

**NO. 49099-4**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL BOUGARD, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Katherine M. Stolz

No. 15-1-02696-0

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly exercised its discretion by not ordering another competency evaluation after defendant was found to be competent and the record does not support an inference to the contrary?
2. Whether defendant has failed to prove his counsel was ineffective for not requesting another competency evaluation when the record does not support any issue of competency that would have affected the outcome of the trial?
3. Should this court make a determination as to whether appellate costs are appropriate before the State seeks enforcement of costs if the State is to prevail on appeal?

B. STATEMENT OF THE CASE.

On July 10, 2015, the Pierce County Prosecutor's Office (State) charged Michael Stephen Bougard with one count of assault in the second degree, domestic violence aggravated by the circumstance of having occurred within sight or sound of the victim's minor child. CP 1-2. The charge stems from an incident on July 9, 2015, in which defendant beat the mother of his child over the head with a cell phone causing bleeding on her brain and a laceration requiring stitches. 5/19/16RP 141-42, 153-54.

On July 21, 2015, the trial court ordered a competency evaluation for defendant to be completed at the jail. CP 3-7. Defendant declined to participate in that evaluation. CP 12-13. Due to defendant's lack of participation in the evaluation and at the request of defense counsel, the trial court ordered defendant be evaluated at Western State Hospital (WSH). 7/28/15RP 2-3; CP 14-18, 19-23. Defendant was admitted to WSH on August 18, 2015. CP 32. Defendant refused to participate in evaluations at WSH, stating he did not want to speak about anything that could affect his case. CP 32-33. Defendant's lack of participation prevented a full evaluation and resulted in the evaluator opining defendant lacked the capacity to understand proceedings against him and to assist in his own defense despite the observation that defendant's thought processes appeared to be goal directed and linear. CP 33-34.

On September 2, 2015, the trial court ordered defendant committed to WSH for up to 90 days for evaluation and treatment to restore competency to proceed to trial. CP 24-26. Defendant was admitted to WSH on October 29, 2015. CP 30. He refused to take medications or participate in restorative treatment while at WSH stating:

I know everything about what goes on in the courtroom.  
...I'm intelligent. I know what's going on. I am competent  
to stand trial.

I'm very competent, but at the same time, I don't want my  
constitutional rights violated...I'm supposed to be innocent  
until proven guilty beyond a reasonable doubt.

CP 40-41, 44. Defendant did speak this time with evaluators at WSH who concluded defendant presented no symptoms of mental disease or defect that significantly affected his capacity to have a factual or rational understanding of the charges and proceedings, or his ability to consult with his attorney. CP 39-45.

During the December 2, 2015, competency hearing, the trial court found defendant competent to proceed to trial and defense counsel stated he had no professional opinion to the contrary. 12/2/15RP 5; CP 36-37.

The case proceeded to trial on May 16, 2016. 5/16/16RP 3. At trial, defendant elected to wear jail clothes each day. 5/16/16RP 22; 5/19/16RP 67; 5/23/15RP 182. He declined to answer questions from his attorney or the trial court for the most part, although he did address the trial court at sentencing in response to being asked if he had anything he wanted to say. 6/24/16RP 319. He informed the trial court he could not participate in what he considered systematic deceit and fraud. 6/24/15RP 319. Defendant also responded when the trial court asked if he would cooperate in giving fingerprints. 6/24/15RP 322. Defendant stated he was not willing to give his fingerprints but that if he were forced and obliged to, he would not fight against it. 6/24/15RP 322.

Following trial, a jury found defendant guilty as charged. CP 117. They also found the offense was a domestic violence offense as defendant and the victim were members of the same family or household and that it was aggravated by the presence of their minor child. CP 119, 120.

On June 24, 2016, the trial court sentenced defendant to an exceptional sentence above the standard range for 18 months confinement. CP 213; 6/24/16RP 320. Defendant was ordered to pay mandatory legal financial obligations and restitution. CP 211. Defendant filed a timely notice of appeal. CP 186-187.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN NOT ORDERING YET ANOTHER COMPETENCY EVALUATION AFTER DEFENDANT WAS FOUND TO BE COMPETENT AND THE RECORD DOES NOT SUPPORT AN INFERENCE TO THE CONTRARY.

A trial court's decision regarding a defendant's mental competency is reviewed for an abuse of discretion. *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). Defendants are presumed competent. *State v. Coley*, 180 Wn.2d 543, 552, 326 P.3d 702 (2014). The burden is on the party challenging competency to prove by a preponderance of the evidence that the defendant is incompetent. *Id.* at 554-55. The standard for competency is enunciated in a two-part test which requires the defendant (1) understand the nature of the proceedings against him or her, and (2) be capable of assisting in his or her defense. RCW 10.77.010(15); *State v. Hahn*, 106 Wn.2d 885, 894, 726 P.2d 25 (1986).

Whether a competency evaluation should be ordered is a determination generally within the discretion of the trial court. *In re*

*Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). Factors the trial court may consider include the “defendant’s appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel.” *Id.* (quoting *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)).

In this case, the trial court did not abuse its discretion by not ordering another competency proceeding as the record shows no change in defendant’s mental state. The information available to the trial court indicated defendant understood the nature of the proceedings against him. The trial court reviewed the Forensic Mental Health Report from WSH hospital and considered statements of counsel in finding defendant competent to proceed to trial. CP 36. The State, after reviewing the findings of the Forensic Mental Health Report, requested the trial court find defendant competent. 12/2/15RP 4. Defendant’s counsel stated he had no professional opinion to contradict the finding that defendant was competent. 12/2/15RP 5. It follows then, that the trial court considered this information in not ordering another competency evaluation during trial. The report showed defendant, without the aid of medications and restorative treatment services, understood the nature of the proceedings against him. CP 40-41, 45. Defendant acknowledged the charge was for an assault in the second degree and he knew how much jail time he could expect if convicted. CP 40. “He provided an accurate understanding of the concept of competency to proceed to trial.” CP 42. Defendant related to

the evaluator concerns he had about his case with regards to being read his rights and cited Washington state law. CP 43.

The information available to the trial court also indicated defendant possessed the ability to assist in his own defense, he simply chose not to. The Forensic Mental Health Report showed defendant's reluctance to communicate with his attorney was more likely due to his lack of desire and not a lack of ability to communicate. CP 40-44. Defendant expressed to the evaluator criticism of his lawyer for calling him overweight and not respecting his religion. CP 40. It is noted in the Forensic Mental Health Report, "[I]t appears that his willingness to communicate with his attorney is likely influenced by his pattern of interpersonal relating and not due to psychotic symptoms." CP 44.

Defendant's own words:

I don't want to work with my lawyer because he wants me to sign that I committed a charge that I didn't commit. The lawyer wants me to plea bargain without spending any time to talk with me first...

CP 41.

This is consistent with defendant's behavior during the trial in that he chose not to interact with his attorney. He did, however, answer questions from the court at times indicating a conscious choice, rather than an inability, to speak or not to speak. 6/24/16RP 319, 323.

Defense counsel expressed to the trial court confidence in defendant's ability to assist in his own defense. Considerable weight

should be given to defense counsel's opinion regarding his client's competency. *State v. Woods*, 143 Wn.2d 561, 605, 23 P.3d 1046 (2001). Defendant quotes in his opening brief a portion of a statement made by defense counsel to the trial court that defendant, "obviously has not really participated in the trial," to further the argument that incompetency was apparent. Brief of App. 5. However, when taking defense counsel's statement to the trial court in its entirety, what was actually conveyed was defendant possessed the ability to participate and chose not to. Defense counsel stated:

Mr. Bougard, obviously, has not really participated in the trial. He's still in jail clothes. He's not in restraints and has not been in restraints at any time that the jury has seen that I'm aware of; and it may give the impression when one reads the record, he's kind of comatose, more or less. *He is awake. He is paying attention as far as I can tell.*

During the introduction to the veneer when we first started to pick a jury, when I introduced myself and Mr. Bougard, I put my left hand on his right shoulder. Later, I understand he complained to one of the guards that he did not like that; and I appreciate being advised of that and have not done it since.

I bring that up to show that *Mr. Bougard does have the ability to object and to voice his opinion and has done so.* He just has not done so here at counsel table, and that's my record.

5/24/16RP 216-17 (emphasis added).

The record does not support an inference defendant's conduct during trial gave the court reason to call his competency into question. The trial court had the opportunity to observe defendant's demeanor and

conduct throughout the trial. Not only is the record devoid of evidence that defendant's behavior during trial changed, but the record supports an inference that there was no change in competency of the defendant, as demonstrated by defense counsel's statements to the trial court as quoted above.

Defense counsel in his appellate brief contends that because defendant chose to wear jail clothes during trial it was "evident that he had no rational understanding of the prejudicial effect" of doing so. Brief of App. 9. However, the record does not support an inference that defendant had no rational understanding of the potential consequences of his choice of attire. A defendant may choose to dress in jail clothes as a trial tactic; it is not necessarily an indication of incompetence. *See State v. Caver*, 195 Wn. App. 774, 783, 381 P.3d 191 (2016); *see also Felts v. Estelle*, 875 F.2d 785, 786 (9th Cir. 1989). Although defendant chose to dress in jail clothes, there is nothing in the record to suggest his appearance manifested an inability to understand the charges or assist in his own defense.

Defendant does not appear to contest the trial court's finding of competency, but rather argues the trial court should have ordered another evaluation based on the fact that defendant chose to wear jail clothes and chose not to actively participate during trial. Brief of App. 8-10. However the standard is not whether the defendant does assist in his own defense, it is whether the defendant is capable of assisting. *See State v. Jones*, 99 Wn.2d 735, 746, 664 P.2d 1216 (1983) (citing *Dusky v. United States*,

362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)) (“defendant need only have ability to consult with his lawyer with a reasonable degree of rational understanding”). Here, the defendant communicated to the trial court his choice not to participate in the proceedings along with his reason that he believed them to be unfair and deceitful. 6/24/16RP 319.

Defendant’s choices during trial were aligned with his choices and statements during evaluations at WSH which produced a diagnosis of narcissistic personality traits and not a mental health condition affecting his capabilities relating to the trial. CP 39-45.

The trial court did not abuse its discretion in not ordering yet another mental health evaluation during trial when the Forensic Mental Health Report, counsel’s statements, and defendant’s demeanor and appearance all indicated defendant was competent to stand trial.

2. DEFENDANT HAS FAILED TO PROVE HIS COUNSEL WAS INEFFECTIVE FOR DECLINING TO REQUEST ANOTHER COMPETENCY EVALUATION WHEN THE RECORD DOES NOT SUPPORT ANY ISSUE OF COMPETENCY THAT WOULD HAVE AFFECTED THE OUTCOME OF THE TRIAL.

Ineffective assistance of counsel claims arise from a defendant’s right to counsel under the Sixth Amendment to the United States Constitution. See *Strickland v. Washington*, 466 U.S. 668, 685-87, 80 L.Ed.2d 674 (1984). Counsel’s performance is examined to ensure criminal defendants receive a fair trial. *Id.* at 684. To establish a claim of

ineffective assistance of counsel, a defendant must show (1) counsel's performance was deficient, and (2) the defendant was prejudiced by the deficient performance. *In re Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing *Strickland*, 466 U.S. at 668).

a. Defendant fails to show counsel's performance was deficient.

Counsel's performance is only deficient when it falls below an objective standard of reasonableness based on consideration of all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption that counsel's performance was not deficient. *Id.* "The burden is on the defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *Id.* The defendant must show in the record the absence of a legitimate strategic or tactical reason supporting the challenged conduct by counsel. *In re Personal Restraint of Elmore*, 162 Wn.2d 236, 252-53, 172 P.3d 335 (2007).

Defendant contends his defense counsel was ineffective for failing to request another competency evaluation. Brief of App. 12-15. However, the record provides no legitimate basis for a request for an additional competency evaluation. As demonstrated in the previous section, defense counsel conveyed to the trial court confidence in defendant's competency during trial and lacked any professional opinion indicating defendant was incompetent. 12/2/15RP 5; 5/24/16RP 216-17. Defense counsel is not

obliged to raise every conceivable issue, however frivolous or inconsequential, at the risk of being charged with incompetence. *State v. Lottie*, 31 Wn. App. 651, 654, 644 P.2d 707 (1982) (quoting *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)).

Further, the record supports an inference that defense counsel considered, in addition to the findings of the Forensic Mental Health report, his client's choice to proceed. 12/2/15RP 5-6. Defendant articulately expressed to the trial court his desire to avoid further delay:

I have a right to a speedy trial and that was violated. 48 hours after your arrest, *Seattle v. Bonifacio*<sup>1</sup>, that states that you are supposed to go to a speedy trial, a prompt speedy trial, 60 days after the arrest. I have been incarcerated for almost five months.

12/2/15RP 5-6. Defense counsel's decision not to request another frivolous competency evaluation aligned with his client's wishes to proceed to trial.

Defendant also contends defense counsel at trial was deficient for failing to bring to the court's attention his client's mental history without argument or authority in support of this contention. The trial court had available to it, and as demonstrated in the previous section, relied upon the Forensic Mental Health Report. CP 36. The trial court also had the opportunity to make the same observations as defense counsel of

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<sup>1</sup> *The City of Seattle v. Bonifacio*, 127 Wn.2d 482, 484 n.1, 900 P.2d 1105 (1995), addresses time for trial.

defendant's demeanor, conduct, and appearance during the trial.

Defendant has failed to show how choosing not to reiterate information already known to the trial court was unreasonable.

Defense counsel's decision not to pursue a diminished capacity defense was strategic. Defense counsel's chosen defense of general denial, as manifest on the record, was a reasonable trial strategy. Defense counsel alluded to a possible motive for fabricating the events during cross-examination of the victim, suggesting the victim was aware the defendant was planning to request a change to the parenting plan for their child.

5/19/16RP 171-72. Defense counsel revisited the suggestion the victim had motive to fabricate the events at issue during closing argument.

5/24/16RP 287. During cross examination of the child witness, defense counsel called into question the witness's recollection of events.

5/23/16RP 188-89. A general denial defense could not coincide with a strategy focused on negating the mens rea of defendant, one or the other would need to be pursued. Given the finding of competency by the trial court and the information provided by the Forensic Mental Health Report indicating competency, defense counsel performed reasonably in exclusively focusing on a defense strategy more likely to prevail.

Defendant, now dissatisfied with the outcome of defense counsel's failed strategy, claims deficiency. However, a deficient performance inquiry does not allow for speculation of what the ideal strategy might have been and declare an attorney's performance deficient for failing to

follow that strategy. *State v. Carson*, 184 Wn.2d 207, 220, 357 P.3d 1064 (2015). It is easy for a court to examine counsel's defense after it has failed and conclude that a particular act or omission was unreasonable, but courts must resist the temptation to substitute their own personal judgment for that of defense counsel. *Id.* Defendant has not met his burden in showing defense counsel's performance during this trial was deficient.

- b. Defendant fails to show he was prejudiced by defense counsel's choice not to delay trial with an unsubstantiated competency claim.

Deficient performance prejudices a defendant when there is a reasonable probability the result of the proceeding would have been different if not for counsel's errors. *McFarland*, 127 Wn.2d at 335. Proof of demonstrable strategic or tactical errors will not support reversal so long as the adversarial testing envisioned by the Sixth Amendment occurred. *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045 (1984).

Defendant suggests he was prejudiced by defense counsel's failure to move for another competency hearing, "regardless of the fact that the last evaluation concluded Bougard was competent," because defendant was preventing counsel from pursuing a diminished capacity defense. Brief of App. 13-14. However, the record does not support nor does the defendant show, that such a defense would have prevailed. At most, defendant argues the prior evaluations raised concerns about his mental

condition. Brief of App. 14. Case law makes clear, evidence of mental health issues is not enough to warrant a diminished capacity defense. *State v. Astebha*, 142 Wn.2d 904, 921, 16 P.3d 626 (2001). Substantial evidence must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the required mental state to commit the crime charged. *State v. Ferrick*, 81 Wn.2d 942, 945, 506 P.2d 860 (1973). Defendant's argument necessarily relies on an assumption that a subsequent competency evaluation would have provided the necessary substantial evidence to support a diminished capacity defense. However, he fails to even argue what that substantial evidence might have been, much less present evidence in support of his claim. Defendant merely asserts the legal conclusion that his due process right to a fair trial was violated and his conviction must be reversed. Brief of App. 14. His unsupported assertion incorrectly assumes that mere speculation as to how the trial might have played out is sufficient to find prejudice.

Further, it is unlikely defendant himself would have wanted to pursue a diminished capacity defense and thus he has failed to show how an additional competency evaluation would have changed the outcome of the trial. Defendant quotes defense counsel's statement to the court during trial that "there has been no expert who has evaluated him" in support of his argument that his lack of participation in evaluations precluded a diminished capacity defense. Brief of App. 13. However, the Forensic Mental Health Report available to defense counsel and the trial court

clearly indicated defendant had been evaluated by an expert. CP 38-45.

Specifically,

Mr. Bougard announced that he did not consent to the evaluation, as it violated his statutory rights and rights under HIPAA. *Nonetheless, Mr. Bougard engaged in an evaluation interview of nearly an hour.*

CP 39 (emphasis added). In addition to the evaluation in which defendant did engage, the report cites observations of defendant made by evaluators.

CP 39-44. For example,

Dr. Aulakh noted on November 12, that Mr. Bougard was cooperative, and dressed and groomed appropriately.

Staff noted on November 30, 'Patient has been observed out in the day area interacting and socializing with some of his peers and the staff. He does participate with the leisure activities and the community meetings. No thoughts of self harm, or any audio/visual hallucinations.'

Staff noted that Mr. Bougard followed ward rules and protocols, and presented with no behavioral problems on the ward.

CP 41.

The inference that defendant had not been evaluated, thereby precluding a diminished capacity defense, is misleading and inaccurate. Rather, the record supports an inference that defendant would not have *agreed* to a diminished capacity defense. Defendant believed himself to be competent, he expressed dissatisfaction with his attorney for suggesting he was incompetent, he was found competent after being evaluated at WSH, and he made no objection to that finding. CP 41, 43, 45; 12/2/15RP 5.

Defendants have a right to control their chosen defense and in this case, it appears defendant likely would not have chosen a diminished capacity defense. *State v. Coristine*, 177 Wn.2d 370, 379-80, 300 P.3d 400 (2013).

Defendant has failed to show how electing not to request another competency evaluation had any effect on the outcome of the trial aside from possibly delaying an unfavorable verdict; therefore, he has failed to meet his burden in establishing prejudice.

3. APPELLATE COSTS MAY BE APPROPRIATE IN THIS CASE IF THE COURT AFFIRMS THE JUDGMENT OF THE TRIAL COURT, AND SHOULD BE ADDRESSED IF THE STATE WERE TO PREVAIL AND WERE TO SEEK ENFORCEMENT OF COSTS.

Under RCW 10.73.160, an appellate court may order the recoupment of appellate costs from a convicted defendant. *State v. Blank*, 131 Wn.2d 230, 234, 930 P.2d 1213 (1997). The award of appellate costs to a prevailing party is within the discretion of the appellate court. RAP 14.2; *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Because the State has yet to file a cost bill, this Court should decline to determine an award of costs at this time. If defendant does not prevail, and if the State files a cost bill, defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's conviction and to decline to review defendant's objection to appellate costs until and if the State substantially prevails and the State submits a cost bill.

DATED: March 24, 2017.

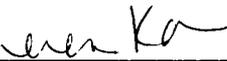
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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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**PIERCE COUNTY PROSECUTOR**  
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