PD-0672-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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COURT OF CRIMINAL APPEALS NO. PD-0672-17
NINTH COURT OF APPEALS NO. 09-15-00196-CR
356TH DISTRICT COURT TRIAL COURT NO. 23010

FILED
COURT OF CRIMINAL APPEALS
7/10/2017
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In the
TEXAS COURT OF CRIMINAL APPEALS
in
AUSTIN, TEXAS

CRYSTAL LUMMAS BOYETT
v.
THE STATE OF TEXAS

Petitioner's Petition for Discretionary Review

Trial Court: 356th Judicial District Court (Hardin County) / The Honorable Steve Thomas
Petitioner: James P. Spencer II (Crystal Lummas Boyett's Attorney)
Respondent: State of Texas (Represented by the Hardin County District Attorney)

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CRYSTAL LUMMAS BOYETT

Respondent:

THE STATE OF TEXAS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATEMENT REGARDING ORAL ARGUMENT

Oral Argument is requested in this case if the Honorable Justices feel it is needed to better explain the arguments.

STATEMENT of the CASE

Nature of the Case:	This is a manslaughter conviction arising from a vehicular accident with two (2) deaths and an injury.
Trial Court:	The Honorable Steve Thomas, 356th Judicial District Court, Hardin County, after trial a jury entered a verdict of guilty and accessed the maximum sentence of twenty (20) years.
Court of Appeals:	Ninth Court of Appeals, Beaumont, Texas.
Parties in the Court of Appeals:	Appellant[s]: Crystal Lummas Boyett Appellee[s]: State of Texas
Disposition:	Justice Kreger authored the court's opinion, joined by Justices McKeithen and Horton. The court of appeals affirmed the judgment below. No motions for rehearing were filed.
Status of Opinion:	Justice Kreger noted "Do Not Publish" on the opinion.

STATEMENT of the JURISDICTION

This Court has jurisdiction pursuant to section 68.1 of the Texas Rules of Appellate Procedure.

STATEMENT of the PROCEDURAL HISTORY

This case was submitted on June 16, 2016. The Ninth Court of Appeals delivered its opinion on May 31, 2017. No motion for rehearing was filed in this case.

GROUNDS FOR REVIEW

Issue 1: The court's competency examination ruling.

The court of appeals erred in affirming the trial court's judgment because the evidence presented at trial was sufficient to satisfy the statutory standard of "some evidence" necessary to require a "formal competency hearing."

Issue 2: The court's ruling regarding Petitioner's right to testify.

The court of appeals erred in affirming the trial court's decision because the Petitioner's attorney indicated that he wanted the Petitioner to testify but stated that he **refused** to allow the Petitioner to testify.

ARGUEMENT

Argument 1: The court's competency examination ruling.

"On suggestion that the defendant may be incompetent to stand trial, the court shall determine by informal inquiry whether there is **some evidence** from **any source** that would support a finding that the defendant may be incompetent to stand trial." See **Texas Code of Criminal Procedure Sec. 46B.004(c)** [emphasis added].

The Defense had four witnesses testify as to their observations of the Petitioner; the Petitioner's attorney filed a motion stating that the Petitioner could not work with her attorney or their expert with a rational degree of understanding. The statutory requirement for a formal competency hearing is that "some" evidence of incompetency is shown to the trial court at the informal competency hearing. In order for the Trial court to refuse to grant a "formal" competency hearing, it had to find "no" evidence of incompetency existed. This means that the Trial court found that all four of the witnesses who testified for the Petitioner were completely without credibility (this included a local respected attorney and an accident reconstruction expert). Additionally, Trial counsel filed a motion with the Court that Petitioner was mentally incapable of interacting with her attorney with a "sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding and/or a rational as well as factual understanding of the proceedings against the person;" this is the legal definition of incompetency under the appropriate statute. See **Texas Code of Criminal Procedure Sec.**

46B.003. The trial court had to completely disregard the opinion of the Petitioner 's attorney as it regards her ability to help prepare her case. The Court of Appeals states that the record is "void of any evidence of any specific problems with the behavior of Boyett during the trial or of any specific problems that Boyett's counsel had attempting to communicate with his client about trial strategy." See **Memorandum Opinion** pg 14. However, all of the witnesses pointed to "specific problems" during their testimony.

Witness Dornbos testified as to her credentials to make an assessment of the mental state of the Petitioner. The State chose not to question her qualifications and accepted her credentials as stated. Witness Dornbos also stated a litany of "specific problems" the Petitioner exhibited. See **Appellant's Brief** pg. 18 to 23.

Witness Evans testified that the Petitioner was not able to comprehend/understand the situation sufficiency to interact with her accident reconstruction expert. Evans pointed to "specific problems" in the attempted conversation with the Petitioner. See **Transcript** Vol. 9, page 23, line 1 to line 24 and Vol. 9, page 47, line 10 to page 54 line 10.

Witness Bush confirmed the Petitioner's previous diagnosis of "bi-polarism and schizophrenia." Bush pointed out that the behavior ("specific problems") of the Petitioner were similar to behaviors which necessitated an involuntary hospitalization in 2013. See **Transcript** Vol. 9, page 29, line 4 to line 12 and Vol.

9, page 59, line 24 to page 60 line 24. The Court of Appeals noted the witness testified "Boyett did not seem to have the present ability to talk with her attorney with a reasonable degree of rational understanding." See **Memorandum Opinion** pg 12. The Court of Appeals then, conversely, stated "there is no evidence from Boyett's sister that she was familiar with the statutory standard for incompetency;" however, her testimony, referenced above, tracks the statutory standard for incompetency in Texas. Bush is the Petitioner 's sister and is intimately familiar with the mental issues afflicting the Appellate.

Witness Butler testified as to "bizarre behavior" by the Petitioner "carrying on a fairly loud conversation with herself" in the Courthouse. See **Transcript** Vol. 9, page 30, line 25 to page 31, line 25.

Any of these witnesses' testimonies individually would have constituted "**some**" evidence of incompetency, especially combined with Trial counsel's statements/motion regarding his own interactions with the Petitioner after the trial started. Evidence is usually sufficient to create a bona fide doubt if it shows recent severe mental illness, at least moderate retardation, or truly bizarre acts by the defendant. **McDaniel v. State**, 98 S.W.3d 704, 710 (Tex. Crim. App. 2003). The involuntary hospitalization in 2013 would constitute "severe mental illness" and all of the witnesses testified as to Petitioner's "bizarre acts."

Based on the level of proof required to demand a formal hearing on competency (i.e. "**some** evidence"), the Court of Appeals had to find **no** evidence was presented to the Trial court from testimony from four (4) witnesses and the statements and contents of the Petitioner 's attorney motion in order to uphold the Trial court's refusal to grant a formal hearing on competency. The Petitioner's attorney at trial met the burden of "**some**" evidence, which would simply have required the Trial court to have the Petitioner examined by a medical professional prior to deciding the Petitioner's mental state at a formal hearing.

The Court of Appeals erred in finding that the evidence requiring a formal hearing on competency was not sufficient.

Argument 2: The court's ruling regarding Petitioner's right to testify.

This Court identified two issues in a prior case's "analysis overview," trial court error and "structural" defect, that need to be answered in order to apply the proper standard of harm analysis test. See **Johnson v. State**, 169 SW3d 223, 228 (CCA - 2005). In this case, the answers to both questions are "yes."

The error caused by trial counsel is attributable to the Trial court. The Trial court improperly failed to conduct a "formal competency examination" (see **Argument 1** for reasoning). By failing to have a medical professional make the competency determination, the Defense attorney was left in a "no win" situation.

The Defense attorney believed he had provided "some" evidence of incompetency through the testimony of four (4) uncontroverted witnesses in addition to his own statements to the Trial court. While having a realistic belief that his client was incompetent (despite the Trial court's ruling in the informal competency hearing), the Defense attorney had an ethical duty not to let his client testify if he believed she was incompetent. If he had let Petitioner testify and the competency was again challenged in a later Motion for New Trial (with a report of incompetency from a professional paid for by the Defendant's family), there was the possibility that Trial counsel could be found ineffective for letting his incompetent client testify. The only course of action was not to let her testify despite both their original intentions to have her testify. Strickland's framework is only used when the "deprivations flow solely from defense counsel." See **Johnson at 232.** Thus, the Defense attorney's preventing his client from testifying was directly attributable to the Trial court's failure to have competency determined by a medical professional in a formal hearing.

The deprivation of the defendant's right to testify is a "structural defect." The prior Court states that absent a showing of "what her testimony would have been," there is no harm under Strickland. See **Memorandum Opinion** pg 18. The Appellate was unable to converse with her attorney and her expert with any degree of rational understanding due to her mental condition; therefore, it was impossible

for the Defense counsel to present any evidence/"offer of proof" to the Court of Petitioner 's expected testimony. Unlike **Strickland** and **Johnson**, the Appellate was not able to converse with her attorney with a rational degree of understanding of her case. See **Strickland v. Washington**, 466 US 668, 104 S Ct 2025, 80 LEd 674 (1984) and **Johnson** generally. Any testimony she would give would be relevant as a participant and/or as someone who could testify about any mechanical failure in her vehicle causing the accident. Requiring an individual who could not, at the time, operate with a rational degree of understanding of her case to present an example of relevant evidence in her case as a prerequisite to preserving error is a "structural defect" in the Court's decision. It is the legal equivalent of the Court requiring a paraplegic to do pull-ups to prove that he cannot do pull-ups.
Under the above analysis (by finding "yes" to both issues), this Court has previously determined that no analysis of harm or prejudice is required to be conducted in order to find ineffective assistance of counsel. See **Johnson v. State**, 169 SW3d 223, 228 (CCA - 2005)

The Court erred in finding no ineffective assistance of counsel in this case.

PRAYER FOR RELIEF

For the foregoing reasons, Petitioner prays that this Court vacate the current judgment and dismiss this case. Or in the alternative, dismiss the current judgment

and send this case back to the trial Court with instructions to retry this case pursuant this Court's instructions. The Petitioner also prays for any and all other relief that this Honorable Court deems necessary to a fair and final determination in this case.

Respectfully submitted,

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/s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th DAY of July, 2017, a copy of the foregoing REQUEST FOR PETITION FOR DISCRETIONARY REVIEW was served upon all persons and counsel entitled thereto, all in accordance with the Tex.R.App.P., by certified mail, return receipt requested, upon:

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CERTIFICATION

I HEREBY CERTIFY that his document complies with the requirements of Tex. R. App. Proc. 9.4(i)(2)(B) because there are 2359 words in this document, excluding the portions of the document excepted from the word count under rule 9(i)(1), as calculated by the MS Word computer program used to prepare it.

_____/s/_____
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APPENDIX

NO. 09-15-00196-CR

In the

COURT OF APPEALS

for the

NINTH SUPREME JUDICIAL DISTRICT

at

BEAUMONT, TEXAS

CRYSTAL LUMMAS BOYETT

v.

THE STATE OF TEXAS

Appellant's Brief

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATE CASES:

FEDERAL CASES:

STATE STATUTES and RULES:

FEDERAL STATUTES and RULES:

NO. 09-15-00196-CR

In the

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CRYSTAL LUMMAS BOYETT

v.

THE STATE OF TEXAS

Appellant's Brief

TO THE HONORABLE the JUSTICES of the NINTH COURT of APPEALS:

COMES NOW Appellant, CRYSTAL LUMMAS BOYETT, and files this Appeal and, in support thereof, this Appellant brief.

STATEMENT REGARDING ORAL ARGUEMENT

Oral argument will aid the Court's decision process in this appeal.

STATEMENT of the CASE

For ease of reference, the following facts can be found generally in the Court Reporter's transcript Volume 7, Page 11, Line 17 through Page 17, Line 20.

On or about February 3, 2014, the victims of the accident were involved in a motor vehicle collision. The victims were all members of the same family, Dawn Sterling (mother), Connely Burns (older daughter) and Courtney Sterling (younger daughter). This case involves the manslaughter death of Connely Burns. Dawn Sterling was the only survivor of the accident except for the Appellant. Mrs Sterling does not remember the accident. The Appellant drove a red Camero and the victims were in a white Nissan Murano (Courtney Sterling was the driver).

Several law enforcement officers testified that they sighted a red Camero traveling southbound on Highway 62 (South of Buna nearing Lumberton) and radar indicated the speed was over 150 mph. Some of the officers attempted an intercept but due to the speed and department regulations involving high speed pursuits, they were unable to catch up to the red Camero. The vehicle drove through the main street of Lumberton (Hwy 62) and approached the Hwy 62 / Hwy 96 "Y" (split). After the red Camero merged onto Hwy 96, it impacted the rear of the Nissan Murano. The driver (Courtney Sterling) was mortally wounded and died at the hospital, Connely Burns was killed on impact and Dawn Sterling was

seriously injured but survived. The Appellant survived with non-life threatening injuries.

The Court conducted a hearing for a Continuance on March 31, 2015 based on the failure of the State to provide a litany of discovery materials. The Court refused to grant the continuance after a hearing. On April 15, 2015, the Appellant filed a formal motion for a continuance (again complaining of late discovery conducted by the State), which was denied without a hearing. The Appellants case began trial on April 20, 2015, Appellant was tried by a jury for Manslaughter and found guilty. During the Trial, the Appellant became unable to either aid her attorney or understand the case against her. Appellants attorney requested a competency hearing and an examination by a trained professional, a hearing was granted but the examination request was denied. Appellants attorney refused to let the Appellant take the stand in her own defense due to his belief that the Appellant was incompetent at that time. Appellant was unable to put on any witnesses due to the incompetency of the Appellant preventing her participation in preparing her case. Appellant was tried by a jury for Manslaughter and found guilty. Appellant was assessed the maximum punishment of twenty years in Tex Department of Corrections - Institutional Division.

This Appeal results.

ARGUMENT

POINT ONE

The trial court abused its discretion by not granting the Defense's continuance request when the State had not produced discovery materials containing possible Brady/Morton/Exculpatory material less than twenty days before trial.

A prosecutors' suppression of requested evidence favorable to an accused violates the Fifth Amendment due process clause if the evidence is material either to guilt or to punishment. This is true irrespective of the good or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83, 87-89 (1963); Kyles v. Whitley, 514 U.S. 419, 434, 437-40 (1995). See also United States v. Sipe, 388 F.3d 471, 485 (5th Cir. 2004) (evidence may be material even if inadmissible at trial). The rule emanates from the government's "substantial resources [and] considerable other advantages" over defendants, and thus, the "system reposes great trust in the prosecutor to place the ends of justice above the goal of merely obtaining a conviction." Kirkpatrick v. Whitley, 992 F.2d 491, 496 (5th Cir. 1993).

The "Government must make [these] disclosures in sufficient time that [Defendant] will have a reasonable opportunity" " either to use the evidence in the trial or use the information to obtain evidence for use in the trial." United States v. Rodriguez, 496 F.3d 221, 226 (2d Cir. 2007). The defense is entitled "to use the information with some degree of calculation and forethought." Leka v. Portuondo, 257 F.3d 89, 103 (2d Cir. 2001). "To say that the government satisfied its obligation under *Brady* by informing the defendants of the existence of favorable

evidence, while simultaneously ensuring that the defendants could neither obtain nor use the evidence, would be nothing more than a semantic somersault." United States v. Salerno, 937 F.2d 797, 807 (2d Cir.1991), *reversed on other grounds*, 505 U.S. 317 (1992).

The State received into its possession 4323 pages of medical records with a medical records affidavit date of "3-19-2015" which was twenty one days before the "special setting" trial date of April 20, 2015. (Transcript Vol. 5, page 11, line 23 to page 12, line 10 and Vol. 5, page 18, line 6 to line 7). The Court was able to hear the Appellant's (informal - no motion filed) request for a continuance on the matter on March 31, 2015 (Transcript Vol. 5, page 11, line 17 to 20). The Appellant preserved any error by requesting a continuance to review the materials. See Adams v. State, No. 01-05-00201-CR (Tex.App.-Houston [1st Dist.] 2006); Ray v. State, No. 14-06-00205-CR (Tex.App.-Houston [14th Dist.] 2007, no pet); State v. Fury, 186 S.W.2d 67 (Tex.App.-Houston [1st Dist.] 2005, pet ref'd). The State admitted that they had not examined the records and **could not** certify that there was no Exculpatory/Brady evidence contained in the requested records. (Transcript Vol. 5, page 17, line 13 to page 18, line 4). Additionally, the State admitted that they were still receiving Discovery as late as the day before this hearing but argued it was "minimal type things." (Transcript Vol. 5, page 18, line 10 to 21). There is nothing "minimal" about evidence which has not been turned

over to the Defense but to which they are entitled. The State further argued against the continuance because the Court, with the input of the parties, had created the "special setting" six (6) months prior to the trial date. (Transcript Vol. 5, page 18, line 5 to line 9). The State was aware of this "special setting" when they failed to turn over the records referenced in the Defense's Motion for Continuance. (Transcript Vol. 5, page 18, line 5 to line 9). The Clerk's records show the State did not even subpoena the 4323 pages of medical records until "March 19, 2015" (Clerks Record page 32) The State argued that the Appellant could object and request a hearing at trial, if further need arose. (Transcript Vol. 5, page 22, line 5 to page 19, line 3). But the Appellant is entitled to those medical records with sufficient time to review them prior to trial because the State admitted the medical records might contain items of "a non-medical nature" (i.e. Exculpatory/Brady evidence). (Transcript Vol. 5, page 17, line 13 to page 18, line 4). The Court refused to grant the continuance and as a result any potential Exculpatory/Brady evidence contained in the Records were not available for use to the Appellant at trial. (Transcript Vol. 5, page 14, line 25 to page 15, line 1). The Appellant formally (in writing) requested the continuance a second time because Appellant had still not received many of the materials subject to discovery. (Clerks Record pages 55 to 58). The Appellant needed time to have an expert examine the (not yet produced) medical records and determine if they contained any Brady/Exculpatory

evidence to be used in the Appellant's defense in this case. (Clerks Record pages 55 to 58). Some of these materials were crime scene photos and supplemental reports by the investigators which were not received by the State until between March 4, 2015 and April 14, 2015. (Clerks Record pages 55 to 58). The State did not receive the discoverable items until three days before trial, meaning that the Appellant would not receive them until after the State reviewed the items (less than three days before trial at the earliest). The Court denied the motion for continuance without a hearing. (Clerks Record page 61). The parties do not disagree that the Court set a date for designation of experts at least 30 days before trial, but the constant influx of discoverable materials up to three days before trial makes it impossible for the Appellant to conform to the Court's rule and designate her expert before the Court's deadline. (Transcript Vol 5, page 11, line 11 to line 16). No testimony during the hearing indicates when the State would make the discovery materials available to the Appellant or in what form (i.e. paper or electronic) after the March 31, 2015 hearing date. (See Generally Transcript Vol. 5).

The Appellant requested the continuance for many reasons but necessarily for the purpose of having an expert examine the over 4323 pages of medical records to determine if it contained Exculpatory/Brady evidence favorable to the Appellant's case at trial. (See Generally Transcript Vol. 5). The standard for abuse

of discretion is that the "defendant was actually prejudiced by the denial of his motion." See Heiselbetz v. State, 906 S.W.2d 500, 511 (Tex.Crim.App. 1995) The Courts have determined that "late disclosure prejudices the defendant only if the defense didn't get the evidence in time to make effective use of it at trial." See Palmer v. State, 902 S.W.2d 561 (Tex.App.-Houston [1st Dist] 1995, no pet). The standard for abuse of discretion is that the "defendant was actually prejudiced by the denial of his motion." See Heiselbetz v. State, 906 S.W.2d 500, 511 (Tex.Crim.App. 1995)

The State also suggested that the Appellant file a motion for new trial or a new continuance request if they found any Exculpatory/Brady material during/after the trial, which is in violation of the disclosure requirements discouraging "defending through cross-examination" and thwarting of the creation of a defensive theory prior to trial. See Ex Parte Danny Orona Ybarra, 629 S.W.2d 943, 948 (Tex.Crim.App 1982). (Transcript Vol. 5, page 16, line 11 to line 20 and page 18, line 17 to line 25).

The Appellant only had a maximum of twenty days to retain an expert (from the hearing date), have that expert review 4323 pages of medical records, have the expert prepare a written report detailing any Brady material favorable to the Appellant's case and then have the Appellants attorney review the report to subpoena any witnesses/paperwork/physical evidence that the report suggests

might have information containing that favorable evidence. The State was still receiving discovery materials (i.e crime scene photos **needed** by the Appellant's expert to prepare for trial) were as late as March 4, 2015 and April 14, 2015. (Clerks Record pages 55 to 58). In prior cases, the Court of Criminal Appeals has determined that production of discovery two weeks (14 days) before trial was not considered "timely." See Mowbray v. State, 943 S.W.2d 461 (Tex.Crim.App. 1996).

It is the State who created the need for a continuance by not getting their discovery together for production to the Appellant well in advance of the trial date and the State who opposes the continuance to further prevent the Appellant from having sufficient time to examine the records prior to the trial date. In this case, the records are so voluminous and the time period of disclosure so short as to make this a constructive failure to disclose the potential Exculpatory/Brady material. The Appellant was prevented from using any of the evidence in her defense because of her attorney's inability to fully have the records reviewed prior to the trial. Finally, the State's inability to certify that there is NO Exculpatory/Brady material contained in the above referenced materials only serves to bolster the need for a continuance to have the records actually produced and properly examined prior to any trial date.

The Court abused its discretion by not granting Appellant's request for a continuance due to the State's failure to produce discovery materials within a reasonable time before trial. The State's failure toproduce exculpatory materials within a reasonable time before trial resulted in Appellant's inability to review and use these materials in her defense. The judgment of the trial court should be reversed and the case remanded to the trial court for a new trial. In the alternative, Appellant's appeal should be abated and the cause remanded for a determination as to Appellant's competency at the time of her trial.

POINT TWO

The Court abused its discretion in failing appoint a licensed physician to make a Medical determination of the competency of the Appellant before making a legal determination.

During the trial, the Appellant's attorney filed a motion raising the issue of competency of the Appellant. (Clerks record page 76 to 79). The Court dismissed the Jury and held an informal hearing on the validity of the motion. (Transcript Vol. 9, page 12, line 3 to page 63, line 17).

The State based much of its case on the mental state of the Appellant, portraying her as cold and unfeeling, thus the State initially called into question the mental condition of the Appellant. (Transcript Vol. 7, page 17, line 21 to line 24; Vol. 8, page 76, line 2 to line 6; Vol. 8 page 83, line 17 to page 84, line 7; Vol. 8, page 86, line 21 to line 22; Vol. 8, page 91, line 6 to line 16). The States witnesses

testified that the Appellant was taking medication for "severe bi-polar disorder." (Transcript Vol. 8, page 75, line 22 to page 76, line 6). No medications were found in the Appellant's system except for the Xanex. (Transcript Vol. 8, page 74, line 18 to line 22). Indicating that the other medications prescribed for her mental condition were not in her system (Transcript Vol.9, page 19, line 4 to line 10), in other words she was medically non-compliant at the time of the accident. Continued medical non-compliance is a possible cause of the Appellant's incompetency at the time of trial.

The Appellant called Jennifer Dornbos as its first witness to prove incompetence. (Transcript Vol. 9, page 13, line 14 to page 14, line 6). Mrs. Dornbos stated her background qualifications to testify as a witness to the Appellant's incompetence as follows:

> **Dornbos**: "I have seven degrees. I have been in practice for 17 years for Curt Wills as his psychological associate doing psychological testing, assessments, jury selection and competency issues."
> (Transcript Vol. 9, page 14, line 9 to line 12).
>
> AND
>
> **Attorney:** "To the best of your ability, how many competency issues do you think you have handled or been a part of?"
> **Dornbos:** "That's hard to tell over the years."
> **Attorney:** "This isn't your first one?"
> **Dornbos:** "No, sir, it's not. Basically, all my reports, you know, go to competency. And then we do the

> psychological evaluations, and my reports are sent forth to the Judge."
> (Transcript Vol. 9, page 20, line 10 to line 17).

The witness actually does the kind of testing the Court would request and appoint out to a physicians office to prepare a report for a formal competency/commitment hearing. Mrs. Dornbos was helping prepare the Appellant for her testimony the following day. (Transcript Vol. 9, page 14, line 16 to page 16, line 8). Mrs. Dornbos stated she believed the Appellant was "divorced from reality." (Transcript Vol. 9, page 17, line 4 to line 17). She based this on her observations of the Appellant, the Appellants family's observations of the Appellant and the Appellants prior mental history. (Transcript Vol. 9, page 16, line 12 to page 20, line 9). Mrs. Dornbos further stated specific facts and observations that helped her form an opinion that the competency motion was valid and not frivolous:

> **Dornbos:** "I cannot be totally certain if there was an absence or presence of psychosis, but the behavior was extremely extraneous. And knowing the history that she has hallucinations and delusions and she is schizophrenic and bipolar, that does not help the issue of competency."
> (Transcript Vol. 9, page 15, line 3 to line 7).

AND

> **Dornbos:** "Usually in court cases, we will give a Defendant a notepad and paper which -- they can ask their attorneys, or the prosecutors even, questions in trial. And there is -- the only questions in that notebook are those that I asked her. She has doodles and hearts. And

there was some lengthy, you know, sentences that were loosely connected and really absent of any sense, basically."
(Transcript Vol. 9, page 15, line 12 to line 18).

AND

Attorney: "These ramblings that you saw in the notebook were after the conclusion of the proceedings yesterday; is that correct?"
Dornbos: "Yes, sir."
(Transcript Vol. 9, page 16, line 5 to line 8).

AND

Attorney: "Knowing that she has a history of bipolar schizophrenia, is it possible she is becoming episodic?"
Dornbos: "I would say, yes. The fact that she disassociates and has no insight is a huge concern"
(Transcript Vol. 9, page 16, line 12 to line 15).

AND

[while Appellant was speaking with expert witness]
Attorney: "When the expert was speaking with her, was he using hyper-technical jargon that a layperson would not understand?"
Dornbos: "No, sir. He was using lay terms that anyone would be able to understand."
Attorney: "In fact, he was -- not only was he speaking, he was illustrating it through forms of, like props, correct?"
Dornbos: "Yes, sir."
Attorney: "Anybody could understand that, in your opinion?
Dornbos: "Yes, sir."
Attorney: "What was Ms, Boyett's affect during that point in time?"

Dornbos: "Very flat affect and -- it wasn't as if she had any factual understandings of what was being told to her."
Attorney: "Its almost as if -- I don't want to put words in your mouth -- it went in one ear and out the other?"
Dornbos: "Basically, yes."
Attorney: "Do you feel like at this point in time she appreciates the gravity of the situation?"
Dornbos: "No, sir, I don't."
Attorney: "In fact, you were present during two different conversations on two separate days; and she didn't recollect the conversation from the day prior; is that accurate?"
Dornbos: "Very accurate."
Attorney: "Almost as if that is the first time she has heard it?"
Dornbos: "Yes."
(Transcript Vol. 9, page 17, line 18 to page 18, line 21).

AND

Attorney: "What are the mediations she [Appellant] is supposed to be taking?"
Dornbos: "Lithium. She is on Geodon for bipolar -- both are psychotropics for schizophrenia and bipolar. She is on two medications for thyroid and Hashimoto's. And she is on -- she was on Valium, but the doctor changed he prescription from Valium -- I mean Xanex to Valium."
(Transcript Vol. 9, page 19, line 4 to line 10).

AND

Attorney: "Do you believe that she [Appellant] has a sufficient present ability to consult with me [Appellant's attorney] within a reasonable degree of rational understanding?"
Dornbos: "No, sir."
(Transcript Vol. 9, page 19, line 11 to line 14).

AND

> **Attorney:** "In your estimation, is this filing of a request and suggestion frivolous?"
> **Dornbos:** "No, sir."
> (Transcript Vol. 9, page 20, line 18 to line 20).

AND

> **Dornbos:** "[Regarding Appellant's trial notes] And it was -- there was -- it was all tangential which is another symptom of schizophrenia and bipolarism. You know, they can't put thoughts together; and they are very delusional thoughts. And, you know, we were every -- all concerned about what we saw in this notebook."
> (Transcript Vol. 9, page 46, line 17 to line 21).

When the State cross-examined Mrs. Dornbos, it was revealed that the Appellant had developed a "tic", which Mrs. Dornbos adamantly related to the Appellant's "schizophrenic" diagnosis, despite repeated attempts by the State to reclassify the "tic" as merely a sign of disgust. (Transcript Vol. 9, page 34, line 10 to page 36, line 13). The witness stated that the "tic" worsened as time progressed and Mrs. Dornbos was convinced that it was a manifestation of the schizophrenia based on her experience. (Transcript Vol. 9, page 35, line 1 to page 36, line 10). The witness observed the Appellant's further detachment from reality, in that the Appellant was "delusional" about the attitude of the jury and the sentence. (Transcript Vol. 9, page 37, line 4 to page 38 line 16). Despite the States cross-examination, the witness was adamant that the Appellant was not able to assist in her own defense. (Transcript Vol. 9, page 37, line 2 to line 3). The witness stated

her understanding of competency and explained why she believed the Appellant was experiencing a schizophrenic episode due to possible medical non-compliance. (Transcript Vol. 9, page 38, line 25 to page 39 line 19). The witness consulted with the Appellant's family about the Appellant's behavior and prior mental health incidents. (Transcript Vol. 9, page 39, line 23 to page 40 line 15). Additionally, this witness was NOT HIRED/PAID by the Appellant for her assessment of the Appellant's competency; she volunteered to stay on at no fee after the jury selection. (Transcript Vol. 9, page 40, line 16 to page 40 line 24).

The second witness called by the Appellant was the Appellant's accident reconstruction expert, James Paul Evans. (Transcript Vol. 9, page 21, line 5 to line 14). Mr. Evans testified as to his inability to communicate and get information from the Appellant sufficiently to prepare for Court. (Transcript Vol. 9, page 21, line 24 to page 24 line 13). He explained that he was not able to interact with the Appellant in any rational way. (Transcript Vol. 9, page 23, line 1 to line 24). The State tried to classify the Appellant's inability to work with the accident constructionist as "not caring" about her case but the witness explained it more as "[she's] not getting it", "it's not clicking" or "denying basic things." (Transcript Vol. 9, page 47, line 10 to page 54 line 10). This caused harm to the Appellant in that the expert was not able to discuss the case with the Appellant with sufficient

rational understanding to prepare for either his or her testimony the next day. This resulted in the loss of testimony for two witnesses for the Appellant's defense.

The Appellant's third witness was Charlotte Bush, the Appellant's sister. (Transcript Vol. 9, page 25, line 10 to line 17). She re-confirmed her sister's diagnosis of "bipolar and schizophrenic and depression." (Transcript Vol. 9, page 27, line 15 to line 20). She also confirmed that the Appellant was supposed to be on medication but could not confirm whether the Appellant was medically compliant. (Transcript Vol. 9, page 27, line 21 to page 28 line 4). The witness is familiar with the Appellants behavior and believes that at the time of this hearing, the Appellant is incompetent. (Transcript Vol. 9, page 28, line 5 to line 19). The witness also stated that the Appellant had to be hospitalized for her mental condition (bipolar schizophrenia) in late 2013. (Transcript Vol. 9, page 28, line 20 to page 29 line 3). The witness related that the Appellant's current behavior is similar to her past behavior which necessitated the 2013 hospitalization. (Transcript Vol. 9, page 29, line 4 to line 12). During the State's cross-examination of Mrs. Bush, the witness stated that the Appellant "did not understand the seriousness of the trial." (Transcript Vol. 9, page 56, line 13 to page 57 line 4). The witness described the behavior of the Appellant when she is having an "episode" as:

> **Attorney:** "When you said that she's maybe going through some stage of an episode, what did you mean?"

Bush: "She's back in the beginning stages of --"
Attorney: " I'm sorry?"
Bush: "Back in the Beginning stages of schizophrenia."
Attorney: "Well, what do you mean by that?"
Bush: "Where she -- she gets very agitated, very hostile with it."
Attorney: "What does that mean? By doing what?"
Bush: "She gets fidgety and ignores. She will retreat into herself and not want to speak with nobody, not want to deal with anybody, not want to -- and I don't know what the long-term effects of that would be, whether she would be a danger to herself."
Attorney: "Well what do you mean when she said -- when you said she exhibits a lot of anger? What does she do to exhibit anger?"
Bush: "She internalizes and she will start talking to herself and she will have conversations with herself -- loud conversations."
Attorney: "So, that's how you know she's angry?"
Bush: "At times, yes, sir."
Attorney: "How else do you know she's angry?"
Bush: "She will tell me she's angry."
Attorney: "Does she yell and scream?"
Bush: "Sometimes."
(Transcript Vol. 9, page 59, line 24 to page 60 line 24).

The Appellant's final witness was a local attorney, Gary Butler, who witnesses' the Appellant exhibiting "bizarre behavior" by "carrying on a fairly loud conversation with herself" in the Courthouse. (Transcript Vol. 9, page 30, line 25 to page 31, line 25). Evidence is usually sufficient to create a bona fide doubt if it shows recent severe mental illness, at least moderate retardation, or truly bizarre acts by the defendant. McDaniel v. State, 98 S.W.3d 704, 710 (Tex. Crim. App. 2003). The Appellant's prior history taken with her bizarre statements and actions

are sufficient to create a bona fide doubt sufficient to at least have a medical professional examine her to make a final MEDICAL determination of her competency.

An involuntary plea or waiver violates a defendant's Fifth Amendment right to due process. U. S. Const. amends. V, XIV; Burke v. State, 80 S.W.3d 82, 93 (Tex. App.-Fort Worth 2002, no pet.). The conviction of an accused while he is legally incompetent violates due process. McDaniel v. State, 98 S.W.3d 704, 709 (Tex. Crim. App. 2003). A defendant cannot be sentenced if he is incompetent to stand trial. Tex. Code Crim. Proc. Ann. art. 42.07 (Vernon 2014); Casey v. State, 924 S.W.2d 946, 949 (Tex. Crim. App. 1996).

The State argues that the Appellant's actions show that she "thinks the jury likes her" and they're going to "sentence her to prison". (Transcript Vol. 9, page 62, line 11 to line 13). This argument makes absolutely NO sense, in that if the jury likes her why would they send her to prison rather than acquit her or give her probation. The State makes suppositions and fails to present ANY evidence to support their assumptions but opposes having a licensed physician settle the matter with an examination. They failed to call any witnesses to controvert the Appellants witnesses' testimony. (Transcript Vol. 9, Entire volume)

The Statute defining incompetency states:

> Art. 46B.003. INCOMPETENCY; PRESUMPTIONS. (a) A person is incompetent to stand trial if the person does not have:
>
> (1) sufficient present ability to consult with the person's lawyer with a reasonable degree of rational understanding; or
>
> (2) a rational as well as factual understanding of the proceedings against the person.
>
> (b) A defendant is presumed competent to stand trial and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence.
>
> (See Texas Code of Criminal Procedure Ch 46B, Art. 46B.003)

The standard for abuse of discretion is that the "defendant was actually prejudiced by the denial of his motion." See Heiselbetz v. State, 906 S.W.2d 500, 511 (Tex.Crim.App. 1995) At a minimum, the Appellant met the burden of a preponderance of the evidence by showing how her prior mental health history is an indicator of the reasons behind her current actions. The State made a lot of assumptions and accusations but wholly failed to show how or why the evidence supports their assertions. A large part of the Appellant's witnesses', Mrs. Dornbos, job is to assess individual's competency for the Courts. Her assessment alone creates a preponderance of the evidence, absence an assessment to the contrary by the States witnesses. (Transcript Vol. 9, page 61, line 17 to page 62, line 3). The State's questions seem to be concerned with the outward actions of the Appellant rather than her present ability to assist her attorney with this case (i.e. TCCP 46B(a)(1)) or her rational/factual understanding of this case (i.e. TCCP 46B(a)(2)).

At least in part, the harm to the Appellant, by not ordering an assessment by a licensed physician is that the Appellant's attorney will not allow his client to assert her constitutional rights to testify in her own behalf, due to his belief (based on the evidence submitted) that she is incompetent to testify. (This point is more thoroughly explained in POINT THREE of this Appeal). See Rock v. Arkansas, 483 U.S. 44, 51-53 (1987). The Court was asked and agreed to produce findings of fact and conclusion of law as to its finding of competence but to date none has been produced by the Court.

After the State rested its case, the Appellant's attorney refused to let his client testify. The Appellant's attorney gave the following reason for his client's failure to testify on the record:

> **Attorney:** "...in light of the filing of the suggestion of incompetency motion for mental exam, I anticipated calling my client to testify on her behalf. I feel that she is not competent to testify. Therefore, I cannot put her on the stand to testify. So, therefore we cannot produce any witnesses at this point in time. So we will rest, as well." (Transcript Vol. 9, page 73, line 25 to page 74, line 6)

In effect, accepting the Appellant's attorney's reasoning (i.e. "I feel that she is not competent to testify") without an additional hearing to determine whether the Appellant waived her right to testify "knowingly and intelligently" creates an ambiguity on the record. This ambiguity is that the Court may have recognized that the Appellant is now apparently incompetent and therefore cannot testify, even

to tell the Court that she cannot testify. The Court made no further inquiries into the Appellant attorney's waiver of the Appellant's right to testify. At a minimum, this lack of action would seem to be "arbitrary and unreasonable" when compared to the Court's earlier determination. This violates the standards of abuse of discretion as set out in Lawrence v. State, when a Judge's decision regarding competency is "arbitrary or unreasonable." Lawrence v. State, 169 S.W.3d 319, 322 (Tex. App.-Fort Worth 2005, pet. ref'd). A medical determination of the Appellant's competency would have cleared up any "arbitrary or unreasonable" arguments about the Court's decision. The Court abused its discretion in failing to appoint a licensed physician to make a medical determination of the competency of the Appellant before making a legal determination.

Appellant's due process rights were violated by the trial court's failure to make a medical determination that she was competent to stand trial before making a legal determination as the legal determination seems to be "arbitrary or unreasonable," given the lack of evidence to support competency and the voluminous evidence supporting incompetency. The judgment of the trial court should be reversed and the case remanded to the trial court for a new trial. In the alternative, Appellant's appeal should be abated and the cause remanded for a determination as to Appellant's competency at the time of her trial.

POINT THREE

The Defendant was denied her Constitutional Right to testify on her own behalf after her attorney refused to allow her to testify because the Court refused to conduct a hearing to determine whether the Defendant had waived her Constitutional Right to testify in this case.

The Supreme Court has held that a criminal defendant's right to testify on his own behalf is rooted in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. See Rock v. Arkansas, 483 U.S. 44 (1987); United States v. Vargas, 920 F.2d 162 (11th Cir. 1990). The Appellant has a Constitutional right to "testify on their own behalf" as determined by the Supreme Court in 1987. See Rock v. Arkansas, 483 U.S. 44, 59-52 (1987). This right is granted to the Defendant personally and not to his counsel. See Rock v. Arkansas, 483 U.S. 44 (1987). The Supreme Court has affirmed "a criminal defendant has a fundamental constitutional right to testify in his or her own behalf at trial. This right is personal to the defendant and cannot be waived either by the trial Court or by defense counsel." See United States v. Teague, 953 F.2d 1525, 1532 (11th Cir.) (on rehearing en blanc), cert. denied, ___ U.S. _____, 113 S.Ct. 127, 121 L.Ed2d 82 (1992). It has long been recognized that a criminal defendant cannot validly waive a fundamental constitutional right unless the defendant has actual knowledge of the right to be waived. See Johnson v. Zerbst, 304 U.S. 458 (1938) The United States Supreme Court has consistently held that, where a right is "fundamental", it can only be waived personally by the defendant, which necessarily requires that the

waiver be "knowing and intelligent." See Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). The defendant's personal, knowing, and intelligent waiver of the right must appear **"on the record."** See Conley v. Cochran, 369 U.S. 506, 516 (1962); Boykin v. Alabama, 395 U.S. 238, 242 (1969); and Barker v. Wingo, 407 U.S. 512, 529 (1972).

During the hearing on the motion to determine competency, the Appellant's witness disclosed to the Court that Appellant had wished to testify at the trial of this case (Transcript Vol. 9, page 14, line 16 to page 16, line 8), but that her defense counsel had determined that she should not testify. (Transcript Vol. 9, page 73, line 25 to page 74, line 6). The testimony definitively indicates that the decision, not to testify, was made by the attorney and not by the Appellant. (Transcript Vol. 9, page 73, line 25 to page 74, line 6). The District Court dismissed the Appellant's contention without any questioning of either the Appellant or his counsel as to the voluntariness of the Appellant's attorney's waiver of the Appellant's rights. (Transcript Vol.9, page73, line 24 to page 74, line 9). The Appellant had previously expressed a desire to testify as shown by her attempted preparation for her coming testimony the night before filing the Motion to Determine Competency. (Transcript Vol. 9, page 14, line 16 to page 16, line 8). The Appellants right to testify in her own defense is sacrosanct and her attorney cannot legally prevent her from testifying, since that was her decision prior to

becoming, as her attorney believes, incompetent. In this case the attorney for Appellant felt that the Appellant's mental condition (i.e. his belief that Appellant was incompetence to testify) was so severe as to require the attorney to bar the Appellant from testifying. (Transcript Vol. 9, page 73, line 25 to page 74, line 6). An attorney has both a duty and an obligation to protect his client's rights and see that his client's desires to testify are fulfilled. In this case the Attorney technically committed the offense of ineffective assistance of counsel, in that he made the decision for his client not to let her testify after she had made a decision to testify. However, it was only his sincere belief that she was incompetent, that caused him to prevent her testimony. The Appellant's attorney was presented with a cruel dilemma, let his incompetent client testify or deny his client her constitutional right to testify. The Appellant's attorney gave the reasons for his clients failure to testify on the record:

> **Attorney:** "...in light of the filing of the suggestion of incompetency motion for mental exam, I anticipated calling my client to testify on her behalf. I feel that she is not competent to testify. Therefore, I cannot put her on the stand to testify. So, therefore we cannot produce any witnesses at this point in time. So we will rest, as well." (Transcript Vol. 9, page 73, line 25 to page 74, line 6)

There was an actual need for the Appellant to testify, in that (1) the Appellant was a survivor of the crash, (2) she can testify about her medical/mental state on the day of the crash and (3) she is the ONLY person that can explain her

actions on the day of the crash. Even the District Attorney believed that there might be a need for a lesser charge included in the jury charge after the Appellant's testimony. (Transcript Vol. 9, page 18, line 2 to line 21) The Appellant's inability to put on any witnesses in her defense severely prejudices her case. The jury wants to hear a Defendant testify and failure to testify by a Defendant makes the jury suspicious of the lack of testimony. In this case, the Appellant's testimony had a reasonable chance of resulting in a lesser charge and therefore a lesser sentence. Her testimony could have explored sufficient facts to warrant a jury verdict on a lesser charge or a lower sentence. The Appellant's prior mental history and the description of how difficult that condition is to control would have been mitigating evidence at punishment. The State attempted to portray the Appellant as an unfeeling, reckless individual with no concerns for the safety of others, when in fact the Appellant suffers from several debilitating mental illnesses. (Transcript Vol.9, page 19, line 4 to line 10). The Appellant had every intention of testifying and was prevented from doing so due to a mental condition beyond her control. Additionally, the Appellant's attorney prohibited the Appellant from testifying, believing her to be incompetent. These events should have REQUIRED a mental examination to determine when she could become competent to testify, and a hearing to determine whether the Appellant "knowing and intelligently" waived her right to testify should have been held.

This Point of Error has a duel argument in that the situation can be seen from the two perspectives of both the Court and Appellant's Attorney. There is no dispute that the Appellant's Attorney waived the Appellant's right to testify without consulting the Appellant (i.e. you cannot consult with a seemingly incompetent client).

Seen from the Court's perspective, if the Appellant was competent then the Court had a duty to hold a hearing and inquire as to whether the Attorney's waiver of the Appellant's right to testify was done "knowingly and intelligently" with the Appellant's permission. Failure to make this inquiry by the Court resulted in a violation of the Appellant's constitutional right to testify. This Court must then remand this case to the District Court, which should be instructed to appoint separate counsel to represent the Appellant in asserting her claim that she was denied her constitutional right to testify on her behalf. Only after the District Court has appointed counsel and read the pleadings provided by new counsel can it make the determination whether the Appellant has met her burden of showing with particularity that she had been deprived of/coerced into waiving her constitutional right to testify.

Seen from the Appellant Attorney's perspective, an incompetent client cannot give informed consent, but the Court determined that the Appellant was competent, despite all the Appellant's attorney's evidence to the contrary. If the

Appellant was incompetent, as her attorney believed, then it would be ineffective assistance of counsel to allow the Appellant to give any testimony. The Appellant's incompetency would make her unable to testify in her own behalf in a "knowing and intelligent" manner. Under these circumstances, the Court should have stopped all proceedings and appointed a licensed physician to immediately examine the Appellant to make a MEDICAL determination of her competency. Based on the determinations of a licensed physician, the Court could then have declared a mistrial and followed the medical professional's instructions to force the Appellant to attain to degree of competency; or, if competency was determined, introduced the licensed professional's report into evidence and forced the Appellant to declare on the record whether she wished to waive her right to testify. In effect, accepting the Appellant's attorney's reasoning (i.e. "I feel that she is not competent to testify") without a hearing to determine whether the Appellant waived her right to testify "knowingly and intelligently" creates an ambiguity on the record. This ambiguity is that the Court recognizes that the Appellant is now incompetent and therefore cannot testify, even to tell the Court that she cannot testify.

The Court created an ineffective assistance of counsel for the Appellant by not appointing a licensed physician to examine the Appellant and create a record to protect the Appellant's attorney if he allowed the Appellant to testify. The Court failed its duty to conduct a hearing to determine, with the assistance of an expert

on competency, whether the Appellant was of sufficient mental health to "knowingly and intelligently" waive her right to testify. Appellant was therefore denied her Constitutional right to testify on her own behalf and deserves a new trial after a competency hearing.

Therefore, the Court had a duty to MEDICALLY determine the competency of the Appellant through an examination by a licensed professional. After which, the Court had a duty to hold a hearing and inquire as to whether the Attorney's waiver of the Appellant's right to testify was done "knowingly and intelligently" with the Appellant's permission. Failure to make this inquiry by the Court resulted in a violation of the Appellant's constitutional right to testify. This Court must then remand this case to the District Court, which should be instructed to appoint separate counsel to represent the Appellant in asserting her claim that she was denied her constitutional right to testify in his behalf. Only after the District Court has appointed counsel and read the pleadings provided by new counsel can it make the determination whether the Appellant has met her burden of showing with particularity that she had been deprived of/coerced into waiving her constitutional right to testify.

PRAYER

For the foregoing reasons, Appellant prays that this Court vacate the current judgment and dismiss this case. Or in the alternative, dismiss the current judgment

and send this case back to the trial Court with instructions to retry this case pursuant this Court's instructions.. The Appellant also prays for any and all other relief that this Honorable Court deems necessary to a fair and final determination in this case..

Respectfully submitted,

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/s/
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TBN 17365980
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ DAY of _____, 2015, a copy of the foregoing APPELLANT'S BRIEF was served upon all persons and counsel entitled thereto, all in accordance with the Tex.R.App.P., by certified mail, return receipt requested, upon :

Counsel for Appellee:

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_____/s/_____
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CERTIFICATEOF COMPLIANCE WITH RULE 9.4

I HEREBY CERTIFY that his document complies with the requirements of Tex. R. App. Proc. 9.4(i)(2)(B) because there are 7922 words in this document, excluding the portions of the document excepted from the word count under rule 9(i)(1), as calculated by the MS Word computer program used to prepare it.

_____/s/_____
James P. Spencer, II
Attorney for Appellant
TBN 17365980

In The

Court of Appeals

Ninth District of Texas at Beaumont

_____

No. 09-15-00196-CR

_____

CRYSTAL LUMMAS BOYETT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 356th District Court
Hardin County, Texas
Trial Cause No. 23010

MEMORANDUM OPINION

Appellant, Crystal Lummas Boyett, appeals her conviction for manslaughter and asks this Court to dismiss the case against her, or in the alternative, remand for a new trial. Boyett presents three issues for review. First, Boyett argues that the trial court erred by denying Boyett's request for a continuance to review medical records that the State produced before trial. Second, Boyett argues the trial court erred by failing to appoint an expert to evaluate her competency before it determined that she was competent to stand trial. Finally, Boyett argues that her constitutional right to

testify in her defense was violated when her trial attorney refused to allow her to testify at trial. We overrule Boyett's issues and affirm the judgment.

I. Background

The grand jury indicted Boyett for manslaughter for causing the death of a backseat passenger by recklessly crashing her Camaro into the vehicle occupied by the victim. Trial was set for April 20, 2015.

On March 19, 2015, thirty-two days before trial, the State received over 4,300 pages of medical documents, which the State represented pertained to the victim's mother, another passenger involved in the accident. On April 9, 2015, during a pre-trial hearing, Boyett made an oral request for a continuance on the matter, which the trial court denied. On April 14, 2015, Boyett filed a written motion for continuance, and the following day, the trial court held a hearing on the motion. During the hearing, Boyett argued that she required additional time to review the medical records in order to determine whether they contained information that she could use in her defense. At the hearing, the State admitted that it had not thoroughly reviewed the records and could not guarantee that the medical records did not contain potentially exculpatory material. After the hearing, the trial court denied the motion, and jury selection began as scheduled on April 20, 2015.

On April 23, 2015, during the final day of the guilt-innocence phase of trial, Boyett's counsel filed a motion suggesting incompetency and requested an examination. The trial court conducted an informal inquiry into Boyett's competency and, without appointing an expert to examine the defendant, found insufficient evidence to justify a formal competency determination.

Following the informal inquiry, the State called its final witness and then rested. Boyett's trial counsel then informed the trial court, outside of the presence of the jury, that he could not put his client on the stand to testify on her own behalf due to his belief that she was incompetent. The defense then rested without calling any witnesses. After closing arguments, the jury found Boyett guilty of manslaughter.

II. Motion for Continuance and *Brady* Material

In her first issue, Boyett argues that the trial court committed reversible error in denying her motion for continuance to review the medical documents because the lack of additional time effectively denied her the use of possibly exculpatory *Brady* material. We review the trial court's grant or denial of a motion for continuance for an abuse of discretion. *Renteria v. State*, 206 S.W.3d 689, 699 (Tex. Crim. App. 2006).

Under *Brady v. Maryland*, the State has an affirmative duty to turn over favorable evidence to the defense. 373 U.S. 83, 87 (1963); *Harm v. State*, 183

S.W.3d 403, 406 (Tex. Crim. App. 2006) ("[T]he suppression by the prosecution of evidence favorable to a defendant violates due process if the evidence is material either to guilt or punishment, without regard to the good or bad faith of the prosecution."). However, a defendant has no general right to non-exculpatory material. *See id*. To establish a claim under *Brady*, the defendant must demonstrate: "(1) [the State] failed to disclose evidence (2) favorable to the accused[,] and (3) the evidence is material . . . ." *Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999). Under the first element, the State's disclosure of such evidence must be in time for the defendant to use it in her defense. *Id*. As long as the defendant received the material in time to use it effectively at trial, a disclosure does not violate due process simply because "it was not disclosed as early as it might have and should have been." *Id*.

Even assuming, without deciding, that the State's production of the medical documents was not in time for Boyett to use the documents effectively at trial, Boyett's *Brady* claim must fail under the second and third parts of the test. The second part of the test requires the defendant to establish that the evidence was favorable to the accused. *Pena v. State*, 353 S.W.3d 797, 809 (Tex. Crim. App. 2011). "Favorable evidence is any evidence that 'if disclosed and used effectively, it *may* make the difference between conviction and acquittal.' Favorable evidence

includes both exculpatory and impeachment evidence." *Thomas v. State*, 841 S.W.2d 399, 404 (Tex. Crim. App. 1992) (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)). Boyett fails to identify any exculpatory material within the documents and complains only that she had insufficient time to determine whether or not they contained any exculpatory evidence. Boyett asserts that the State was unable to certify that the documents did not contain exculpatory material, but "[t]he State has no duty to seek out exculpatory information independently on defendant's behalf." *Palmer v. State*, 902 S.W.2d 561, 563 (Tex. App.—Houston [1st Dist.] 1995, no pet.). Therefore, Boyett's claim must fail under the second part of the test.

Under the third part of the test, documents are material if "there is a reasonable probability that, had the [documents] been disclosed to the defense, the result of the proceeding would have been different." *Little*, 991 S.W.2d at 866. To prove materiality, the defendant must do more than show a mere possibility that the documents might have helped in her defense or that the documents might have affected the outcome of the trial. *Hampton v. State*, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002). Here, Boyett failed to elaborate on how her defensive strategy would have differed or what the probable impact of having additional time to review the documents would have been. Therefore, Boyett's claim must also fail under the third part of the test.

We hold that the trial court acted within its discretion in denying Boyett's motion. We overrule Boyett's first issue.

III. Competency Examination

In her second issue, Boyett argues the trial court abused its discretion in failing to grant her request for a court-appointed licensed physician to make a medical determination of her competency.

A. Standard of Review

We review challenges to the adequacy of a trial court's informal competency inquiry for an abuse of discretion. *George v. State*, 446 S.W.3d 490, 499 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). Under this standard, we do not substitute our judgment for that of the trial court, but we determine whether the trial court's decision was arbitrary or unreasonable. *Montoya v. State*, 291 S.W.3d 420, 426 (Tex. Crim. App. 2009), *superseded by statute on other grounds*, Tex. Code Crim. Proc. Ann. art. 46B.004(c-1) (West Supp. 2016), *as stated in Turner v. State*, 422 S.W.3d 676, 692 (Tex. Crim. App. 2013).

B. Competency

The prosecution and conviction of a defendant while she is legally incompetent violates due process. *Morris v. State*, 301 S.W.3d 281, 299 (Tex. Crim. App. 2009). "'[A] person whose mental condition is such that [she] lacks the

capacity to understand the nature and object of the proceedings against [her], to consult with counsel, and to assist in preparing [her] defense may not be subjected to trial.'" *Turner*, 422 S.W.3d at 688–89 (quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975)). The constitutional standard for competency to stand trial, which the Texas Legislature has adopted, "asks whether the defendant has a sufficient present ability to consult with [her] lawyer with a reasonable degree of rational understanding and whether [she] has a rational as well as factual understanding of the proceedings against [her]." *Id.* at 689; *see also* Tex. Code Crim. Proc. Ann. art. 46B.003(a) (West 2006). A person is presumed to be competent to stand trial, and the burden is on a criminal defendant to prove incompetency by a preponderance of the evidence. Tex. Code Crim. Proc. art. 46B.003(b); *Ex parte LaHood*, 401 S.W.3d 45, 54 (Tex. Crim. App. 2013).

To support a finding of incompetency, a defendant must do more than show that she suffers from a mental illness, or that she obstinately refuses to cooperate with her trial counsel, or even both of these situations together. *Turner*, 422 S.W.3d at 691. "Indeed, even a mentally ill defendant who resists cooperating with [her] counsel may nevertheless be found competent if the manifestations of [her] particular mental illness are not shown to be the engine of [her] obstinacy." *Id*. A defendant must show that her mental illness "prevent[s] [her] from rationally

understanding the proceedings against [her] or engaging rationally with counsel" to support a finding of incompetency. *Id*. "Evidence that raises this possibility necessitates an informal inquiry, and if that inquiry reveals that the possibility is *substantial*, a formal competency trial is required." *Id*. (emphasis added).

Under the Texas Code of Criminal Procedure, any suggestion that the defendant may be incompetent to stand trial requires the trial court to first make an "informal inquiry" into the defendant's competency to decide whether a formal competency determination is warranted. *See* Tex. Code Crim. Proc. Ann. art. 46B.004(c), 46B.005(a). During the initial informal inquiry, the trial court is tasked with "determin[ing] . . . whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial." *Id*. "[S]ome evidence" means "'a quantity more than none or a scintilla[.]'" *Ex parte LaHood*, 401 S.W.3d at 52–53 (quoting *Sisco v. State*, 599 S.W.2d 607, 613 (Tex. Crim. App. [Panel Op.] 1980)). During the informal inquiry, the trial court must consider only the evidence tending to show incompetency. *Turner*, 422 S.W.3d at 692. A trial court's first-hand factual assessment of a defendant's competency is entitled to great deference on appeal. *Ross v. State*, 133 S.W.3d 618, 627 (Tex. Crim. App. 2004).

If, after the informal inquiry, the trial court determines that sufficient evidence exists to support a finding of incompetency, the proceedings are propelled to a

formal competency determination. *See* Tex. Code Crim. Proc. Ann. art. 46B.005 (West 2006). While the trial court has discretion to appoint an expert to examine the defendant during the informal inquiry, the appointment of an expert is mandatory during the formal competency determination. *Id*. art. 46B.021(a), (b) (West Supp. 2016); *see Sosa v. State*, 201 S.W.3d 831, 832 (Tex. App.—Fort Worth 2006, pet. ref'd).

The question therefore becomes whether, in light of what became known to the trial court by the conclusion of the informal inquiry, it should have conducted a formal competency hearing and appointed an expert to evaluate Boyett.

C. Present Facts

Boyett's counsel raised the issue of competency for the first time on the third and final day of the guilt-innocence phase of trial, simultaneously filing a motion to suggest incompetency. Boyett's counsel argued that Boyett had previously been diagnosed with "bipolar schizophrenia" and that it was trial counsel's belief that she was "episodic, as we speak." Boyett's trial counsel explained that he raised the issue "as soon as [he] was aware of it." Trial counsel further stated that he first suspected Boyett might not be competent the night before, while he was meeting with Boyett, Boyett's mother and sister, the defense's expert witness, and his volunteer assistant. It was not Boyett's behavior during this meeting that raised the issue of competency;

instead, trial counsel stated that while Boyett was out of the room, he looked through the notebook in which she had been writing for the past three days and found "aimless doodling" and "very bizarre writings." Trial counsel then inquired with the other members of the defense team, as well as Boyett's sister and mother, and decided to file a motion suggesting incompetency.

The defense counsel's suggestion of incompetency propelled the trial court into the informal inquiry stage. While Boyett's counsel made various representations to the trial court to convince the judge to conduct an informal inquiry into Boyett's competency, Boyett's counsel did not testify during the inquiry, nor did he execute and introduce an affidavit with his observations into evidence. Boyett herself did not testify. The only evidence that Boyett's trial counsel offered consisted of testimony from four witnesses.

The first witness, Jennifer Doornbos, had been assisting the defense team as a volunteer for the preceding three days. Doornbos testified that she had concerns regarding Boyett's competency and that Boyett exhibited "extremely extraneous" behavior. Doornbos testified that Boyett had a prior diagnosis of schizophrenia and bipolar disorder. While Doornbos understood that Boyett was being treated through medications, Doornbos had no knowledge if Boyett was compliant with her prescribed medications. Doornbos agreed with Boyett's trial counsel's suggestion

that it was possible that Boyett was currently suffering from a mental disorder: "I would say, yes. The fact that she disassociates and has no insight is a huge concern." Doornbos testified that she believed that Boyett was divorced from reality, potentially due to her mental illness. Specifically, Doornbos testified that Boyett's counsel provided Boyett a notebook to take notes and write down questions during trial, but Boyett had used the notebook to doodle and write seemingly nonsensical sentences, and that Boyett would make small noises, or "tics," in the courtroom. Doornbos also testified that the evening before, while Boyett was meeting with her defense team to prepare for trial, Boyett seemed more interested in taking a break to smoke than discussing her case. Doornbos testified that, in her opinion, Boyett "does not have the sufficient present ability to consult with [her attorney]" and that she "witnessed that."

Next, Boyett's trial counsel elicited testimony from the defense's accident reconstruction expert, James Evans. Evans testified that while preparing for trial the previous evening, he attempted to explain the State's expert testimony to Boyett, but he did not believe she was processing the information, and he had difficulty interacting with her.

The third witness the defense put on the stand was Charlotte Bush, Boyett's sister. Bush testified that Boyett had a history of mental illness—bipolar disorder,

schizophrenia, and depression—and received medication for these diagnoses, but Bush did not know whether Boyett was medically compliant. Bush testified that Boyett was exhibiting unusual behavior, such as "[f]requent cussing," that she was "fidgety and aggravated[,]" and that she did not want to talk about the events for which she was on trial. Bush testified that Boyett did not seem to have a grasp of the legal points her attorney explained to her and that Boyett did not seem to have the present ability to talk with her attorney with a reasonable degree of rational understanding.

The final witness from whom the defense sought testimony was Gary Butler, a local attorney who was unaffiliated with the case. Butler testified that that very morning, he witnessed Boyett in the court's cafeteria, fixing her coffee while loudly talking to herself. Butler testified that because Boyett's behavior struck him as bizarre, he mentioned it to her trial counsel, who was also in the cafeteria at the time.

D. Analysis

The record supports the trial court's determination that there was insufficient evidence to justify a formal competency determination.

On appeal, Boyett argues that the evidence showed Boyett's prior mental illness was "an indicator of the reasons behind her current actions" and that Boyett's "prior history taken with her bizarre statements and actions" were sufficient to justify

a court-ordered expert examination. Although Doornbos and Bush testified that Boyett had previously been diagnosed with a mental illness, Boyett failed to establish a substantial possibility that any such condition operated in a way as to prevent her from engaging with counsel in a reasonable and rational manner or from rationally and factually understanding the proceedings against her. *See Turner*, 422 S.W.3d at 691. A past diagnosis of a mental disorder, or even a current mental disorder, would not, without more, require the trial court to hold a formal competency trial. *See id*. at 691, 696 (stating that in a case in which there is some evidence of mental illness but no evidence from which it may reasonably be inferred that the defendant's mental illness renders her incapable of consulting rationally with counsel, the evidence would not be sufficient to compel a formal competency hearing).

Moreover, although Doornbos testified that, in her opinion, Boyett was not able to consult with her attorney, Doornbos was not shown to be a qualified expert and thus, provided only her lay opinion. Further, Boyett's trial counsel, who had worked with Boyett over the course of the several preceding months, stated that he was not aware that there could be an issue concerning competency until the night before the final day of trial. Trial counsel's ability to represent Boyett throughout the charges against her, without doubting her competency, detracts from any claim

that she was not able to rationally assist her lawyer in her defense or did not have a rational and factual understanding of the proceedings. *See McDaniel v. State*, 98 S.W.3d 704, 709–10, 713 n.19 (Tex. Crim. App. 2003) (noting that reliable evidence of incompetency could include the defendant's conduct or statements in court, as well as the defendant's attorney orally reciting "the specific problems he has had in communicating with his client"). The record is void of any evidence of any specific problems with the behavior of Boyett during the trial or of any specific problems that Boyett's counsel had attempting to communicate with his client about trial strategy.

The trial court was not required to agree that Boyett's behavior indicated that Boyett lacked the capacity to engage with her trial counsel rationally or to make rational choices with respect to her legal strategies and options. The trial court could have reasonably decided that Boyett's behavior in doodling and talking to herself did not show she was unable to comprehend the proceedings or communicate rationally with counsel. Nor does her heightened agitation with her sister indicate that she was incompetent to stand trial.

The trial court was also not required to view the accident-reconstruction expert's testimony that he had difficulty communicating with Boyett as evidence that Boyett was not competent. *See Turner*, 422 S.W.3d at 691 (stating that a

defendant's refusal to cooperate with trial counsel does not by itself mean that the defendant is incompetent). And, although Boyett's sister testified that she did not believe Boyett had a grasp of the legal points or the present ability to talk with her attorney with a reasonable degree of rational understanding, she based her opinion on Boyett's refusal to answer her attorney's questions while both Boyett and her sister were present. There is no evidence from Boyett's sister that she was familiar with the statutory standard for incompetency.

The trial court had observed Boyett interact with the Court and her counsel in several hearings over a period of several months. The trial court's first-hand factual assessment of a defendant's competency is entitled to great deference. *Ross*, 133 S.W.3d at 627 (citing *McDaniel*, 98 S.W.3d at 710–11 n.19). The record reflects that Boyett exhibited appropriate behavior throughout the proceedings. *See* Tex. Code Crim. Proc. Ann. art. 46B.024(1)(E) (West Supp. 2016) (stating one factor to consider in evaluating incompetence is whether the defendant has capacity to exhibit appropriate courtroom behavior). We must give great deference to the trial court's inferences based on its observations of the defendant throughout the course of the trial, as well as its evaluation of the credibility of the witnesses who testified during the informal inquiry. *See Ross*, 133 S.W.3d at 627. As Judge Keller expressed in her dissent in *Turner*, the trial court, though compelled to consider only the evidence

that tends to show the defendant's incompetency, may properly exercise its discretion to disregard unreliable testimony. 422 S.W.3d at 700 (dissenting opinion). We hold that the trial court did not abuse its discretion by concluding that Boyett failed to show that her case presented one of the "relatively rare instances" where the defendant's mental illness prevented her from rationally understanding the proceedings against her or engaging rationally with counsel. *See id*. at 691, 696.

Therefore, we conclude that the trial court did not act unreasonably or arbitrarily in finding, based upon the evidence presented at the hearing, that no formal competency hearing or expert evaluation was required. We overrule Boyett's second issue.

IV. Right to Testify

In her third and final issue, Boyett complains that her trial counsel denied her the right to testify.

Strickland v. Washington provides the appropriate framework for addressing a defendant's allegation that her trial counsel denied her the right to testify. 466 U.S. 668, 687 (1984); *Johnson v. State*, 169 S.W.3d 223, 235 (Tex. Crim. App. 2005). Under *Strickland*, to show ineffective assistance of counsel, a defendant must establish that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that the result of the

proceeding would have been different but for the attorney's deficient performance. *Strickland* 466 U.S. at 687-88, 694; *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009); *see also Johnson*, 169 S.W.3d at 239 (holding "that a complete denial of the right to testify at trial is not a structural defect but is the type of violation that can be subjected to a harm/prejudice inquiry" and, therefore, "the usual *Strickland* prejudice analysis applies").

Near the conclusion of trial, after the court had found insufficient evidence to support a finding that Boyett was incompetent, Boyett's trial counsel made the decision not to put her on the stand, stating:

> [DEFENSE COUNSEL]: . . . [I]n light of the filing of the suggestion of incompetency motion for mental exam, I anticipated calling my client to testify on her behalf. I feel that she is not competent to testify. Therefore, I cannot put her on the stand to testify. So, therefore, we cannot produce any witnesses at this point in time. So, we will rest, as well.

Boyett argues that her trial counsel "technically committed the offense of ineffective assistance of counsel, in that he made the decision for his client not to let her testify after she had made a decision to testify." On appeal, Boyett fails to present any evidence of her desire to testify. Even assuming that Boyett's trial counsel's performance fell below professional norms, we conclude that the record does not establish that she can satisfy the prejudice prong of *Strickland*.

Boyett argues that:

> [t]here was an actual need for [Boyett] to testify in that[:] (1) [Boyett] was a survivor of the crash[;] (2) she can testify about her medical/mental state on the day of the crash[;] and (3) she is the ONLY person that can explain her actions on the day of the crash.

However, Boyett fails to give any indication of the substance of what her testimony would have been. The record is insufficient to permit us to draw any conclusions regarding how her purported testimony would affect the outcome of her trial. We therefore overrule Boyett's third issue.

Having overruled all of Boyett's issues on appeal, we affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on June 16, 2016
Opinion Delivered May 31, 2017
Do Not Publish

Before McKeithen, C.J., Kreger and Horton, JJ.