

63661-8

63661-8

NO. 63661-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JAMES D. WILKS,

Appellant.

2010 MAR 11 11:53

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LARRY JORDAN  
THE HONORABLE JAMES ORLANDO

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. A party waives an evidentiary challenge if he fails to renew his objection. Here, defense counsel objected to the competency of a witness. The trial court reserved ruling on the objection until after the witness had testified. Counsel never renewed his objection or sought a final ruling. Has the issue been waived?

2. A witness is presumed competent. Inconsistencies in a witness's testimony involve credibility determinations, which are made by the jury and not subject to appellate review. Here, Wilks contends that a witness's inconsistent testimony rendered the witness incompetent. Did the trial court exercise proper discretion when it ruled that any inconsistencies by the witness affected the weight, not the admissibility, of the evidence?

3. Crawford v. Washington,<sup>1</sup> bars the admission of testimonial hearsay. Non-testimonial hearsay is admissible, subject to the evidentiary rules. In this case, the trial court determined that a witness's utterance, spontaneously made at the time that the witness observed the event--the defendant's threatening glare--and not uttered in response to any questioning, was a present sense

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<sup>1</sup> 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

impression, not testimonial hearsay. Did the trial court exercise proper discretion by admitting the non-testimonial hearsay?

4. The decision to grant or deny a new trial based on a claim of ineffective assistance of counsel is within the trial court's discretion. Wilks claims now, as he did below, that he received ineffective representation because his attorney failed to have him evaluated for competency. However, after a two-day hearing, which included testimony from defense counsel, the deputy prosecutor, the trial judge (who had recused himself after trial, but before the motion for a new trial), and a psychologist from Western State Hospital, the court determined that neither defense counsel, nor the trial judge, ever had reason to doubt Wilks's competency. Rather, Wilks presented quite well and Western State Hospital had determined that Wilks's manipulative and narcissistic personality — and not a mental defect — was the impetus for his disruptive behavior. Was it within the trial court's discretion to deny Wilks's unfounded motion for a new trial?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On November 2, 2007, by amended information, the State charged the defendant, James Dean Wilks, with one count of attempted first-degree robbery and two counts of second-degree assault for conduct that had occurred on August 26, 2007. Each count also alleged a deadly weapon enhancement.<sup>2</sup> CP 6-7.

On January 8, 2008, the matters proceeded to trial. CP 575-76. On January 11, 2008, after the State had rested, the defense moved to dismiss count two — second-degree assault (with Gene White the named victim). CP 585; 6RP 105.<sup>3</sup> The trial court agreed that insufficient evidence existed on count two as charged; however, the court instructed the jury on fourth-degree assault, a lesser-included offense. 6RP 109-10; CP 60-61, 585.

During trial on the above-listed charges, the police investigated Wilks for numerous threats that he had made to judges

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<sup>2</sup> The State had charged another count of second-degree assault. CP 8. When the State could neither confirm the identity, nor the location, of the victim named in count four, the count was dismissed with prejudice. 1/8/08RP 3-4.

<sup>3</sup> The record consists of 15 volumes of verbatim report of proceedings, designated as follows: 1RP (9/20/07); 2RP (12/12/07); 3RP (1/8/08); 4RP (1/9/08); 5RP (1/10/08); 6RP (1/11/08); 7RP (1/14/08); 8RP (2/8/08); 9RP (6/13/08); 10RP (7/11/08); 11RP (10/10/08); 12RP 3/27/09); 13RP (4/16/09); 14RP (4/30/09); 15RP (5/28/09).

in Seattle Municipal and King County Superior courts on unrelated cases.<sup>4</sup> See 2RP 3. Immediately after closing arguments in the instant case, the State attempted to arraign Wilks on the new charges. 6RP 175-76; CP 586. The defense objected because the trial judge in this case had been asked to come out of retirement and preside over the trial to avoid any potential conflict. 3RP 142; 6RP 176. Additionally, the defense felt that it was prejudicial for the trial court to learn of new allegations of criminal conduct by Wilks before the jury rendered its verdicts. 6RP 176-79. The court agreed and continued the arraignment until the following week, and before a different judge. 6RP 179-80; CP 586.

The jury convicted Wilks of counts one and three, as charged, including the deadly weapon enhancement, and of fourth-degree assault. CP 89-91, 587-88; 7RP 8-13. In court, after the jury returned its verdict, Wilks threatened the deputy prosecuting attorney; he added her to his "Hit List."<sup>5</sup> 7RP 18; CP 198, 210, 588.

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<sup>4</sup> Under King County Cause Number 08-1-00841-6 SEA, Wilks was charged with making numerous threats to Seattle Municipal Court and King County Superior Court judges, and for threats to bring a sniper rifle to Smith Tower in downtown Seattle and shoot at law enforcement officers as they entered the King County Courthouse. See State's Motion to Seal at Appendix C (filed May 21, 2010).

<sup>5</sup> An additional charge of felony harassment was added to the information charged under King County Cause Number 08-1-00841-6 SEA. To avoid a conflict of interest, the Attorney General's office prosecuted Wilks under this cause number.

On February 8, 2008, the matter was scheduled for sentencing. 8RP 2. The trial court noted that, based on Wilks's apparent inability to assist counsel in his defense in King County Cause Number 08-1-00841-6, a competency hearing had been ordered by the judge in that case. 8RP 2. Although defense counsel in the instant case felt confident that Wilks was competent to proceed to sentencing, the State recommended continuing sentencing until after Western State Hospital ("WSH") had evaluated Wilks. 8RP 5. The court agreed. 8RP 6; CP 92-96.

On April 25, 2008, the trial court reviewed the WSH report dated March 11, 2008, and found Wilks incompetent to proceed to sentencing. CP 124-25. Wilks remained confined at WSH until he again became competent.

On June 13, 2008, after the trial court had reviewed the WSH report dated June 2, 2008, the court found Wilks competent to proceed with sentencing. 9RP 2-4; CP 128-29. However, because the WSH report contained information about Wilks's "Hit List," and other bad acts, defense moved the court for recusal. 9RP 5-7; CP 210. The court denied the motion. 9RP 8.

At the same hearing, Wilks moved the court for permission to proceed pro se on a motion for a new trial. 9RP 8; CP 97-123,

142-72. After a colloquy with Wilks, the trial court found that Wilks had made a knowing, voluntary and intelligent waiver of his right to counsel.<sup>6</sup> 9RP 8-10. Wilks then made another motion for recusal, which the court again denied. 9RP 13-19.

At the same hearing, the State brought to the court's attention that, because Wilks's motion for a new trial included claims of ineffective assistance of trial counsel, new stand-by counsel should be appointed. 9RP 28; CP 97-123. The court agreed. 9RP 28.

On June 16, 2008, the trial court sua sponte reconsidered its previous denials regarding recusal and entered an order of recusal. CP 173. On June 30, 2008, the Washington State Supreme Court entered an order appointing a judge from Pierce County, Honorable James Orlando, to preside over this case. CP 174.

On July 11, 2008, Judge Orlando appointed new stand-by counsel. 10RP 2-3. After Judge Orlando reviewed the June 2, 2008 WSH report, he also found Wilks competent to proceed to sentencing. CP 175-76. In addition, Judge Orlando authorized

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<sup>6</sup> For a short while Wilks had pro se status pre-trial. See 1RP 2-31 (Honorable Judge Downing presided over the hearing at which Wilks's motion to proceed pro se was granted); 2RP 2 (record states that at a previous hearing — not designated by Wilks on appeal — Wilks rescinded his right to proceed pro se and trial counsel was appointed).

Wilks to continue pro se, but Wilks then decided that he wanted stand-by counsel to represent him. 10RP 17.

On October 10, 2008, defense counsel contended that Wilks's mental health was decompensating and asked the court to return Wilks to WSH for further evaluation. 11RP 2-8. The court deferred to counsel; however, the court had misgivings because the June 2, 2008 report indicated that Wilks was a malingerer whose personality disorder, as opposed to the effects of some mental disorder, caused any perceived incompetency. 11RP 8; CP 217-20. Nevertheless, the court ordered a new evaluation.<sup>7</sup> CP 177-80.

On March 27 and April 16, 2009, the court heard testimony and reviewed exhibits in a motion for a new trial based, in part, on whether trial counsel had been ineffective either for failing to bring to the trial court's attention Wilks's previous mental health issues or by failing to have Wilks evaluated. See generally volumes 12 and 13 RP; CP 181-238 (supplemental motion for new trial); 239-67

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<sup>7</sup> The record in this case does not contain a third report from WSH. However, under King County Cause Number 08-1-00841-6 SEA and King County Cause Number 08-1-05067-6 SEA, which was dismissed pursuant to plea negotiations, Judge Orlando reviewed a WSH report dated November 13, 2008, after which he entered findings of fact and conclusions of law regarding Wilks's competency. Presumably, Wilks was found competent as to all of his then-pending cases, including the instant case. The November 13<sup>th</sup> report was filed under seal in the other two cases.

(second supplemental motion for a new trial); 268-318 (motion for a new trial). On April 21, 2009, the court issued a written ruling.

CP 338-40. The court stated:

Looking at the evidence presented I do not find that Mr. Wilks received ineffective assistance of counsel by Mr. Johnson [trial counsel]. I also believe that there was no reason for Judge Jordan to have ordered a competency evaluation during trial based on the high functioning of Mr. Wilks during the trial process.

CP 340. Accordingly, Judge Orlando denied Wilks's motion for a new trial. CP 340.

On April 30, 2009, Wilks again wished to proceed pro se. 14RP 2. The court engaged in a colloquy with Wilks, after which the court granted Wilks's motion and again appointed stand-by counsel. 14RP 10-16, 19; CP 337. The court agreed to continue sentencing to allow Wilks to file a motion for reconsideration of the court's April 21<sup>st</sup> ruling. 14RP 23-28; CP 351-78.

On May 28, 2009, the court denied Wilks's motion for reconsideration. 15RP 10, 67. The court also denied Wilks's motion to stay sentencing. 15RP 67; CP 407-14. The court then

imposed 42.75 months on count 1, concurrently with 26 months on count 3, but consecutively to 12 months on count 2.<sup>8</sup> CP 540-51.

Wilks appeals. CP 556.

Additional procedural and substantive facts will be discussed in the section to which they pertain.

## 2. SUBSTANTIVE FACTS

John Holden is 77-years-old. He is homeless, living in shelters at night, and spending his days at the library. 5RP 43-46. Years ago, Holden was shot in the head while jogging. As a result, he suffered a brain injury that affects his balance, speech and hearing. He often forgets dates. 5RP 46, 52-53. Holden is also blind in his right eye. 5RP 51.

Some time after his injuries, Holden met the defendant, James Dean Wilks. They met in a park, and for about six days they

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<sup>8</sup> The sentencing court erred. The time imposed on counts 1 and 3 included the 12 months on each count for the deadly weapon enhancement. CP 544, 546; 15RP 71, 101-03. If the court had wanted to impose the low-end of Wilks's standard range for the attempted first-degree robbery (count 1) and the high-end of Wilks's standard range for the second-degree assault (count 3), the court needed to impose 30.75 months + 12 months consecutively for the deadly weapon enhancement on that count + another 12 months consecutively for the deadly weapon enhancement on count 3 for a total of 54.75 months on counts 1 and 3 (count 2, a misdemeanor, is not governed by the SRA). Compare CP 544 & 546 with RCW 9.94A.533(4)(b), (e) (requiring that all deadly weapon enhancements "shall run consecutively to all other sentencing provisions, including . . . other deadly weapon enhancements.") The State, however, did not realize the error until after the time had passed for it to file a cross-appeal.

shared a motel room on Aurora Avenue. 5RP 47-48. Holden thought that Wilks had stolen his food stamp debit card. 5RP 50.

After Holden and Wilks shared the motel room, Wilks accosted Holden in a park and demanded that Holden relinquish his shoes. Holden gave Wilks his shoes because he did not want any trouble. Holden explained, "I am an old man." 5RP 51.

Later, on August 26, 2007, Wilks again accosted Holden, who was sitting on a park bench. 5RP 52-53. Wilks claimed that Holden owed him forty dollars and he demanded money. 5RP 53, 79. Wilks brandished an "ugly looking" knife — with about a six and one half inch fully serrated blade — in his left hand. 5RP 58-59. Wilks's demeanor was "aggressive and violent"; Holden backed away. 5RP 62-63, 81. Holden did not give Wilks any money.<sup>9</sup> 5RP 83.

Shortly after Wilks attempted to rob Holden, Wilks assaulted a 40-year-old crack-addicted, paranoid-schizophrenic homeless woman, Ms. Gene White. 5RP 88-90. White met Wilks early in the summer of 2007. 5RP 91. Wilks had approached White in a shelter doorway where she slept. White gave Wilks some blankets

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<sup>9</sup> This formed the basis for the attempted first-degree robbery plus a deadly weapon enhancement.

because he did not have any, and Wilks gave White some food.

5RP 91-92.

On August 26, 2007, White and Wilks stopped getting along after one of White's crack cocaine binges. 5RP 90, 93. When White returned to where Wilks had been watching over her belongings, Wilks was angry, threatening. 5RP 94. Wilks said that he would find White and cut her in her sleep. 5RP 94.

About one hour later, Wilks tried to make good on his threat. 5RP 94-95. According to John Trotter and Konstantin Roubinchtein (who are also homeless), while White slept on a stage that had been used the previous night for a concert, Wilks accosted White. 5RP 120-24; 6RP 34-35, 39-40. White kept telling Wilks to leave her alone; she sounded annoyed and scared. 5RP 124-26; 6RP 41. Trotter asked Wilks to leave White alone. 6RP 41. The more that White begged Wilks to leave her alone, the angrier Wilks became. 6RP 41-42. Wilks cursed and grabbed at White. 6RP 42-44, 80-81.

Trotter, calmly, but firmly, asked Wilks to leave White alone. 6RP 43. Wilks pulled out a knife and said to Trotter, "Shut up,

Nigger.”<sup>10</sup> 5RP 128. Wilks waved the knife at White and Trotter. 6RP 47-48. Trotter had to move his face back to avoid being slashed.<sup>11</sup> 5RP 129; 6RP 49. Wilks slashed at Trotter; Wilks screamed, “I’ll kill you, fucking nigger.” 6RP 48-49. White, who was still coming down from her drug use, leaned on Trotter; she only remembered being awakened by a police officer who wanted to check her face to see whether Wilks had cut her.<sup>12</sup> 5RP 95, 138.

As Wilks assaulted White and Trotter, a man known to Trotter from the Union Gospel Mission, told Trotter not to worry. The man had a cell phone and he called the police. 5RP 130-31; 6RP 52. At that point, Wilks left. 5RP 131.

A short while later the police arrested Wilks. Wilks had a knife in his pants pocket. 5RP 170-73. Wilks told the police that Holden owed him money so he had approached him and asked for to be paid back; Wilks denied having displayed a knife. 5RP 175-76.

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<sup>10</sup> On a previous occasion, Wilks had shown White—in a non-threatening manner—a knife similar to the knife that Holden described. White described the knife as a “Crocodile Dundee” knife with a seven- or eight-inch blade. 5RP 102, 109, 112. The knife that the police seized from Wilks upon his arrest was not the knife described by Holden and White. 5RP 80, 102, 171, 173.

<sup>11</sup> This formed the basis for the second-degree assault plus a deadly weapon enhancement with Trotter the victim.

<sup>12</sup> This formed the basis for the fourth-degree assault with White the victim.

**C. ARGUMENT**

**1. WITNESS HOLDEN IS PRESUMED COMPETENT.**

Wilks contends that the trial court abused its discretion by ruling that witness John Holden was competent. Specifically, Wilks claims that Holden's incompetency involved his inability to “retain an independent recollection of the events and to recount them accurately.” Br. of Appellant at 15.

This Court should reject Wilks's claim for three reasons. First, Wilks failed to preserve this issue because, after the trial court reserved ruling on Holden's competence, Wilks did not renew his objection.<sup>13</sup> Second, the “competency” objection was really a challenge to Holden's credibility — a determination made by the jury and not subject to review on appeal. Finally, the trial court properly ruled that any difficulties Holden had experienced either remembering or recounting the events involved the weight, and not the admissibility, of the evidence. 6RP 12-13.

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<sup>13</sup> Wilks interposed a competency objection after Holden had finished testifying and when the State tried to introduce Holden's written statement to the police. As discussed fully below, the objection was to the admission of the document, not to Holden's previous testimony. 6RP 3-12.

In Washington, adult witnesses are presumed competent to testify.<sup>14</sup> State v. Smith, 97 Wn.2d 801, 802-03, 650 P.2d 201 (1982); RCW 5.60.020;<sup>15</sup> CrR 6.12.<sup>16</sup> An adult witness becomes incompetent to testify if he or she is of “unsound mind,” or appears incapable of receiving and relating accurate impressions of the facts about which they are examined. RCW 5.60.050;<sup>17</sup> CrR 6.12(c).<sup>18</sup> The burden is on the party opposing the witness to show incompetence which precludes the witness from testifying. Smith, 97 Wn.2d at 803. To the extent that a defendant's challenge is

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<sup>14</sup> Wilks relies on the “Allen factors.” See Br. of Appellant at 13, citing State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). However, the Allen factors pertain to *child* witnesses (“The true test of the *competency of a young child* as a witness”), not to adult witnesses, such as Mr. Holden. Allen cites State v. Davis, 20 Wn.2d 443, 147 P.2d 940 (1944), for authority that the trial court determines whether a witness meets the requirements of the test. Davis involved a witness under the age of 15 years.

<sup>15</sup> “Every person of sound mind and discretion, except as hereinafter provided, may be a witness in any action, or proceeding.”

<sup>16</sup> “(a) Who May Testify. Any person may be a witness in any action or proceeding under these rules except as hereinafter provided or as provided in the Rules of Evidence.”

<sup>17</sup> “The following persons shall not be competent to testify:  
(1) Those who are of unsound mind, or intoxicated at the time of their production for examination; and  
(2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.”

<sup>18</sup> “(c) Persons Incompetent To Testify. The following persons are incompetent to testify:  
(1) Those who are of unsound mind, or intoxicated at the time of their production for examination; and  
(2) children who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly. This shall not affect any recognized privileges.”

really to a witness's credibility, credibility determinations are for the trier of fact and not subject to review on appeal. State v. Cross, \_\_\_ P.3d \_\_\_, 2010 WL 2590588 at \*9-10 (filed June 29, 2010, as amended July 1, 2010) (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

The preliminary determination of competence is within the trial judge's discretion because he or she observes the witness and his manner, and can consider his capacity and intelligence. State v. Swan, 114 Wn.2d 613, 645, 790 P.2d 610 (1990). It is for the trial court to decide whether the witness understands the obligation to tell the truth and is capable of recalling and recounting the events in question. See Smith, 97 Wn.2d at 803. This Court reviews this determination for an abuse of discretion. State v. Froehlich, 96 Wn.2d 301, 304, 635 P.2d 127 (1981). An abuse of discretion occurs when the trial court's decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). No such abuse of discretion has been shown in this case.

State v. Froehlich is instructive. In that case, John Bliss, the defendant's accomplice in a burglary (who had previously been convicted), was called as a State's witness. Froehlich, 96 Wn.2d at

303. Based on an injury that Bliss had received eight years earlier, a nervous condition, and medication that he received, Bliss had a hard time remembering things. Id. Outside the presence of the jury, Bliss was examined and cross-examined to determine the extent to which he had an independent recollection of critical events. Id. Bliss was able to identify Froehlich, was able to recall that he and Froehlich were at the location of the burglary at the critical time, and that he “took stuff.” Id. On cross-examination, Bliss could not recall whether he and Froehlich had taken anything. Id. During testimony in the jury’s presence, Bliss acknowledged that he could remember very little about the crime, but stated that he did remember Froehlich being at the burglarized apartment. Id. at 304-05. The trial judge concluded that he could not disqualify Bliss as a witness. Bliss was competent to testify subject to cross-examination and the question of credibility was left to the jury. Id. at 303.

On appeal, Froehlich contended that Bliss's medical condition resulted in his memory being insufficient to retain an independent recollection of the events and that Bliss was thus incompetent to testify. Froehlich, 96 Wn.2d at 303, 307. The Washington Supreme Court rejected Froehlich's claim, holding that

the trial court had not abused its discretion in finding Bliss competent as a witness. Id. at 304. The court stated, “In a situation such as this competency shades into credibility.” Id. at 307. Once a trial judge determines that a person with a mental defect is competent -- that he understands the nature of an oath and is not incapable of giving a correct account of what he witnessed -- the jury must then determine the extent to which the witness has the required capacities to observe, recollect and communicate truthfully because those same factors affect credibility. Id.

The facts in this case are similar to the facts in Froehlich. Witness John Holden sustained a gunshot wound to the head years earlier that had caused cognitive impairment and difficulties with his balance, eyesight and hearing. 5RP 46, 52-53, 77. The gunshot damaged Holden's *aqueduct of Sylvius*,<sup>19</sup> which resulted in memory problems (such as dates), but Holden said that he could still recall important facts. 5RP 52-53, 69. After Holden had insufficient recall of the critical facts to testify fully about the attempted robbery, the State tried to refresh Holden's recollection with the statement that

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<sup>19</sup>The *aqueduct of Sylvius*, a channel connecting the third and fourth ventricles of the brain — called also cerebral aqueduct. Available at: [www.merriam-webster.com/medical/dubois](http://www.merriam-webster.com/medical/dubois).

he had given to police at the time of the incident. See generally 5RP 43-56. Holden said that his review of his prior statement had refreshed his memory as to the events. 5RP 69.

The trial court asked the State to further question Holden outside the presence of the jury to determine whether Holden truly did recall the events. 5RP 68, 70. Defense counsel objected to Holden's competency as a witness. 5RP 68-69, 77-78. The trial court reserved ruling until after the court heard Holden's testimony. 5RP 78. The court then permitted Holden to testify from his independent knowledge in the jury's presence.

Holden's testimony was somewhat confused about what precisely had occurred on the date of the charged incident.<sup>20</sup> See generally 5RP 43-67, 78-87. However, Holden did say that Wilks had demanded money while he held a knife in his left hand. 5RP 79-81. Holden described the knife as a "dreadful piece of machinery" that had a fully serrated blade approximately six and one half inches long. 5RP 58-59. Holden backed away from Wilks "because you don't exactly talk Shakespeare to a guy with a knife." 5RP 81.

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<sup>20</sup> Holden wanted to testify about Wilks's threat with a knife to a "Punjabi," because it had upset Holden. The trial court, however, admonished Holden several times not to discuss that incident. See, e.g., 5RP 59-66, 86.

After Holden was cross-examined, Wilks did not renew his motion to find Holden incompetent or move to strike Holden's testimony. See 5RP 87 (defense counsel completed his cross-examination and never sought a final ruling on his motion to find Holden incompetent as a trial witness); see also 5RP 185 (defense counsel acknowledged that, after Holden testified, counsel had not explored further his motion to find Holden incompetent as a trial witness); 5RP 187 (with regard to whether Holden was unavailable to be recalled as a witness, the State reminded the court and counsel that Holden "has not been found incompetent"). Consequently, Wilks waived appellate review of this issue. See State v. Riker, 123 Wn.2d 351, 369, 869 P.2d 43 (1994) (finding that the defendant waived an evidentiary challenge by failing to renew it).

It was not until later in the trial, when the State sought to admit Holden's written statement to the police as a recorded recollection, that the defense again broached Holden's competence. See 5RP 186-91; 6RP 3-12. However, Wilks's objection to the *written statement* did not revive his earlier objection to Holden's competence as a trial witness.

Defense objected under Crawford v. Washington,<sup>21</sup> to the trial court admitting the written statement. Counsel contended that, because of his brain injury, Holden was unavailable for cross-examination; therefore, admission of his written statement would constitute error. 6RP 6-8.

The trial court agreed that admitting the recorded recollection would constitute error. The court acknowledged its difficulty in finding that the written statement was “an accurate knowledge of what happened,” as required under ER 803(a)(5).<sup>22</sup> 6RP 14. However, the trial court's determination that Holden's written statement was inadmissible is a separate issue from whether Holden was a competent witness.

With regard to Holden's competence, the court said that although Holden “wasn't as lucid as some witnesses,” on this record, it could not find incompetency as defined by the rules. 6RP 12. See, e.g., Cross, \_\_\_ P.3d \_\_\_, 2010 WL 2590588 at \*9

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<sup>21</sup> 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

<sup>22</sup> ER 803(a)(5) provides:

Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(affirming the trial court's ruling regarding the competency of a witness who had four previous brain surgeries and problems with her long- and short-term memories, but which found that while the witness was genuinely confused about some things, it was not to the extent that she was truly incompetent to testify). The court here stated, "It's difficult when you review this witness; you almost have to see him to believe him." 6RP 14. It is precisely for this reason that the trial court has considerable discretion in ruling whether a witness is competent. See Smith, 97 Wn.2d at 803; Swan, 114 Wn.2d at 645. Thus, to the extent that the trial court's comments are construed as a final ruling on counsel's earlier competency motion, the trial court exercised sound discretion when it found Holden competent as a witness.

Wilks essentially argues on appeal that because Holden's testimony was inconsistent and, therefore, not credible, he was an incompetent witness. However, the jury determines whether a witness's testimony is credible — a determination that is not subject to review on appeal. See Froehlich, 96 Wn.2d at 307; Cross, \_\_\_ P.3d \_\_\_, 2010 WL 2590588 at \*9-10. Also, the jury determines whether any inconsistencies can be reconciled. See 6RP 12-13 (the trial court stated that any issue regarding Holden's recollection,

went to the weight that the jury afforded Holden's testimony).<sup>23</sup>

Although Holden was confused about the details, his confusion did not per se make him incompetent. In fact, that would turn the presumption of each witness's competency on its head. See RCW 5.60.020; CrR 6.12. The Court should reject this claim.

**2. THE TRIAL COURT'S ADMISSION OF A NONTTESTIMONIAL PRESENT SENSE IMPRESSION DID NOT VIOLATE WILKS'S RIGHT TO CONFRONTATION.**

Wilks next contends that the trial court violated his Sixth Amendment right to confront witnesses when it permitted a police officer who conducted an identification show-up to testify about Holden's spontaneous remark, "Look at him. He is threatening me right now." Br. of Appellant at 17-18, 23-28. Wilks argues that Holden's utterance was testimonial and thus impermissible under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). This Court should reject Wilks's claim. The statement was not testimonial; it was a present sense impression, properly admitted under ER 803(a)(1).

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<sup>23</sup> See also 6RP 136-37, 144-47 (Defense counsel stressed in his closing argument why Holden's confusion meant that he was not a credible — as opposed to an incompetent — witness).

The Sixth Amendment confrontation clause guarantees that a person accused of a crime “shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. AMEND VI. The Washington State Constitution guarantees an accused the right “to meet the witnesses against him face to face.” CONST. ART. 1, SECTION 22 .

In Crawford, the United States Supreme Court held that an out-of-court testimonial statement may not be admitted against a criminal defendant unless the declarant testifies at trial or is unavailable, and the defendant had a prior opportunity to cross-examine the declarant.<sup>24</sup> Crawford, 541 U.S. at 68. The decision in Crawford was restricted to the use of testimonial hearsay, but “left for another day any effort to spell out a comprehensive definition of ‘testimonial.’” Crawford, at 68. However, the Court did provide several specific examples of testimonial evidence: (1) ex parte in-court testimony or its functional equivalent, i.e., affidavits, custodial examinations, prior testimony that the defendant was

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<sup>24</sup> The trial court here found that, unlike in Crawford, there was no showing that the declarant-victim was “unavailable.” 5RP 183; see also 5RP 188 (the trial court said, “I don’t believe there is a confrontation issue. Cross-examination was available.”). However, as Wilks correctly points out, the trial deputy prosecutor was required to ask Holden about the hearsay statement. See Br. of Appellant at 19-24 and cases cited therein; see also 5RP 188 (the trial court said, “I don’t believe there is a confrontation issue. Cross-examination was available.”).

unable to cross-examine, or similar pretrial statements that a declarant would reasonably expect to be used in prosecution; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. Crawford, at 51-52.

The Court did not hold that any and all statements made to a government employee are testimonial. To the contrary, the Court was concerned with “*structured* police questioning,”<sup>25</sup> and the “involvement of government officers in the *production of testimony with an eye toward trial* [that] presents unique potential for prosecutorial abuse[.]” Crawford, 541 U.S. at 56 n.7 (emphasis supplied). Crawford did not alter prior law with respect to nontestimonial statements. United States v. Saget, 377 F.3d 223, 227 (2d Cir.2004). In other words, when a statement is not “testimonial,” the rules of evidence govern its admissibility.

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<sup>25</sup> Crawford, at 53 n.4 (emphasis supplied).

Later, in Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court held that statements to law enforcement personnel were not testimonial when “circumstances objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,” but are testimonial when “the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” Davis, 547 U.S. at 822. The Court thus held that statements made in a 911 call during an ongoing domestic disturbance were not testimonial, whereas statements made to police officers after a domestic disturbance were testimonial because there was no immediate danger. In distinguishing the questioning during the event in the 911 call from that in Crawford (post-event), the Court noted several factors it considered important. First, the 911 call described events “*as they were actually happening*, rather than ‘describ[ing] past events.’” Id. at 827 (quotation omitted) (alteration in original). Second, statements made in the 911 call were made while the declarant was “facing an ongoing emergency,” rather than “report[ing] a crime absent any imminent danger.” Id. Third, the

questions asked by the 911 operator were “necessary to be able to resolve the present emergency, rather than simply to learn (as in Crawford) what had happened in the past.” Id. Finally, there was a “difference in the level of formality between the two interviews.” Id.

In applying the principles from Crawford and Davis to this case, it is clear that Holden's spontaneous exclamation was not testimonial. As stated above, the admissibility of a nontestimonial hearsay statement is determined by the evidence rules. A present sense impression is one exception to the rule prohibiting hearsay. ER 803(a)(1).<sup>26</sup> “The statement must be a 'spontaneous or instinctive utterance of thought,' evoked by the occurrence itself, unembellished by premeditation, reflection, or design.” State v. Martinez, 105 Wn. App. 775, 783, 20 P.3d 1062 (2001) (citing Beck v. Dye, 200 Wash. 1, 9-10, 92 P.2d 1113 (1939)), overruled on other grounds by State v. Rangel-Reyes, 119 Wn. App. 494, 499 n.1, 81 P.3d 157 (2003). In addition, to qualify as a present sense impression, the statement may not be in response to a question. Martinez, 105 Wn. App. at 783. A trial court's determination of whether a statement falls under a hearsay exception is reviewed for

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<sup>26</sup> “A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.”

an abuse of discretion. Martinez, at 782. However, whether a rule of evidence applies in a given factual situation is a question of law that this Court reviews de novo. State v. Williams, 131 Wn. App. 488, 494, 128 P.3d 98 (2006).

Officer Gallegos stated that during the identification show-up, Wilks appeared angry and stared at Holden in a “threatening manner.” 3RP 132; 5RP 178. Holden spontaneously exclaimed, “Look at him. He is threatening me right now.” 3RP 132, 135. Holden seemed afraid; he expressed fear of what Wilks would do when he got out of jail and he wondered how to obtain a protection order. 3RP 132.

As in Davis, Holden's statement concerned events “*as they were actually happening*, rather than 'describ[ing] past events.'” See Davis, 547 U.S. at 827. Furthermore, Holden's statement was spontaneous; it was not in response to a question, much less in response to *structured police questioning* as in Crawford. See Martinez, 105 Wn. App. at 783; Crawford, 541 U.S. at 53 n.4. As the trial court stated, “Mr. Holden is the one who initiated the conversation with the officer concerning the stare, glare, and then the officer confirmed that with Mr. Holden and also observed him.” 3RP 141-42.

Moreover, even though Wilks did not pose an imminent threat, as in Davis, the victim-declarant in this case, Holden, perceived an ongoing emergency. 5RP 132, 135. So, even though Holden made the exclamation in a testimonial setting, this did not change the nature of his nontestimonial statement. See Davis, 547 U.S. at 832 (identifying statements which may fairly be described as “a cry for help” or “the provision of information enabling officers to end a threatening situation” as “nontestimonial.”).

Because Holden's statement described Wilks's threatening glare as Holden perceived it, his statement was properly admitted.<sup>27</sup> See 5RP 180 (Officer Gallegos stated that Holden's statement occurred “simultaneously” with her observation of Wilks's threatening look). The trial court correctly found that Holden's statement was admissible as a present sense impression and that it did not implicate the Confrontation Clause. See 5RP 182-83, 188.

If Holden's exclamation was testimonial, then the trial court erred in admitting the statement. Any error, however, was harmless. See Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (a violation of the right to

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<sup>27</sup> In addition to overruling counsel's hearsay objection, the trial court also overruled counsel's relevancy objection. 5RP 178-79.

confrontation is subject to harmless error analysis). A confrontation clause error is harmless if the evidence is overwhelming and the violation so insignificant by comparison that this Court is persuaded, beyond a reasonable doubt, that the violation did not affect the verdict. State v. Vincent, 131 Wn. App. 147, 154-55, 120 P.3d 120, 124 (2005).

In this case, despite Holden testifying inconsistently, he nevertheless told the jury that Wilks had threatened him with a knife as he demanded money. 5RP 53, 58-63, 79-84. The fact of Holden's memory loss was emphasized by defense counsel in closing. See 6RP 136-37, 144-47. Counsel's summation argued that Holden's testimony was incredible because of his inconsistencies. As the Washington Supreme Court recognized,

The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.

State v. Price, 158 Wn.2d 630, 641, 146 P.3d 1183 (2006) (quoting Delaware v. Fensterer, 474 U.S. 15, 21-22, 106 S. Ct 292, 88 L. Ed. 2d 15 (1985)).

Yet, despite Holden's inconsistencies, there was corroborating evidence. Ms. White described a knife very similar to the “dreadful piece of machinery” described by Holden. 5RP 58-59 (Holden's description); 5RP 102, 109-14 (White's description). In addition, Officer Gallegos saw Wilks's threatening look. Officer Gallegos stated that Wilks stared at Holden with a fixed gaze — he would not look away; it was in a threatening or glaring manner. 5RP 178. The trial court had already ruled that Officer Gallegos would be permitted to describe Wilks's threatening look, a ruling not challenged on appeal. 3RP 132-42.

Wilks claims that the prejudice from admitting Holden's statement was fully realized because: (1) Holden's statement implied that Wilks had threatened Holden earlier, and (2) the jury “must have relied heavily” on Holden's remark, as evidenced by the jurors' request to have Holden's police statement sent back during deliberations. Br. of Appellant at 27-28. These claims should be rejected. First, Holden said, “Look at him. He is threatening me *now*.” Holden did not say, “Look at him. He is threatening me

*again,*” or “He is threatening me now, *just like he did before.*”

Holden's actual remark cannot fairly be construed as implying that there had been an earlier threat. Rather, the natural reading of Holden's remarks is that Holden was afraid at that precise moment (which, of course, is precisely why his remark was not testimonial).

Finally, nothing can be inferred by the presiding juror's request to receive Officer Gallegos's statement into evidence. A party may not inquire into the internal processes through which the jury reaches its verdict. State v. Linton, 156 Wn.2d 777, 787, 132 P.3d 127 (2006).

In this case, if the trial court erred by admitting Holden's hearsay statement, the violation was insignificant. See Vincent, 131 Wn. App. at 154-55. Any error was harmless beyond a reasonable doubt.

**3. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO HAVE WILKS EVALUATED FOR COMPETENCY.**

Wilks argues that he received ineffective assistance when defense counsel failed to request a competency evaluation. Br. of Appellant at 32-33. This argument fails because defense counsel appropriately refrained from seeking a competency evaluation when Wilks's competence was not legitimately in question. In a

memorandum opinion, Judge Orlando denied Wilks's motion for a new trial grounded in this precise claim of ineffective representation. Judge Orlando found that, based on the information known to the trial judge and trial counsel, there was no reason to question Wilks's competency to stand trial, to understand the nature of the proceedings and to assist trial counsel. CP 139-40. Accordingly, this Court should reject Wilks's claim.

A criminal defendant has a constitutional right to effective representation of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant must show trial counsel's conduct fell below a minimum objective standard of reasonable attorney conduct and that the deficient performance prejudiced him. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993). The prejudice prong requires the defendant to show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991). "Courts engage in a strong presumption counsel's representation was effective." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The decision to grant or deny a new trial based upon a claim of ineffective assistance of counsel will not be disturbed absent a

manifest abuse of discretion. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999) (citing State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989)).

The United States Constitution requires that an accused have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding’ and to assist in his defense with ‘a rational as well as factual understanding of the proceedings against him.” In re Fleming, 142 Wn.2d 853, 862, 16 P.3d 610 (2001) (quoting Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)). In Washington, an incompetent person cannot be tried, convicted, or punished while his incapacity continues. RCW 10.77.050; Lord, 117 Wn.2d at 900.

A trial court must order a competency evaluation and hearing when there is reason to doubt the accused's competency. RCW 10.77.060(1). “Incompetency” exists where 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(14). In determining whether there is a factual basis sufficient to raise a reasonable doubt as to competency, a trial court examines the defendant's apparent understanding of the charge, facts underlying the charge,

and ability to relate the facts to counsel to assist in the defense. City of Seattle v. Gordon, 39 Wn. App. 437, 442, 693 P.2d 741, review denied, 103 Wn.2d 1031 (1985). The defendant's appearance, demeanor, past behavior, medical reports and counsel's statements are also relevant. State v. Higa, 38 Wn. App. 522, 525, 685 P.2d 1117 (1984). "[T]he court should give considerable weight to the attorney's opinion regarding a client's competency and ability to assist in the defense." Gordon, 39 Wn. App. at 442.

The record here does not show that counsel had a reason to doubt Wilks's competency. Although there is evidence that counsel knew Wilks has had mental health issues, there is no evidence that his mental health adversely affected his competency. 12RP 51, 73-80; CP 226-27. On the contrary, the record is replete with evidence that Wilks understood the nature of the proceedings and was sufficiently able to assist counsel in preparing his defense.<sup>28</sup>

After hearing testimony from defense counsel, the prosecutor, the trial judge and a WSH staff psychologist, Judge

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<sup>28</sup> Both WSH reports stated that Wilks understood the nature of the proceedings; the contested issue was whether Wilks was sufficiently able to assist counsel in preparing his defense. See CP 202-04, CP 218 ("Mr. Wilks . . . has consistently displayed a clear understanding of his charges. . . . He has a solid knowledge of court procedures . . . and legal matters.")

Orlando concluded that Wilks had not received ineffective assistance of counsel and he denied Wilks's motion for a new trial.

CP 340. Judge Orlando ruled,

This is a challenging case with a most difficult defendant.

Looking at the information [defense counsel, the prosecutor and the trial judge] possessed about Mr. Wilks and his presentation in January 2008 during the trial, I do not believe they had any reason to question his competency to stand trial, to understand the nature of the proceedings and to assist his legal counsel. Mr. Wilks was described by Judge Jordan as an active participant in the trial, taking notes, speaking with his attorney and engaging the trial judge in discussions on various matters.

He was described by [trial counsel] as the brightest client he had defended with a full knowledge of the trial process. Mr. Wilks had successfully brought civil suit against King County while an inmate on a pro se basis. He had access to legal reference materials and filed many pro se motions while self-represented that were described by [the deputy prosecutor] as being well written and appropriate for the issues presented.

Against this presentation, Mr. Wilks was continuing to fight jail staff and was written up but found not competent to have disciplinary action brought against him for some of the violations. Mr. Wilks engaged in many similar behaviors while at Western State Hospital during his competency restoration, leading the forensic evaluators to conclude that Mr. Wilks has a bi-polar condition but also significant personality disorders that form the basis for his behaviors.

Looking at the evidence presented I do not find that Mr. Wilks received ineffective assistance of counsel. . . . I also believe there was no reason for Judge Jordan to have ordered a competency evaluation during trial based on the high functioning of Mr. Wilks during the trial process.

...

The motion is denied.

CP 339-40.

Wilks has not assigned error to any of Judge Orlando's factual findings; thus, they are verities on appeal. Cf. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (unchallenged factual findings from a suppression hearing verities on appeal).

The trial court's factual findings are supported by substantial evidence. Both trial counsel (defense attorney and prosecutor) and Judge Jordan observed Wilks's interaction with defense counsel throughout the proceedings and it was not until the jury returned an unfavorable verdict that Wilks showed an inability — or, perhaps more accurately, an unwillingness — to assist counsel. Western State Hospital concluded that Wilks's relationship with his counsel “was not impaired because of a mental disorder”; rather, Wilks is “manipulative” and he “stands behind his mental condition when convenient or seemingly beneficial to him.” CP 218-19. Wilks's

“antisocial and narcissistic” behavior “supersedes his mood disorder.” CP 217-18.

Defense counsel said that, although he was aware of Wilks's mental health issues, there was no point at which he had reason to doubt Wilks's competency. 12RP 42, 48, 73-80; CP 226-27.

Counsel discussed with Wilks the various trial strategies and the different defenses to the charges. 12RP 42; CP 226-27. Defense counsel stated,

I can say that I saw Mr. Wilks quite a few times, and I talked to him on the phone--I am quite confident--well over 100 times, probably more. We talked about every aspect of his case: facts, law, trial strategy, negotiations, general plans for his defense.

CP 227. Judge Jordan confirmed the “excellent interaction” between Wilks and his counsel. 13RP 43. Even Wilks conceded that he had a “good working relationship” with counsel. CP 204.

Wilks's attorney-client relationship soured only after the jury returned its verdicts. 12RP 66; see also 7RP 2-18 (Wilks launched into a diatribe just before, during and after the verdict was announced). During trial, Judge Jordan had no indication that Wilks was mentally ill. 13RP 44. Judge Jordan observed Wilks being “very involved” with his counsel, “constantly taking notes and

consulting with [counsel].” 13RP 40; see also CP 339. Judge Jordan had no concerns about Wilks's ability to understand the nature of the proceedings or to assist his counsel. 13RP 41; 43-44. The deputy prosecutor agreed. She stated that, until the unfavorable verdict, there was never a time that she had a concern about Wilks's relationship with his counsel. 13RP 30.

Wilks's reliance on In re Fleming, is misplaced. In In re Fleming, the defendant pleaded guilty to Burglary in the First Degree and Unlawful Possession of a Firearm. In re Fleming, 142 Wn. App. at 857. Prior to the plea, the defendant participated in two psychological evaluations, both of which included opinions on the defendant's competency to stand trial. Id. at 858. One of the psychiatrists opined that the defendant was psychotic at the time of the crime, and further concluded that the defendant was “marginally competent” to stand trial. Id. The second evaluator found the defendant incompetent to stand trial. Id. Defense counsel presented neither one of those reports to the court, nor did he mention anything to the court about the competency issue. Id. at 860. In a personal restraint petition, the court vacated the

defendant's plea and sentence, finding that defense counsel was ineffective for failing to notify the court of the expert opinion regarding competency prior to the plea. Id. at 866-67.

Wilks's case is clearly distinguishable from In re Fleming, as Judge Orlando ruled. See CP 340. Even with Wilks's mental health history, there is no evidence in the record suggesting that defense counsel had reason to doubt Wilks's competency to stand trial. Rather, Wilks relies on jail infractions as evidence of his incompetency. See Br. of Appellant at 32. However, the jail infractions tell only part of Wilks's history.

Wilks was booked into the King County Jail on the instant case on August 26, 2007, after having recently completed five one-year consecutive sentences. CP 414-15. The specific infractions upon which Wilks relies occurred almost immediately-- and, sometimes within minutes of another alleged infraction.<sup>29</sup> See CP 229-38. Yet, between August 27, 2007, and May 15, 2009,

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<sup>29</sup> For example, after having been booked on August 26, 2007, Wilks was infraacted that same day, at 17:28 and again at 17:30. CP 230-31. Two days later, on August 28, Wilks was infraacted four times, at 00:45, 4:57, 17:48 and 18:00.

Wilks had amassed 115 infractions. CP 417. Apparently, Wilks was competent to adjudicate the remaining 105 infractions.

Dr. Danner (from WSH) determined that Wilks's behavior was "goal directed and purposeful activity." CP 217. See also CP 215-16 (Wilks's abusive behavior toward WSH personnel); CP 416-17 (Wilks's abusive behavior toward jail personnel). Given that, In re Fleming is not controlling and does not support Wilks's ineffective assistance of counsel claim.

In short, the record demonstrates that defense counsel had no reason to doubt Wilks's competency. Accordingly, Wilks has not overcome the strong presumption of competence of counsel and thus has failed to establish that his counsel was deficient in not raising the competency issue. Because Wilks has not met this burden, it is unnecessary to address the prejudice component of the test. State v. Thompson, 69 Wn. App. 436, 440, 848 P.2d 1317 (1993) (reviewing court need not address both prongs of test if defendant makes an insufficient showing on one of the prongs). Wilks's ineffective assistance of counsel claim therefore fails.

D. CONCLUSION

For the reasons stated above, the State respectfully asks this Court to affirm the judgment in this case.

DATED this 23 August 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

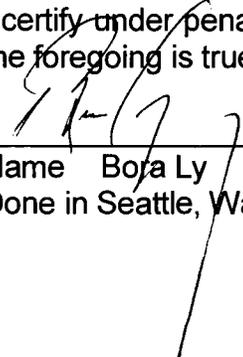
By: 

JAMES MORRISSEY WHISMAN,  
WSBA #19109  
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Attorneys for Respondent  
Office WSBA #91002

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 Maureen M. Cyr, 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. WILKS, Cause No. 63661-8-1, 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.

  
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Done in Seattle, Washington

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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 Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Signature Page for Brief of Respondent, in STATE V. JAMES DEAN WILKS, Cause No. 63661-8-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.

W Brame

Name

Done in Seattle, Washington

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Date

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