101934-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON PETITION FOR REVIEW FROM

State of Washington v. Marvin Talavera Hernandez,
Court of Appeals No. 83138-1-I

State of Washington,

Respondent,

v.

Marving Talavera Hernandez

Petitioner,

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. IDENTITY OF PETITIONER

Marvin Talavera Hernandez ("Mr. Talavera"), appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. COURT OF APPEALS DECISION

Mr. Talavera requests review of the decision of the Court of Appeals, Division I, in State of Washington v. Marvin Talavera Hernandez, filed March 27, 2023, No. 83138-1-I, affirming his convictions for three counts of rape of a child in the first degree and one count of child molestation in the first degree, in violation of RCWs 9A.44.073 and 9A.44.083 in the Snohomish County Superior Court.

III. ISSUES PRESENTED

A. Whether this Court should grant review because the Court of Appeals holding that Mr. Talavera knowingly, voluntarily, and intelligently waived his right to counsel conflicts with the decisions this Court as well as the decisions of the Court of Appeals?

B. Whether this Court should grant review on the ground that this case presents significant questions of law under the Sixth Amendment to the United States

Constitution and Article I, section 22 of the Washington Constitution as well as the Fourteenth Amendment to the United States Constituiton and Article I, section 3 of the Washington Constitution because the Court of Appeals erred in holding that the trial court did not abuse its discretion when it permitted Mr. Talavera to stand trial and proceed to trial pro se without inquiring into Mr. Talavera's competency?

IV. STATEMENT OF THE CASE

On April 3, 2018, Mr. Talavera was charged with one count of rape of a child in the second degree and one count of child molestation in the first degree based upon alleged acts of sexual abuse involving his stepdaughter, J.J. CP 391 – 92. On January 10, 2019, the State filed an amended information charging Mr. Talavera with one count of first degree child molestation, occurring between June 29, 2010, and June 28, 2015, and three counts of rape of a child in the first degree occurring between June 29, 2012, and June 28, 2015, all involving the same alleged minor victim, J.J. CP 385 – 386.

Mr. Talavera was represented at his first trial by appointed counsel. RP 2/14/20 at 3 – 4.[1] Mr. Talavera's first trial resulted in a hung jury. SRP 6/3/2019 at 74 – 81. During his first trial Mr. Talavera's appointed attorney performed competently and defended him vigorously. SRP 6/3/2019 at 24 – 42. But after his first trial resulted in a mistrial, Mr. Talavera moved to discharge his counsel and proceed pro se without any explanation. RP 2/14/20 at 4.

During his Faretta[2] colloquy Mr. Talavera struggled to explain why he wanted to proceed without counsel and claimed that there was no proof against him, despite the evidence presented against Mr. Talavera during his first trial, as the trial

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[1] The verbatim report of proceeding in this case is composed of proceedings from three separate trials. Citations to the original verbatim report of proceedings are designated "RP" followed by the date of the relevant transcript and citations to the supplemental report of proceedings are designated "SRP" followed by the date of the relevant transcript.

[2] Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, S. Ct. 2525 (1975).

court reminded him, and despite the fact that Mr. Talavera's first trial resulted in a hung jury. RP 2/14/20 at 5 – 7.

Mr. Talavera acknowledged during the colloquy that he had no legal training and did not know anything about the law, and stated that he was not even going to attempt to learn the law and procedural rules that were necessary to defend himself against the charges: "I don't have any law background, and I'm not going to have it . . . . But I still want to represent myself." RP 2/14/20 at 5. Mr. Talavera, a native Spanish speaker, who relied heavily on the assistance of an interpreter throughout his first trial and all other proceedings in the case, even went as far as to assert that he was prepared to proceed without an interpreter. RP 2/14/20 at 7.

Mr. Talavera told the trial court during the colloquy that he did not care that he was looking at a potential life sentence and that it would be a good thing for his case if the State had even more advantages in their prosecution against him. RP 2/14/20 at 6, 9. When the trial court explained to Mr. Talavera

that the fact that he represented himself would not be a basis for a new trial if he were to be convicted, Mr. Talavera responded: "May God's will be done." RP 2/14/20 at 8.

At one point the trial court even stated on the record that it did not understand what Mr. Talavera's incoherent responses meant: "I'm not sure what you mean exactly by that." RP 2/14/20 at 9. On this record, the trial court concluded that Mr. Talavera made an unequivocal request to proceed pro se and found that he knowingly, intelligently, and voluntarily waived his right to counsel. RP 2/14/20 at 9.

Mr. Talavera's strange behavior continued after the Court granted his request to proceed pro se. Mr. Talavera discharged standby counsel and asserted on the record during the hearing regarding standby counsel: "I have already won this case. I don't need an attorney." RP 7/9/21 at 13. Mr. Talavera also told the court that he did not trust anyone. RP 7/9/21 at 14.

Throughout the hearings and trial that followed, Mr. Talavera continued to act contrary to his own interests and make

irrational statements.[3] At the beginning of his second trial, Mr. Talavera told the court that he did not even open the packet of discovery provided to him because it was not important to him. RP 11/16/20 at 49. He failed to appear at a prescheduled discovery conference at the prosecutor's office to review the child forensic interview. RP 8/2/21 at 11.[4] He showed up for trial without any of the discovery materials or anything to write on and told the court he was not ready. RP 8/2/21 at 2, 3, 13. He also stated that he would not read the paperwork handed to him by the prosecutor. 8/2/21 at 13.

Mr. Talavera refused to participate in portions of the jury selection process saying things like, "I'm not ready," "I'm not taking part in any of this" and "God decides." RP 8/2/21 at 2,

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[3] After Mr. Talavera's first trial resulted in a mistrial, a second trial commenced on November 13, 2020. RP 11/13/20 at 3. That trial was terminated before a jury was empaneled due to the coronavirus pandemic. RP 11/18/20 at 342. Mr. Talavera's third trial commenced on August 2, 2021.

[4] The transcript referred to as "RP 8/2/21" contains the proceedings from 8/2/21, 8/3/21, 8/4/21, and a portion of the proceedings from 8/5/21.

18, 36, 50, 232. Mr. Talavera's opening statement was three sentences long. RP 8/2/21 at 255. He made a single motion in limine, barely raised any objections during the course of the five-day trial, conducted almost no cross-examination, told the court he wasn't interested in reviewing the jury instructions, and presented an incomprehensible closing argument referencing the judgment of God, artificial insemination, and "promoting the stars." RP 8/2/21 at 47, 346, 401, 473; RP 8/9/21 at 41 – 45. At one point Mr. Talavera asserted: "From the beginning, I promised not to defend myself and I'll maintain my position." RP 8/5/21 at 520.

The jury ultimately convicted Mr. Talavera on all counts and found pursuant to RCW 9.94A.535(3)(g) that each count of conviction was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time. RP 8/9/21 at 60 – 64. On September 16, 2021, Mr. Talavera was sentenced to a minimum term of 318 months in prison and a maximum

term of life. CP 3 – 18. Mr. Talavera filed a timely notice of appeal. CP 2.

On March 27, 2023, the Court of Appeals issued a decision denying Mr. Talavera's appeal and affirming his convictions. Mr. Talavera now petitions this Court to review the Court of Appeals decision affirming his convictions.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. The Court Should Grant Review Pursuant to RAP 13.4(b)(1) and (b)(2) Because the Court of Appeals Decision Conflicts with Decisions of this Court and the Court of Appeals.

Review should be granted in Mr. Talavera's case pursuant to RAP 13.4(b)(1) and (b)(2) because the Court of Appeals decision conflicts with decisions of this Court and the Court of Appeals. Specifically, the Court of Appeals decision in Mr. Talavera's case conflicts with this Court's decision in State v. Burns, 193 Wn.2d 190, 203, 438 P.3d 1183 (2019), and the Court of Appeals' decisions in State v. Chavis, 31 Wn. App.

784, 644 P.2d 1202 (1982), and State v. Christensen, 40 Wn. App. 290, 698 P.2d 1069 (1985).

The question presented by Mr. Talavera's case is whether a trial court abuses its discretion when it permits a defendant to proceed to trial pro se where it is clear from the defendant's Farreta colloquy that the defendant does not appreciate the dangers of representing himself and does not understand the legal, evidentiary, and procedural rules he will be required to follow at trial, and the trial court fails to conduct further inquiry to ensure that the defendant's waiver of his constitutional right to counsel is knowing, voluntary, and intelligent.

The right to counsel in a criminal case is a fundamental right secured by the Sixth Amendment to the United States Constitution and Article I, Section 22, of the Washington Constitution. In Faretta v. California, the United States Supreme Court first articulated the test courts must apply in determining whether a valid waiver of counsel has occurred. 422 U.S. 806, 95 S. Ct. 2525 (1975). During a Faretta colloquy, a court must

inform a defendant of the "nature of the charges against the defendant, the maximum penalty, and the fact that the defendant will be subject to the technical and procedural rules of the court in the presentation of his case." Burns, 193 Wn.2d at 203. Additionally, courts must consider, "the defendant's education, experience with the justice system, mental health, and competency." Id. There is a strong presumption against the waiver of the right to counsel. Id.

The focus during a Faretta colloquy is on the subjective understanding of the accused. See State v. Chavis, 31 Wn. App. at 790. "The judge must make a penetrating and comprehensive examination in order to properly assess that the waiver was made knowingly and intelligently." See id. A waiver of counsel is invalid if not "intelligently or understandingly made." Id. Ultimately, the record must establish that the defendant "knows what he is doing and his choice is made with eyes open." Faretta, 422 U.S. at 835. During the inquiry the judge must seek to understand the defendant's reasons for refusal of the assistance

of counsel and attempt to mitigate them. See Chavis, 31 Wn. App. at 791. If there are any doubts about the validity of the defendant's waiver, counsel must be appointed. Id.

After the court told Mr. Talavera during his Farreta colloquy that he was facing life in prison, Mr. Talavera responded simply: "I don't care." RP 2/14/20 at 6. When the trial court told Mr. Talavera that he was going to be required to follow the rules of procedure and evidence and inquired into Mr. Talavera's background, Mr. Talavera responded: "I don't have any law background, and I'm not going to have it . . . . But I still want to represent myself." RP 2/14/20 at 5. When the trial court explained to Mr. Talavera that he would not be entitled to a new trial if he was convicted after representing himself pro se, Mr. Talavera replied with a religious reference, asserting: "May God's will be done." RP 2/14/20 at 8.

Finally, when the trial court advised Mr. Talavera that he would be greatly disadvantaged because the State was represented by an experienced prosecutor, Mr. Talavera

responded that it was even better for him if the State had more advantages. RP 2/14/20 at 9. No inquiry was made into Mr. Talavera's education and his ability to read and understand the English language, even though Mr. Talavera used an interpreter throughout the proceedings in the trial court.

At a later hearing, where Mr. Talavera declined standby counsel, he told the judge that he had "already won this case" and that he didn't trust anyone, leading the judge to respond: "Well, it is statements like that that give me pause." RP 7/9/21 at 14.

Mr. Talavera's responses to the trial court's questions during his Faretta colloquy were wholly incoherent and failed to demonstrate that Mr. Talavera understood the legal and procedural rules he would have to adhere to when representing himself and the disadvantages that he would face by proceeding to trial without counsel. Despite this fact, the trial court failed to inquire further to ascertain whether Mr. Talavera was waiving his right to counsel knowingly, intelligently, and voluntarily.

It is obvious from Mr. Talavera's responses to the trial court's admonishment about the disadvantages he would face at trial and his responses to the trial court's other questions during his Faretta colloquy that the court's inquiry was wholly insufficient to ascertain whether Mr. Talavera thoroughly understood the risks and disadvantages of proceeding to trial without an attorney and that Mr. Talavera did not, in fact, understand the technical requirements and disadvantages of representing himself at trial.

The Court of Appeals recited the Faretta standard for waiver of counsel, but ultimately denied Mr. Talavera's claim that the trial court abused its discretion, holding that because Mr. Talavera acknowledged that he was required to follow the rules of evidence and procedure and that the State would have advantages over him, and nonetheless persisted in his request to represent himself, his wavier of the right to counsel was knowing, intelligent, and voluntary. Talavera, Slip Op. at 14 – 15. The Court of Appeals also cited the fact that Mr. Talavera

had an opportunity to observe his first trial as a consideration supporting its decision. Id.

The Court of Appeals' conclusion that Mr. Talavera knowingly, intelligently, and voluntarily waived his right to counsel and that the trial court did not abuse its discretion in allowing him to proceed pro se was error. The conclusion that Mr. Talavera's waiver of his right to counsel was knowing, intelligent, and voluntary is unsupported by the record and is inconsistent with the decisions of this Court and other decisions of the Court of Appeals.

The Court of Appeals attempted to explain away Mr. Talavera's responses to the trial court during his Faretta colloquy, citing his steadfast adherence to his decision to represent himself and the fact he had an opportunity to observe his first trial. However, these two factors are insufficient to overcome the requirement of a searching and thorough inquiry on the record establishing that Mr. Talavera knowingly,

intelligently, and voluntary wavied of his right to counsel on the record.

In State v. Burns, this Court held that the trial court did not abuse its discretion where it denied a defendant the right to represent himself pro se, despite his acknowledgment that he understood the dangers and requirements of self-representation. 193 Wn.2d at 206. There, the defendant asserted during his Faretta colloquy that he understood the seriousness of the charges he was facing, but that the charges didn't "faze" him, asserted that trial was "about acting," and asserted that the United States was a corporation of which he was not a citizen. Id. at 204.

Based on this record, this Court held that it was clear that the defendant did not understand the seriousness of the charges against him, the importance and technicalities of self-representation, and the general gravity of his situation. Id. at 205. The Court explained that the defendant's statements were

not consistent with those of "a defendant who understands the seriousness of the charges against him." Id. at 206.

The Court of Appeals decision in this case conflicts with this Court's decision in Burns because like the statements of the defendant in Burns, Mr. Talavera's statements to the trial court during his Faretta colloquy made clear that he did not understand the dangers of proceeding pro se, the seriousness of the charges he faced, and the technical requirements of proceeding pro se. Despite the similarities to Burns, the Court of Appeals nonetheless concluded that the Faretta colloquy was adequate and that Mr. Talavera's responses indicated that he knowingly, intelligently, and voluntarily waived his right to counsel. The decision in Mr. Talavera's case cannot be reconciled with this Court's decision in Burns, and review is therefore proper under RAP 13.4(b)(1).

The decision in this case also conflicts with the decisions of the Court of Appeals. In State v. Christensen, the trial court advised the defendant of his right to counsel as well as the nature

of the charges and maximum penalties. 40 Wn. App. at 294 – 95. The trial court also inquired about the defendant's level of education and ability to read and write English. Id. However, the trial court failed to advise the defendant about the technical aspects of conducting a defense, the rules regarding procedures used to preserve error, and explain that presenting a defense was more than just telling a story. Id. During trial, the defendant barely participated in any aspects of his own defense. The Court of Appeals concluded that the defendant's lack of understanding and appreciation of proceeding without counsel was evident from his "total lack of participation in his own case, e.g., his lack of participation during voir dire of the jurors, his minimal cross examination of witnesses, his lack of argument, pretrial motions, objections and jury instructions on his own behalf." Id. Ultimately, the Court of Appeals concluded that no valid waiver of counsel occurred and reversed the conviction. Id.

In State v. Chavis, the Court of Appeals reversed a conviction on the basis that the trial court's colloquy was not

thorough enough to ascertain whether the defendant was knowingly, intelligently, and voluntarily waiving counsel. 31 Wn. App. 784. There, the trial court asked the defendant a number of questions about his understanding of the charges and experience with legal proceedings which the defendant answered with yes or no, but the defendant's answers did not provide sufficient information to ascertain on the basis of the colloquy whether the defendant truly understood the risks and challenges of representing himself at trial. See id. at 789. The court ultimately concluded that the defendant's "single answer responses do not satisfy us that Mr. Chavis fully understood the dangers and disadvantages of self-representation." Id.

The Court of Appeals decision in Mr. Talavera's case conflicts with Chavis and Christensen. Despite Mr. Talavera's non-responsive and incoherent answers to the trial court's inquiries, as in Chavis, the trial court merely proceeded through a routine set of questions and concluded that Mr. Talavera had knowingly, intelligently, and voluntarily waived his right to

counsel without any regard for the responses Mr. Talavera was providing or whether he actually understood the consequences of waiving the right to counsel.

Further, the Court of Appeals decision in this case conflicts with Christensen because as in Christensen, Mr. Talavera's lack of participation in his own defense establishes that Mr. Talavera did not understand that the consequences of waving his right to counsel and did not knowingly, voluntarily, and intelligently waive his right to counsel. Like the defendant in Christensen, Mr. Talavera refused to participate in voir dire, made limited and incoherent statements during opening and closing, raised almost no objections throughout the trial, and conducted minimal cross-examination of witnesses, yet contrary to Christensen the Court of Appeals in this case held that Mr. Talavera's performance at trial was immaterial to whether or not he knowingly, intelligently, and voluntarily waived his right to counsel. Accordingly, because the Court of Appeals decision

conflicts with other decisions of the Court of Appeals review is proper pursuant to RAP 13.4(b)(2).

Because the Court of Appeals decision in this case conflicts with the decisions of this Court and the Court of Appeals, this Court should accept review pursuant to RAP 13.4(b)(1) and RAP 13.4(b)(2).

B. This Court Should Grant Review Pursuant to RAP 13.4(b)(3) Because this Case Presents Significant Questions of Law Involving Mr. Talavera's Sixth Amendment and Article I, Section 22 Rights to Counsel and his Fourteenth Amendment and Article I, Section 3 Rights to Due Process.

Additionally, the Court should grant review in Mr. Talavera's case because it presents significant questions of law under both the state and federal constitutions. RAP 13.4(b)(3). Specifically, the question presented in this case is whether the trial court abused its discretion and violated Mr. Talavera's Sixth Amendment and Article I, Section 22 rights to counsel and Mr. Talavera's Fourteenth Amendment and Article I, Section 3

rights to due process when it failed to consider whether Mr. Talavera was competent to represent himself at trial.

An additional question presented by this case is whether the trial court abused its discretion and violated Mr. Talavera's Fourteenth Amendment and Article I, section 3 due process rights when it failed to consider whether Mr. Talavera was competent to stand trial at all.

The right to counsel in a criminal case is a fundamental right secured by the Sixth Amendment to the United States Constitution and Article I, Section 22, of the Washington Constitution. Furthermore, the Fourteenth Amendment requires that a defendant's decision to proceed pro se must be made knowingly, voluntarily, and intelligently. Chavis, 31 Wn. App. at 790.

This Court has held that a defendant's rights to a fair trial and counsel outweigh a defendant's right to represent himself where the defendant's mental condition prevents him from effectively representing himself at trial. State v. Koloctronis, 73

Wn.2d 92,436 P.2d 774 (1968). Furthermore, the United States Supreme Court had held that a trial court cannot allow a legally competent, but mentally ill defendant to proceed to trial pro se where the defendant "lacks the mental capacity to conduct his defense without the assistance of counsel. Indiana v. Edwards, 554 U.S. 164, 128 S. Ct. 2379 (2008).

Additionally, the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the Washington Constitution prohibits the prosecution of a legally incompetent defendant. State v. McCarthy, 193 Wn.2d 792, 446 P.3d 167 (2019). This principle is codified in Washington under RCW 10.77.050. Washington has a two-part test for legal competency to stand trial: (1) whether the defendant understands the nature of the charges, and (2) whether he is capable of assisting in his own defense. In re Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

In Washington, "whenever there is reason to doubt competency, the court on its own motion . . . shall either appoint

or request . . . to evaluate the and report upon the mental condition of the defendant." RCW 10.77.060(1)(a). Factors to be considered in whether to order a competency hearing are the defendant's behavior, appearance, demeanor, personal and family history, and psychiatric reports. See Fleming, 142 Wn.2d at 863.

There were numerous reasons for the trial court to doubt Mr. Talavera's competency to proceed pro se and to stand trial. Mr. Talavera dismissed his attorney and requested to proceed pro se after counsel had vigorously represented him in his first trial, which resulted in a hung jury. Mr. Talavera made various incoherent and irrational statements during his Faretta hearing, making a reference to God's will and stating that it was a good thing if the State had more advantages in its prosecution against him. RP 2/14/20 at 8 – 9. Mr. Talavera subsequently dismissed standby counsel stating: "I don't need an attorney, I already won this case" and "I don't trust anyone." RP 7/9/21 at 13, 14. Mr. Talavera never opened the envelope containing discovery

materials provided to him by the State after he was permitted to proceed pro se and failed to appear for a discovery conference. RP 11/16/20 at 49; RP 8/2/21 at 11.

Mr. Talavera repeatedly stated on the record that he was not participating in portions of his trial because it was not important to him and because God decides, and provided incoherent opening and closing statements composed primarily of religious references and incomprehensible assertions. RP 8/2/21 at 232. When asked whether he wanted to testify in his own defense Mr. Talavera responded: "From the beginning, I promised not to defend myself and I'll maintain my position." RP 8/5/21 at 520. At sentencing, Mr. Talavera similarly asserted that he was not participating, but invited the court to proceed anyway. RP 9/16/21 at 76.

Mr. Talavera's behavior and incoherent statements on the record were more than enough for the trial court to order a competency evaluation, both when he decided to proceed pro se and during trial. Indeed, the trial court acknowledged that there

were doubts about Mr. Talavera's competency. After Mr. Talavera asserted that he had already won the case and therefore didn't need an attorney, dismissing his standby counsel, the trial court responded: "Well, it is statements like that that give me pause." RP 7/9/21 at 14. Yet despite its concerns, instead of order a competency determination, the trial court allowed Mr. Talavera to proceed pro se and simply proceeded with trial without ever inquiring into Mr. Talavera's competency. The trial court's failure to order a competency evaluation was error.

The Court of Appeals concluded that the trial court did not abuse its discretion when it failed to consider Mr. Talavera's competency before permitting him to proceed to trial pro se, holding that trial courts may, but are not constitutionally required to, consider a defendant's mental health status in determing whether a defendant has knowingly, intelligently, and voluntarily waived his right to counsel. Talavera, Slip Op. at 18 – 19. The Court of Appeals additionally denied Mr. Talavera's claim that he was not competent to stand trial. Id. at 23. While

acknowledging that Mr. Talavera made "odd" statements throughout the trial, the court held that Mr. Talavera "demonstrated his competence" by engaging in strategic decision-making during parts of his trial, particularly through cross-examination and closing argument. Id. at 21 – 22. The Court of Appeals erred in concluding that permitting Mr. Talavera to stand trial and represent himself did not amount to a violation of his constitutional rights to counsel and due process.

In In re Rhome, the petitioner argued that the trial court was required to conduct an evaluation to determine whether he was competent to represent himself pro se in addition to determining whether he was competent to stand trial before granting his motion to waive his right to counsel and proceed to trial pro se. 172 Wn.2d 654, 664, 260 P.3d 874 (2011). This Court refused to resolve the question of whether the trial court was required to conduct an evaluation to determine whether the defendant was competent to represent himself pro se and competent to stand trial prior to granting his motion to waive the

right to counsel because any decision would constitute a new rule, which could not be applied to Mr. Rhome on collateral attack. Id.

However, this Court stated that "there may be room [under current precedent] to craft a due-process-based rule requiring a more stringent waiver of counsel for a defendant whose competency is questioned." Id. Since Rhome, this Court has not yet directly resolved the question of whether courts are required to consider a defendant's competency to represent himself a trial before accepting a waiver of counsel. Mr. Talavera's case present this Court with an opportunity to resolve this important constitutional question and to clarify when trial courts are required to order a competency determination sua sponte.

Accordingly, this Court should grant review pursuant to RAP 13.4(b)(3) because Mr. Talavera's case presents significant questions of law under the federal and state

constitutions involving the Sixth Amendment and Article I, Section 22 rights to counsel and the Fourteenth Amendment and Article I, Section 3 rights to due process.

VI. CONCLUSION

Based on the foregoing, Mr. Talavera respectfully asks the Court to grant his petition for review pursuant to RAP 13.4(b)(1), (b)(2) and (b)(3).

DATED this 26th day of April, 2023.

Respectfully submitted,

BLACK & ASKEROV, PLLC

I hereby certify in compliance with RAP 18.17 that this brief contains 4,715 words.

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APPENDIX A

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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MARVIN J. TALAVERA-HERNANDEZ, Appellant.	No. 83138-1-I DIVISION ONE UNPUBLISHED OPINION

CHUNG, J. — The State charged Marvin Talavera-Hernandez with child rape and molestation for acts of sexual abuse involving his stepdaughter. His first trial ended in a mistrial. His second trial, at which he represented himself, ended with convictions on all counts. Talavera[1] claims several errors by the trial court: improperly declaring a mistrial; allowing him to represent himself without a valid waiver; failing to order a competency evaluation; and allowing a State expert witness to render an opinion on his guilt.

We conclude that Talavera consented to his mistrial, so the State did not violate double jeopardy. Further, the trial court properly conducted its colloquy and determined his waiver of his right to counsel was voluntary, intelligent, and knowing. The trial court did not abuse its discretion by not ordering a competency examination on its own accord. Finally, the claimed evidentiary error is not a

[1] Appellant's briefing uses the name Talavera, so we use that name here.

manifest constitutional error, so Talavera cannot raise it for the first time on appeal. Therefore, we affirm.

FACTS

In 2018, the State charged Talavera with one count of second degree rape of a child and one count of first degree child molestation. In January 2019, the State amended the information to three counts of first degree rape of a child and first degree child molestation, all for acts toward his stepdaughter, J.J.

Talavera's first, week-long trial began in May 2019. Talavera was represented by counsel and had a court-certified interpreter. At the end of the trial, the jury retired to deliberate at 11:19 a.m. They received the exhibits and ate lunch and then began deliberations at approximately 11:45 a.m. At 2:19, the jury sent a question to the court asking, "What do we do if we have [sic] do not have a consensus."

Without the jury present, the court discussed with the parties its plan to poll the jurors. The court proceeded to poll every juror, asking "is there a reasonable probability of the jury reaching a verdict within a reasonable time as to all of the counts?" Every juror answered "no." The court then asked each juror, "Is there a reasonable probability of the jury reaching a verdict within a reasonable time as to any of the counts?" Each juror again answered "no." [2]

[2] The pattern instruction includes both questions as possibilities. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: General Instruction 4.70 at 157 (5th ed. 2021). The accompanying "Note on Use" explains, "Use bracketed material as applicable to find out whether the jury may have a verdict or be able to reach a verdict on some of the counts . . . and possibly be deadlocked on the others."

Out of the presence of the jury, the court then told the parties that it intended to declare a mistrial and asked for their responses. Both the State and Talavera agreed with the court's plan. The court dismissed the jury and entered its written order declaring a deadlocked jury. The court's order indicated that the defendant "has consented to the discharge of the jury."

Before his second trial, the court granted Talavera's motion to proceed pro se. Standby counsel was appointed, but Talavera chose to proceed to trial despite standby counsel's unavailability. COVID-19 disrupted the trial court's calendar, but during renewed preparations for his second trial, at Talavera's request, the court dismissed standby counsel. At his second trial, Talavera did not question potential jurors, and he conducted minimal cross-examination of witnesses. His closing argument was extremely short. The jury found him guilty on all counts. After the court appointed appellate counsel, Talavera timely appealed.

DISCUSSION

On appeal, Talavera claims several errors by the trial court: improperly declaring a mistrial so as to place him in double jeopardy; violating his right to counsel by allowing him to represent himself without valid waiver; violating due process and RCW 10.77.050 by not ordering a competency evaluation; violating due process and his right to counsel by not determining whether he was competent to represent himself; and allowing a State expert witness to render an opinion on his guilt.

I. Double Jeopardy

Talavera argues the State subjected him to double jeopardy because no extraordinary and striking circumstances warranted the trial court's declaration of a mistrial. The State argues jeopardy did not terminate because Talavera consented to the mistrial. We agree with the State.

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution are "identical in thought, substance, and purpose," and both prohibit a State from twice putting a person in jeopardy for the same offense. State v. Ervin, 158 Wn.2d 746, 752, 147 P.3d 567 (2006). Double jeopardy not only protects criminal defendants from a second prosecution for the same offense after a conviction or an acquittal and from multiple punishments for the same offense, but it also protects criminal defendants' right to a trial completed by the original jury. State v. Jones, 97 Wn.2d 159, 162, 641 P.2d 708 (1982).

Double jeopardy applies when (1) jeopardy has previously attached, (2) jeopardy has terminated, and (3) the State places a defendant in jeopardy a second time for the same offense in fact and law. Ervin, 158 Wn.2d at 752. Jeopardy attaches once the jury is impaneled and the first witness answers the first question. Jones, 97 Wn.2d at 162. Jeopardy terminates when a criminal defendant (1) is acquitted, (2) is convicted and that conviction is final, or (3) the court dismisses the jury without the defendant's consent and the dismissal is not in the interest of justice. Ervin, 158 Wn.2d at 752-53 (citing Green v. United

States, 355 U.S. 184, 188, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)). In this case, the parties dispute only whether jeopardy terminated.

Talavera's first trial ended in a mistrial. Double jeopardy protects a criminal defendant not only after acquittal or conviction, but also after the trial is terminated by mistrial. Jones, 97 Wn.2d at 162. However, double jeopardy's protection against retrials following a mistrial is not absolute. Id. In particular, a hung jury is an unforeseeable circumstance that requires dismissing the jury in the interests of justice. Ervin, 158 Wn.2d at 753. Thus, jeopardy does not terminate if either a defendant consents to a mistrial or a trial court declares a mistrial in the interest of justice. State v. Juarez, 115 Wn. App. 881, 888, 64 P.3d 83 (2003) ("If the defense did not freely consent [to a mistrial], [then] we examine the sufficiency of the trial court's grounds for discharging the jury.").

An appellant can raise double jeopardy for the first time on appeal. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006); RAP 2.5(a). Double jeopardy is a question of law reviewed de novo. State v. Strine, 176 Wn.2d 742, 751, 293 P.3d 1177 (2013). However, the decision whether to grant a mistrial is reserved to the "broad discretion" of the trial judge, especially in cases involving a potentially deadlocked jury. Strine, 176 Wn.2d at 754 (citing Arizona v. Washington, 434 U.S. 497, 509-10, 98 S. Ct. 824, 54 L.Ed.2d 717 (1978)).

Here, the parties do not dispute that jeopardy attached and that the State retried Talavera, so the issue is whether jeopardy terminated after his first trial. Jeopardy did not terminate if Talavera consented to the mistrial. The record shows Talavera agreed with the trial court's plan to poll the jurors and in fact

argued for the court to poll the jurors. After polling the jurors, the trial court stated, "my inclination would be to declare a mistrial," and asked for the parties' responses. The prosecutor said "I don't think there's anything I can say, Your Honor, and I don't think there's any instructions that the Court can give." Talavera's counsel said, "Agreed." And the court's order declaring deadlock indicated Talavera "has . . . consented to the discharge of the jury." Thus, jeopardy did not terminate because Talavera consented to the discharge of the jury.

Talavera argues his consent "was really no consent at all" because he had only a "Hobson's choice"[3] between allowing the jury to continue its deliberations or agreeing to poll the jurors. However, the authority he cites, State v. Rich, is distinguishable. 63 Wn. App. 743, 821 P.2d 1269 (1992). In Rich, the defendant did not appear the morning of trial, and the court recessed the trial to give him time to appear. Id. at 745. After an hour's recess, the court granted the State's motion to try the defendant *in absentia*. Id. After both parties presented witnesses and rested their cases, the defendant appeared and moved to dismiss for insufficient evidence, as none of the witnesses had identified him as the person arrested for the crime charged. Id. at 746. The court denied the motion and gave the defendant a choice: either agree to allow the State to reopen its case or agree to a mistrial. Id. Even though the defendant objected to both choices, the court granted its own motion for a mistrial. Id. The reviewing court held that the

[3] An apparent freedom to take or reject something offered when in actual fact no such freedom exists: an apparent freedom of choice where there is no real alternative. Webster's New International Dictionary 1076 (3rd ed. 1969).

defendant had not consented, as he had been "faced with a Hobson's choice" between agreeing to allow the State to reopen its case, "which would clearly prejudice his prospects for acquittal," or a mistrial, and chose neither. Id. at 748. "His failure to select either of two unfavorable options cannot be considered consent to the declaration of a mistrial." Id. at 748.

Here, unlike the defendant in Rich, Talavera was not presented with two unfavorable options, but rather, requested the court to poll the jury. Then, when the court suggested a mistrial, he affirmatively consented to the jury's discharge. Therefore, jeopardy did not terminate and the State did not twice place Talavera in jeopardy.[4]

II. Right to Counsel

Talavera contends the trial court violated his constitutional right to counsel, and his conviction should be reversed, because he did not knowingly, intelligently, and voluntarily waive this right. The State argues the trial court did not abuse its discretion in granting Talavera's motion to proceed pro se. We agree with the State.

"Criminal defendants have an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution." State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (citing WASH. CONST. art. I, § 22; Faretta v. California, 422 U.S. 806,

[4] Talavera's consent is dispositive of the issue of termination and double jeopardy. Talavera argues that the jury's two hours of deliberation is "inadequate." However, the Washington Supreme Court expressly declines to require the "mechanical application" or any "rigid formula" when trial judges decide whether jury deadlock warrants a mistrial. Strine, 176 Wn.2d at 755 (citing Wade v. Hunter, 336 U.S. 684, 691, 69 S. Ct. 834, 93 L. Ed. 974 1978)).

819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). The right to self-representation is "so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." Madsen, 168 Wn.2d at 503.

Criminal defendants also have a right to counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. "A tension exists between the constitutional right to self-representation and the constitutional right to proceed with adequate counsel." State v. Burns, 193 Wn.2d 190, 202, 438 P.3d 1183 (2019). Defendants have a right to waive assistance of counsel and represent themselves at trial. State v. DeWeese, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). Given the hazards of self-representation, courts are required to give "every reasonable presumption" against a defendant's waiver of right to counsel. Madsen, 168 Wn.2d at 504.

As a result of this presumption, a trial court may deny a request for self-representation only if the request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. Burns, 193 Wn.2d at 202-03; Madsen, 168 Wn.2d at 504-05. "[T]he record will establish that '[the defendant] knows what [they are] doing and [the] choice is made with eyes open.' " State v. Hahn, 106 Wn.2d 885, 889, 726 P.2d 25 (1986) (quoting Faretta, 422 U.S. at 835). Courts engage in a multistep process to evaluate a defendant's request to proceed pro se, first determining whether the request was unequivocal and timely, then proceeding to determine if the request is knowing, voluntary and intelligent. Burns, 193 Wn.2d at 203.

To assess the defendant's understanding of the risks of forgoing counsel, courts engage in a colloquy which "should generally include a discussion of the nature of the charges against the defendant, the maximum penalty, and the fact that the defendant will be subject to the technical and procedural rules of the court in the presentation of his case." Burns, 193 Wn.2d at 203. Courts may also consider education, experience with the justice system, mental health, and competency, as well as the defendant's behavior, intonation, and willingness to cooperate with the court. Id. The court then uses all the information gained from the colloquy to ensure the defendant's waiver of counsel is made with an understanding of the seriousness and possible consequences. Id. at 203-04. Waiving one's constitutional right to counsel requires a heightened standard in that waiver must be knowing and voluntary, but no heightened standard of competence is required. Burns, 193 Wn.2d at 206 (citing Godinez v. Moran, 509 U.S. 389, 400, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993)). We consider only the evidence before the trial court at the time of the colloquy; subsequent conduct while a defendant is proceeding pro se is not part of our inquiry. State v. Sabon, __ Wn. App. 2d __, 519 P.3d 600, 607 (Wash. Ct. App. 2022).

We review a trial court's decision on a defendant's request to proceed pro se for abuse of discretion. Burns, 193 Wn.2d at 202. A trial court abuses its discretion if its decision is manifestly unreasonable, unsupported by the record, or based on an incorrect legal standard. Id. We give deference to the trial court's discretion because "[t]rial judges have more experience with evaluating requests to proceed pro se and have the benefit of observing the behavior, intonation, and

characteristics of the defendant during a request." Id. The defendant has the burden to prove improper waiver. Hahn, 106 Wn.2d at 885.

Here, Talavera argues the trial court failed to establish on the record through a sufficiently "penetrating and comprehensive" colloquy that he had sufficient understanding of the charges against him and the disadvantages of representing himself. The record demonstrates otherwise. Two judges conducted extensive colloquies to verify Talavera's request for self-representation. Both concluded that his waiver was knowing, intelligent, and voluntary.

Talavera initially moved to proceed pro se approximately one month before his case was set for retrial. The court addressed the seriousness of the charges and the hazards of representing himself. The court began, "first of all, I do want to impress on you, you do understand the seriousness of the charges that you're facing?" The court explained to Talavera that he faced some of the most serious charges a person could face, including three counts of rape of a child in the first degree that each carried a potential life sentence. The court informed Talavera that proceeding pro se "seems highly ill advised."

Talavera affirmed that he understood the charges. He told the court, "she cannot even prove everything she's saying. . . And I can prove what I'm going to say." When asked about whether he had a legal background, Talavera responded, "I don't have any law background, and I'm not going to have it . . . But I still want to represent myself."

The court asked Talavera if he understood he would need to follow procedures and rules, even though he did not know the rules. Talavera

acknowledged this but reiterated that he wanted to represent himself. The court reminded Talavera that an attorney "apparently must have persuaded some of the jurors [in the previous trial] that the State had not proven you guilty beyond a reasonable doubt," and so an attorney could also help in the second trial. Talavera said, "Yeah, I understand that," but continued to assert his desire to proceed pro se.

After the repeated assertions, the court attempted to dissuade Talavera again, stating "I'm going to say this much. You have a right to represent yourself. Given the nature of the charges that you are facing, given the consequences, if you are found guilty of even one of them, I think that it is not a wise decision to proceed without an attorney." Talavera responded that he understood.

The court tried one last time:

> Well, Mr. Talavera-Hernandez, if it is your decision, in light of all of the consequences, to represent yourself, despite your lack of legal knowledge or anything about legal procedure -- and you understand the state's going to be represented by an attorney who has all of that knowledge, and you still want to represent yourself?

Talavera responded, "Yeah, it's good to have even more advantages." When the trial court attempted to clarify this response, Talavera said, "for her to have advantages, that's okay." The court tried to again to understand Talavera's response:

> I'm not sure what you mean exactly by that. I'm just trying to make sure you understand what a serious decision you're making. I mean, there may be times when an attorney would make an objection as to the testimony, and you're not going to know when to do that.

Talavera said he was "just going to use what they have said already."

In the end, and with reluctance, the trial court found that Talavera made a knowing and voluntary waiver of his right to counsel and it had no choice but to permit self-representation. The court concluded by offering stand-by counsel, which Talavera reluctantly accepted.

Trial was delayed due to COVID-19, and when the time for trial approached in August 2021, stand-by counsel was unavailable. Talavera told the court[5] he did not want any assistance with his case. Talavera said, "I don't trust anyone. I can do it." The court verified,

> At this point, it does seem—and I am basing this both on the oral statements of Mr. Talavera as well as, frankly, his clear demeanor in answering the questions and in how he is representing himself to the Court that he does not wish to have an attorney assist him or be available to him to assist in any way. And, again, Mr. Talavera, I just want to make sure that I am understanding all of this correctly. Do I have that correct?

Talavera responded, "It is correct." The court then concluded that "Mr. Talavera absolutely unequivocally has indicated—which is his right—that he wishes to represent himself and not have standby counsel." Additionally, the court found, "He is making this decision clearly, knowingly, voluntarily, and intelligently. This is based on this colloquy here today as well as several previous conversations Mr. Talavera has had with this Court and [a different judge]. And I am incorporating all of those previous hearings by reference."

When the time for trial arrived, the court had another conversation with Talavera at the behest of the State. "Mr. Talavera Hernandez, we've discussed this several times. Are you really sure about this decision? It seems you're not in

[5] At this point, the case proceeded before a different judge from the earlier proceedings.

a place to really effectively meet what's against you." Talavera responded, "I'm not worried about what they say. What I'm worried about is that I'm not taken advantage of."

Unsatisfied with that answer, the court reiterated its concern that Talavera was unprepared and asked, "You have told it's [sic] at least three judges that you don't want an attorney and it's your decision. But again, is this I guess really what you want to do?" Talavera replied, "As I said before, I already won this case and I know what I am going to do. They, themselves accused themselves and I'm ready."

The court made a final attempt to dissuade Talavera: "I guess I'm just going to say it one last time, maybe in a different way. I don't think you're making a great decision. The optics, as I say, just don't look good, but it is your decision to make." Talavera told the court, "I am innocent and I have nothing to fear." After that, the court began hearing motions in limine.

Two separate judges conducted colloquies to assess Talavera's waiver of counsel and his request to proceed pro se. In both instances, the court explained the nature and seriousness of the charges and that Talavera would be at a disadvantage because he did not know the legal rules and procedures. Talavera confirmed his understanding and remained firm in his request to represent himself. Even on the eve of trial when the court observed that Talavera appeared unprepared, Talavera said "I'm prepared." He also told the court, "When I am ready, I will represent myself," and "I already won this case and I know what I'm

going to do." He indicated that he would follow the blueprint from the previous case, as he was "just going to use what they said already."

In addition to Talavera's repeated acknowledgments that he was aware and understood the seriousness of the charges and was prepared to represent himself, Talavera had first-hand knowledge of the process from the first trial on the charges, during which he was represented by counsel. Courts have considered this experience in assessing a defendant's request for self-representation. "The knowledge required to waive counsel may be gained from participation in an earlier trial on the same matter." State v. Conlin, 49 Wn. App. 593, 595–96, 744 P.2d 1094 (1987). As the court described in another case, when the defendant had already experienced a previous trial, the defendant

> witnessed firsthand a full, totally realistic demonstration and application of what to expect, what the problems of presenting his defense were and precisely how to do it. The trial gave him a sound basis from which to make a judgment as to self-representation, far better than verbal advice from the bench, no matter how well conceived and delivered.

State v. Strodtbeck, 46 Wn. App. 26, 29, 728 P.2d 622 (1986). The same holds true for Talavera.

Given Talavera's participation in his prior trial and his steadfast commitment to proceeding pro se expressed through at least two complete colloquies detailing the serious nature of child rape charges, the potential for a life sentence, and the technical nature of particularly the evidentiary law and trial procedure for which he would be responsible as pro se, the trial court did not

abuse its discretion by finding that Talavera had knowingly, intelligently, and voluntarily waived his right to counsel.[6]

III. Competency to Proceed Pro Se

Talavera next contends the trial court violated due process and his right to counsel by not determining whether he was competent to represent himself pro se. We disagree, as the law does not require an evaluation of competency for a valid waiver of the right to counsel to proceed pro se.

"Although often conflated under an umbrella of 'competency,' the distinction between competency to stand trial [i.e., as a defendant] and competency to represent oneself [i.e., as pro se counsel] is important, as the legal standards governing each are vastly different." State v. Phan, No. 82708-1, slip op. at 15, (Wash. Ct. App. Dec. 27, 2022), https://www.courts.wa.gov/opinions/pdf/827081.pdf. The Washington Supreme Court has held that a trial court is *permitted* "to consider the defendant's mental health when assessing whether a request for self-representation is knowing, intelligent, and voluntary, but that the trial court is *not constitutionally required* to conduct an independent determination as to the defendant's competency to proceed pro se." Phan, No. 82708-1, slip op. at 18 (original emphasis) (citing In re Pers. Restraint of Rhome, 172 Wn.2d 654, 665, 260 P.3d 874 (2011)).

"[A] defendant's mental health status is but one factor a trial court may consider in determining whether a defendant has knowingly and intelligently

[6] While the thrust of Talavera's argument is that his waiver was not knowing or intelligent, he suggests his performance as counsel should be reviewed. However, a pro se litigant's subsequent performance as pro se counsel is not part of the inquiry into whether waiver was knowing and intelligent. Sabon, 519 P.3d at 607.

waived his right to counsel, but [precedent does] not require us to find that an independent determination of competency for self-representation is a constitutional mandate." In re Rhome, 172 Wn.2d at 665; Phan, No. 82708-1, slip op. at 20 (explaining that " '[m]andating the use of that discretionary authority [to order a competency examination] in some difficult-to-define subset of these types of cases will only limit trial court discretion at a time when it is most needed and will not provide for any meaningful review' ") (quoting State v. Lawrence, 166 Wn. App. 378, 395, 271 P.3d 280 (2012)). However, if incompetency is a basis for finding that a pro se request was not made voluntarily, knowingly, and intelligently, the trial court is required to order a competency evaluation if the colloquy leads to such concerns. Sabon, 519 P.3d at 608 (citing State v. Madsen, 168 Wn.2d 496, 510, 229 P.3d 714 (2010)).

As analyzed in the preceding section, Talavera's waiver of his right to counsel was knowing, voluntary, and intelligent. The trial court's decision not to sua sponte order a competency evaluation of Talavera to proceed as pro se counsel was not an abuse of its discretion.

IV. Competency to Stand Trial

Talavera also contends the trial court violated his due process rights and RCW 10.77.050 by failing to order a competency evaluation for him as a defendant. We disagree.

The due process clause of the Fourteenth Amendment to the United States Constitution prohibits criminal prosecution of a legally incompetent defendant. State v. McCarthy, 193 Wn.2d 792, 800, 446 P.3d 167 (2019).

Washington provides protection under RCW 10.77.050: "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." Incompetency "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(17). Washington has a two-part test for legal competency: (1) whether the defendant understands the nature of the charges and (2) whether he is capable of assisting in his defense. In re Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). RCW 10.77.060(1)(a) establishes the trial court's role in ensuring legally competency for prosecution:

> Whenever . . . there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.

In deciding whether a competency hearing is necessary, the trial court considers defendant's behavior, demeanor, appearance, personal and family history, psychiatric reports, and defense counsel's opinion. McCarthy, 193 Wn.2d at 801. We review whether a trial court should have sua sponte ordered a competency evaluation for abuse of discretion. Id. at 803.

Here, Talavera asserts there were "numerous reasons" to doubt his competency. He dismissed his attorney and refused stand-by counsel, made statements about God's will, said he "already won this case" and that he did not trust anyone. He also refused to open the 278 pages of discovery from his first trial provided to him by the State, saying "It's not important to me," and he failed

to attend a mutually scheduled discovery conference with the State. Throughout the trial he made religious references and sometimes incomprehensible assertions.[7]

However, Talavera also demonstrated his competence by engaging in strategic decisions and actions, such as conducting cross-examination with a clearly articulated purpose. For example, the court questioned Talavera as to the relevance of his line of questioning of J.J.'s father about a police report on vandalism of J.J.'s father's car. Talavera explained "[i]t's going to, like, impeach the police report." When asked how, Talavera said "[p]roving that they lie. The prosecution is making an accusation based on a police report and, beyond that, [J.J.'s mother] and [J.J.]. So what I'm trying to get at is for the police report not to be considered." While the evidence appeared irrelevant to the State and the court, Talavera was enacting a strategy to further his defense.

During cross-examination of J.J., Talavera elicited information that J.J. had an allergic reaction to latex resulting in hives. The State discussed the presence of latex in condoms, and J.J. denied having broken out in hives after Talavera had sex with her. Talavera reminded the jury of the allergy during closing arguments. "At no moment did she mention that she had to be taken to a hospital or that she had to take medicine somehow, so she couldn't have been touched without having that kind of reaction." Talavera was clearly drawing the

[7] For example, when explaining his lack of participation in voir dire, Talavera explained, "For me, they are not the ones that decide. So then I don't care if they're there or not." When the trial court asked who Talavera believed would decide, he replied "God." In closing arguments, Talavera told the jury, "So I'm not a promoter of stars. I'm not promoting people to be famous. For that, look for -- I hope you declare me not guilty because I have a lot of work to do. That's it. I'm very thankful to you."

connection between the use of latex condoms and J.J.'s allergy in an attempt to refute her claims.

While Talavera declined to participate in certain parts of the proceedings and made odd statements throughout the trial, he demonstrated a strategy to defend himself and attempts to implement that strategy. Thus, Talavera displayed behavior that satisfied Washington's standard for determining a defendant is competent to stand trial: he understood the charges against him and assisted in his defense. See Fleming, 142 Wn.2d at 862.

V. Opinion on Guilt

Finally, Talavera argues that an expert witness rendered "an almost explicit opinion" on his guilt. Because there is no manifest constitutional error, we decline to review the merits on appeal.

One of the testifying witnesses was a licensed mental health counselor with a child advocacy program. She conducted a mental health assessment of J.J. that resulted in a referral for ongoing therapy. During the assessment, the counselor used several screening tools to evaluate J.J.'s mental health. The State asked the counselor about her findings:

> PROSECUTOR: Okay. And what were the results of that, if you recall?
>
> WITNESS: She had clinically significant trauma symptoms.
>
> PROSECUTOR: What does that mean?
>
> WITNESS: That the symptoms that she was reporting connected to this traumatic event were sufficient to meet criteria for a mental health diagnosis and necessitate ongoing therapy.

Talavera did not object to this testimony. On appeal, Talavera challenges this testimony as an improper opinion on his guilt that violated his right to a jury trial. Under RAP 2.5(a), the appellate court may refuse to review an error not raised before the trial court. "Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction)." State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). However, a party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). "The defendant must demonstrate that '(1) the error is manifest, and (2) the error is truly of constitutional dimension.' " State v. Dillon, 12 Wn. App. 2d 133, 139-40, 456 P.3d 1199 (quoting State v. O'Hara, 167 Wn.2d 91,98, 217 P.3d 756 (2009)), review denied, 195 Wn.2d 1022, 464 P.3d 198 (2020). This standard requires the defendant to identify a constitutional error and show how the error actually affected their rights at trial. Kirkman, 159 Wn.2d at 926-27. The appellant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial. State v. A.M., 194 Wn.2d 33, 38, 448 P.3d 35 (2019).

"The right to have factual questions decided by the jury is crucial to the right to trial by jury." State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). "The general rule is that no witness, lay or expert, may 'testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.' " City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). When determining whether statements are an impermissible opinion on guilt, courts consider the

circumstances of the case, including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact. Heatley, 70 Wn. App. at 579. Expressions of personal belief as to the guilt of defendant, intent of the accused, or veracity of witnesses are improper opinion testimony. Montgomery, 163 Wn.2d at 591.

Despite the clear prohibition of opinion testimony on credibility, "[a]dmission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error." Kirkman, 159 Wn.2d at 936. In such cases, manifest error requires "an explicit or almost explicit witness statement." Kirkman, 159 Wn.2d at 936. Opinion testimony relating only indirectly to a victim's credibility does not rise to the level of manifest constitutional error. Kirkman, 159 Wn.2d at 922.

Talavera objects to the mental health counselor's statement: "the symptoms that [J.J.] was reporting connected to this traumatic event were sufficient to meet criteria for a mental health diagnosis and necessitate ongoing therapy." Specifically, Talavera points to the counselor's reference to "this traumatic event" as testimony that "linked, without any scientific basis, the symptoms that J.J. was suffering to the alleged abuse," and was, therefore, an unconstitutional comment on guilt. Talavera cites to State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987), and State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236 (2009), to support his claim that this medical expert testimony constituted improper opinion on his guilt.

In Black, the court concluded that an expert's testimony on rape trauma syndrome was an opinion on the defendant's guilt: "[i]t carries with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped. It constitutes, in essence, a statement that the defendant is guilty of the crime of rape." 109 Wn.2d at 349. Following the example of Black, Hudson discussed an expert's testimony that the nature of the alleged victim's injuries were "extensive injury related to nonconsensual sex," and determined that the expert "explicitly testified" that the alleged victim's injuries "were caused by nonconsensual sex, i.e., rape," and because the alleged victim "had no sexual encounters other than with Hudson, who did not dispute that their encounter caused her injuries, these opinions amounted to statements that he was guilty of rape." 150 Wn. App. at 653 (original emphasis).

Despite both cases involving expert opinions provided after evaluations of alleged sexual assault victims, Hudson and Black have important distinctions that make them inapposite to the case at hand. Both cases considered errors properly preserved at the trial court. The court in Black expressly determined the appellant had preserved the issue for appeal. 109 Wn.2d at 340. And in Hudson, the defendant objected to the testimony during trial. 150 Wn. App. at 651. As a result, neither of these cases necessitated a showing of manifest constitutional error—and the required explicit or almost explicit statement of opinion on guilt—in order to be properly considered on appeal. The reviewing courts examined the merits without the initial hurdle of manifest constitutional error. In the case of Black, this distinction proves critical. The court noted that the witness statement

was "an implied opinion that the alleged victim is telling the truth." Black, 109 Wn.2d at 349. An implied opinion would not have met the standard for manifest constitutional error.

Here, Talavera acknowledges the implicit nature of the mental health counselor's statement. He contends that because the only sexual interactions the jury heard about were allegedly between himself and J.J., the mental health counselor's testimony "carried an implied opinion that J.J. was telling the truth" and that he had raped her. But an implied opinion will not satisfy the requirement for an explicit or near explicit statement for review as a manifest constitutional error.

This court has declined to review similar unpreserved errors. For example, in State v. Borsheim, 140 Wn. App. 357, 362-63, 165 P.3d 417 (2007), 11-year-old B.G. alleged that her mother's partner sexually abused her. A medical witness testified that she had reviewed B.G.'s medical files, her observations were consistent with B.G.'s reports of sexual abuse, and her medical diagnosis was that B.G. had been sexually abused. Borsheim, 140 Wn. App. at 363. This testimony did not rise to the level of manifest constitutional error because it "conveyed only the witness's opinion that sexual abuse had occurred, not that the witness believed B.G.'s assertion that Borsheim was the party guilty of that abuse." Borsheim, 140 Wn. App. at 375.

Compared to Borsheim, the testimony in this case was much less direct on the subject of sexual abuse. Rather than testify about sexual abuse, the expert merely concluded that J.J.'s mental health issues connected to "this

traumatic event" showed a need for continuing treatment. Reference to "this traumatic event" was not an explicit or near explicit opinion on Talavera's guilt. Therefore, Talavera has not demonstrated a manifest constitutional error, and we decline to review the merits of this issue on appeal.

Affirmed.

Chung, J.

WE CONCUR:

Birk, J.

Dwyer, J.

BLACK LAW PLLC

April 26, 2023 - 9:02 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	83138-1
Appellate Court Case Title:	State of Washington, Respondent v. Marvin J. Talavera-Hernandez, Appellant
Superior Court Case Number:	18-1-00970-1

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