Supreme Court No. 96170-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 34848-2-III

DIVISION THREE, COURT OF APPEALS
OF THE STATE OF WASHINGTON

JOHN INGERSOLL,

Petitioner,

v.

CITY OF MATTAWA,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

John Ingersoll, appellant in the Court of Appeals, files this petition for review.

II. COURT OF APPEALS DECISION

Ingersoll seeks review of the unpublished decision of the Court of Appeals, Division Three, filed April 24, 2018, in *Ingersoll v. City of Mattawa*, No. 34848-2-III. Ingersoll seeks review only of the issue identified by the Court of Appeals as "Behavior at Hearing" discussed between pages six and eight of the slip opinion. A copy of the slip opinion is attached as Appendix A. The Court of Appeals denied Ingersoll's motion to publish on May 29. A copy of that order is attached as Appendix B. Because the order denying the motion to publish "was inadvertently not distributed to the parties," the Court of Appeals recalled the mandate. A copy of the ruling recalling the mandate, filed July 11, is attached as Appendix C.

III. ISSUE PRESENTED FOR REVIEW

A trier of fact may consider a witness's conduct during a proceeding to assess that witness's credibility. Credibility determinations have always been solely for the trier of fact and unreviewable on appeal. The Court of Appeals expanded the purposes for which a trier of fact may consider courtroom conduct. It held that a trier of fact may consider a party's courtroom conduct as substantive evidence of guilt. May a trier of fact consider a party's courtroom conduct as substantive evidence? This issue warrants review under RAP 13.4(b)(2), (3), and (4).

IV. STATEMENT OF THE CASE

John Ingersoll served as a full-time police officer with the Mattawa Police Department. The Department and the mayor praised his performance and increased his salary multiple times in his first three years on the force. CP 2090, 2116, 2770-71, 2777-78.

Ingersoll's wife suddenly left one day with their two children. CP 2936. His wife filed for divorce three weeks later; for the first time, Ingersoll learned his wife was accusing him of domestic violence. CP 2059, 2116, 2206.

The Department put Ingersoll on nondisciplinary administrative leave pending an investigation. CP 2117-18, 2382, 2754, 2779, 2860, 2872-73. At the time, Ingersoll had no disciplinary record and had never been accused of domestic violence. CP 2091. A local trial judge later granted Ingersoll unsupervised visitation with his children and determined that his wife's accusations were unfounded. CP 2119-20, 3051, 3142, 3290-91.

Starting in September 2012, the mayor issued the first of three *Loudermill* letters to Ingersoll that recommended termination based on alleged conduct that had occurred, in some cases, two years earlier and that had been investigated without resulting discipline.[1] CP 2867-69 (first letter), 2991-94 (second letter), 2270-75 (third letter). Each letter identified purported conduct that supported termination for misconduct or unfitness.

[1] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (due process requires notice of the charges and an opportunity to be heard before termination of a public employee).

After the first two letters, the mayor chose not to discipline Ingersoll, but he still remained on administrative leave. CP 2278.

To be able to return to the Department, the new interim police chief, John Turley, required Ingersoll to sit for a fit-for-duty examination with Dr. Mark Mays. CP 2280, 3048. Dr. Mays evaluated Ingersoll and prepared a report. CP 2560-73.

In his report, Dr. Mays concluded Ingersoll had a "Personality Trait Disturbance": a "pattern of behavior in which he behaves in impulsive, self-indulgent, and short-cited ways, . . . [and that] makes him more likely than most people, particularly people in law enforcement, to not maintain appropriate limits, maintain consistent and appropriate behavior, show emotional constraint, or provide accurate reports." CP 2571. While Dr. Mays did not find that Ingersoll was unfit for duty as a police officer, he noted that "most law enforcement agencies reviewing these results would consider [him] not to be qualified as fit for duty." CP 2573.

In the third *Loudermill* letter, the mayor listed eight reasons for discharge: (1) domestic violence; (2) harassment and intimidation; (3) false reporting; (4) off-duty misconduct; (5) falsifying report/dishonesty; (6) use of police position for personal gain; (7) insubordination; and (8) unfitness for duty. CP 2270-75. The mayor relied on Dr. Mays's report to support unfitness for duty. CP 2274. After a hearing, the mayor terminated Ingersoll. CP 2276-77.

Ingersoll challenged the decision and requested a hearing before the Mattawa Civil-Service Commission.

The Commission held a five-day hearing to determine if the mayor's termination decision was made in good faith for cause. The Commission was represented by counsel during the hearing. CP 1609, 1763, 1817, 1992, 2145.

The Commission dismissed *every* misconduct allegation either for insufficient evidence or because the City of Mattawa knew about the alleged conduct but chose not to discipline Ingersoll. CP 8-9. The Commission found the allegations "to be a piling up of alleged misconduct in an effort to support termination of employment." CP 9. Even though the Commission dismissed every misconduct allegation, it considered those unproven misconduct allegations as "background evidence" for fitness for duty. CP 9.

In its findings, the Commission faulted Ingersoll for "totally denying any wrongdoing" while testifying at the hearing and for his conduct during the hearing that purportedly showed an immaturity and inconsistency about his ability to control his actions and emotions.[2] CP 9. The Commission upheld the mayor's termination decision. CP 10.

The superior court affirmed the Commission's decision. CP 3369.

Division Three of the Court of Appeals affirmed and held that the Commission properly considered Ingersoll's purported courtroom conduct as substantive evidence supporting the unfitness allegation. *Slip Op.* at 7-8.

[2] Apart from the Commission's finding, no evidence in the record supports the Commission's purported observations.

V. SUMMARY OF ARGUMENT

This appeal is not about determinations of witness credibility. Appellate courts do not review those determinations.

This appeal instead concerns a trier of fact's consideration of courtroom conduct as substantive evidence. This is an issue of first impression in this Court.

The prevailing view is that a party's courtroom conduct is not substantive evidence. The Court of Appeals' contrary holding is in conflict with *State v. Barry*, 179 Wn. App. 175, 317 P.3d 528 (2014), and raises a significant state and federal constitutional due-process issue. And as the Court of Appeals here recognized, its holding would apply at any trial or hearing—making this an issue of substantial public interest that this Court should decide.

Review by this Court is warranted under RAP 13.4(b)(2), (3), and (4).

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. A trier of fact may not use a party's courtroom conduct as substantive evidence to infer guilt.

Credibility determinations are solely for the trier of fact and unreviewable on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

Cases about a trier of fact's consideration of courtroom conduct for other purposes rarely arise, mainly—if not only—because courts do not invade the province of jury deliberations except under exceptional circumstances. *State v. Balisok*, 123 Wn.2d 114, 117-18, 866 P.2d 631

(1994). The cardinal rule requires jury deliberations to "remain secret." *State v. Elmore*, 155 Wn.2d 758, 770, 773, 123 P.3d 72 (2005); *see also Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003) ("The individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach a jury verdict."). The process by which a trier of fact reaches its decision and evaluates the evidence is sacrosanct. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990); *Ryan v. Westgard*, 12 Wn. App. 500, 503, 530 P.2d 687 (1975).

To know if a trier of fact considered courtroom conduct as substantive evidence to infer guilt is virtually impossible due to the secrecy of jury deliberations. *Elmore*, 155 Wn.2d at 670-71 (citing *United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997)). Of course, there are sound policy reasons for this approach—promoting the free interchange of ideas and fostering open and candid debate in reaching a decision, to name a few. *Thomas*, 116 F.3d at 618-19; *Balisok*, 123 Wn.2d at 117-18. And in cases where the trier of fact did consider courtroom conduct as substantive

evidence, that issue almost always escapes appellate review because of appellate courts' reticence to invade the jury room.[3]

Despite the infrequency with which these issues surface in appellate courts, Division Two addressed this precise issue in *State v. Barry*, 179 Wn. App. 175, 317 P.3d 528 (2014), *aff'd*, 183 Wn.2d 297, 352 P.3d 161 (2015). *Barry* arose because the jury during deliberations asked the trial court if it could consider the defendant's courtroom conduct that it observed during trial as substantive evidence. 179 Wn. App. at 177. The trial court instructed the jury that "[e]vidence includes what you witness in the courtroom." *Id.*

As an issue of first impression, *Barry* held that a defendant's courtroom conduct is *not* substantive evidence. 179 Wn. App. at 180. The trial court's instruction to the jury—expressly allowing it to use the defendant's courtroom conduct as evidence of guilt—was error. *Id.* at 176, 181. Even though *Barry* concluded the instruction was erroneous, it

[3] To be clear, this case does not concern the other purpose for which demeanor evidence may be properly considered by a trier of fact: to make credibility determinations. *See, e.g.*, WPI 1.02 ("You are the sole judges of the credibility of each witness, and of the value or weight to be given to the testimony of each witness."); WPIC 1.02 (substantially similar). Courtroom conduct, or demeanor, is just one "factor for the jury to consider—along with several other factors—in assessing credibility." *Barry*, 179 Wn. App. at 179; *see also* WPI 1.02 (listing factors the trier of fact may consider). For instance, a trier of fact may consider a party's appearance and courtroom conduct, and may be swayed by the party's body language or tone of voice. These are all observations that the trier of fact may use to assess credibility. This is why, as the Court of Appeals here noted, "participants in a trial or hearing are on their best behavior . . . to present themselves to the decision-maker in the best possible light." *Slip Op.* at 8.

ultimately held that the defendant failed to establish prejudice. Because the record did not reflect any of the defendant's conduct during trial, the court could not determine "what demeanor evidence the jury may have considered or whether his demeanor could have affected the verdict." *Id.* at 182 (internal quotation marks omitted).

As *Barry* recognized, not everything a trier of fact sees or hears is substantive evidence. Demeanor evidence may be considered by the jury only to the extent "it bears on the credibility of a witness." *People v. Garcia*, 206 Cal. Rptr. 468, 473 (Cal. Ct. App. 1984). While a trier of fact may generally be exposed to a party's conduct during a proceeding, that conduct is not substantive evidence.

Indeed, the prevailing view is that courtroom conduct is not substantive evidence. Edward J. Imwinkelried, *Demeanor Impeachment: Law and Tactics*, 9 AM. J. TRIAL ADVOC. 183, 191 (1986); *e.g., People v. Bowen*, 298 Ill. App. 3d 829, 837, 232 Ill. Dec. 932, 699 N.E.2d 1117 (1998) ("[A] defendant's demeanor . . . does not constitute evidence in a case."); *People v. Foss*, 201 Ill. App. 3d 91, 95, 147 Ill. Dec. 254, 559 N.E.2d 254 (1990) ("It is equally obvious that defendant's demeanor as it relates to the testimony of any witness is not a matter of evidence.").

A party's courtroom conduct is "irrelevant to the issue of his guilt." *Good v. State*, 723 S.W.2d 734, 737 (Tex. Ct. App. 1986) (concluding that by "partially focusing the jury's attention upon appellant's courtroom conduct, the State invited the jury to convict appellant on the basis of his irrelevant nontestimonial demeanor rather than evidence of his guilt."); *see*

also United States v. Schuler, 813 F.2d 978, 980 (9th Cir. 1987) ("His courtroom behavior off the witness stand was legally irrelevant to the question of his guilt of the crime charged."); *Garcia*, 206 Cal. Rptr. at 473, 473 n.7, 475 (concluding that a defendant's courtroom conduct cannot be considered as substantive evidence of guilt).

There are sound policy reasons, too, why most courts do not afford evidentiary status to courtroom conduct. To begin, when a decision rests on demeanor evidence, which typically is *not* reflected in the record (*see, e.g.*, *Barry*, 179 Wn. App. at 177), an appellate court loses the power to review the legal sufficiency of the evidence supporting the decision. In addition, adjudications of guilt, misconduct, or unfitness should be based on substantive evidence and not character evidence.

Courts that have considered courtroom conduct as character evidence hold that such evidence cannot be used substantively to prove guilt. *See, e.g.*, *Schuler*, 813 F.2d at 980-83 (holding that courtroom conduct—character evidence—is not relevant to prove guilt); *United States v. Carroll*, 678 F.2d 1208, 1210 (4th Cir. 1982) (prohibiting use of a party's character evidence "solely to prove guilt"); *United States v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973) (same); *Good*, 723 S.W.2d at 738 (same); *Garcia*, 206 Cal. Rptr. at 473-74 (same). Character evidence is inadmissible to prove that a person acted in conformity with a character trait. *State v. Bell*, 60 Wn. App. 561, 564, 805 P.2d 815 (1991) (citing ER 404(a)). Evidence of specific acts of misconduct is inadmissible if it is offered to

prove the character of the person, and that the person acted in conformity with that character trait. ER 404(b); ER 405(a).

The Court of Appeals here considered Ingersoll's courtroom conduct as substantive evidence bearing on "the accuracy of a third party's evaluation." *Slip Op.* at 8. That third-party evaluation from Dr. Mays concluded that Ingersoll had a "Personality *Trait* Disturbance." CP 2571 (emphasis added). The Court of Appeals thus allowed the Commission to consider Ingersoll's courtroom conduct—*i.e.*, demeanor evidence—as substantive evidence to prove Ingersoll's acting in conformity with traits identified by Dr. Mays's report.

B. The Court of Appeals' decision conflicts with Division Two's decision in *State v. Barry*.

The Court of Appeals in *State v. Barry* held that a trier of fact *cannot* consider courtroom demeanor as substantive evidence for determining guilt. 179 Wn. App. 175, 181, 317 P.3d 528 (2014).

Here the trier of fact (the Mattawa Civil-Service Commission) found:

> The conduct of Mr. Ingersoll during the hearing showed an immaturity and inconsistency regarding [his] ability to control [his] actions and emotions. This included comments during witness testimony, attempts to stare down citizens at the hearing and providing testimony totally denying any wrongdoing on his part.

CP 9. Under this finding, the Court of Appeals determined that the Commission used Ingersoll's purported courtroom conduct as substantive evidence both to "support[] the allegation of unfitness" and "to help validate [Dr. Mays's report]." *Slip Op.* at 7, 8. The Court of Appeals ultimately

concluded that the Commission properly considered Ingersoll's courtroom conduct in upholding the mayor's termination decision. *Slip Op.* at 7, 8.

The Court of Appeals first broadly pronounced that a participant's conduct during a hearing is "always a factor that the decision-maker may consider." *Slip Op.* at 8. That may be true, but *only* for credibility purposes. A participant's conduct during a hearing is *not* a factor that the decision-maker may consider as substantive evidence. But that is exactly what the Court of Appeals sanctioned here.

The Court of Appeals held that courtroom conduct may be considered not just for purposes of evaluating credibility, but as substantive evidence. *Id.* It acknowledged that the Commission considered Ingersoll's purported courtroom conduct "as *evidence* supporting the allegation of unfitness" when it upheld the termination decision. *Id.* at 7 (emphasis added). According to the Court of Appeals, "current behavior may shed light on allegations regarding past behavior *or, as in this case, the accuracy of a third party's evaluation*." *Slip Op.* at 8 (emphasis added). The Court thus approved the Commission's use of Ingersoll's courtroom conduct as substantive evidence to infer unfitness and independently support the termination decision. CP 9 (FF 1). Finding number one indicated the Commission's use of substantive evidence to support its decision and was not a mere credibility finding.[4]

[4] The Commission *knew* how to make credibility findings: it expressly found Dr. Mays's report "credible." CP 10

Barry stated that "merely stating that a jury may have considered a defendant's demeanor without any information about that demeanor cannot establish prejudice because that consideration may have favored the defendant." 179 Wn. App. at 182. But here the record refers precisely to the evidence that the Commission considered in its decision. CP 9. And that evidence was plainly *unfavorable* to Ingersoll. Review is warranted under RAP 13.4(b)(2) because of the conflict with *Barry*.

C. This case presents an issue of substantial public interest that extends not just to administrative hearings but to any trial, hearing, or proceeding where a party's conduct is at issue.

This case allows this Court to address an issue of substantial public interest that this Court did not have the opportunity to reach in *Barry* because, before this Court, the State *conceded* the trial court's instruction that the jury could consider courtroom conduct as substantive evidence was erroneous:

> The State has conceded that the trial court's instruction was erroneous. We accept this concession for the purposes of this opinion and therefore do not reach whether a jury can ever consider a nontestifying defendant's demeanor or whether evidence may, in some circumstances, include other juror observations made during the course of a trial.

183 Wn.2d 297, 305, 352 P.3d 161 (2015) (affirming).

The significance of the issue is magnified because, as the Court of Appeals here recognized, its holding that a decision-maker may use courtroom conduct as substantive evidence is not limited to the context of administrative hearings but would apply at any "trial or hearing." *Slip Op.* at 8. Thus, under the Court of Appeals' decision, the jury in a criminal

matter may consider the accused's courtroom conduct in determining if the accused committed the charged crime. And the trial judge in a family-law matter where a spouse is accused of domestic violence may consider that spouse's courtroom conduct in determining if the accusations are true, or if a third-party assessment of the spouse is accurate. Indeed, the same principle would apply in *any* proceeding where a party's conduct is at issue.

This case presents an opportunity for this Court to align itself with the prevailing view that courtroom conduct is not substantive evidence that may be used to infer guilt. Review is warranted under RAP 13.4(b)(4).

VII. CONCLUSION

This Court should grant review to decide the issue whether a trier of fact may consider a party's conduct during a trial or hearing as substantive evidence. This issue is of substantial public interest, as it applies to any proceeding where a party's conduct is at issue. Due only to a party's concession of instructional error, this Court three years ago did not reach this issue in *State v. Barry*. This Court should accept review and align itself with the prevailing view that courtroom conduct is not substantive evidence in any proceeding.

Respectfully submitted: August 9, 2018.

CARNEY BADLEY SPELLMAN, P.S.

By _____
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney of record by the methods noted:

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DATED: August 9, 2018.

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APPENDIX A

FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

JOHN INGERSOLL, Appellant, v. CITY OF MATTAWA, Respondent.	)))))))))	No. 34848-2-III UNPUBLISHED OPINION

KORSMO, J. — John Ingersoll appeals from a civil service commission decision that upheld the termination of his job as a police officer for the City of Mattawa. Discerning no prejudicial error and concluding that the evidence supported the action, we affirm.

FACTS

Mr. Ingersoll was hired as a police officer for Mattawa in 2009. In May 2012, his wife and children left their house and were transported to a domestic violence safe house whose location was unknown to the officer. The City placed Officer Ingersoll on

administrative leave. After a three month investigation, the Mayor sent the officer a *Loudermill* letter.[1]

The letter accused the officer of domestic violence as well as harassment and intimidation of various Mattawa citizens and several other allegations. At the ensuing meeting, Officer Ingersoll denied all of the allegations against him. The Mayor sent a second *Loudermill* letter on January 25, 2013. This letter repeated the original allegations and expanded upon some of them. The letter also noted that the officer's personnel file was missing. The City also required the officer to undergo a fitness for duty examination.

Around that time, a new police chief, John Turley, was hired. Chief Turley soon found the personnel file and discovered therein a letter from Officer Ingersoll's previous employer, the King County Sheriff's Office. The letter indicated that Ingersoll had been terminated from King County for not meeting standards; that information was at odds with the statement on Ingersoll's city job application that he had resigned in good standing from the King County Sheriff's Office.

Chief Turley on February 13, 2013, issued a disciplinary notice for Ingersoll's failure to follow directions regarding service of the second *Loudermill* letter. He had not

[1] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (due process is satisfied when a public employee receives a letter listing allegations against him and informing him of the opportunity to respond).

arrived at the office to receive the letter and the copy sent by certified mail was returned unclaimed. The following month, the officer met with Dr. Mark Mays for the fitness for duty evaluation. Dr. Mays offered a lengthy report that concluded the officer had a Personality Trait Disturbance and likely would have future difficulties. Dr. Mays also noted that Mr. Ingersoll was "prone to denial" and allegedly engaged in behavior that others "describe as problematic." Clerk's Papers (CP) at 886, 887. Dr. Mays concluded, "most law enforcement agencies reviewing these results would consider John Ingersoll not to be qualified as fit for duty." CP at 887.

The Mayor issued a third *Loudermill* letter stating eight factual bases for discipline and alleging violations of Mattawa Police Civil Service Rule X, Section 2, Subsections A, B, C, and K. The rule and subsections cover disciplinary action and identified instances in which discipline may be justified. The Mayor's letter summarized the four subsections:

> Subsection A provides:
>
> > Incompetency, inefficiency, or inattention to or dereliction of duty.
>
> Subsection B provides:
>
> > Violation of law, of official rules or regulations, or orders, or failure to obey any lawful or reasonable direction when such failure or violation amounts to insubordination or serious breach of discipline.
>
> Subsection C provides:
>
> > Dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public or a fellow employee, or any other act of omission or commission tending to injure the public service; or any other willful failure on the part of the employee to properly conduct himself; or any willful violation of the provisions of Chapter 41.12 RCW or of these rules and regulations.

Subsection K provides:

> Any other act or failure to act which in the judgment of the Civil Service Commission is sufficient to show the offender to be an unsuitable and unfit person to be employed in the public service.

CP at 76. The first seven of the eight allegations involved misconduct, while the eighth relied on Dr. Mays' evaluation to conclude that Mr. Ingersoll was unfit for duty. CP at 2270-2275.

A disciplinary hearing was held May 23, 2013, in response to the third letter. On June 3, the Mayor terminated the officer's employment. A contentious civil service commission hearing was conducted over five evenings during the period of October 1 to October 7. After the City concluded its case, the Commission "scratched" several of the allegations about which it heard no evidence, including domestic violence and insubordination. The officer then presented several witnesses and testified in his own behalf. The parties then argued the case to the Commission.

The Civil Service Commission upheld the termination on December 3, 2013. Its findings and decision dismissed the first seven allegations either because they were not supported by sufficient evidence or were not acted on in time. The Commission entered five findings in support of its decision.

> 1. The conduct of Mr. Ingersoll during the hearing showed an immaturity and inconsistency regarding your ability to control your actions and emotions. This included comments during witness testimony, attempts to stare down citizens at the hearing and providing testimony totally denying any wrongdoing on his part.

2. Mr. Ingersoll's lack of acceptance that his wife and children were in a safe house, the location of which would not be disclosed, based upon his law enforcement training, should have been an acceptable explanation. The very nature of a safe house is anonymity. The Commission finds Mr. Ingersoll's conduct in attempting to locate the safe house was poor judgment and led to the making of a false missing person report. This conduct is consistent with findings in a fitness-for-duty examination regarding self-indulgent behaviors and inconsistency regarding his position as a police officer.

3. Mr. Ingersoll's conduct in an incident involving two Hispanic gentlemen at Ken's Corner also evidences poor judgment. The Commission finds the incident shows a disregard of the boundaries between his private capacity and that of a police officer. Recognizing a police officer has police powers 24 hours of the day, does not justify seizing property and then leaving the scene of the incident without calling for assistance by an on-duty police officer. This conduct evidences the type of inconsistent police performance referenced in the fitness-for-duty letter of April 3, 2013.

4. Substantial testimony was heard regarding the testing on a DUI case. The Commission does not find the testing protocol to be the relevant issue; however, the Commission does find the testimonies of the other officers present indicate Mr. Ingersoll lacked self control in dealing with this matter, which again evidences behavior described in the fitness-for-duty exam.

5. The Commission finds the report of Dr. Mays to be credible and the assessment to be consistent with conduct as stated above.

CP at 9-10.

Mr. Ingersoll petitioned the Grant County Superior Court for review of the decision; the City cross petitioned. After the hearing, the court rejected Mr. Ingersoll's petition and declined to address the cross petition. Mr. Ingersoll then timely appealed to this court. A panel heard oral argument on the case.

ANALYSIS

This appeal presents two issues. Mr. Ingersoll contends that the Commission erred in considering his behavior during the hearing. He also contends that the Commission's decision was arbitrary and capricious. Before turning to those issues, we initially note the standards that govern our review of this case.

In an appeal from a superior court decision upholding a city civil service commission's affirmance of the discharge of a police officer, this court directly reviews the record considered by the superior court and determines whether the commission's conclusions could be, as a matter of law, arbitrary, capricious, or contrary to law. *Benavides v. Civil Serv. Comm'n*, 26 Wn. App. 531, 534, 613 P.2d 807 (1980). Under the arbitrary and capricious standard, this court must uphold the Commission unless it finds willful and unreasoning action in disregard of the facts and circumstances. *Skagit County v. Dep't of Ecology*, 93 Wn.2d 742, 749, 613 P.2d 115 (1980). A decision by an administrative commission is not arbitrary and capricious simply because this court concludes, after reading the record, it would have decided otherwise; only a finding or decision made without evidence to support it is arbitrary. *State ex rel. Perry v. City of Seattle*, 69 Wn.2d 816, 821, 420 P.2d 704 (1966).

Behavior at Hearing

Mr. Ingersoll argues that the Commission erred in considering his behavior during the hearing because (1) it postdated the decision to terminate his employment, (2)

punished him for denying the allegations of misconduct during his testimony, and (3) he was not provided notice that his behavior might be used against him. We conclude that none of these arguments, which we consider jointly, show that the Commission erred in considering Mr. Ingersoll's behavior as evidence supporting the allegation of unfitness.

In general, tenured, full-time city police officers covered by chapter 41.12 RCW have a property interest in continued employment. *Bullo v. City of Fife*, 50 Wn. App. 602, 607, 749 P.2d 749 (1988). The due process clause of the United States Constitution safeguards a person's property interest by requiring notice and an opportunity to be heard prior to any governmental deprivation of a property interest. *Id.*, at 606-607. The due process requirements of RCW 41.12.090 include discharge only for cause and only after written notice of the reasons for discharge, a public hearing at which the person had the opportunity to personally appear with counsel and present a defense, and the opportunity to appeal the results to the superior court. The person must be afforded an opportunity to refute the charges and present his side of the story. *Danielson v. City of Seattle*, 108 Wn.2d 788, 798, 742 P.2d 717 (1987) (discussing pretermination hearings).

A civil service commission has discretionary power to investigate whether charges brought against a police officer are sufficient grounds for dismissal, the exercise of this power is confined to the content of those charges, and the commission may not substitute reasons of its own. *In re Smith*, 30 Wn. App. 943, 947, 639 P.2d 779 (1982). As stated in the statute, "the investigation shall be confined to the determination of the question of

whether such removal, suspension, demotion or discharge was or was not made for political or religious reasons and was or was not made in good faith for cause." RCW 41.12.090. To afford the accused administrative due process, an officer must know the precise conduct that is the subject of the hearing and the basis for the discharge. *Porter v. Civil Serv. Comm'n of Spokane*, 12 Wn. App. 767, 773, 532 P.2d 296 (1975).

The parties, quite understandably, struggle to find relevant authority on the hearing room behavior issue. Typically, participants in a trial or hearing are on their best behavior in order to present themselves to the decision-maker in the best possible light. Nonetheless, the whole purpose of live testimony is to allow the decision-maker to assess the credibility of the witness. For that reason, we believe a participant's behavior during the hearing is always a factor that the decision-maker may consider. In many instances, the demeanor evidence will only serve to aid in the credibility assessment. In other instances, current behavior may shed light on allegations regarding past behavior or, as in this case, the accuracy of a third party's evaluation. Here, Mr. Ingersoll appeared to act consistently with Dr. Mays' evaluation and his actions served to help validate the report. It was not error for the Commission to consider Mr. Ingersoll's behavior and report its findings.

The argument that he was not put on notice that his behavior might be considered at the hearing also misses the mark. Mr. Ingersoll was terminated due to unfitness for duty, not for his behavior at the hearing. No warning needed to be given about

subsequent behavior because that was not the subject matter of the hearing. The fact that the behavior tended to corroborate the allegations against him may have been fortuitous for the City, but it was not something that could be predicted, let alone been the subject of prospective notice. Mr. Ingersoll controlled his own behavior. The Commission was not required to anticipate that Mr. Ingersoll might act out against his own best interests and warn him in advance that it could use his behavior against him.

More troublesome is the wording of finding 1 about Mr. Ingersoll "providing testimony totally denying any wrongdoing." CP at 9. He argues that he was punished for exercising his due process right to present his side of the story. Although that certainly would be problematic, we think the problem here is more one of unartful wording than it is a violation of due process.

The first sentence of finding 1 described his conduct at the hearing and reflected the assessment of the Commission that it "showed an immaturity and inconsistency regarding your ability to control your actions and emotions." CP at 9. The second sentence, which concludes with the language challenged by Mr. Ingersoll, gave examples about the troubling behavior observed by the Commission—commenting during the testimony of others, attempting to stare down citizens attending the hearing, and totally denying any wrongdoing in his testimony. In context, this portion of the sentence simply reflects an assessment of Mr. Ingersoll's credibility and the corroboration it gave to Dr. Mays' report.

As fact-finder, the Commission was entitled to determine which witnesses it believed and which it did not. Mr. Ingersoll denied all wrongdoing despite the contrary testimony of others. If the Commission credited the other witnesses, Mr. Ingersoll's denials rang hollow. The Commission was free to comment on that determination if it saw fit to do so.

However, finding 5 suggests an additional reason for the challenged final comment of finding 1. Finding 5 states: "The Commission finds the report of Dr. Mays to be credible and *the assessment to be consistent with conduct as stated above*." CP at 10. The report had noted consistent denial of any wrongdoing whatsoever as a character trait of Mr. Ingersoll that contributed to Dr. Mays' conclusion that Mr. Ingersoll had a Personality Trait Disturbance. Viewed in this light, the statement from finding 1 merely notes the "behavior" of total denial despite the contrary evidence. Mr. Ingersoll simply could not accept the possibility that he might have been in the wrong.

While this statement could have been better drafted, we do not read it as punishing Mr. Ingersoll for denying the case against him. Instead, it simply recognizes that his consistent practice of denying all wrongdoing was a part of the trait diagnosed by Dr. Mays.

Although unartful, the challenged language of finding 1 is not indicative of prejudicial error by the Commission. This assignment of error is without merit.

Commission's Decision

Mr. Ingersoll also argues that the Commission's decision was arbitrary and capricious. Specifically, he contends that the Commission erred in relying upon the seven "misconduct" factors that it rejected as grounds for termination and in relying on Dr. Mays' report. We address the first contention before turning to the second.

As noted previously, this court must uphold the Commission unless it finds willful and unreasoning action in disregard of the facts and circumstances. *Skagit County*, 93 Wn.2d at 749. Mr. Ingersoll has not established that the Commission's decision was arbitrary or capricious under this demanding standard.

Mr. Ingersoll first finds fault with the Commission's consideration of the facts of three of the incidents that it determined did not, on their own, independently justify the termination decision. He argues that the dismissed counts could not thereafter be considered. However, the Commission carefully limited what it "dismissed" and why it did so. Although some of the misconduct allegations were dismissed for insufficient evidence, others were rejected due to failure to take timely disciplinary action. CP at 9. The Commission then determined:

> Although the allegations set forth in these paragraphs do not support termination of employment for misconduct, the conduct in question does provide background evidence regarding fitness-for-duty and, for purposes of this decision, are considered by the Commission.

CP at 9 (emphasis added).

We are aware of no rule that would require the Commission to limit its consideration of these incidents merely to the misconduct prong of the rules.[2] Given that Dr. Mays relied on some of these incidents in his assessment of Officer Ingersoll's fitness for duty, it was understandable that the Commission would do the same *if* it found that the incidents occurred as described by the witnesses. The action was not arbitrary or capricious. The Commission did not err in its consideration of the incidents described in findings 3, 4, and 5.

Mr. Ingersoll also argues that the Commission erred in finding him unfit for duty, contending both that (1) the termination letter did not use any variant of the word "mental" in front of the unfit for duty allegation and (2) that it was error to rely on the report of Dr. Mays. Neither of these contentions merits much discussion.

The Civil Service rule governing fitness for duty states:

> Any other act or failure to act which in the judgment of the civil service commission is sufficient to show the offender to be an unsuitable and unfit person to be employed in the public service.

CP at 1600 (Rule X, Section 2, Subsection K of Rules of Mattawa Police Civil Service Commission). As noted therein, there is no adjective qualifying the meaning of the word "unfit." The third *Loudermill* letter simply stated that he was "not fit for duty" in accordance with the report of Dr. Mays. CP at 2274. That reference strongly informed

[2] *Cf.* ER 105 (requiring court to instruct jury when evidence may be considered only for a limited use).

Mr. Ingersoll that his mental health, not physical capacity, was in question. The Commission similarly found that Mr. Ingersoll was "not fit for duty." CP at 10.

No "mental unfitness" qualification needed to be alleged, nor was any found. However, the City expressly relied on the report of Dr. Mays to support the unfitness finding and that allegation gave Mr. Ingersoll notice that only his mental fitness was at issue. There was no undisclosed allegation of physical unfitness.

Finally, the argument that the report of Dr. Mays could not be relied on is without merit. Mr. Ingersoll and the City both offered the report as exhibits before the Commission, and the exhibit entered (along with numerous others) by agreement of the parties. CP at 577, 2255, 1616. His hearing brief also referenced the exhibit. CP at 31. Having offered the exhibit and relied on it below, he can hardly complain on appeal that the Commission also relied on it.[3]

Similarly, the fact that Dr. Mays did not testify is meaningless. Mr. Ingersoll was very unlikely to want to have him testify, but certainly could have objected to the report if he had wanted the doctor to appear in person. Moreover, there was significant testimony at trial to corroborate some of the incidents discussed in the report. He was not found unfit for duty merely on the basis of multiple levels of uncorroborated hearsay as he now alleges.

[3] This argument likely is foreclosed by the invited error doctrine. *E.g.*, *Humbert v. Walla Walla*, 145 Wn. App. 185, 192, 185 P.3d 660 (2008).

The Commission did not err in relying upon the report. It amply supported the determination that Mr. Ingersoll was unfit to work as a police officer.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Siddoway, J.

APPENDIX B

FILED
MAY 29, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

JOHN INGERSOLL, Appellant, v. CITY OF MATTAWA, Respondent.	)	No. 34848-2-III ORDER DENYING MOTION TO PUBLISH

THE COURT has considered appellant's motion to publish the opinion of April 24, 2018, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion to publish the opinion of this court's decision of April 24, 2018, is hereby denied.

PANEL: Judges Korsmo, Lawrence-Berrey, Siddoway

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
Chief Judge

APPENDIX C

Renee S. Townsley
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July 11, 2018

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CASE # 348482
John Ingersoll v. City of Mattawa
GRANT COUNTY SUPERIOR COURT No. 142000118

Counsel:

Please see the enclosed Clerk's Ruling Recalling Mandate pursuant to RAP 12.9(b).

A Petition for Review to the Supreme Court if filed, must be received by this Court within 30 days of the Ruling Recalling Mandate. If not filed, the case will be Mandated.

Sincerely,

Renee S. Townsley
Clerk/Administrator

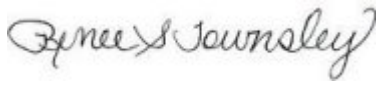
RST:bls
Cc: Hon. John M. Antosz **E-MAIL**
Grant County Superior Court **E-MAIL**

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

JOHN INGERSOLL, **Appellant,**	)	
v.	)	**CLERK'S RULING RECALLING MANDATE**
CITY OF MATAWA, **Respondent.**	)	**No. 34848-2-III**

Given the Motion to Publish Order filed on May 29, 2018 was inadvertently not distributed to the parties, the Mandate issued on July 10, 2018 is hereby recalled. RAP 12.9(b).

DATED: July 11, 2018



RENEE S. TOWNSLEY
CLERK

CARNEY BADLEY SPELLMAN

August 09, 2018 - 10:33 AM

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