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No. 50467-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

RODMAN ALFRED WIDING,

Appellant.

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

The Honorable Derek J. Vanderwood, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Rod Widing, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Widing seeks review of the unpublished opinion of the Court of Appeals in cause number 50467-7-II, filed February 26, 2019. *State v. Widing*, 2019 WL 951407. A copy of the decision is in the Appendix A at pages A-1 through A-10.

C. ISSUE PRESENTED FOR REVIEW

1. Should this Court accept review where the petitioner received ineffective assistance of counsel in a commitment hearing following a finding of not guilty by reason of insanity, where his attorney failed to object to the state expert's testimony discounting the defense theory that a psychotic episode was caused by copper toxicity and acute renal failure, where the witness was trained in the area of psychology and not in the area of toxicity?

D. STATEMENT OF THE CASE

1. Procedural history:

Widing was found not guilty by reason of insanity for first and second degree assault, and appealed from the trial court's order of commitment to Western State Hospital. Widing asserted at the hearing that the episode of psychosis was temporary in nature and was caused by copper

toxicity and acute renal failure. *State v. Widing*, slip. op. at *1.

The trial court ordered Widing's commitment based on a finding that he presented a substantial danger to others. *Widing*, slip. op. at *1.

By unpublished opinion filed February 26, 2019, the Court of Appeals, Division II, affirmed order of commitment to Western State Hospital. *Widing*, slip. op. at *10.

Widing now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this Court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. **TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO CHALLENGE DR. RICE'S TESTIMONY ATTRIBUTING THE PSYCHOTIC EPISODE TO AN UNTREATED BIPOLAR DISORDER AND HER TESTIMONY THAT THE EPISODE WAS CAUSED BY COPPER TOXICITY WAS "IMPROBABLE"**

The federal and state constitution's guarantee a criminal defendant the right to counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22. Defense counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. *Strickland v. Washington*, 466

U.S. 668, 84-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. To establish the first prong of the *Strickland* test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 229-30. To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

A lawyer's strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. *Strickland*, 466 U.S. at 690. In reviewing the first prong of the *Strickland* test, the appellate

courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. *Strickland*, 466 U.S. at 689-90; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Only legitimate trial strategy or tactics constitute reasonable performance. *State v. Kylo*, 166 Wn.2d 856, 869, 215 P.3d 177 (2009).

The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687.

Failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the verdict would have been different had the evidence not been admitted. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Counsel's failure to challenge the credentials of Dr. Rice and challenge her testimony discounting the opinion of Dr. Singer that the psychosis was caused by copper toxicity and acute renal failure constitutes ineffective assistance of counsel. *Strickland, supra*, and *Thomas, supra*.

Regarding expert witnesses, ER 702 states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

When considering the admissibility of testimony under ER 702, the reviewing court engages in a two-part inquiry: “(1) does the witness qualify as an expert; and (2) would the witness's testimony be helpful to the trier of fact.” *State v. Guillot*, 106 Wash.App. 355, 363, 22 P.3d 1266 (citing *State v. Farr-Lenzini*, 93 Wash.App. 453, 460, 970 P.2d 313 (1999)), review denied, 145 Wash.2d 1004, 35 P.3d 381 (2001).

In this case, several doctors provided opinions regarding Mr. Widing's mental state at the time of the psychotic episode.

Dr. Rice evaluated Mr. Widing's mental condition and opined that he was insane at the time of the offense against Ms. Meisenheimer, that he suffered from brief psychotic disorder, unspecified bipolar disorder or other related disorder with manic episode with mood congruent with psychotic features. Dr. Larsen opined that Widing had suffered from psychosis as a result of acute renal failure. Dr. Singer opined that Mr. Widing had experienced psychosis related to copper toxicity. Last, Dr. French and Dr. Predmore testified that Widing's psychosis was not as a result of ingesting drugs. RP at 154.

Dr. Rice, a psychologist, initially filed an evaluation concluding that

Widing's risk for future dangerousness to others was medium to low, but then amended her report and concluded that his risk for future dangerousness to others was high. 3RP at 242. Dr. Rice also testified that she "reviewed with psychiatrists and our doctoral level pharmacologist at Western State Hospital" the issue of copper toxicity. 3RP at 223. She stated that her conclusion was that copper toxicity as the cause of the episode "could be possible, it seemed improbable, particularly compared to either a bipolar disorder that had been sort of masked and untreated prior to the incident offense episodes---or leading up to and during---and then the cannabis use." 3RP at 223-24.

Trial counsel did not object to Dr. Rice's foray into medical diagnosis. Considering that this case boiled down to a battle between the experts, it was objectively unreasonable for counsel to allow the State's expert to depart from the field of psychology and veer into the realm of toxicity and medical opinion without a demonstration of the appropriate credentials to do so.

A trial court has discretion to determine a witness' qualifications as an expert. *In re Detention of A.S.*, 138 Wn.2d 898, 917, 982 P.2d 1156 (1999). An expert may be qualified to testify to specialized knowledge if he has training and experience in a relevant field. *State v. McPherson*, 111 Wn. App. 747, 761-762, 46 P.3d 284 (2002). However, a witness may not testify to matters that go beyond his area of expertise. *Queen City Farms*,

Inc. v. Central National Insurance Company of Omaha, 126 Wn.2d 50, 102-103, 882 P.2d 703 (1994).

In this case the record shows that Dr. Rice's training did not qualify her to critique and ultimately discount Dr. Singer's opinion; she did not have the same kind of training that Dr. Singer does in the area of toxicology, despite the Court's finding that Dr. Singer had not studied the area of copper toxicity "for very long." Finding of Fact 20. CP 75.

Dr. Rice was not only not qualified, but her testimony exceeded the scope of practice in the licensing statute for psychologists. RCW 18.83.010¹, the licensing statute for psychologists, specifies the scope of practice of a psychologist. Her testimony delved in the area reserved for physicians. RCW 18.71.011,² the licensing statute for physicians, other hand, specifies the scope of practice of a physician.

¹ (1) The "practice of psychology" means the observation, evaluation, interpretation, and modification of human behavior by the application of psychological principles, methods, and procedures for the purposes of preventing or eliminating symptomatic or maladaptive behavior and promoting mental and behavioral health. It includes, but is not limited to, providing the following services to individuals, families, groups, organizations, and the public, whether or not payment is received for services rendered:

(a) Psychological measurement, assessment, and evaluation by means of psychological, neuropsychological, and psycho educational testing;
(b) Diagnosis and treatment of mental, emotional, and behavioral disorders, and psychological aspects of illness, injury, and disability; . . .

² A person is practicing medicine if he or she does one or more of the following:

(1) Offers or undertakes to diagnose, cure, advise, or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, by any means or instrumentality;
(2) Administers or prescribes drugs or medicinal preparations to be used by any other person[.]

Regarding the cause of the psychotic episode, Dr. Rice opined that Dr. Singer's assessment that copper toxicity was the cause was "improbable," and instead claimed it was caused by an untreated bipolar disorder, a theory not endorsed by any of the other witnesses. Dr. Rice stated:

[T]he harder question is what may have triggered that psychotic disorder. So cannabis-induced psychoses was a hypothesis and/or a bipolar disorder with psychotic features, which at the time I really felt could not be differentiated or ruled out. Mr. Widing, in our interview, had indicated he was at an initial stage in February of 2016 of exploring the copper toxicity hypothesis, which Dr. Singer later testified on in a September 1st hearing. And I did, after the interview, receive, oh, more like research-article-type documents — not really a research article, it would be more like case-study-type documents from defense regarding that.

I reviewed with psychiatrists and our doctoral-level pharmacologist at Western State Hospital the available copper. I think it was serum and urine levels, including the follow up at Kaiser for — it's a ophthalmological exam where you're looking for copper within the eyes, basically deposits. What my — the ultimate conclusion, with — including those consultations, was while such a cause could be possible, it seemed improbable, particularly compared to either a bipolar disorder that had been sort of masked and untreated proper to the in-cent offense episodes, ---or leading up to and during --- and then the cannabis use. There was significant cannabis use there.

RP at 223-24.

Here, Dr. Rice's testimony strongly discounting the possibility of toxicity and renal failure was outside her area of practice and instead was clearly medical in scope. Moreover, Dr. Rice's testimony favored her own theory of a "bipolar discord that had been sort of masked and untreated." RP

at 223. It should be noted that Dr. Rice's theory of an untreated bipolar disorder and cannabis use was not endorsed by any of the other expert witnesses; Dr. Larson believed the psychotic episode was the result of actual renal failure. Dr. French and Dr. Predmore did not believe that the episode was the result of ingesting substances. RP at 154.

Trial counsel was ineffective due to his failure to object to Dr. Rice's opinion in light of her lack of minimum qualifications to render a medical opinion regarding possible toxicological causes of the temporary psychosis.

Moreover, the failure to object to Dr. Rice's testimony regarding copper toxicity was prejudicial to Mr. Widing's defense. The case rested upon credibility of the experts, and in particular, involved competing theories regarding the cause of Widing's psychotic episode. The court, by rejecting Dr. Singer's theory, apparently for the reason that he had not "been studying the issue of copper toxicity very long," implicitly endorsed Dr. Rice's theory of a bipolar disorder and cannabis use. The court did not make specific findings regarding Dr. Rice's testimony, but it implicitly accepted her testimony discounting copper toxicity as a cause by rejecting Dr. Singer's testimony regarding copper toxicity. The court found:

20. Dr. Singer, by his own admission, hadn't been studying the issue of copper toxicity very long.

21. Dr. Singer's lack of experience undercuts the Court's confidence in his risk assessment and the Court

Clerk's Papers at 77.

The court clearly dismissed Dr. Singer's testimony regarding copper toxicity. Finding of Fact 21. Axiomatically, the court must have accepted Dr. Rice's testimony discontinuing copper toxicity as the cause of the episode, despite making findings regarding her testimony.

The improper expert testimony of Dr. Rice that it was "improbable" that copper toxicity was a cause of the psychotic episode, and her opinion that the episode was caused by an untreated bipolar disorder, and counsel's failure to object to the same, was prejudicial to Mr. Widing. It cannot be concluded that Dr. Rice's testimony had no impact on the court's ruling.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced error in the unpublished opinion of the court below.

DATED: March 27, 2019.

Respectfully submitted,
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CERTIFICATE OF SERVICE

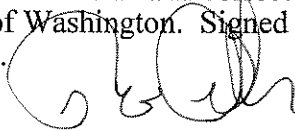
The undersigned certifies that on March 27, 2019, that this Appellant's Petition for Review was sent by the JIS link to Derek Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 27, 2019.



PETER B. TILLER

APPENDIX A

February 26, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RODMAN ALFRED WIDING,

Appellant.

No. 50467-7-II

UNPUBLISHED OPINION

MAXA, C.J. – Rodman Widing appeals the trial court’s order of commitment to Western State Hospital following the court’s ruling that he was not guilty by reason of insanity for charges of first and second degree assault. The charges arose from a psychotic episode in which he choked his wife, Athena Meisenheimer. Widing claimed that his psychosis was temporary and was caused by copper toxicity and acute renal failure. The trial court ordered Widing’s commitment based on a finding that he presented a substantial danger to other people unless kept under control.

Initially, we decline to consider Widing’s argument that Patricia Rice, Ph.D., a psychologist, was not qualified to give an expert opinion regarding copper toxicity because Widing did not object to that testimony in the trial court. We hold that (1) substantial evidence supports the trial court’s finding that Widing presented a substantial danger to others unless kept under further control, and (2) Widing did not receive ineffective assistance of counsel when

defense counsel failed to object to Dr. Rice's testimony regarding copper toxicity because Widing cannot show prejudice.

Accordingly, we affirm the trial court's order committing Widing to Western State Hospital.

FACTS

In June 2015, Meisenheimer noticed that Widing was acting strangely. Widing seemed to be hallucinating or in some type of psychotic episode. Meisenheimer thought that Widing's behavior related to his use of marijuana.

Widing subsequently pinned Meisenheimer down on the bed and choked her until she lost consciousness. When Meisenheimer regained consciousness she managed to call the police.

When the responding deputies arrived Widing was running around, eating handfuls of dirt and grass and yelling for the officers to kill him. Widing was sedated and taken to the hospital for evaluation. He was experiencing acute renal failure and elevated levels of copper in his urine.

The State charged Widing with first degree assault and second degree assault, both with a domestic violence aggravator. Widing pleaded not guilty by reason of insanity.

Acquittal by Reason of Insanity

Widing filed a motion for acquittal by reason of insanity. In considering the motion, the trial court heard testimony from Rice; Dr. Raymond Singer, a neuropsychologist and neurotoxicologist; Dr. Loren Keith French, a physician at the hospital that treated Widing; and Dr. David Predmore, a forensic toxicologist. The court also considered reports from Dr. Rice and Dr. Jerry Larsen, a psychiatrist.

Dr. Rice evaluated Widing's mental condition and submitted a forensic mental health report. She concluded that Widing was insane at the time of the offense and was unable to tell right from wrong with respect to his assault on Meisenheimer.

Dr. Rice formed the diagnostic impression that Widing suffered from brief psychotic disorder, unspecified bipolar disorder or other related disorder with manic episode, with mood congruent psychotic features. However, the other medical experts provided alternative diagnoses. Dr. Larsen concluded that Widing had suffered from psychosis as a result of his acute renal failure. Dr. Singer concluded that Widing had experienced psychosis related to copper toxicity. And Dr. French and Dr. Predmore testified that Widing's psychosis was not the result of voluntarily ingesting any substances.

After receiving evidence, the trial court heard argument on Widing's motion. The court acquitted Widing of the charged crimes because of insanity.

Commitment to Western State Hospital

The trial court then addressed whether Widing should be involuntarily committed to Western State Hospital. Dr. Rice engaged in further assessment and prepared a report evaluating Widing's risk for future danger to others.

Dr. Rice's initial forensic mental health evaluation concluded that Widing's risk for future dangerousness to others was medium to low. However, Dr. Rice later consulted with colleagues and amended her report. Dr. Rice's amended report concluded that Widing's risk for future dangerousness to others was high.

In particular, Dr. Rice stated that although Widing was unable to tell right from wrong during the attack, he demonstrated a capacity to contain and direct his actions and act purposefully to achieve his intended outcomes within the context of his delusional beliefs. Dr.

Rice also stated that Widing's behavior during the attack was far beyond normal behavior for either the general population or the population of people with mental disorders. Dr. Rice noted that Widing's lack of insight into the specific cause of his psychosis could increase Widing's risk because he might be unwilling to acknowledge that he had a significant mental disorder.

In addressing whether Widing should be involuntarily committed, the trial court considered the evidence presented in the previous proceedings. The court also heard further testimony from Dr. Rice about her amended report. Dr. Rice stated that she had initially overvalued the fact that Widing was doing well out of custody. She stated that upon reconsideration Widing presented a high risk because the offenses he committed while insane were beyond the norm for any population, the circumstances of his personal life suggested a higher risk, and he had a history of substance abuse issues.

The trial court found that Widing presented a substantial danger to other people unless kept under further control. This conclusion was based on the severity of the charged offenses and the lack of clarity about the underlying cause of his insanity. The court stated in its oral ruling that Widing had proposed continuing with his current course of treatment as an alternative to hospitalization. However, the court ruled that given the seriousness of the offense, the current course of treatment did not have enough supervision. Therefore, the court ruled that Widing should be placed in treatment at Western State Hospital, and entered an order of commitment.

Widing appeals the trial court's commitment order.

ANALYSIS

A. ADMISSIBILITY OF DR. RICE'S EXPERT TESTIMONY

Widing argues that the trial court erred under ER 702 by admitting Dr. Rice's expert testimony at the commitment hearing that it was highly improbable that copper toxicity was the

cause of his psychosis. He argues that, as a psychologist, Dr. Rice was not qualified to give expert opinions on toxicity. We decline to consider this argument.

Widing did not challenge the admissibility of Dr. Rice's expert opinion testimony on toxicology in the trial court. Under RAP 2.5(a), we generally will not review claims raised for the first time on appeal. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). However, RAP 2.5(a)(3) permits a party to raise such a claim if the issue amounts to a "manifest error affecting a constitutional right." To determine whether we consider an unpreserved error under RAP 2.5(a)(3), we inquire whether (1) the error is truly of a constitutional magnitude, and (2) the error is manifest. *Kalebaugh*, 183 Wn.2d at 583.

The trial court's erroneous admission of expert testimony under ER 702 does not necessarily implicate a defendant's constitutional rights. *See State v. Barr*, 123 Wn. App. 373, 380, 98 P.3d 518 (2004). And Widing does not argue that a constitutional right was implicated. Accordingly, we decline to consider Widing's ER 702 challenge.

B. FINDING OF SUBSTANTIAL DANGER TO OTHERS

Widing argues that the trial court erred by finding that he presented a substantial danger to others unless kept under further control. He claims that substantial evidence does not support the court's finding. We disagree.

1. Legal Principles

RCW 10.77.110(1) states that the trial court must order the hospitalization or appropriate alternative treatment of a defendant who is acquitted by reason of insanity "[i]f it is found that such a defendant is a substantial danger to other persons, or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further

control.” However, if the defendant is acquitted and found not to be a substantial danger to others, the trial court must release the defendant. RCW 10.77.110(1).

Under this statute, to involuntarily commit an insanity acquittee the trial court must find that the acquittee suffers from a mental illness and is a danger to others. *State v. Beaver*, 184 Wn.2d 321, 332, 358 P.3d 385 (2015). The State bears the burden of proving that the defendant presents a substantial danger to others. *State v. Wilcox*, 92 Wn.2d 610, 612-14, 600 P.2d 561 (1979). Whether an insanity acquittee presents a substantial danger to others is a question of fact.¹ *State v. Klein*, 156 Wn.2d 102, 121, 124 P.3d 644 (2005). Further, “[w]e generally do not substitute our judgment for that of the trier of fact regarding issues of conflicting expert testimony.” *Id.*

We review a trial court’s findings on substantial danger to determine if substantial evidence supports those findings. *See State v. Chanthabouly*, 164 Wn. App. 104, 128-29, 262 P.3d 144 (2011) (addressing findings for insanity acquittal). Unchallenged findings of fact are verities on appeal. *Id.* at 129.

2. Analysis

a. Substantial Danger to Others

The trial court found that “Dr. Rice authored an amendment to her initial report that assessed the defendant as having a high risk of future dangerousness to others.” Clerk’s Papers (CP) at 77. Widing does not challenge this finding. He does challenge a related finding that Dr. Rice’s amended report concluded that “the defendant’s risk of future dangerousness to others

¹ Contrary to *Klein*, the trial court entered conclusions of law stating that Widing presented a danger to others. Where a trial court erroneously labels a conclusion of law that is properly considered as a finding of fact, this court treats the conclusion as a finding of fact. *State v. Marcum*, 24 Wn. App. 441, 445, 601 P.2d 975 (1979). Accordingly, we review the trial court’s conclusion of law as a question of fact.

was high.” CP at 77. And he challenges the court’s finding that Widing presented a “substantial danger to other persons unless kept under further control.”² CP at 78.

As the trial court found, Dr. Rice’s initial evaluation was that Widing’s risk for future dangerousness to others was medium to low. But the evidence was undisputed that Dr. Rice stated in her amended report that Widing presented a high risk because of the serious nature of the offense. And Dr. Rice explained in her testimony why she amended her report. This evidence supports the trial court’s factual finding that Dr. Rice’s amended report stated that Widing’s risk of future dangerousness to others was high. And that evidence also supports the trial court’s finding that Widing presented a substantial danger to other persons unless kept under further control.

Widing argues that the record does not support the trial court’s findings regarding Dr. Rice’s opinions because Dr. Rice’s opinions were based on her use of the Historical Clinical Risk Management–20 instrument. He claims that because the record does not contain Rice’s methodology, the support for Rice’s conclusions is vague. But Widing does not argue that Rice’s methodology makes her report inadmissible, only that the trial court should not have relied on Rice’s report. We do not weigh evidence. *See State v. Monaghan*, 166 Wn. App. 521, 534, 270 P.3d 616 (2012).

We conclude that substantial evidence supports the trial court’s findings that Dr. Rice’s amended report stated that Widing’s level of future dangerousness was high and the finding that Widing presented a substantial danger to others unless placed under further control.

² The trial court stated this finding as a conclusion of law. But as stated above, the determination of whether Widing presented a substantial danger to other persons is a question of fact. *Klein*, 156 Wn.2d at 121.

Accordingly, we hold that the trial court did not err in ordering that Widing be committed to Western State Hospital under RCW 10.77.110(1).

b. Additional Challenged Findings

Widing challenges findings of fact 21 and 24 in his assignments of error. Finding of fact 21 states, “Dr. Singer’s lack of experience undercuts the Court’s confidence in his risk assessment and the Court is not convinced the defendant’s behavior at the time of this event was caused solely by copper toxicity.” CP at 77. Finding of fact 24 states, “The alternative program proposed by defense appears to lack the necessary structure.” CP at 77.

However, Widing provides no substantive argument to support his claims and did not include the proposed alternative program in the record. We may decline to consider claims that a party does not argue in its briefs. *See State v. Bello*, 142 Wn. App. 930, 932 n.3, 176 P.3d 554 (2008). And as the appellant, Widing is responsible for designating the necessary portions of the record for review. RAP 9.6(a); *State v. Drum*, 168 Wn.2d 23, 38-39 n.3, 225 P.3d 237 (2010). Therefore, we decline to consider Widing’s challenge to finding of fact 21 or 24.³

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Widing argues that he received ineffective assistance of counsel because defense counsel did not challenge Rice’s qualification to testify about whether copper toxicity contributed to his psychosis. He argues that if defense counsel had challenged that testimony and that portion of Rice’s report the trial court would have found that he was not a substantial danger to others. We hold that even if defense counsel was deficient, Widing cannot show prejudice.

³ In any event, substantial evidence supports these findings. Both findings relate to the trial court’s assessment of the evidence, and we will not second guess such an assessment. *See Monaghan*, 166 Wn. App. at 534.

Ineffective assistance of counsel is a constitutional error, arising from the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). Persons subject to commitment proceedings are entitled to effective assistance of counsel. *In re Det. of T.A.H.-L.*, 123 Wn. App. 172, 179, 97 P.3d 767 (2004).

To prevail on an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *Estes*, 188 Wn.2d at 457-58. Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 458. Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. *Id.*

Here, even if defense counsel's performance was deficient, there was no prejudice. Dr. Rice did not provide a strong testimony regarding copper toxicity. Under direct questioning by the trial court, she specifically declined to give an opinion on whether Widing had experienced copper toxicity. She did not testify about the results of Widing's copper toxicity evaluations or offer an opinion on whether Widing had experienced copper toxicity. Dr. Rice stated only that copper toxicity was one possible contributing factor to Widing's psychosis, but that given all the other possibilities her opinion was that it was highly improbable.

Further, the trial court did not rely on Dr. Rice's testimony in determining that Widing's psychosis was not based on copper toxicity. The court made no findings regarding that testimony. And the court did not find Dr. Singer's testimony that copper toxicity caused Widing's psychotic state to be credible. The court made the following findings:

20. Dr. Singer, by his own admission, hadn't been studying the issue of copper toxicity very long.

21. Dr. Singer's lack of experience undercuts the Court's confidence in his risk assessment and the Court is not convinced the defendant's behavior at the time of this event was caused solely by copper toxicity.

CP at 77.

Widing has not shown that but for defense counsel's failure to object to Dr. Rice's copper toxicity testimony, there was a reasonable probability that the trial court's ruling would have been different. Accordingly, we hold that Widing's claim of ineffective assistance of counsel fails.

CONCLUSION

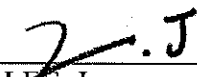
We affirm the trial court's order committing Widing to Western State Hospital.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.




MAXA, C.J.

We concur:



LEE, J.



MELNICK, J.

THE TILLER LAW FIRM

March 27, 2019 - 4:00 PM

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