

62632-9

62632-9

NO. 62632-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RICHARD HODGES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA BENTON
THE HONORABLE ANDREA DARVAS
THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED	1
B. STATEMENT OF THE CASE	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	13
C. ARGUMENT	13
1. THE TRIAL COURT PROPERLY ACCEPTED HODGES' GUILTY PLEAS.	13
a. This Court Should Not Grant Review Of The Claim That The Trial Court Erred By Accepting The Guilty Pleas.....	14
b. The Trial Court Determined That Hodges Was Competent To Stand Trial And Hodges Remained Competent When He Entered His Guilty Pleas.....	17
2. THE SENTENCING COURT APPLIED THE CORRECT LEGAL STANDARD IN MAKING ITS DECISION NOT TO IMPOSE AN EXCEPTIONALLY LOW SENTENCE.....	27
3. THE SUFFICIENCY OF THE DEFENSE EVIDENCE IN SUPPORT OF MITIGATION IS BEYOND THE SCOPE OF REVIEW OF THE STANDARD RANGE SENTENCES.....	32
D. CONCLUSION	37

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Fleming, 142 Wn.2d 853,
16 P.3d 610 (2001)..... 26

State v. Allert, 117 Wn.2d 156,
815 P.2d 752 (1991)..... 28

State v. Benn, 120 Wn.2d 631,
845 P.2d 289, cert. denied,
510 U.S. 944 (1993)..... 24

State v. Branch, 129 Wn.2d 635,
919 P.2d 1228 (1996)..... 18

State v. Fowler, 145 Wn.2d 400,
38 P.3d 335 (2002)..... 28

State v. Gaines, 122 Wn.2d 502,
859 P.2d 36 (1993)..... 28

State v. Garcia-Martinez, 88 Wn. App. 322,
944 P.2d 1104 (1997), rev. denied,
136 Wn.2d 1002 (1998)..... 29, 35

State v. Garza, 123 Wn.2d 885,
872 P.2d 1087 (1994)..... 30

State v. Grayson, 154 Wn.2d 333,
111 P.3d 1183 (2005)..... 29, 33

State v. Heddrick, 166 Wn. 2d 898,
215 P.3d 201 (2009)..... 15, 16

State v. Khanteechit, 101 Wn. App. 137,
5 P.3d 727 (2000)..... 29

<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991), <u>cert. denied</u> , 506 U.S. 856 (1992).....	15, 24, 26
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	14
<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	14
<u>State v. Rogers</u> , 112 Wn.2d 180, 770 P.2d 180 (1989).....	28
<u>State v. Ross</u> , 141 Wn.2d 304, 4 P.3d 130 (2000).....	15
<u>State v. Schloredt</u> , 97 Wn. App. 789, 987 P.2d 647 (1999).....	29
<u>State v. Smith</u> , 74 Wn. App. 844, 875 P.2d 1249 (1994), <u>rev. denied</u> , 125 Wash.2d 1017 (1995).....	24
<u>State v. Walsh</u> , 143 Wn.2d 1, 17 P.3d 591 (2001).....	16

Statutes

Washington State:

RCW 10.77.010.....	15
RCW 10.77.050.....	15
RCW 10.77.060.....	17
RCW 9.94A.530(2).....	30
RCW 9.94A.535.....	27, 30

Rules and Regulations

Washington State:

RAP 10.3(g) 15
RAP 2.5(a) 13, 14, 16

A. ISSUES PRESENTED

1. Error invited in the trial court may not be challenged on appeal. Hodges agreed with the trial court's finding, after comprehensive evaluation, that he was competent. He told the judge who accepted his pleas that he was competent to proceed. Did Hodges invite any error in the failure to order another evaluation of his competency?

2. RAP 2.5(a) permits review of an error first raised on appeal only if it is a manifest constitutional error. The defendant must establish the error and prejudice. Hodges agreed to the finding of competency below, challenging his competency at the time of the pleas for the first time in this appeal. Has he failed to establish prejudice because he has not shown that he was incompetent at the time of the pleas?

3. A standard range sentence is reviewable only if the court refuses to consider an exceptional sentence request or relies on an impermissible basis for the sentence. The sentencing court in this case carefully considered the exceptional sentence request. It applied the correct legal standard. Is the sentencing decision not reviewable?

4. The exercise of discretion in determining the proper sentence is not appealable. The refusal to consider an exceptional sentence request is considered an appealable failure to exercise discretion. Hodges requested an exceptional sentence based on alleged impaired capacity, which must exclude the influence of drugs. The sentencing court reviewed the materials presented and questioned the defense expert. Is the court's decision that the facts presented did not establish the statutory mitigating factor not reviewable?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On April 17, 2007, defendant Richard Hodges was charged by information with a residential burglary that occurred on April 11, 2007, in King County Cause No. 07-1-04166-1 SEA. CP 1-3. On April 24, 2007, Hodges was charged with violation of the uniform controlled substances act, possession of cocaine on April 19, 2007, in King County Cause No. 07-1-04263-2 SEA. CP 60.

On May 1, 2007, the trial court ordered an evaluation of Hodges' competency to stand trial on both cause numbers. CP 4-7, 63-66.

In a report dated May 29, 2007, Western State Hospital (WSH) evaluator Dr. Gregg Gagliardi determined that Hodges could understand the nature of the legal proceedings and was capable of assisting defense counsel. CP 143, 152.¹ The report indicated that, while he may suffer from schizophrenia or a personality disorder, Hodges exhibited "rather flagrant malingering," that is he made up or exaggerated symptoms of mental illness. CP 146, 151.

The report stated that Hodges had been malingering symptoms of mental impairment as a means for promoting his goal of outpatient treatment instead of incarceration. CP 152. Hodges malingered symptoms of psychosis and incompetency when admitted but eventually abandoned that strategy, showing fairly stable mental functioning and competency. CP 143.

Hodges, when asked to identify his defense counsel, pretended several times to confuse the male examiner with his female attorney. CP 148, 151. He claimed not to know what his charges were. CP 147-48. His test performances were so incredible as to be not believed by the examiner. CP 147. He would often respond with the answer, "I don't know," when asked basic questions. CP 147-48, 151.

¹ This report appears in the clerk's papers at both CP 120-32 and CP 142-54.

At one point in the evaluation, the examiner told Hodges that he had one of two choices: either he would be found competent and proceed to trial, or he would return to the hospital for involuntary treatment and medication. CP 152. At that moment, Hodges expressed a clear preference to return to jail and prepare his legal defense with his attorney. Id.

From that point on, Hodges' thinking was "logical, coherent, and well-organized with no evidence of a thought disorder." CP 152. He showed an appropriate understanding of his legal peril. Id. Hodges referenced his desire to negotiate an acceptable plea bargain and his desire to get into mental health court or drug court to seek treatment as an alternative to incarceration. Id.

In that May 2007 report, Dr. Gagliardi noted that Hodges' first forensic evaluation was in 1998, relating to a charge of assault in the second degree.² CP 145. During the initial outpatient evaluation Hodges was found very impaired but when he was admitted to WSH, tested and observed, he was determined to have no psychotic disorder and finally found to be competent. CP 145-46.

² This evaluation apparently was in the course of the proceedings relating to Hodges conviction of assault in the second degree on March 30, 1999. CP 33.

On Hodges' 2002 forensic evaluation,³ which was described as "particularly comprehensive," he was found to be faking symptoms but not suffering a major mental disorder. CP 146. In another evaluation later in 2002 he was again found to be malingering symptoms. Id.

On June 7, 2007, Judge Helen Halpert, the presiding judge, considered the issue of Hodges' competency to proceed on these two cases, as well as on another pending case against Hodges, King County Cause No. 06-1-00007-9 SEA (theft in the second degree and violation of the uniform controlled substances act, possession of cocaine). 6/07/07RP 1-3; 10/2/08RP 34-35.⁴ At this time, all parties agreed that Hodges was competent to stand trial. 6/7/07RP 3, 8. The court found Hodges competent on all three cases. CP 8-9, 67-68; 6/7/07RP 3-4. Hodges was arraigned on the 2007 drug charge and a trial date was set for June 25, 2007, on the 2006 case. 6/7/07RP at 4-7.

Judge Michael Hayden presided over a jury trial on the 2006 cause beginning on July 16, 2007. 6/25/08RP 13, 16-17. Hodges

³ This evaluation apparently was in the course of the proceedings relating to Hodges conviction of residential burglary on July 23, 2002. CP 33.

⁴ The verbatim report of proceedings will be referred to by the date of the hearing, followed by "RP" and the page reference in the volume that includes that hearing.

was convicted as charged. 10/2/08RP 34. The appeal from that conviction is pending in this Court as COA No. 62631-1-I.

On October 17, 2007, the presiding court ordered another competency evaluation on the two 2007 cause numbers. CP 10-13, 69-72. The hearing at which that occurred has not been transcribed, but the orders for evaluation indicate that part of the basis of the judge's decision was "the defense psych. report." CP 10, 69. That reference may be to a report of defense expert Dr. Marcia Kent, dated October 11, 2007, which later also was reviewed by WSH evaluators.⁵ CP 157.

In a report dated December 7, 2007, Dr. Gagliardi opined that Hodges was not competent at that time and did not appear to be malingering. CP 163-64. Dr. Gagliardi recommended an MRI and a neuropsychological examination to establish what problems Hodges was experiencing. CP 156, 164.

A neuropsychological examination then was performed by Dr. Christopher Graver, reflected in his report of December 18, 2007. CP 166-70. Hodges failed multiple symptom validity tests, some administered in isolation and some embedded in other tests. CP 168. His memory complaints were found not credible. CP 169.

In summary, Dr. Graver concluded that Hodges' complaints appeared exaggerated and were not typical of brain injury or neurological disease. CP 170. The results also were not typical of schizophrenia. Id. Dr. Graver found that Hodges' learning abilities were within normal limits and that Hodges is able to think through matters in a complex, abstract, and reasonable manner. Id.

In a report dated January 25, 2008, Dr. Gagliardi incorporated the neuropsychological findings, further observation at Western State Hospital, and an additional interview with Hodges. CP 137-38. Dr. Gagliardi observed that the neuropsychological examination provided "strong evidence" that Hodges was "feigning symptoms of a major mental disorder." CP 138. An MRI test was conducted on January 8, 2008, and it revealed no evidence of brain pathology. CP 139.

The January 2008 report noted that in an interview on January 23, 2008, Hodges' thought processes were clear, logical, and coherent. Id. Dr. Gagliardi opined that antipsychotic medications appeared to have helped to restore Hodges' competency and found that Hodges was competent to proceed. CP 140.

⁵ That report is not part of the court record in either of the cases at bar.

On March 10, Judge Suzanne Barnett considered the issue of Hodges' competency to proceed on these two cases. The matter had been continued for the defense expert to evaluate Hodges' competency. 3/10/08RP 11-12. All parties agreed that Hodges was competent to stand trial. Id. The court found Hodges competent to proceed. CP 14-15, 73-74.

Hodges pled guilty as charged under both of these cause numbers in hearings spanning April 15-16, 2008, before Judge Monica Benton.⁶ CP 16-35, 75-93. During those hearings, the court reviewed the consequences of the pleas with Hodges in exhaustive detail. 4/15/08RP 11-39; 4/16/08RP 9-41.⁷ Hodges confirmed that the plea forms were read to him by his attorney, that Hodges' questions were answered, and that Hodges understood. 4/15/08RP 8-13.

At the start of the first plea hearing, the court told Hodges that he could stop the proceedings if he wanted to speak to his attorney. 4/15/08RP 9. Asked if he knew that, Hodges explained that he had not known that, but now understood it. Id. Later that

⁶ On April 8, a change of plea hearing was terminated when the court concluded that in light of Hodges' problems, the court did not have sufficient time to complete that hearing, given that other cases were waiting. 4/8/08RP 21-22.

⁷ During the April 16 hearing, the court started the process again at the beginning of the plea form and reviewed the entire form in detail. 4/16/08RP 8.

afternoon, Hodges did exactly that, stopping the colloquy and telling his attorney and then the court that he was feeling confused about some things. Id. at 39-40.

The length of the plea colloquy was caused in large part by Hodges' questions regarding many peripheral details. For example, he asked how much restitution would be, whether he could pay restitution in small amounts, and whether he could begin paying it from his jail account. 4/15/08RP 38. Later he asked if he could pay the possible fine by paying some each month. 4/16/09RP 18. Hodges also explained to the court that he had discussed the different types of burglary that could be charged. 4/15/08RP 13-14. He asked the court how long he would be prohibited from owning a firearm. 4/16/08RP 39.

During the colloquy, the plea court carefully questioned Hodges about the voluntariness of his pleas. 4/15/08RP 24-29; 4/16/08RP 24-27, 30-31. At the end of the colloquy on April 16, the court concluded that the pleas were made knowingly, intelligently and voluntarily. 4/16/08RP 41.

On May 21, Judge Cheryl Carey ordered an outpatient competency evaluation. CP 36. Then on June 17, Judge Carey ordered an evaluation at Western State Hospital. CP 37-40, 94-97.

In a report dated June 24, 2008, Dr. Gagliardi explained that this evaluation had been ordered because defense social worker Ann Potter noted a decline in Hodges' mental health "following his plea hearing." Supp. CP ___ (07-1-04263-2 Sub 93, Medical Report, filed under seal 9/25/08) (hereafter cited as 6/24/08 WSH Report) at pp. 1, 4. At his intake interview at Western State Hospital, Hodges presented in the same incredible manner as in previous intake interviews, describing symptoms inconsistent with known clinical phenomena. Id. at 4-5. Hodges made a point of suggesting that he preferred treatment and that treatment would be a fairer way of dealing with him than prison. Id. at 5. It was unclear if Hodges' mental condition truly had deteriorated, but in the interest of caution, the report recommended further inpatient commitment. Id. at 6.

On June 25, Judge Hayden continued Hodges' commitment to Western State Hospital based on the June 24th report. 6/25/08RP 23-25.

On September 25, Judge Carey considered the issue of Hodges' competency to proceed on these two cases. 9/25/08RP 30-32. All parties agreed that Hodges was competent to stand trial.

Id. The court found Hodges competent to proceed. Id. at 32; CP 41-42, 98-99.

Judge Hayden sentenced Hodges on all three cause numbers on October 2, 2008. 10/2/08RP 34-35. The defense presented testimony of psychiatrist Dr. Marcia Kent in support of a request for an exceptional sentence below the standard range. Id. at 46-69. The court declined to impose an exceptional sentence. Id. at 69-70.

The case at bar is the consolidated appeal of the two 2007 cases on which guilty pleas were entered (King County Cause No. 07-1-04166-1 SEA and No. 07-1-04263-2 SEA).

2. SUBSTANTIVE FACTS

The plea agreements in both cases at bar include the stipulation that the facts in the Certification for Determination of Probable Cause are real and material facts for purposes of sentencing. CP 32, 89. The residential burglary case included two probable cause statements, one authored by a patrol officer and another by an investigating detective. CP 28, 29. The following recital of facts is based primarily on to the facts included in those documents.

In 2001, Hodges burglarized the Al-Sadoon home in Seattle—the same home that Hodges was caught inside during the current (2007) burglary incident. CP 29. The prosecutor at the sentencing hearing in the case at bar related the victim's statement that during that 2001 burglary, items were removed from the home and placed in the alley nearby. 10/2/08 RP 40. That fact was not disputed by Hodges. Hodges has two prior residential burglary convictions, including one with a crime date of December 10, 2001. CP 33.

On April 11, 2007, Hodges was inside the same house, without permission. CP 28, 29. The property is gated and not open for pedestrian travel. CP 28. A resident of the home noticed that an outside door leading to the basement was open and, suspecting an intruder, went to investigate. CP 29. The resident found Hodges in the basement, recognized him as the same man who burgled the home in 2001, and tried to restrain him. CP 28, 29. Hodges struggled and the resident took up a hammer and struck Hodges twice in the head. CP 29. When police arrived minutes later, the resident and Hodges were still struggling in the basement. CP 28, 29. Both Hodges and the victim suffered minor injuries in the struggle. CP 29.

After the residential burglary charge was filed, an arrest warrant was issued. CP 1, 87. A police officer approached Hodges on the street on April 19, 2007, and served that arrest warrant. CP 87. In a search incident to arrest, the officer found chunks of a substance that he recognized as cocaine in Hodges' right pants pocket. CP 87. In Hodges' left pants pocket the officer found a copper pad of a type commonly used as a filter by those who smoke cocaine. CP 87. There was burnt residue on the pad. CP 87. The rocks of cocaine and the pad both field-tested positive for cocaine. CP 87.

C. **ARGUMENT**

1. THE TRIAL COURT PROPERLY ACCEPTED HODGES' GUILTY PLEAS.

Hodges asserts that the trial court erred by accepting his guilty pleas in the two cases at bar, claiming that his behavior at the plea hearings established that he was incompetent or that an additional evaluation of his competency should have been ordered. Hodges has waived any claim that there was any procedural defect in the court's failure to order another evaluation before accepting the pleas. Moreover, pursuant to RAP 2.5(a), these claims should

not be reviewed absent a showing by Hodges that he was incompetent. Hodges' competency had been determined after extensive evaluations shortly before the pleas. CP 14-15, 73-74. The record reflects that Hodges was competent at the time of the pleas.

- a. This Court Should Not Grant Review Of The Claim That The Trial Court Erred By Accepting The Guilty Pleas.

Hodges did not object to the procedure employed by the trial court in determining his competency or to the acceptance of his guilty pleas. RAP 2.5(a) bars consideration of these issues.

A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and caused actual prejudice to the defendant's rights. McFarland, 127 Wn.2d at 333. If the facts necessary to adjudicate the issue are not in the record, the error is not manifest. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). It is Hodges' burden to establish that he was incompetent in order to obtain review and he has not done so.

In Washington, an incompetent person may not be tried, convicted, or sentenced for an offense so long as the incapacity continues. RCW 10.77.050. A defendant is incompetent if he or she "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(14); see also State v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992).

The trial court found Hodges competent to stand trial on March 10, 2008, just a month before the entry of the pleas challenged on appeal. CP 14-15, 73-74. That finding followed comprehensive evaluation by a forensic psychologist, a neuropsychological examination, an MRI, and a defense examination. CP 136-70; 3/10/08RP 11-12. That finding of competency has not been challenged on appeal, so it is a verity. State v. Ross, 141 Wn.2d 304, 309-11, 4 P.3d 130 (2000); RAP 10.3(g).

When defense counsel asserted that Hodges was competent at the time of the plea, he invited any error in the court's failure to inquire further at that time. State v. Heddrick, 166 Wn. 2d 898, 909, 215 P.3d 201 (2009). The doctrine of invited error applies even to

claimed errors of constitutional magnitude that may be raised for the first time on appeal. Id. Though the procedures of RCW 10.77 are required to satisfy due process, the right to due process may be waived. Id.

Defense counsel in the trial court agreed to the finding of competency in March 2008, and at the time of the entry of the pleas in April, again asserted that Hodges was competent. 3/10/08RP 11-12; 6/15/08RP 10. By doing so, he specifically waived any error in the procedure used to ensure his competency to proceed. The procedure for determination of competency may be waived. Heddrick, 166 Wn. 2d at 905-09.

The only authority provided by Hodges in support of review of these issues for the first time on appeal is State v. Walsh, 143 Wn.2d 1, 17 P.3d 591 (2001). That case is cited for the proposition that review of the voluntariness of a plea may be raised for the first time on appeal. App. Brief at 6. However Walsh did not hold that any claim relating to voluntariness is reviewable—it applied a RAP 2.5(a)(3) analysis to the claim of involuntariness asserted (that the defendant there was misinformed of his standard range). Walsh, 143 Wn.2d at 7-8.

Even if a procedural constitutional error had been preserved, it would not be "manifest error" because there is no indication that Hodges would have been found incompetent if there had been further evaluation.

- b. The Trial Court Determined That Hodges Was Competent To Stand Trial And Hodges Remained Competent When He Entered His Guilty Pleas.

On March 10, 2008, the trial court properly concluded, with the agreement of both parties, that Hodges was competent to stand trial. CP 14-15, 73-74. A month later, at the time of the guilty pleas, defense counsel again represented that Hodges was competent to proceed. 6/15/08RP 10. There is no reason to conclude that Hodges was not competent at that time.

RCW 10.77.060 provides that if a court finds there is a "reason to doubt" a defendant's competency, the court shall have the defendant evaluated by professionals who will report on the defendant's mental condition. RCW 10.77.060(1)(a).⁸ The trial

⁸ In pertinent part, RCW 10.77.060(1)(a) provides:

Whenever a defendant has pleaded not guilty by reason of insanity, or 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 at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

court twice ordered a competency evaluation during the pendency of these cases: once in May of 2007, and again in October of 2007 after questions were raised by the defense expert. CP 4-7, 10-13, 63-66, 69-72, 156. Each time, after a comprehensive evaluation, Hodges was found competent to proceed, with the concurrence of both parties. CP 8-9, 14-15, 67-68, 73-74; 6/7/07RP 3, 8; 3/10/08RP 11-12.

In January of 2008, Hodges received psychotropic medication that appeared to improve his mental state. CP 140. Hodges continued to take that medication through the date that the guilty pleas were accepted. 4/15/08RP 8; 4/16/08RP 5.

The signed and acknowledged guilty plea statements are prima facie evidence of the voluntariness of the pleas. State v. Branch, 129 Wn.2d 635, 642 n.2, 919 P.2d 1228 (1996). Because the trial judge orally inquired of Hodges and satisfied herself on the record (in this case, after a lengthy colloquy) that the plea was voluntary, the presumption of voluntariness is virtually irrefutable. Id.

Hodges claims that it is apparent that he was incompetent, citing a number of circumstances surrounding the plea hearings

and some of his remarks during the hearings. The State disputes Hodges' characterizations of the facts.

An attempt was made to enter a change of plea on April 8, 2008, before Judge Andrea Darvas, with an attorney who was not defense counsel of record representing Hodges at that hearing. 4/8/08RP 1-2. When the court had difficulty quickly progressing through the plea form, the court cut off the hearing, citing the lack of time to spend on these cases given that other cases were waiting to enter changes of plea that afternoon. Id. at 21-22. Although the court stated that, "[I]t doesn't sound like you [understand what's going on] right now," the court did not conclude, as suggested by Hodges, that Hodges did not have the capacity to enter a knowing and intelligent plea. Id. at 23.

Hodges theorizes that on April 8, "the defendant thought that the prosecutor was assisting him in the case." App. Br. at 10. He asserts that the pronoun "she" in the statement, "She is trying to help me," referred to Ms. Weston, the prosecutor. However, Hodges was represented at that hearing by a female defense attorney (Nicole Gaines) and accompanied by the female defense social worker (Ann Potter). 4/8/08RP 1-2. Hodges said that he did not know Gaines' name. Id. at 5. Later in that hearing, Hodges

repeated the same phrase, "She's been helping me," in a clear reference to Gaines. Id. at 19.

Gaines confirmed that she had discussed the nature of the plea on the residential burglary with Hodges earlier, which also would explain the pronoun referent in the earlier statement, "she is helping me," because that earlier statement was made in the context of a remark about Hodges' understanding of the guilty plea on the burglary charge. 4/8/08RP 5-7. There is no reason to believe that Hodges was referring to the prosecutor in the remark cited.

Hodges asserts that on April 8, he believed that he was in court to show why he had not committed a burglary, citing only a statement by Hodges that he was having trouble understanding "the res. burg. thing, how I fell through an open door." App. Br. at 10. Hodges repeatedly tried to excuse his behavior during the burglary, during a competency evaluation as well as his plea hearings. E.g., CP 139; 4/8/08RP 6-7; 4/16/08RP 15. It appears that he was trying to persuade the listeners that he did not intend to commit a crime inside the home, in his continuing effort to persuade the court that he should be sentenced to a treatment program and not to prison.

Moreover, the remark about having trouble with "the res. burg. thing" is equally understandable as a reference to pleading guilty to that crime when he believed that he was innocent. Though that is a common legal concept, it is an usual idea for the average citizen. Hodges' counsel interpreted the statement as a reference to that legal concept and it was immediately explained to Hodges again. 4/8/08RP 4-8.

When the change of plea was rescheduled on the afternoon of April 15, defense counsel met with Hodges for over an hour immediately before the hearing. 4/15/08RP 5. As a result, the hearing did not begin until 3 p.m. Id. at 4. The review of the plea forms progressed slowly but steadily until 4 p.m., when Hodges said that he was confused and the court decided to recess until the next morning. Id. at 39-40.

The efforts made by the court to ensure that Hodges understood his rights were exhaustive should not be misinterpreted as evidence that Hodges ultimately was unable to voluntarily plead guilty. Hodges' attorney explained, when the court reconvened the next morning, that he believed that Hodges was tired at the end of the previous day and, when tired, Hodges would lose focus. 4/16/08RP 4-5. The length of the proceeding was caused in large

part by the conversational style that Hodges used during the hearings, often asking collateral questions.⁹

Hodges' questions often reflected his thoughtful consideration of the court's remarks. For example, the court noted that social worker Ann Potter was present at the plea hearing, and told Hodges not to talk with Ms. Potter about legal questions. 4/15/08RP 6-7. The court asked for Hodges' assurance that he would not do so. Id. at 7. Hodge responded that he might not know what was a legal question and what was not—an insightful observation. Id. The court responded, "Now, that's a fair point," and directed Hodges to rely on Ms. Potter to tell him if a question was a question that should be put to the defense lawyer. Id.

Hodges suggests that his references to getting into a mental health treatment program indicate that he did not understand the proceedings, because the plea agreement did not include a mental health program. App. Br. at 11. These statements actually would have been references to the defense strategy, which was to seek an exceptional sentence that included a treatment program. 4/8/08RP 14; 10/2/08RP 46-69.

⁹ E.g., the amount of restitution and payment methods, 4/15/08RP 38; the possibility of paying a fine in monthly installments, 4/16/09RP 18; how long he would be prohibited from owning a firearm, 4/16/08RP 39.

The standard terms of the plea agreement forms had been modified to reserve Hodges' right to seek an exceptional sentence. CP 32, 89. The plea court made certain that Hodges understood that at sentencing, the court would not necessarily impose a treatment program instead of prison. 4/15/08RP 24-27; 4/16/08RP 25-26, 30-31.

It should be noted that there is a transcription error in an exchange cited by Hodges, App. Br. at 13. The exchange was transcribed as

COURT: All right. Now, do you recall having signed these documents yesterday?

DEFENDANT: Yes, I do. Write on. I did.

4/16/08RP at 7. Clearly, "Write on" was the phrase "Right on."

The plea proceedings were difficult. It is of no significance to competency that "simple language" works best in communicating with Hodges and Hodges provides no authority for his suggestion that this establishes that Hodges is incompetent.¹⁰ The cause of the difficulties during the plea hearings may have been Hodges' limited intellectual abilities or his interest in appearing to be a person who needed treatment instead of prison time. In either

¹⁰ See App. Br. at 12; 4/15/08RP 11.

event, those difficulties do not establish that he was not competent to plead guilty.

Hodges refers to one reference to an hallucination as "very strange." App. Br. at 15. The description Hodges provided of that hallucination is certainly odd. 4/16/08RP 12. That Hodges described the event as an hallucination establishes that he knew the thoughts were not part of reality. The description also appears to tally with Hodges' description of a nightmare a few minutes earlier. Id. at 5.

The existence of a mental disorder does not establish incompetency. State v. Smith, 74 Wn. App. 844, 850, 875 P.2d 1249 (1994), rev. denied, 125 Wash.2d 1017 (1995). There must be a link to capacity, a showing that the disorder interfered with the ability to voluntarily plead guilty. Id. That a defendant is suffering delusions does not prevent him from being competent to understand the proceedings and assist with his defense. State v. Benn, 120 Wn.2d 631, 661-62, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993); Lord, 117 Wn.2d at 901-04.

Hodges has a lengthy history of malingering, making up and exaggerating symptoms of a mental disorder. That history is described in the WSH reports and the neuropsychological

examination. CP 145-52; 166-70. The behavior apparently is an effort to further his goal of receiving treatment instead of jail time as a consequence of his criminal convictions. CP 152. It is certainly possible that the odd references during the plea hearing were part of that behavior, as Hodges would not know whether that behavior in court could influence his sentencing. Even if Hodges experienced a delusion, there is no showing that it affected his ability to voluntarily plead guilty.

The record also indicates that the defense social worker who was present during the plea hearings, and who worked with Hodges in trying to obtain treatment services, noted a decline in Hodges mental health "[f]ollowing his plea hearing." 6/24/08 WSH report at 1. The defense requested another competency evaluation in May. Id. at 4. When Hodges was evaluated again at Western State Hospital, he once again was exaggerating symptoms incredibly during his intake interview. Id. at 4-5.

Hodges never wavered in his statements that it was his intent to plead guilty to these charges. He has not refuted the trial court's "well-nigh irrefutable" finding of voluntariness.

Hodges offers an alternative argument that the trial court should have sua sponte declared that she had a reasonable doubt

as to Hodges' competency and ordered another competency evaluation. A court's conclusion regarding the existence of a reasonable doubt concerning a defendant's competency is reviewed for an abuse of discretion. In re Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

Neither party suggested that there was a reasonable doubt as to Hodges' competency. Defense counsel assured the court that Hodges was competent to proceed and that Hodges understood the contents of the plea form. 4/8/08RP 18-19; 4/15/08RP 10. The court was entitled to place considerable weight on that assertion. Lord, 117 Wn.2d at 901. The record does not permit review of Hodges' appearance, demeanor, and conduct during the proceedings, which are factors necessarily considered by the court below. Fleming, 142 Wn.2d at 863. Hodges has not shown an abuse of discretion in the court's failure to find a reasonable doubt as to Hodges' competency and sua sponte order another competency evaluation.

2. THE SENTENCING COURT APPLIED THE CORRECT LEGAL STANDARD IN MAKING ITS DECISION NOT TO IMPOSE AN EXCEPTIONALLY LOW SENTENCE.

Hodges claims that the trial court applied the incorrect legal standard to Hodges' request for an exceptional sentence, warranting reversal of the standard range sentences imposed. This argument should be rejected. The court applied the correct legal standard, which has been established by the Supreme Court's definition of the statutory mitigating factor at issue.

Hodges requested an exceptional sentence below the standard range based on the impaired mental capacity statutory mitigating factor in RCW 9.94A.535. 10/2/08RP 46-47. The statute provides, in pertinent part:

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative ... reasons for exceptional sentences.

....

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

RCW 9.94A.535(1)(e).

The Supreme Court has defined this statutory mitigating factor as it applies to a person whose mental state was impaired by a combination of the use of drugs and other factors. State v. Allert, 117 Wn.2d 156, 815 P.2d 752 (1991). The Court held that voluntary use of alcohol (or drugs) cannot be considered in relation to this mitigating factor.¹¹ Id. at 167. The mitigating factor has not been established unless the defendant has established that absent the substance abuse, he would have been significantly impaired in appreciating the wrongfulness of his conduct or conforming his conduct to the law. Id. at 166-67.

Mental impairment cannot be considered in support of the impaired capacity mitigating factor unless that mental impairment is unrelated to the drugs or alcohol ingested. State v. Fowler, 145 Wn.2d 400, 410-11, 38 P.3d 335 (2002). The defendant must meet a "stringent test": establish not only the existence of a mental impairment, but also that the mental impairment specifically led to significant impairment of the defendant's capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law. State v. Rogers, 112 Wn.2d 180, 185, 770 P.2d 180 (1989).

¹¹ Drug use also may not be considered as a nonstatutory mitigating factor. State v. Gaines, 122 Wn.2d 502, 510, 859 P.2d 36 (1993).

The sentence imposed is reviewable only if the court categorically refused to consider an exceptional sentence request or relied on an impermissible basis for refusing to impose it. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005); State v. Khanteechit, 101 Wn. App. 137, 138, 5 P.3d 727 (2000).

Application of an incorrect legal standard would constitute such an impermissible basis. State v. Schloredt, 97 Wn. App. 789, 801-03, 987 P.2d 647 (1999). "[A] trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling." Khanteechit, 101 Wn. App. at 138-39, quoting State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), rev. denied, 136 Wn.2d 1002 (1998).

Hodges' argument for reversal of his sentence is premised on his claim that the trial court mistakenly believed that the "mere fact of Mr. Hodges' alleged use of drugs or state of having ingested drugs around the time of the commission of the offense per se precluded application" of the asserted mitigating factor. App. Br. at 22. That claim is belied by the court's repeated efforts to determine whether the defense expert could separate the effects of the

cocaine from the other claimed mental impairment. 10/2/08RP 64-69. The court understood the applicable legal standard.

Hodges acknowledged that he was under the influence of cocaine at the time of the burglary, through both the defense psychiatrist, Dr. Kent, and through defense counsel. 10/2/08RP 64, 66. On appeal, Hodges appears to suggest that Dr. Kent's report of Hodges' cocaine use is unreliable because Hodges denied drug use in his clinical interviews at Western State Hospital. App. Br. at 47. His acknowledgement of his cocaine use at the sentencing hearing justified the court's reliance on that fact. RCW 9.94A.530(2); State v. Garza, 123 Wn.2d 885, 889-90, 872 P.2d 1087 (1994) (to dispute information presented at sentencing hearing, defendant must timely and specifically challenge it).

The sentencing court accurately stated the legal standard: if, "had he not been taking cocaine that day, he would have committed the residential burglary and he still would have been unable to appreciate the wrongfulness of his conduct." 10/2/08RP 67.¹² The court repeated a correct paraphrase of the standard:

¹² The phrase, "he would have committed the burglary" apparently refers to the capacity to conform conduct to the requirements of the law aspect of RCW 9.94A.535(1)(e). Both prongs of the statute were articulated by defense counsel (10/2/08RP 46-47) and that standard was not disputed. There is no reason to believe that the court misunderstood it.

But unless she can say that the cocaine did not contribute to his confusion, did not contribute to his lack of capacity to understand and appreciate the wrongfulness of his conduct and that he would have been in the same state without the cocaine, then in my judgment, the legislature has said he doesn't qualify for an exceptional sentence.

Id. The court's reference to "being in the same state" refers to the significantly impaired capacity required by the statutory mitigating factor.

Dr. Kent understood the question that was being asked, stating that she could say that the cocaine contributed to the other conditions, but that she could not say what his mental state would have been without the cocaine that day. Id. at 67-69. She said she could not say what Hodges' mental state would have been without the cocaine because she did not know what his mental state was prior to taking the cocaine. Id. at 68.

In its concluding remarks explaining the denial of the exceptional sentence, the court again accurately paraphrased the legal standard. It said that if a person with a mental deficit uses drugs that make his mental condition worse, and part of the reason the person does not understand that their activity is criminal is that the person voluntarily took a proscribed drug, that does not qualify for an exceptional sentence. Id. at 69-70.

The court later noted that Hodges' mental state at the time of the burglary was "anything but clear" because Hodges was under the influence of cocaine. Id. at 73.

Because the court applied the correct legal standard, the standard range sentences should be affirmed. Hodges gives great weight to the sentencing judge's serious consideration of an exceptional sentence, arguing that this warrants reversal if the evidence could be construed to be sufficient to support the mitigating factor. The finding that the evidence was insufficient to support the mitigating factor was within the sentencing court's discretion and is beyond the scope of review of the standard range sentences imposed.

3. THE SUFFICIENCY OF THE DEFENSE EVIDENCE IN SUPPORT OF MITIGATION IS BEYOND THE SCOPE OF REVIEW OF THE STANDARD RANGE SENTENCES.

Hodges contends that this Court should review the sufficiency of the evidence to support the mitigating factor, and if any evidence in the record is sufficient to support the mitigating factor, this Court should reverse the sentences on the basis that the sentencing court must not have reviewed all of the prior competency evaluations. This is a creative effort to avoid the basic

prohibition of review of the trial court's exercise of discretion in denying a mitigated sentence—it should be rejected. In any event, there is no record of the materials provided to the trial court for purposes of sentencing, there is no indication that the court did not consider any materials presented, and there is no support in the record for the conclusion that absent Hodges' use of cocaine, at the time of the residential burglary his capacity to appreciate the wrongfulness of his conduct or conform his behavior to the requirements of the law would have been significantly impaired on April 11, 2007.

A defendant who seeks an exceptional sentence is entitled to have that option actually considered. Grayson, 154 Wn.2d at 342. The complete failure to consider that alternative is reversible error. Id.

Hodges supplied three reports to the trial court in support of its request for an exceptional sentence. 10/2/08RP 37. Those reports were not made part of the record, although they apparently included at least one report from defense expert Dr. Kent.¹³ Id. at 49. The court acknowledged receiving those reports and by its reference to their contents, indicated that he had read them. Id. at

37, 47. Testimony of Dr. Kent was presented at the sentencing hearing. Id. at 63-69.

Hodges claims that when the sentencing date was being scheduled, "the parties and the court acknowledged" that he wished to have all of the prior competency evaluations filed in the record be considered as to sentencing. App. Br. at 44. He cites as support for this claim a hearing on September 25, 2008, which occurred before Judge Carey, who was not the assigned sentencing judge. 9/25/08RP 1. The page to which Hodges cites in that transcript is p. 31. App. Br. at 44. That page includes no reference to any medical reports in the record. 9/25/08RP 31. In referring to scheduling the sentencing date, the prosecutor states, "The problem with the sentencing date is something that perhaps Mr. Kitching should address because he wants to have his expert there, not for purposes of contesting competency but for the purpose of providing information to the court in order for the court to make a reasoned decision about the sentence." Id. The record does not support Hodges' assertion on appeal that he asked the

¹³ The State could find no report authored by Dr. Kent included anywhere in the record in either case.

sentencing judge to review all of the medical reports that had been filed in these cases.

There is no authority offered for the proposition that if the court could have found a basis for imposing an exceptional sentence, it must be presumed that the court did not review the record and the sentence should be reversed on that basis. The court in this case seriously considered the nature of the exceptional sentence that might be imposed before concluding that the facts did not justify imposition of an exceptional sentence. Contrary to the defense argument, that does not justify appellate review of the court's final decision not to impose such a mitigated sentence.

Garcia-Martinez, supra, upon which Hodges relies, does not require a judge to review on the record every fact that is considered in determining the proper sentence. That case holds simply that a court that "has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion" and the sentencing decision is not appealable. 88 Wn. App. at 330. The sentencing court in this case not only acknowledged receiving reports from the defense,¹⁴ he questioned the defense expert at length in an effort to determine whether she could say that Hodges'

alleged mental impairment significantly affected his capacity, independent of his use of cocaine. 10/2/08RP 63-70. It is clear that the court considered the factual basis for the defense request, although it did not cite to the facts it considered in whatever reports were submitted.

In any event, none of the passages cited by Hodges from reports of WSH evaluators specifically relate to his state of mind at the time of the burglary. Nothing specifically connected any mental disorder to Hodges' capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law. In the competency evaluation reports, the only mention of Hodges' mental state at the time of the crimes occurs when the evaluator specifically declines to address it. CP 137, 152, 164. Nothing in the record would have supported the conclusion that solely because of factors unrelated to use of drugs, Hodges' capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was significantly impaired on April 11, 2007.

The court considered the facts and the applicable law and concluded that an exceptional sentence was not warranted. That exercise of discretion is not appealable.

¹⁴ 10/2/08RP 37, 47.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Hodges' convictions and sentences.

DATED this 31ST day of December, 2009.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent in STATE V. RICHARD HODGES, Cause No. 62632-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame

Name

Done in Seattle, Washington

12/31/09
Date