No. 31244-5-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

DAVID WAYNE HALLS,

Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Carrie L. Runge, Judge, Bench, Trial/Sentencing
Honorable Craig J. Matheson, Judge, Pre-Trial Matters

BRIEF OF APPELLANT

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2. The trial court erroneously accepted a jury waiver that the defendant did not knowingly, intelligently, and voluntarily enter.

3. The trial court erred by accepting Mr. Halls' waiver of his right to counsel.

4. The trial court erred by failing to hold an evidentiary hearing on the issue of Mr. Halls' competency to stand trial and by finding Mr. Halls competent based on only a competency evaluation.

5. The First Amended Information contains a scrivener's error that should be corrected.

6. The trial court erred under RCW 9.94A.701 by imposing a variable term of community custody contingent on the amount of early release earned.

Issues Pertaining to Assignments of Error

1. Does David Halls' conviction violate his Fourteenth Amendment right to due process when no evidence shows he intentionally threw a candle holder at his girlfriend?

2. Does a trial court violate a defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, if it accepts a jury waiver that the defendant did not knowingly, intelligently, and voluntarily enter?

3. Does a trial court err by accepting relinquishment of the Sixth Amendment right to assistance of counsel without sufficiently establishing that the waiver was knowing and intelligent?

4. Does a trial court deny a defendant due process where it fails to hold an evidentiary hearing on the issue of the defendant's competency and bases its finding of competency on only a competency evaluation?

5. Does the State's First Amended Information contain a scrivener's error that should be corrected where the State told the court, "The state does intend to add the assault III in the alternative," but the

amended information does not indicate that Assault III is an alternative charge?

6. Did the sentencing court lack statutory authority under RCW 9.94A.701(2) to impose a variable term of community custody contingent on the amount of early release earned?

B. STATEMENT OF THE CASE

The State charged David Wayne Halls with second and third degree assault – domestic violence on April, 2012, for allegedly throwing a candle holder at his girlfriend, causing a cut on her forehead that required staples. Clerk's Papers (CP) 5-6.

Mr. Halls' trial counsel withdrew due to a conflict of interest five days before trial. RP (4/4/2012) 1. The court appointed new counsel, who sought a week's continuance, but Mr. Halls again declined to waive his speedy trial right. RP (4/4/2012) 5-6. Mr. Halls, instead, wanted to represent himself at trial. RP (4/4/2012) 8; CP 7. After questioning Mr. Halls, the Court accepted his waiver of counsel, finding it was voluntarily and knowingly waived:

> THE COURT: Mr. Halls, before I have you represent yourself, and you've probably gone over most of these things with Mr. Swanberg, but I want to go over it on the record.
> MR. HALLS: Yes.

THE COURT: Do you know what you're doing when you represent yourself?
MR. HALLS: Partially.
THE COURT: Well, do you think you need the assistance of counsel to do with correctly?
MR. HALLS: Um, on my point, no, I don't think so. I'd like to switch from jury trial to have a bench trial and be ready for Monday, and I wish to take that upon myself and do it.
THE COURT: You want to do it a nonjury trial?
MR. HALLS: Yes. I would like to have bench trial on Monday.
THE COURT: Now I have two things to address formally on the record. Let me – are you able – how far did you go in school?
MR. HALLS: Probably about the 9th grade.
THE COURT: Are you able to read and write?
MR. HALLS: Yes.
THE COURT: Do you understand the maximum sentence that you're exposed to is ten years in prison and a $20,000 fine on this charge?
MR. HALLS: OK, yes.
THE COURT: Do you understand the Court will not assist you? You'll be expected to handle all your own legal affairs without assistance from the Court?
MR. HALLS: Yes.
THE COURT: During the trial.
MR. HALLS: Yes.
THE COURT: Do you think you're capable of doing that?
MR. HALLS: Yes.
THE COURT: And have you been in court before? Have you gone to trial before? Have you been through the process?
MR. HALLS: I have been to trial once, and I think I had him for an attorney.
THE COURT: Mr. Swanberg?
MR. HALLS: Yeah, for residential burglary. I signed off on it. It's one that's kind of hard because everyone's trying to get me to plead guilty to second degree and third degree, a misdemeanor. Sylvia already knew who the person was

on the witness, on the crime, and she waited till the last moment and then dropped me off. I don't actually want to be represented by no one. Just because I won't want to assign another attorney and go outside the 60 days.
THE COURT: I'm sorry. I didn't quite hear you. Do you want another attorney or not?
MR. HALLS: I do not.
THE COURT: And you don't want to go outside of the technical speedy trial rule here?
MR. HALLS: No, I do not.
THE COURT: All right. I would encourage you to consider that and be represented by counsel, given your limited education and limited experience in court. I think it makes more sense for you to be represented by counsel on this fairly serious charge.
MR. HALLS: Yes.
MS. WHITMIRE: Your Honor, there are some –
THE COURT: But the call is up to you.
MR. HALLS: Yes, I would like to take it upon myself and have a bench trial on Monday.
MS. WHITMIRE: Your Honor, there are some things specific to this case that I think may – maybe should be addressed, but he indicated right off the bat that he partially understands, and that concerns the state. I'm not sure what he thinks he doesn't understand. The defendant has 13 prior felonies. He's looking at a standard range of 63 to 84 months. Because he has convictions in excess of the nine, the state would be seeking an exceptional sentence of 120 months should he be convicted.
THE COURT: Let me -- let me just stop and address that. Mr. Halls, what that means is they're going to ask for ten years if you get convicted, and they would be legally in a position to get that.
MR. HALLS: Yes.
THE COURT: Are you sure you don't want counsel on this?
MR. HALLS: No, I do not.
THE COURT: A few days, you know, speedy trial rule is important, but it's not absolute. It's designed to get cases efficiently through the system and also not let cases get so

old that memory fails, but this case is not that old. It was filed in February of 2010. Is that correct? February 10th of this year.
MS. WHITMIRE: Correct.
THE COURT: Of 2012. So it's a fairly new case. It might be reasonable for you to consider continuing it and taking advantage of Mr. Swanberg, who has represented you in the past. Do you want to reconsider that?
MR. HALLS: I -- no, I don't. I would just like to represent myself, go through Monday on bench trial, and not waste the Court's time and get it dealt with done and over.
THE COURT: Was there something else that the state wanted to raise?
MS. WHITMIRE: A number of things, your Honor. During the interview with the witness she, um, disclosed that the defendant had sent her a letter. We did get a copy of that letter from her. I've handed it to counsel or actually to the defendant. Now the contents of that letter do support a charge of witness tampering. Miss Cornish and I had discussed that letter previously. In fact I believe she read it, the original, because it's in pencil. No, she hadn't?
MS. CORNISH: I never received that letter. I never got it.
MS. WHITMIRE: It had been indicated to her, however, that the state will be filing tampering charges in the event we go to trial. I don't know if his defenses have now changed, if he has any affirmative defenses, he understands what those are, be calling any witnesses, or if he has any motions in limine or pretrial motions.
THE COURT: Well, we have a signed omnibus form here.
MR. HALLS: We had an omnibus hearing already. They didn't give no names, phone numbers, addresses, anything. Yes, there is a letter in the file. I wrote it to my attorney Sylvia. That's the only one I can see in there. And one for my celly, but he wants gas paid for.
THE COURT: Before we take on what's necessary to get the case out on the 9th, I want to finish a couple of things here. One is whether or not he's clearly waiving his right to counsel. And then whether or not he wants to waive a jury trial. Those are the two issues. And I'm trying to focus on

those at this time. So, Mr. Halls, have you had a chance to go over the police reports with your attorney?
MR. HALLS: Um, not in full, not totally. With Sylvia.
THE COURT: Well, do you think you're ready to go to trial on the 9th if you haven't looked at the police reports?
MR. HALLS: Yes, and I'd like to waive the jury and --
THE COURT: Do you know who the witnesses are who will be called to testify against you?
MR. HALLS: Not by last names. The prosecutor wants them to come, I'm sure she can contact them. I have no part with that because I have a no-contact order, and I don't wish to violate that. So I can't call, visit, nothing. So if she wants that, she's going to have to have an omnibus hearing. Pretrial last week and rotated over to the 4th this week. I don't want to waste the Court's time no more. I want to waive the lawyer, and I want to waive having a jury trial.
THE COURT: Have you ever had a stay at Eastern State Hospital or any other mental health facility?
MR. HALLS: Eastern and Western and both competent.
THE COURT: Have you ever been committed involuntarily to a mental health institution?
MR. HALLS: What's that?
THE COURT: Have you ever been committed involuntarily to a mental health institution?
MR. HALLS: What does that mean?
Put myself into?
THE COURT: No, have you ever been put in by the county? Have you ever been put in a mental health institution other than evaluation?
MR. HALLS: No.
THE COURT: Before a trial?
MR. HALLS: No, I have not.
THE COURT: All right. I think he's competent to make this decision and represent himself and waive his right to trial -- or to counsel at trial.
MR. HALLS: Jury trial.
THE COURT: He's had -- doing one at a time.
MR. HALLS: Excuse me,
THE COURT: He's had the opportunity to speak with counsel, and he's making that choice I believe freely and

> voluntarily and knowingly. And so I'll consider his right to counsel waived.

RP (4/4/2012) at 8-15. The court then accepted Mr. Halls' waiver of his jury trial right after further questioning:

> THE COURT: . . . Now a jury trial, do you know the difference between a jury and a nonjury trial?
> MR. HALLS: Um, my say on it would be I'd have 12 in the box and one outside of it, 13, and then for a bench trial it would just be the prosecutor, me, and a judge.
> THE COURT: Well, you seem to notice the difference. Had you talked over that strategy with your attorney before making the decision?
> MR. HALLS: No. I've made that by myself and set that up.
> THE COURT: And do you think you know what you're doing? You have a reason for that? I don't want to necessarily know what that is, but do you have a reason for making that decision?
> MR. HALLS: I just don't want to waste no more court's time on this.
> THE COURT: Do you realize you'll have a jury trial on the 9th, the same day you would have judge trial?
> MR. HALLS: That's fine. I realize that.
> THE COURT: And you still want to go jury or nonjury?
> MR. HALLS: Nonjury.
> THE COURT: I'll find that he's waived his right to jury trial freely and voluntarily and knowingly. Appears to understand what it is, and he's been in the court system a lot, and I'm sure he does understand.

RP (4/4/2012) at 15-16.

Trial was held April 9, 2012. RP (4/9/2012) 3. Mr. Halls' girlfriend, with whom Mr. Halls lived at the time, testified that Mr. Halls threw a candleholder that hit her in the head, causing her head to bleed and

requiring staples. RP (4/9/2012) 15, 18-20, 54. The responding officer testified that Mr. Halls "threw a candlestick at her and hit her in the head." *Id*. at 54. No one else witnessed the alleged assault. *Id*. at 39-40, 50.

After the State rested, Mr. Halls testified in his own defense and denied throwing anything at his girlfriend. RP (4/9/2012) 63.

Nevertheless, the Court found, in part, that Mr. Halls "picked up a glass candle holder, which appeared in actuality to be a short and somewhat wide drinking glass, and threw it at Ms. Harshman." CP at 41 (Finding of Fact No. 4). Based in part on this finding, the court then concluded that, "On February 16, 2012, in Benton County State of Washington, the defendant intentionally threw an object, a glass and/or glass candle holder, at Ms. Harshman and hit her in the head. The defendant's actions constituted an assault." CP at 41 (Conclusion of Law No. 1). The court then found Mr. Halls guilty of second degree assault – domestic violence and entered a judgment and sentence listing only that offense. Among other things, it also imposed a variable term of community custody contingent on the amount of early release time earned. RP (4/9/2012) 79; RP (4/18/2012) 21; CP 42-43, 49.

Counsel was appointed to represent Mr. Halls at sentencing because of Mr. Halls' request for an exceptional downward sentence. (RP

(4/9/2012) 80; RP (4/18/2012) 21). His counsel moved for an evaluation of Mr. Halls' competency. (RP (4/18/2012) 21; RP (5/10/2012) 85). The Court granted the motion and stayed proceedings on May 10, 2012, ordering that Eastern State Hospital conduct a forensic mental health evaluation of Mr. Hall's competency to stand trial. CP 11, 14; RP (5/10/2012) 86-87. On August 16, 2012, Eastern State Hospital found that Mr. Halls did not have a mental disease or defect and had the capacity to understand the proceedings against him and to assist in his own defense. CP 21.

The Court found Mr. Halls competent to stand trial based on only Eastern State Hospital's report and entered an order of competency accordingly on September 12, 2012, without holding an evidentiary hearing. CP 39; RP (8/29/2012) 28; RP (9/12/2012) 2-3.

This appeal followed. (CP 62, 72)

C. ARGUMENT

1. Mr. Halls' conviction violated his Fourteenth Amendment right to due process because the evidence was insufficient to prove the essential elements of the second degree assault beyond a reasonable doubt.

The trial court erroneously found that Mr. Halls "picked up a glass candle holder, which appeared in actuality to be a short and somewhat wide drinking glass, and threw it at Ms. Harshman." CP at 41 (Finding of

Fact No. 4). It further erred by concluding, based on this finding, that Mr. Halls acted intentionally.

The Washington Constitution, Article 1, § 3, and the Fourteenth Amendment to the United States Constitution require the state to prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970)

In determining whether evidence is sufficient to prove an element of a crime, this court analyzes whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). While circumstantial evidence is no less reliable than direct evidence, evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997); *Baeza*, 100 Wn.2d at 491. Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial

evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972).

Assault in the second degree requires proof that Mr. Halls intentionally assaulted another person and thereby recklessly inflicted substantial bodily harm. RCW 9A.36.021(1)(a). "This crime is defined by an act (assault) and a result (substantial bodily harm)." *State v. Keend*, 140 Wn. App. 858, 866, 166 P.3d 1268 (2007). The act (assault) requires the mens rea of intent, which means assault by battery requires the State to show Mr. Halls' *intended* or meant to do the physical act constituting the assault . *Id*. at 866-67. Although intent can be inferred as a logical probability from all the facts and circumstances, it can never be presumed simply because there was an assault. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).

To sustain Mr. Halls' second degree assault conviction, the evidence must show that Mr. Halls intentionally threw the candle holder at his girlfriend. The evidence, however, shows only that Mr. Halls threw the candle holder, not that he actually threw it *at* his girlfriend.

His girlfriend testified that "there was a candle thrown towards me that hit me in the head." RP (4/9/2012) at 15. She then testified that "he picked that up and threw it." *Id*. at 18. A police officer testified that Mr.

Halls threw a *candlestick*, not a candle holder, at his girlfriend. *Id*. at 54. Mr. Halls denied throwing a candle holder at his girlfriend. *Id*. at 63. The other two witnesses did not see Mr. Halls throw a candle holder at his girlfriend. *Id*. at 39-40, 50.

None of this evidence supports the court's finding that Mr. Halls intentionally threw a candle holder at his girlfriend. His girlfriend clearly testified that Mr. Halls merely threw the candleholder, not that he threw it at her. The fact that the candleholder ultimately hit her cannot, by itself, support a finding of Mr. Halls' intent. Moreover, the reporting officer's testimony that Mr. Halls threw a candle*stick* at his girlfriend does not support the finding that he threw a candle *holder* at her.

The evidence is insufficient to support the trial court's finding on the essential element of intent and the resulting conclusion that Mr. Halls acted intentionally. Without this finding and conclusion, the State has failed to prove all elements of second degree assault. Mr. Halls' second degree assault conviction should be reversed and dismissed.

2. The trial court violated the Mr. Halls' right to a jury trial under Washington Constitution, Art. 1, § 21 and U.S. Constitution, Sixth Amendment, by accepting a jury waiver that Mr. Halls did not knowingly, intelligently and voluntarily enter.

A person charged with an offense that could result in over six months' imprisonment is entitled to a trial by jury. *See Cheff v.*

Schnackenberg, 384 U.S. 373, 383, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). By contrast, Washington Constitution, Art. 1, § 21, affords the citizens of this state the right to trial by jury for any offense that is defined as a "crime," the conviction of which could result in any imprisonment. *Pasco v. Mace*, 98 Wn.2d 87, 100, 653 P.2d 618 (1982). Since all persons charged with a crime have a fundamental right to trial by jury, the waiver of this right may be sustained only if a defendant acts knowingly, intelligently, voluntarily and free from improper influences. *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994).

The waiver of the right to jury trial must either be made in writing or made orally on the record. *State v. Donahue*, 76 Wn. App. 695, 697, 887 P .2d 485 (1995). If the defendant challenges the validity of the jury waiver on appeal, the State bears the burden of proving that the waiver was knowingly, intelligently and voluntarily made. *Id*. Because it implicates the waiver of an important constitutional right, the appellate court reviews a trial court's decision to accept the defendant's jury trial waiver *de novo*. *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2007).

The validity of a waiver of any constitutional right, and the inquiry required to establish waiver, will depend on the circumstances of each

case, including the defendant's experience and capabilities. *Stegall*, 124 Wn.2d at 725. The reviewing court considers whether the defendant was informed of his constitutional right to a jury trial. *Ramirez-Dominguez*, 140 Wn. App. at 240. It may not presume that a defendant waived his jury trial right unless the record establishes a valid waiver. *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). A written waiver is not determinative evidence of a validly waived jury trial right. *Id*. at 771. The record must reflect a personal expression of waiver by the defendant. *Stegall*, 124 Wn.2d at 725.

In *Pierce*, the court found a valid waiver where the defendant received the advice of counsel, submitted his waiver in writing, knew only the judge would decide his case and where the court informed defendant that he had the right to a unanimous verdict by 12 people. 134 Wn. App. at 722. This state's constitutional right to a jury trial varies significantly from the United States Constitution and many other state constitutions, which do not require complete jury unanimity in order to sustain a guilty verdict. *See State v. Gimarelli*, 105 Wn. App. 370, 379, 20 P.3d 430 (2001). Thus, a trial court should ensure that the defendant understands he is entitled to a unanimous jury verdict.

Unlike the defendant in *Pierce*, Mr. Halls had not received the advice of counsel on waiving his jury trial right and expressed only an understanding that a jury consisted of 12 jurors and one alternate and a bench trial was before only the judge. The record does not show he knew he had a right to a unanimous jury verdict. *See In re Keeney*, 141 Wn. App. 318, 327, 169 P.3d 852 (2007) ("Every criminal defendant has the constitutional right to a unanimous verdict of guilt determine by a jury . . . This constitutional requirement also demands unanimous jury findings on all of the elements of the charged offense.") Instead, the record shows Mr. Halls' waiver was based on his preoccupation with not wasting the court's time rather than trial strategy. It further shows the court acknowledged Mr. Hall's lack of education and courtroom experience. RP (4/2/2012) 10-11. Finally, it shows the court's colloquy on the jury trial waiver consisted of only questions: whether Mr. Halls knew the difference between a jury and nonjury trial, whether he had discussed trial strategy with an attorney, and whether he knew he could have a jury or nonjury trial on his trial date before accepting Mr. Halls' waiver. RP (4/2/2012) at 15-16. The court did not advise Mr. Halls that, under the Washington constitution, a jury must agree unanimously to find a defendant guilty.

Absent advice on this important component of the right to jury trial under Washington Constitution, Article 1, § 21, the State cannot satisfy its burden of showing that Mr. Halls knowingly, intelligently, and voluntarily waived his right to a jury trial. This Court should, therefore, reverse the conviction and remand for a new trial before a jury.

3. The trial court erred by accepting Mr. Halls' waiver of his right to counsel where the court did not inform Mr. Halls of the maximum penalty for witness tampering, or, with regard to the assault charge, the nature of the charge or the statutory offense against him.

The court erred by allowing Mr. Halls to waive his right to counsel and represent himself. A defendant has the constitutional right to represent himself at trial. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). However, a trial court must establish that a defendant, in choosing to proceed *pro se*, makes a knowing and intelligent waiver of his constitutional right to the assistance of counsel. *State v. Bebb*, 108 Wn.2d 515, 525, 740 P.2d 829 (1987); *City of Bellevue v. Acrey*, 103 Wn.2d 203, 209, 691 P.2d 957 (1984).

Appellate courts review a trial court's acceptance of a waiver of counsel for an abuse of discretion. *State v. Hemenway*, 122 Wn. App. 787, 792, 95 P.3d 408 (2004). A trial court abuses its discretion if its "decision is manifestly unreasonable, or is exercised on untenable grounds, or for

untenable reasons." *State v. Vermillion*, 112 Wn. App. 844, 855, 51 P.3d 188 (2002). Appellate courts review the record as a whole in determining whether a defendant knowingly and intelligently waived counsel. *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999).

A trial court should assure the defendant understands the risks of self-representation through a colloquy on the record. *State v. Buelna*, 83 Wn. App. 658, 660, 922 P.2d 1371 (1996). "At a minimum, the colloquy 'should consist of informing the defendant of the nature and classification of the charge, the maximum penalty upon conviction[,] and that technical rules exist [that] will bind defendant in the presentation of his case.'" *Id.* (quoting *Acrey*, 103 Wn.2d at 211, 691 P.2d 957) (alterations in original). Indeed, this court has previously set forth a list of questions to help the trial court explore a defendant's request to waive legal counsel. *State v. Christensen*, 40 Wn. App. 290, 295 n.2, 698 P.2d 1069 (1985).

In *Buelna*, the court of appeals held that Buelna's waiver of his right to the assistance of counsel was an uninformed and unintelligent waiver, because Buelna said he did not understand the charges and because the record did not establish that Buelna was properly advised of the nature and seriousness of the charges and the possible penalties. 83 Wn. App. at 661. The Court reversed Buelna's convictions and remanded

the case for a new trial and advised the court to follow the colloquy in *Christensen*. *Id*. at 662.

Like in *Buelna*, the court here did not inform Mr. Halls that he was charged with second degree assault with a domestic violence enhancement – a felony. *See* RP (4/4/2012) at 8-15. Nor did the court ask Mr. Halls if he understood the nature of the charge. It also did not ask him to reconsider his waiver after the State indicated that it would likely amend its information and charge him with witness tampering or explain the maximum penalty if he was convicted of witness tampering.

In light of these omissions, the court's acceptance of Mr. Halls' waiver of counsel was based on untenable grounds and, therefore, constituted an abuse of discretion. Consequently, Mr. Halls' conviction should be reversed and the case remanded for a new trial.

4. The trial court erred by finding Mr. Halls competent to stand trial based on only a competency evaluation and without an evidentiary competency hearing.

Mr. Halls was denied due process when the trial court failed to hold an evidentiary hearing on the issue of Mr. Halls' competency. The two-part test for legal competency for a criminal defendant in Washington is (1) whether the defendant understands the nature of the charges and (2)

whether he is capable of assisting in his defense. *In re Personal Restraint of Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001).

"Whenever there is reason to doubt [a defendant's] competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts to examine and report upon the mental condition of the defendant." RCW 10.77.060(1)(a). Here, the trial court granted sentencing counsel's motion for a competency evaluation.

Competency to stand trial is a legal, not medical, concept. *State v. Bertrand*, 123 N.H. 719, 726, 465 A.2d 912 (1983); *see State v. Heddrick*, 166 Wn.2d 898, 904, 215 P.3d 201 (2009). The trial court must not delegate its duty to determine competency to a psychiatrist. *Bertrand*, 123 N.H. at 726. It must make an independent determination of competency after an evidentiary hearing even where the medical professional concludes a defendant is competent. A court's failure to hold an evidentiary hearing is an error that denies the defendant an opportunity to challenge the basis of a medical professional's opinion. *Id.* Thus, this court should review the trial court's competency determination de novo.

In this case, even though the court's competency order suggests a competency hearing was held, the court failed to hold an evidentiary

hearing on competency and found Mr. Halls competent based upon only Eastern State Hospital's mental health evaluation:

> THIS MATTER having come on regularly for hearing Wednesday, August 29, 2012 @ 8:30a.m., following the defendant's commitment for evaluation from Eastern State Hospital, for an examination regarding his competency to stand trial, the defendant being present and represented by Sam Swanberg, and the State being present, and the Court having considered the report dated, August 16, 2012, from Eastern State Hospital, which was admitted into evidence for the purpose of this hearing, FINDS that the defendant does have the capacity to understand the proceedings against his and to assist his attorney in his own defense, NOW, THEREFORE, IT IS HEREBY ORDERED that the defendant is competent to stand trial.

CP at 39; *compare* RP (8/29/2012) 28. The court's reliance on only the evaluation and failure to hold an evidentiary hearing is an error that denied Mr. Halls' due process rights. Mr. Hall had no opportunity to challenge Eastern State Hospital's evaluation. His conviction should, therefore, be reversed and this matter remanded for a new trial. *See Bertrand*, 123 N.H. at 727 (concluding that a new trial is appropriate because remand for a *nunc pro tunc* inquiry of defendant's competency runs the risk of an erroneous retrospective determination of competency in the absence of a record of a hearing on the competency issue when the issue was raised).

5. The First Amended Information contains a scrivener's error that should be corrected.

The court should remand this case to the trial court to correct a scrivener's error in the First Amended Information because it fails to set forth alternative charges, which is what the State intended. Clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time. CrR 7.8(a). The remedy for a scrivener's error is to remand to the trial court for correction of the error. *In re Pers. Restraint Petition of Mayer*, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

The original information charged Mr. Halls with second degree assault. The amended information, which was filed on April 4, 2012, accuses Mr. Halls of second degree assault *and* third degree assault, alleging the same facts to support both counts charged. However, also on April 4, the State told the Court it was adding the third degree assault charge *in the alternative* to the second degree assault charge:

> The state does intend to add the assault III in the alternative, however. It is not a lesser included, but we would like to present that . . . to the bench as well. I will get a copy of that to him immediately.

RP (4/4/2012) at 17. Moreover, the prosecutor and the judge referred to the third degree assault charge as an alternative charge several times at trial. RP (4/9/2012) 4, 28, 75, 82. Finally, the judgment and sentence does not mention the third degree assault charge at all. CP 43.

Based on the record, the First Amended Information should be corrected (or a second amended information filed) to reflect that the assault charges were alternative allegations. If the charging document is not corrected, the judgment and sentence should be amended to show that the third degree assault charge was dismissed.

6. The sentencing court lacked statutory authority under RCW 9.94A.701 to impose a variable term of community custody contingent on the amount of early release earned.

The sentencing court lacked statutory authority to impose a variable term of community custody on Mr. Halls. Statutory construction is a question of law reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

A trial court may only impose a sentence that is authorized by statute. *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980). It has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

"Under [RCW 9.94A.701], a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length

of community custody at the time of sentencing." *State v. Franklin*, 172 Wn.2d 831, 836, 263 P.3d 585 (2011).

Here, RCW 9.94A.701(2) authorized the trial court to impose an 18-month term of community custody for second degree assault:

> A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense.

See RCW 9.94A.030(54)(viii) (defining "violent offense" to include second degree assault); *see also* RCW 9.94A.030(45) (defining "serious violent offense" to *not* include second degree assault). The court, nevertheless, imposed an 18-month term of community custody contingent on the amount of early release earned:

> (A) The defendant shall be on community placement or community custody for the longer of:
> (1) the period of early release. RCW 9.94A.728(1), (2); or
> (2) the period imposed by the court, as follows:
> … 18 months[.]

CP at 49.

The trial court did not have the statutory authority to sentence Mr. Halls to this variable term of community custody. It could sentence him only to a finite term of 18 months. RCW 9.94A.701(2). The trial court,

therefore, erred, and the judgment and sentence should be remanded to the trial court for correction.

D. CONCLUSION

Mr. Halls' second degree assault conviction is based on insufficient evidence and invalid waivers of his rights to a jury and counsel. Moreover, his due process rights were violated by the court's failure to hold an evidentiary hearing on the issue of Mr. Halls' competency. His conviction should, therefore, be dismissed, or at least reversed and his case remanded for a new trial. Additionally, the trial court should be required to correct the amended information's scrivener's error and the judgment and sentence's community custody provision.

Respectfully submitted on June 10, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 10, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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