a window. 16 RP 276. He stated that he (1) opened the door for several accomplices, (2) then served as a lookout, and (3) that the only thing he personally took was a remote control. 16 RP 277-78.

The defendant called no witnesses and presented no evidence. After deliberations, the jury returned guilty verdicts on all counts. 18 RP 451.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR A SECOND COMPETENCY HEARING BECAUSE THERE WAS NO EVIDENCE OF A CHANGE IN THE DEFENDANT'S COMPETENCY.

RCW 10.77.050 provides that no person who is incompetent may be "tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." Furthermore if there is "reason to doubt" competency, the court on its own motion, or on the motion of any party,

shall appoint or request an expert "to evaluate and report upon the mental condition of the appellant." RCW 10.77.060(1). Incompetent defendants may not stand trial. This is a right protected by the due process clause of the Fourteenth Amendment and by the Washington Constitution. Wash. Const. Art. 1 § 3, *State v. Lord*, 117 Wn.2d 829, 822 P.2d 177 (1991).

The determination of whether to order a competency evaluation is within the trial court's discretion. *State v. Heddrick*, 166 Wn.2d 898, 903, 215 P.3d 201 (2009). Such determinations are reviewed for an abuse of discretion. *Id.* *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). Reviewing courts generally defer to the trial court's judgment on competency. *State v. Coley*, 180 Wn.2d 543, 551, 326 P.3d 702 (2014).

A trial court is not required to hold a formal hearing on competency unless a threshold determination is made that there is reason to doubt competency. *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). The court need not convene a hearing merely because a motion is filed or a request is made. *Id.* *Seattle v. Gordon*, 39 Wn. App. 437, 441, 693 P.2d 741 (1985). "[T]he motion must be supported by a factual basis. Only then will the court inquire to verify the facts." *State v. Lord*, 117 Wn.2d at 901.

The defense in *Lord* moved in writing for a competency evaluation and other relief on the eve of the penalty phase in a capital case. After hearing testimony about statements of defendant Lord that could arguably have been delusional, the trial court did not immediately order a competency hearing, but did rule that the defendant could be seen by state and defense mental health experts.

The mental health examinations did not take place. Defense counsel prevented them because arrangements for the defense expert were not able to be made. At the subsequent hearing, after colloquy with defense counsel, the trial court denied the request for a competency hearing for lack of "prima facie indicia for the Court to grant a full blown competency hearing." *State v. Lord*, 117 Wn.2d at 903. The Supreme Court affirmed the trial court's ruling in *Lord*, saying: "The threshold burden of establishing that there was reason to doubt Lord's competency was not met." *State v. Lord*, 117 Wn.2d at 903-04.

The threshold for a second competency hearing was not met in this case any more than it was met in *Lord*. Apart from statements offered by defendant's trial counsel during the colloquy, no evidence was produced to support the need for a new competency hearing. No updated information was offered from Dr. Oneal or Dr. Hendrickson. Defendant's counsel argued that there were reasons to doubt competency, but the information

she pointed to was contradicted by the deputy prosecutor and by the record from the parallel murder case. 10 RP 20-22. No testimony, declarations, or other evidence was offered to show a change in condition.

The lack of evidence supporting a new competency hearing was not surprising considering the record from the original competency hearing. Dr. Hendrickson evaluated the defendant's general intellectual capacity. 4 RP 55. He testified at the competency hearing that the defendant was moderately developmentally delayed but was "high mild" for adaptive functioning. 4 RP 50 He explained that developmentally delayed individuals are known to have adaptive abilities that make their functioning higher than one might expect given a low intelligence score. 4 RP 51-52. In the defendant's case, his functional ability was at the high end of the range. 4 RP 55.

The defendant's relatively high functional ability bore directly on his competency. Dr. Hendrickson concluded that the defendant was competent and that he would have the ability to participate in trial proceedings with ordinary assistance from his attorney. 5 RP 33-34. Such assistance could include written questions to be answered by the attorney when time permitted. 5 RP 37-38. Such accommodations "would be helpful for anybody, but certainly it would be worthwhile in his case." 5

RP 34. This is the same thing that other people deemed competent would do during a trial. 5 RP 38-39.

The trial court rightly considered that a claim of mental incompetence was being advanced in this case when it not had been advanced in the contemporaneous murder prosecution. 10 RP 22-23. No evidence or declarations from the murder case were brought before the court to support the need for a second competency hearing. The presiding court in this case acknowledged that competency could be raised at any time but the court also reasonably concluded that there was nothing to show that defendant's mental health had deteriorated. 12 RP 12. The trial court can hardly have abused its discretion when no evidence was produced and when the defendant's counsel's information was contradicted by the record in a contemporary proceeding of a very serious matter. The trial court's ruling should be affirmed.

2. THE TRIAL COURT PROPERLY ASSIGNED THE DEFENDANT'S CASE FOR TRIAL WHERE A PROPOSED COMMUNICATIONS SPECIALIST HAD NOT BEEN CONTACTED OR RETAINED AND SUBSEQUENTLY THE CASE WAS NOT ACTUALLY CALLED FOR TRIAL FOR NEARLY A MONTH.

The decision to grant or deny a continuance motion is generally left to the trial court's discretion. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 116 (2004)(denial of a continuance for the purpose of hiring a

child competency expert). Such decisions are reviewed for an abuse of discretion and will not be reversed "absent a showing of manifest abuse of discretion". *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984). The denial of a defense request for a continuance will be disturbed on appeal only on a showing "that the defendant was prejudiced or that the result of the trial would likely have been different had the motion been granted." *State v. Kelly*, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982).

In this case, defense counsel requested delay of the trial on April 23, 2013, for the purpose of contacting a communication specialist, Ted Judd. 12 RP 20. At that time, the defendant had not contacted Mr. Judd. 12 RP 20. A continuance was denied by the presiding judge but no ruling was made concerning Mr. Judd. 12 RP 22. Subsequently, nearly a month elapsed before the case was assigned for trial. 12 RP 22. 14 RP 3. The record does not disclose any further discussion concerning the availability of Mr. Judd. No motion was filed seeking funds to hire him. No statement was made concerning his availability or unavailability to assist during the trial. The trial court was simply not called upon to rule concerning the request for a communication specialist.

Defendant argues that his motion for accommodation in the form of a communications specialist was improperly denied. Brief of Appellant, p.1. The record does not support this argument. The only

motion denied was delay of the start of trial. 12 RP 22. No motion for any form of accommodation, including the communications specialist, was denied. 12 RP 15, 22.

Generally, a claim of error not brought before the trial court will not be entertained by an appellate court absent an error of constitutional magnitude that had "practical and identifiable consequences at trial." *State v. Kalebaugh*, 179 Wn. App. 414, 421, 318 P.3d 288 (2014)(alleged misstatement in trial court's oral instruction). In the absence of any further request or motion for accommodation³, it follows that this Court should not entertain this claim of error. The trial court's ruling should be affirmed.

3. THE TRIAL COURT'S RULING EXCLUDING EXPERT TESTIMONY SHOULD BE AFFIRMED AS NO ADEQUATE OFFER OF PROOF WAS MADE AND THE TESTIMONY WAS NOT SHOWN TO BE HELPFUL TO THE JURY.

A claim of error on an evidentiary ruling excluding evidence requires an offer of proof. ER 103(a)(2). "An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it

³ The defendant did not seek accommodation pursuant to GR 33. Any claim of error predicated on GR 33 would likewise be error not brought before the trial court.

creates a record adequate for review." *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). "It is the duty of a party offering evidence 'to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling.'" *Id.* at 539, quoting *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978). The substance of an offer of proof need not be made known to the trial court in detail but may be made apparent from questions that were asked or context. *In re Detention of McGary*, 175 Wn. App. 328, 337, 306 P.3d 1005 (2013).

In this case, the defendant argues that he should have been permitted to call Dr. Oneal to testify about the credibility of the defendant's statement to the police. Assuming for the purpose of argument that such testimony could be deemed admissible under ER 702, the defense attorney did not make clear to the trial court what Dr. Oneal would have testified about on that subject. Review of the defense trial memorandum and declaration shows that Dr. Oneal was prepared to testify about the defendant's ability to handle cross examination. CP 83-84. This is very different from testimony about the defendant's statements to the police.

The defense memorandum did not provide specific information about the proposed testimony about the defendant's statements to the police. Dr. Oneal had testified at the competency hearing that those statements were of little consequence to his evaluation and that he was unsure whether he had even read them. 5 RP 93-94. Accordingly, it cannot be said that the defendant made it clear what he was offering and why the testimony would be admissible over the state's objection. The claimed error was not preserved in this case through an adequate offer of proof.

Even if the error could be deemed preserved, the trial court's ruling was nevertheless correct. A trial court has considerable discretion regarding the admissibility of both lay and expert testimony. *State v. Stumpf*, 64 Wn. App. 522, 527, 827 P.2d 294 (1992). A trial court's ruling concerning admissibility of such evidence is reviewed for an abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010). Abuse of discretion occurs when a trial court's decision to admit or not admit evidence is “manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

There is no question that defendant had a constitutional right to present a defense. United States Constitution, Amendment VI.

Washington Constitution, Article I, §22. That right does not however include "introduction of otherwise inadmissible evidence." *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). *State v. Mee Hui Kim*, 134 Wn. App. 27, 41, 139 P.3d 354 (2006), quoting *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). The right to defend means simply that "[a] defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible." *State v. Rafay*, 168 Wn. App. 734, 794-95, 285 P.3d 83 (2012), quoting *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

The defendant could not offer expert testimony on his own credibility at trial. *State v. Green*, ___ Wn. App. ___, 328 P.3d 988, 995 (2014), citing *State v. Ciskie*, 110 Wn.2d 263, 280, 751 P.2d 1165 (1988), and *State v. Hanson*, 58 Wn. App. 504, 508, 793 P.2d 1001 (1990). This was what defense counsel's declaration proposed when Dr. Oneal was said to be prepared to testify about the defendant's testimony during cross examination. Now on appeal the argument is put forth that Dr. Oneal actually would have testified about the defendant's police statements. The expert was not asked to evaluate the defendant's mental capacity at the time the police statements in question were made. 14 RP 48-49. Dr. Oneal never authored an opinion regarding those statements, so no

information was before the court to show the evidence would be admissible. CP 342-43. Under these circumstances, with no supportive evidence having been brought forward, the trial court ruled that the testimony would not be admitted. 14 RP 57. That ruling should not be deemed “manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Magers*, 164 Wn.2d at 181.

4. THE COURT'S SENTENCE FOR COUNTS TWO AND THREE IS NOT AMBIGUOUS AND DOES NOT INCLUDE PROBATION.

At sentencing the trial court unambiguously imposed 364 days incarceration for each of the two misdemeanor counts with none suspended. 20 RP 469-70. The time was ordered to run concurrent with the sentence imposed in the murder case. 20 RP 70.

The written judgment is consistent with the oral ruling. The misdemeanor judgment states that “[The defendant] shall be punished by confinement in the Pierce County Jail for a term of not more than 364 days [with] 0 days suspended.” CP 662. A separate conditions form included an option for the defendant to be supervised on probation by a “probation officer” or “the Court”. CP 664. Those options were not checked off. CP 664. Since probation was not ordered, additional optional language in the form, concerning “[r]evocation of this probation”, did not apply to the defendant. CP 665. Considering the oral sentence and the written

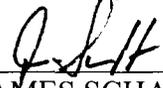
judgment, it cannot be said that the defendant was ordered to serve any time on probation for counts two and three. The court's judgment as to counts two and three should therefore be affirmed.

D. CONCLUSION.

None of the defendant's assignments of error are well taken. For the foregoing reasons, the defendant's convictions should be affirmed.

DATED: September 30, 2014.

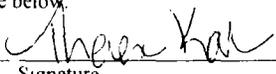
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Certificate of Service:

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

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PIERCE COUNTY PROSECUTOR

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Court of Appeals Case Number: 45203-1

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