

No. 44866-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

COURTNIE CROSBY,

Appellant.

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DIVISION TWO  
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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

The Honorable Ronald E. Culpepper, Trial Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion and appellant Courtnie Crosby was deprived of her rights to present a defense under the Sixth and Fourteenth Amendments and Article I, § 22 when the trial court refused to grant a continuance.
2. The trial court's decision also violated Crosby's rights to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The sole issue at trial was whether Crosby was a knowing participant in and helped plan the crimes.

Before trial, counsel, who had only been substituted in on the case about a month before, asked for additional time to secure crucial expert witnesses and evidence in order to support a mental health defense which would explain to jurors why Crosby behaved in ways which a "reasonable" person might not understand. Counsel explained that she had been unaware of the potential defense when she took over the case and needed a brief continuance in order to finish preparing and adequately represent her client.

1. Did the trial court abuse its discretion and were Crosby's rights to present a defense violated by the refusal to allow counsel a brief continuance necessary to secure the presence of the experts and other evidence to support her defense?
2. Further, was Crosby deprived of her rights to effective assistance when the court's denial of the continuance ensured counsel would not be fully prepared to defend her client adequately?
3. Did the refusal to grant the motion further seriously prejudice Crosby when, in arguing Crosby's guilt, the prosecution repeatedly pointed to Crosby's behavior and different statements as making no "sense" and thus showing that she was guilty and the trial court excluded further evidence and faulted counsel for failing to have an expert who would support her mental health claims?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Courtnie Crosby was charged by amended information

with first-degree assault with a firearm or deadly weapon, along with a deadly weapon enhancement (Count I), first-degree robbery, also with a deadly weapon enhancement (Count II), felony violation of a court order based on conduct which was an assault “which did not amount to an assault in the first or second degree” (Count III) and residential burglary, also with a deadly weapon enhancement (Count IV). CP 25-27; RCW 9.94A.530; RCW 9.94A.533; RCW 9.94A.825; RCW 9A.35.011(1)(a); RCW 9A.56.190; RCW 9A.56.200(1)(a)(i); RCW 26.50.110(4); CP 25-27.

After pretrial proceedings before the Honorable Brian Tollefson on November 13, 2012, and the Honorable Bryan Chuschcoff on January 29 and March 4, 2013, a jury trial was held before the Honorable Ronald E. Culpepper on March 4-7, 11-13, 2013.<sup>1</sup> At the conclusion of trial, the jury found Crosby not guilty of the first-degree assault (Count I) but guilty of all other counts as charged. CP 678-73.

On May 3, 2013, Judge Culpepper ordered Crosby to serve a standard range sentence totaling 77 months. CP 89. Crosby appealed and this pleading follows. See CP 108-19.

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<sup>1</sup>The verbatim report of proceedings in this case consists of 10 volumes, which will be referred to as follows:

November 13, 2012, as “1RP;”  
January 29, 2013, as “2RP;”  
March 4, 2013, before Judge Bryan Chuschcoff, as “3RP;”  
March 4, 2013, before Judge Culpepper, as “4RP;”  
March 5, 2013, as “5RP;”  
the chronologically paginated volumes containing March 6, 7, 11, 12 and 13, 2013, as “6RP;”  
the sentencing proceedings of May 3, 2013, as “SRP.”

2. Testimony at trial

Felix Preval and Courtnie Crosby met in June or July of 2011. 6RP 103-14. By December of the same year they were living together in his house, along with Crosby's kids. 6RP 104-13. But shortly after that, Preval got a no-contact order against Crosby. 6RP 158.

Preval admitted that, after he got that order, he still had Crosby living with him at his house for about 12 more days. 6RP 158.

Finally, on December 25, 2011, Preval and Crosby broke up. 6RP 112-13. On December 28, Crosby called Preval in an effort to arrange to get her things from his home. 6RP 113. Crosby wanted to come over without having to have an officer present and Preval agreed. 6RP 113.

Preval told Crosby he would put her things outside so she could come by and get them. 6RP 113-14. At about 8:30 or 9 that night, Preval heard noise outside the door and opened it, seeing Crosby there starting to collect her things. 6RP 113-14. Preval said they started to argue because he wanted her to give back a bracelet he said he had "loaned" her but she said was a birthday gift. 6RP 115, 388. Ultimately, Preval threatened to call the police and Crosby left without all her things. 6RP 115, 388.

About 20-25 minutes later, Preval said, Crosby called back and asked to come get her stuff. 6RP 116-17. Crosby, in contrast, said that Preval texted her that her things were going to get wet due to the rain. 6RP 289. When she asked him to take the things inside because she did not have a ride, he told her she needed to come get them that day. 6RP 289.

Crosby finally returned, driving a white Buick. 6RP 110. She and

Preval talked for a little while and she mentioned that she did not have food for her kids. 6RP 119. He told her she could have cereal and crackers on top of his fridge and gave her some money to buy food. 6RP 119.

According to Preval, Crosby then started asking about maybe getting back together. 6RP 120-22. Preval said he demurred, because Crosby had caused some problems. 6RP 119. In contrast, Crosby said Preval had asked her to come inside, suggesting that they could maybe work something out. 6RP 633. She remembered the conversation happening before the argument with the bracelet. 6RP 633.

Eventually, the two were carrying Crosby's stuff to the car when Preval heard some kind of noise and felt an "impact" around his eyes. 6RP 120. He said someone was "on" him, choking him, and he turned his head and saw a second person there, too, wearing a mask. 6RP 122.

At some point, Preval said, he heard Crosby say she was going to call the police. 6RP 124-25. Preval claimed, however, that Crosby was not saying it "with any kind of energy." 6RP 123. Preval conceded that, after Crosby said she was calling police, the man with the mask threatened her. 6RP 145.

The men dragged them inside, demanding to know where Preval had his money and drugs. 6RP 125-26. After he was his some more, Preval showed the men where he kept his money. 6RP 125-29. When he spoke to police just after the incident, Preval said he had \$10,000 in the house. 6RP 169. At trial, he claimed it was more like \$19,000. 6RP 125. Preval denied ever having told a police officer it was \$16,000. 6RP 170.

Preval admitted that he had never said anything to Crosby about having money in the house. 6RP 125. He also conceded that she never asked him about having such money. 6RP 125. Preval nevertheless opined at trial that Crosby had been interested in his financial situation. 6RP 125.

When asked why the assailants were asking him for his drugs, Preval answered, “[b]ecause I am Cuban, maybe they were trying to do some kind of case, complicated case, about drugs.” 6RP 163. He then declared that he thought maybe Crosby had planned it that way, although he admitted he had no evidence of that at all. 6RP 163.

In a defense pre-trial interview, the 61-year old Preval said not only did he use drugs but he was using cocaine on a weekly basis. 6RP 108, 168.

For the first time, at trial, Preval said that the masked man took him in a choke hold to the kitchen and appeared to be searching for something to light up a burner on the stove. 6RP 146-47. Preval did not explain why he never made such a claim to police, or before that day at trial. 6RP 173.

Preval did not see where it came from but, at some point when they were in the kitchen, one of the men had a knife and stabbed Preval in the stomach and back. 6RP 131. Preval also said he felt like he was losing consciousness and heard someone say “police.” 6RP 146-50. He was then released and fell back onto the floor, where he lay for a little while, possibly unconscious. 6RP 148. When he “came to,” the door was closed and he somehow got up and locked the front door, then called police. 6RP

148.

Preval was taken to the hospital, where he spent several days. 6RP 148-50. A doctor who treated him at the emergency room described four stab wounds which resulted in four holes in Preval's stomach. 6RP 247.

A Tacoma Police Department (TPD) officer who responded to Preval's 9-1-1 call found Preval in the kitchen and started administering aid. 6RP 199. 214, 216-17. Also in the kitchen were what appeared to be a handgun on the stove, a large steak knife and barbecue fork. 6RP 188, 216-17. The gun was later identified as an airsoft or BB gun and a forensic specialist with TPD could not say if it was "operable." 6RP 217, 266. The barbecue fork on the floor had blood on it. 6RP 188.

An officer said that Preval described the incident as involving two black males stabbing him. 6RP 192-93. He also said a woman was there. 6RP 192-93. Preval did not give any names, however, until en route to the hospital, when Preval identified Crosby as being at the scene. 6RP 194-95.

TPD detective Robert Baker spoke to Crosby on February 1. 6RP 298-301. She told him she had seen someone tackle Preval and had tried to call police on her cell phone and was attempting to unlock the screen when someone tackled her to the ground and took her phone. 6RP 303-304. She also said that one of the men took her to the bedroom and hit her until she agreed to undress, then had taken nude photos of her against her will with his phone. 6RP 306-307. He threatened to put the photos on social media so she "allowed him to have intercourse with her." 6RP 306. She also said he cut her inner left wrist with a knife when she tried to flee,

so she bled on the floor. 6RP 308-309. When she tried to flee through the bedroom window she could not because there were bars. 6RP 309.

Crosby told the officer she was ordered to sit in the living room and threatened with a gun and that the man who had raped her hit her on the back of the head when she tried to flee. 6RP 309-310. After the assailants left, she ran and drove away without doing anything to help Preval. 6RP 311-12. She said she was afraid she would get blamed for the robbery. 6RP 213.

After that, she tried to call and text Preval but he did not answer. 6RP 311-15. When they ultimately spoke, she did not want to talk about it. 6RP 311-15.

TPD Detective Heath Holdern spoke with Crosby on March 8, asking her to describe the incident. 6RP 278-79. Crosby described going over to the home, the argument breaking out and Preval's threats to call police. 6RP 281. She then told the officer that she had borrowed "Sharon's" car for \$10 to go back and get her stuff, which she thought was getting wet out in the rain. 6RP 281. Crosby told the officer that the two assailants had come out of nowhere and attacked Preval, that she had been pushed and told not to move and that they had both been dragged into the house. 6RP 282-83. She then described the sexual assault. 6RP 282-83.

Crosby said she could hear Preval crying for help while the other assailant demanded money and drugs. 6RP 282-83. Crosby put on her clothes and went towards the door, actually getting into a kind of pushing match to try to get out. 6RP 284.

The officer asked Crosby if she had called police but she said she

had not. 6RP 286. Crosby told the officer she had no knowledge that any robbery was about to happen and that she did not steal anything herself or receive anything stolen from Preval. 6RP 286-87.

Holdern opined that Crosby's version of events "was kind of confusing," "didn't make a whole lot of sense" and caused the officer to think, "why didn't you just run away?" 6RP 282-83. The officer admitted that he was holding Crosby to his own standards. 6RP 289-90.

Baker got a warrant to try to find any evidence of sexual assault but swabs and other tests did not show anything. 6RP 322.

Ultimately, Baker confronted Crosby with his "suspicions" that she had been involved. 6RP 328. He said his only question was "if she had instructed" the suspects to stab Preval. 6RP 328. Crosby then began crying and told the officer that she called her "brother," a man named Darnell Jones, to get a ride because she wanted to get her stuff. 6RP 329. She wanted Jones with her to stand up to Preval if he gave her any trouble about giving her stuff back. 6RP 333.

Crosby asked Jones to help and they met up at her aunt's house. 6RP 335-36. Jones arrived with another man, "YG." 6RP 335-36. She dropped the two men off a couple of blocks away. 6RP 329, 335-36.

During the interrogation, Crosby was very upset, crying off and on. 6RP 345. The officer said she would "decline[] to answer the questions." 6RP 345. The officer said that Crosby did not know why she had lied about the sexual assault. 6RP 337.

According to the officer, Crosby said something about telling Jones and YG that would have to "jump" Preval outside and bring him inside if

he would not let her in. 6RP 335. She also said she thought he had hundreds of dollars in the home, not thousands. 6RP 334.

Crosby was arrested and, the next day, from jail, she apparently contacted Baker and he went over to talk to her. 6RP 338-39. She gave the officer more details, saying that, during the incident, she had armed herself with the airsoft gun and pointed it at YG, threatening to shoot him. 6RP 339. She also said Jones told her to go into the back bedroom to move things around in order to make it wound like she was getting hit and that was when she grabbed the gun. 3RP 341-42. When she then threatened YG with it in the kitchen, he told her to go ahead and shoot him, so she put a pistol on the counter and left. 6RP 342.

When shown a photo montage of a suspect named Darnell Jones, Preval identified him as someone she had previously met through Crosby but not as someone involved in the incident. 6RP 322.

Crosby testified in her defense. 6RP 382. She said that, shortly after she moved in, Preval started getting more jealous. 6RP 382. After he got the restraining order, whenever he did not get "his way," he would then threaten to call police on her. 6RP 388.

December 25, the day they broke up, was her birthday. 6RP 383.

On the day of the incident, Crosby had asked Preval to take her items inside after they had the fight over the bracelet. 6RP 389. She did not have a ride and, when he told her she had to come get her things that day, she started calling around and finally got Jones to agree to come get her. 6RP 390. He drove over to pick her up and, when she got into the car, she saw someone in the back seat. 6RP 391. She was a little

frustrated and asked why Jones had brought someone else, concerned that with a third person in the car her stuff would not all fit. 6RP 393.

On the way over to Preval's home, Jones, who knew Crosby, joked with her about finally getting away from Preval. 6RP 393. YG then said something like, "we're going to rob this nigga." 6RP 394. Crosby laughed and said, "you're joking." 6RP 394. She scoffed that it would never work because Preval had cameras on the house and bars on the windows. 6RP 394. She never thought they were serious. 6RP 395, 433, 459.

Crosby dropped the men off a few blocks away from Preval's home, at a home where the mother of Jones' child was living. 6RP 395. When they got out of the car, the men were both wearing blue jeans, and Jones had on a gray sweatshirt while YG had a blue shirt. 6RP 451. Crosby did not see a mask or gloves or anything similar on the men. 6RP 451.

Preval was helping her load her car and she was sad and crying, so they went inside and talked for 20-30 minutes. 6RP 396-97. When they went back outside, she said, she heard a voice she did not recognize say, "don't f'ing move." 6RP 398-99.

At that point, Crosby saw someone with a mask on. 6RP 389-99. Crosby got very scared. 6RP 389-99. Someone hit Preval and someone grabbed her by her hair, forced her to the ground and took her cell phone from her when she said she was going to call police. 6RP 400. The man who took her cell phone told her to get on the ground and then she and Preval were both dragged into the house. 6RP 403.

Once inside, Crosby said, she recognized Jones' voice. 6RP 403. He went to help YG, leaving her in the bedroom, and Crosby then tried to get out the window but could not find the release for the bars. 6RP 404. Crosby then heard screaming from Preval and had a panic attack. 6RP 405-406. She grabbed the BB gun and came out with it, threatening to shoot the men. 6RP 407. When YG said "shoot," Jones came towards her, took the gun from her and hit the side of her face. 6RP 407. She fell to the floor and said she was dragged to the corner of the living room. 6RP 408. At one point, she said, Jones put a knife to her throat. 6RP 422.

From where she was, Crosby could hear the men in the kitchen demanding money, drugs and jewelry. 6RP 410. They were accusing Preval of lying and he finally told them where the money was in the closet. 6RP 411. Crosby then yelled "police are coming," and "I called the police." 6RP 413. After they ran out, she followed, without stopping to see if Preval was okay. 6RP 414. She got into Jones' car and drove up the street, almost hitting Jones who was standing in the road, in the dark and rain. 6RP 415.

Crosby stopped the car and Jones and YG got in. 6RP 415. YG kept saying he thought Crosby was going to go to police but Jones said she would not. 6RP 415. At that point, YG pulled her hair from where he sat in the back seat, then forced her to take an envelope with money in it, saying that way they would know she could not go to the police. 6RP 417. Crosby first said she would not take it but ultimately did. 6RP 418. She used some of the money on some things for her and her family but put the rest in a storage unit. 6RP 418. The contents of the unit was later sold off

after she did not pay the bill while in custody. 6RP 418.

Crosby had not known that Preval had been stabbed until police told her. 6RP 423. She had sent him “text” messages via a cell phone and had offered to come bring him soup and otherwise do things to take care of him after the incident. 6RP 423.

Crosby explained her differing statements to police. She said that, when the first officer called her, Crosby called Jones to say the police wanted to have her come talk to them. 6RP 426. Jones told Crosby not to talk to police but then told her what to say when she went. 6RP 426. Crosby said that, when she went to speak to the first officer, the officer was not looking for the truth but seemed to want her to agree with what he thought happened. RP 428.

The first officer Crosby spoke to kept banging on the table and yelling at her like she was the one who had done something wrong. 6RP 428. It caused Crosby to have a panic attack. 6RP 428.

Before her second statement to police, Crosby called Jones again and told him they were questioning her once more. 6RP 432. Jones told Crosby to leave his name out of it and threatened her, saying he would do the same thing to her that had happened to Preval. 6RP 434. Crosby then gave a statement which was mostly a lie but some truth and the officer said if she called him within the next day to make a formal statement he could get her “leniency” from the prosecutor, who was a personal friend. 6RP 434-38.

After the incident, Crosby’s family had been threatened by Preval and decided to move out of state. 6RP 447. The aunt with whom Crosby

had been living had left town, as had the rest of her family, which is why Crosby had gotten a storage unit for her things. 6RP 446. Crosby's family had told her that Preval had also said he was going to "get" her and pay her back. 6RP 448.

D. ARGUMENT

MS. CROSBY'S STATE AND FEDERAL RIGHTS TO PRESENT A DEFENSE AND TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED WHEN THE TRIAL COURT DENIED A REASONABLE REQUEST FOR A CONTINUANCE CROSBY NEEDED IN ORDER TO PRESENT HER DEFENSE

Both the state and federal due process clauses guarantee the accused in a criminal trial the right to present a defense. See, State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993); see Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Further, a defendant in a criminal case is entitled to effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 90 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

In this case, this Court should reverse, because the trial court's decision to deny recently substituted counsel's reasonable request for a brief continuance was an abuse of discretion and deprived Crosby of her rights to present a defense and to effective assistance of counsel.

a. Relevant facts

Crosby was charged in March of 2012, and several continuances were granted for various reasons, such as a need for further time to

investigate, negotiate and prepare for trial (April 2012), more time needed to prepare for trial (September 17, 2012), unavailability of the prosecutor and the need for the defense to receive certain items (November 7, 2012) and the codefendant getting new counsel who then needed time to prepare (November 13, 2012). CP 6-9; 1RP 4-8. Crosby had also expressed unhappiness with her attorney and asked for a new one as early as November of 2012, at the same time that codefendant's counsel had been replaced. 1RP 5-7. Crosby's request had been denied. 1RP 5-7.

On January 29, 2013, however, the court finally granted one of Crosby's requests for new counsel. 2RP 6-8. A continuance was already needed because of codefendant's counsel continuing to need time to get ready for trial. 2RP 5. He needed extra time, he said, as he had only had the discovery about two months. 2RP 5.

Crosby's current defense counsel had been concerned enough about the relationship with his client that he had asked to have a proposed new attorney substitute in. 2RP 5-6. Crosby had trying to fire current counsel for awhile. 2RP 5-6. Current counsel said the proposed new attorney had already looked at the discovery, had an understanding of the basic facts and had access to information about the victim interview. 2RP 5-6.

The prosecution opposed the motion, stating a concern that, in the future, the new attorney would decide she needed more time. 2RP 10-11. The court then asked the new attorney, who was present, if she could be able to try the case without additional continuances if 30 days was granted. 2RP 10-11. The new attorney stated her belief that she would be ready,

telling the court that she had read the discovery and discussed it “numerous times” with Ms. Crosby and current counsel. 2RP 11-12. The court allowed new counsel to substitute in. 2RP 11-12.

When the parties next appeared on March 4, 2013, however, new counsel asked the court for a continuance. 3RP 7. Counsel had learned new information while preparing for trial and she needed time to get records and experts for her defense of “battered woman’s syndrome.” 3RP 7-8. She was getting records from Crosby’s childhood out of Minnesota and needed time to get two psychologists to testify experts for the defense. 3RP 7-8. She had talked with the experts about Crosby but they had not had time to interview her themselves and two weeks was needed to get the experts on board. 3RP 6-8.

When the prosecutor questioned whether the defense would apply, counsel told the court the experts she had spoken to were in agreement that it would. 3RP 11-13. The court indicated it wanted more information, thinking the “battered woman’s syndrome” might not apply in a case not involving self-defense. 3RP 12-14. Counsel explained that there was abuse in the relationship between Crosby and Preval and abuse that Crosby suffered as a child, which would explain why Crosby had done things during and after the incident that might seem not rational. 3RP 12-14. The court was unpersuaded that the potential defense had “much merit” and said, “[t]his case has been pending for a year. That’s plenty of time for the defense to get ready on this case. I have a courtroom ready, and I’m going to send you out.” 3RP 18. The case was sent out to Judge Culpepper’s courtroom.

Later that same day, in front of Judge Culpepper, counsel renewed her request for a continuance in order to be able to present the defense. 4RP 7. Counsel told the court that she had believed at the time she was substituted in that she would be ready in a month but after she started preparing the case for trial and learning more about her client's history of being abused, counsel began doing research which led her to believe that she needed to pursue more investigation and get documents from Minnesota, as well as testimony from experts, in support of a potential defense. 4RP 11-13.

Counsel told the court her concern was that Crosby was "entitled to some kind of a defense." 4RP 13. Counsel also said that, even if this case did not fit "so neatly" into a typical battered woman's syndrome situation, she had "done the research" which showed that the syndrome applied. 4RP 13. More specifically, counsel noted, Crosby had made several statements to the police, each of which were not true and did not really make sense. 4RP 14-15. The evidence and experts counsel sought would explain why Crosby would do the apparently irrational things she had done. 4RP 14-15.

The prosecutor complained of potential delay and stated his opinion that there was no defense for Crosby. 4RP 22-23. The court then asked counsel how the syndrome evidence would apply. 4RP 22. At that point, counsel objected to having to try her whole case during a motion to continue. 4RP 22. Counsel again noted that the defense was relevant to explain Crosby's reaction to interrogation by the officers and why she had lied repeatedly to police. 4RP 27-28. When the court suggested that

people lied to police all the time without having it be a mental health defense, counsel told the court that two psychologists were supporting her theory. 4RP 28.

Counsel argued that Crosby had a constitutional right to present a defense and to have effective, prepared counsel. 4RP 28. Counsel told the court she could not be effectively prepared if she did not have the psychologists she had already talked to “on board.” 4RP 28. She again told the court that she had not known that the defense existed when she told the court she could be ready in a month. 4RP 28.

In denying the motion to continue, the court said it was “not sure” the battered woman’s syndrome defense “would really apply here” and that it seemed the defense was applying “kind of an expansive view of how the syndrome works,” at least as the court currently understood it. 4RP 27-29.

The next day, before the parties finished up a pretrial motion, counsel again raised the issue. 5RP 5. While she did not want to “beat a dead horse,” she said, she was trying to make a record and had filed a supplemental brief on the battered woman’s syndrome defense. 5RP 7. The court asked for clarification of how the defense would apply to the facts of the case. 5RP 8-9. Counsel explained that it was relevant to why Crosby told different stories to police in the face of their interrogation tactics. 5RP 9-10.

Put simply, counsel argued, the only way the jury was going to understand Crosby’s behavior and giving various stories was “if they understand her history and they hear expert testimony that this is not an unusual way that a battered woman would respond.” 5RP 10-11. Counsel

again stated that the experts she had spoken to would say that Crosby was more susceptible to influence and threats and would react in an unreasonable fashion as a result. 5RP 10-11.

The judge again raised counsel's declaration, when she substituted in, that she would be ready for trial in a month. 5RP 11-12. Counsel again stated that she had not known the existence of the defense when she agreed to the one-month date. 5RP 12. Had she known of it, counsel said, she would never have said she could be ready so quickly. 5RP 12. The judge said that he would listen to an offer of proof with witnesses "next week." 5RP 11-12.

As part of the motion to suppress, counsel argued that Crosby's characteristics had to be considered, mentioning that this was something having an expert would support. The judge said, however, that he had not "heard anything to convince. . . [him] that PTSD means you can't make a voluntary statement." 6RP 83. The court again noted counsel's "objection on the continuance issue that we haven't had any real testimony about that" but returned to its belief there was nothing showing how the potential diagnosis would affect Crosby or make her "incapable of voluntary consent." 6RP 84.

In opening statement, counsel started to try to talk to jurors about what can cause someone's behavior and to detail Crosby's tragic history of abuse and PTSD. 6RP 104. The prosecutor objected, "[p]rior rulings." 6RP 104. The resulting sidebar was later put on the record, with the court saying that it had upheld the objection because the motion in limine had been granted excluding the evidence. 6RP 134.

At trial, an officer who spoke to Crosby after the incident commented about how Crosby's version of events and failure to run away during the incident did not make "a whole lot of sense." 6RP 284. He admitted he was basing that opinion on what he would do in the same situation. 6RP 289-90.

Another officer was asked about Crosby's failure to attempt to contact police after the incident, prior to them contacting her. 6RP 298.

During initial discussion of jury instruction, the judge mentioned a proposed defense instruction on battered woman's syndrome and the prosecutor said he objected to any psychological defense being raised without the testimony of an expert. 6RP 360-361.

A little later, before Crosby took the stand in her own defense, the prosecutor objected to any mention of Crosby's history of being abused or suffering depression. 6RP 371-72. Counsel stated that the prosecution was focusing on how Crosby would cry as if that crying was an admission of guilt, so counsel should be allowed to show the mental state issues which would negate that claim. 6RP 371.

The judge asked counsel what expert would establish this information. 6RP 372. The court also felt the discussion of the abuse that Crosby suffered as a child was "just a sympathy pitch." 6RP 374-75. Counsel again pointed out that she would have presented an expert in support of the defense if she had been given sufficient time. 6RP 375.

After all the evidence had been presented, during closing argument, the prosecutor repeatedly commented on Crosby's demeanor, such as her testimony when she "casually" said "she had no alternative" but to flee

after hearing Preval screaming (6RP 471), that her statements and her testimony all made no sense (6RP 476) and how it “really doesn’t make sense” that she did not call the police right after the incident (6RP 484). The prosecutor also described Crosby as “manipulative,” then declared, “none of it made any sense, and that’s why she’s sitting where she is today.” 6RP 485.

Defense counsel told the jury that Crosby had lied to police because of her fears of Darnell and YG, who had threatened her. 6RP 496.

In rebuttal closing argument, the prosecutor returned to how “convoluted” Crosby’s statements were, emphasizing that as evidence that she was guilty. 6RP 507.

- b. Denial of the motion to continue was an abuse of discretion and deprived Crosby of her constitutional rights to present a defense and to effective assistance of counsel

The trial court abused its discretion in denying counsel’s motion for sufficient time to be able to marshal the evidence and experts needed to present Crosby’s defense. In general, trial courts have discretion to decide whether to grant or deny a request for a continuance. See State v. Downing, 151 Wn.2d 265, 274-75, 87 P.3d 1169 (2004). That discretion, however, is violated when the ruling violates a constitutional right. See State v. Iniquez, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). As a result, while a decision about whether to grant a continuance is usually reviewed for abuse of discretion, because here appellant argues that the denial of the continuance violated her constitutional rights to present a defense and to effective assistance, the Court reviews those claims de

novo. See State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

On de novo review, this Court should reverse, because the trial court's decision to deny the request for a continuance violated Crosby's state and federal constitutional rights to present a defense and to effective assistance of counsel. First, the decision violated Crosby's rights to present a defense. Those rights are, essentially, "the right to a fair opportunity to defend against the State's accusations." Chambers, 410 U.S. at 294. While a defendant has no right to present irrelevant evidence in her defense, she does have a right to present evidence in her defense which is "of at least minimal relevance." See State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

Further, the threshold for "relevance" is "low," and evidence is relevant if it has "**any** tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401 (emphasis added); Darden, 145 Wn.2d at 621. If evidence meets that minimal standard of relevance to the defense, the burden then shifts to the prosecution to show that "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wn.2d at 622.

That showing, however, does not end the inquiry. If the prosecution meets the high burden of showing the evidence sufficiently prejudicial to the "fairness" of trial, the state's interest in excluding that evidence must still be balanced against the defendant's "need for the information sought," with the balance shifting strongly in favor of the

defense. See Jones, 168 Wn.2d at 720 (quoting, Darden, 145 Wn.2d at 622). The state's interest must outweigh the defendant's need for the evidence. See Jones, 168 Wn.2d at 720. For evidence which is of "high probative value" to the defense, the Supreme Court has declared that there is "no state interest [which] can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. Art. I, §22." Jones, 168 Wn.2d at 720, quoting, State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). This is because of the need to honor "the integrity of the truthfinding process" and the defendant's right to a fair trial. Jones, 168 Wn.2d at 720, quoting, Hudlow, 99 Wn.2d at 14.

Notably, even if there is an evidentiary prohibition such as a rule of evidence or the "rape shield" statute, where evidence is of high probative value to the defense, the rights of the defendant trump the evidentiary rule or statute. Jones, 168 Wn.2d at 723.

Here, there can be no question that the evidence and testimony counsel sought time to secure would have been of "high probative value" to Crosby's defense. Evidence is of such value to a defense where its exclusion would deprive the defendant of the ability to present their version of the incident. Jones, 168 Wn.2d at 720-21. Without the evidence and expert testimony, counsel was not allowed to present any evidence to explain the unusual behavior Crosby exhibited after trial and her multiple statements to police.

A trial court's denial of a motion to continue may infringe upon the defendant's rights to present a defense if that denial prevents her from presenting a witness whose testimony is "material" to her defense. See

Downing, 151 Wn.2d at 274-75. The question of whether a denial of continuance violated a defendant's rights is subject to a "case by case inquiry," because there are "no mechanical tests for deciding when the denial of a continuance violates due process, inhibits a defense, or conceivably projects a different result," so that "the answer must be found in the circumstances present in the particular case." State v. Eller, 84 Wn.2d 90, 96, 524 P.2d 242 (1974). Courts examining the issue have looked at such questions as diligence of counsel, materiality of the proposed evidence, the need for orderly procedure, the possible impact on the trial, whether prior continuances have been granted and whether the purpose of the request was improper desire to delay the proceedings. See id; see also, State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), review denied, 137 Wn.2d 1024 (1999).

Here, consideration of these factors shows that the decision here was in error. Counsel's request for a continuance was made after she had made efforts to secure the evidence and the witnesses and had only been on the case for a month. 2RP 5-9; 3RP 7-9. She was already working to and had obtained some records from out of state and had talked to three different experts about Crosby's case. 3RP 6-8. She had found two experts willing and able to get involved and needed only two weeks in order to secure their presence. 3RP 6-8. There can be no question that she acted with due diligence.

Further, due process supported granting the continuance. Crosby's defense was that she did not know about and was not involved in the planning or execution of the crimes. Her behavior and statements after the

incident was specifically used by the prosecution as evidence that she must be guilty. 6RP 471, 476, 484, 485, 507. In order to explain that incriminating evidence and present a defense, Crosby needed the testimony of the missing experts and the relevant records from out-of-state, which would have established that her PTSD and prior history as an abused child were the explanations for that “strange” behavior and multiple statements, rather than guilt.

Nor was the request improper in light of the prior history of the case. The prior continuances were for a need for further time to investigate, negotiate and prepare for trial (April 2012), more time needed to prepare for trial (September 17, 2012), unavailability of the prosecutor and the need for the defense to receive certain items (November 7, 2012) and the codefendant getting new counsel who needed time to prepare (November 13, 2012). CP 6-9. None of those requests smack of an effort to delay, nor did this one. Further, Crosby’s dissatisfaction with prior counsel had already been made clear. 1RP 2-9. While prior delay had occurred, none of it was for improper or delaying purposes and a further short delay to guarantee that Crosby had the ability to present her defense was warranted.

Notably, our Supreme Court has cautioned that considerations of efficiency should not trump a defendant’s important rights, because even though “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[.]” State v. Watson, 69 Wn.2d 645, 651, 419 P.2d 789 (1966).

At trial, the prejudice in failing to grant the motion to continue to allow counsel the time to get the testimony of the experts and evidence regarding the abuse and PTSD was absolutely clear. During her opening statement, when counsel started to talk to jurors about Crosby's history of abuse and her PTSD diagnosis, the court sustained the prosecutor's objection. 6RP 104. But the prosecution focused on how Crosby's actions and statements did not make sense to the ordinary person, eliciting testimony from one officer that Crosby's failing to run away during the incident "didn't make a whole lot of sense" (6RP 282-83) and arguing to the jury that Crosby's statements and her testimony all made not sense (6RP 476), how it "really doesn't make sense" that she did not call the police right after the incident (6RP 484), and that Crosby was "sitting where she is today" because "none of it made any sense." 6RP 485. The court also denied counsel's efforts to introduce the concept through an instruction (6RP 360-61) and the prosecution objected to Crosby bringing *any* mental defense unless she had an expert to support it. 6RP 361.

Indeed, the court itself faulted counsel for failing to have an expert when ruling that Crosby could not testify about her childhood abuse or mental situation. 6RP 375.

In addition to violating Crosby's rights to present a defense, the trial court's ruling deprived Crosby of her state and federal constitutional rights to assistance of counsel. Those rights, guaranteed by the Sixth and Fourteenth Amendments and Article I, § 22, ensure not only the presence of an attorney but also that the attorney meet certain minimal standards of effectiveness. See Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9

L. Ed. 2d 799, 93 A.L.R.2d 733 (1963); Hendrickson, 129 Wn.2d 77-78. While courts apply a strong presumption that counsel is effective, that presumption is overcome if counsel fails to properly investigate factual or legal defenses in order to prepare a defense. See State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). Thus, to be effective counsel must be given sufficient time and resources to engage in such preparation and to present a defense.

Under the circumstances in this case, the trial court's ruling deprived Crosby of her right to effective assistance of counsel. Counsel cannot adequately represent her client when she does not have the evidence and expert testimony required to establish her client's only defense. And counsel herself told the court she did not feel she could be adequately prepared to defend her client without the assistance of the experts and resources she sought. 4RP 28.

Indeed, ensuring that counsel has sufficient time to prepare to adequately represent her client is not just a duty of counsel herself. More than 60 years ago, our state's highest court noted that the court shares in the duty of making sure the attorney has "reasonable time within which to consult his client and make adequate preparation for trial." Buckingham v. Cranor, 45 Wn.2d 116, 273 P.2d 494 (1954), cert. denied, 348 U.S. 938 (1955) (quotations omitted).

Notably, the U.S. Supreme Court has declared that, while "[t]he prompt disposition of criminal cases is to be commended and encouraged," "in reaching that result a defendant, charged with a serious crime, must not be stripped of his right" to have counsel have sufficient

time to prepare his defense. Powell v. State of Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

The trial court's decision to refuse to grant a brief continuance was an abuse of discretion, in violation of Crosby's rights to present a defense and effective assistance of counsel. And these constitutional errors cannot be shown by the prosecution to be harmless, beyond a reasonable doubt. The due process right to present a defense is, "in essence, the right to a fair opportunity to defend against the State's accusations." Chambers, 410 U.S. at 294. A prosecution must "comport[] with prevailing notions of fundamental fairness," which require that the defendant is "afforded a meaningful opportunity to present a complete defense." State v. Lord, 117 Wn.2d 829, 867, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992). The trial court's decision to deny counsel sufficient time to secure experts and evidence in order to be able to present Crosby's defense deprived Crosby not only of the opportunity to present her only defense but also to have counsel who was able to provide effective assistance. This Court should so hold and should reverse.

F. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial.

DATED this 17th day of March, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows: to Kit Proctor, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402; to Courtnie Crosby, DOC 361110, WCCW, 960 Bujacich Rd. NW, Gig Harbor, WA 98332-8300.

DATED this 17th day of March, 2014.

Respectfully submitted,

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