Supreme Court No. _____
COA No. 37846-2-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL CHENOWETH,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KITTITAS COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Michael Chenoweth was the defendant in Kittitas County No. 19-1-000247-19 and the appellant in COA No. COA 37846-III, and is the Petitioner herein.

B. COURT OF APPEALS DECISION

Mr. Chenoweth seeks review of the decision in COA No. COA 37846-III, issued April 2, 2024. Appendix A (Decision).

C. ISSUES PRESENTED ON REVIEW

1. Mr. Chenoweth's Due Process rights and state constitutional right to appeal were violated where the State secured his conviction for first degree assault in a trial which was audio-recorded, but failed to make any recording of jury selection. In a decision which erroneously equated the inadequate re-created record's inability to contain evidence of the sort of error such as that appearing in State v. Irby, supra, to a record that affirmatively showed that no such error occurred or could have occurred, the Court of Appeals

disregarded State v. Waits, 200 Wn.2d 507, 520 P.3d 49 (2022). Is review required under RAP 13.4(b)(3) and RAP 13.4(b)(1)?

2. Is automatic reversal required where the State failed to make a recording of jury selection, and the absence of a word-for-word verbatim report - a transcript, as opposed to a narrative report - prevents Mr. Chenoweth's appellate counsel from determining whether a juror uttered a statement during *voir dire* that categorically required the trial court to preclude that person from sitting, and would require reversal on appeal even in the absence of any objection, and without any showing of prejudice?

3. Is review required under RAP 13.4(b)(4) where the responsibility to make a record of jury selection in the prosecution of criminal defendants, if deemed by the courts to be a mistake of no consequence even where a brief, un-noticed and un-remarked upon utterance under Irby might require automatic reversal, will result in *wealthy* defendants

securing their own private court reporter or audio record of jury selection to ensure that if (as here) the required recording is lost or never made, a record will be preserved for appeal?

D. STATEMENT OF THE CASE

1. <u>Facts</u>. On August 27, 2019, Kittitas County Sheriff's Office Detective Chris Whitsett and other deputies were called to the Ellensburg property of the Chenoweth family, where Scott Chenoweth and his parents lived, along with Scott's brother Michael. Mr. Chenoweth resided on his own in a trailer on the family grounds. CP 1-6. The deputies came to the property after a warrant for involuntary detainer of Mr. Chenoweth had been secured, based on reports by Bradley Bastion of Compass Mental Health, who had learned that Michael was not taking his mental health medication and was delusional. Mr. Chenoweth had verbally threatened household members, and then he went inside his trailer, and locked the door. CP 1-6.

Detective Whitsett was familiar with Mr. Chenoweth's mental health issues from prior incidents. CP 1-6. Mr. Chenoweth refused to exit the trailer, so the deputies drilled through the trailer's door lock. When the deputies forced the door open, Mr. Chenoweth fired an arrow from a hunting bow, which struck Corporal James Woody. Corporal Woody's bulletproof vest resulted in the arrow glancing off his protective gear and causing a bleeding wound in his shoulder area. CP 1-6.

The State charged Mr. Chenoweth with first degree assault in Kittitas County No. 19-1-00247-5 (19). CP 72-73. He was subsequently found guilty as charged by the jurors sitting on his case, and the trial court sentenced him to a prison term of 111 months based on his offender score of zero. CP 135-36.

2. <u>Absence of record of jury selection for appeal.</u>

Mr. Chenoweth, through trial counsel, timely filed a notice of appeal and a statement of arrangements. CP 13.

However, no record of any kind of the jury selection in Mr. Chenoweth's trial had been made, or if made, it had was not maintained. Over the course of multiple pleadings, and following the Supreme Court's decision in State v. Waits, 200 Wn.2d 507, 509, 520 P.3d 49 (2022), the only record of *voir dire* that could be fashioned, given defense counsel's sworn statement of an inability to recall any aspect of jury selection, was a general, narrative description of the proceeding constructed from the trial court minutes and the trial prosecutor's notes. See CP 227-240 (order of April 13, 2023, settling the record in the form of a brief description of jury selection stating that jurors were selected at the hearing) Mr. Chenoweth appealed, arguing that the reconstructed narrative report of jury selection is wholly inadequate for effective appellate review, requiring a new trial. The Court of Appeals affirmed. Appendix A.

E. ARGUMENT

Where the government fails to make and maintain a verbatim transcript of *voir dire,* a general, narrative report of proceedings such as that constructed here cannot possibly be of sufficient completeness to allow effective appellate review, because of the unique nature of that central aspect of a jury trial. A new trial is required without further showing.

1. Review is required under RAP 13.4(b)(3) and RAP 13.4(b)(1) and RAP 13.4(b)(4) where the required record of a court proceeding is absent, and only a reconstructed record that is sufficiently equivalent to a verbatim transcript to permit effective appellate review can avoid automatic reversal for violation of the constitutional right to appeal, and pursuant to *State v. Waits*.

This Court, in State v. Waits, addressed the constitutional consequences of a deficient trial record on criminal appeal. State v. Waits, 200 Wn.2d at 509. The Court of Appeals disregarded Waits, requiring review under RAP 13.4(b)(1). When the defendant/appellant is faced with a defective or incomplete record, the first governing standard arises from the Washington State Constitution, under which criminal defendants have the right to appeal in

all cases. State v. Waits, 200 Wn.2d at 509 (citing Wash. Const. art. I, § 22). This guarantee necessarily means that a criminal defendant is constitutionally entitled to a record of sufficient completeness to permit effective appellate review. Waits, 200 Wn.2d at 509-10 (citing State v. Tilton, 149 Wn.2d 775, 781, 72 P.3d 735 (2003)).

The Court of Appeals thus also disregarded Mr. Chenoweth's constitutional right to appeal, requiring review under RAP 13.4(b)(3). A sufficiently complete record does not necessarily require a complete verbatim transcript, but under Article 1, section 22 and Fourteenth Amendment Due Process, an alternative record permits effective review only if it allows counsel to discern the issues to be raised on appeal and puts before the reviewing court an "equivalent" report of the trial events from which the issues arise. Waits, 200 Wn.2d at 510, 513-14 (citing Tilton, at 781, 783) (and citing Mayer v. City of Chicago, 404 U.S. 189, 194, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971) (Fourteenth Amendment

due process requires a record sufficient for effective appellate review).

Mr. Chenoweth is entitled to effective assistance of counsel on appeal. Matter of Frampton, 45 Wn. App. 554, 559, 726 P.2d 486 (1986) (appellant has a Sixth Amendment right to effective assistance of counsel on appeal); U.S. Const., amend VI. It is also appellate counsel's ethical obligation under RPC 1.3 to competently review the record so as to secure available remedies on appeal. In re Juarez, 143 Wn.2d 840, 875, 24 P.3d 1040 (2001). As part of this process, a criminal defendant is constitutionally entitled to a "record of sufficient completeness" to permit effective appellate review to determine the presence of error that denied him a fair trial. Draper v. Washington, 372 U.S. 487, 499, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963). Absent a record that is adequately equivalent to a verbatim report and sufficient for appellate review, Mr. Chenoweth's appellate

counsel cannot provide effective assistance to him on appeal.

For these reasons, the meaning of "equivalent," and the standard for effective review, is necessarily first measured against the record required. Under Washington law, the record required is a word-for-word transcript. The superior courts are courts of record. RCW 2.08.030. A "court of record" is a "court that is required to keep a record of its proceedings." Black's Law Dictionary 380 (8th ed.2004); see Black's Law Dictionary 1497 (6th ed.1990). In Washington, the court is responsible for preserving a complete record of trial proceedings by a stenographic or recording method authorized. State v. Woods, 72 Wn. App. 544, 550, 865 P.2d 33 (1994); RCW 2.32.180 ("It shall be and is the duty of each and every superior court judge . . .to appoint . . . a stenographic reporter"); RCW 2.32.050(1),(2) ("it is the duty of the clerk . . . to record the proceedings of the court").

The absence of an adequate record requires reversal. "Where a record is insufficient to permit effective review, a defendant receives a new trial." Waits, 200 Wn.2d at 510 (citing Tilton, at 783).

2. Here, where the absent record is that of jury selection, wherein automatic reversal is required if a biased juror sat on the jury, only a word-for-word transcript of the proceeding is a record sufficient to permit effective appellate review.

The Court of Appeals misstated the record. The Court stated, "The [reconstructing trial] court noted that Chenoweth had 'preserved no objection or exception to either of these portions of the proceedings on the record below,' and that there was 'no apparent GR 37, Batson, or other manifestation of systemic injustice on this record.' " CP at 228. Decision, at 6. By this language Mr. Chenoweth did not agree that no error occurred below, nor did he agree that the absence of an indication of error showed that no error occurred. The Court of Appeals writes that the reconstructing trial court found that " 'the State's

Proposed Supplemental Narrative Report of Proceedings . . . [is] the best available record of [that proceeding],' " Decision, at 9 (citing CP at 227-28), and writes, "Chenoweth does not assign error to this finding." Decision, at 9.

Mr. Chenoweth did not agree that the reconstructed record was either complete, or adequate – only that it was the best possible re-created record, albeit one sorely lacking in completeness. The Court of Appeals writes that "the deputy prosecuting attorney handling this appeal declared that he interviewed the attorneys who tried the case," Decision, at 9-10, but fails to note the agreed fact that trial defense counsel had no recollection of jury selection whatsoever *one way or the other*. Opening Brief, at p. 4 (citing CP 227-40 (order of April 13, 2023).

In relying on the notion that "no one recalled any events during jury selection beyond what was recorded in the clerk's minutes and records," Decision, at 10, the Court of Appeals disregarded the nature of the error at issue, which

is a reconstructed record incapable of reflecting the presence or absence of an error consisting of a mere several words demonstrating a juror's categorically disqualifying bias which, by the definition of the cases in which such error has required automatic reversal, is by its very nature a phrase or utterance that no court actor – court, clerk, bailiff, prosecutor, defense counsel, or any other person - took any notice of when it was uttered – yet which utterance required reversal on appeal without any specific showing of prejudice after appellate counsel detected the phrase and raised the issue on appeal.

Whether a reconstructed record is sufficient for purposes of determining error for appellate review depends on the nature of the proceeding and the possible error. Waits, 200 Wn.2d at 513 ("Effective review allows counsel to determine which issues to raise on appeal and provides the relevant, equivalent report of the trial record where the alleged issues occurred") (citing Tilton, at 781).

Waits recognizes that where the lost record of a proceeding is that of jury selection, and the potential issue is a GR 37 question as to whether race could be seen as a reason a juror was peremptorily struck, "[i]t is hard to imagine that a narrative or agreed report would be sufficient to allow such a case to come before appella[te] review," because effective appeal of such an issue involves "a granular examination of juror statements for which a transcript [is] critically important." Waits, 200 Wn.2d at 522 n. 8.

Of course, in a GR 37 case like that described by the Waits Court - where the clerk's minutes, or a participant's memory and/or notes can at least identify the presence of a GR 37 issue, similar to an issue arising under Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986), reconstructive efforts might, theoretically, have a chance of succeeding in focusing recollection on that matter. After all, the parties will have litigated the issue,

and the court will have ruled, thus recollection might be jogged so as to produce a sufficient record. However, Waits properly finds effective review "hard to imagine" in this instance. Waits, at 522 n. 8. Given the review of the record of jury selection which is required where a GR 37 issue is raised, this Court in Waits was correct to deem effective appellate review likely impossible - absent a word-for-word transcript.

If effective appellate review of an identified GR 37 or Batson issue likely cannot be accomplished in the absence of a word-for-word transcript of jury selection, the Waits / Tilton rule requiring a new trial applies categorically to jury selection generally, under cases such as State v. Irby, which mandate automatic reversal where a biased juror sat in judgment. Under Irby, when a juror with actual bias is seated, the right to a fair trial is violated and the "error requires a new trial without a showing of prejudice." State v. Irby, 187 Wn. App. 183, 193, 347 P.3d 1103 (2015).

In Irby, one of the jurors had said during *voir dire* that she "would like to say he's guilty." Irby, 187 Wn. App. at 196-97. This Court reversed. A trial judge has an independent obligation to excuse such a juror, regardless of inaction by counsel. Irby, 187 Wn. App. at 193. The seating of a biased juror is manifest error requiring automatic reversal including when raised for the first time on appeal, and by definition, it arises in cases where neither counsel nor the court deemed the remark deserving of any notice, or notation whatsoever. See, e.g., State v. Phillips, 6 Wn. App. 2d 651, 662, 431 P.3d 1056, 1064 (2018) (recognizing rule of automatic reversal and manifest error where trial court's duty to dismiss a biased juror exists "regardless" of whether the matter is brought to the court's attention or not); State v. Lawler, 194 Wn. App. 275, 286, 374 P.3d 278 (2016); see also State v. Guevara Diaz, 11 Wn. App. 2d 843, 853-54, 456 P.3d 869, 874, review denied, 195 Wn. 2d 1025, 466 P.3d 772 (2020).

In the Irby circumstance, automatic reversible error results from a remark by one juror, but which remark neither counsel nor the court deemed worthy of any note, comment, or objection, much less preservation of the remark in memory. In the Irby cases, the error could only be discerned by appellate counsel's dry paper review of all words spoken by the *venire* members who composited the jury, from the first page to the last of a complete verbatim transcript. Where trial counsel fails to seek to remove a biased juror, and the court fails to *sua sponte* remove the biased juror, only the actual verbatim transcript will reflect the error. Upon discernment of such error on appellate review, automatic reversal is required.

If, for this Court in Waits, it was hard to imagine that anything less than a verbatim transcript would make effective appellate review possible in a GR 37 case, it is impossible to imagine that effective appellate review can be accomplished from a reconstructed general record of *voir*

dire that merely lists the fact that a *venire* was gathered, and that jurors sat on the ultimate panel. Waits described this as "hard to imagine" being susceptible of effective appellate review absent a complete verbatim transcript, and here, in the circumstances of this case, it requires automatic reversal under these facts.

Only a review of each juror's statements during *voir dire* can determine whether a biased juror was seated contrary to the trial court's *sua sponte* duty to discharge him or her, or the lawyer's obligation of non-deficient performance, and absent a verbatim record, this issue will not be discovered - there having been, by definition, no bringing of the matter to the attention of anyone. The fact that a re-created record in this case revealed that 'no one could recall anything bad having happened' could be said of *every* Irby-type case.

3. Review is also required under RAP 13.4(b)(4).

Further, review is required under RAP 13.4(b)(4). Review

is warranted where the case "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Here, this case has the potential to effect every criminal case and establish a dividing line between the possibility of relief on appeal to which the financially well-off, in comparison to those of limited means, may secure. See State v. Watson, 155 Wn. 2d 574, 577, 122 P.3d 903 (2005).

If the responsibility to make a record of jury selection in the prosecution of criminal defendants, because now deemed by the courts to be a mistake of no consequence even where a brief, un-noticed and un-remarked upon utterance such as that in Irby would require automatic reversal, will therefore result in *wealthy* defendants securing their own private court reporter or audio record of jury selection to ensure that if (as here, and as in Irby) the required word-for-word recording is lost or never made, a record will be preserved for appeal. Following the Court of

Appeals decision in Mr. Chenoweth's case, counsel, knowing that the loss of the court's own record of jury selection will have no consequence, would be ineffective under the Sixth Amendment and United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), if he or she failed to ensure that arrangements for such a back-up recording are made so that appellate counsel may scrutinize the record for an error that, although missed by the judicial participants including the court (for example, because it was buried in a stack of juror questionnaires), will require automatic reversal on appellate review.

For these reasons, reversal is required in this case where no sufficient record is available for effective appellate review.

F. CONCLUSION

Based on the foregoing, Michael Chenoweth requests that the Court accept review and reverse his conviction in favor of a new trial.

This pleading contains 3,139 words and is formatted in font Times New Roman size 14.

Respectfully submitted this 2nd day of May, 2024.

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APPENDIX A

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

STATE OF WASHINGTON, Respondent, v. MICHAEL D. CHENOWETH, Appellant.	)))))))))	No. 37846-2-III UNPUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Michael Chenoweth appeals his conviction for first degree assault. He contends the agreed supplemental narrative of jury selection is not sufficiently complete to allow effective appellate review. He also contends the trial court violated his due process rights when it entered an order, in his absence, allowing the administration of involuntary medication without considering the *Sell*[1] factors.

We disagree and affirm. First, the agreed supplemental narrative of jury selection is sufficient to permit effective appellate review because it adequately confirms the absence of reversible error. Second, the trial court did consider the *Sell* factors, and Chenoweth's absence at that hearing was harmless beyond a reasonable doubt, given that

[1] *Sell v. United States*, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003).

the medication significantly benefited him and resulted in restored competency so he could assist his counsel at trial. We affirm Chenoweth's conviction.

FACTS

In August 2019, the State charged Chenoweth with harassment, assault in the first degree, and resisting arrest. Soon after these charges were filed, defense counsel reviewed the police report and requested an order for mental competency examination. The trial court granted the request. Soon after, the trial court held a review hearing with Chenoweth present. During the hearing, the parties agreed that Chenoweth should receive involuntary treatment pursuant to RCW 71.05.240, and the court so ordered.

On September 13, 2019, the parties appeared in court again, but this time without Chenoweth. The parties presented two agreed proposed orders, one for competency restoration treatment and the other for authorizing administration of involuntary medication. The involuntary medication order expressly set forth each of the four *Sell* factors,[2] and a box appeared next to each factor with an "X" in the box. Clerk's Papers (CP) at 61-62.

[2] *Sell* requires the trial court to make four findings before authorizing the involuntary administration of medications: (1) that important state interests are at stake, (2) that involuntarily administering medication will significantly further the state's interests, (3) that involuntarily administering medication is necessary to further the state's interest, and (4) that administration of the drugs is in the patient's best medical interest in light of their medical condition. 539 U.S. at 180-81.

The proposed orders were based on a report authored by a licensed psychologist, Dr. Trevor Travers. Dr. Travers concluded in his report:

> In my opinion, [Mr. Chenoweth] does not currently have the capacity to understand the proceedings against him or to assist in his own defense. Therefore, I recommend an Order Staying Proceedings at Eastern State Hospital for 90 days pursuant to RCW 10.77 for the purposes of treating Mr. Chenoweth and assisting him to regain his competency to stand trial. Records reviewed regarding Mr. Chenoweth indicated that he has delusions about being poisoned by his medications or his doctors. In my opinion, psychiatric medication will be necessary for his competency restoration, and in my opinion, it is likely that he would refuse voluntary compliance with medications due to his delusional beliefs. Therefore, I recommend that an Order Staying Proceedings for Mr. Chenoweth include a provision that allows Eastern State Hospital to involuntarily administer antipsychotic and psychotropic medications to him and to obtain appropriate laboratory studies should he refuse voluntary compliance with the medications or the studies.

Rep. of Proc. (RP) at 40.

The verbatim transcript of the motion hearing contains numerous "inaudible" notations, so the parties agreed to a reconstructed version of the transcript. The trial court adopted the reconstructed transcript, which provides in relevant part:

> THE COURT: Let's call the case of Michael Chenoweth. Michael Chenoweth is—I was just told by our corrections staff that he's still not present.
>
> [PROSECUTING ATTORNEY]: Judge, he's the evaluation from Eastern that he's not competent. I've handed up an order on restoration, they're also asking for an order on involuntary medication. . . .
>
> . . . .

> [PROSECUTING ATTORNEY]: . . . We need the court to enter those orders—restoration process, I think they noted a hearing in there for they suggested 90 days, I want to say it's December 9th.
>
> . . . .
>
> THE COURT: . . . There is no objection to the administration of involuntary . . . You probably looked up the law and realized there's not much the legal thing to do . . .
>
> [DEFENSE COUNSEL]: Yeah, I'm just not confident I'm not sure my client would have been thrilled with that but I don't think he's competent to make a decision as to tell me whether he agreed or not, and I do think it's in his best interest.

CP at 239-40. The court signed both orders.

On September 29, 2020, the State filed an amended information charging Chenoweth with assault in the first degree and alleging a deadly weapon enhancement.

Chenoweth was admitted to Eastern State Hospital on October 28, 2019. Following Chenoweth's 90-day competency restoration treatment, Dr. Randall Strandquist conducted a forensic evaluation and prepared a report for the court. His report states in part:

> Over the course of Mr. Chenoweth's admission he was compliant with medication . . . .
>
> . . . .
>
> Mr. Chenoweth said that he felt much better, when compared to how he felt when Dr. Travers interviewed him. . . . He did admit that the medication he is currently taking has made a significant difference in helping him feel better. He denied experiencing any significant side effects. . . .
>
> . . . .

> . . . Mr. Chenoweth demonstrated that he has sufficient knowledge of court proceedings and the roles of the participants involved with these proceedings. He was able to explain the roles and responsibilities of the judge, defense attorney, prosecuting attorney, witness, and jury.
>
> He is able to identify his attorney and how he may contact him. Mr. Chenoweth stated that he trusts his attorney. . . .

CP at 123-24. Dr. Strandquist concluded, "Mr. Chenoweth has the capacity to understand court proceedings and productively participate in his own defense." CP at 121. Based on Dr. Strandquist's report, the trial court found Chenoweth competent to stand trial.

Jury selection and conviction

Chenoweth's jury trial occurred during the COVID-19 pandemic. During that time, to comply with the Washington State Supreme Court's June 18, 2020 "Order RE Modification of Jury Trial Proceedings" and social distancing requirements, the court conducted jury selection at the Ellensburg Armory. Due to technical problems, Chenoweth's jury selection proceedings were not captured by the court clerk's recording devices.

The empaneled jury convicted Chenoweth of assault in the first degree and found the presence of the deadly weapon enhancement. The trial court sentenced Chenoweth, and Chenoweth timely appealed.

PROCEDURE ON APPEAL

On Chenoweth's motion, we stayed his appeal pending the Supreme Court's decision in *State v. Waits*, 200 Wn.2d 507, 520 P.3d 49 (2022). Following the *Waits* decision, we lifted our stay and set a briefing schedule for the parties. Notation Ruling Lifting Stay, *State v. Chenoweth*, No. 37846-2-III (Wash. Ct. App. May 9, 2023).

In the wake of *Waits*, the prosecuting attorney worked to reconstruct the record in Chenoweth's jury selection. The parties eventually submitted to the trial court a proposed agreed order to adopt the supplemental report of proceedings. The court signed the agreed order and the supplemental report became the official record of the *Sell* hearing and of Chenoweth's jury selection. The court noted that Chenoweth had "preserved no objection or exception to either of these portions of the proceedings on the record below," and that there was "no apparent GR 37, *Batson*,[3] or other manifestation of systemic injustice on this record." CP at 228.

ANALYSIS

A. SUFFICIENCY OF RECORD FOR EFFECTIVE APPELLATE REVIEW

Chenoweth contends the agreed narrative report of proceedings for jury selection is not sufficiently complete to allow effective appellate review. We disagree.

[3] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Criminal defendants have the right to appeal in all cases. WASH. CONST. art. I, § 22. A criminal defendant is constitutionally entitled to a record of sufficient completeness to permit effective appellate review of their claims. *Waits*, 200 Wn.2d at 513; *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003). However, a sufficiently complete record does not necessarily require "'a complete verbatim transcript.'" *Tilton*, 149 Wn.2d at 781 (quoting *Mayer v. City of Chicago*, 404 U.S. 189, 194, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971)).

Alternatives to a verbatim transcript are permissible if they permit effective review; that is, if the alternative method allows counsel to determine which issues to raise on appeal and puts before the reviewing court an equivalent report of the trial events from which the issues arise. *See id.*; *see also State v. Jackson*, 87 Wn.2d 562, 565, 554 P.2d 1347 (1976). Alternatives include "'[a] statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript.'" *Jackson*, 87 Wn.2d at 565 (quoting *Draper v. Washington*, 372 U.S. 487, 495-96, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963)).

"The burden of showing that alternatives will suffice for an effective appeal rests with the State." *Waits*, 200 Wn.2d at 514 (citing *Mayer*, 404 U.S. at 195). Where a

record is not sufficient to permit effective review, the remedy is a new trial. *State v. Larson*, 62 Wn.2d 64, 67, 381 P.2d 120 (1963).

In Washington, RAP 9.3 and RAP 9.4 outline the permissible alternatives. RAP 9.3 governs narrative reports. The rule provides:

> The party seeking review may prepare a narrative report of proceedings. A party preparing a narrative report must exercise the party's best efforts to include a fair and accurate statement of the occurrences in and evidence introduced in the trial court material to the issues on review. A narrative report should be in the same form as a verbatim report . . . . If any party prepares a verbatim report of proceedings, that report will be used as the report of proceedings for the review. A narrative report of proceedings may be prepared if the court reporter's notes or the electronic recording of the proceeding being reviewed is lost or damaged.

RAP 9.3. "This form is traditionally a summary of the testimony and proceedings at trial, usually not by question and answer as would be a verbatim report." *Waits*, 200 Wn.2d at 514 (citing 2A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE RAP 9.1 author's cmts. at 629 (8th ed. 2014)). "The narrative report must be submitted to the trial judge as prescribed in RAP 9.5(b), and any party may object to the report under RAP 9.5(a)." *Id.*

RAP 9.4 pertains to agreed reports of proceedings. The rule provides:

> The parties may prepare and sign an agreed report of proceedings setting forth only so many of the facts averred and proved or sought to be proved as are essential to the decision of the issues presented for review. The agreed report of proceedings must include only matters which were actually before the trial court. An agreed report of proceedings should be in

> the same form as a verbatim report, as provided in rule 9.2(e) and (f). An agreed report of proceedings may be prepared if the court reporter's notes or the electronic recording of the proceeding being reviewed is lost or damaged.

RAP 9.4. "This rule was meant to allow excerpts from the verbatim report, a narrative report, or some combination of each." *Waits*, 200 Wn.2d at 515 (citing 2A TEGLAND, *supra*, RAP 9.4 author's cmts. at 661). The agreed report must be submitted to the trial judge under RAP 9.5(b). *Id.*

Chenoweth, with a nod to *Waits*, argues that only a reconstructed record that is equivalent to a verbatim transcript can permit effective appellate review of jury selection. Chenoweth's argument is not supported by *Waits*. Rather, *Waits* requires a record sufficient for effective appellate review. Where the reconstructed record adequately shows the absence of error, the record is sufficient under *Waits*.

With respect to the constructed record of jury selection, the trial court found "the State has undertaken due diligence to attempt to reconstruct the missing record of jury selection and *voir dire* in this case, . . . [and] the State's Proposed Supplemental Narrative Report of Proceedings . . . [is] the best available record of [that proceeding]." CP at 227-28. Chenoweth does not assign error to this finding. Substantial evidence supports it. Here, the deputy prosecuting attorney handling this appeal declared that he interviewed the attorneys who tried the case and utilized the trial court clerk's minutes and record of

jurors from jury selection to assist in creating the narrative report of jury selection. The deputy prosecutor additionally reached out to the jury administration, the county clerk, witnesses, and three jurors, and no one recalled any events during jury selection beyond what was recorded in the clerk's minutes and records. In addition, the deputy prosecutor worked with defense counsel on appeal before submitting the reconstructed record to the trial court for signature.

In its order, the court noted that Chenoweth "preserved no objection or exception" during the jury selection proceedings. CP at 228. The trial court concluded that there was "no apparent GR 37, *Batson*, or other manifestation of systemic injustice on this record." CP at 228. In other words, with the input of numerous trial participants and recorded notes, there was no evidence of any error during jury selection.

Under these circumstances, the narrative report of jury selection adequately shows the absence of error during jury selection and thus is sufficient under *Waits* to permit effective appellate review.

B. CONSIDERATION OF *SELL* FACTORS AND RIGHT TO BE PRESENT

Chenoweth argues the trial court violated his constitutional right to due process when, in his absence, it authorized antipsychotic medications to be involuntarily administered to restore his competency and without first considering the *Sell* factors. We address the two issues separately.

1. Consideration of Sell *factors*

Forcibly medicating a person against their will "'represents a substantial interference with that person's liberty.'" *State v. Mosteller*, 162 Wn. App. 418, 424, 254 P.3d 201 (2011) (quoting *Washington v. Harper*, 494 U.S. 210, 229, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990)). In rare circumstances, the State can forcibly administer unwanted medications solely for trial competency purposes. *Id*. (citing *Sell*, 539 U.S. at 180). Before the trial court can order the forced administration of medications in such situations, however, it must consider certain factors, known as the *Sell* factors. *Id.* at 425.

Here, the agreed order allowing administration of involuntary medication set forth the four *Sell* factors, and an "X" appears in the box next to each of the factors. In addition, Dr. Travers' report, which the agreed order was based on, contained all the necessary facts to support the *Sell* factors. Trial courts are not automatons, signing orders without reading or reflecting on them. Where the factual record supports the court's written findings, we treat them as sufficient. *See In re Marriage of Horner*, 151 Wn.2d 884, 895-96, 93 P.3d 124 (2004) (in determining whether trial court considered necessary factors, we may look to the order itself and whether the record establishes the existence of the factors). We are of the opinion that the trial court *did* consider the *Sell* factors. Chenoweth provides no authority, and we have found none, that requires the trial court to also make oral findings.

2. Chenoweth's absence at the Sell *hearing*

Chenoweth argues that a competency hearing is a critical stage of a criminal prosecution. The State argues that any error in obtaining Chenoweth's presence for the competency hearing was harmless beyond a reasonable doubt. We agree with the State.

Under the confrontation clause of the Sixth Amendment to the United States Constitution and the due process clause of the Fourteenth Amendment, a criminal defendant has a constitutional right to be present during all "critical stages" of the criminal proceedings. *State v. Rooks*, 130 Wn. App. 787, 797, 125 P.3d 192 (2005) (citing *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); *State v. Berrysmith*, 87 Wn. App. 268, 273, 944 P.2d 397 (1997)). And unlike the United States Constitution, the Washington Constitution provides an explicit guaranty of the right to be present: "'In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.'" *State v. Irby*, 170 Wn.2d 874, 884-85, 246 P.3d 796 (2011) (quoting WASH. CONST. art. I, § 22).

However, due process does not require the defendant's presence in a criminal proceeding "'when presence would be useless, or the benefit but a shadow.'" *Berrysmith*, 87 Wn. App. at 273 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106-07, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). The core of the constitutional right to be present is the right to be present when evidence is being presented. *In re Pers. Restraint of Lord*,

123 Wn.2d 296, 306, 868 P.2d 835 (1994) (citing *Gagnon*, 470 U.S. at 526). When the right to confrontation is not implicated, as here, the court must address two questions in determining whether the hearing was a critical stage in the proceedings. *Berrysmith*, 87 Wn. App. at 273-74 (citing *Gagnon*, 470 U.S. at 526; *Pers. Restraint of Lord*, 123 Wn.2d at 306). First, whether the subject of the hearing related to a purely legal matter and, second, if so, whether the absence of the defendant affected the opportunity to defend against the charge, "or whether a fair and just hearing was thwarted by his absence." *Id*.

We find it unnecessary to determine whether the *Sell* hearing was a critical stage for purposes of due process. This is because, as explained below, Chenoweth's absence at the hearing was harmless beyond a reasonable doubt.

A violation of the due process right to be present is subject to harmless error analysis. *Irby*, 170 Wn.2d at 885. "'The burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt.'" *Id*. at 886 (quoting *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983)).

We first note the record does not show that Chenoweth was involuntarily administered antipsychotic medication. Dr. Strandquist described Chenoweth as "compliant" "[o]ver the course of [his] admission." CP at 123. In addition, there is no evidence that Chenowith was involuntarily medicated at any time after his competency

was restored. If Chenoweth was not involuntarily medicated, his absence from the *Sell* hearing had no impact whatsoever and the State has met its burden.

Regardless, Chenoweth told Dr. Strandquist the medication made a "significant difference in helping him feel better [and] denied experiencing any significant side effects." CP at 123. Most important, Chenowith's competency was restored, and he was able to assist his counsel at trial. Under these circumstances, any due process violation was harmless beyond a reasonable doubt.

SAG ISSUES I & II

RAP 10.10 permits a defendant to file a pro se SAG if the defendant believes his appellate counsel has not adequately addressed certain matters.

Chenoweth submitted an SAG raising two arguments. In the first, he seems to argue he was not informed of warrants and states that "evidence was digital." In the second, he writes "self defense" and "genocide conspearisey [sic]."

Chenoweth's "arguments" fail to identify any error for this court to review. RAP 10.10(c). We consider only issues raised in an SAG that adequately inform us of the nature and occurrence of the alleged errors. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

Affirmed.

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

Lawrence-Berrey, C.J.

WE CONCUR:

Fearing, J.

Pennell, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Three** under **Case No. 37846-2-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / electronic mail address as listed on ACORDS:

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Date: May 2, 2024

WASHINGTON APPELLATE PROJECT

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