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STATE OF WASHINGTON
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No. 43172-6-II

SUPREME COURT OF THE STATE OF WASHINGTON

REX POPE

Petitioner,

v.

STATE OF WASHINGTON

Respondent.

FILED
JAN 21 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
[Signature]

MOTION FOR DISCRETIONARY REVIEW, RAP 13.1(a)

REX POPE

Printed Name

DOC# 942200, Unit S-E

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The trial court erred when Mr. Pope's convictions were entered in violation of his Sixth and Fourteenth Amendment rights to due process and his Constitutional right to present a defense.

Assignment of Error 2

The trial court erred when Mr. Pope was deprived of trial attorney to obtain medical records, consult with experts regarding Mr. Pope's Parkinson's disease.

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Assignment of Error 3

The trial court erred by denying Mr. Pope's motion for continuance so his attorney could obtain medical records and consult with experts regarding Mr. Pope's Parkinson's disease.

Assignment of Error 4

The trial court commented on matters of fact by instructing jurors to disregard Mr. Pope's physical symptoms which were visible to them throughout trial.

ISSUES PERTAINING TO ASSIGNMENT OF ERRORS

1. Did the trial judge violate Mr. Pope's Sixth and Fourteenth Amendment rights to due process and to present a defense by unreasonably denying his requests for a continuance?

The constitution guarantees an accused person a meaningful opportunity to present his or her defense, Here, the trial judge refused Mr. Pope's request for a continuance to allow his attorney to obtain medical records, consult with experts, and secure the attendance of witnesses at trial.

2. Was Mr. Pope denied his sixth and Fourteenth Amendment right to effective assistance of counsel?

The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to adequately investigate any potential defense prior to trial. Defense counsel failed to obtain any documentation of any kind that Mr. Pope had "advanced Parkinson's disease".

3. Did the trial judge's comment violate Mr. Pope's rights under Article IV, Section 16?

A trial judge is absolutely prohibited from commenting on matters of fact, and any judicial comment is presumed to be prejudicial. In this case, the judge instructed jurors to disregard visible symptoms of Mr. Pope's illness.

B. STATEMENT OF THE CASE

Forty-six-year-old Rex Pope suffers from advanced Parkinson's disease. He experiences pain, seizures, and muscle spasms; his movements are jerky and stiff, he has uncontrollable tremors, and his balance is unstable. These symptoms are most severe on his right side. Motion for new trial(exhibits A3,A9,A13),Supp.CP. In addition he walks with what is referred to as a "Parkinsonian gait." Motion for New Trial (exhibit A9), Supp. CP.

In September of 2011, he was charged with second-degree assault and attempted theft of a motor vehicle. CP 1-4. The prosecution alledged that he had punched a man named Laverne Hallsted while trying to steal his pick-up truck. Cp 1-4. Trial was set for November 8,2011. Minutes (9/12/11), Supp. CP.

Mr. Pope asked his attorney to obtain medical records and expert testimony regarding his physical abilities, with the goal of showing the jury that he could not have inflicted injuries and escaped in the manner alledged by Mr. Hallsted.
RP(12/6/11am)4;RP(12/6/11pm)

12. At a "trial call" on November 8, the court granted a

continuance to December 6th. Minutes(11/8/11),Supp. CP; See also RP(12/6/11am)2.

By December 6th, defense counsel had still not been able to obtain medical records or speak with Mr.Popes's medical providers. He again he asked that the trial be continued. The court denied his request, and the trial began that day with argument and rulings on preliminary matters. RP(12/6/11am) 26;RP(12/6/11pm) 4-9,13-46.

D. ARGUMENT

I. MR.POPE WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

A. Standard of Review

A trial court's ruling denying a motion for continuance is ordinarily reviewed for abuse of discretion; however, this discretion is subject to the requirements of the constitution. See, e.g., State v. Iniguez, 167 Wash.2d 273, 280-81,217 P.3d 768(2009). Accordingly, where the appellant makes a constitutional argument regarding the denial of a continuance, review is de novo. Id.

Constitutional error is presumed to be prejudicial,and the state bears the burden of proving harmlessness beyond a reasonable doubt. State v. Watt, 160 Wash.2d 626,635,160 P.3d 640 (2007). Constitutional error is harmless only if it is "trivial,or merely academic,and (is) not prejudicial to the substantial rights of the party assigning it,and in no way affected the final outcome of the case." State v. Koslowski,166

Wash.2d 409,433,209 P.3d 479(2009)(Sanders,J.,concurring)(quoting State v. Britton,27 Wash.2d 336,341,178 P.2d 341 (1947)); see also City of Bellevue v. Lorang,140 Wash.2d 19,32,992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Burke,163 Wash.2d 204,222,181 P.3d 1 (2008).

B. Under the Fourteenth Amendment's due process clause, Mr. Pope was guaranteed a meaningful opportunity to present his defense.

A state may not "deprive any person of life,liberty,or property,without due process of law..." U.S. Const. Amend. XIV. The due process clause (along with the Sixth Amendment right to compulsory process) guarantees criminal defendants a meaningful opportunity to present a complete defense. Holmes v. South Carolina,547 U.S. 319,324,126 S. Ct 1727,164 L.Ed.2d 503 (2006). An accused person must be allowed to present his version of the facts so that the fact-finder may decide where the truth lies. State v. Maupin,128 Wash.2d 918,924,913 P.2d 808 (1996) Washington v. Texas,338 U.S. 14,19,87 S.Ct. 1920,18 L.Ed.2d 1019 (1967); Chambers v. Mississippi,410 U.S. 284,294-95,302,93 S.Ct. 1038,35 L.Ed.2d 297 (1973).

Trial continuances are governed by CrR 3.3. Under that rule,the court "may continue the trial date to a specified date

when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). Failure to grant a continuance may deprive a defendant of a fair trial. State v. Purdom, 105 Wash.2d 745, 725 P.2d 622 (1986); see also United States v. Flynt, 756 F.2d 1352 (9th Cir.1985). furthermore,

While efficient and expeditious administration is, of course, a most worth-while objective, the defendant's rights must not be overlooked in the process through overemphasis upon efficiency and conservation of the time of the court. State v. Watson, 69 Wash.2d 645, 651, 419 P.2d 789 (1966).

Factors relevant to the trial court's decision on a continuance motion include the moving party's diligence, due process considerations, the need for the orderly procedure, the possible impact on the trial, whether prior continuances have been granted, and whether the purpose of the motion was to delay the proceedings. State v. Bonisisio, 92 Wash.App. 783, 964 P.2d 1222 (1998).

For example, in Flynt, the defendant sought a continuance to enable him to consult with a psychiatrist in anticipation of presenting a diminished capacity defense to a contempt charge. Flynt, at 1356. The trial court refused the request, and the case proceeded to hearing without expert testimony. Flynt, at 1356-1357. The 9th Circuit Court of Appeals reversed the convictions, finding that

Flynt's only defense...was that he lacked the requisite mental capacity. The district court's denial of a continuance...effectively foreclosed flynt from presenting a defense.

Flynt, at 1358.

C. The trial court infringed Mr. Pope's constitutional right to present a defense by denying his request for a continuance.

The trial court's refusal to grant a continuance prevented Mr. Pope from presenting evidence about his Parkinson's disease. The factors outlined above weighed in favor of granting the continuance; accordingly, the judge should have postponed the trial.

Diligence

The first step in the investigation was to obtain Mr. Pope's medical records; counsel attempted to contact medical providers in advance of the trial in order to acquire Mr. Pope's records.

Because the trial court denied Mr. Pope's continuance request, the trial concluded before the records were received by defense counsel. Motion to Reconsider, Supp. CP. as can be seen, the records contained information that would have permitted defense counsel to consult with an expert-either one of Mr. Popes treating physicians or an independant doctor-to testify about Mr. Pope's physical inability to punch someone with his right hand. Motion to Reconsider, Exhibits, Supp. CP.

Due process

Mr. Pope's planned defense hinged on undermining Hallsted's testimony. Hallsted claimed that his assailant punched him with his right hand with sufficient force to give him a bloody nose. RP(12/8/11) 99-100,120,131. Without testimony about the weakness in his right arm and the tremors from which he suffered, Mr. Pope was left unable to present his defense(except possibly through his own self-serving testimony). Accordingly, due process considerations supported the requested postponement.

Impact on the trial

The evidence sought would have had a significant impact on the trial. If defense counsel had been granted the time to obtain Mr. Pope's medical records and consult with an expert, he would have been able to present testimony undermining Hallsted's version of events. Because Hallsted provided the only evidence outlining the interaction between himself and Mr. Pope, his testimony was critical to the prosecution.

Furthermore, Mr. Pope's decision not to testify was impacted by lack of medical evidence explaining his condition to the jury. RP(12/6/11pm)33. Had the continuance been granted and expert testimony secured, Mr. Pope may well have provided the jury with his version of events.

II. THE TRIAL JUDGE COMMENTED ON MATTERS OF FACT, IN VIOLATION OF WASH. CONST. ARTICLE IV, SECTION 16.

A. Standard of Review

Alleged constitutional violations are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(A)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A comment on the evidence "invades a fundamental right" and may be challenged for the first time on review under RAP 2.5(a)(3). *State v. Becker*, 132 Wash.2d 54, 64 935 P.2d 1321 (1997).

A judicial comment is presumed prejudicial and is only harmless if the record affirmatively shows no prejudice could have resulted. *State v. Levy*, 156 Wash.2d 709, 725, 132 P.3d 1076 (2006). This is a higher standard than that normally applied to constitutional errors. *Id.*

B. The trial judge improperly commented on matters of fact by instructing jurors to disregard Mr. Pope's visible symptoms.

Under Article IV, Section 16 of the Washington Constitution, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare law." Wash. Const. Article IV, Section 16, In this case, the trial judge improperly commented on matters of fact, in violation of Article IV, Section 16.

In particular, the judge instructed jurors to disregard

Mr. Pope's physical symptoms-visible throughout the trial-and thus prevented Mr. Pope from arguing the central point of his defense (that he could not have inflicted the injury in the manner claimed by Hallsted). RP (12/7/11 voir dire) 10. This was error. Although the prosecution is prohibited from using an accused person's off-the-stand demeanor as evidence of guilt, nothing prevents the defense from arguing as evidence of guilt, nothing prevents the defense from arguing that the defendant's visible physical characteristics are inconsistent with the prosecution's version of events.

In this case, jurors could see that Mr. Pope suffered from uncontrollable tremors. They should have been allowed to consider that fact when evaluating Hallsted's claim that he received his bloody nose when Mr. Pope punched him with his right hand. The court's instruction-that "(t)his is not a fact in the case"-prohibited jurors from considering Mr. Pope's medical condition during their deliberations. The court's remark was an improper comment on the evidence, in violation of Wash. Article IV, Section 16.

The error is presumed prejudicial, unless the record affirmatively shows that no prejudice resulted. Levy, at 725. The record is devoid of any affirmative indication that the error was harmless under the Levy test. Accordingly, Mr. Pope's convictions must be reversed and the case remanded for a new trial. Id.

C. The error was not invited by counsel.

Under the invited error doctrine, "a party may not set up error at trial and then complain about the error on appeal." State v. Korum, 157 Wash. 2d 614, 646, 141 P.3d 13 (2006) (emphasis added). The invited error doctrine does not bar review in this case because Mr. Pope did not "set up" the error.

When defense counsel asked that the jury be informed about Mr. Pope's symptoms, the prosecutor said he "would also like for the jury to be instructed that they should know this, but fact is not evidence to be used by them in deliberations." RP(12/6/11pm)41. He went on to suggest "that it would be appropriate to tell the jury when you introduce the Defendant but that the fact that he suffers from Parkinson's is not evidence to be used in your deliberations." RP(12/6/11)42.

Defense counsel indicated that he would have no objections to the court addressing that or making that introduction, if the court feels it's more appropriate coming from the bench than from myself. You know, I certainly defer to the court on that idea.

RP(12/6/11pm)42.

Defense counsel did not propose any language regarding how the jury should treat Mr. Pope's symptoms. Accordingly, it cannot be said that Mr. Pope "set up" or invited the error. Korum. at 646.

III. MR. POPE WAS DENIED OF HIS SIXTH AND FOURTEENTH AMENDMENT

RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

B. The sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth and Fourteenth Amendment provides that "(i)n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel foer his defense." U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S.335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799(1963). Likewise, Article I, Section 22 of the Washington Constitution provides, "In prosecutions, the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. Article I, Section 22. The right to counsel is "one of the most fundamental and cherished rights guaranteed by the Constitution." *United States v. Salemo*, 61 F.3d 214.221-222 (3rd Cir.1995).

An appellant claiming ineffective assistance must satisfy the familiar two-part Strickland...test for ineffective assistance claims—first, objectively unreasonable performance, and second, prejudice to the defendant." *State v. Sandoval*. 171 Wash. 2d 163, 169, 249 P.3d 1015(2011)(citing *Strickland v.*

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); see also *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004).

The presumption of adequate performance is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of...prior convictions has no support in the record."). Finally, "(a)n uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all." *Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008).

These are guidelines only, not "mechanical rules." *Strickland*, at 696. Instead, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id.* In every case, the court must consider whether the result is unreliable because of a breakdown in the adversarial process. *Id.*

C. Defense counsel provided ineffective assistance by failing to assist his client in making an informed decision about whether to accept a plea offer or go to trial.

Among other things, defense counsel in a criminal case should confer with the accused person without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. *United States v. DeCoster*, 487

F.2d 1197,1203(D.C. Cir.1973);see also RPC 1.4.

In addition, counsel must undertake a reasonable decision that particular investigations are necessary). *Duncan v. Duncan v. Ornoski*, 528 F.3d 1222,1234(9th Cir.2008). Any decision not to investigate must be directly assessed for reasonableness. Furthermore, strategic choices made after less than complete investigation are only reasonable to the extent that professional judgement supports the limitations on investigation. *Foust v. Houk*, 655 F.3d 524,538 (6th Cir. 2011).

Finally, counsel must assist the defendant "in making an informed decision as to whether to plead guilty or proceed to trial." A.N.J., at 111-12. Counsel must, "at the very least... reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." *Id.*

In this case, counsel failed to adequately investigate Mr. Pope's case. Although he made some attempt to obtain them, counsel did not review Mr. Pope's medical records prior to trial. In fact, defense counsel did not seek authorization for public funds to obtain copies of the records until after Mr. Pope was convicted. See Motion for Funds for Copies of Health Care Records. Supp. CP. Nor did he consult with Mr. Pope's treating physicians, to determine the extent of Mr. Pope's disability. Nor did counsel consult with experts, to determine whether or nor a person with Mr. Pope's condition could punch someone hard enough to cause a bloody nose. RP (12/6/11 am)2-6;RP (12/6/11

pm) 4-43.

In addition, Mr. Pope repeatedly mentioned the 12 witnesses he wished to testify on his behalf, yet counsel did not make any effort to secure their attendance at trial. See Motion for New Trial, pp. 6-7. This itself might constitute deficient performance. See, e.g., *State v. Visitacion*, 55 Wash. App. 166, 174, 776 P.2d 986 (1989). RP.(12/7/11 voir dire) 5; Motion to Reconsider, Supp. CP. at least one of them—Mr. Pope's former employer, Clayton Longacres—would have been able to testify about the extent of Mr. Pope's disability and its everyday impact on his physical capabilities. See Motion for New Trial, p. 11.

Having failed to adequately investigate the case, counsel was in no position to properly assess Mr. Pope's chances at trial, to advise him regarding any plea offers, or to represent him at trial. A.N.J., *supra*; Ornoski, *supra*. Under these circumstances, Mr. Pope was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. His convictions must be reversed and the case remanded for a new trial. A.N.J., *supra*.

CONCLUSION

For the foregoing reasons, Mr. Pope's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on January 17, 2014


Rex Pope
Appellant.

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

STATE OF WASHINGTON,)
)
 Plaintiff,)
 Vs.)
)
 REX LEE POPE)
)
 Defendant.)
 STATE OF WASHINGTON)
)
 COUNTY OF FRANKLIN)

NO. 11-1-00729-2

**DEFENDANT'S MOTION
FOR RECONSIDERATION**

I, Rex Pope, after being first duly sworn under the oath deposes and says:

1. That I am over 18 years of age and competent to be a witness herein.
2. That I am the defendant in the above captioned matter and make this affidavit in that capacity.
3. That from the beginning of my case, I requested from my court-appointed counsel to look into my medical records for the verification of my incapacity that medical proven would prevent me from performing the acts that constitute the crime(s) for which I was charged in the above-captioned matter.

Pope

4. That on or about the 6th day of December, 20011, on the record, my court appointed counsel asked me to sign the Medical Release of Information Authorization.'
 5. That after trial, I received copies of some of my medical records and immediately filed a Motion for New Trial and attached said medical records.
 6. That thereafter, I received more medical records after due diligence and I am filing this Motion for Reconsideration of the Denial of my Motion For a New Trial.
 7. That on said medical records crystal clear demonstrates that I am physically incapable of doing the things that constitute the essential elements of the crime for which I was (unknowingly) convicted of.
 8. That I ask this court to grant me a new trial.
 9. That numerous constitutional rights were materially affected.
- Further efficient says naught.


REX LEE POPE

CASE# 11-1-00729-2

DECLARATION OF SERVICE

IN ACCORDANCE WITH 28 USC § 1746, I declare under the penalty of perjury that on this date, I mailed the following documents:

- A. Motion for Reconsideration with Exhibits/Attachments;
- B. Affidavit of Rex Lee Pope
- C. Notice of Motion
- D. Declaration of Service; and
- E. Cover Letter

Directed to: *Clemk*

Kitsap County Superior Court
614 Division St.
Port Orchard, WA 98366

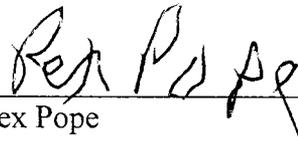
and served a copy to:

Kitsap County Prosecutor

614 Division St.
Port Orchard, WA 98366

Attorney at Law
Jodi Backlund
P.O. Box 6490
Olympia, WA 98504

DATED THIS 9 day of July, 2012.



Rex Pope

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

STATE OF WASHINGTON,)	NO. 11-1-00729-2
)	
Plaintiff,)	DEFENDANT'S MOTION
vs.)	FOR RECONSIDERATION
)	
REX LEE POPE,)	
)	
<u>Defendant.</u>)	

COMES NOW Rex Lee Pope, the defendant, **In Propria Persona**, and hereby moves this Honorable Court to reconsider its oral decision denying defendant's motion for new trial dated March 2, 2012.

Originally, defendant argued that he shall be given a new trial based on the additional new evidence he had just received that would have assisted on his defense, and would have changed the outcome of the trial and appended the evidence to his motion, to wit: Medical Records.

The defendant attempted to demonstrate that the medical condition clearly described in the appended medical records, would make it "physically impossible" for the defendant to throw a punch, an essential element of the crime charged.

The prosecutor's response to defendant's motion argued that: "The state's review of the records does not reveal any opinion about defendant throwing punches." Response at 3, 1st Para-

graph And that: “Nevertheless, the rule requires under CrR 7.5 (a) (3) that the defendant could not have discovered with reasonable diligence and produce at the trial.” Response at 3, second paragraph, first part And further argues that: “In the trial the state offered to enter into a stipulation that the defendant suffered from Parkinson’s Disease...” And that: “The existence of the disease was not “newly discovered” after December 8, 2011.”

The state was, is right about the fact that the Parkinson’s Disease was not newly discovered evidence, based on the obvious appearance of the defendant.

The “newly discovered evidence” in the present case, are the medical reports that describe the defendant’s incapacitation from throwing a punch. Not the disease, but the obvious incapacitation that according to the Medical Records, the defendant is not physically able to throw a punch. To commit the crime for which he was prosecuted and wrongfully convicted due to the lack of these newly discovered evidence. See Defendant’s Affidavit.

CrR 7.5(a) states:

“The court on motion of a defendant may grant a new trial for anyone of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected.”

Subsection (3) states:

“Newly discovered material evidence for the defendant could not have discovered with reasonable diligence and produced at the trial.” State v. Larsen 160 Wn. App. 577, 249 P.3d 669 (2011).

In State v. Larsen, 160 Wn. App. 577, 249 P.3d 669 (2011), the court held that: “Defendant’s motion for a new trial under Cr . 7.5(a)(3) on the basis of newly discovered evidence was properly denied because the alleged new evidence was known to defendant prior to trial and the witness who could have testified to such evidence was availa-

ble but was held in the local jail at the time of trial.”

In the present case, the “newly discovered evidence” was not known to the defendant prior to trial. It was known to the defendant that the medical records existed, however, the contents of said records were not known to the defendant, and therefore, the grounds for the defense in asking the trial court for a continuance of the trial date, which was, unfortunately, denied.

Therefore, this Honorable Court, in the interest of justice and fairness, shall reconsider its previous decision in denying defendant’s motion for new trial, and review defendant’s affidavit and medical records appended herein, and grant defendant’s motion for new trial.

It shall be noted, that the defendant, pursuant to CrR 3.3(f)(2)1 timely moved the court for a continuance for the “sole” purpose to obtain these newly discovered evidence, and said continuance was denied, preventing defendant to have discovered with reasonable diligence and produced at trial. State v. Larsen, 160 Wn. App. 577, 249 P.3d 669 (2011); State v. Guloy, 104 Wn. 2d 412 (1985), cert. denied, 475 U.S. 1020, 106 s. ct 1208, 89 L. Ed. 2d 321 (1986); State v. Turner, 16 Wn. App. 292 (1976); State v. Harp, 13 Wn. App. 273 (1975), State v. Williams, 84 Wn. 2d. 853 (1075); State v. Watkins, 71 Wn. App. 164 (1993).

Both parties knew of the Parkinson’s Disease, but nobody knew of the contents of the Medical Records that crystal clear demonstrates that the defendant was, and is “physically incapacitated” to throw a punch, to run, to do things that would constitute the facts and elements of the crime charged.

In the present case, on the 6th day of December of 2011, Mr. McMurdo, defendant's counsel, had the defendant sign a Medical Release of Information
Mr. McMurdo:

“...I can't speak for the speed to which outside parties respond to Defense's requests for, please sign this waiver so that we can gather medical (December 6th, 2011 VRP at 10) records for your patient, my client.” VRP at 11 Exhibit “A”

And on December 16th, 2011, the Peninsula Community Health Services faxed the first newly discovered evidence to defendant's counsel, Mr. McMurdo, after with due diligence defendant's counsel formally requested on about not later than December 6th, 2011. Exhibit “B”.

The speedy trial rule grants a defendant statutory rights extending beyond the constitutional speedy trial right. State v. Berry, 31 Wn. App. 408 (1982).

And a defendant's request for a continuance tolls the speedy trial clock. State v. Greene, 49 Wn. App. (1987).

In State v. Turner, 16 Wn. App. 292 (1976), the court held that: That granting of a continuance rests with the discretion of the trial court, which will not be disturbed without a showing that the defendant was prejudiced, or that the result of the trial would have been different.”

In State v. Williams, 84 Wn. 2d. 853 (1975), the court held that” “Denial of a continuance to an accused which under the circumstance of the case, results in depriving him of due process and a fair trial is an abuse of the trial court's discretion.”

Therefore, the forgoing circumstances (i.e., denial of the continuance to obtain the medical records that would have assisted the defendant in showing that he was physically

incapacitated to do things that would constitute the facts and elements of the crime, *to present a defense;*
to prepare a successful defense...) were grounds for ^{the} continuance, especially when the
continuance would have granted the defendant a fair trial, and therefore, in the event this
Honorable Court would not grant defendant's motion for a new trial, and the opportunity
to demonstrate his innocence, the appellate court will, beyond doubt, held that is
Honorable Court abused its discretion in not granting the continuance, and would reverse
the defendant's conviction and the state would lose face in the eyes of the public.

CrR 7.5 (a)(3) crystal clear mandates a new trial when it affirmatively appears
that a substantial right of the defendant was materially affected.
*The foregoing facts crystal clear demonstrates that not only one (1), but several rights
(i.e., fair trial, due process, effective representation...) of the defendant were materially affected.*
And therefore, this Honorable Court, in the interest of justice, must grant

defendant's motion for a new trial, which would allow the state to show the public at
large, that Justice does work.

The state in its response argued that: "While the defendant alleges that his
evidence is to be found within the attached medical records he has appended, it is not
clear how the evidence that is provided "proves" that is was physically impossible for
him to throw a punch. The records do not, in and of themselves, address that issue."

And on December 6th, 2011 the state argued in court:

"The defendant would have to describe how it affects his ability to commit the acts that
are ~~described~~ ^{described} in the police reports and by the witnesses in this case." See Exhibit "A" page 12

Whether the original newly discoverable evidence does not address the issue of
whether defendant could have proved with the medical records that he was "physically
impossible" for him to throw a punch, is for this Honorable Court to verify by a close
review at said medical records.

Therefore defendant would direct the courts attention to each and every report originally attached under section Chronic Problems. And further directs this court's attention to a page of the June 16th, 2010's medical report.

On said page under Review of Systems section and subsection psychological states: ".....sleep disturbances awakens due to right hand stiffness.." See Exhibit C"

On another page under the section of Neurological and subsection of Coordination states: "Tremor involving the right wrist and forearm, at times a nosynchronous tremor is seen in the right leg." And under subsection Gait states: "Right arm is held flexed at the elbow with continued tremor as noted above." See Exhibit D

At trial the so-called victim, under penalty of perjury, testified that the defendant had struck him with his right hand (punched) and that the defendant ran so fast that he was not able to catch him.

The foregoing that can be verified by the medical records attached to Motion For New Trial, and exhibit B and D attached herein crystal clear demonstrates that the defendant would have been able to prove that it was physically impossible for him to throw a punch.

In addition to the foregoing the defendant with due diligence has received additional evidence about the physical incapacitation that he suffers that would make him physically incapable to do the things that would constitute the facts and element of the crime charged herein. See Attachment 1

It shall be noted that the defendant has the option to bring these newly discoverable evidence pursuant to CrR 7.8, however, in the interest of saving the court's

time the defendant wisely and properly chose to simply move the court to reconsider its March 2nd, 2012's decision.

Due process of law is jeopardized if new evidence sufficient to grant a new trial become available too late to be submitted to the new trial court. State v. Christie, 5 Wn. App. 395 (1971).

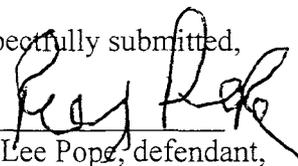
The forgoing crystal clearly demonstrates that due to the court's denial of the timely request for a continuance, substantial justice had not been done. CrR 7.5(a) (8).

In State v. Hobbs, 13 Wn. App. 866, review denial, 85 Wn. 2d 1019 (1975), the court held that: "A new trial may be granted on the basis of newly discovered evidence only when such evidence will probably change the outcome, was discovered since trial, could not have been discovered earlier by exercising due diligence, is material, and is not merely cumulative or impeaching."

In the present, case the medical records demonstrate that the defendant is physically incapacitated to perform the things that constitute the facts of the crime charged and therefore these newly discovered evidence will change the outcome, had been discovered since trial, and therefore, this Honorable Court must grant the motion, in the interest of justice and fairness.

DATED THIS 5th day of July, 2012

Respectfully submitted,


Rex Lee Pope, defendant,
In Propria Persona

APPENDIX
MEDICAL RECORDS

EX B

Commed Healthcare Management, Inc. Authorization for Release of Confidential Information

1179-0038

Inmate Name (Last, First, MI): Pope, Rex Lee Date of Birth: 3.27.66 Inmate ID Number: 40518663 Social Security No: 07-58-3550 Covering Records for Period of (Dates): 2/2011 to Present

I, do hereby authorize PCF Bremerton Detention Facility, and/or any hospital to which I am admitted to release to you my confidential health information...

In the event of hospitalization or utilization review company, acts as an agent of Commed Healthcare Management, Inc. and is entitled to request information related to the patient noted above.

Information to be released:

DEC 15 2011

- Complete Health Record 2/2011 - present
Admission Summary Report
Operative Summary Report
Consultations/Special Report Studies
Immunization History
Drug Treatment and Counseling Reports
History and Physical Examination
Day Treatment Records
Dental Treatment History
Discharge Summary Report
X-ray Reports
Laboratory Reports
Psychiatric Summary Report
Psychological Testing
Social Work Summary
Pharmacy Medication History

Please include mental health as well

Facility: Kitsap County Jail, Clinician Name: Neal Randleman, MD, Title: Medical Director ARNP, Telephone No: 360-337-7115, Fax: No 360-337-7203

Purpose of this disclosure, name of individual(s) to whom the information is being disclosed, and the date of the disclosure.

This authorization will expire one (1) year from the authorizing date indicated below unless the specific expiration condition is hereby named. The authorization covers only treatment for the dates specified above.

I, the undersigned, have read the above and authorize the staff of the disclosing facility named to disclose such information as herein described. I understand that this authorization may be withdrawn by me in writing at any time except to the extent that action has been taken in reliance upon it.

All information requested is recognized as confidential and will be used only to ensure prompt and appropriate treatment for this named inmate.

Inmate Signature: Rex Pope Date: 12.16.11
Witness Signature: [Signature] Title: RN Date: 12.16.11 Time: 1000

Prohibition on Re-disclosure: This information has been disclosed to you from records protected by Federal confidentiality rules (42 CFR Part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 CFR Part 2.

8



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

OFFENDER I.D. DATA: POPE, REX
(Name, DOC#, DOB) 942200

REQUEST TO USE NON-FORMULARY DRUG

DO NOT THIN

PROVIDERS

This form should be initiated when it is medically necessary to prescribe a non-formulary drug.
FILL OUT ELECTRONICALLY AND E-MAIL TO CHAIR OF P & T COMMITTEE.

Facility: AHCC

Generic name: ROPINOROLE

Proprietary name(s) (if a particular brand is being requested): REQUIP

Dosage form, strength, and frequency requested: TITRATION: 0.25MG X 7 THEN 0.5MG X7 THEN 0.75MG X7 THEN 1.0MG CONTINUED

Anticipated length of treatment: INDEFINITE

Diagnosis(es) relevant to this request: ADVANCED PARKINSON'S DISEASE

Justification for this request including, but not limited to, reasons:

- 1) Why comparable drugs in Formulary, if applicable, will not suffice: HISTORY OF ADVERSE REACTION TO LEVODOPA, NO EFFECT FROM AMANTADINE AND BENEDRYL. SPECIALIST CONSULT AND ATTACHED ARTICLE RECOMMEND ROPINOROLE.
- 2) Previous unsuccessful therapy including Dosage and Duration: AMANTADINE 100MG X 3+ MONTHS, DISTANT HISTORY OF LEVODOPA.
- 3) Objective measures of failure, if applicable: TREMORS AND OTHER SYMPTOMS CONTINUE TO WORSEN.
- 4) New high quality evidence in literature:
 - A) Web address:
[HTTP://WWW3.INTERSCIENCE.WILEY.COM/JOURNAL/104532619/ABSTRACT?CRETRY=1&SRTRY=0](http://www3.interscience.wiley.com/journal/104532619/abstract?cretry=1&srtry=0)
 - B) Copy attached: Yes No
- 5) Details of problem of which drug is being requested including nature, frequency, severity, impact of symptoms, how diagnosis was made): RAPIDLY PROGRESSING PARKINSON'S DISEASE OVER THE LAST YEAR. FAMILY HISTORY OF EARLY DEATH FROM PARKINSON'S RELATED COMPLICATIONS.
- 6) Other explanation to support your request: PT WAS REFERRED TO DR. BRONDOS (NEUROLOGY) WHO RECOMMENDS THIS MEDICATION. I discussed this case with Dr. Smith who authorized starting treatment.

REQUESTED BY: SANDRA CONNER

TITLE: ARNP

DATE: 08/18/2009

ACTION BY PHARMACY AND THERAPEUTICS COMMITTEE

A. Action: APPROVED X 3 MONTHS

B. Comments: PLEASE DOCUMENT IMPROVEMENT OF SYMPTOMS WITHIN 3 MONTHS

CHAIRPERSON, P & T COMMITTEE: NICOLE KLOSTERMAN, PHARM D

DATE: 08/19/2009

The following must be completed if any of the above information drops to page two:

Offender Name:

DOC #:

Date of Request:

State law (RCW 70.02; RCW 70.24.105; RCW 71.05.390) and/or federal regulations (42 CFR Part 2; 45 CFR Part 164) prohibit disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law.

WILLIAM I. BENDER M.D.
JOHN M. WURST M.D.

Diplomates American Board of Psychiatry and Neurology
SACRED HEART DOCTOR'S BUILDING
West 105 Eighth Avenue, Suite 560
Spokane, Washington 99204
Phone (509) 456-7200
Fax (509) 625-1441

Patient: Rex L. Pope
Date of birth: 3/27/1966
Date: August 14, 2009

Referring Physician: John Smith, MD
PO Box 1899
Airway Heights, WA 99001

IDENTIFYING DATA AND CHIEF COMPLAINT: Rex Pope is a 43-year-old red-handed man with shaking.

HISTORY OF PRESENT ILLNESS: He says that since 1996 he has had shaking. This involves the upper part of his body including his head, neck, and hands. On questioning, shaking does seem to affect such things as buttoning buttons, writing, and eating. He also complains that his balance is off. He is okay if he walks slowly, but if he tries to walk at any speed he may fall. He also complains of pain in his neck that is predominantly on the right side and radiates to his ear. He complains of his neck being on fire, and a feeling of hot rags on his right leg.

He has attributed his problem to a logging injury that he had a 1996, which apparently required placement of a halo. His symptoms mentioned above began within months after that accident. He has been seeing a neurologist in Seattle (Dr. Ravits) who apparently had been treating him for Parkinson's. He most recently has been on Amantadine, and feels that it helps somewhat. He does not recall all the details of prior medications, but does feel that he may have previously been on Levodopa, and that it helped his symptoms, but caused intolerable nightmares leading to him discontinuing the medication. He thinks that Mirapex sounds familiar, but does not really know whether he took it or what happened. Ropinirole/Requip does not sound familiar to him.

PAST MEDICAL HISTORY: Unremarkable

CURRENT MEDICATIONS: Amantadine 100 mg b.i.d., Docusate, psyllium

MEDICATION ALLERGIES: None known

SOCIAL HISTORY/HABITS: He does not smoke or drink. He was a logger until his injury in 1996. He says that he became despondent after he was unable to work, and that he very much wants to work. Because of this, he took to crime, and has been incarcerated.

FAMILY HISTORY: His mother either had "MS or Parkinson's disease". She did shake. There is no other family history of neurologic disease.

PHYSICAL EXAMINATION: VITAL SIGNS: BP Sitting: 130/86 Pulse Rate: 60
GENERAL: He is well-developed, well nourished, pleasant, and in no distress.
HEAD: Normocephalic. **NECK:** Supple. Carotids are 2 + and there are no bruits.

MENTAL STATUS: Alert and oriented x 4, without gross cognitive deficits.

CRANIAL NERVES:

I: Intact to smell of coffee grounds bilaterally.

II: Pupils are 5 mm, equal, round, and reactive to light to 3 mm. Visual fields are full. Fundi are benign. Spontaneous venous pulsations are visualized.

III, IV, VI: Extraocular movements are full, and there is no nystagmus.

V: Facial sensation and muscles of mastication are intact.

VII: Muscles of facial expression are intact.

IX, X: Levator of the palate is intact.

XI: Sternocleidomastoid and trapezius are intact.

XII: Tongue is in the midline, without atrophy or fasciculations.

MOTOR: He has marked visible tremor noted in his head with flexion/extension in the affirmative direction at a frequency of approximately 5 Hz. He has a resting tremor in both hands/forearms at the same frequency with predominantly flexion/extension of the hands. He has moderate masking of facial expression and moderate

bradykinesia with his hands with diminished gesture. Tone is increased in the upper extremities with cogwheeling. Power is full. He does make some wincing expressions when power is tested in his upper extremities, indicating some pain in his neck and shoulders. Hand throws are done moderately poorly bilaterally. Handwriting is of normal size with some superimposed tremor.

DEEP TENDON REFLEXES: 1+. Toes are down going.

SENSATION: Intact to pin, touch, position, vibration, and graphesthesia.

CEREBELLAR: Finger to nose and heel to shin are intact.

STANCE AND GAIT: He walks with moderately good-sized steps. There is no arm swing, and his arms are held slightly flexed with some superimposed tremor. He takes several steps to turn around. He responds to postural perturbation forward without taking any steps, but backward he takes a number of steps and potentially would fall if not assisted.

ASSESSMENT:

1. Parkinson's disease. It seems to have been a coincidence that this started after his injury, as it would be difficult to draw a connection between them. It is also of interest that his mother may have Parkinson's, and that his family may represent a hereditary instance of it.
2. Unrelated neck injury.

PLAN:

I have not initiated medication with him, but would like to set forth the following medication plan to be initiated by Dr. Smith:

1. Ropinirole 0.25 mg t.i.d. for one week, 0.5 mg t.i.d. for one week, 0.75 mg t.i.d. for one week, and 1 mg t.i.d. after that.
2. I would like to see him again in six weeks, with potential other dosage adjustments as needed/tolerated. Hallucinations will be a potential concern.

William I. Bender, MD

WILLIAM I. BENDER M.D.
JOHN M. WURST M.D.

Diplomates American Board of Psychiatry and Neurology
SACRED HEART DOCTOR'S BUILDING
West 105 Eighth Avenue, Suite 560
Spokane, Washington 99204
Phone (509) 456-7200
Fax (509) 625-1441

Patient: Rex L. Pope
Date of birth: 3/27/1966
Date: October 20, 2009

S: He feels that Ropinirole has helped to make his walking more fluid so that he doesn't have to think about it as much. He doesn't feel that it has helped the tremor. He also takes the occasion to complain about headaches, which he has had since his injury in 1996. He calls these "migraines". They are behind his eyes and in the back of his head, and present on a daily basis. He has apparently been treating them on a regular basis with Tylenol/Ibuprofen. He wonders about something else that he could take for them. On questioning him about sleep, it sounds as though he sleeps poorly. Apparently Amitriptyline was initiated to help with this.

Current Medications: Ropinirole 1 mg t.i.d., Amitriptyline 25 mg qhs, Diphenhydramine 25 mg qhs, psyllium, Acetaminophen 500 mg t.i.d. prn headache

~~O:~~ He has tremendous tremor in his head and in his right hand. Blink rate is good. He has fairly good facial expression. He does little with his right hand, and the tremor is present in all attitudes. He generally holds the arm against himself to dampen the tremor. He walks fairly well, although keeps his arm against his side still to dampen the tremor. When asked to take his arm away from his side, he does so reluctantly.

A:

1. The working diagnosis has been Parkinson's disease, and this may still be what it is. His tremor is so dramatic that one almost wonders whether there is a nonorganic component.
2. Complaint of chronic daily headache

P:

1. I would ask Dr. Smith to increase his Amitriptyline dosage by 25 mg increments every few nights until he can sleep through the night. This will hopefully be helpful for headache prophylaxis as well. This is preferable to him using analgesics on a regular basis, which will only cause rebound.
2. I would also ask Dr. Smith to increase his Ropinirole to 2 mg t.i.d. for one week, 3 mg t.i.d. for one week, and then 4 mg t.i.d.
3. I will see him again in one month.

William I. Bender, MD

cc: John Smith, MD

BOGACHIEL CLINIC

DATE: 03/25/04

PATIENT: POPE, REX

SUBJECTIVE:

Patient is here GAU physical evaluation. The form was completed. Additional notes are summarized. He has had tremors of his body since 1996. He has trouble holding things ←
→ with his right hand. He has difficulty with coordination of hands, especially with fine ←
motor movement. Symptoms came on after a logging injury in 1996. Labor & Industries was involved, but eventually closed his case with their opinion that the tremors were not specifically related to the accident. He has seen several neurologists. We do not have all of the records, though we do have record from visit to Virginia Mason Medical Center approximately two years ago. There was some suspicion of Parkinson disease. He apparently tried several medications, but is not aware of specifics of this other than that he did not get any significant improvement. He is unable to work at the present time because of his tremors, although he would like to work. He is returning to school this year, but is needing some public assistance to get him through this time.

PHYSICAL EXAMINATION:

→ There is some stiffness of his neck. He has limited range of motion because of this. He
→ also has a constant tremor of his head and a tension tremor of both hands, more so on the
→ right side. Facial features are somewhat drawn with his expression. Facial expressions are minimal.

ASSESSMENT:

Suspected Parkinson disease, etiology not clear.

PLAN:

His GAU evaluation form is completed. I would like to refer him to neurologist for specialty consultation.

Theodore Matheny, M.D.
TM/ss

TM

D: 03/26/04

T: 03/26/04

BOGACHIEL MEDICAL CLINIC

Patient: Rex Pope

Date of birth: 03/27/1966

Date of visit: 10/20/05

SUBJECTIVE: Rex is a 39-year-old male who presents to the office for an L&I consult. He tells me that he was involved in a logging accident back in 1996 and developed spasticity of his neck since that time. He apparently has been involved with L&I for this is an ongoing problem. It appears that he has been evaluated by a neurologist in Seattle and given botox injections. He tells that at one point there was a discussion about possible surgery but they elected not to proceed. He denies having a second opinion at the time. States that his biggest problem has been pain control for neck pain. He's had numerous MRI's in the past. States that he has constant tremor of his head as well as his extremities. Also has some weakness and giving out of his left leg. States that he has been told that he may possibly have Parkinsonism. He also claims that he has had problems with pain meds in the past and so currently is just taking Tylenol pm.

PAST MEDICAL HISTORY: Significant for this logging accident in 1996.

PAST SURGICAL HISTORY: He denies.

SOCIAL HISTORY: He's currently living with his mother and father. His mother has parkinsonism and has had a rough time. She is currently in the hospital with what he believes is the flu. He admits to taking occasional weed to help him sleep at night although he denies that it's on a daily basis. He denies any cigarette use but admits to chewing tobacco on a daily basis. He also has a history of alcohol abuse in the past but states that he has been clean for the last 8-9 months. He also has two sons that are teenagers at this time.

ALLERGIES: No known drug allergies

CURRENT MEDS: none

OBJECTIVE EXAM: weight 193 pounds, temperature 97.1, pulse 88, blood pressure 110/78, respiratory rate 20, he walks with a shuffling gait. He does have a special loss of faces. There is a constant tremor of his head, which appears to cause a tremor in his upper extremities. Motion is somewhat dystonic at this time. He has muscle strength 4-5 in all upper extremities. His reflexes are 2+ brachial and wrist. He has palpable spasticity of the muscles in his cervical neck area. He has extreme limited range of motion with flexion and extension of his neck. He's barely able to flex his neck with no extension essentially. He was able to laterally tilt his head to about 15 degrees bilaterally. He has probable spasticity on abduction of his arm/upper extremities. He also has what appears to be diminished sensation on the upper extremity in the C6 to C8 area.

Theodore Matheny, MD
Bogachiel Clinic
590 Bogachiel Way
Forks, Washington 98331

January 14, 2005

Rex Pope

Subjective:

Follow-up L+I Claim P303223. Continues with constant tremor of head, hands, unsteadiness with hands, poor coordination. Has pain and stiffness, feeling of numbness in neck and upper back, chronic.

Has apparently not had independent medical evaluation yet.

Objective:

Pulse 92 Resp 18 BP 126/90

Walks with shuffling gait. Expression-less facies. Has constant tremor of head and upper extremities. Motions somewhat dystonic. Bradykinesia present. Muscle strength 4/5, all muscle groups, upper extremities. Reflexes 2+/=, brachial and wrist. Muscles of neck quite stiff.

Range of motion of neck sharply limited; see photos taken today. Barely 15 degrees neck flexion. Essentially zero degrees, neck extension. 5 to 10 degrees with lateral tilt. Maximal forward flexion of shoulders limited to 120 degrees.

→ Fine motor coordination sharply limited as seen by his hand-writing sample of today.

Photographs are taken, attached to this progress note.

Assessment:

Chronic dystonia disorder; precise diagnosis is unclear. Per patient's history, this condition arose following severe whiplash trauma to his neck while at work as logger in 1996.

Original diagnosis from L+I claim was apparently neck sprain, thoracic sprain, and brachial neuritis. In this physician's opinion, present condition could have developed as sequela of severe neck sprain with associated head trauma; we need specialty consultation to corroborate this. He saw a neurologist at Virginia Mason in 2001; apparently sinemet was not helpful, and a trial of botox injection was considered.

He is not able to work due to extreme nature of his muscular rigidity, limited ←
→ range of motion of neck and shoulders, and marked impairment of fine motor
→ coordination of hands, as demonstrated by his hand-writing sample of today.

Plan:

Referral to neurologist is requested through L+I to assist with diagnosis and treatment options. Hopefully this can be accomplished through the independent medical evaluation program. Recheck with us in one month.

T. Matheny, MD



7/31/04

SVT 3/31/04

PHYSICAL EVALUATION

Please refer to the Provider Handbook and WAC 388-448-0020 and 0030 for more information.

1. Clients are not eligible for any medical or cash assistance until we receive clear, objective medical documentation. Please return the information as soon as possible.
2. Payment for a general or comprehensive physical evaluation requires attachment of any chart notes for last six months, medical facts about the client's functional capacity and supporting evidence such as Range of Motion studies, laboratory, pathology or imaging results. The Medical Evidence Request, DSHS 14-150, is your authorization for payment for services. A bill for services must accompany this evaluation.
3. As you examine this patient, please evaluate all medical conditions that may limit the ability to work (functional capacity). You are not limited to evaluating the presenting problem(s).
4. Please list each diagnosis separately and assign one rating of severity for each diagnosis. We will use information from this report along with education and work history to decide whether the client is employable and meets Washington State general assistance incapacity criteria.
5. Include recommended treatment plan and information about mental health issues and substance abuse if known.
6. Confidentiality: The information you provide is subject to Washington State Public Disclosure laws and may be released to the client upon request. Information will remain confidential under state law and DSHS discloses no further information without the written consent of the individual to whom it pertains or as otherwise permitted by state law.
7. Reminder:
 - Include the date of your examination, your address and telephone number.
 - Advanced Registered Nurse Practitioners (ARNP) need to indicate their area of advanced training.
 - The supervising physician must co-sign reports completed by their Physician Assistant.

A. CLIENT IDENTIFICATION		
NAME <i>Rex L Pope</i>	BIRTH DATE <i>3-27-66</i>	CLIENT IDENTIFICATION NUMBER <i>3120859</i>
CHIEF COMPLAINTS AND SYMPTOMS <i>Tremors of body since 1996 trouble holding things with right hand. Difficulty with coordination of hands fine motor movement Logging injury 1996 L + I case was eventually closed</i>		
B. AUTHORIZATION TO RELEASE INFORMATION		
I authorize <u><i>Dr. Matheny</i></u> to release to the Department of Social and Health Services (DSHS)		
EXAMINING PROFESSIONALS NAME		
the following information regarding my condition, solely to evaluate eligibility for public assistance. This release includes diagnostic testing or treatment information concerning mental health, alcohol or drug abuse, sickle cell disease, and results of Sexually Transmitted Diseases (STD), including HIV/AIDS [Revised Code of Washington (RCW) 70.24.105].		
This authorization is valid for one year or until _____ (date or event).		
I may revoke or withdraw this authorization at any time in writing, but that will not affect any information already shared.		
I understand that the information provided to DSHS may be re-disclosed only with a valid authorization from me or if required by law.		
PROVIDER'S SIGNATURE <i>Rex L Pope</i>		DATE <i>3-25-04</i>

ED

C HISTORY

Date of onset of primary impairment: 1996.

Describe any treatment to date including any hospitalizations: we don't have all details of treatments. He has seen a neurologist who felt he had Parkinsons.

Describe any response to treatment: Apparently did not respond to several medication regimens, is presently not on any meds

Is there a current indication or history of alcohol or drug abuse? Yes No

D EXAMINATION RESULTS

Instructions: Describe physical examination findings and attach chart notes with lab, pathology and imaging reports

Height 5'8" Weight 220 Blood Pressure 124/96 Respiratory Rate 20

CHECK IF WITHIN NORMAL LIMITS (WNL)	IF NOT WNL, DESCRIBE ANY ABNORMAL FINDINGS
<input checked="" type="checkbox"/> Skin	
<input checked="" type="checkbox"/> ENT	
<input checked="" type="checkbox"/> Cardio-Vascular	
<input checked="" type="checkbox"/> Pulmonary	
<input checked="" type="checkbox"/> Abdomen	
<input checked="" type="checkbox"/> Shoulders/upper extremities	<u>→ Neck quite stiff, can't extend to look at ceiling can't touch chin to chest</u>
<input checked="" type="checkbox"/> Back (thoracic-lumbo-sacral spine)	
<input checked="" type="checkbox"/> Hips/lower extremities	
<input checked="" type="checkbox"/> Gait and station	
<input type="checkbox"/> Neurological	<u>(Include any weakness, + Romberg, ataxia, sensory deficit, and/or DTRs) tremors of head constant. Facial features drawn. hands tremble with any movement expression minimal</u>

Describe any signs or proof of limits on agility, mobility, or flexibility or non-exertional environmental/workplace restrictions (such as visual, hearing or pulmonary restrictions).

Signature: demonstrates his tremor and poor coordination of hands

Laboratory/diagnostic/ROM studies results (attach reports):

Ret. Pore

List any additional tests or consultations needed:

Is it reasonable to expect the diagnosed medical condition to produce the reported symptoms? Yes No

FAXED
3/31/09

SENT 3/31/09

E: ASSESSMENT

- List each diagnosis in Column 1 below.
- In Column 2 below estimate the degree of interference with the client's ability to perform the basic work-related activities of (a) sitting, (b) standing, (c) walking, (d) lifting, (e) handling, (f) carrying, (g) seeing, (h) hearing, (i) communicating, and (j) understanding or following directions.
- In Column 3 below, estimate the severity of the diagnosis using the following definitions.

RATING	SEVERITY	DEFINITION
1	None	No interference with the ability to perform basic work-related activities
2	Mild	No significant interference with the ability to perform basic work-related activities
3	Moderate	Significant interference with the ability to perform one or more basic work-related activities
4	Marked	Very significant interference with the ability to perform one or more basic work-related activities
5	Severe	Inability to perform one or more basic work-related activities

1. DIAGNOSIS	2. AFFECTED WORK ACTIVITIES (See (a) - (j) above)	3. SEVERITY RATING
Tremor - suspected parkinson's disease	a, b, c, d, e, f	

Check any of the following areas that has restricted mobility, agility or flexibility: balancing, bending, climbing, crouching, handling, kneeling, pulling, pushing, reaching, sitting, and stooping.

Describe any restrictions:

Using the definitions below, what is the client's overall work level? severely limited

Definitions of Work Levels

Heavy work means the ability to lift 100 pounds maximum and frequently* lift and/or carry up to 50 pounds.

Medium work means the ability to lift 50 pounds maximum and frequently* lift and/or carry up to 25 pounds.

Light work means the ability to lift 20 pounds maximum and frequently* lift and/or carry up to 10 pounds. Even though the weight lifted may be negligible, light work may require walking or standing up to six (6) out of eight hours per day, or involve sitting most of the time with occasional** pushing and pulling of arm and/or leg controls.

Sedentary work means the ability to lift 10 pounds maximum and frequently* lift and/or carry such articles as files and small tools. A sedentary job may require sitting, walking and standing for brief periods.

Severely limited means unable to lift at least 2 pounds or unable to stand and/or walk.

* Frequently means the person is able to perform the function for 2.5 to six (6) hours in an eight-hour day. It is not necessary that performance be continuous.

** Occasional means the person is able to perform the function from very little up to 2.5 hours of an eight-hour day. It is not necessary that performance be continuous.

Rex Pope

FAXED
(3/31/04)

SENT 3/31/04

F. ASSESSMENT (CONTINUED)

List each diagnosis that is probably caused or aggravated by alcohol or drug abuse:

Is alcohol/drug treatment recommended? Yes No

List each diagnosis where level of work would increase with 60 days of abstinence:

How long do you estimate the current, overall limitations on work activities will continue without medical treatment?

- At least 12 months
- 90 days to 12 months. Number of months: _____
- Less than 90 days. Number of days: _____

F. PLAN

1. What treatment is recommended to improve employability?
No specific treatment option at present - see comments below
2. Is the client able to participate in pre-employment activities such as job search or employment classes?
 Yes No Explain in comments below.
3. Is this the client's first visit with you? Yes No; if no, how long have you attended this client? 1 wk
4. Will you be providing ongoing care? Yes No
5. Once the client has received recommended treatment, how soon should the ability to work be re-evaluated?

G. COMMENTS

Has undiagnosed condition of tremor; has not seen a neurologist for 2 years. Apparently did not respond to prior treatment. After DSHS coverage is approved, would like him to see neurologist for specialty consultation.

The information you provide is subject to Washington State Public Disclosure laws and may be released to the individual upon his or her request. All information disclosed from your records will remain confidential under state law and DSHS discloses no further information without the written consent of the person to whom it pertains, or as otherwise permitted by state law.

RETURN THIS REPORT TO: DSHS - Forks CSO B64-1 421 5 th Avenue Forks, WA 98331		PRINT NAME OF EXAMINING PROFESSIONAL <i>Theodore Matheny</i>	EXAMINATION DATE <i>3/25/04</i>
		SPECIALTY AREA/ADVANCED TRAINING <i>Family Practice</i>	TELEPHONE NUMBER <i>(360)374-6998</i>
WORKER SIGNATURE <i>[Signature]</i>	DATE	STREET ADDRESS <i>590 Bogachid Way</i>	CITY <i>Forks</i>
		STATE <i>WA</i>	ZIP CODE <i>98331</i>
TELEPHONE NUMBER <i>360-374-2257</i>	EXAMINING PROFESSIONAL'S SIGNATURE/TITLE <i>T Matheny MD</i>		DATE <i>3/25/04</i>
FAX NUMBER <i>360-374-5464</i>	RELEASING AUTHORITY/SUPERVISING PROFESSIONAL'S SIGNATURE		DATE

FAXED
3/31/04

SENT *3/31/04*

Rex Pote

PHYSICAL EVALUATION

Please refer to the Provider Handbook and WAC 388-448-0020 and 0030 for more information.

1. Clients are not eligible for any medical or cash assistance until we receive clear, objective medical documentation. Please return the information as soon as possible.
2. Payment for a general or comprehensive physical evaluation requires attachment of any **chart notes** for last six months, medical facts about the client's functional capacity and supporting evidence such as Range of Motion studies, laboratory, pathology or imaging results. The Medical Evidence Request, DSHS 14-150, is your authorization for payment for services. A bill for services must accompany this evaluation.
3. As you examine this patient, please evaluate all medical conditions that may limit the ability to work (functional capacity). You are not limited to evaluating the presenting problem(s).
4. Please list each diagnosis separately and assign one rating of severity for each diagnosis. We will use information from this report along with education and work history to decide whether the client is employable and meets Washington State general assistance incapacity criteria.
5. Include recommended treatment plan and information about mental health issues and substance abuse if known.
6. **Confidentiality:** The information you provide is subject to Washington State Public Disclosure laws and may be released to the client upon request. Information will remain confidential under state law and DSHS discloses no further information without the written consent of the individual to whom it pertains or as otherwise permitted by state law.
7. **Reminder:**
 - Include the date of your examination, your address and telephone number.
 - Advanced Registered Nurse Practitioners (ARNP) need to indicate their area of advanced training.
 - The supervising physician must co-sign reports completed by their Physician Assistant.

A. CLIENT IDENTIFICATION		
NAME <i>Rex L Pope</i>	BIRTH DATE <i>3-27-66</i>	CLIENT IDENTIFICATION NUMBER <i>3120859</i>
CHIEF COMPLAINTS AND SYMPTOMS <i>Tremors of body since 1996 trouble holding things with right hand. Difficulty with coordination of hands fine motor movement Lossing injury 1996 L + I case was eventually closed</i>		
B. AUTHORIZATION TO RELEASE INFORMATION		
I authorize <u><i>Dr. Matheny.</i></u> to release to the Department of Social and Health Services (DSHS)		
EXAMINING PROFESSIONALS NAME		
the following information regarding my condition, solely to evaluate eligibility for public assistance. This release includes diagnostic testing or treatment information concerning mental health, alcohol or drug abuse, sickle cell disease, and results of Sexually Transmitted Diseases (STD), including HIV/AIDS [Revised Code of Washington (RCW) 70.24.105].		
This authorization is valid for one year or until _____ (date or event).		
I may revoke or withdraw this authorization at any time in writing, but that will not affect any information already shared.		
I understand that the information provided to DSHS may be re-disclosed only with a valid authorization from me or if required by law.		
PROVIDER'S SIGNATURE <i>Rex Pope</i>	DATE <i>3-25-04</i>	

C HISTORY

Date of onset of primary impairment: 1996.

Describe any treatment to date including any hospitalizations: We don't have all details of treatments. He has seen a neurologist who felt he had Parkinsons.

Describe any response to treatment: Apparently did not respond to several medication regimens, is presently not on any meds.

Is there a current indication or history of alcohol or drug abuse? Yes No

D EXAMINATION RESULTS

Instructions: Describe physical examination findings and attach chart notes with lab, pathology and imaging reports

Height 5'8" Weight 220 Blood Pressure 124/96 Respiratory Rate 20

CHECK IF WITHIN NORMAL LIMITS (WNL)	IF NOT WNL, DESCRIBE ANY ABNORMAL FINDINGS
<input checked="" type="checkbox"/> Skin	
<input checked="" type="checkbox"/> ENT	
<input checked="" type="checkbox"/> Cardio-Vascular	
<input checked="" type="checkbox"/> Pulmonary	
<input checked="" type="checkbox"/> Abdomen	
<input checked="" type="checkbox"/> Shoulders/upper extremities	<u>→ Neck quite stiff, can't extend to look at ceiling can't touch chin to chest</u>
<input checked="" type="checkbox"/> Back (thoracic-lumbo-sacral spine)	
<input checked="" type="checkbox"/> Hips/lower extremities	
<input checked="" type="checkbox"/> Gait and station	
<input type="checkbox"/> Neurological	<u>(Include any weakness, + Romberg, ataxia, sensory deficit, and/or DTRs) tremors of head constant. Facial features drawn. hands tremble with any movement expression minimized</u>

Describe any signs or proof of limits on agility, mobility, or flexibility or non-exertional environmental/workplace restrictions (such as visual, hearing or pulmonary restrictions).

Signature: demonstrates his tremor and poor coordination of hand:

Laboratory/diagnostic/ROM studies results (attach reports):

Ret. Pore

List any additional tests or consultations needed:

Is it reasonable to expect the diagnosed medical condition to produce the reported symptoms? Yes No

FAXED
3/31/04

SENT 3/31/04

E. ASSESSMENT

1. List each diagnosis in Column 1 below.
2. In Column 2 below estimate the degree of interference with the client's ability to perform the basic work-related activities of (a) sitting, (b) standing, (c) walking, (d) lifting, (e) handling, (f) carrying, (g) seeing, (h) hearing, (i) communicating, and (j) understanding or following directions.
3. In Column 3 below, estimate the severity of the diagnosis using the following definitions.

RATING	SEVERITY	DEFINITION
1	None	No interference with the ability to perform basic work-related activities
2	Mild	No significant interference with the ability to perform basic work-related activities
3	Moderate	Significant interference with the ability to perform one or more basic work-related activities
4	Marked	Very significant interference with the ability to perform one or more basic work-related activities
5	Severe	Inability to perform one or more basic work-related activities

1. DIAGNOSIS	2. AFFECTED WORK ACTIVITIES (See (a) - (j) above)	3. SEVERITY RATING
Tremor - suspected parkinson's disease	a, b, c, d, e, f	

Check any of the following areas that has restricted mobility, agility or flexibility: balancing, bending, climbing, crouching, handling, kneeling, pulling, pushing, reaching, sitting, and stooping.

Describe any restrictions:

Using the definitions below, what is the client's overall work level? severely limited

Definitions of Work Levels

- Heavy work** means the ability to lift 100 pounds maximum and frequently* lift and/or carry up to 50 pounds.
 - Medium work** means the ability to lift 50 pounds maximum and frequently* lift and/or carry up to 25 pounds.
 - Light work** means the ability to lift 20 pounds maximum and frequently* lift and/or carry up to 10 pounds. Even though the weight lifted may be negligible, light work may require walking or standing up to six (6) out of eight hours per day, or involve sitting most of the time with occasional** pushing and pulling of arm and/or leg controls.
 - Sedentary work** means the ability to lift 10 pounds maximum and frequently* lift and/or carry such articles as files and small tools. A sedentary job may require sitting, walking and standing for brief periods.
 - Severely limited** means unable to lift at least 2 pounds or unable to stand and/or walk.
- * Frequently means the person is able to perform the function for 2.5 to six (6) hours in an eight-hour day. It is not necessary that performance be continuous.
- ** Occasional means the person is able to perform the function from very little up to 2.5 hours of an eight-hour day. It is not necessary that performance be continuous.

E. ASSESSMENT (CONTINUED)

List each diagnosis that is probably caused or aggravated by alcohol or drug abuse:

Is alcohol/drug treatment recommended? Yes No

List each diagnosis where level of work would increase with 60 days of abstinence:

How long do you estimate the current, overall limitations on work activities will continue without medical treatment?

At least 12 months

90 days to 12 months. Number of months: _____

Less than 90 days. Number of days: _____

F. PLAN

1. What treatment is recommended to improve employability?

No specific treatment option at present - see comments below

2. Is the client able to participate in pre-employment activities such as job search or employment classes?

Yes No Explain in comments below.

3. Is this the client's first visit with you? Yes No; if no, how long have you attended this client? 1 wk

4. Will you be providing ongoing care? Yes No

5. Once the client has received recommended treatment, how soon should the ability to work be re-evaluated?

G. COMMENTS

Has undiagnosed condition of tremor; has not seen a neurologist for 2 years. Apparently did not respond to prior treatment. After DSHS coverage is approved, would like him to see neurologist for specialty consultation.

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RETURN THIS REPORT TO: DSHS - Forks CSO B64-1 421 5th Avenue Forks, WA 98331		PRINT NAME OF EXAMINING PROFESSIONAL <i>Theodore Matheny</i>		EXAMINATION DATE <i>3/25/04</i>	
		SPECIALTY AREA/ADVANCED TRAINING <i>Family Practice</i>		TELEPHONE NUMBER <i>(360)374-6998</i>	
WORKER SIGNATURE <i>Jamie Cunningham</i>	DATE	STREET ADDRESS <i>590 Bogachid Way Forks</i>	CITY <i>WA</i>	STATE <i>WA</i>	ZIP CODE <i>98331</i>
TELEPHONE NUMBER <i>360-374-2257</i>		EXAMINING PROFESSIONAL'S SIGNATURE/TITLE <i>T Matheny MD</i>		DATE <i>3/25/04</i>	
FAX NUMBER <i>360-374-5464</i>		RELEASING AUTHORITY/SUPERVISING PROFESSIONAL'S SIGNATURE		DATE	

FAXED
3/31/04

SENT 3/31/04

Rex Pote

APPEALS COURT
STATE OF WASHINGTON
DIVISION II

COURT CLERK
JAN 21 PM 1:01
STATE OF WASHINGTON

REX POPE
Petitioner

v.
State of Washington
Defendant

Case No. 43172-6-II

DECLARATION OF MAILING

I, Rex Pope [name], declare that, on 1/16/14 [date], I deposited the foregoing [list document/s]:

Motion For Motion For Discretionary Review

or a copy thereof, in the internal mail system of Coyote Ridge Correction Center CRCC [name of institution]

and made arrangements for postage, addressed to each of the following:

Washington State Court of Appeals Division II
950 Broadway, Suite 300, Tacoma WA 98402-4454

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at CRCC Connell Wa. [city, STATE]

on this 17 day of January, 2014.

Rex Pope
[signature]

MJZWICKY

COYOTE RIDGE CORRECTIONS CENTER

OTRTASTA

TRUST ACCOUNT STATEMENT

10.2.1.3

DOC#: 0000942200 Name: POPE, REX L
LOCATION: R03-140-SA031L

DOB: 03/27/1966

ACCOUNT BALANCES Total: 22.32 CURRENT: 22.32 HOLD:
07/01/2013 07/19/2013

SUB ACCOUNT	START BALANCE	END BALANCE
SPENDABLE BAL	0.15	22.32
SAVINGS BALANCE		
WORK RELEASE SAVINGS		
EDUCATION ACCOUNT		
MEDICAL ACCOUNT		
POSTAGE ACCOUNT	0.00	0.00
COMM SERV REV FUND ACCOUNT		

RECEIVED
JAN 21 2013

CLERK OF COURT OF APPEALS DIV 1
STATE OF WASHINGTON

DEBTS AND OBLIGATIONS

TYPE	PAYABLE	INFO NUMBER	AMOUNT OWING	AMOUNT PAID	WRITE OFF AMT.
COI	COST OF INCARCERATION	02162000	UNLIMITED	82.93	0.00
TVRTD	TV RENTAL FEE DEBT	03192001	0.00	1.00	0.00
LMD	LEGAL MAIL DEBT	03282012	2.80	0.00	0.00
COSFD	COS - FELONY DEBT (206)	06122002	0.00	530.65	0.00
WRBD	WR ROOM AND BOARD DEBT	10292003	2023.50	331.68	0.00
LMD	LEGAL MAIL DEBT	05302012	11.82	0.00	0.00
HYGA	INMATE STORE DEBT	10192006	0.00	2.25	0.00
COPD	COPY COSTS DEBT	03212012	5.06	0.00	0.00
COPD	COPY COSTS DEBT	03272001	0.00	1.30	0.00
DEND	DENTAL COPAY DEBT	08132012	4.00	0.00	0.00
EL	ESCORTED LEAVE	09-2011	UNLIMITED	0.00	0.00
MISCD	MISCELLANEOUS DEBT	05012012	5.00	0.00	0.00
644D	CSRF LOAN DEBT	HQ Ck# 2915	56.40	143.60	0.00
COPD	COPY COSTS DEBT	01182007	0.00	15.83	0.00
POSD	POSTAGE DEBT	12242002	0.00	7.53	0.00
CVC	CRIME VICTIM COMPENSATION	02162000	UNLIMITED	65.42	0.00
POSD	POSTAGE DEBT	05152012	7.71	0.00	0.00
POSD	POSTAGE DEBT	03222012	0.90	0.00	0.00
COSXD	COST OF SUPERVISION DEBT	03062012	270.00	0.00	0.00
LMD	LEGAL MAIL DEBT	01092007	0.00	0.59	0.00
MEDD	MEDICAL COPAY DEBT	03072001	0.00	1.90	0.00
TVD	TV CABLE FEE DEBT	10122002	0.00	7.77	0.00
HYGA	INMATE STORE DEBT	09082000	90.58	22.32	0.00
HYGA	INMATE STORE DEBT	05012012	305.58	0.47	0.00
HYGA	INMATE STORE DEBT	10142000	0.00	6.26	0.00
HYGA	INMATE STORE DEBT	01082003	0.00	14.73	0.00
LMD	LEGAL MAIL DEBT	12202000	0.00	2.08	0.00
CVCS	CRIME VICTIM COMPENSATION/07112000	02162000	UNLIMITED	22.01	0.00
HYGA	INMATE STORE DEBT	06092000	0.00	1.05	0.00
SPOSD	SAPOS POSTAGE DEBT	05062013	10.40	0.00	0.00

MJZWICKY

COYOTE RIDGE CORRECTIONS CENTER

OTRTASTA

T R U S T A C C O U N T S T A T E M E N T

10.2.1.3

DOC#: 0000942200
 LOCATION: R03-140-SA031L

Name: POPE, REX L

DOB: 03/27/1966

DEBTS AND OBLIGATIONS

TYPE	PAYABLE	INFO NUMBER	AMOUNT OWING	AMOUNT PAID	WRITE OFF AMT.
TVD	TV CABLE FEE DEBT	10142000	0.00	2.00	0.00
LMD	LEGAL MAIL DEBT	01172003	0.00	6.80	0.00
LFO	LEGAL FINANCIAL OBLIGATIONS	20000228	UNLIMITED	431.28	0.00
COIS	COST OF INCARCERATION /07112000	02162000	UNLIMITED	88.01	0.00
DEND	DENTAL COPAY DEBT	01242003	0.00	6.00	0.00
644D	CSRF LOAN DEBT	HQ CK#2310	0.00	150.00	0.00
POSD	POSTAGE DEBT	12262000	0.00	4.26	0.00
POSD	POSTAGE DEBT	10202006	0.00	9.43	0.00
TVD	TV CABLE FEE DEBT	05122012	6.40	0.00	0.00
MEDD	MEDICAL COPAY DEBT	08102000	0.00	5.56	0.00
SPHD	STORES PERSONAL HYGIENE DEBT	10032003	0.00	1.76	0.00
TVD	TV CABLE FEE DEBT	05132000	0.00	2.00	0.00
TVD	TV CABLE FEE DEBT	10142006	0.00	1.50	0.00
COPD	COPY COSTS DEBT	06052012	4.00	0.00	0.00
MEDD	MEDICAL COPAY DEBT	07192012	16.00	0.00	0.00
MISCD	MISCELLANEOUS DEBT	03122012	3.07	0.00	0.00
MEDD	MEDICAL COPAY DEBT	02142007	0.00	4.55	0.00

TRANSACTION DESCRIPTIONS --			SPENDABLE BAL	SUB-ACCOUNT
DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE
07/10/2013	P3	P-3 P/R Sage June	52.50	52.65
07/10/2013	DED	Deductions-CVC-02162000 D D	(2.63)	50.02
07/10/2013	DED	Deductions-644D-HQ Ck# 2915 D D	(10.50)	39.52
07/13/2013	TV	I05 - TV CABLE FEE	(0.50)	39.02
07/17/2013	CRS	CRS SAL ORD #7350443	(16.70)	22.32

TRANSACTION DESCRIPTIONS --			SAVINGS BALANCE	SUB-ACCOUNT
DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE

TRANSACTION DESCRIPTIONS --			WORK RELEASE SAVINGS	SUB-ACCOUNT
DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE

TRANSACTION DESCRIPTIONS --			EDUCATION ACCOUNT	SUB-ACCOUNT
DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE

TRANSACTION DESCRIPTIONS --			MEDICAL ACCOUNT	SUB-ACCOUNT
DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE

TRANSACTION DESCRIPTIONS --			POSTAGE ACCOUNT	SUB-ACCOUNT
DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE

TRANSACTION DESCRIPTIONS --			COMM SERV REV FUND ACCOUNT	SUB-ACCOUNT
DATE	TYPE	TRANSACTION DESCRIPTION	TRANSACTION AMT	BALANCE

07/19/2013 10:30

Department of Corrections

Page 3 Of 3

MJZWICKY

COYOTE RIDGE CORRECTIONS CENTER

OTRTASTA

T R U S T A C C O U N T S T A T E M E N T

10.2.1.3

DOC#: 0000942200

Name: POPE, REX L

DOB:

03/27/1966

LOCATION: R03-140-SA031L

<u>DATE</u>	<u>TYPE</u>	<u>TRANSACTION DESCRIPTION</u>	<u>TRANSACTION AMT</u>	<u>BALANCE</u>
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07/19/2013

Department of Corrections

PAGE: 01 OF 01

MJZWICKY

COYOTE RIDGE CORRECTIONS CENTER

OIRPLRAR

10.2.1.18

DOC#: 0000942200 NAME: POPE REX ADMIT DATE: 03/06/2012
 DOB: 03/27/1966 ADMIT TIME: 10:32

AVERAGE MONTHLY RECEIPTS	20% OF RECEIPTS	AVERAGE SPENDABLE BALANCE	20% OF SPENDABLE
34.25	6.85	9.08	1.82

RECEIVED
 JAN 27 2011
 CLERK OF COURT OF APPEALS DIV I
 STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II

2013 DEC 17 AM 8:50

STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 43172-6-II

Respondent,

v.

REX LEE POPE,

UNPUBLISHED OPINION

Appellant.

WORSWICK, C.J. – A jury returned verdicts finding Rex Lee Pope guilty of second degree assault and attempted theft of a motor vehicle. The jury also returned special verdicts finding the aggravating factors that Pope committed both offenses shortly after being released from incarceration. Pope appeals his convictions, asserting that (1) the trial court violated his right to present a defense by denying his continuance motion, (2) the trial court improperly commented on the evidence, (3) the trial court’s substantial step definitional jury instruction relieved the State of its burden to prove the essential elements of attempted theft of a motor vehicle, and (4) defense counsel was ineffective for failing to adequately investigate his case before trial and for failing to adequately advise him about accepting a plea offer. We affirm.

FACTS

On August 8, 2011, Laverne Hallsted parked his Toyota pickup truck at a Port Orchard, Washington park-and-ride lot and rode a commuter bus to his job at the Puget Sound Naval Shipyard in Bremerton. When Hallsted returned to the park-and-ride lot at around 4:25 PM, he saw that a door to his truck was open and that two feet were hanging out of the open door. As he

No. 43172-6-II

approached his truck, Hallsted saw a man, later identified as Pope, attempting to smash the truck's ignition lock with a stick. Hallsted asked Pope, "Sir, can I help you?" Report of Proceedings (Dec. 8, 2011) at 99. Pope responded, "Yes, you can," as he stood in front of Hallsted. RP (Dec. 8, 2011) at 99. Pope then looked down, grabbed Hallsted's shirt, and punched Hallsted in the face with his right hand. Hallsted responded by grabbing Pope's shirt and jabbing keys into his cheek. During the struggle, items from Pope's satchel fell to the ground. Among those items were several blister packs of medication marked with Pope's name, as well as a roll of duct tape, a notebook, a hat, an X-Acto knife, and X-Acto knife blades. Pope fled and Hallsted chased him for a short distance before calling 911.

Port Orchard Police Officer Donna Main took Hallsted's statement and summoned medical assistance to treat his injuries. The following day Hallsted identified Pope from a photographic montage as the man who had broken into his truck and assaulted him. Main arrested Pope the next day. When she arrested Pope, Main saw that Pope had scratch marks and injuries on the left side of his face. During his arrest, Pope did not appear to have any physical disability and did not have any difficulty walking, kneeling, or getting out of the patrol car.

On November 8, 2011, the State charged Pope by first amended information with second degree assault and attempted theft of a motor vehicle. The State also alleged aggravating factors that Pope committed each offense shortly after being released from incarceration and that his multiple offenses and high offender score would result in some of his offenses going unpunished.

Pope was arraigned and was appointed counsel on September 12, 2011. On November 8, Pope moved to continue the start of his trial. The trial court granted Pope's continuance motion and set his trial to commence on December 6. On December 6, Pope again moved for a

No. 43172-6-II

continuance, asserting that he was attempting to obtain medical records and to secure witnesses to testify about his Parkinson's disease. When the trial court asked about the relevance of Pope's Parkinson's disease, defense counsel stated:

Your Honor, there's an allegation in part of this case regarding an alleged assault that occurred between—where Mr. Pope is the alleged offender on that. And the defense is trying to gather more information regarding his Parkinson's disease to show that Mr. Pope because of the—how far the disease has progressed at this point, that he would be unable to conduct himself in a manner that the state is alleging.

RP (Dec. 6, 2011 AM) at 4.

The State opposed Pope's continuance motion, asserting that it was not basing Pope's second degree assault charge on allegations that Pope had severely beaten the victim but, rather, that it was charging him under RCW 9A.36.021(1)(e) for assaulting the victim "with intent to commit a felony." Clerk's Papers (CP) at 1. The State argued that it was unlikely that any expert witness would testify that Pope could not commit assault in the manner alleged. The State also told the trial court that it would be willing to stipulate that Pope suffered from Parkinson's disease. The trial court denied Pope's continuance motion, noting that his trial had already been continued once for the same reason.

That same day, Pope's case was called for trial before a different trial court judge, and Pope renewed his motion to continue the start of his trial. The trial court denied Pope's continuance motion, stating:

Well, that decision has been made. I'm not going to overrule what's already been decided this morning. There's no new information provided so far as the medical records. And I've not heard anything specific as to how it's going to relate to or be relevant to the defense, in this case, especially in light of the fact that there appears to be an acknowledgement this afternoon that there is no mental defense being sought.

No. 43172-6-II

RP (Dec. 6, 2011 PM) at 13. Before the start of trial, Pope requested that the trial court admit two exhibits titled, “Parkinson’s Disease at a Glance,” and “Symptoms by Mayo Clinic Staff.” RP (Dec. 6, 2011 PM) at 32. Defense counsel stated that the purpose of the exhibits was to “have something for the jurors available to explain why Mr. Pope visibly shakes in the courtroom.” RP (Dec. 6, 2011 PM) at 33. The State opposed admission of the exhibits but stated that it wasn’t opposed to having the trial court instruct the jury about Pope’s visible symptoms of Parkinson’s disease. Following a lengthy discussion, both parties agreed that the trial court could instruct the jurors as follows, ““At Mr. Pope’s request, I would like to inform you that he suffers from Parkinson’s disease. This is not a fact in the case. But he has requested that this be conveyed to you so as to explain his symptoms.”” RP (Dec. 6, 2011 PM) at 43.

The following day, the trial court suggested modifying the agreed instruction to read, ““At Mr. Pope’s request, I would like to inform you that Mr. Pope suffers from Parkinson’s disease. This is not a fact in the case, but he has requested that this be conveyed so as to explain his visible symptoms of shaking.”” RP (Dec. 7, 2011) at 49. Defense counsel and the State agreed to the modified language in the proposed instruction, and the trial court later read the instruction to potential jurors at the start of voir dire.

At trial, Hallsted and Main testified consistently with the facts as stated above. The trial court provided the jury with an instruction stating, “A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.” Suppl. CP at 146. Pope did not object to this instruction. The jury returned verdicts finding Pope guilty of second degree assault and attempted theft of a motor vehicle. The jury also returned special verdicts finding the

aggravating factors that Pope committed both offenses shortly after being released from incarceration.

At a January 13, 2012 sentencing hearing, Pope's defense counsel moved to withdraw from representation, asserting that communications with Pope had broken down. The trial court granted defense counsel's motion to withdraw, appointed new counsel to represent Pope, and set a new sentencing hearing date. On February 24, Pope's new defense counsel informed the sentencing court that he had reviewed the trial transcript and could not find a basis to file a meritorious CrR 7.5 motion and, therefore, he was prepared to go forward with sentencing.

Pope then told the trial court that he wanted to act pro se. Following a *Faretta*¹ inquiry, the trial court found that Pope had knowingly waived his right to counsel. Pope then filed a written CrR 7.5 motion for a new trial, which motion the trial court denied on March 2. The trial court declined to impose an exceptional sentence and sentenced Pope within the standard range. Pope timely appeals.

ANALYSIS

I. RIGHT TO PRESENT A DEFENSE

Pope first contends that the trial court violated his constitutional right to present a defense by denying his motion to continue the start of trial. We disagree.

A. *Standard of Review*

A defendant in a criminal trial has a constitutional right to present a defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's

¹ *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

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accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

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

Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). However, a criminal defendant’s right to present a defense is not absolute; a defendant seeking to present evidence must show that the evidence is at least minimally relevant to a fact at issue in the case. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

A trial court’s denial of a continuance motion may infringe on a defendant’s right to compulsory process and right to present a defense “if the denial prevents the defendant from presenting a witness material to his defense.” *State v. Downing*, 151 Wn.2d 265, 274-75, 87 P.3d 1169 (2004). We determine whether a trial court’s denial of a continuance motion violated a criminal defendant’s constitutional right to present a defense on a case-by-case basis, examining “the circumstances present in the particular case.” *Downing*, 151 Wn.2d at 275 n. 7 (quoting *State v. Eller*, 84 Wn.2d 90, 96, 524 P.2d 242 (1974)). We review the trial court’s decision to grant or deny a continuance motion for an abuse of discretion. *Downing*, 151 Wn.2d at 272. And we review de novo claims of a denial of Sixth Amendment rights, including the right to present a defense. See e.g., *Jones*, 168 Wn.2d at 719; *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

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B. *Trial Court's Continuance Ruling Did Not Violate Pope's Right To Present a Defense*

Examining the particular circumstances present here, we hold that the trial court did not violate Pope's right to present a defense. Fatal to his claim is Pope's failure to show any prejudice resulting from the trial court's denial of his continuance motion.

[E]ven where the denial of a motion for continuance is alleged to have deprived a criminal defendant of his or her constitutional right to compulsory process, the decision to deny a continuance will be reversed only on a showing that the accused was prejudiced by the denial and/or that the result of the trial would likely have been different had the continuance not been denied.

State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994) (citing *Eller*, 84 Wn.2d at 95-96).

First, Pope has not demonstrated that the medical records and testimony he sought to obtain for trial would have supported his contention that he could not have committed assault in the manner alleged by the State. The medical records attached to Pope's CrR 7.5 motion for a new trial merely show that Pope was diagnosed with Parkinson's disease, exhibited "jerky" and "stiff" movements, had poor coordination and balance, and had an "uncontrollable tremor in the right and to a lesser extent left hand, with some spread into the right leg." Suppl. CP at 36, 45. Nothing in the medical records showed that Pope could not commit an assault during his attempted theft of a motor vehicle, and he has not identified any expert witness that would so testify. Additionally, the trial court had already granted Pope a nearly one-month continuance to obtain the medical records he had sought. And Pope did not explain why he had been unable to obtain the records during that time when he again moved for a continuance on the first day of trial.

Finally, the outcome of Pope's trial would not likely have differed had the trial court granted him a continuance to allow him to present medical records and testimony regarding his

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Parkinson's disease in light of the overwhelming evidence of his guilt. Hallsted identified Pope as his assailant in a photographic montage and at trial. Several blister packs of medication labeled with Pope's name fell from the assailant's satchel and were recovered by Main at the scene. Hallsted and Pope both had injuries consistent with Hallsted's account of the assault. And Main did not see that Pope had any apparent physical disability when she arrested him. In light of these circumstances, we hold that the trial court did not violate Pope's constitutional right to present a defense by denying his second continuance motion.

II. JUDICIAL COMMENT

Next, Pope contends that the trial court improperly commented on the evidence in violation of article IV, section 16 of the Washington Constitution. Specifically, Pope asserts that the trial court improperly commented on the evidence when it orally instructed prospective jurors, pursuant to the parties' agreement, that "At Mr. Pope's request, I would like to inform you that Mr. Pope suffers from Parkinson's disease. This is not a fact in the case, but he has requested that this be conveyed to you so as to explain his visible symptoms of shaking." RP (Dec. 7, 2011) at 52. We disagree.

Article IV, section 16 of the Washington Constitution² prohibits a trial court from conveying to the jury its personal attitude toward the merits of the case and prohibits the trial court from "instructing a jury that 'matters of fact have been established as a matter of law.'" *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d

² Article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

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54, 64, 935 P.2d 1321 (1997)). A jury instruction that does no more than accurately state the law pertaining to an issue does not constitute an impermissible comment on the evidence. *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001).

Here, Pope argues that the trial court's instruction impermissibly commented on the evidence by stating that his Parkinson's disease was "not a fact in the case" because it prohibited the jurors from considering his Parkinson's disease during its deliberations. RP (Dec. 7, 2011) at 52. But the instruction's directive that Pope's Parkinson's disease was "not a fact in the case" was an accurate statement of the law because there was no evidence presented at trial regarding his Parkinson's disease. Rather, the trial court gave the instruction because Pope had requested that the jury be informed of his disease to explain why he was visibly shaking in the courtroom. Thus, consistent with the jury instructions as a whole, the trial court properly instructed the jury that it should not consider Pope's Parkinson's disease when determining whether the State proved beyond a reasonable doubt the essential elements of the charged offenses.³

Moreover, even if the trial court erred in giving the challenged instruction, Pope invited such error by agreeing to the instruction's language. The invited error doctrine prohibits a party from setting up an error at trial and then complaining of the error on appeal. *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). Pope asserts that the invited error doctrine does not apply here because, although he had agreed that the trial court should give the instruction, he did not propose the instruction or its language. But, "[u]nder the doctrine of invited error, even

³ The trial court's written jury instructions stated in part, "The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." Suppl. CP at 133.

where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction *or agreed to its wording.*” *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) (emphasis added). Here, Pope did more than merely acquiesce to the trial court giving the challenged instruction; he requested that the jury be informed about his Parkinson’s disease and twice agreed to the language of the trial court’s proposed instruction. Because Pope expressly agreed to the language of the instruction, the invited error doctrine prohibits him from challenging the instruction on appeal.

III. SUBSTANTIAL STEP JURY INSTRUCTION

Next, Pope asserts that the trial court’s substantial step jury instruction relieved the State of its burden to prove beyond a reasonable doubt the elements of attempted theft of a motor vehicle. As an initial matter, we must determine if this issue is properly before us. Generally, we will not address issues raised for the first time on appeal. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). And Pope did not object to the substantial step jury instruction at trial. He asserts, however, that his claimed error is of constitutional magnitude and, thus, we may review it for the first time on appeal under RAP 2.5(a)(3).⁴ We disagree.

Although a trial court’s failure to instruct the jury on every element of an offense is an error of constitutional magnitude under RAP 2.5(a)(3), “any error in further defining terms used in the elements is not of constitutional magnitude.” *State v. Gordon*, 172 Wn.2d 671, 677, 260

⁴ RAP 2.5(a) provides in relevant part:

Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutional right.

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P.3d 884 (2011) (quoting *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992)). Here, Pope does not contend that the trial court's attempted theft of a motor vehicle 'to convict' jury instruction failed to inform the jury on every element of the offense.⁵ Instead, he only takes issue with the trial court's substantial step definitional instruction. But this is not an alleged error of constitutional magnitude that we may address for the first time on appeal. *Gordon*, 172 Wn.2d at 677. Accordingly, we hold that by failing to object to the substantial step instruction, Pope has failed to preserve his argument that the trial court erred in giving the instruction.

Moreover, even if this issue were properly before us, Pope's claim lacks merit. Here the trial instructed the jury, "A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation." Suppl. CP at 146. This instruction deviates from *Washington Pattern Jury Instruction: Criminal* 100.05 only insofar as it replaces "that" with "which." 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 100.05 at 390 (3d ed. 2008) (WPIC).

⁵ That instruction provided:

To convict the defendant of the crime of Attempted Theft of a Motor Vehicle as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt—

- (1) That on or about August 8th, 2011, the defendant did an act which was a substantial step toward the commission of theft of a motor vehicle;
- (2) That the act was done with intent to commit theft of a motor vehicle; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Suppl. CP at 147.

Pope nonetheless argues that the trial court erred by using WPIC 100.05 because the instruction differs from the instruction adopted in *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). Specifically, Pope claims that the substantial step jury instruction's use of the word "indicate" rather than "corroborate" relieved the State of its burden of providing independent and corroborating proof of Pope's intent. Br. of Appellant at 20. He also claims that the instruction's reference to "a criminal purpose" rather than "the criminal purpose" relieved the State of its burden to prove Pope's criminal intent. Br. of Appellant at 21. But we have recently rejected these same exact claims in *State v. Davis*, 174 Wn. App. 623, 636-37, 300 P.3d 465, review denied, 178 Wn.2d 1012 (2013). Accordingly, even if Pope had preserved these issues for appeal by objecting to the substantial step definitional jury instruction at trial, his claims lack merit in light of our decision in *Davis*.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Last, Pope contends that his defense counsel was ineffective for failing to adequately investigate his case and for failing to advise him about accepting a plea offer. Again, we disagree.

We review ineffective assistance of counsel claims de novo. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To establish ineffective assistance of counsel, Pope must show both that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness based on all the circumstances and (2) the deficient performance resulted in prejudice in that there was a reasonable possibility that the outcome of the proceeding would have differed but for counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130,

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101 P.3d 80 (2004). We strongly presume that counsel is effective. *Reichenbach*, 153 Wn.2d at 130. To overcome this presumption, the defendant bears the burden of “establishing the absence of any ‘conceivable legitimate tactic explaining counsel’s performance.’” *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting *Reichenbach*, 153 Wn.2d at 130).

A. *Failure To Investigate*

Pope first asserts that his counsel was ineffective for failing to adequately investigate his case before trial. Specifically, Pope argues that his defense counsel failed to review his medical records before trial, failed to consult with his treating physicians, failed to consult with experts to determine whether Pope could have punched the victim in the manner alleged, and failed to secure witnesses to testify on Pope’s behalf. In support of his claim that defense counsel failed to review his medical records before trial, Pope cites to counsel’s December 14, 2011 motion for funds for copies of Pope’s health records, which was filed after the guilt phase of Pope’s trial had ended on December 8. Although Pope’s defense counsel did not file for reimbursement until after trial, a November 30, 2011 invoice attached to the motion clearly shows that defense counsel requested Pope’s medical records prior to the start of trial on December 6, 2011. Accordingly, Pope fails to show that defense counsel rendered deficient performance by failing to review his medical records before trial.

With regard to his claims that his defense counsel was ineffective for failing to consult with his treating physicians or with experts that could testify that he was unable to commit the assault because of his Parkinson’s disease, Pope fails to demonstrate that the outcome of his trial would have differed had his counsel consulted with his physicians or potential expert witnesses. On this record, Pope cannot show that his treating physicians or any potential expert witness

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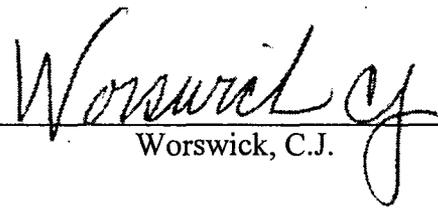
would have provided admissible evidence favorable to his defense. Thus, his claim fails the prejudice prong of the ineffective assistance of counsel test.

And, with regard to his claim that defense counsel failed to secure witnesses to testify on his behalf, Pope similarly fails to show that any potential witness would have provided admissible evidence favorable to his defense. Accordingly, Pope fails to demonstrate on this record that his defense counsel was ineffective for failing to adequately investigate his case.

B. *Failure To Advise Pope Regarding Plea Deal*

Finally, Pope argues that his defense counsel was ineffective for failing to advise him about whether to accept a plea offer. This argument is meritless because there is no evidence in the record that the State had offered a plea deal to Pope. Accordingly, we hold that Pope cannot show that his defense counsel rendered ineffective assistance and we affirm his convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

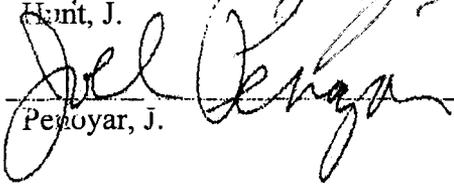


Worswick, C.J.

We concur:



Hunt, J.



Penoyar, J.