Supreme Court No. 101324-8
Court of Appeals No. 83491-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN LEE BROWN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Steven Brown, 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

Brown seeks review of the unpublished opinion of the Court of Appeals in cause number 83491-6-I, 2022 WL 3715062 (Slip Op. August 29, 2022). A copy of the decision is attached as Appendix A at pages A-1 through A-16.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review where the lower court erred by appointing Dr. Jaime Wilson as a "qualified expert" and by allowing Dr. Wilson to opine that Brown was competent to stand trial where Dr. Wilson also provided Brown with competency restoration treatment, creating an overt conflict of interest in violation of the "multiple relationship" ethical standards of the American Psychological Association?

2. Should this Court accept review where the trial court

abused its discretion by finding Brown competent to stand trial where Dr. Jaime Wilson served in a "dual agency" role as both Brown's competency restoration treatment provider and also as Brown's evaluator regarding whether Mr. Brown's competency was restored following restoration treatment provided by Dr. Wilson?

3. Should this Court accept review where Dr. Wilson was not a "qualified" expert as required by RCW 10.77.060(1)(a) where Dr. Wilson was engaged in "multiple relationships" and had an actual conflict of interest by providing a competency evaluation that directly "commented on" the effectiveness or lack thereof of Dr. Wilson's competency restoration treatment?

D. STATEMENT OF THE CASE

1. Procedural history

Steven Brown was charged by information filed July 15, 2016 in Pierce County Superior Court with two counts of second-degree child molestation, one count of second-degree rape of a child, and one count of third-degree child molestation. Clerk's Papers (CP) at 605-07. The offenses were alleged to have

occurred between August 11, 2012 and August 10, 2014. CP at 605-07. Mr. Brown is deaf and required an American Sign Language ("ASL") interpreter who translates to a certified deaf interpreter ("CDI") during almost all of the proceedings. RP (10/4/19) at 23.

2. Competency proceedings

Brown's counsel noted that he may have competency issues and an order for companion evaluation was entered January 27, 2017. CP at 619-25. Defense counsel hired Dr. Jamie Wilson, a clinical psychologist who works with deaf patients to conduct a forensic psychological evaluation. CP at 631-645. The defense hired Dr. Wilson so that Mr. Brown would not have to go into custody at WSH. CP at 884. Dr. Wilson filed a report dated April 6 and 13, 2017, finding that Mr. Brown was not competent to stand trial. CP at 644-45; RP (4/3/18) at 5. Dr. Wilson opined that Mr. Brown has "extreme impairment" and that this classification is largely based on communication barriers with his attorney. CP at 644.

The State hired Dr. Ray Hendrickson, a licensed

psychologist, who also holds a Juris Doctorate, to conduct a forensic evaluation of Mr. Brown. RP (4/3/18) at 5. Dr. Hendrickson conducted an evaluation in June 2017 using an American Sign Language interpreter and Certified Deaf Interpreter. RP (8/15/20) at 89; CP at 672. Dr. Hendrickson filed a forensic mental health report dated August 9, 2017 in which he found that Mr. Brown was not competent to stand trial, that his ability to have a rational understanding of the court proceedings is "significant impaired," and that the symptoms of his mental disease or defect "significantly impair his ability to consult with his attorney with a reasonable degree of rational understanding." CP at 676. Dr. Hendrickson recommended competency restoration involving "intense one-on-one instruction" with an ASL and CDI interpreter. CP at 676. Defense counsel noted that the issue was not mental health, but "a learning situation." RP (4/3/18) at 5.

Brown was transferred to Western State Hospital for 90 day competency restoration. CP at 721. Dr. Johnathan Sharrette, a licensed psychologist completed an inpatient forensic

competency report dated July 20, 2018. CP at 725-42. Dr. Sharrette opined that Mr. Brown lacks the capacity to understand the nature of the proceedings and to assist in his own defense due to mental disorder. CP at 740. WSH staff reported that no outpatient competency restoration program was available for him. RP (4/3/18) at 5.

The case came on for a series of competency hearings in which the state contested the evaluations finding Mr. Brown incompetent. 1RP (8/15/18) at 11-98, 2RP (8/16/18) at 103-123; 3RP (8/20/18) at 129-231; 4RP (8/22/18) at 236-246.

Brown had 180 hours of competency restoration at WSH from May through July 2018. RP (8/15/18) at 25. Dr. Jonathan Sharrette, who was hired by the State, evaluated Brown and completed a psychological evaluation on July 20, 2018. RP (8/15/18) at 21; Exhibit 4. Dr. Sharrette used the Dusky Standard to evaluate Brown's competency. RP (8/15/18) at 23. Dr. Sharrette stated that the Dusky Standard is "the ability to consult with an attorney with a reasonable degree of rational understanding." RP (8/15/18) at 23. He stated that another part

of the test is to have "a rational and factual understanding of the proceedings[.]" RP at 24.

Dr. Sharrette stated that Brown lacks the capacity to understand the nature of the proceedings. RP (8/15/18) at 25. He stated that Mr. Brown received approximately 180 hours of individualized education regarding competency, the courtroom proceedings, who is present in the courtroom, the jobs of the persons in the courtroom, and "overall functioning of the courtroom" and that Brown "still had difficulty with some very basic factual information." RP (8/15/18) at 25. Dr. Sharrette said that Brown was not able to assist in his defense and that he was not aware of the specific charges against him and could not describe the charges against him even when told directly. RP (8/15/18) at 30. Dr. Sharrette stated that Brown has a mild intellectual disability and that he had a communication or language disorder including both receptive and expressive speech "over and above the deafness," and that a communication disorder is classified as a neuro developmental disorder. RP (8/15/18) at 31. Dr. Sharrette said that the results from tests he administered

to Brown were negative for malingering and that "he was not exaggerating his symptoms." RP (8/15/18) at 51.

Dr. Sharrette said that Brown remained incompetent and that a second period of restoration was not warranted following 180 hours of individualized competency restoration treatment he had previously received. RP (8/15/18) at 79.

Dr. Hendrickson completed an evaluation of Brown dated August 9, 2017. RP (8/15/18) at 92. Exhibit 3. Dr. Hendrickson used the Dusky Standard definition of incompetency. RP (8/15/20) at 93. Dr. Hendrickson testified that Brown's ability to have a rational understanding of the proceedings and to be able to assist counsel is impaired. RP (8/15/20) at 94. Dr. Hendrickson said that under the second part of the standard—which is if the defendant is unable to assist in his or her own defense— Brown lacks the ability to be able to communicate and assist his attorney because of his mental disease or defect. RP (8/15/18) at 95, RP (8/20/18) at 135. He stated that Dr. Wilson noted that Mr. Brown has a developmental disability or intellectual disability "in the mildly impaired range," that impairs his ability to have a full

understanding of the legal proceedings and impairs his ability to communicate with his attorney. RP (8/20/18) at 135. Dr. Hendrickson stated that Brown's verbal IQ is 61 and performance IQ is 75, and his full-scale IQ is 64. RP (8/20/18) at 138. Dr. Hendrickson described this as being in the deficient range and is defined as "mild impaired intellectual function." RP (8/20/18) at 138.

J.F. is the father of K.F. and C.F. RP (8/16/18) at 112. He testified that he was friends with Brown from 1996 until 2015 and that Mr. Brown graduated from Mount Tahoma High School, worked at Pizza Hut, and that he was skilled and had no difficulties making pizzas. RP at 111, 113, 114. J.F. stated that Mr. Brown had a car and driver's license, and that he deposited his paycheck at his bank and used a PIN to access his account. RP at (8/15/18) at 114, 116.

After hearing the testimony, the court found that the chart notes from WSH admitted as Exhibit 7 show that Brown has a "pretty good understanding of the court and court processes" and that the notes show more than "mere parroting of the

information," and that the understood the roles of the court participants and understood plea options. RP (8/22/18) at 242. The court did not make a specific ruling on competency and continued the hearing and directed that Dr. Wilson reevaluate Mr. Brown "to see if Mr. Brown meets the minimum threshold for competency with the Court's specific concerns articulated to him." RP (8/22/18) at 243, 244; CP at 860-61.

In September 2018, Brown had a competency re-evaluation with Dr. Wilson, who agreed with Dr. Hendrickson's conclusion that Mr. Brown is not yet competent but is restorable. In his evaluation Dr. Wilson proposed that he communicate with Brown "one on one" in a competency restoration program by his office—Wilson Clinical Services. RP (4/3/18) at 7. Defense counsel filed a motion in opposition to appointment of Dr. Wilson to perform an evaluation of Brown following restoration treatment by Dr. Wilson. CP at 883-918. Over defense objection, the court ordered that restoration treatment be provided by Dr. Wilson at Wilson Clinical Services, and that he then perform a re-evaluation of Mr. Brown's competency. RP (12/6/18) at 277.

On February 8, 2019, Dr. Wilson filed an evaluation recommending that Mr. Brown have three months of 90-minute remediation classes twice weekly at WSH, which he believed would restore Mr. Brown to competency. RP (9/27/18) at 253.

Defense counsel argued that Dr. Wilson should not conduct the restoration treatment and the following evaluation because it constituted a conflict of interest. RP (10/19/18) at 266-67; RP (12/6/18) at 276. Counsel argued that "[e]either he's going to have to say that [']yes, my restoration program works[], because it would probably be hard for him to say it doesn't work, especially now that he's doing it under contract with Western State, [Department of Social and Health Services]" and that Dr. Wilson obtained the DSHS contract in August, 2018. RP (12/6/18) at 276. The court ordered that Dr. Wilson provide the restoration services and the re-evaluation. RP (12/6/18) at 277.

On March 8, 2019, the court found that based on Dr. Wilson's evaluation dated February 8, 2019, (CP at 1210-21) that communication is the issue that prevents Brown from understanding the legal proceedings instead of a cognitive defect,

and found that Mr. Brown was competent to proceed to trial. 10RP (3/18/19) at 304.

Ultimately, the jury found Brown guilty of the inferior degree of third-degree child molestation (Count 1), second degree rape of a child (Count 2), second-degree child molestation (Count 3), and third-degree child molestation (Count 4). 7RP at 884; CP at 1146-53. On May 6, 2020, the defense filed a motion for new trial under CrR 7.5(a)(2) and (3), and motion to arrest judgment pursuant to CrR 7.8(b)(1) and (2). CP at 1220-32.

Brown appealed his convictions, challenging the trial court's appointed expert, its denial of a motion to continue and the motion for a new trial, and the imposition of community custody supervision fees. The Court affirmed the convictions, concluding that the trial court did not abuse its discretion by appointing a competency evaluator who could perform the evaluation, even though the evaluator had also provided Brown competency restoration treatment, concluding that the court did not abuse its discretion by denying the motion to continue or a motion for a new trial based on newly discovered evidence and reports of jury

conduct that inhered in the verdict. The Court reversed in part and remanded to strike supervision fees. ***Brown***, 2022 WL 3715062, at *8, 15.

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 this issue 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. RESPECTFULLY, THIS COURT SHOULD GRANT REVIEW WHERE THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING BROWN COMPETENT TO STAND TRIAL WHERE DR. WILSON SERVED IN A "DUAL AGENCY" ROLE AS BOTH BROWN'S COMPETENCY RESTORATION TREATMENT PROVIDER AND ALSO AS BROWN'S EVALUATOR REGARDING WHETHER BROWN'S COMPETENCY WAS RESTORED FOLLOWING RESTORATION TREATMENT PROVIDED BY DR. WILSON

The due process clause of the Fourteenth Amendment to the United States Constitution guarantees an accused the fundamental

right not to stand trial if he is legally incompetent. ***State v. Ortiz-Abrego***, 187 Wn.2d 394, 402-03, 387 P.3d 638 (2017). The constitutional standard for competency is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and to assist in his defense with a rational as well as a factual understanding of the proceedings against him. ***Dusky v. United States***, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). Competency is fundamental to an adversary system of justice. ***Drope v. Missouri***, 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). The due process clause not only precludes the conviction of an incompetent person but also demands a state to administer a process to determine the accused's competency if questions arise regarding the competency. ***Pate v. Robinson***, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

Washington law affords greater protection under RCW 10.77.050, which provides that "[n]o incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." Under the statutory definition, "'[i]ncompetency' means a person lacks the capacity to understand

the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(15).

Procedures of the competency statute (chapter 10.77 RCW) are mandatory and not merely directory. ***In re Pers. Restraint of Fleming***, 142 Wn.2d 853, 863, 16 P.3d 610 (2001) (citing ***State v. Wicklund***, 96 Wn. 2d 798, 805, 638 P. 2d 1241 (1982)). "Chapter 10.77 RCW governs the procedures and standards trial courts use to [assess] the competency of defendants to stand trial." ***State v. Coley***, 180 Wn.2d 543, 551, 326 P.3d 702 (2014).

Under RCW 10.77.060(1)(a), whenever there is a reason to doubt a defendant's competency, the superior court "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 further outlines the process of assessing an accused's competency once the trial court finds reason to doubt competency. Under this statute, the accused may hire his or her own expert to evaluate him or her and the accused's expert may

witness the court appointed expert's evaluation. If, after receiving the psychological evaluation, the trial court determines the accused to lack capacity, the court may commit the accused to a mental health facility for treatment for the purpose of restoring competency. RCW 10.77.086. If a defendant is determined to be incompetent, the superior court shall commit the defendant for competency restoration treatment for a period of no more than 90 days. RCW 10.77.086(1).

Failure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process. ***State v. Heddrick***, 166 Wn. 2d 898, 909, 215 P. 3d 201 (2009) (citing ***Fleming***, 142 Wn.2d at 863; ***State v. O'Neal***, 23 Wn.App. 899, 901, 600 P.2d 570 (1979)). No additional balancing of interests is necessary. ***Heddrick***, 166 Wn.2d at 904.

The determination of whether a competency examination should be ordered rests generally within the discretion of the trial court. ***State v. Thomas***, 75 Wn.2d 516, 518, 452 P.2d 256 (1969). The appointed expert's competency evaluation and report is only one consideration among many in a trial court's determination of the defendant's competency to stand trial. See ***State v. Ortiz***, 104 Wn.2d

479, 482, 706 P.2d 1069 (1985).

Here, the question is whether Brown understood the legal proceedings and whether he could assist his attorney, in particular, whether he was deprived his right to a "qualified," conflict-free expert where Dr. Wilson served two roles, one as providing therapeutic, restorative psychological treatment, and the serves as the evaluator to determine whether the services he provided were successful in restoring Brown's competency.

The Washington code of ethics for psychologists is part of the statutory context that requires "qualified" expert as used in RCW 10.77.060(1)(a) to be defined as "fit for the particular purpose" of evaluation and reporting. Therefore, it is critical that competency evaluations be conducted by qualified experts and in a qualified manner. ***State v. Sisouvanh***, 175 Wn.2d 607, 621, 290 P.3d 942 (2012). "This state's statutes express a clear public policy in favor of putting an end to unethical and unprofessional behavior on the part of therapists." ***American Home Assur. Co. v. Cohen***, 124 Wn. 2d 865, 880, 881 P. 2d 1001 (1994). Psychologists must be licensed under RCW 18.83.020(1) in order to "safeguard the people of the

state of Washington from the dangers of unqualified and improper practice of psychology." *Id.* The legislature has directed the Examining Board of Psychology to adopt a code of ethics for psychologists "designed to protect the public interest." RCW 18.83.050(5). A psychologist who violates the code commits unprofessional conduct and is subject to discipline. RCW 18.83.121(2). The language and purpose of RCW Chapter 18.130 authorizes the initiation of a disciplinary proceeding to be based upon unprofessional conduct as an expert witness. ***Deatherage v. State Examining Bd. of Psychology***, 134 Wn. 2d 131, 139-140, 948 P. 2d 828 (1997).

In this case, the trial court failed to follow the requirements of RCW 10.77.060(1)(a), and thus Brown was forced to proceed to trial without a determination of competency that complied with due process. ***Ortiz-Abrego***, 187 Wn.2d at 402; ***Fleming***, 142 Wn.2d at 863. The remedy is to vacate the convictions and remand for a new trial to take place only after a competency evaluation is completed by a conflict-free, qualified expert that complies with the mandatory, not merely directory, procedural requirements of Chapter 10.77

RCW.

The court erred in finding that Brown was competent because it should not have relied on the evaluation by Dr. Wilson because the evaluation was obtained in violation of the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct. The erred by appointing Dr. Wilson to evaluate whether Dr. Wilson's own "one on one" restoration treatment was successful in restoring Mr. Brown to competency.

Dr. Wilson's appointment by the court to prepare the evaluation violated the American Psychological Association (APA) Ethics Code 3.05 (Multiple Relationships), and 3.06 (Conflicts of Interest). American Psychological Association, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT, American Psychologist (Dec. 2002). Dr. Wilson violated Standard 3.05 and Standard 3.06 of the Code of Ethics when he acted in the role of both Mr. Wilson's evaluating psychologist and treating psychologist Pursuant to the Code of Ethics, Dr. Wilson was per se not objective when he evaluated Mr. Brown. Rule 3.05 prohibits a psychologist from entering into a professional role with a

person at the same time he is involved in another relationship that could reasonably be expected to impair his objectivity, competence, or effectiveness is performing his functions. The Ethical Principles of Psychologists and Code of Conduct states, in pertinent part,

> Section 3.05 Multiple Relationships
>
> (a) A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person....
>
> A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists.

Here, Dr. Wilson's appointment and resulting evaluation was in violation of subsection (a) because he was involved in a multiple relationship with Mr. Brown. He was "wearing two hats" in the case because he was involved with Mr. Brown's treatment and at the same time conducted an evaluation of the adequacy of the treatment provided by Dr. Wilson.

APA Ethical Section 3.06 concerning conflicts of interest

states:

> Psychologists refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships could reasonably be expected to (1) impair their objectivity, competence, or effectiveness in performing their functions as psychologists.

WAC 246-924-357 provides that a psychologist "shall not undertake or continue a professional relationship with a client when the objectivity or competency of the psychologist is impaired because of the psychologist's present or previous familial, social, sexual, emotional, financial, supervisory, political, administrative, or legal relationship with the client or a person associated with or related to the client."

A mental health care provider is precluded from "wearing two hats" by providing treatment for competency restoration and then providing an evaluation regarding whether the patient's competency is restored—essentially passing judgment on whether the psychologist's treatment was effective. RCW 18.83.121(2) authorizes the examining board of psychology to take disciplinary action against any psychologist for violating the psychologist's ethical code.

Generally speaking, a conflict of interest is defined as "A real or seeming incompatibility between one's private interests and one's public or fiduciary duties" or "A real or seeming incompatibility between" two different duties, such as a conflict between "the interests of two of a lawyer's clients." Black's Law Dictionary, 341 (9th ed. 2009).

Here, Dr. Wilson's "dual" role creates a clear conflict of interest. Experience reveals that people want to believe that they are good at what they do, and that they have acted appropriately in their assigned roles. People will, therefore, seek to justify their actions. Dr. Wilson is in private practice and also holds a DSHS contract to provide services; he has a financial interest in providing treatment that is viewed as being effective. Permitting mental health providers to review and justify their own work by evaluating the competency of a current or former patient would be like allowing a trial counsel to also be the judge, or a judge to review his or her own case on appeal. Even if their intentions are good, it is simply unlikely that they will be able to objectively review their own actions and treatment provided.

Psychologists must adhere to recognized principles in the scientific community and they must adhere to their Ethics Code. Dr. Wilson cannot be said to be a "qualified" expert as required by RCW 10.77.060(1)(a) because he suffered from an actual conflict of interest and because he was involved in a prohibited multiple relationship with Mr. Brown. In other words, he was engaged in a 'dual agency' conflict of a practitioner serving in both clinical and forensic capacities. The court relied entirely on Dr. Wilson's evaluation when it found Mr. Brown competent. The court stated, "Given Dr. Wilson's most recent evaluation, I am going to enter an Order of Competency and then we will set a trial date." 10RP (3/8/19) at 304.

In addition, Dr. Wilson's opinion that Brown's competency was restored was based on one-on-one communication with Dr. Wilson—which was not used during trial. Instead, the entire trial was communicated to him through the ASL interpreter and CDI. Therefore, it is unknown how much of the proceedings Brown actually understood.

A case from U.S. Court of Appeals for the Armed Forces

involving court martial proceedings is illustrative of a conflict of interest identical to the conflict in this case. In ***United States v. Best***, 61 M.J. 376 (C.A.A.F. 2005), a competency evaluation was conducted during the course of court-martial proceedings. On appeal, Best had raised issues regarding his mental competence to stand trial and his sanity at the time of the alleged offenses. The United States Court of Appeals for the Armed Forces remanded the case for the conduct of a mental examination, after which Best was examined by a sanity board charged with determining his competence. Best argued that members of the sanity board had a conflict of interest because they had both previously conducted assessments of Best's mental condition in a treatment capacity. The board reported that Best had been both competent to stand trial and sane at the time of the charged offenses. ***Best***, 61 M.J. at 377. In a subsequent appeal, the Court of Appeals for the Armed Forces, "question[ed] the reliability of the sanity board report on the basis of an alleged conflict of interest created by membership on the board of two psychotherapists who had previously assessed [Best's] mental condition" and remanded the case. ***Best***, 61 M.J. at 377. In a third

appeal, the Court of Appeals for the Armed Forces adopted the following conflict-of-interest test used by the United States Army Court of Criminal Appeals:

> " '[A]n actual conflict of interest exists if a psychotherapist's prior participation materially limits his or her ability to objectively participate in and evaluate the subject of [a] ... sanity board.' "

Best, 61 M.J. at 387.

Although the Court of Appeals in ***Best*** concluded that the two psychotherapists had no "actual conflict of interest" because neither had assessed Best as suffering from a mental disease or defect, had treated Best for such a disease or defect, or had been Best's psychotherapist, the Court of Appeals for the Armed Forces examined, among other things, Standard 3.06 of the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct. ***Best***, 61 M.J. at 388.

Unlike the psychologists in ***Best***, Dr. Wilson had had extensive interaction with Brown; he had previously evaluated Brown and found him not competent, and had invested a large amount of time treating him.

Division One found that "although Dr. Wilson had more involvement with Brown before evaluating him that the doctors in *Best*, it is still not clear that there was a material limitation on Dr. Wilson's objectivity." ***Brown***, at *8. Brown respectfully submits that the Court sidestepped the thrust of his argument, which is that when looking at the facts in this case as a whole, Dr. Wilson cannot reasonably be said to be objective. His conclusion that Brown was restored to competency after treatment and assessments by his peers and professional colleagues repeatedly finding Brown not competent to go to trial, is a clear conflict of interest. His finding of competency amounts to a "self-congratulatory" comment on the effectiveness of his own treatment methods and therefore should have been viewed in that light. The trial court's appointment of Dr. Wilson was an abuse of discretion meriting reversal of the convictions.

This Court should accept review and reverse the convictions and remand for further proceedings regarding the petitioner's competency.

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 that conflict with prior decisions of this Court and the courts of appeals.

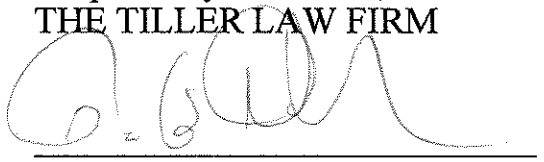
DATED: September 27, 2022.

Certification of Compliance with RAP 18.17:

This petition contains 4548 words, excluding the parts of the petition exempted from the word count by RAP 18.17.

DATED: September 27, 2022.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF MAILING

The undersigned certifies that a copy of this Petition for Review was sent by JIS to Ms. Lea Ennis, Clerk of Court of Appeals, Division I, and to Britta Ann Halverson, Pierce County Prosecutor's office, and a copy was mailed, postage prepaid on September 27, 2022, to the appellant at the following address:

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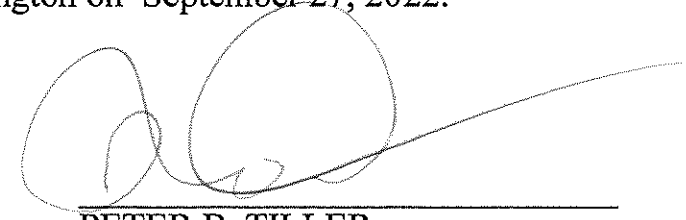
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 27, 2022.



PETER B. TILLER

APPENDIX A

FILED
8/29/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. STEVEN LEE BROWN, Appellant.	No. 83491-6-I DIVISION ONE UNPUBLISHED OPINION

SMITH, A.C.J. — Steven Brown was convicted on several counts of child rape and child molestation in 2020, after undergoing multiple rounds of competency evaluation and competency restoration treatment. Brown moved for a new trial based on newly discovered evidence implicating a different suspect and on alleged juror misconduct. The court denied the motion. Brown appeals, challenging the court's appointed expert, its denial of a motion to continue and the motion for a new trial, and its imposition of community custody supervision fees.

We conclude that the court did not abuse its discretion by appointing a competency evaluator who could perform the evaluation in Brown's first language, even though the evaluator had also provided Brown competency restoration treatment. We also conclude that the court did not abuse its discretion by denying the motion to continue or a motion for a new trial based on unauthenticated and tenuous newly discovered evidence and reports of jury

conduct that inhered in the verdict. However, because the court appears to have erroneously imposed the supervision fees, we reverse in part and remand for the court to strike these fees from Brown's judgment and sentence.

FACTS

In 2016, Steven Brown was charged with several counts of child rape and child molestation against two victims, K.F. and C.F. Brown is deaf and was friends with the victims' parents, J.F. and R.F, who are also deaf. K.F. and C.F. reported that when they were in middle school, they each spent the night alone at Brown's residence and on those occasions, Brown molested them and raped C.F.

In January 2017, Brown's attorney requested and the court ordered a competency evaluation for Brown. In April, Dr. Jaime Wilson performed a psychological evaluation in American Sign Language (ASL) and found that Brown exhibited extreme impairment in his ability to consult with counsel and moderate impairment in his factual understanding of the courtroom. Dr. Wilson concluded that Brown was not competent to participate in court proceedings but recommended that he be referred for competency remediation services, ideally with a provider who could communicate directly in ASL.

Between June and August of 2017, Dr. Ray Hendrickson performed additional competency evaluations—using ASL interpreters—and also concluded that Brown was not competent, based on his limited factual understanding of court proceedings, his significantly impaired rational understanding of the proceedings, and his significantly impaired ability to consult with his attorney.

In November of 2017, the court ordered 90 days of competency restoration treatment. Brown was admitted to inpatient treatment at Western State Hospital in April of 2018. After 10 weeks of one-on-one instruction for 18 hours a week, with an ASL interpreter and a certified deaf interpreter, and visual aids and demonstrations of courtroom procedures, the evaluator concluded that Brown still lacked the capacity to understand the proceedings against him and to assist in his defense. The evaluator, Dr. Johnathan Sharrette, did not recommend any further treatment, concluding that there was "no evidence that Mr. Brown will benefit in any significant way from additional instruction."

In August 2018, Brown moved to dismiss the case based on his inability to be restored to competency, but after a contested hearing the court ordered Dr. Wilson to reevaluate Brown. After Dr. Wilson concluded that Brown was restorable, the court ordered Dr. Wilson to provide an additional 90 days of treatment. Brown moved for the court to appoint an expert other than Dr. Wilson to perform the next evaluation, claiming that Dr. Wilson had a conflict of interest based on his role as both an evaluator and restoration treatment provider. The court denied the motion. On March 8, 2019, based on Dr. Wilson's report among other evidence, the court found Brown competent to proceed in trial.

The case proceeded to trial in February 2020. On the second day of trial, after C.F. and K.F. had testified, Brown moved for a mistrial or, alternatively, a continuance based on new evidence. Brown's attorney reported that she had just been shown a Facebook message that Brown's roommate Manny Oriza had received in October 2019. The Facebook message was purportedly from Jorge

German, a friend of the victims' family who had lived with them for several years, claiming that he had molested C.F. and K.F., not Brown. Citing doubts about the message's authenticity and admissibility, the court denied the motion.

On March 2, 2020, the jury found Brown guilty of second-degree child rape, second-degree child molestation, and two counts of third-degree child molestation.

On May 6, 2020, Brown moved for a new trial or relief from judgment. He cited the Facebook message purporting to be from German as newly discovered evidence. He also claimed that Juror 8 had committed misconduct based on a different juror's statement that Juror 8 told a detailed story about a close family member being sexually assaulted at the start of deliberations, stated that she believed Brown was guilty before deliberations began, and stated that she believed the victims and their parents implicitly. The court denied the motion, finding that Brown did not establish juror misconduct and that the new evidence was not material, would not change the result of trial, and could potentially have been discovered before trial with due diligence.

The court sentenced Brown to 245 months to life confinement. It found Brown indigent and stated that it would impose "only those fees and obligations as required by law," but the judgment and sentence imposed community custody supervision fees.

Brown appeals.

ANALYSIS

Appointment of Qualified Expert

Brown contends that the court failed to comply with RCW 10.77.060 because its designated expert, Dr. Wilson, was not "qualified" given that he both treated and evaluated Brown. We disagree.

"In Washington, a person is competent to stand trial if [they have] the capacity to understand the nature of the proceedings against [them] and if [they] can assist in [their] own defense." State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). So long as there is a question about the defendant's competency, the procedures in chapter 10.77 RCW are "mandatory to satisfy due process." State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009).

RCW 10.77.060(1)(a) requires that when reason exists to doubt a defendant's competency, the court "shall . . . appoint . . . a qualified expert or professional person . . . to evaluate and report upon the mental condition of the defendant." Not only must the expert be qualified, but the court must "ensure that a statutory competency evaluation is conducted in a qualified manner." State v. Sisouvanh, 175 Wn.2d 607, 621, 290 P.3d 942 (2012).

"[A] trial court's determination of the underlying adequacy of a statutory competency evaluation [is] reviewed for abuse of discretion." Id. at 620. Thus, "so long as the underlying adequacy of a given competency evaluation is 'fairly debatable,' the trial court has discretion to accept or reject that evaluation in satisfaction of RCW 10.77.060." Id. at 623 (internal quotation marks omitted) (quoting Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979)).

Here, Brown contends that Dr. Wilson was not "qualified" (or did not conduct the evaluation in a qualified manner) because he violated his ethical obligations by both providing treatment for Brown and then evaluating Brown's competence. Brown points to the American Psychological Association's (APA) "Ethical Principles of Psychologists and Code of Conduct," and contends that Dr. Wilson violated its provisions with respect to multiple relationships and conflicts of interest. The relevant provisions read, in full:

> 3.05 Multiple Relationships
>
> (a) A multiple relationship occurs when a psychologist is in a professional role with a person and (1) at the same time is in another role with the same person, (2) at the same time is in a relationship with a person closely associated with or related to the person with whom the psychologist has the professional relationship, or (3) promises to enter into another relationship in the future with the person or a person closely associated with or related to the person.
>
> A psychologist refrains from entering into a multiple relationship if the multiple relationship *could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness* in performing his or her functions as a psychologist, or otherwise risks exploitation or harm to the person with whom the professional relationship exists.
>
> *Multiple relationships that would not reasonably be expected to cause impairment or risk exploitation or harm are not unethical.*
>
> (b) If a psychologist finds that, due to unforeseen factors, a potentially harmful multiple relationship has arisen, the psychologist takes reasonable steps to resolve it with due regard for the best interests of the affected person and maximal compliance with the Ethics Code.
>
> (c) *When psychologists are required by law, institutional policy, or extraordinary circumstances* to serve in more than one role in judicial or administrative proceedings, at the outset *they clarify role expectations and the extent of confidentiality and thereafter as changes occur*. . . .

> 3.06 Conflict of Interest
>
> Psychologists refrain from taking on a professional role when personal, scientific, professional, legal, financial, or other interests or relationships *could reasonably be expected to (1) impair their objectivity, competence, or effectiveness* in performing their functions as psychologists or (2) expose the person or organization with whom the professional relationship exists to harm or exploitation.

(Emphasis added.)

Accepting Brown's proposition that an expert must comply with these standards to be "qualified" under RCW 10.77.060,[1] the record does not establish that Dr. Wilson violated these provisions. The multiple relationships standard and conflict of interest standard only direct psychologists to refrain from taking a role when it could "reasonably be expected" to impair their "objectivity, competence, or effectiveness." Whether providing both competency restoration treatment and competency evaluations to Brown would impair Dr. Wilson's objectivity, competence, or effectiveness is a matter that is fairly debatable and therefore in the trial court's discretion. Moreover, the multiple relationships standard specifically contemplates that psychologists may be "required by law, institutional policy, or extraordinary circumstances to serve in more than one role."[2] That is the case here—the court noted that Dr. Wilson "seem[ed] to be

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[1] While it certainly seems appropriate for a trial court to only appoint experts who comply with ethical standards, the statute itself gives no definition of "qualified," let alone an explicit reference to the APA standards specifically. RCW 10.77.060.

[2] Evidence submitted to the trial court indicated at least one doctor's conclusion that "there are no ethical issues with an evaluator also providing restoration services, especially in cases where there is such a distinct need for specialized services."

uniquely qualified" as a psychologist who was also fluent in ASL.[3] In the absence of an indicator that Dr. Wilson violated his ethical obligations, we conclude that the court did not abuse its discretion by appointing him.

Brown disagrees and points to United States v. Best, a case from the United States Court of Appeals for the Armed Forces. 61 M.J. 376 (2005). In that case, the court addressed whether there was a conflict of interest where members of the board that assessed the defendant's sanity had previously assessed the defendant individually. Id. at 377. The court reviewed the lower court's "assessment of the reliability of trial proceedings" de novo. Id. at 381. It concluded that there was no "per se exclusion from participation in examining boards of practitioners who have either treated or diagnosed the subject of such a board," and that there was "no material limitation" of either doctor's "ability to participate objectively in the board," given that each doctor had only briefly assessed the defendant. Id. at 387-88. Here, although Dr. Wilson had more involvement with Brown before evaluating him than the doctors in Best, it is still not clear that there was a material limitation on Dr. Wilson's objectivity. And unlike Best, we must defer to the court's discretion. We therefore conclude that

[3] The record indicates that there may have been another psychologist available to conduct the evaluation in ASL—the State requested that if the court did bar Dr. Wilson from conducting the evaluation, "a sign language fluent associate in Dr. Wilson's office, Dr. Colleen Donohue, Psy.D, should be ordered to complete the evaluation in his place." It seems that such an option would have been preferable, and that it is generally a best practice to have restoration treatment and evaluation conducted by different doctors. But given the lack of information or argument concerning this potential alternative, we cannot say that the court abused its discretion by appointing Dr. Wilson.

the court complied with RCW 10.77.060 and did not abuse its discretion in appointing an expert and ultimately finding Brown competent.

Motion to Continue

Brown contends that the court abused its discretion by denying his motion to continue trial after he discovered the Facebook message. We disagree.

We review a denial of a motion for continuance for an abuse of discretion. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). "In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." Id. at 273.

The denial of a motion to continue may deny a defendant of due process. Id. at 274. "Whether the denial of a continuance rises to the level of a constitutional violation requires a case by case inquiry," and "the court must examine the totality of the circumstances." Id. at 275; State v. Jennings, 35 Wn. App. 216, 220, 666 P.2d 381 (1983). But "the decision to deny a continuance will be reversed only on a showing that the accused was prejudiced by the denial and/or that the result of the trial would likely have been different had the continuance not been denied." State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994).

Here, the court did not abuse its discretion. Brown's motion for a continuance came on the second day of trial, after Brown, through his mother, let his attorney know that Oriza had received a Facebook message from Jorge German more than four months before the trial. Brown's attorney told the court

that the message appeared to be from German's Facebook page and stated that German, not Brown, had abused the victims. She noted that Brown had consistently claimed that German was the actual perpetrator, but that there had previously been insufficient evidence to support that theory.

Because there are several indicators supporting a conclusion that the message was inauthentic, Brown cannot show that the result of trial would likely have been different if the continuance had not been denied. The message was purportedly from German claiming not only that he had molested the victims, but that he knew Brown had not molested them. But testimony indicated that Brown was the only person in the room with the victims during the rape and molestation, so it is unclear how German would know that Brown was not a perpetrator. While the last message suggests a conspiracy between German and the victims' father ("Not steve brown Just [J.F.] and me"), the first message says the author is "lying to all [J.F. R.F. C.F. K.F. and] mona." The victims in this case were teenagers who had known both German and Brown for years, so both of them mistaking the perpetrator's identity is implausible. The message was apparently not discovered until the first day of trial, even though it was sent months prior. See State v. Riofta, 166 Wn.2d 358, 372, 209 P.3d 467 (2009) ("in evaluating probative force of newly presented evidence 'the court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence' " (quoting Schlup v. Delo, 513 U.S. 298, 332, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995))). The message was sent from an account named "Jorge German," but the account did not have a profile picture,

and the defense never provided, for instance, a screenshot of the Facebook account that might indicate whether it was used for anything aside from sending the message.[4]

As the prosecutor pointed out, information in the record indicated that after Brown was arrested, Brown's mother texted the victims' family to say that Brown had not molested the children and German had. Later, someone called Child Protective Services (CPS) and told them that German had molested the children, and CPS came to the victims' house to ask them about it, but immediately closed the investigation upon finding out that Brown was being prosecuted. The prosecutor represented at the continuance hearing that Brown had subpoenaed the CPS records months before the trial to find out who made the CPS call and never reported anything about the results. These facts further undermine the authenticity of the Facebook message.

Moreover, the court noted that the Facebook message appeared to be inadmissible hearsay. While it may have provided defense counsel with more incentive to investigate her client's theory, she had been aware of this theory for at least three years. And in her motion for a new trial more than two months later, she had no further information to provide to support the message's authenticity. She noted only that

> Defense investigator, Jerry Crow, was able to conduct a brief interview with Mr. Rodriguez about receiving the message and attempted to contact Mr. German via Facebook. Defense Counsel

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[4] While not conclusive, it is also worth noting that the writing in the Facebook message reads similarly to the writing in Facebook messages sent by Brown to one of the victims.

> also attempted to learn Mr. German's contact information from the victim's parents, but they did not know his address although they had been there.

Given that no admissible evidence appeared to follow from the discovery of the Facebook message, it is unlikely that granting a continuance would have changed the outcome of trial. Moreover, the court was balancing the orderly procedure of a trial that had just begun after a years-long delay, in a case where the court is generally required to weigh any reasons for a continuance against the detriment to the victims of sex crimes. RCW 10.46.085.

The court did not abuse its discretion by denying the motion for a continuance.

Motion for a New Trial

Brown contends that the court abused its discretion by denying his motion for a new trial based on newly discovered evidence and juror misconduct. We disagree.

The court may grant a new trial based on newly discovered evidence or juror misconduct "when it affirmatively appears that a substantial right of the defendant was materially affected." CrR 7.5(a). "The decision to grant or deny a new trial will not be disturbed unless it constitutes a manifest abuse of discretion." State v. Dawkins, 71 Wn. App. 902, 906, 863 P.2d 124 (1993).

1. Newly Discovered Evidence

First, the court did not abuse its discretion by denying the motion based on newly discovered evidence.

The trial court should grant a motion for a new trial based on newly discovered evidence if the moving party shows that "the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching." State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981) (emphasis omitted). "The absence of any one of the five factors is grounds for the denial of a new trial." Id.

Here, as discussed above, Brown fails to show that the new evidence would probably change the result of trial. The Facebook message itself was likely inadmissible as hearsay and because it lacked authentication, and Brown failed to obtain any new evidence about the purported confession in the two months after trial. Even if the message was admissible, there are significant questions about its authenticity that Brown failed to address (for instance, by submitting a screenshot of the Facebook profile or recounting any efforts to locate German beyond asking the victims' parents for his address). Moreover, the message itself was not strictly newly discovered evidence, but was instead discovered during trial.

The court did not abuse its discretion by denying a new trial on the grounds of newly discovered evidence.

2. Juror Misconduct

Brown also contends that juror misconduct required a new trial. We disagree.

"Appellate courts will generally not inquire into the internal process by which the jury reaches its verdict." Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 204, 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." State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988) (quoting State v. Crowell, 92 Wn.2d 143, 146, 594 P.2d 905 (1979)). "Juror use of extraneous evidence is misconduct and entitles a defendant to a new trial, if the defendant has been prejudiced." State v. Boling, 131 Wn. App. 329, 332, 127 P.3d 740 (2006). "Jurors may, however, rely on their personal life experience to evaluate the evidence presented at trial during the deliberations." Breckenridge, 150 Wn.2d at 199 n.3, 202-04 (juror's comparison of his wife's medical care for migraines to facts in the case inhered in verdict); Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 273-74, 796 P.2d 737 (1990) (juror's evaluation of evidence based on her medical training was not extraneous evidence; juror had disclosed her medical background during voir dire). Furthermore, the "*mere* revealing of an opinion, as to the ultimate outcome of a trial by an otherwise unbiased juror, before submission of the case to the jury . . . does not, standing alone, constitute such misconduct as to justify the granting of a new trial." Tate v. Rommel, 3 Wn. App. 933, 937-38, 478 P.2d 242 (1970).

Here, Brown claims that Juror 8 introduced extraneous evidence into deliberation by telling a detailed story about a family member who was sexually assaulted as a child, and that she committed misconduct by expressing at the beginning of deliberations that Brown was guilty. First, Brown's assertion fails

because it relies on the defense investigator's notes of his discussions with other jurors, and these notes appear to be inadmissible hearsay. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). Second, the juror's discussion of her family member's experience was not extraneous evidence, as it did not relate to the facts of the case but instead related to the juror's personal life experience. The discussion also inhered in the verdict because it related to her individual thought process. Ng, 110 Wn.2d at 43. And finally, the juror's statement at the beginning of deliberations, after the conclusion of the trial, that she believed Brown was guilty, along with any other statements during deliberations that Brown would have us interpret as indicating a predisposition against him, inhere in the verdict because they relate to her thought processes. The court did not abuse its discretion by denying a new trial on these grounds.

Community Custody Supervision Fees

Finally, Brown challenges the trial court's imposition in the judgment and sentence of community custody supervision fees, contrary to its oral ruling. The State concedes that these should be stricken, and we agree.

The court stated that it was "imposing only those fees and obligations as required by law," but the judgment and sentence contained form language requiring Brown to "pay supervision fees as determined by" the Department of Corrections. "[B]ecause 'supervision fees are waivable by the trial court, they are discretionary [legal financial obligations].' " State v. Bowman, 198 Wn.2d 609, 629, 498 P.3d 478 (2021) (quoting State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199, review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020)). The trial

court committed procedural error by imposing the supervision fee where it had stated it was waiving discretionary fees and the remedy is to remand to strike the fees from the judgment and sentence. Bowman, 198 Wn.2d at 629.

We reverse in part and remand for the court to strike the supervision fees.

Smith, A.C.J.

WE CONCUR:

Cohen, J. Andrus, C.J.

THE TILLER LAW FIRM

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