In the
Court of Appeals
Fifteenth District of Texas at Arlington

No. 15-12-00053-CR

RODNEY DANTWON BROWN
Appellant

V.

THE STATE OF TEXAS
Appellee

On Appeal from the 202nd District Court
Tarrant County, Texas
The Honorable Richard Cockrell
Trial Court No. 39920

Before Tucker, S., Wright, D. and Franks, L.
Tucker, Chief Justice, in which Wright, D. joins

OPINION

Rodney Dantwon Brown, a twenty-year-old male with moderate mental retardation, was convicted of the sexual assault of a child after entering an open plea of guilty. He was sentenced to twenty years' imprisonment following trial of punishment to a jury, despite his counsel's closing argument requesting leniency due to Brown's "obvious mental retardation." Brown appeals the trial court's judgment on the grounds that: (1) his mental impairment rendered his confession involuntary and should have been suppressed; (2) his counsel rendered ineffective assistance in failing to adequately investigate whether he was competent to enter a plea; and (3) his mental impairment rendered his plea involuntary. We do not agree that Brown's mental impairment rendered his confession involuntary. However, it is a fundamental principle of this nation's system of criminal justice "that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (U.S. 1975). Because we believe this principal was grossly violated due to counsel's ineffective assistance, we reverse the trial court's judgment and remand the matter for a new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Alleged Sexual Assault

Brown has an intelligence quotient (IQ) similar to that of the average five or six year old. He lived with his parents, Desmond and Deondra Brown, and attempted to earn a living by conducting simple odd jobs for neighbors, family friends, and acquaintances. Even while conducting these odd jobs, Brown is rarely unsupervised.

On the afternoon of October 12, 2010, Brown rang his next door neighbors' doorbell to inquire if he could rake their leaves in exchange for twenty-five dollars. The house belonged to

long-time family friends, Michael and Angela Gard, and their thirteen-year-old daughter, B.G. Angela answered the door and accepted Brown's offer. Brown fetched tools from his garage, told his father that he would be raking leaves next door, and returned to the Gards' home to begin his work. The school bus dropped off B.G. just as Brown was finishing raking the leaves in the front lawn. B.G. went inside the home and greeted her mother.

Brown next began raking the leaves in the Gards' fenced-in backyard, which contains an enclosed shed. B.G. joined Brown in the backyard. The evidence establishes that the two were friends. According to Angela's testimony, B.G. had been in the backyard for approximately thirty minutes before Angela decided to remind B.G. about her daily chores and check on Brown's progress. She became concerned when she could not see B.G. and Brown in the backyard through the sliding glass door. Angela opened the door and followed B.G.'s and Brown's voices to the shed, where she witnessed B.G. half-clothed and Brown "scrambling to hurry and pull his pants up." During Angela's confrontation with Brown, which occurred after B.G. was sent to her room, Brown repeatedly apologized and stated that B.G. was the one who had pulled his pants down.

Angela ran inside the home to call the police and her husband, Michael. To Angela's surprise, Brown followed her inside the home and asked if Michael would be angry at him. He then begged Angela not to tell his father because he was warned that he would lose privileges to his game console if he got into trouble. A frantic Angela yelled at Brown and told him to go home. Brown walked outside, but began raking the remaining leaves in the backyard instead of going home. Angela dialed 911, informed her husband about the incident, and called Desmond to demand that he remove Brown from the Gards' residence.

An alarmed Desmond and Deondra raced next door to find Brown "sitting on the ground next to a pile of leaves, clutching his rake, and crying." Brown refused to get up and go home with them. Angela stormed outside to meet the family after hearing the commotion. Brown stated that he was not going to leave until he was paid for the work he had completed. Michael arrived at the house and confronted Brown, who pleaded with Michael not to be angry at him and to pay him for raking the leaves. Officer Casey Moore arrived at the scene and arrested Brown.

B. Police Interrogation of Brown Leads to a Confession

Upon arresting Brown, Moore read Brown his *Miranda* rights, restrained him with handcuffs, and placed him in his patrol unit. According to Moore, Brown, who had no prior experience with police officers, appeared fascinated with the patrol unit, even asking him to turn on the lights and sirens. At one point during the drive to the police station, Moore asked Brown, "Do you like the lights and sirens, Rodney? Well, if you agree to cooperate and talk with us once we arrive at the station, I'll turn on the lights and sirens just for you!" Brown replied, "That would be fun, mister! Okay, I'll talk." Moore then turned on the lights and sirens for a brief amount of time. This caused Brown to laugh hysterically. In fact, Brown laughed so hard that it made Moore uncomfortable. Then, Brown suddenly stopped laughing.

At a pretrial hearing on Brown's motion to suppress, Moore testified that Brown's behavior was so odd that it caused Moore to wonder if Brown was "right in the head." At one point, Moore asked Brown, "Hey Rodney, is everything all right back there? You're sort of freaking me out by being so quiet." Brown asked in response, "Where are we going? This isn't fun anymore." Brown then started sobbing softly and repeated over and over, "I want my parents." Moore told him, "You're a grown man, buddy. You don't have a right to your parents. You do, however, have a right to a lawyer. Don't forget that. Do you want a lawyer?" Brown

responded, “I don’t want a lawyer. I want my parents.” Moore replied, “Well, maybe if you’re good, and you talk with us and cooperate, you can see your parents after we’re done questioning you.” Brown then asked Moore, “Promise?” Moore answered, “Promise.” Brown then stopped crying, and resumed laughing hysterically.

Tiring of Brown’s erratic behavior, Moore explained to him that what he had done was serious and not a laughing matter. Moore testified, “I told him that I knew he was guilty and that a jury would know that he was guilty. I also told him that he would be going to jail for a very long time, possibly the rest of his life, and that his only hope for mercy was a full confession.” Moore further testified, “When I explained to him that he was going to jail, he became upset and just kept on saying he was sorry, he just wanted to go home, didn’t want to go to jail, and he wouldn’t do it again.” Moore added, “I thought it was weird that he mentioned that the girl’s mother owed him some money.” Rather than asking Brown to explain what that meant, Moore told Brown, “That poor girl’s mother owes you nothing, you sick and twisted bastard. You, however, owe her a full apology, and that’s another reason why you should confess what you did.” According to Moore, Brown denied doing anything wrong, expressed more confusion as to where they were going, again asked for his parents, and resumed crying.

At the police station, Moore led Brown into the interrogation room. The room was small, approximately the size of a walk-in closet, with a rectangular table in the center of the room that was surrounded by four chairs, one on each side. A video camera was in the corner of the ceiling, recording the interrogation. The following recitation of facts is based on what was shown on the recording, a copy of which was admitted into evidence at the suppression hearing and reviewed by the trial court prior to its ruling.

Once inside the interrogation room, Moore removed Brown's handcuffs, asked Brown if he wanted a soda or a snack, and told him that another officer would be arriving "soon." Advising Brown to "think long and hard about the truth and what happened to that poor girl," Moore left the room and slammed the door shut behind him. While Brown waited, he could be seen alternately crying, praying, and talking to himself quietly. Although most of what he said was inaudible, at one point Brown could be heard saying, "Stupid, stupid, stupid" and, "Dumb girl." Approximately three hours later, Detective Clint Harbour entered the room with an apologetic expression on his face. "Rodney, I'm really sorry about the delay, man. We are incredibly busy around here, and there are a lot of cases that I'm working on.[1] Here's your soda and some cheese puffs, just like you requested. How are you feeling?" Brown took a sip of his soda and then answered, "It's hot in here." Harbour nodded. "Yeah, our AC is out. There is nothing we can do about that.[2] Of course, the longer we're in here, the hotter it's going to get. Man, I can see you sweating already. Here, use this towel to wipe your face. That's better." Brown thanked Harbour meekly and proceeded to eat a handful of cheese puffs.

Harbour then told Brown, "First things first. I know Officer Moore covered this earlier, but you have certain rights that you need to know about." Harbour then repeated the *Miranda* warnings that Moore had previously recited upon Brown's arrest and asked Brown if he understood those rights and was waiving them. In response, Brown asked, "Huh?" Harbour replied, "Oh, I'm sorry. Allow me to explain. Waiving your rights means that you are giving up your right to an attorney, your right to remain silent, etc. Do you understand?" Brown nodded his head up and down. Harbour stated, "That's not good enough, buddy. I need to hear you say

[1] On cross-examination at the suppression hearing, Harbour admitted that this was a lie. He had no other cases at that time, and he had spent the previous two hours interviewing B.G. and her mother.

[2] This was another lie. Harbour testified that the AC had been turned off to increase Brown's level of discomfort.

yes or no." Brown then replied, "No. I mean yes." Harbour asked, "Yes, you understand, or yes you're giving up your rights?" Brown responded, "Both, I guess." Harbour grinned. "Good enough. Let's proceed."

At that moment, Officer Moore re-entered the room, looking angry and holding a firearm. He slammed his weapon down on the table and began yelling profanities. Harbour got up from his chair and tried to get Moore to calm down (or at least that is what he appeared to be doing on the recording): "Moore, what is your problem? Get a grip, man! And I'm not talking about gripping your gun, which I presume is unloaded." Harbour took the gun from the table and secured it in his holster. However, on the recording, the gun was still visible on Harbour's waist.

"Unloaded? Sure, whatever you say, Harbour.[3] Look, I've had a very bad day. I just got chewed out by the captain for unauthorized use of my firearm. Apparently he doesn't think I should be threatening to use it on slimeballs who hurt kids. Whatever. It's not like I've ever actually discharged my gun on an unarmed slimeball." Moore then looked directly at Brown and continued, "Anyway, here this scumbag sits, sipping his soda and munching on his damn cheese puffs, playing dumb, when we both know he's guilty as sin."

Harbour held his hand up to quiet Moore. "Calm down, man. Yeah, we know he's guilty, and he knows he's guilty, but there's no need to treat him like an animal. He's a human being who made a mistake. Isn't that right, Rodney?" Rodney said nothing. "Besides," Harbour continued, "Scaring the poor guy won't do any good. He needs to feel free to have a conversation with us, tell us his side of the story, so that he can get this over with and maybe see his parents." At this last remark, Brown looked up and asked, "I can see my parents?" Moore interjected, "That's what I promised you earlier, didn't I? I keep my promises. Just like I keep my gun unloaded at all times. Heh, heh."

[3] The firearm was, in fact, unloaded.

Harbour sighed. "Can we please stop with all this talk of guns? You know I don't like firearms, man. Here, Moore, you can have your damn gun back. But keep it holstered, you idiot. We wouldn't want to have another accident." Rather than handing the gun directly to Moore, Harbour placed the gun back on the table, making sure to point the barrel away from Brown, and slid it gently to where Moore was standing. Moore then slowly picked up the gun, examined it, and placed it in his holster. Moore then turned to Brown and asked, "So what do you say, Rodney? Wanna talk?"

Brown replied, "What if I told you that I didn't do it?" Harbour and Moore exchanged surprised glances. Moore was the first to speak. "Then I'd say you were a lying bastard. You were caught with your pants down in the girl's presence, you sick creep." Harbour remained calm. "Relax, Moore. Sit down." Harbour then turned to Brown and told him, "Look, Rodney, the fact is, we know you did it. Do you know how we know?" Brown said nothing. Harbour explained, "We know because I talked to the girl, Rodney, and she told me everything that happened. Everything. She told me what you did to her."[4]

Brown looked shocked. He exclaimed, "She's lying!" Harbour shook his head. "It's your word against hers, Rodney. And I think we both know whose word a jury will believe." Brown then became defiant. "No! She's a liar. I'm telling the truth! Ask my parents. They know I don't tell lies." Harbour looked over at Moore, who told Brown, "Yeah, there's something you should know about your parents. They could get in big trouble because of what you did. They should have been supervising you better. The girl's parents could file a lawsuit against your parents, and your parents could lose everything. They wouldn't be able to afford to take care of you anymore. Do you want that to happen?" Brown shouted, "No!" Moore smirked. "Then confess, Rodney, and maybe – just maybe – your parents won't be sued."

[4] This was another lie. Although Harbour had talked to B.G., she had refused to say what had happened.

Harbour looked over at Moore angrily. "That's it! I've had enough of you, Moore! You're ruining this investigation! Get out of here!" Moore replied, "Fine. This is on your head, Detective. I'm done." He then left the room. Harbour then turned to Brown and apologized. "I'm sorry about that, Rodney. The truth is that nothing will happen to your parents. At least, I don't think so. It would just be a lot easier on everyone, including on your parents, if we got this over with quickly. That makes sense, doesn't it?" Brown nodded his head. Harbour smiled. "Hey, how about we start fresh. Forget everything that Moore said and did. He's just a jerk. Whatever 'promises' he made to you were nothing but lies. Now, I'm going to leave you alone and give you some time to rest, clear your head, and think about things. Think about that girl and her parents. Think about your parents. Then think about what you want to tell me." Brown asked Harbour, "Can I go to the bathroom if I need to go? I've had a lot of soda and cheese puffs." Harbour replied, "Absolutely. In fact, you're free to move about the entire station. You can even walk outside the building if you want and get some fresh air. There are no guards outside this room. You can do whatever you want to do, except go home. We still need to talk some more before that can happen." Harbour then left Brown alone in the room. During the time he was alone, Brown went to the bathroom unsupervised and also walked around outside the building. He eventually returned to the empty interrogation room, rested his head on the table, and fell asleep.

Approximately two hours later, Harbour returned, with Moore. This time, however, Moore had no visible weapon on his person. Neither did Harbour, who was the first to address Brown. "Rodney, sorry that took so long, but you fell asleep, and I wanted to make sure you were well rested before we proceed. First of all, I want to go over your rights with you one more time." Harbour then handed Brown a piece of paper with the statutory warnings provided in

Article 38.22 of the code of criminal procedure. "Rodney, can you read what is on here?" Brown responded, "No, I can't read." Harbour replied, "No problem, Rodney, I'll read it for you. This says that you have the right to remain silent and not make any statement at all and that any statement you make may be used against you at your trial; that any statement you make may be used as evidence against you in court; that you have the right to have a lawyer present to advise you prior to and during any questioning; that if you are unable to employ a lawyer, that you have the right to have a lawyer appointed to advise you prior to and during any questioning; and that you have the right to terminate the interview at any time. Do you understand those rights?" Brown stated, "Yes." Harbour replied, "Good. Are you giving up those rights?" Brown stated, "Yes." Harbour continued, "Now please sign your name at the bottom of this form indicating that you are knowingly, intelligently, and voluntarily waiving any rights set out in the warning." Brown, who was unable to write, printed his initials at the bottom of the form.

Harbour then motioned to Moore. "Rodney, before we continue, Officer Moore has something he wants to say to you." Moore looked at Brown and told him, "Rodney, I'm sorry. I was out of line earlier. Your parents are good folks, and I meant them no disrespect. They're not going to get sued because of what you did to that girl. Also, I want to make it clear that I can't promise you anything in exchange for your confession. For example, I can't promise that if you confess, you'll be able to see your parents soon. I'm sorry if I misled you about that earlier. Finally, I'm sorry if you felt threatened by my firearm. I never would have actually used it on you." Brown replied, "That's okay, mister. Can I see my parents now?" Harbour responded, "Not yet, Rodney. The fact remains that we have a strong case against you. The girl told us everything. Now, I can't promise you anything, but I will tell the prosecutor that you cooperated with us. Your confession might – might – demonstrate to the prosecutor that you're an honest

man who made an honest mistake." Harbour added, "Again, I can't make any promises, none whatsoever, but a confession might help you out. But there are no guarantees, Rodney. None. I have no control over what happens after you confess, except through my eventual testimony in court. Now, you need to confess. Not because of anything I can do for you, but because it's the right thing to do. What do you say?"

Brown looked at both men for several minutes, not saying anything. Harbour could see Brown fighting back tears. Harbour appeared sympathetic. "Rodney, I understand how hard this is for you, but confession is good for the soul. It will make you feel so much better about yourself and will allow the healing process to begin. I know you're a good man. Now prove it to that girl's parents, your parents, and everyone else. Tell the truth." After sobbing for several minutes, Brown eventually confessed, stating the following: "Okay. I confess. I did it. I had sex with that girl. She wanted to have sex with me, and I agreed to have sex with her, even though I didn't want to. I did it because she was my friend and she asked me to have sex with her. When her mom caught us, we had just finished having sex. I'm sorry I did it." Harbour smiled. "Good job, Rodney. I appreciate your honesty. Moore, please escort Mr. Brown to a jail cell." Moore placed Brown back in handcuffs, and led him away. This prompted Brown to resume sobbing uncontrollably.

At the suppression hearing, Harbour testified that based on his observations, Brown's "ability to understand and observe what was going on during the interrogation and to make judgments" was not below average or impaired. Moore testified similarly, adding that in his opinion, Brown appeared to be of "average intelligence for a criminal" and that Brown "knew exactly what was going on during the interrogation." Both Harbour and Moore testified that they were unaware during the interrogation that Brown was retarded.

C. Counsel's Meeting with Brown Leads to a Competency Examination

Attorney Virginia Portugal was appointed to represent Brown after he was charged with sexual assault of B.G. Portugal described Brown as "confused," "meek," and "scared." Due to his "relentless sobbing, unwillingness to discuss the incident, and repetition of irrelevant questions," Portugal had difficulty communicating with Brown and became concerned that he "may not be competent to answer the State's Indictment." According to Portugal, Brown did "not seem to understand the proceedings or the allegations against him." Portugal moved the trial court for an independent psychiatric examination. The court granted Portugal's motion and appointed Dr. John Walsh to conduct the examination.

Walsh reviewed Brown's school records, conducted a mental retardation evaluation, insanity evaluation, and a competency evaluation. Although no diagnostic testing occurred during Walsh's interview with Brown, Walsh's report of the mental retardation evaluation placed Brown "in the category of a mentally retarded person, to a moderate degree," with an "IQ of approximately 45," and noted that Brown "never learned to read or write." Despite his low IQ, the report stated that Brown was acquainted with his rights. The report did not specify how Walsh knew Brown was able to grasp abstract concepts such as his Constitutional rights, but stated that he did. The report also noted that Brown "admitted to having sexual relations with [B.G.]" during the interview. The insanity evaluation contained similar information, but concluded that Brown was not insane.

Again, only school records were requested and reviewed, and no tests were conducted during the competency evaluation. The same history as in the first report was given. Without providing any reasoning or examples, Walsh concluded that Brown "has a factual and rational understand[ing] of his charges" and that he was able to disclose facts, events, and states of mind.

Walsh reported Brown was able to engage in a reasoned choice of legal strategies and options due to the fact that Brown stated "he would like to 'get out of jail' and 'get probation so he could go home.'" When evaluating the effect of Brown's mental retardation on the capacity to engage with counsel in a reasonable and rational manner, Walsh wrote that it "diminishes it but does not prohibit it." Walsh also said Brown understood the adversarial nature of the proceeding and could name his attorney. He concluded that Brown could testify, although "he is difficult to understand," and that Brown could exhibit appropriate courtroom behavior. Walsh's final conclusion, and the conclusion of the trial court, was that Brown was competent to stand trial.

D. Trial and Punishment

Portugal met with Brown several times after the court's ruling that Brown was competent to stand trial. Prior to trial, Portugal filed a motion to suppress evidence, alleging that "coercive police practices" and Brown's mental impairment rendered the confession involuntary. The trial court held a hearing on the motion. At the hearing, in addition to the videotaped recording of the interrogation and the testimony of Harbour and Moore, summarized above, the trial court also considered the testimony of Dr. Walsh. In addition to providing testimony relating to Brown's competence, summarized above, Walsh also testified that in his opinion, during the interrogation, Brown was "probably" able to understand his rights, although he could not be 100 percent certain. Walsh explained, "Even children are able to understand what it means to remain silent and how their words can be used against them. I don't see how Brown's understanding would be any different." Walsh added, "People who are mentally retarded are not stupid. They know about cause and effect, and they know that their actions – and their words – have consequences. I am fairly confident that Brown knowingly, intelligently, and voluntarily confessed."

Following the hearing, the trial court denied the motion to suppress and entered the following findings of fact:

1. The defendant was arrested following an accusation that he had sexually assaulted a teenage girl.
2. After defendant's arrest, the defendant was informed of his constitutional and statutory rights listed in Article 38.22, section 2, of the Texas Code of Criminal Procedure on multiple occasions. The defendant indicated he understood his rights and subsequently waived his rights and agreed to provide a statement.
3. The defendant was sober, alert and was not mentally impaired for reasons other than his moderate mental retardation. There is no evidence that his moderate mental retardation had an effect on the voluntariness of his statement.
4. The defendant never invoked any of his constitutional or statutory rights before or after giving his statement.
5. No one coerced or threatened the defendant to make the statement. Although certain behavior by Officer Moore was troubling, this behavior all occurred hours before the defendant actually made his statement and thus did not influence the defendant's decision to confess. Additionally, the effect of any borderline coercive behavior by Moore was neutralized by the non-coercive behavior of Detective Harbour.
6. Officer Moore and Detective Harbour were credible witnesses.
7. The testimony of Dr. Walsh was credible.
8. No inherently coercive or threatening behavior was shown on the videotaped recording of the interrogation.

The trial court also entered the following conclusions of law:

1. The defendant's statement was freely and voluntarily made by the defendant, without threats, promises, coercion, or other improper inducement on the part of any police officer or individual.
2. The defendant's statement was taken in full compliance with the requirements of Article 38.22 of the Texas Code of Criminal Procedure, after the defendant knowingly and intelligently waived the rights set out in Article 38.22, section 2, of the Texas Code of Criminal Procedure.
3. The defendant's videotaped statement is admissible in evidence under Articles 38.21 and 38.22 of the Texas Code of Criminal Procedure and under all applicable provisions of the Texas Constitution and the United States Constitution.

Believing that the admission of Brown's videotaped confession would almost certainly result in a conviction, Portugal worked diligently to obtain a plea bargain for his client. Portugal ultimately persuaded Brown to plead guilty to the offense.

Eventually, Brown signed written plea admonishments which he could not read, but which counsel assured was explained to him, along with a stipulation of evidence. Before taking Brown's plea, the trial court asked Portugal whether she felt that Brown was mentally competent to enter a plea. Portugal replied:

> Yes, Your Honor. I had previously asked Dr. Walsh to examine Mr. Brown. As you know, Dr. Walsh is regularly used by the court as its independent expert. The report from Dr. Walsh stated he is mentally competent. The report did indicate he was moderately retarded with an IQ, I believe, of 45. However, I have been able to speak with Brown. After spending a lengthy amount of time discovering ways to communicate with him, he was able to effectively communicate with me about the facts and details of the indictment. I believe he understands his range of punishment.

After proper admonishments contained on the record, the following plea exchange occurred:

The Court: Okay Mr. Brown. You said you met with your counsel to discuss your options as to how to plead today?

The Defendant: Yes sir.

The Court: And did your counsel explain these admonishments contained in these papers?

The Defendant: Yes sir.

The Court: And you've discussed the range of punishment?

The Defendant: Yes sir.

The Court: All right Mr. Brown, you are charged with sexual assault of a child. As to this, how do you wish to plead?

The Defendant: Yes sir.

The Court: No, I asked how do you plead to the court's indictment?

The Defendant: I plead yes, sir.

The Court: Guilty or not guilty?

The Defendant: Not—

Ms. Portugal: Pleading guilty. Tell the Judge.

The Defendant: Guilty. Guilty.

The Court: Okay.

The trial court accepted Brown's plea, the stipulation of evidence signed by Brown was introduced, and the punishment trial began. The State called B.G.'s parents and Moore to testify about the incident. The testimony of Angela and Michael during punishment was consistent with the recitation of facts above. Moore added:

> While we were on the way to the station [Brown] was first excited about being in a squad car. He asked about the lights, the sirens, and wanted to see my badge. When I explained to him that he was going to jail he became upset and just kept on saying he was sorry, he just wanted to go home, didn't want to go to jail, and

> he wouldn't do it again…. I thought it was weird that he mentioned that the girl's mother owed him some money.

Angela, Michael, and Moore all testified that they believed Brown knew right from wrong.

Portugal's defense witnesses included Desmond, Deondra, Brown's school principal, Keya Jones, and his special education teacher, Judy Berrios. Reading from Brown's official school records, Jones testified that Brown was found to have an IQ between forty-three and forty-seven, depending on the year of the examination, meaning that Brown's scores were higher than only .01% of all subjects his age. He was always enrolled in special education classes. Berrios testified this meant that Brown functioned at "the level of a kindergartener." She told the jury that she had taught Brown for three years and that he was a good student, listened well, and did not cause disturbances. She told the jury that he knew right from wrong "in the sense that he knew it was wrong to steal or lie," but that he generally experienced great difficulty in grasping abstract concepts.

Desmond and Deondra explained that Brown was incapable of taking care of himself. According to their testimony, Brown could not count money, read, write, cook, bathe, or tell time. He "like[d] toys made for six year olds," "watched kid's cartoons," and communicated "like a child." They told the jury that they had always supervised him and begged for leniency because their son "wouldn't be able to survive in jail."

During closing argument, Portugal asked for "mercy" due to Brown's "obvious mental retardation," while the prosecutor focused on the fact that Brown admitted to the crime, was found to be competent, and knew right from wrong. The jury sentenced Brown to twenty years' imprisonment.

Attorney Dalton Franks was appointed to represent Brown on appeal. He filed a motion for new trial on grounds that Brown's confession should have been suppressed and that Portugal

failed to adequately investigate whether Brown was competent to stand trial and enter a plea. Specifically, Franks' motion complained that counsel was inadequate for failing to: (1) request an examination from a consulting expert; (2) challenge Walsh's qualifications; (3) request that the incompetency trial be held before a jury; and (4) consider Brown's mental retardation as a part of the defensive strategy. A hearing on the motion for new trial was set.

E. Evidence at Hearing on Motion for New Trial

No new evidence was admitted at the hearing regarding the voluntariness of Brown's confession.[5] Instead, the hearing was focused on the issue of the effectiveness of trial counsel. Portugal was the first witness to testify at the hearing on the motion for new trial. She stated that she reviewed Brown's school records, interviewed his family and teachers, and met with Brown several times before coming to her own conclusion that he was mentally impaired. Brown's initial difficulty in communicating with her prompted the request for an independent examination. Although Portugal did not choose Walsh, and recognized that he was not a consulting expert, Portugal testified that she knew the court would appoint Walsh "almost as a matter of course," that Walsh was "this court's go-to guy" for mental health evaluations, that there was no need to challenge his qualifications, and that she had worked with him "a bunch in the past." She said that she reviewed Walsh's reports and "took them at face value" because "[Walsh] is independent, he's credible," and "there's no point in wasting resources." She testified that she believed the State "had a real good case against Mr. Brown" and that "this case was all about punishment." Portugal testified that she met with Brown and his parents and that she explained the proceedings, Brown's rights, and the effects of a guilty plea "in the simplest

[5] In fact, at the beginning of the hearing, the trial court stated, "This hearing isn't about the admissibility of Brown's confession. I made my ruling on that issue following the hearing on the motion to suppress, and my ruling stands. You can take that issue up on appeal."

terms possible," adding "from what his parents told me, I think he understood what was going on." She said, "[w]e all agreed on what to do."

Franks also called psychologist Dr. Edwin Beard to testify. Beard generally agreed that Brown would have a difficult time making distinctions between degrees of wrongfulness and grasping abstract concepts. He explained that there is a common tendency for individuals with mental retardation to "just nod in approval even when they don't understand what is being said," including "saying something that is not true because they want to please a person of authority without understanding the consequences." He cited Brown's plea as an example that Brown was "highly suggestible."

Beard also conducted his own examination of Brown. With respect to the issue of competency, Beard stated that Brown could not remember his attorney's name and did not understand the terms guilty, appeal, or admonishment. When asked if he knew what it meant to waive a constitutional right, Brown waved his hand. When asked why he pleaded guilty, Brown said, "I was supposed to." However, Brown also said there were "people against him trying to put [him] in jail." He said his lawyer helps his case and is there to help him out of trouble. When asked why he was going to court, Brown said, "[T]o get help and learn. To keep me out of trouble." Brown understood the term confidentiality when explained, why he was in jail, that he got a big sentence, that he "did something bad," said the judge cannot make him plead guilty, the jury decides "if I go home or not," and that he did not have to give a statement to the police unless he wanted to.

Yet, Beard believed that Brown did not comprehend the serious nature of the allegations or punishment. He testified, "[Brown] even asked how his friend [B.G.] was doing, when he could go home to play with her." At other points in the interview, he asked "when he was going

to get his money back," "if he could have his PlayStation for Christmas," and "if Mr. Gard was still mad at him." Brown told Beard that he believed Moore, the arresting officer, was there to protect him. Beard opined, "I just don't think he had the mental capability to understand what was going on. A six-year-old wouldn't, and I don't think he did either."

Beard testified that further testing would most likely reveal that Brown was incompetent to stand trial. He also believed that Walsh certainly did not have the information necessary to conclude Brown was competent since he did not conduct any diagnostic testing. He criticized Walsh for being a mental health expert, but "not a mental retardation expert," and discussed the difference in training required. Beard explained that there were competency assessment tools and tests for mentally retarded subjects that Walsh did not use, including the Competence Assessment to Stand Trial for Defendants with Mental Retardation (CAST*MR) test, which is widely used. Beard's report stated Brown's motivation for pleading guilty "could have been his belief it would result in an immediate reward, or because he was told to plead guilty." Beard stated that a challenge should have been made to Walsh's report and credentials.

At the conclusion of the hearing, the trial court overruled the motion for new trial from the bench, stating merely, "I believe Ms. Portugal to be competent counsel."[6]

II. BROWN'S CONFESSION WAS VOLUNTARY

A. Standard of Review

In reviewing a trial court's ruling on a motion to suppress, "an appellate court must apply a standard of abuse of discretion and overturn the trial court's ruling only if it is outside the zone of reasonable disagreement." *Martinez v. State*, 348 S.W.3d 919, 922 (Tex. Crim. App. 2011) (citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)). "The appellate court must apply a bifurcated standard of review, giving almost total deference to a trial court's

[6] No findings of fact and conclusions of law were requested or entered.

determination of historic facts and mixed questions of law and fact that rely upon the credibility of a witness, but applying a de novo standard of review to pure questions of law and mixed questions that do not depend on credibility determinations." *Id*. at 922-23 (citing *Guzman v. State*, 955 S.W.2d 85, 87-89 (Tex. Crim. App. 1997)).

The trial court is the "sole and exclusive trier of fact and judge of the credibility of the witnesses" and the evidence presented at a hearing on a motion to suppress, particularly where the motion is based on the voluntariness of a confession. *Delao v. State*, 235 S.W.3d 235, 238 (Tex. Crim. App. 2006); *Green v. State*, 934 S.W.2d 92, 98 (Tex. Crim. App. 1996); *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990); *Bizzarri v. State*, 492 S.W.2d 944, 946 (Tex. Crim. App. 1973). Additionally, given this vital role, great deference is accorded to the trial court's decision to admit or exclude such evidence, which will be overturned on appeal only where a flagrant abuse of discretion is shown. *Delao*, 235 S.W.3d at 238; *Montanez v. State*, 195 S.W.3d 101, 106 (Tex. Crim. App. 2006); *Guzman*, 955 S.W.2d at 89; *Alvarado v. State*, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995).

B. Applicable law

Article 38.21 of the Texas Code of Criminal Procedure provides that the statements of a person accused of a crime "may be used in evidence against him if it appears that the same w[ere] freely and voluntarily made without compulsion or persuasion." TEX. CODE CRIM. PROC. ANN. art. 38.21 (West 2005). "In all cases where a question is raised as to the voluntariness of a statement of an accused, the court must make an independent finding in the absence of the jury as to whether the statement was made under voluntary conditions." *Id*. art. 38.22 § 6 (West 2005); *see also Jackson v. Denno*, 378 U.S. 368, 380 (1964) (holding that federal due process requires trial court to hold hearing on admissibility of statement outside presence of jury). The

burden of proof at the hearing on admissibility is on the prosecution, which must prove by a preponderance of the evidence that the defendant's statement was given voluntarily. *Alvarado*, 912 S.W.2d at 211.

Under federal law, the United States Supreme Court has held that the determination as to whether a confession was voluntarily rendered must be analyzed by examining the totality of the circumstances. *Arizona v. Fulminante*, 499 U.S. 279, 285-86 (1991). The mental condition of a suspect is a factor to consider in the determination of whether a confession was voluntary. *See, e.g.*, *Culombe v. Connecticut*, 367 U.S. 568, 620, 625-35 (1961) (mental retardation); *Reck v. Pate*, 367 U.S. 433, 441-44 (1961) (mental retardation); *Blackburn v. Alabama*, 361 U.S. 199, 207-11 (1960) (mental illness); *Spano v. New York*, 360 U.S. 315, 322-23 & n.3 (1959) (brain injury); *Fikes v. Alabama*, 352 U.S. 191, 196-97 (1957) (mental illness). However, "while mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry." *Colorado v. Connelly*, 479 U.S. 157, 165 (1986). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Id*. at 167. A statement is "involuntary," for the purposes of federal due process, only if there was official, coercive conduct of such a nature that any statement obtained thereby was unlikely to have been the product of an essentially free and unconstrained choice by its maker. *Alvarado*, 912 S.W.2d at 211. The ultimate question with regard to coercion is whether the defendant's "will was overborne" by the officer's actions. *Creager v. State*, 952 S.W.2d 852, 856 (Tex. Crim. App. 1997); *Weaver v. State*, 265 S.W.3d 523, 534 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd). Relevant circumstances to determine if a defendant's will has been overborne have included length of detention, incommunicado or

prolonged interrogation, denying a family access to a defendant, refusing a defendant's request to telephone a lawyer or family, and physical brutality. *Armstrong v. State*, 718 S.W.2d 686, 693 (Tex. Crim. App. 1985).

Police deception during an interrogation is another relevant factor in assessing whether the suspect's confession was voluntary. *Green v. State*, 934 S.W.2d 92, 99 (Tex. Crim. App. 1996) (citing *Frazier v. Cupp*, 394 U.S. 731, 739 (1969)). Of the numerous types of police deception, a misrepresentation relating to an accused's connection to the crime is the least likely to render a confession involuntary. *Id*. (citing *Holland v. McGinnis*, 963 F.2d 1044, 1051 (7th Cir. 1992)). The types of deception which are likely to lead to involuntary confessions are based on extrinsic considerations. *See, e.g.*, *Lynumn v. Illinois*, 372 U.S. 528, 533-34 (1963); *Spano*, 360 U.S. at 320-23; *United States v. Anderson*, 929 F.2d 96, 100 (2d Cir. 1991)

Under state law, claims of involuntariness "can be, but need not be, predicated on police overreaching, and they could involve the 'sweeping inquiries into the state of mind of a criminal defendant who has confessed' found in *Connelly* that are not of themselves relevant to [federal] due process claims." *Oursbourn v. State*, 259 S.W.3d 159, 172 (Tex. Crim. App. 2008). "In essence, the question is whether the accused's mental impairment is so severe that he was incapable of understanding the meaning and effect of his statement." *Franks v. State*, 90 S.W.3d 771, 785 (Tex. App.—Fort Worth 2002, no pet.) (citing *Casias v. State*, 452 S.W.2d 483, 488 (Tex. Crim. App. 1970); *Reed v. State*, 59 S.W.3d 278, 281-82 (Tex. App.—Fort Worth 2001, pet. ref'd)); *see also Grayson v. State*, 40 Tex. Crim. 573, 51 S.W. 246, 246 (1899) ("[I]f the party against whom the confessions are introduced is shown not to possess sufficient intelligence to make a statement as to the transaction interrogated about, or has not sufficient intelligence to understand the nature and obligation of an oath, that the statement or confession of such witness

ought not to be received in evidence."). Factors courts consider in determining whether a suspect has a less-than-average ability to resist police pressure include: physical fatigue, youth, lack of experience with police, mental illness, lack of education, mental retardation, state-administered drugs, physical injury, and physical illness. *See State v. Terrazas*, 4 S.W.3d 720, 733-34 (Tex. Crim. App. 1999) (Womack, J., dissenting) (collecting cases).

C. No Abuse of Discretion Has Been Shown

We cannot conclude on this record that the trial court abused its discretion in admitting Brown's videotaped confession. Although we share the concurrence's concerns with some aspects of this interrogation, the police officers did not engage in any practice that has been held to be inherently coercive as to make a statement involuntary. *See, e.g.*, *Michigan v. Tucker*, 417 U.S. 433, 439-43 (1974) (discussing history of right against compulsory self-incrimination and emphasizing that "the privilege against self-incrimination 'was aimed at a . . . far-reaching evil – a recurrence of the Inquisition and the Star Chamber.'" (quoting *Ullmann v. United States*, 350 U.S. 422, 428 (1956))); *Davis v. North Carolina*, 384 U.S. 737, 739-41 (1966) (defendant's will overborne by "sustained pressures upon him" such as repeated interrogations over sixteen days without being advised of rights and without being allowed to see anyone or make telephone calls); *see also Connelly*, 479 U.S. at 164 n.1 (collecting cases describing coercive interrogation practices). Rather, it appears that Detective Harbour and Officer Moore were employing the familiar "good cop/bad cop" routine, with Moore acting as the "bad cop." Although some of Moore's behavior was problematic, especially his display of a firearm, we cannot conclude that Moore's actions, when considered in their totality, rendered Brown's confession involuntary. Moreover, as the trial court observed, Moore's questionable behavior occurred hours before Brown made his confession. Thus, we cannot conclude that there is a direct relationship between

Moore's allegedly improper behavior and Brown's confession. *See Barton v. State*, 605 S.W.2d 605, 607-09 (Tex. Crim. App. 1980); *Berry v. State*, 582 S.W.2d 463, 465 (Tex. Crim. App. 1979); *see also Cooper v. Scroggy*, 845 F.2d 1385, 1391-92 (6th Cir. 1988) (discussing ways in which coercive police behavior may be "cured" by subsequent behavior); *United States v. Jenkins*, 938 F.2d 934, 940 n.3 (9th Cir. 1991) (same).

As for Brown's argument that his statement was involuntary because of his mental retardation, we cannot conclude that Brown's mental impairment was so severe that he was incapable of understanding the meaning and effect of his confession. The recorded interview demonstrates that Brown understood and responded to Detective Harbour's questions and statements, he was coherent throughout the entire interview, he implicated himself in the crime only after Detective Harbour indicated that the State's case against Brown was strong, and he indicated that he was sorry for what he had done. Nothing that occurred during the interview indicates that Brown lacked the mental capacity to knowingly and voluntarily give his statement or to otherwise understand and waive his rights. We also observe that Texas Court of Criminal Appeals has repeatedly upheld the voluntariness of confessions made by defendants with mental deficiencies as severe or more severe than Brown's. *See, e.g.*, *Lane v. State*, 933 S.W.2d 504, 509-13 (Tex. Crim. App. 1996); *Smith v. State*, 779 S.W.2d 417, 427-29 (Tex. Crim. App. 1989); *Bell v. State*, 582 S.W.2d 800, 808-09 (Tex. Crim. App. 1979); *Casias*, 452 S.W.2d at 488-89; *Vasquez v. State*, 163 Tex. Crim. 16, 288 S.W. 100, 108-09 (1956).

Considering the totality of the circumstances, we cannot conclude that the trial court abused its discretion in concluding that Brown's confession was voluntary. We overrule Brown's first issue.

III. PORTUGAL'S ASSISTANCE TO BROWN WAS INEFFECTIVE

A. Standard of Review

"No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary." TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (West 2009). Brown was entitled to effective assistance of counsel during the plea bargaining process. *Ex parte Battle*, 817 S.W.2d 81, 83 (Tex. Crim. App. 1991) (en banc). "A guilty plea is not voluntary if made as a result of ineffective assistance of counsel." *Ex parte Burns*, 601 S.W.2d 370, 372 (Tex. Crim. App. 1980); *Ex parte Karlson*, 282 S.W.3d 118, 129 (Tex. App.—Fort Worth 2009, pet. ref'd).

"[T]he constitutional validity of a guilty plea made upon the advice of counsel depends on whether counsel's performance was reasonably competent, rendering a defendant effective representation during the particular proceedings." *Battle*, 817 S.W.2d at 83. If Brown's guilty plea was based on erroneous advice by Portugal, the plea was not knowing or voluntary. *Id*.

As many cases have noted, the right to counsel does not mean the right to errorless counsel. *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006). In order to prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*. 466 U.S. 668, 687-88 (1984); *see also Ex parte Imoudu*, 284 S.W.3d 866, 869 (Tex. Crim. App. 2009). The United States Supreme Court and the Texas Court of Criminal Appeals have held that the *Strickland* test applies to challenges to guilty pleas based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985); *see also Imoudu*, 284 S.W.3d at 869; *Battle*, 817 S.W.2d at 84. We review the trial court's decision to deny a new trial based on ineffective assistance of counsel for abuse of discretion. *Ramirez v. State*, 301 S.W.3d 410, 415 (Tex. App.—Austin 2009, no pet.).

The first prong requires a showing that counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687. This requirement can be difficult to meet since there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "This measure of deference, however, must not be watered down into a disguised form of acquiescence." *Profitt v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987) (finding ineffective assistance where counsel failed to request medical records and relied on court-appointed competency examination when he knew the client had escaped from a mental institution). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003) (quoting *Strickland*, 466 U.S. at 690-91). However,

> strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Wiggins v. Smith, 539 U.S. 510, 521-22 (2003) (quoting *Strickland*, 466 U.S. at 690-91). Therefore, we analyze whether Portugal's decision not to further investigate was reasonable in light of accepted professional norms.

The second *Strickland* prejudice prong requires a showing that but for counsel's unprofessional error, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88; *see also Imoudu*, 284 S.W.3d at 869.[7] "Reasonable probability" means a "probability sufficient to undermine confidence in the

[7] In circumstances not applicable to this case, a defendant challenging a guilty plea would normally satisfy the prejudice requirement of *Strickland* by showing a reasonable probability that, absent counsel's deficient performance, he would not have pleaded not guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

outcome." *Strickland*, 466 U.S. at 694. An appellant need not show, however, that counsel's deficient performance more likely than not altered the outcome of the case. *Milburn v. State*, 15 S.W.3d 267, 269 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd).

Due process prohibits convictions of mentally incompetent persons. *Corley v. State*, 582 S.W.2d 815, 818 (Tex. Crim. App. 1979) (citing *Bishop v. United States*, 350 U.S. 961 (1959)). "This constitutional right cannot be waived by the incompetent—by guilty plea or otherwise." *Bouchillon v. Collins*, 907 F.2d 589, 592 (5th Cir. 1990) (cited in *Ex parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App. 2005)). While a guilty plea may only be attacked on the basis that it was not knowing and voluntary, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right[s]...." *Pate v. Robinson*, 383 U.S. 375, 384 (1966). If Brown was incompetent, "his plea was ineffective and he was prejudiced by its entry" to a degree satisfying the second prong of *Strickland*. *Bouchillon*, 907 F.2d at 595. *Strickland*'s second prong is a "lower burden of proof than the preponderance standard." *Bouchillon*, 907 F.2d at 595; *Strickland*, 466 U.S. at 694.

A failure to make a showing under either prong defeats a claim for ineffective assistance. *Rylander v. State*, 101 S.W.3d 107, 110-11 (Tex. Crim. App. 2003). Allegations of ineffectiveness must be firmly founded in the record. *Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). The *Strickland* test "of necessity requires a case-by-case examination of the evidence." *Williams v. Taylor*, 529 U.S. 391 (2000).

B. The First *Strickland* Prong Was Met

The test of incompetency is whether a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362

U.S. 402, 402 (1960); TEX. CODE CRIM. PROC. ANN. art. 46B.003(a) (West 2006). "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." TEX. CODE CRIM. PROC. ANN. art. 46B.003(b).

Factors considered in a competency examination include capacity to: rationally understand the charge and potential consequences of the pending criminal proceeding; disclose pertinent facts and states of mind; engage in a reasoned choice of legal strategies and options; understand the adversarial nature of the proceeding; exhibit proper courtroom behavior; and the ability to testify. TEX. CODE CRIM. PROC. ANN. art. 46B.024(1) (West Supp. 2012). An expert conducting a competency review must also take into consideration the impact of the mental illness or mental retardation on the defendant's capacity to engage with counsel in a reasonable and rational manner. TEX. CODE CRIM. PROC. ANN. art. 46B.024(3).

On appeal, Franks' briefing claims that Portugal disregarded multiple "red flags" that would have caused reasonably competent counsel to investigate Brown's competency further. He argues that facts such as Brown's demand for money from Angela after the alleged assault, failure to leave the scene, and fascination with Moore's patrol unit suggested that Brown did not understand the full import of circumstances surrounding the case. Although Portugal knew that Brown was mentally retarded, Portugal did not independently investigate the degree to which Brown's mental retardation would affect his competence to stand trial. Franks writes, "Portugal's reliance on Walsh's report was unjustified because Walsh's qualifications and conclusory results without proper testing warranted a *Daubert/Robinson* challenge." The brief suggests that counsel should have: requested funds for a consulting mental retardation expert, asked for a jury trial on the issue of competence, and considered mental retardation as a

defensive strategy during guilt/innocence. The State argues that Portugal's "sound trial strategy should not be second-guessed" and that she was entitled to rely on Walsh's conclusions.

1. Walsh's qualifications do not meet statutory requirements

Article 46B.022 of the Texas Code of Criminal Procedure states:

> (a) To qualify for appointment under this subchapter as an expert, a psychiatrist or psychologist must: (1) as appropriate, be a physician licensed in this state or be a psychologist licensed in this state who has a doctoral degree in psychology; and (2) have the following certification or experience or training; (A) as appropriate, certification by: (i) the American Board of Professional Psychiatry and Neurology with added or special qualifications in forensic psychiatry; or (ii) the American Board of Professional Psychology in forensic psychology; or (B) experience or training consisting of: (i) at least 24 hours of specialized forensic training relating to incompetency or insanity evaluations… (iii) for an appointment made on or after January 1, 2005, at least five years of experience before January 1, 2004, in performing criminal forensic evaluations for courts and eight or more hours of continuing education relating to forensic evaluations, completed in the 12 months preceding appointment and documented with the court.
>
> (b) In addition to meeting qualifications required by Subsection (a), to be appointed as an expert a psychiatrist or psychologist must have completed six hours of required continuing education course in forensic psychiatry or psychology, as appropriate, in either of the reporting period in the 24 months preceding the appointment.
>
> (c) A court may appoint as an expert a psychiatrist or psychologist who does not meet the requirements of Subsections (a) and (b) only if exigent circumstances require the court to base the appointment on professional training or experience of the expert that directly provides the expert with a specialized expertise to examine the defendant that would not ordinarily be possessed by a psychiatrist or psychologist who meets the requirements of Subsections (a) and (b).

TEX. CODE CRIM. PROC. ANN. art. 46B.022 (West Supp. 2012). Here, Walsh's curriculum vitae was filed with the trial court. It contained information establishing that Walsh possessed a doctoral degree in psychology and was certified by the American Board of Professional Psychology. However, the curriculum vitae failed to state the area of board certification and did

not contain any information regarding continuing education courses. Although the court could have appointed Walsh in accordance with Subsection (c), no exigent circumstances were contained within the record.[8]

We agree with Franks that these facts, coupled with the nature of the Walsh reports which found that Brown's mental retardation "diminishes[] but does not prohibit," capacity to engage with counsel in a reasonable and rational manner, should have caused Portugal to further investigate. We review the remainder of Portugal's actions to determine whether her assistance can be seen as ineffective based on the totality of the circumstances.

2. Portugal should have hired a mental health/mental retardation expert

Franks argues that Portugal should have hired a mental health expert and asked for a hearing on Brown's competency. In Texas, "[i]f a defendant wishes to be examined by an expert of the defendant's own choice, the court on timely request shall provide the expert with reasonable opportunity to examine the defendant." TEX. CODE CRIM. PROC. ANN. art. 46B.021(f) (West 2006). "A counsel in a noncapital case . . . appointed to a defendant under this code shall be reimbursed for reasonable and necessary expenses, including expenses for investigation and for mental health experts." TEX. CODE CRIM. PROC. ANN. art. 26.05(d) (West Supp. 2012); s*ee De Freece v. State*, 848 S.W.2d 150, 152 (Tex. Crim. App. 1993) (en banc).

The State points out that no Texas court has held that it was ineffective for counsel to fail to request a consulting expert after requesting and obtaining appointment of an independent expert to evaluate competency. It believes Portugal was entitled to rely on Walsh's report. We disagree. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances." *Wiggins*, 539 U.S. at 521-22. Counsel

[8] The State argues that Walsh was commonly used by the trial court as an expert and that the trial court must have been made aware at some point that Walsh met the statutory requirements. The State wishes for this Court to assume facts which are not in evidence. We decline to do so.

cannot rely on a court-appointed expert's report as a basis for sound trial strategy excusing investigation where reasonable professional judgment does not otherwise support a decision not to further investigate. *See Freeman v. State*, 167 S.W.3d 114, 118-19 (Tex. App.—Waco 2005, no pet.). Walsh's report espoused, without the benefit of diagnostic testing, that Brown "has a factual and rational understand[ing] of his charges," despite having an IQ equivalent to that of the average five or six year old. Walsh agreed that Brown's low level of functioning diminished Brown's capacity to engage with counsel in a reasonable and rational manner, but did not prohibit it. Tellingly, while Portugal's motion for the appointment of an independent expert stated that Brown did not seem to understand the proceedings and allegations against him, and her testimony at the hearing on the motion for new trial demonstrated that she continued having difficulty communicating with Brown, she failed to further pursue the issue of competency. As Franks states in his brief, this should have been the "red flag" that led her to further investigate the effects of Brown's mental retardation.

Contrary to the State's assertion that there is no need to get a second opinion, the role of the mental health expert in a case like this is critical. The mental health expert is more than just a simple witness. Appointment of a consulting expert in this case would provide the defense with a basic tool for determining whether Walsh's report was correct, or whether to go forward with a defense of diminished capacity during guilt/innocence. "It must be a very rare circumstance indeed where a decision not to investigate would be 'reasonable' after counsel has notice of the client's history of mental problems." *Bouchillon*, 907 F.2d at 597. Had Portugal asked for a mental health expert to challenge Walsh, she would have been entitled to one, and failure to appoint the expert would have resulted in error. *See De Freece*, 848 S.W.2d 150. Because Portugal believed her client was incompetent upon conferring with him, had difficulty

discussing the case with him, and relied on Walsh's report, which found Brown's mental retardation diminished his capacity to engage with counsel—a key competency requirement, she should have questioned Brown's competency up to the point of Brown's questionable plea.[9]

Notwithstanding the difficulty of making evaluations of the kind required in these circumstances, we conclude that the record reveals a failure to give proper weight to the information suggesting Brown's incompetence. Where due process[10] prohibits convictions of mentally incompetent persons and requires the appointment of a consulting expert where mental competence is in question, how can Brown be denied this procedure due to counsel's failure to raise these issues at trial without being denied his Constitutional right to due process? *See Corley*, 582 S.W.2d at 818; *De Freece*, 848 S.W.2d at 158. We hold that because the background and extent of Brown's mental illness was plainly evident, counsel had a duty to further investigate and request appointment of a consulting expert. Failure to do so was unreasonable. Should we hold otherwise, we would be unraveling the guarantees affording a defendant such as Brown a reasonably level playing field in this adversarial system of justice.

3. Counsel could have filed a motion for a competency hearing before a jury

Next, Franks argues that counsel should have requested a competency hearing. A competency hearing is a separate and independent hearing from the trial. TEX. CODE CRIM. PROC. ANN. art. 46B.005 (West Supp. 2012). "The purpose of a separate hearing is to allow a determination uncluttered by evidence of the offense itself," since guilt is not an issue. *Lasiter v. State*, 283 S.W.3d 909, 915 (Tex. App.—Beaumont 2009, pet. ref'd) (quoting *Basham v. State*,

[9] We note that our sister court has previously refused to find ineffective assistance for failure to request a competency hearing where the defendant suffered from bi-polar disorder. *Magic v. State*, 217 S.W.3d 66 (Tex. App.–Houston [1st Dist.] 2006, no pet.). However, our case is easily distinguishable, since the defendant in *Magic* demonstrated competency in dealings with the court and through the pro se motions he filed.

[10] Franks's motion for new trial and his multifarious appellate briefing contained two lines raising due process concerns. We address these concerns in the interest of justice.

608 S.W.2d 677, 679 (Tex. Crim. App. 1980)). The requirements are simple—"(b) Except as provided by Subsection (c), the court shall hold a trial under Subchapter C before determining whether the defendant is incompetent to stand trial on the merits." TEX. CODE CRIM. PROC. ANN. art. 46B.005. Under Subsection "(c)[,] A trial under this chapter is not required if: (1) neither party's counsel requests a trial on the issue of incompetency; (2) neither party's counsel opposes a finding of incompetency; and (3) the court does not, on its own motion, determine that a trial is necessary to determine incompetency." *Id.* Where there is evidence suggesting a defendant would be entitled to a competency hearing, the conviction may be reversed based on violation of due process even if a hearing was not requested at trial. *Corley*, 582 S.W.2d at 818 (citing *Drope*, 420 U.S. 162); *Pate v. Robinson*, 383 U.S. 375, 376, 378 (1966).

Evidence capable of creating a bona fide doubt is usually sufficient to create such 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). If evidence warrants a competency hearing and the trial court denies such a hearing, the defendant is deprived of his constitutional right to a fair trial. *LaHood v. State*, 171 S.W.3d 613, 618 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (citing *Pate v. Robinson*, 383 U.S. 375, 385, (1966)). There was evidence in the record already, including Brown's school records and the Walsh report, that raised evidence of moderate retardation. Portugal also could have called Berrios and Jones to testify. A competency hearing should have been requested.

4. Failure to consider a diminished capacity defense

Here, the record demonstrates that counsel looked at Walsh's report and employed the strategy to focus on punishment. Franks argues that Portugal's determination that this was a

"punishment case" and her failure to consider Brown's mental retardation as a diminished capacity defensive strategy as to the issue of guilt/innocence constituted ineffective assistance.

While diminished capacity is not an affirmative defense, it is a "failure-of-proof defense in which the defendant claims that the State failed to prove that the defendant had the required state of mind at the time of the offense." *Ruffin v. State*, 270 S.W.3d 586, 593 (Tex. Crim. App. 2008); *Jackson v. State*, 160 S.W.3d 568, 573-74 (Tex. Crim. App. 2005). Evidence of diminished capacity should be brought to the fact-finder's attention during the guilt/innocence phase of trial.

A criminal defense lawyer must have a firm command of the facts of the case as well as governing law before he can render reasonably effective assistance to his client—in or out of the courtroom. *Ex parte Ybarra*, 629 S.W.2d 943, 946 (Tex. Crim. App. 1982). In this case, Portugal was aware of Brown's diminished capacity, but failed to consider its impact during guilt/innocence.[11]

5. Portugal's representation fell below the standard of prevailing professional norms

"[C]ounsel has a duty to make *reasonable* investigations." *Strickland*, 466 U.S. at 691. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* A tactical choice not to pursue a course of action "should not be confused with the duty to investigate." *Bouchillon*, 907 F.2d at 597 (quoting *Beavers v. Balkcom*, 636 F.3d 114, 116 (5th Cir. 1981)). "To do no investigation at all on an issue that not only implicates the accused's only defense, but

[11] *See Imoudu*, 284 S.W.3d at 866 (discussing failure to advise about possibility of insanity defense after inadequate investigation into possibility of insanity); *see also Conrad v. State*, 77 S.W.3d 424, 426-27 (Tex. App.─Fort Worth 2002, pet. ref'd).

also his present competency, is not a tactical decision. Tactical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum." *Id.* at 597.

Counsel failed to challenge Walsh's questionable expert report, failed to request the assistance of a consulting mental health expert, failed to request a competency hearing despite her own reservations about Brown's mental capacity, and failed to consider Brown's diminished capacity as a defensive strategy that could be employed during guilt/innocence. Portugal had the information which we find would require a reasonable attorney to further investigate the effects of Brown's mental capacity on his competency to stand trial. Instead, she unreasonably acquiesced to Walsh's questionable report. We find that when Portugal's representation is viewed as a whole, Brown has met his burden to demonstrate that the first *Strickland* prong has been met.

C. The Second *Strickland* Prong Was Met

Franks argues that had counsel sought expert assistance, or had otherwise challenged Walsh's opinions, Brown would have been entitled to a competency trial before a jury, could have been found incompetent to testify by the trial court or by a jury, or could have employed the diminished capacity defensive strategy during guilt/innocence. Brown also contends that his plea, entered as a result of counsel's ineffective assistance, was involuntary.

Fundamental fairness entitles indigent defendants to an "adequate opportunity to present their claims fairly within the adversary system." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)). In order to implement this principle, basic tools must be provided to indigent defendants. *Id.* In *Ake*, the Court wrote,

> [W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the [diminished capacity] defense is viable, to present testimony, and to assist in preparing the

> cross-examination of a State's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high.

Id. at 82. The same reasoning is soundly applied to the issues of competence. Considering the critical role that a consulting expert could have played in this case, and the state of the record before us, we find that Brown meets the second *Strickland* prong.

When discussing the failure to request a competency examination, the court in *Bouchillon* reasoned:

> Bouchillon need only demonstrate a "reasonable probability" that he was incompetent, "sufficient to undermine confidence in the outcome." This is a lower burden of proof than the preponderance standard. Thus, even if Bouchillon were to fail to prove his incompetency by a preponderance of the evidence, it is still possible that he raised sufficient doubt on that issue to satisfy the prejudice prong of his ineffective assistance of counsel claim.

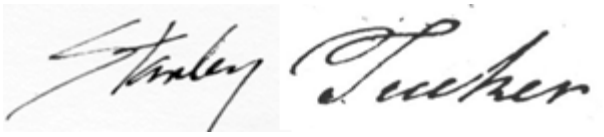
907 F.2d at 595 (citation omitted). As in *Bouchillon*, we believe that had counsel requested the appointment of a consulting mental health expert, he could have raised sufficient doubt on Brown's capacity to stand trial, especially in light of the testimony by Beard, Berrios and Jones, which would necessitate a trial on the issue of incompetence.

We hold that Portugal's failures, leading to the questionable plea in this case, clearly prejudiced and undermined this Court's confidence in the outcome of the proceedings. The second *Strickland* prong is met.

For the reasons set forth above, we find that the trial court erred in failing to grant Brown's motion for new trial.[12] Brown's points of error relating to ineffective assistance of

[12] A trial court errs in failing to grant a motion seeking appointment of a consulting mental health expert or a trial on competency where proper circumstances are present. *Corley*, 582 S.W.2d at 818; *De Freece v. State*, 848 S.W.2d 150; *LaHood*, 171 S.W.3d at 618. Had Portugal rendered Brown the proper assistance, the trial court would have been required to have provided these procedural assurances to Brown. In our opinion, the abuse of discretion standard in the denial of a motion for new trial does not lessen the justice system's responsibility to afford a defendant full due process considerations. In this case, we find the trial court abused its discretion in denying the motion for new trial.

counsel are sustained. Accordingly, we reverse the judgment of conviction and remand for a new trial.



Stanley Tucker
Chief Justice

FRANKS, Justice (Concurring)

I agree that Brown is entitled to a new trial and therefore concur in the judgment reversing Brown's conviction. However, I disagree with the labeling of Portugal's assistance to Brown as ineffective. As discussed below, I strongly believe that the majority has failed to place the appropriate emphasis on the facts of this case in finding that the trial court abused its discretion in failing to grant Brown's motion for new trial based on ineffective assistance claims. There is a strong presumption that Portugal's actions fell within the wide range of reasonable professional assistance. Considering the statutory presumption of Brown's competence set forth by the Legislature, I would find Portugal's actions reasonable, given the standards of prevailing professional norms and the fact that no court in the State of Texas has ever held that counsel's reliance on a finding of competence contained in a report given by an independent expert constitutes ineffective assistance.

The facts of this case were to be viewed in light of the trial court's ruling. Walsh concluded that Brown understood the term "probation," was aware of the adversarial nature of the proceedings, and exhibited appropriate behavior. He concluded that Brown's mental retardation did not prohibit Brown from communicating with Portugal. Even Beard, who did not actually find Brown mentally incompetent, testified that Brown knew: there were "people against him"; his lawyer keeps him out of trouble by helping him; why he was in jail; he received a big sentence; he did something bad; the judge could not induce him to plead guilty; and that he understood the role of the jury and the meaning of the word confidentiality (an abstract concept). Given the failure to find Brown mentally incompetent, the trial court, who was in a position to observe Brown's demeanor, was free to disregard Beard's testimony as mere speculation.

Portugal, who is not a mental health expert, read Walsh's report and considered it "credible" due to her past experiences with Walsh and her knowledge that Walsh was the trial court's "go-to-guy" in the field of mental health evaluation. She then continued to spend a "lengthy amount of time discovering ways to communicate" with Brown, much like a kindergarten teacher learns to communicate and teach children of Brown's mental age. After these "lengthy" discussions, Portugal decided a trial on the issue of guilt/innocence would be futile. She told the trial court that Brown understood the plea admonishments, stipulation of evidence, and range of punishment. She testified that "we all agreed on what to do" in terms of the plea. The majority characterizes Brown's plea as "questionable," but, when viewed in a light most favorable to the judgment, Brown's "yes" response to the trial court's question of "how do you plead" could be interpreted to mean that "yes, the indictment is correct."

Moore testified that Brown said he was sorry and became upset when he was told he was going to jail. Jones testified that he was a good student, listened well, and did not disturb classes.

Jones and the Gards testified that Brown knew right from wrong. Most importantly, the Walsh report revealed Brown's admission that he engaged in sexual activity with B.G.

This testimony suggests that even though Brown is functioning at a lower level than an average person of his age, he: (1) understood that he was being charged with a crime which could lead to imprisonment; (2) could disclose the facts of the sexual encounter; (3) could make a reasoned choice to plead guilty; (4) understood the adversarial nature of the proceedings; (5) could exhibit appropriate courtroom behavior; and (6) could communicate with counsel in a reasonable and rational manner.

There is no right to errorless counsel. On this issue, I would find the denial of the motion for new trial to be within the trial court's discretion.

However, I would nevertheless hold that Brown was entitled to a new trial based on what I believe to be the improper admission of his videotaped confession. Although I cannot conclude that Brown's mental deficiency was severe enough to render him incompetent to stand trial, I believe that his moderate retardation, when combined with the outrageous behavior of Officer Moore, rendered his confession involuntary. It shocks me that the majority would conclude otherwise. Brown had no prior experience with police and had the IQ of a young child. Given those characteristics, the police should have exercised the utmost care when attempting to obtain a confession from the man. Instead, Moore treated Brown with disrespect, made promises and threats regarding Brown's parents, and, perhaps worst of all, displayed a firearm in Brown's presence during the interrogation. Additionally, Brown was denied access to his parents, even though he requested their presence, and he exhibited significant emotional distress before, during, and after the interrogation. He had no attorney present to advise him during the interrogation, and he was at the police station for hours before he finally confessed. These are all

undisputed circumstances that, when considered in their totality, should render any confession involuntary, especially one made by a man with Brown's obvious mental deficiencies. And, unlike the trial court and the majority, I do not believe that the passage of time between the coercive behavior and the actual confession made Brown's subsequent confession voluntary. Nor do I believe that Detective Harbour's more "reasonable" behavior removed the taint of Moore's actions. To the contrary, I believe that Harbour and Moore worked in tandem to secure a coerced confession from Brown and that Harbour enabled Moore's behavior. I find the police behavior in this case comparable (although admittedly not as extreme) to behavior that Texas courts in other cases have found sufficiently coercive to render a confession inadmissible. *See, e.g.*, *Sherman v. State*, 532 S.W.2d 634, 635-36 (Tex. Crim. App. 1976) (interrogating officer threatened to recommend death penalty to prosecutor if defendant did not confess); *Farr v. State*, 519 S.W.2d 876, 878 (Tex. Crim. App. 1975) (death threats); *Zuliani v. State*, 903 S.W.2d 812, 822 (Tex. App.—Austin 1995, pet. ref'd) (physical violence); *Connor v. State*, 640 S.W.2d 374, 375 (Tex. App.—San Antonio 1982), *aff'd*, 773 S.W.2d 13 (Tex. Crim. App. 1989) (threat of violence). I also find this case similar to cases in which the United States Supreme Court reversed convictions that were obtained as a result of confessions made by defendants with mental deficiencies. *See Reck v. Pate*, 367 U.S. 433, 441-42 (1961); *Blackburn v. Alabama*, 361 U.S. 199, 204-08 (1960); *Fikes v. Alabama*, 352 U.S. 191, 196-98 (1957).

Because I agree that Brown is entitled to a new trial, but for a different reason than the one identified by the majority, I concur in the judgment only.

Lisa Franks
Justice

Date Submitted: November 11, 2012
Date Decided: November 16, 2012