No. 31390-5-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

AHMIN SMITH

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY

The Honorable Judge Christopher Culp

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Ahmin Smith was convicted of four counts of domestic violence felony harassment (threat to kill) as to his wife Crystal Miller-Smith, Ms. Miller-Smith's father Mark Miller, her stepmother Deb Miller, and her mother Deborah McDonald. But a new trial is required in this case, because the jury reached what it called a difficult decision after being swayed by impermissible testimony and evidence that invaded the fact-finding province of the jury. The trial was also tainted by a deputy's improper comment on Mr. Smith's right to silence and by inadmissible evidence of Mr. Smith's bad acts following his arrest. The "bad acts" evidence was irrelevant, unduly prejudicial and/or inadmissible as the fruit of Mr. Smith's unlawful arrest. Furthermore, Mr. Smith should not have been tried until after he was deemed competent following proper evaluation. Finally, there was insufficient evidence to affirm these convictions, and the cumulative error doctrine merits a new trial in this case.

B. ASSIGNMENTS OF ERROR

1. The court erred and counsel was ineffective for permitting a deputy to testify to ultimate guilt determinations that this was a case of "felony harassment."

2. The court erred by admitting Exhibit 105 that identified this as a case of "felony harassment" by suspect "Smith, Ahmin."

3. The court erred and counsel was ineffective by permitting the deputy to comment on Mr. Smith's right to silence.

4. The court erred by admitting irrelevant and prejudicial evidence of Mr. Smith's words and conduct following his unlawful, warrantless arrest.

5. The court erred by admitting evidence following Mr. Smith's unlawful arrest.

6. The court erred and counsel was ineffective for failing to conduct a formal 3.6 suppression hearing as the defendant requested in order to suppress the fruit of his unlawful seizure.

7. The court erred by convicting Mr. Smith where the evidence was insufficient to establish the crimes charged.

8. The court erred by failing to refer Mr. Smith for a competency evaluation.

9. The court erred by convicting Mr. Smith where the effect of the cumulative errors in this case was the denial of a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Mr. Smith was denied his constitutional right to a fair trial when the deputy (a) invaded the province of the jury by repeatedly testifying that this was a case of "felony harassment" by the defendant; and (b) erroneously commented on the defendant's right to silence by highlighting the fact that the defendant avoided the deputy and refused to speak with him.

a. Deputy Newport improperly invaded the province of the jury by expressing his opinion that Mr. Smith committed "felony harassment."

b. Deputy Newport impermissibly commented on Mr. Smith's right to silence.

c. Deputy Newport's testimony on ultimate guilt determinations, the highly suggestive exhibit, and the comment on Mr. Smith's right to silence were prejudicial, constitutional error.

Issue 2: Whether the court erred by admitting irrelevant and unduly prejudicial evidence regarding Mr. Smith's allegedly bad conduct subsequent to his arrest.

Issue 3: Whether the court erred by failing to suppress evidence obtained subsequent to Mr. Smith's unlawful arrest.

a. Mr. Smith was unlawfully seized when officers pulled him out of his home and arrested him without a warrant.

b. No exigent circumstances existed to otherwise justify Mr. Smith's warrantless arrest.

c. The evidence obtained pursuant to Mr. Smith's unlawful arrest was not sufficiently attenuated from the unlawful seizure and should, therefore, have been suppressed.

d. Mr. Smith either sufficiently preserved this error or may raise this constitutional error for the first time on appeal.

Issue 4: Whether sufficient evidence supports Mr. Smith's convictions for four counts of felony harassment, including evidence that the victims feared Mr. Smith "would" carry out the threats and evidence that there was ever a threat to kill Deb Miller as opposed to causing her emotional harm.

Issue 5: Whether Mr. Smith should have been referred for a competency evaluation prior to trial.

a. A competency evaluation was required.

b. A competency evaluation was not properly waived by counsel, and the defendant's substantive stipulation to competency is of no moment.

c. Any waiver of competency procedures cannot stand where there is no other credible confirmation of competency and countering facts continue to suggest incompetency.

Issue 6: Whether the cumulative error doctrine should result in a new trial in this case.

D. STATEMENT OF THE CASE

On August 12, 2012, Crystal Miller-Smith received several troubling text messages to her cell phone. (RP 369, 374, 385) The messages came from a cell phone that was ordinarily used by Ms. Miller-Smith's husband, Ahmin Smith, from whom Ms. Miller-Smith had recently separated. (RP 259, 284-85, 287-91, 373-74, 424, 426-27)

Throughout the day and into the evening on August 12th, dozens of text messages were sent to Ms. Miller-Smith's phone from her husband's cell phone. (RP 257, 269) The graphic messages stated that the sender would kill Ms. Miller-Smith and her family, including her father, Mark Miller, and her mother, Deborah McDonald. (RP 262-64, 299; Exhibits 1-53, 57-105) The messages also threatened to "murk" Mr. Miller and his wife, which the family presumed meant Crystal's stepmother Deb Miller, stating specifically that the sender would kill Mr. Miller, but would let "Deb" live to watch and tell. (RP 257-58, 262, 360, 390; Exhibit 7, 19, 23-24)

Ms. Miller-Smith went to her father and step-mother's home to show them the messages. (RP 298, 357) Ms. Miller-Smith was visibly upset, nervous and shaky. (RP 298, 369) She was concerned for the safety of her and her family and believed Mr. Smith would "possibly" carry out the threats, testifying that she had no idea what he was capable

of because he was so angry, that he was capable of carrying out the threats if he wanted to. (RP 373-75) Mr. Miller testified that he was concerned for his safety as well due to the threats to kill him, that he turned on all the lights at the house, that he had no control over Mr. Smith's mental state, and that he felt the need to "protect…from the worst." (RP 300-01) Ms. Deb Miller testified that she recalled messages about defacing her or cutting her head off and "feeding it to a lion, or something," though no such messages were included in the collection of messages submitted as exhibits. (RP 359; see Exhibits *passim*) Ms. Miller testified she felt scared, threatened, and thought the sender "could" carry out the threats. (RP 360)

That evening, Ms. Miller-Smith had a brief cell phone conversation with Mr. Smith at the same number the messages were coming from, during which Mr. Smith yelled, sounded angry and hung up on her. (RP 369-71) Ms. Miller-Smith did not recall Mr. Smith threatening to kill during this phone conversation. (RP 370)

Okanogan County sheriff's deputy Kevin Newport responded to Ms. Miller-Smith's call to law enforcement at the Millers' home in Pateros, Washington. (RP 245, 363) Deputy Newport had Ms. Miller-Smith forward the ongoing messages to him as they arrived to her cell phone, and he ultimately took pictures of the 92 text messages. (RP 246-

47, 260; Exhibits 1-53, 57-105) The deputy also went to Ms. Deborah McDonald's home to inform her of the messages. (RP 248, 363) The messages shocked, upset and scared Ms. McDonald. (RP 364) She thought it was "very possible they could be carried out." (RP 363-64)

Deputy Newport then drove from Patros to Coulee Dam where he picked up other officers to go with him to Mr. Smith's home. (RP 245, 249) At approximately 1:30 a.m. on August 13, 2012, Deputy Newport and the other officers snuck up to the Miller-Smith home in the dark and saw Mr. Smith outside on the porch with what appeared to be a cellular phone. (RP 174-75, 253, 269) Deputy Newport asked Mr. Smith to talk. (RP 175-76, 181-85) But Mr. Miller-Smith said he did not want to talk and went inside the home, at which point the deputy told him he was under arrest. (RP 252-53) Then, without any warrant, Deputy Newport went onto the porch, opened the front door of the home, reached inside, grabbed Mr. Smith, and pulled Mr. Smith out of the home. (RP 176, 185) Mr. Smith was immediately arrested, placed in cuffs, read his *Miranda* rights, and transported to jail in the deputy's patrol car. (RP 177-78)

Deputy Newport repeatedly informed the jury that he had arrested Mr. Smith for "felony harassment." (RP 248-49, 252) And one exhibit displaying a cellular phone identified the exhibit as "felony harassment" involving "suspect Smith, Ahmin." (Exhibit 105) Over objection, the

deputy also testified that Mr. Smith was very upset with the deputy during his arrest and transport, trying to pull away from the deputy, yelling at the deputy that his rights had been violated, complaining about the deputy's driving, stating that he did not want to talk with the deputy, and saying he would sue the department for false arrest. (RP 253-55) Mr. Smith also twice told the deputy that he had removed his hands from the cuffs and that he would assault the officer if given the chance. (RP 255) Deputy Newport said he never asked Mr. Smith any questions and "just let him talk." (RP 180)

Within the hour after Mr. Smith was arrested, the messages to Ms. Miller-Smith's phone stopped. (RP 256, 369-70) The next day, Mr. Miller went to his daughter and Mr. Smith's home (which belonged to Mr. Miller's sister) to change the locks and set up game cameras for added security. (RP 301-02) Mr. Miller also found Mr. Smith's cell phone on the porch, which was provided to law enforcement a few months later. (RP 259, 301)

Mr. Smith then testified in his own defense. Mr. Smith testified that he had not sent the threatening text messages, that he did not know who sent them, and that other people had access to his phone on the evening in question. (RP 425-26)

After a deliberation that lasted longer than the testimony, in what one juror described as "not a slam dunk…[or] easy decision…" (RP 514-15), the jury convicted Mr. Smith of four counts of felony harassment (threat to kill) as to the defendant's wife, her father, her stepmother, and her mother (RP 471; CP 2-11, 23). Each count also had a special domestic violence verdict for having threatened a family or household member. (RP 472-73; CP 19-22) Mr. Smith was sentenced toward the high-end of the standard range to 42 months incarceration. (RP 485, 518; CP 2-11) This appeal timely followed. (CP 1-12) Additional facts will be cited as pertinent to the issue raised on appeal.

E. ARGUMENT

Issue 1: Whether Mr. Smith was denied his constitutional right to a fair trial when the deputy (a) invaded the province of the jury by repeatedly testifying that this was a case of "felony harassment" by the defendant; and (b) erroneously commented on the defendant's right to silence by highlighting the fact that the defendant avoided the deputy and refused to speak with him.

Deputy Newport should not have been permitted to testify that this was a case of "felony harassment" by the defendant or admit an exhibit identifying Mr. Smith as the suspect of "felony harassment." This ultimate conclusion was for the finder of fact. Next, Deputy Newport informed the jury that the defendant avoided him and did not want to speak with him, which was an impermissible comment on the defendant's right to silence. Defense counsel was ineffective to the extent that he did

not object to this testimony or Exhibit 105. And these manifest constitutional errors were not harmless.

Generally, to demonstrate ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that the deficient representation prejudiced the defendant. *State v. Aho,* 137 Wn.2d 736, 745, 975 P.2d 512 (1999). A defendant suffers prejudice if there is a reasonable probability that, but for counsel's performance, the result would have been different. *Strickland v. Washington,* 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The competency of counsel is based on the entire record, and there is a strong presumption that counsel's performance was effective. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

a. Deputy Newport improperly invaded the province of the jury by expressing his opinion that Mr. Smith committed "felony harassment."

Ultimate guilt determinations are questions for the jury. *State v. Welchel*, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); 5D WAPRAC ER 704(6), (9) and (11). Neither a lay nor expert witness can testify that a defendant is guilty. *State v. We*, 138 Wn. App. 716, 725, 158 P.3d 1238 (2007), *review denied*, 163 Wn.2d 1008 (2008) (citing *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002)). An "expert's opinion must

be based on the evidence and the expert's experience and not the defendant's credibility." *Id*. Opinion testimony from law enforcement officers is especially problematic because it is more likely to influence the jury. *State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004); *State v. Notaro*, 161 Wn. App. 654, 661-62, 255 P.3d 775 (2011) (opinion on guilt by law enforcement "may influence the factfinder and deny the defendant a fair and impartial trial.")

"To determine whether statements are impermissible opinion testimony, a court will consider the circumstances of a case, including, (1) 'the type of witness involved,' (2) 'the specific nature of the testimony,' (3) 'the nature of the charges,' (4) 'the type of defense,' and (5) 'the other evidence before the trier of fact.'" *State v. King*, 167 Wn.2d 324, 219 P.3d 642 (2009) (internal quotations omitted).

Here, Deputy Newport repeatedly testified that he had arrested Mr. Smith in this case for "felony harassment." (RP 248-49, 252, 254) And an exhibit was submitted to the jury that was labeled "felony harassment" by "suspect Smith, Ahmin." (Exhibit 105) Whether Mr. Smith was guilty of felony harassment was a determination solely for the jury. But Deputy Newport's testimony and the suggestive exhibit improperly invaded the province of the jury by concluding that Mr. Smith had committed "felony harassment." Rather than simply stating that he had arrested Mr. Smith,

Deputy Newport went too far by repeatedly informing the jury that this was a case of "felony harassment." The deputy's testimony went beyond mere facts and instead represented an opinion on the ultimate guilt issue. Moreover, given the deputy's position of authority with the jury, along with the fact that Mr. Smith's defense was general denial, the deputy's opinion on guilt was especially problematic. And the highly suggestive exhibit on guilt only exacerbated the problem.

b. Deputy Newport impermissibly commented on Mr. Smith's right to silence.

No person shall be compelled in any criminal case to give evidence or be a witness against himself. U.S. Const. Amend. V; U.S. Const. Amend XIV; Wash. Const. Art. I, §9. This "constitutional right to silence applies in both pre and post-arrest situations." *State v. Romero*, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002) (citing *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996)). The State may not use a defendant's constitutionally permitted silence as substantive evidence of guilt in its case in chief. *Id*. at 787; *Easter*, 130 Wn.2d at 239. "The use of silence at the time of arrest and after the *Miranda* warnings is fundamentally unfair and violates due process." *Easter*, 130 Wn.2d at 236. Importantly, "'a police witness may not comment on the silence of a defendant so as to infer guilt from a refusal to answer questions.'" *State v. Saavedra,* 128

Wn. App. 708, 714, 116 P.3d 1076 (2005) (citing *Romero*, 113 Wn. App. at 787).

Here, Deputy Newport testified that he asked to speak with Mr. Smith when he arrived at the defendant's home in Coulee Dam, in order to see how the defendant was "going to react…" (RP 252) But, the defendant got up to leave, told the deputy he did not want to talk, went inside the residence and closed the door. (RP 253) This testimony had no place in this trial. It was not relevant to prove any element of harassment, and it was designed to suggest guilt by the defendant's avoidance and refusal to speak to law enforcement. In fact, the deputy admitted that he asked to talk to Mr. Smith specifically to see how Mr. Smith would react. Clearly, the deputy's testimony was designed to suggest that Mr. Smith's refusal to speak with him was indicative of guilty knowledge. But Mr. Smith had every right to refuse to speak with the deputy. Therefore, the deputy's comment on Mr. Smith's right to silence was improper.

c. Deputy Newport's testimony on ultimate guilt determinations, the highly suggestive exhibit, and the comment on Mr. Smith's right to silence were prejudicial, constitutional error.

Invading into the fact-finding province of the jury can deprive a defendant of the constitutional right to a fair trial. *See e.g. We*, 138 Wn. App. at 730 (J. Schultheis dissenting); *Notaro*, 161 Wn. App. at 661. "Since testimony concerning an opinion on guilt violates a constitutional

right, it generally may be raised for the first time on appeal." *Id*. (internal citations omitted). Whether a defendant seeks review as one of constitutional magnitude, or as one gleaning from ineffective assistance of counsel, the defendant is required to show two traits common to each: (1) that inadmissible evidence was admitted and (2) that the outcome of the trial would have been different if the improper evidence had been excluded. *We*, 138 Wn. App. at 722-23 (citing *State v. Warren,* 134 Wn. App. 44, 57, 138 P.3d 1081 (2006) (manifest constitutional error); and *State v. Hakimi,* 124 Wn. App. 15, 22, 98 P.3d 809 (2004) (ineffective assistance of counsel)).

Similarly, eliciting testimony about and commenting on a defendant's post-arrest silence or partial silence is constitutional error that can be raised for the first time on appeal and is subject to the stringent constitutional harmless error standard. *Easter*, 130 Wn.2d at 236-37; *Saavedra*, 128 Wn. App. at 713. The State bears the burden of showing a constitutional error was harmless beyond a reasonable doubt. *Id*. at 242. A constitutional error is harmless only if the untainted evidence is so overwhelming that any rational trier of fact would necessarily have found the defendant guilty. *Id*.; *State v. Fuller*, 282 P.3d 126, 169 Wn. App. 797 (2012).

Here, as will be argued in greater detail below, the evidence against Mr. Smith was not so overwhelming that *any* rational trier of fact would have found him guilty. Importantly, the jury had a difficult time deciding this case as it deliberated for a longer time than it took to present the evidence. And one juror did say that this was not a "slam dunk" or easy decision to make. (RP 514-15) Particularly troubling was the inadequate evidence to show that the victims believed the threats *would* be carried out, as opposed to the belief that they "could" be carried out. Ultimately, given the jurors' difficulties and the questions in the evidence, the deputy's opinion testimony, exhibit concluding this was a case of "felony harassment," and impermissible comment on Mr. Smith's right to silence did likely effect the outcome of this trial and cannot be ignored as harmless. A new trial is warranted in this case.

Issue 2: Whether the court erred by admitting irrelevant and unduly prejudicial evidence regarding Mr. Smith's allegedly bad conduct subsequent to his arrest.

Defense counsel objected on relevance grounds when the State sought to introduce the deputy's testimony regarding Mr. Smith's behaviors and statements following his arrest. The court erred by allowing this prior bad act evidence since it was irrelevant to any of the charged elements and unduly prejudiced the defendant.

A trial court's decision to admit evidence of a defendant's prior bad acts is reviewed for abuse of discretion. *State v. Ragin,* 94 Wn. App. 407, 411, 972 P.2d 519 (1999). Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity with that character. ER 404(b). But such evidence may be admitted where it is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs its prejudicial effect. *Ragin*, 94 Wn. App. at 411.

Evidence is relevant if it has any tendency to make the existence of any material fact more or less probable. ER 401. Even relevant evidence may be inadmissible if the danger of unfair prejudice substantially outweighs its probative value. ER 403. "The danger of unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response." *State v. McCreven*, 170 Wn. App. 444, 457, 284 P.3d 793 (2012) (internal citation omitted).

A defendant is guilty of felony harassment if he threatens to cause bodily injury to a person that consists of a threat to kill, and the other person is placed in reasonable fear that the threat will be carried out. RCW 9A.46.020(1). Evidence of a defendant's prior bad conduct may be relevant if it aids the jury in sifting out idle threats from true threats or puts the threats in context. *See Ragin,* 94 Wn. App. at 411-12. Or, such

evidence may be relevant to establish that the victims' fear was reasonable; a jury is entitled to know what the victims knew regarding the defendant's behavior when the threats were made. *Id*. Although, even if evidence is probative of a material fact, it should still be excluded where the prejudicial effect substantially outweighs its probative value. *Id*.

Here, evidence of Mr. Smith's conduct following his arrest was not relevant, was unduly prejudicial, and should have been excluded. This included evidence that Mr. Smith yelled at officers, resisted their attempts to restrain him, threatened to assault an officer if removed from the patrol car, removed his handcuffs, and threatened to sue the department for illegal arrest. None of this evidence made it more or less probable that Mr. Smith had sent the text messages in question. None of this evidence was an admission of guilt, a confession or even related to the crime in question to suggest that a true threat was made as opposed to idle talk. Instead, this evidence was directly related to Mr. Smith's anger over being arrested from within his home without a warrant; it was irrelevant to the crimes charged.

This evidence likewise did not establish the reasonableness of the victims' fear of the defendant or put the threats into any sort of context. Unlike in *State v. Ragin* where evidence of the defendant's prior bad acts was admissible, here the defendant's alleged bad behaviors occurred after

the arrest, and this evidence was unknown to the victims when the threats were received. Evidence of the defendant's bad behavior with law enforcement did not prove or disprove any fact, including the reasonableness of the victims' fear, and it did not put the threats into any sort of context to help the jury better understand the threats. The evidence constituted classic, irrelevant evidence of prior bad acts that should have been excluded pursuant to ER 404(b), ER 401 and/or ER 403. Mr. Smith was unfairly prejudiced at this trial by the suggestion, through irrelevant evidence, that he had some propensity for bad behavior or violence. The court abused its discretion by overruling defense counsel's objection.

Issue 3: Whether the court erred by failing to suppress evidence obtained subsequent to Mr. Smith's unlawful arrest.

Mr. Smith's defense attorney did not move to suppress evidence from Mr. Smith's warrantless arrest, because counsel surmised that no relevant evidence was obtained pursuant to that unlawful seizure (hence, defense counsel's objection above). (RP 18, 39, 80, 104, 114, 118) Indeed, the evidence from the four alleged victims, pictures of the text messages and cell phone records were all obtained before or separate from any unlawful arrest. But, if this Court finds the evidence regarding Mr. Smith's behaviors and statements following his arrest was indeed relevant and admissible (thereby rejecting the argument above), this evidence

should have still been excluded because it was obtained pursuant to Mr. Smith's unlawful arrest.

Review of a suppression ruling is a mixed question of law and fact. *See State v. Harrington*, 167 Wn.2d 656, 662-63, 222 P.3d 92 (2009) (citing *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997)). "'The [trial court's] factual findings [are] entitled to great deference' [and reviewed for substantial evidence, while] 'the ultimate determination of whether those facts constitute a seizure is one of law and is reviewed de novo.'" *Id*. (internal quotations omitted); *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008) (citing *State v. Hill,* 123 Wn.2d 641, 647, 870 P.2d 313 (1994); *State v. Rankin,* 151 Wn.2d 689, 694, 92 P.3d 202 (2004)).[1]

Generally, warrantless searches and seizures are unconstitutional.[2] *State v. Williams*, 148 Wn. App. 678, 683, 201 P.3d 371 (2009); *Gatewood*, 136 Wn.2d at 539 (citing *State v. Ladson,* 138 Wn.2d 343, 349,

[1] The Appellant will rely on the court's oral findings at RP 189-94 for purposes of this argument. Although written findings are generally required following an evidentiary hearing to aid the appellate court on review (CrR 3.6(b)), the oral findings in this case appear sufficient to address this issue.

[2] Wash. Const. Art. I, §7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); U.S. Const. Amend. IV (forbidding "unreasonable searches and seizures."); U.S. Const. Amend. XIV (applying Fourth Amendment to the states); *Harrington,* 167 Wn.2d at 663 (internal citations omitted) (explaining, it is well established that "Washington State Constitution affords individuals greater protections against warrantless searches than does the Fourth Amendment.")

979 P.2d 833 (1999)). When a person establishes that he was seized,[3] the State must establish that the seizure was justified by a warrant or one of the "jealously and carefully drawn exceptions" to the warrant requirement. *State v. Gantt*, 163 Wn. App. 133, 257 P.3d 682, 686 (2011) (citing *State v. Young,* 135 Wn.2d, 498, 510, 957 P.2d 681 (1998)); *State v. Jackson,* 82 Wn. App. 594, 601–02, 918 P.2d 945 (1996)). Evidence or fruits seized following an unlawful arrest should generally be suppressed. *State v. Franklin,* 41 Wn. App. 409, 704 P.2d 666 (1985).

a. Mr. Smith was unlawfully seized when officers pulled him out of his home and arrested him without a warrant.

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law." *State v. Holeman*, 103 Wn.2d 426, 428-29, 693 P.2d 89 (1985) (citing Wash. Const. Art. I §7). The Fourth Amendment prohibits police from entering a person's home to make a routine, warrantless arrest. *Payton v. New York*, 445 U.S. 573, 576, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). "All warrantless entries of a home are presumptively unreasonable." *State v. Hinshaw*, 149 Wn. App. 747, 753, 205 P.3d 178 (2009) (citing *Payton*, 445 U.S. 573).

[3] A person is seized when, "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." *Rankin,* 151 Wash.2d at 695, 92 P.3d 202 (citing *State v. O'Neill,* 148 Wn.2d 564, 574, 62 P.3d 489 (2003)). *See also State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (seizure occurs where officer displays weapon or uses language or a tone of voice compelling compliance with officer requests).

The "Fourth Amendment has drawn a firm line at the entrance to the house." *Holeman*, 103 Wn.2d at 429. "It is not the location of the arresting officer that is important in determining whether an arrest occurred in the home for Fourth Amendment purposes. Instead, the important consideration is the location of the arrestee." *Id*. Accordingly, the warrantless arrest of a suspect standing in his doorway was unlawful in *State v. Holeman*. 103 Wn.2d at 428-29. *See also State v. Eserjose*, 171 Wn.2d 907, 912, 259 P.3d 172 (2011) (suspect's arrest was clearly unlawful where police officers made a warrantless and nonconsensual entry into the suspect's home to effectuate the arrest and lacked exigent circumstances to do so.)

Here, Mr. Smith was clearly seized from within his home without any warrant. (RP 185) Deputy Newport testified that he snuck up to Mr. Smith's home at approximately 1:40 a.m. while Mr. Smith was sitting on the front porch. (RP 175) Mr. Smith saw the officer approaching, stood up, turned around and quickly moved inside. (RP 175-76) The deputy yelled that he needed to talk to Mr. Smith, and he yelled that Mr. Smith was under arrest, but Mr. Smith had already closed the door before the deputy was able to effectuate an arrest on the porch. (RP 176) So, the deputy "opened the door, reached in, [and] grabbed [Mr. Smith.]" (*Id*.) Deputy Newport was "pulling on" Mr. Smith, who was "pulling away…",

and the deputy "eventually had the other two Coulee Dam officers help [him] pull [Mr. Smith] from the doorway, put him on his stomach on the ground and handcuff him behind his back." (*Id*.)

There is no question that Mr. Smith was seized – indeed, he was physically pulled by officers from his home, placed on the ground and handcuffed. There is also no question that the officers lacked any warrant to make this arrest. Finally, Mr. Smith was clearly arrested from within his home. He had gone passed the threshold of his doorway and even shut the door before Deputy Newport opened the door and pulled him out. Under these circumstances, Mr. Smith's warrantless arrest from within his home was presumptively unreasonable and a violation of his constitutional right to privacy.

b. No exigent circumstances existed to otherwise justify Mr. Smith's warrantless arrest.

The warrantless arrest of a suspect from within his home may be legally justified on limited occasions, such as where exigent circumstances exist. But the State bears the burden to establish that such an exception applies. *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003).

"'[E]xigent circumstances' involve a true emergency, i.e., 'an immediate major crisis,' requiring swift action to prevent imminent danger to life, forestall the imminent escape of a suspect, or the destruction of evidence.'" *Hinshaw*, 149 Wn. App. at 753-54 (internal citations

omitted). The underlying premise for this exception to the warrant requirement is that police do not have adequate time to get a warrant. *Id.* "The police bear the heavy burden of showing that exigent circumstances necessitated immediate police action." *Id.* "They must show why it was impractical, or unsafe, to take the time to get a warrant." *Id.* "'When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequence if he postponed action to get a warrant.'" *Id.*

In determining whether a true exigent circumstance existed, courts look to the totality of the circumstances and consider factors such as:

> (1) the gravity of the offense, particularly whether it is violent; (2) whether the suspect is reasonably believed to be armed; (3) whether police have reasonably trustworthy information that the suspect is guilty; (4) whether there is strong reason to believe that the suspect is on the premise; (5) whether the suspect is likely to escape if not swiftly apprehended; (6) whether the entry can be made peaceably; (7) whether police are in hot pursuit; (8) whether the suspect is fleeing; (9) if officers or the public are in danger; (10) whether the suspect has access to a vehicle; and (11) the risk that the police will lose evidence.

Hinshaw, 149 Wn. App. at 754; *State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 295 (1986); *State v. Tibbles*, 169 Wn.2d 364, 236 P.3d 885 (2010). In sum, the circumstances must show that the officer needed to act quickly. *Id.*

Here, no exigent circumstances justified the intrusion into Mr. Smith's home without a warrant. Deputy Newport suspected Mr. Smith of

felony harassment four hours before making the arrest in this case. This was certainly not a case of hot pursuit. The deputy explained that he had to make a considerably lengthy drive from the Miller home in Pateros to Mr. Smith's house in Coulee Dam, and the deputy took the time to gather additional officers when he arrived in Coulee Dam. The circumstances do not show that the officers needed to act quickly rather than calling first for an arrest warrant.

Moreover, Deputy Newport could see that Mr. Smith was home and simply sitting on his front porch with a cell phone in his hand; there was no evidence to suggest that Mr. Smith was armed or taking any immediate action on his alleged threats. Furthermore, there was no risk of losing evidence by waiting for a warrant; the deputy already had copies of the text messages being forwarded to his phone. When the deputy was asked if he could have activated his emergency lights or sirens, the deputy explained that there was no need for that in this situation. Indeed, this was not an emergency situation.

This is a classic case where the deputy should not have acted as his own magistrate and should have taken the time, which he seemed to have aplenty, to obtain a telephonic arrest warrant. The deputy testified that he made a lengthy drive to Mr. Smith's home in Coulee Dam, during which time a judge could have been deciding whether an arrest warrant was

appropriate. Mr. Smith was not attempting to escape from anyone when officers first arrived at his home. He was not fleeing or acting in any manner that created a threat to public or officer safety. Law enforcement could easily have observed Mr. Smith on the porch and called for an arrest warrant before carrying out their covert maneuvers.

"To find exigent circumstances based on these bare facts would set the stage for the exigent circumstances exception to swallow the general warrant requirement." *Tibbles*, 169 Wn.2d at 372. It was not impractical or unsafe to get an arrest warrant prior to entering Mr. Smith's home. Accordingly, Mr. Smith maintains that his arrest was clearly and presumptively unlawful.

c. The evidence obtained pursuant to Mr. Smith's unlawful arrest was not sufficiently attenuated from the unlawful seizure and should, therefore, have been suppressed.

Evidence of Mr. Smith's statements and behaviors during his arrest and subsequent transport to jail was inadmissible as the fruit of his unlawful seizure. This evidence, if this Court deems it relevant, was not sufficiently attenuated from the unlawful arrest in Mr. Smith's home. Indeed, quite the opposite is true – the evidence of Mr. Smith's statements and behaviors was a direct response to his aggravation over being unlawfully seized. This evidence should have been suppressed.

First, as a threshold matter, the Fourth Amendment to the U.S. Constitution clearly provides less protection than our State's exclusionary rule in the circumstances of this case. The federal exclusionary rule would not necessarily bar admission of evidence that was obtained after a suspect's unlawful arrest in his home, so long as police officers had probable cause to believe that the suspect had committed a felony before they made their warrantless entry into the suspect's home. *New York v. Harris*, 495 U.S. 14, 21, 110 S.Ct. 1640, 109 L.Ed.2d 13 (1990). Where "officers had probable cause to arrest [a suspect] for a crime [before the unlawful arrest in the home, the suspect] was not unlawfully in custody when he was removed to the station house, given *Miranda* warnings, and allowed to talk." *Id*. at 18. The rationale is that, "because the police had the legal authority to hold the suspect regardless of his illegal arrest, they were not exploiting the illegality of that arrest." *Eserjose*, 171 Wn.2d at 917 (citing *Harris*, 495 U.S. at 18-19).

But our State Supreme Court found the above rule in *Harris* "incompatible" with our State's exclusionary rule– Wash. Const. Art. I, §7 – and refused a categorical rule that would allow evidence following an illegal arrest so long as police had probable cause prior to making the illegal arrest. *Eserjose*, 171 Wn.2d at 917-19, 929. "[A] rule that makes the admissibility of a confession depend entirely on the legality of

custody… completely ignores the illegality of the preceding arrest." *Eserjose*, 171 Wn.2d at 918. While our state's exclusionary rule is similar to its federal counterpart in aiming to deter unlawful police conduct, "'it's paramount concern is protecting an individual's right of privacy.'" *Id.* (quoting *State v. Afana*, 169 Wn.2d 169, 180, 233 P.3d 879 (2010)). And our State protects this privacy right "by closing the courtroom door to evidence gathered through illegal means." *Id.*

The proper inquiry, then, is whether the evidence "is 'sufficiently an act of free will to purge the primary taint.'" *Eserjose*, 171 Wn.2d at 918-19 (citing *Brown v. Illinois*, 422 U.S. 590, 602, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (citing *Wong Sun v. U.S.*, 371 U.S. 471, 486, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963))). The question is whether the "challenged evidence was 'fruit of the poisonous tree' or [instead] so 'attenuated as to dissipate the taint.'" *Eserjose*, 171 Wn.2d at 919. In making this determination, our State does not apply a "but for" analysis – i.e., our courts do not exclude evidence simply because "it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently

distinguishable to be purged of the primary taint." *Id*. (quoting *Wong Sun*, 371 U.S. at 487-88).

The attenuation analysis considers several factors, aside from the giving of *Miranda* warnings, to determine if evidence was sufficiently attenuated from an illegal arrest. *Eserjose*, 171 Wn.2d at 918-19. Such factors include the "'temporal proximity of the arrest and the [evidence], the presence of intervening circumstances, and particularly, the purpose and flagrancy of the official misconduct.'" *Id*. at 919 (quoting *Brown*, 422 U.S. at 603-04).

In *Brown*, the Court applied this attenuation analysis and found the suspect's confession inadmissible, explaining, "The illegality here…had a quality of purposefulness. The impropriety of the arrest was obvious… The manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Brown*, 422 U.S. at 605.

On the other hand, the Court in *Eserjose* found the evidence sufficiently attenuated from the illegal arrest, explaining that the illegality was less flagrant where the arresting officers actually entered the home with consent and simply exceeded the scope of that consent by entering the upstairs hallway. 171 Wn.2d at 923-24. Moreover, there was no indication that Mr. Eserjose was "viscerally impressed by the

circumstances of his illegal arrest." *Eserjose*, 171 Wn.2d at 924 (distinguishing *State v. Mariano*, 160 P.3d 1258 (Hawaii, 2007)). The deputies' warrantless entry appeared to have made perhaps "no impression at all," and their illegal entry lacked "the quality of purposefulness" and the "obvious" impropriety identified in *Brown*, supra. *Id*. Thus, Mr. Eserjose's confession was "sufficiently an act of free will to purge the primary taint." *Id*.

Here, on the other hand, the evidence obtained following Mr. Smith's unlawful, warrantless arrest in his home was not sufficiently attenuated to purge the taint of the illegality. Like in *Brown, supra*, the police officers had a definite "quality of purposefulness" to their conduct. Deputy Newport explained that they approached Mr. Smith's home in the dark and attempted to sneak up on the suspect. They then went onto Mr. Smith's porch, purposefully opened his front door, grabbed Mr. Smith and dragged him outside to the ground for handcuffing. This is not a case like *Eserjose* where there was consensual entry on any level. The police did not "accidentally" exceed the scope of an otherwise consensual entry. The impropriety of the arrest was obvious, and the officers' actions in those early morning hours of August 13th were clearly designed to cause surprise, fright or confusion.

Furthermore, there was close temporal proximity of the illegality and evidence obtained, and there were no intervening circumstances between the unlawful arrest and Mr. Smith's statements to the officers. Indeed, Mr. Smith was immediately handcuffed and placed in the patrol car for transport to the jail, and throughout this entire process, he maintained frustration with officers over being illegally arrested. The reading of *Miranda* warnings did not intervene to purge the taint in this case. Mr. Smith was still clearly "viscerally impressed by the circumstances of his illegal arrest." *C.f. Eserjose*, 171 Wn.2d at 924. From the time Mr. Smith was illegally arrested until he arrived at the jail, Mr. Smith was upset with the officers, yelled that they had violated his rights, was physically uncooperative, threatened to assault the officer and threatened to sue law enforcement for false arrest, all in response to what Mr. Smith believed was his illegal arrest. (RP 252-55)

As set forth in the issue above, evidence of Mr. Smith's behaviors with law enforcement was likely irrelevant. He did not confess to any crime following his arrest, and his anger over being arrested did not prove or disprove the crime of felony harassment. Nonetheless, if this Court finds that this evidence was relevant, the evidence should have instead been excluded because it was the fruit of Mr. Smith's unlawful arrest. The evidence of Mr. Smith's statements and actions was not sufficiently

attenuated to purge his prior illegal arrest. Therefore, this prejudicial evidence of bad acts by the defendant should have been excluded. *Eserjose*, 171 Wn.2d at 928-29. The court erred by admitting this unlawfully-obtained evidence.

d. Mr. Smith either sufficiently preserved this error may raise this constitutional error for the first time on appeal.

Finally, Mr. Smith expressly and repeatedly informed the court that he refused to waive the challenge to his unlawful arrest, despite counsel's decision to not challenge the unlawful arrest since no relevant evidence appeared to come from that arrest. Whether based on ineffective assistance of counsel for only objecting on relevance rather than suppression grounds, or based on a manifest error affecting a constitutional right, Mr. Smith may raise this issue for the first time on appeal.

To establish ineffective assistance, the defendant must show that an error occurred and that the result of the proceeding would have been different but for counsel's deficient representation. *McFarland*, 127 Wn.2d at 332-33. Alternatively, courts may review a manifest error affecting a constitutional right pursuant to RAP 2.5(a)(3). The error must be both of constitutional magnitude and "manifest" or prejudicial; i.e., the defendant must show how the constitutional error, in the context of trial, actually affected his rights. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d

756 (2009). In sum, the defendant is required to show (1) that a constitutional error occurred and (2) that the outcome of the trial would have been different had the evidence been excluded. *See We*, 138 Wn. App. at 722-23 (citing *Warren,* 134 Wn. App. at 57 (manifest constitutional error); and *Hakimi,* 124 Wn. App. at 22 (ineffective assistance of counsel).

Here, as established above, Mr. Smith was unlawfully arrested without a warrant from within his home. And, evidence obtained pursuant to that unlawful arrest was not sufficiently attenuated from the illegality, so it should have been suppressed. The only remaining question, then, is whether Mr. Smith either preserved this error or was sufficiently prejudiced to raise the issue for the first time on appeal.

First, Mr. Smith contends that he did preserve his objection to the evidence obtained following his unlawful arrest. He repeatedly filed motions in the trial court on his own behalf and vehemently argued both before trial and throughout trial that evidence should be suppressed due to his unlawful arrest. It is the appellant's position, therefore, that he did sufficiently preserve this issue, even if defense counsel neglected to advance any suppression arguments. Mr. Smith repeatedly informed the trial court that he in no way "waived" his challenge to his unlawful arrest, which apparently fell on deaf ears with both the court and counsel.

Alternatively, Mr. Smith was prejudiced at this trial so that he can raise this issue on appeal via an "ineffective assistance" or "error of constitutional magnitude" argument. Here, Mr. Smith's family members alleged that he had sent very graphic and detailed threats of harm. But Mr. Smith maintained at trial that there were other persons who had access to his phone, and that he never sent the messages in question. So, the evidence was certainly not one-sided. Also, the cell phone that was purportedly used to send the messages was found by Mr. Miller the day after Mr. Smith's arrest, but it was not delivered to law enforcement until many months later, which could have created credibility or authenticity doubts for the jury. And the evidence suggested that at least some of the messages may have been actually sent after Mr. Smith's arrest. So, there was certainly reason to doubt guilt in this case.

Furthermore, the jury was tasked with determining whether the alleged victims were reasonably placed in fear that the threats "would" be carried out. Yet there was only evidence that the victims thought the threats "could" be carried out. When this insufficient evidence is combined with Mr. Smith's aggressive and perhaps violent behaviors that law enforcement observed after the arrest, a conviction was much more likely, thus showing how that same evidence prejudiced the defendant. But, if the evidence of Mr. Smith's conduct with the officers was

excluded, as it should have been, there is a greater likelihood that Mr. Smith would not have been convicted in this case.

Indeed, the jurors who decided this case had a difficult time convicting Mr. Smith. They deliberated for a longer time than it took for them to actually hear the evidence. (RP 514-15) One juror even informed the court that this was "not a slam dunk" case, that it was "not an easy decision." (*Id*.) Under these circumstances, it is likely that the illegally obtained evidence tipped the scales unfairly against Mr. Smith. Hearing that the defendant had behaved egregiously with law enforcement did effect the outcome of this trial. Therefore, Mr. Smith has established the prejudice necessary to support this claim based either on ineffective assistance of counsel or a manifest error affecting a constitutional right.

Issue 4: Whether sufficient evidence supports Mr. Smith's convictions for four counts of felony harassment, including evidence that the victims feared Mr. Smith "would" carry out the threats and evidence that there was ever a threat to kill Deb Miller as opposed to causing her emotional harm.

The four victims testified that they thought the defendant "could" "possibly" carry out the threats. But this does not equate to reasonable fear that the threats "would" be carried out. Furthermore, the texts threatened to kill Ms. Miller-Smith, Ms. McDonald and Mr. Miller. But they threatened to do so in front of Mr. Miller's wife, Deb Miller, presumably in order to cause her emotional harm. The texts specifically

stated that Ms. Miller would not be killed so that she could watch and "tell." (Exhibits 7, 23-24) Under these circumstances, the evidence was insufficient to establish that Mr. Smith threatened to kill Ms. Deb Miller.

To determine whether sufficient evidence exists to sustain a conviction, this Court reviews the evidence in the light most favorable to the State to determine whether "any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Romero*, 113 Wn. App. 779, 797, 54 P.3d 1255 (2002) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); *State v. Wilson*, 141 Wn. App. 597, 608-09, 171 P.3d 501 (2007) (citing *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). In this review for sufficient evidence, circumstantial evidence is considered equally as reliable as direct evidence. *Romero*, 113 Wn. App. at 798; *Wilson*, 141 Wn. App at 608. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *Id*. (quoting *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997)).

"A person is guilty of harassment if…, (a) [w]ithout lawful authority, the person knowingly threatens (i) to cause bodily injury immediately or in the future to the person threatened or to any other person… [and] (b) [t]he person by words or conduct places the person threatened in reasonable fear that the threat will be carried out." RCW 9A.46.020(1). Harassment is elevated to a felony if a "person harasses

another person under [the previous subsection] by threatening to kill the person threatened or any other person." RCW 9A.46.020(2)(b).

In order to convict a defendant of felony harassment, "the person threatened must find out about the threat…and words or conduct of the perpetrator must place the person threatened in reasonable fear that the threat will be carried out." *State v. Kiehl*, 128 Wn. App. 88, 93, 113 P.3d 528 (2005), *review denied*, 156 Wn.2d 1013 (2006) (quoting *State v. J.M.,* 144 Wn.2d 472, 28 P.3d 720 (2001)). The person threatened is not necessarily the person who hears the threat itself. *Id*. Where the defendant threatens to kill someone other than the listener of his threat, there must be evidence that the person who was the subject of the threat learned of the threat and, as a result, was placed in reasonable fear that the threat would be carried out. *See id*.

Here, the victims testified that they feared the threats "could" possibly be carried out if the perpetrator wanted to do so. But this is not the evidentiary equivalent of fearing the threats "would" be carried out. Mr. Smith does not argue that there must be evidence that he intended to actually carry out the threats or even that he set any such harm into motion in order to support a harassment charge. But, there must at least be evidence that the victims feared he *would* carry out the threats, which there was not in this case.

For instance, Crystal Miller-Smith testified that she believed Mr. Smith would "possibly" carry out the threats, that she had no idea what he was capable of. (RP 374-75) Her father, Mark Miller, testified that he felt the need to protect from the worst. (RP 300-01) Her stepmother, Deb Miller, testified that she thought the sender "could" carry out the threats. (RP 360) And, Ms. Miller-Smith's mother, Deborah McDonald, testified that she thought it was "very possible [the threats] could be carried out." (RP 363-64) Importantly, these victims never testified that they feared the threats "would" be carried out. They spoke in theoretical possibilities, but that is not enough to sustain a conviction that places Mr. Smith in prison for 42 months.

Next, there was insufficient evidence of a threat to kill Deb Miller. Reviewing the text messages as a whole, they specifically indicated that Deb would live so she could watch the harm done to her husband and then "tell." (RP 262; Exhibits 7, 23-24) Furthermore, although Ms. Miller testified that she thought the defendant had threatened to feed her head to a lion, this testimony was certainly not supported by evidence of the text message exhibits themselves. There was no threat to feed Ms. Miller's head to a lion in the exhibits in this case. Regardless, a reasonable person in Okanogan County could not believe that such a threat would or even could be carried out. A "true threat" is required for a felony harassment

conviction, and a "true threat" legally does not include puffery[4]. *State v. Kilburn*, 151 Wn.2d 36, 46, 84 P.3d 1215 (2004). The threat to feed a person's head to a lion could at most be an exaggeration or puffery in this case. Ultimately, the greater weight of the evidence shows that the text sender never made any true threat of death toward Ms. Deb Miller, so the felony harassment count involving Ms. Miller should be dismissed.

Issue 5: Whether Mr. Smith should have been referred for a competency evaluation.

Mr. Smith demonstrated, and the court believed, that a competency evaluation was necessary. But the court then erred by failing to refer Mr. Smith for the mandatory competency evaluation.

Criminal defendants have the fundamental right not to be tried while incompetent. *Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S.Ct. 89, 43 L.Ed.2d 103 (1975); RCW 10.77.050. And, "the trial court has a duty to establish a defendant's competency…" *State v. Douglas*, __ Wn. App. __, 295 P.3d 812, 816 (2013). A person is "incompetent" when he "lacks the capacity to understand the nature of the proceedings against him…or to assist in his…own defense as a result of mental disease or defect." RCW 10.77.010; *State v. Lord*, 117 Wn.2d 829, 900, 822 P.2d 177 (1991).

[4] "Puffery" or "puffing" is defined as "[t]he expression of an exaggerated opinion – as opposed to a factual representation…" Bryan A. Garner, Black's Law Dictionary, 7th Ed., pg. 1247 (1999).

"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 a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant." RCW 10.77.060(1)(a) (emphasis added); RCW 10.77.060(3) (professional to evaluate whether the defendant suffers from a mental disease or defect and provide an opinion as to mental status and competency).[5] "The failure to observe procedures adequate to protect this [competency] right is a denial of due process." *State v. O'Neal*, 23 Wn. App. 899, 901, 600 P.2d 570 (1979).

A trial court's determination of whether a competency examination should or should not be ordered is reviewed for abuse of discretion. *State v. Heddrick*, 166 Wn.2d 898, 903, 215 P.3d 201 (2009); *State v. Lawrence*, 166 Wn. App. 378, 385-86, 271 P.3d 280 (2012). Discretion is abused when it is exercise on untenable grounds, for untenable reasons, or using an incorrect legal standard. *Id*. In deciding whether to order a competency evaluation, the trial court may consider the defendant's

[5] *See also State v. Sisouvanh*, 175 Wn.2d 607, 620-21, 629, 290 P.3d 942 (2012) ("[I]f there is reason to doubt a defendant's competency to stand trial, RCW 10.77.060(1)(a) requires the trial court to order that a qualified expert or professional person evaluate the defendant and draft a report for the court to consider in determining whether the defendant is competent... It is critical that competency evaluations be conducted by qualified experts and in a qualified manner.")

appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports, and the statements of counsel. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 861, 16 P.3d 610 (2001)

The procedures to determine competency found in RCW 10.77.060 are mandatory, not merely directory. *Heddrick*, 166 Wn.2d at 904 (internal citations omitted). However, while the defendant or his counsel cannot waive a substantive determination of competency, the defense may waive the procedural requirements to determine competency in certain circumstances. *Heddrick*, 166 Wn.2d at 905, 908. For instance, counsel's stipulations to competency could "erase [competency] doubts in the court's mind…," so long as counsel's representations were not "erroneous or counter to some overriding fact." *Id*. at 908-09. A rule otherwise would allow the defendant to set up an error at trial by waiving competency procedures and then claim the lack of adequate competency procedures as an invited error on appeal. *Id*.

In *Heddrick*, the Court allowed waiver of the procedural requirement for a second competency evaluation[6] where one evaluator had already opined that the defendant was competent and defense counsel expressly waived the second evaluation. *Heddrick*, 166 Wn.2d at 908 (The defendant's attorney "entered an express waiver [of a second

[6] *Heddrick* was decided under the pre-2012 version of RCW 10.77.060(1)(a), which required two rather than only one qualified expert to evaluate a defendant when there was reason to doubt competency.

evaluation] after [the first] psychological examination revealed evidence of competence."). Ultimately, if there remains reason to doubt a defendant's competency, the procedures of 10.77 RCW are nonetheless mandatory in order to satisfy due process. *Heddrick*, 166 Wn.2d at 909.

a. A competency evaluation was required.

Here, the trial court should have referred Mr. Smith for a competency evaluation. There was clearly reason to doubt the defendant's competency, as the court expressly noted on multiple occasions throughout these proceedings. Indeed, the record is replete with statements by the defendant that reflected possible psychosis, obsession, delusional thinking, paranoia, or other potential mental defects or disorders that would prevent the defendant from understanding the proceedings or assisting in his own defense.

For example, the defendant appeared quite obsessed with his illegal arrest, discovery, and supposed evidence of police audio recordings that he believed the State was withholding from him, becoming quite agitated that the entire justice system, including the various attorneys appointed to represent him, were conspiring against him. (See e.g., RP 15-17, 23, 25, 35, 39, 43, 80, 104, 114, 118, 133, 134, 191, 349-55) After listening to several outbursts by the defendant and countless motions advanced by the defendant pro se, which the trial court essentially said

were repetitious and lacked merit, the trial court formally expressed its ongoing concern for the defendant's competence and the need for a competency evaluation. (RP 137-38) The court said it was concerned that Mr. Smith had "an inability to hear and understand and perceive the nature of these proceedings..." (*id.*), stating:

> "I'm going to renew my concern about Mr. Smith's inability to comprehend, or inability and unwillingness to accept what's going on… We're not making any progress. We're not accomplishing anything… [due to Mr. Smith's] unwillingness or an inability to comprehend and understand what's going on."

(RP 145)

The court remained concerned that the defendant needed to be able to understand what was going on and to assist in his own defense, rather than "what you're doing is you're obstructing, and you're hindering, and you're unduly delaying this whole process." (RP 167; see also RP 201-02, 206) The defendant, who was quite agitated, demanded at one point that the trial judge be held legally accountable for making supposedly unlawful "psychiatric threats" against him to send him to Eastern State Hospital for evaluation. (RP 166) The court ultimately chose to not have the defendant evaluated for competency, but at the same time the judge was still unsure what the defendant's problem was and continued to question whether the defendant could understand what was going on. (RP 209) The court abused its discretion in these circumstances by failing to refer

Mr. Smith for a competency evaluation by a qualified expert, particularly when the judge remained unconvinced about Mr. Smith's competency at the very time he expressly found Mr. Smith competent.

Mr. Smith's outbursts continued throughout the proceedings (though not apparently while the jury was present), displaying his need for proper evaluation by someone who was qualified to assess his mental health. During a break mid-trial, the defendant interrupted the proceedings to ask for an appeal to the "governor," and he again accused the judge of unlawfully threatening him with the "threat" to send him to a "psych action board." (RP 347-48) The defendant apparently could not fathom why he was being charged and tried for felony threats when the trial judge could make threats against him without even being arrested. (*Id*.) Mr. Smith wanted to press charges against the judge for his "threats," so the judge suggested the defendant talk to the deputy who was in the courtroom about pressing charges. (RP 349) The judge renewed his concern that things were getting "out of control." (RP 347-48) Mr. Smith remained aggravated that he could not get that particular deputy to press charges against the judge, since the deputy was the same person who, Mr. Smith says, committed illegal conduct throughout Mr. Smith's case. (RP 349-55)

There was clearly reason to doubt Mr. Smith's competency, as the trial court stated on the record on multiple occasions. Since there was reason to doubt the defendant's competence, the trial court abused its discretion by making the competency determination without first referring the defendant for the mandatory evaluation by a qualified mental health expert. The trial judge was in the best position to observe the defendant's behaviors in the trial court. But, having observed Mr. Smith's outrageous statements and behaviors that actually made the court doubt Mr. Smith's competence, a mental health expert was then in the best position to provide a qualified opinion on Mr. Smith's mental health status and competence. The court abused its discretion by assuming the role of mental health expert when it doubted, with good reason, Mr. Smith's competency. As such, this matter should be remanded for competency proceedings that comply with 10.77 RCW.

b. A competency evaluation was not properly waived by counsel, and the defendant's substantive stipulation to competency is of no moment.

Next, defense counsel did not expressly waive any procedures for determining competency. Counsel seemed to be trying to appease his client and said that Mr. Smith may meet the very low threshold for competency, but he acknowledged that the defendant had strong opinions that served as a detriment to Mr. Smith's ability to understand another's

point of view. Mr. Smith clearly opposed having a competency evaluation (see RP 166, 347-55), which obviously placed defense counsel in a difficult position of representing his client's wishes while at the same time protecting Mr. Smith's due process rights to only be tried while competent. Mindful of these challenges, defense counsel neither expressly waived nor requested a competency evaluation. When presented with the trial court's *sua sponte* suggestion to refer Mr. Smith for a competency evaluation, counsel responded that he would not object if the court moved for such a competency evaluation. (RP 139-40)

Counsel appeared to be acquiescing to the necessary competency evaluation in a manner that was least likely to upset his client. Counsel's colloquy with the court hardly qualified as an express waiver of competency procedures like in *Heddrick, supra*, let alone any credible assurance from counsel of the defendant's competence. Counsel actually appeared to support the court's suggestion for a competency evaluation, although counsel delicately placed this decision in the trial court's hands, presumably to avoid his client's outrage over such a procedure.

Regardless, if counsel's failure to clearly request a competency evaluation could somehow amount to a waiver, such a waiver should not be accepted because it was contrary to other overriding facts that still suggested incompetence. Indeed, Mr. Smith persistently demonstrated a

lack of competence and outrageous behaviors throughout the underlying proceedings. Any waiver in the face of the behaviors set forth above should not stand.

Finally, Mr. Smith attempted to waive his competency. He essentially informed the court that he was competent and became enraged when the court disagreed, asking that the judge even be arrested for his "threats." But a defendant is not permitted to waive a substantive determination of competency. It is ultimately the court's duty to ensure that a defendant is only tried while competent. Thus, it is of no moment that the defendant believed himself to be competent and attempted to waive any further determinations of competency in this case.

c. Any waiver of competency procedures cannot stand where there is no other credible confirmation of competency and countering facts continue to suggest incompetency.

Finally, to the extent that *State v. Heddrick* suggests that competency procedures may be waived, its holding should not be extended to the facts of this case. *Heddrick* is significantly distinguishable. First, that case was decided under the former version of RCW 10.77.060, which required two experts to determine competency, and at least one competency evaluation had in fact been completed in that case. There, importantly, the Court accepted defense counsel's waiver of

the second evaluator because one expert had already found the defendant competent.

Here, we have no such similar, credible evidence of competency. Mr. Smith was never evaluated by even one expert to assess his competency or determine if he had any mental defect or disorder that prevented him from understanding the proceedings and assisting with his defense. Unlike in *Heddrick, supra*, there was no reliable basis here for finding Mr. Smith competent, or for accepting the defendant's outrageous self-assurances of competency (assurance made while Mr. Smith was demanding that the trial judge be arrested for "threatening" him with a trip to Eastern State Hospital to assess his competency, RP 161, 347-55). As set forth above, Mr. Smith's behaviors and statements suggested a great need for a competency evaluation, and there were no countering statements or evidence that would otherwise support the trial court's discretionary determination of competence to stand trial. Indeed, even the family member victims confirmed that Mr. Smith's mental stability was a concern. (CP 13, 17)

In sum, where there was reason to doubt Mr. Smith's competency, where defense counsel did not expressly waive competency procedures, where Mr. Smith is not permitted to waive a substantive competency determination on his own behalf, and where there was not clear countering

evidence to reliably reassure the court of the defendant's competence, the trial court abused its discretion by failing to refer Mr. Smith for a competency evaluation as required by RCW 10.77.060. This case should be remanded for competency procedures that comply with 10.77 RCW.

Issue 6: Whether the cumulative error doctrine should result in a new trial in this case.

Even if this Court could determine that one or more of the errors are not prejudicial enough to warrant reversal, the cumulative effect of the many prejudicial errors in this case warrants reversal. *See e.g. State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (holding, "a series of errors, each of which is harmless, may have a cumulative effect that is prejudicial.")

"It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless." *State v. Lopez*, 95 Wn. App. 842, 857, 980 P.2d 224 (1999) (internal quotations omitted). "Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence." *Id.* "Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error." *Id.* Nonconstitutional error requires reversal only if, within

reasonable probabilities, it materially affected the outcome of the trial." *Id*.

Here, there were several constitutional errors, including the deputy invading the province of the jury through his testimony and the suggestive "felony harassment" exhibit (Ex. 105); the deputy commenting on the defendant's right to silence; the court allowing evidence of Mr. Smith's prior bad acts that was irrelevant, unduly prejudicial and obtained pursuant to an unlawful, warrantless arrest of the defendant in his home; and the trial of Mr. Smith without first assuring his competency with proper mental health evaluation. The evidentiary errors in this case served to portray Mr. Smith in a negative light before the jury. Had these errors not occurred, a reasonable jury could likely have reached a contrary result. Again, the decision in this case was not easily reached; the evidence was not so overwhelming that any jury would have an "easy" or "slam dunk" decision in this case, as one juror commented. Furthermore, the proceedings in this case suggest a lack of due process since trial proceeded despite serious doubts as to the defendant's competence. Accordingly, due to the cumulative errors in this case, Mr. Smith respectfully requests that this Court reverse and remand for further proceedings.

F. **CONCLUSION**

Mr. Smith was denied his right to a fair trial by the erroneous admission of highly prejudicial evidence. Moreover, the evidence was insufficient to affirm these convictions. And, Mr. Smith was improperly tried after the court doubted his competence and failed to refer him for a mandatory competency evaluation. Finally, the cumulative error doctrine requires a new trial in this case.

Respectfully submitted this 30th day of May, 2013.

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 31390-5-III
vs.	)	
	)	
	)	PROOF OF SERVICE
	)	
Defendant/Appellant	)	
	)	

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 30, 2013, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

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Shelton, WA 98584

Having obtained prior permission from the Okanogan County Prosecutor's Office, I also served Karl Sloan at ksloan@co.okanogan.wa.us, syusi@co.okanogan.wa.us, and shinger@co.okanogan.wa.us by email using Division III's e-service feature.

Dated this 30th day of May, 2013.

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