

No. 49975-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

State of Washington, Respondent

v.

Sergey Fedoruk, Appellant.

APPELLANT'S OPENING BRIEF

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Introduction

Fedoruk was not competent during his trial. His counsel stated he could not communicate with his client and believed Fedoruk was no longer competent. Counsel moved for a mistrial. Despite the warning from counsel, as well as numerous, obvious signs that Fedoruk was no longer competent, the trial court forged ahead. Rather than consider Fedoruk's competency, the court had him shackled and moved his interpreter away from him, prejudicial signals to the jury that Fedoruk was dangerous. Rather than consider Fedoruk's competency, the trial court said Fedoruk's inability to control his behavior waived his presence at trial.

This appeal focuses on the last days of trial, when Fedoruk began chanting in indecipherable Russian; when he was restrained with belly chains and leg irons because the trial court said Fedoruk lost his "composure;" and when Fedoruk collapsed and lost consciousness in the courtroom. During this time, Fedoruk's counsel raised the issue of competency and moved for a mistrial. The trial court denied these motions and also motions to continue the trial. Immediately after the jury returned its verdict, the trial court agreed that Fedoruk was not competent and delayed sentencing so that Fedoruk could be restored.

Since Fedoruk was not competent during his trial, this Court should reverse and remand for a new trial.

Assignments of Error

1. The trial court erred in not granting a mistrial.

2. The trial court erred when it found Fedoruk competent to continue his trial.
3. The trial court erred when it shackled Fedoruk during trial.
4. The trial court erred in moving the interpreter away Fedoruk during trial.
5. The trial court erred in failing to continue the trial to allow for a competency determination.
6. The trial court erred in failing to continue the trial to accommodate Fedoruk's physical illness.

Issues Pertaining to Assignments of Error

1. Fedoruk's counsel was unable to communicate with Fedoruk and Fedoruk was unable to control his behavior. Counsel raised Fedoruk's competency with the court. Did the court err when it denied a mistrial, did not have Fedoruk evaluated, had Fedoruk removed from the courtroom, and continued with trial without Fedoruk present?
2. Fedoruk's counsel raised competency and Fedoruk's actions led to his shackling and to his collapse in the courtroom. Did the court err when it failed to defer to counsel's concerns and considered Fedoruk's actions a problem of "composure" rather than competency?

3. Fedoruk showed obvious signs of mental illness during trial and his counsel raised the issue of his competency. Did the trial court err in shackling Fedoruk rather than having him evaluated for competency?
4. The trial court was unsure if Fedoruk could control his behavior at trial and his counsel raised the issue of his competency. Did the trial court err in moving Fedoruk's interpreter away from him, a move that was obvious to the jury, rather than having him evaluated for competency?
5. The trial court had previously ordered Fedoruk to be forcibly medicated because without medication he quickly turned psychotic. Did the trial court err in not granting a continuance so that Fedoruk could take his psychiatric medications and possibly regain competence?
6. Fedoruk was in severe physical pain and was not receiving medical treatment for the pain. Did the court err in not granting a continuance, even for a single afternoon, so that Fedoruk could attend his trial after receiving medical treatment?

Statement of the Case

A jury found Sergey Fedoruk guilty of second degree murder for the death of Serhiy Ischenko, Fedoruk's relative by marriage. CP 351; CP 1-4 (charging documents)

A. Prior proceedings

This was Fedoruk's second trial for the death of Ischenko. In 2014, this Court held that Fedoruk's counsel's failure to timely retain a mental health expert or investigate the possibility of a mental health defense were deficient performance and prejudiced Fedoruk. As a result, the case was reversed and remanded. *State v. Fedoruk*, 184 Wn. App. 866, 871, 339 P.3d 233 (2014). Fedoruk also alleged prosecutorial misconduct, and this Court agreed. *Id.* at 891.

Fedoruk cites this Court's earlier opinion to provide background.

"Fedoruk has a long history of serious mental illness. He suffered a head injury in a motorcycle accident at the age of 18, was diagnosed with schizophrenia, and was twice admitted to a psychiatric hospital. Doctors have prescribed numerous psychotropic and antipsychotic medications, including Haldol, but Fedoruk has a history of poor compliance with the medication regimens." *Fedoruk*, 184 Wn. App. at 871.

"In 2002, Fedoruk's family members reported to police that he had threatened them. Responding officers took Fedoruk to the emergency room, where doctors prescribed antipsychotic medication. During a 2007 competency evaluation, doctors at Western State Hospital diagnosed

Fedoruk with “[b]ipolar 1 [d]isorder, [m]ost recent [e]pisode [m]anic, with [p]sychotic features.” [] Fedoruk underwent another mental health evaluation after the State charged him with robbery, assault, theft, and criminal trespass in 2008, and a court ultimately found Fedoruk not guilty by reason of insanity.” *Id.* at 872.

“In 2010, a court found Fedoruk gravely disabled and ordered him involuntarily committed, but soon ordered him released on a less restrictive alternative. After Fedoruk violated the terms of the court order, he was again involuntarily committed. Fedoruk had stopped taking his prescribed psychiatric medications and threatened to blow up Ischenko, whom Fedoruk had accused of raping a family member. Fedoruk was again released on a less restrictive alternative in December 2010. At the time of Ischenko’s death [night of July 31/August 1, 2011], Fedoruk lived at a house with numerous relatives, including Ischenko, and received outpatient care at a local clinic.” *Id.*

While awaiting his first trial, “Fedoruk was initially uncooperative with jail staff, who frequently used force to restrain him. After an incident in which Fedoruk ‘had pretty much bitten off one of his fingers,’ the trial court, over Fedoruk’s objection, entered an order directing jail staff to forcibly administer antipsychotic medications. [] Once medicated, Fedoruk became ‘docile, respectful, pretty quiet [and did not] cause any problems.’” 184 Wn. App. at 874 (internal record citations omitted).

After this Court reversed, a mandate issued in January 2015. CP

43.

B. Pretrial proceedings after reversal and remand

On May 11, 2015, while at the Cowlitz County jail, Fedoruk told a psychiatrist in a “rambling, tangential discourse,” about “many prior episodic occasions of high energy, little sleep, and delusional thought . . .” CP 91. He was not taking his Zyprexa, an antipsychotic. CP 91. The psychiatrist found that he understood “basic court-related knowledge and expressed trust and willingness to work with his defense attorney.” CP 91. Psychological tools “did not suggest malingering.” CP 91.

On August 25, 2015, Fedoruk had another evaluation by the same evaluator. CP 91. In August, he was taking Depakote but not Zyprexa. CP 91. He “again understood basic court-related knowledge and expressed trust in and willingness to work with his defense attorney. CP 91. The evaluator also noted that Fedoruk was “improperly medicated.” CP 91.

The psychiatrist believed that Fedoruk was unmedicated and possibly manic or hypomanic when Ischenko was killed. CP 91. In May, the psychiatrist did not conclude that Fedoruk’s psychosis prevented him from conducting himself to the dictates of the law. CP 91. The psychiatrist further noted that treatment “nonadherence has certainly contributed to both the frequency and intensity of manic episodes over the years.” CP 94.

In August, however, the psychiatrist determined that “In my medical psychiatric opinion at the time of the alleged event he was suffering from a severe mental illness and as such he was unable to control his behavior to the dictates of law.” CP 91.

On September 1, 2015, the trial court ordered another a mental health evaluation to determine competency under RCW 10.77. CP 74. As always, the evaluation had to occur through an interpreter. CP 86. Perhaps 10% of his speech was in English. CP 93.

On October 1, 2015, the competency report was submitted. CP 86-96. Fedoruk “consistently showed good effort.” CP 87. That meant that he “presented as candid and open, which included volunteering potentially self-damaging information.” CP 87. While his first conviction was on appeal, Fedoruk was sent to prison in Walla Walla. Fedoruk found prison “a lot better” than county jail because he was allowed outside daily. CP 87. He worked in the kitchen; fruit, coffee and tea were available; and there was a ping-pong table. CP 87.

At the time of the interview, Fedoruk had stopped taking Depakote, a mood stabilizer. CP 87. When asked how the Depakote helped him, he said “When I get sick I haven’t been sleeping, lots of energy. I’ve been flying around all night.” CP 87. These periods can last from weeks to months until Fedoruk began to “take my medicine.” CP 87-88.

Although he reported doing better at Walla Walla, while there he had a manic episode where he believed his cell mate was “after him.” CP 88. Fedoruk was placed in the prison hospital for two months as a result of this episode, where he was given Zyprexa, an antipsychotic, in addition to Depakote. CP 88.

Fedoruk said that his “inability to sleep was known to him as a precursor for a manic episode including paranoid delusions” where his

“brain isn’t working right.” CP 88. Fedoruk said this is how he felt at the time of Ischenko was killed. CP 88.

When he was transferred from Walla Walla back to Cowlitz County, he stopped taking Zyprexa, the antipsychotic, because it made him feel “tired and draggy.” CP 88. He told the interviewer that “If I can’t sleep and I can sense when I do need it, I’ll ask for it.” CP 88.

The evaluator concluded that “Treatment nonadherence has certainly contributed to both the frequency and intensity of manic episodes over the years.” CP 94. Fedoruk’s failure to take his medications meant a “higher risk for return of acute symptoms of his mental disorder—in addition to other factors that can destabilize symptoms of his major mood disorder including increased stress one would expect during a court trial.” CP 95. His earlier “behaviors while in custody—at that time, attributed to a mental health illness, required him to be forcibly medicated by Cowlitz County Jail as ordered by the Court.” CP 95.

On October 1, 2015, the competency report found Fedoruk competent to stand trial. CP 95-96. Fedoruk, however, then “had a psychiatric episode” that lead to an emergency hearing on October 5, 2015. At the conclusion of that hearing, “the court found that the defendant was not competent, and the court ordered restoration at Western State Hospital.” CP 139. On October 8, the court entered an order to force Fedoruk to take his Depakote and olanzapine (the generic name for Zyprexa). CP 106, 139.

Western State failed to take Fedoruk, and the court imposed sanctions. *E.g.*, 131-32. Eventually, Fedoruk was admitted to Western State in early December 2015. CP 142. In January 2016, he was subject to another order directing the use of forced medication. CP 143-45.

On admission in December 2015, Fedoruk was cooperative and his mood was not unusual. CP 147. In reviewing the notes from Cowlitz County Jail in the fall, the evaluator noted periods of improvement and periods “which included manic-like symptoms, with yelling and pounding on his cell door, throwing liquid all over the floor, [and] pacing his cell.” CP 148.

In December 2015, at Western State, he was placed in restraints and the Psychiatric Emergency Response Team was called “numerous times” because of his behavior. CP 148. He was “agitated, loud, touching other patients, and instigating altercations. Patient refused oral medication.” CP 149. He required “additional medication” to deescalate. CP 149.

During his time at Western State, Fedoruk appeared noncompliant with medications, and appeared to improve when the forced medication order was entered. CP 149, 143. During the “periods of instability,” he was “not able to attend his competency restoration groups for safety reasons . . .” CP 149.

While evaluating his understanding of court procedures, Fedoruk stated that “if a witness testifying against him in his trial suddenly began telling a lie about what happened in his case, he would ‘be quiet, but I will

tell my attorney . . . the attorney can tell it to court.’” CP 153. The evaluator in February 2016 found him competent to stand trial. CP 154.

The competency determination came with a caveat: Fedoruk had to continue his medications or his condition would deteriorate and he would require another evaluation.

We note that the above opinion is presented at a time when Mr. Fedoruk has been compliant with his prescribed medication. It will be important for him to continue medication compliance, for should he discontinue, his condition could deteriorate and he could require re-evaluation regarding his competency.

CP 154.

On March 1, 2016, the state once again moved for an evaluation, this time to determine Fedoruk’s mental state five years earlier, at the time Ischenko was killed. CP 156, 163-181. The evaluator noted that it was “quite clear that Mr. Fedoruk has a significant and long history of mental illness symptoms, most recently identified as Schizoaffective Disorder, Bipolar Type.” CP 175. Fedoruk was “exhibiting strange behaviors in late July 2011.” CP 175. Indeed, it was “apparently undisputed that Mr. Fedoruk was suffering from a mental illness at the time of the offense . . .” CP 176. Nonetheless, the evaluator found that “at the time of the acts that resulted in Mr. Ischenko’s death, [Fedoruk] possessed the ability to know right from wrong with respect to his acts.” CP 177. The evaluator also found that the Fedoruk’s mental illness did not impair “in any significant manner, the *ability* to form the element of *intent*.” CP 179 (emphasis in

original). The evaluator found that his risk for future dangerousness and re-offense “would increase should he discontinue his medications and experience an increase in symptoms of psychosis and mood instability.” CP 180.

A pretrial hearing was held on April 12, 2016. The trial was set for July 5, 2016, but the court noted its concerns about a five-week sexual predator trial that could interfere. RP 4/12/16 at 67. There was a dispute over whether Fedoruk was taking his medication. RP 4/12/16 at 68-69. Jail staff testified he was taking his medication. RP 4/12/16 at 75. The state argued that the prior *Sell* orders remain in effect unless the defense moves to terminate them, citing *State v. Mosteller*, 162 Wn. App. 418. RP 4/12/16 at 76. The defense agreed that the order remained in effect. RP 4/12/16 at 77.

In July 2016, a defense expert examined Fedoruk. CP 208-224. Fedoruk’s expert agreed that Fedoruk was acutely mentally ill at the time Ischenko was killed. CP 223. He also agreed that Fedoruk could form the intent to assault Ischenko. CP 223. This expert, however, questioned whether Fedoruk could “fully appreciate the severity of his physical attack . . .” CP 223.

On September 1, 2017, the courthouse was undergoing renovations, with a significant impact on the trial. Access to the courtroom required using the stairs, which would mean that anyone with a disability, or an inability to navigate the stairs, could not serve on the jury.

On September 9, there was hearing on the impact of the courthouse maintenance. The “underlying issue is that the main public elevator is undergoing repairs.” RP 9/9/16 at 80. Fedoruk objected, arguing that his right to a fair cross section and a speedy trial were would be violated by the lack of an elevator. RP 9/9/16 at 80. Fedoruk argued that his defense “is based in large part of [Fedoruk’s] disability.” RP 9/9/16 at 87.

But there was also a need to have trial as soon as possible, in large part because Fedoruk’s competency came and went. RP 9/9/16 at 87. Fedoruk argued that he should not have to pick between speedy trial and impartial jury. RP 9/9/16 at 87-88.

In discussing the issues with construction and getting jurors to the courtroom, the court said, “I have to hear this case; I have to hear a sexual predator matter that’s scheduled to start October 11, and I’m being told we’ll go about five weeks.” RP 9/9/16 at 90. Thus, “if we continue this case, we are continuing the case probably ‘til the first of December, which is not acceptable to anybody, and I understand that.” RP 9/9/16 at 90.

C. Trial

Trial began on Tuesday, September 20. About a week later, on Wednesday, September 28, as the trial entered its closing phase, Fedoruk’s behavior began to change.

1. Wednesday, September 28

On Wednesday, September 28, Fedoruk’s counsel told the court that Fedoruk was having serious back pain and wanted to continue the trial

to the following Tuesday. Fedoruk's pain made it hard to focus on the witnesses, even hard to sit. RP 9/28/16 at 7.

The state responded that its witness was not available the following Tuesday, and would not be available for two weeks. RP 9/28/16 at 7. Fedoruk then requested a two-week continuance. RP 9/28/16 at 7.

The court mentioned that some jurors might not be available in the first week of October "so we'd be starting over, and I'm just not in a position to grant that request." RP 9/28/16 at 8. The court suggested that Fedoruk "talk to jail medical staff over the lunch hour, and if they have any concerns then we can re-assess the matter." RP 9/28/16 at 8.

Fedoruk's counsel noted that Fedoruk had had to slouch the previous day, the 27th, and the 28th as well. RP 9/28/16 at 8. The pain was getting worse each day. RP 9/28/16 at 8. After some testimony, the court took a morning recess.

When the court returned a half an hour later, Fedoruk was in restraints. RP 9/28/16 at 56-57. The court stated that it was its understanding that Fedoruk was "getting more concerned about his physical situation and has been insistent that he be taken to the hospital." RP 9/28/16 at 57.

Counsel confirmed that Fedoruk's back was "unbearable" and he wanted medical attention. RP 9/28/16 at 57.

The jail had not given him any treatment for his back. RP 9/28/16 at 58.

The court informed Fedoruk that “Given witnesses, jurors who are going to be gone, we don’t have any choice but to go forward with your trial.” RP 9/28/16 at 58.

Although recognizing Fedoruk’s pain, the court instructed Fedoruk that it needed him “to maintain your composure throughout the balance of the trial.” RP 9/28/16 at 58. If he did not, the court warned that it could “find by inappropriate behavior you waived your right to be present at your trial.” RP 9/28/16 at 58. The court noted that Fedoruk wished to be present. RP 9/28/16 at 58-59. The court recessed for lunch.

On return, Fedoruk’s counsel asked for a continuance to the next day. RP 9/28/16 at 59. Fedoruk believed that sleep and rest “would go a long way toward making tomorrow more tolerable.” RP 9/28/16 at 59-60. Fedoruk did not receive any treatment at the jail over lunch. RP 9/28/16 at 60.

The court said it would “like to be able to accommodate the request” for a continuance until the next day, but was “simply not in a position to grant a recess” for the afternoon. RP 9/28/16 at 61. While the state had indicated issues with witness, the court was concerned that it told the jury that the trial “would take two weeks,” and the jury included people who had commitments the next week.” RP 9/28/16 at 61. If the trial did not continue that afternoon, “I’d have to declare a mistrial.” RP 9/28/16 at 61.

When the court did a colloquy to determine if Fedoruk voluntarily waived his right to be present, Fedoruk explained that he could not do full

days, only until 2 or 3 pm. RP 9/28/16 at 63. Fedoruk's counsel stated that he believed Fedoruk was still competent. RP 9/28/16 at 65.

With the continuance denied, Fedoruk waived his presence for the rest of Wednesday afternoon, and left court about 1 pm. RP 9/28/16 at 61-62. The trial continued throughout the afternoon, concluding at about 4 pm. RP 9/28/16 at 161-62.

2. Thursday, September 29

Fedoruk was back in court the next day, on Thursday morning. During the examination of a witness on September 29, Fedoruk blurted out "Totally wrong. He's lying." RP 9/29/16 at 8. He then continued by speaking loud enough to be heard, if not loud enough to be understood. RP 9/29/16 at 8. The state rested shortly afterward and the jury was excused from the courtroom. RP 9/29/16 at 9.

Fedoruk's counsel was "concerned" about Fedoruk and noted that his actions were something he had not seen up to that point. RP 9/29/16 at 9. The court then took a recess so that Fedoruk could speak with his attorney. RP 9/29/16 at 10. The break lasted about 17 minutes. RP 9/29/16 at 11.

During the break, Fedoruk's action caused court staff to place him in leg irons and belly chains. RP 9/29/16 at 11. Counsel told the court that he "couldn't discuss anything, really" with Fedoruk during the break. RP 9/29/16 at 11. Fedoruk removed his translation device. RP 9/29/16 at 18.

The court did not address possible competency issues. Instead, the court treated the matter as one of "composure." RP 9/29/16 at 12. The

court believed that “some of the testimony” had “upset” Fedoruk. RP 9/29/16 at 12.

In response, Fedoruk sat in his chair, mumbling. RP 9/29/16 at 12. He then expressed worry that the jury would see his chains. RP 9/29/16 at 12. He told the court he was “fine.” RP 9/29/16 at 13. The court ordered that the belly chains be removed and that the leg irons, which would be covered by the table, remain on Fedoruk. RP 9/29/16. Fedoruk’s counsel objected to the shackling. RP 9/29/16 at 13.

Fedoruk said that “Yeah, maybe I’d [inaudible] stark crazy; but, if nobody touch me, I never touch somebody back.” RP 9/29/16 at 14. The court responded, “All right.” The court continued, “At this point his behavior is very concerning to all, including to the corrections staff.” After stating that again that the chains would not be visible to the jury, the court told Fedoruk, “so I’d appreciate it if you maintain your composure and we’ll all be able to get through this, all right?” RP 9/29/16 at 14. Fedoruk did not respond. RP 9/29/16 at 14.

Counsel also objected to the translator being re-seated, further away from Fedoruk. RP 9/29/16 at 13-14, 15. The court, however, stated that for “the safety of all concerned, including the Defendant and the interpreters, I think it’s the only option we have.” RP 9/29/16 at 15.

After a bathroom break, Fedoruk’s counsel raised competency concerns with the court. RP 9/29/16 at 16. Counsel was “concerned about his ability to assist at this point.” RP 9/29/16 at 16. Fedoruk was “chanting stuff that is some indecipherable Russian . . .” *Id.* When counsel

tried “to explain or get into the testimony of the last witness, the reaction was just pure anger and not real focused.” *Id.* As a result, counsel was “concerned about his competence, at this point.” *Id.*

The court stated that, “based on his observations,” Fedoruk was “responsive to what he is hearing the courtroom and can converse with his attorney.” RP 9/29/16 at 17. The court thought Fedoruk was “emotionally upset.” RP 9/29/16 at 17. Being upset did not “ris[e] to the level of a competency concern.” RP 9/29/16 at 17.

The court noted that the “we are very close to the completion of all the testimony after almost two weeks of trial.” RP 9/29/16 at 17.

Instead of having Fedoruk’s competency evaluated, the court admonished Fedoruk that he risked losing his right to be present, telling Fedoruk again that he must maintain his “composure.” RP 9/29/16 at 17.

Defense counsel began to examine a witness, and soon Fedoruk began crying. RP 9/29/16 at 20. After that single witness, the defense rested. RP 9/9/16 at 26.

As the parties began to consider the jury instructions, Fedoruk became disruptive, speaking in incomprehensible Russian. RP 9/29/16 at 28-30. In response, corrections put him back in belly chains. RP 9/29/16 at 29. Then Fedoruk began asking corrections not to tase him. RP 9/29/16 at 29-30. Court recessed at about 10:45. RP 9/29/16 at 35.

When court reconvened, at about 1:30, to finalize the jury instructions, Fedoruk spoke throughout, unintelligibly. RP 9/29/16 at 36-37. As the jury was about to return to the courtroom, Fedoruk stated that

he would take “Ativan. I’ll take Ativan.” RP 9/29/16 at 38. The court told him “All right.” RP 9/29/16 at 38.

About 15 minutes later, as the court went through the instructions with the jury, Fedoruk collapsed to the floor. RP 9/29/16 at 47. Fedoruk had hit his head on the table. RP 9/29/16 at 48. Fedoruk was crying and did not respond to counsel. RP 9/29/16 at 48. Fedoruk said he had lost consciousness. RP 9/29/16 at 49.

Fedoruk then began singing and chanting in Russian. RP 9/29/16 at 50. With his attorney could no longer communicate with him, and Fedoruk continued his singing and chanting, Fedoruk was removed from the courtroom. RP 9/29/16 at 50.

Corrections had trouble removing Fedoruk, who continued chanting and singing. RP 9/29/16 at 50-52. The interpreter said that Fedoruk had been “praying in poems . . . it’s just a made up language which he prays in, and that’s according to his sisters. We couldn’t make sense of it.” RP 9/29/16 at 53. The sister said that “every time he starts losing it, that’s how he behaves.” RP 9/29/16 at 53.

Fedoruk’s counsel again raised competency. RP 9/29/16 at 54. Counsel explained that when he “tried to redirect his behavior it was completely without effect.” RP 9/29/16 at 54.

The court rejected counsel’s claim that Fedoruk was not competent. First, the court noted that it “a little more than halfway through the giving of instructions and closing argument. It’s a point where

the Defendant's participation, if any, obviously is minimal." RP 9/29/16 at 54.

Second, the court said the Fedoruk did not, or could not, "maintain his composure." RP 9/29/16 at 54. As a result of losing his composure, "he's waived his presence" and there would be "no meaningful participation from him going forward." RP 9/29/16 at 54.

Fedoruk's counsel moved for a mistrial, which was denied. RP 9/29/16 at 55. In denying the motion, the court said that "to the extent there's been any error or problem, it's certainly come from the behavior of the Defendant, whether he can or can't control that, whichever the situation is . . ." RP 9/29/16 at 55.

After the court finished reading the jury instructions and the parties gave their closing arguments, the court gave an update on Fedoruk. The court said that at 2:06, Fedoruk was "lying down on the floor in the holding cell, refusing to get up; speaking in a very loud voice; indicating that he wished to return to jail." RP 9/29/16 at 94.

The instructions to the jury were finished around 3:13 on Thursday afternoon. RP 9/29/16 at 93.

3. Friday, September 30

The next morning, Friday, the court announced that Fedoruk had "spent the night essentially without sleeping and mostly practicing boxing moves." RP 9/30/16 at 98, 99.

Corrections staff testified that Fedoruk was "refusing to come over and he's not following directions at all this morning." RP 9/30/16 at 98.

He stated that he would have had to use force to get Fedoruk to court. RP 9/30/16 at 99.

Fedoruk's counsel once again raised competency. RP 9/30/16 at 100. Rather than risk injury to Fedoruk or others, Fedoruk was left in the jail when the court announced the jury's verdict. RP 9/30/16 at 100.

After the jury was excused, Fedoruk's counsel once again raised competency. RP 9/30/16 at 106-07.

The court found that Fedoruk had not been taking his medications for at least 24 hours. CP 354. In considering the request, the court stated that "conduct that might have caused me to question his competency at all really didn't occur until we were reading jury instructions." RP 9/30/16 at 107. Then, considering his behavior "subsequent" to the jury instructions, including "his behavior overnight in the jail and given the need for him to be able to consult with his attorneys pending sentencing, I think we have enough information, at this point, to question competence." RP 9/30/16 at 107.

The court then considered a *Sell* order for forced medication. The court found that based "on prior history," authority to force medication "seems to be critical and crucial to the Defendant's mental state." RP 9/30/16 at 108. The court wanted to schedule the hearing as soon as possible because "I really don't think it's in the Defendant's best interests to kind of sit and stew pending [a *Sell* hearing]." RP 9/30/16 at 108.

A half an hour later, the *Sell* hearing began. RP 9/30/16 at 111. The state noted that "due to his behavior, it is unsafe to have [Fedoruk]

transported” to court. RP 9/30/16 at 111. The state continued by stating that “there was a time when Mr. Fedoruk’s behavior was very well maintained. Unfortunately, yesterday and then this morning, we seemed to be having behavior issues with Mr. Fedoruk again.” RP 9/30/16 at 112. Fedoruk was refusing medication at the jail. RP 9/30/16 at 112.

The court noted that “in prior *Sells* hearings regarding the Defendant that the statements of the medical professionals have been that they only course of treatment with a reasonable probability of restoring him—Mr. Fedoruk to competence has been medication.” RP 9/30/16.

The court ended the hearing by noting that “I just don’t think it’s in Mr. Fedoruk’s best interests that we delay entry of that [*Sell*] Order any longer than absolutely necessary, based on his history. It’s just going to do him harm.” RP 9/30/16 at 116.

4. Post-trial competency restoration and sentencing

On October 5, a new competency evaluation was completed. CP 365. The evaluator had previously evaluated Fedoruk, and the new information in the evaluation is just two paragraphs. CP 381-82. He was seen in his jail cell on October 3, because jail staff thought Fedoruk was “too acutely impaired and mentally ill to bring out.” CP 381. He was “not sleeping and not taking his medication,” which he was spitting out. CP 381. Jail staff would not open the door because they were concerned about Fedoruk’s behavior, so the interview took place through the cuff port on the door. CP 381. The session ended after about 15 minutes. CP 381.

Fedoruk was “in an acute psychotic, agitated and confused state, and at that point not competent to proceed with his sentencing.” CP 381. The evaluator found it “probable [that] the stress of trial contributed to this apparent acute decompensation.” CP 381.

After a period at Western State, Fedoruk was found competent for sentencing at January 10, 2017, CP 396, and sentenced on January 19, 2017. CP 397-408. He was sentenced to 216 months confinement. CP 400. He also received 36 months community custody. CP 401.

Argument

A. The trial court wrongly denied a mistrial

In denying Fedoruk’s motion for a mistrial, the trial court found that “to the extent that there’s been any error or problem, it’s certainly come from the behavior of the Defendant, whether he can or can’t control that, whichever the situation is, I don’t think it can form the basis for a mistrial, so I’ll deny that Motion.” RP 9/29/16 at 55. The trial court was wrong.

This Court, following the Supreme Court, has held that a defendant must be granted a mistrial where, as here, mental illness causes behavior that leads to the removal of the defendant from trial.

Drope v. Missouri mandates the outcome in this case. 420 U.S. 162 (1975). Drope attempted suicide on the second day of his trial. When the trial court “directed counsel to proceed,” Drope’s counsel moved for a mistrial, expressing “the difficulty of proceeding without a client.” The

trial court denied the motion, stating that “the difficulty was brought about by [Drope].” *Drope*, 420 U.S. at 166. The trial court did not order a competency evaluation. *Id.*

Just as in *Drope*, the trial court here found that any “error or problem” came from the defendant; here, as in *Drope*, the trial court failed to order a competency evaluation despite the concerns of defense counsel and despite obvious signs of mental illness; and here, as in *Drope*, the trial court denied a mistrial. *Drope* requires reversal.

Also squarely on point is *State v. Anene*, 149 Wn. App. 944, 948-49, 205 P.3d 992 (2009). The defendant in *Anene* attempted suicide and was thus absent from trial. The trial court found that

We’ve got a jury that has not reached a verdict, we’ve got witnesses who have yet to testify, we’ve got scheduling, we’ve got other considerations than simply waiting for the defendant to show up to take the verdict. My conclusion is we’ll proceed with the trial.

149 Wn. App. 949. This Court held that, since Anene was comatose, a competency evaluation would have been “superfluous.” *Id.* at 954. But it was a violation of due process to continue with a trial where the defendant was unable to assist in his defense. *Id.* at 955.

Anene was “was clearly unable to assist in his own defense since he was not present and was unconscious in the hospital,” *Anene*, 149 Wn. App. at 956. Similarly here, Fedoruk was “chanting and singing” in a “made up language which he prays in . . . [the interpreter] couldn’t make sense of it.” RP 9/29/16 at 53. His sister confirmed that “every time he

starts losing it, that's how he behaves.” RP 9/29/16 at 53. Fedoruk collapsed in court and lost consciousness before the jury. RP 9/29/16 at 49. Fedoruk ended up “lying down on floor of the holding cell, refusing to get up . . .” RP 9/29/16 at 94. Fedoruk’s counsel “couldn’t discuss anything, really” with his client. RP 9/29/16 at 11. Counsel’s further attempts to communicate with Fedoruk were ineffective. RP 9/29/16 at 54.

Since Fedoruk’s mental illness made him unable to assist in his own defense, “the trial court’s decision to proceed with the trial in [Fedoruk’s] absence clearly violated [his] due process rights.” *Anene*, 149 Wn. App. at 956. Thus “the trial court erred in proceeding with the trial when faced with [Fedoruk’s] obvious incompetence.” *Id.* As in *Anene*, the court should “reverse his conviction and remand for a new trial.” *Id.*

This case is even more clear than *Drope* and *Anene*. Unlike those cases, the trial court here was not even sure if Fedoruk’s behavior was within his control: “whether he can or can’t control that, whichever the situation is, I don’t think it can form the basis for a mistrial, so I’ll deny that Motion.” RP 9/29/16 at 55.

Less than a minute after the verdict was confirmed and the jury was excused, the court questioned Fedoruk’s competency and ordered a competency evaluation. RP 9/30/16 at 107. It is not plausible that Fedoruk lost competency in the minute between the verdict and the court’s order for an evaluation. Indeed, the court itself noted that it had questioned Fedoruk’s competency earlier, during trial and before closing arguments,

when the parties were “reading jury instructions.” RP 9/30/16 at 107. The state concurred. RP 9/29/16 at 112 (agreeing that Fedoruk’s problematic behavior began on Thursday). The trial court plainly violated *Drope* and *Anene* in denying the mistrial.

The trial court abused its discretion in denying a mistrial. *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012) (holding that denial of mistrial is reviewed for abuse of discretion). A discretionary decision is “manifestly unreasonable” or “based on untenable grounds” if it results from applying the wrong legal standard or is unsupported by the record. *State v. Ortiz-Abrego*, 187 Wn.2d 394, 402, 387 P.3d 638 (2017). In failing to apply *Drope* and *Anene*, the trial court applied the wrong legal standard, and no reasonable judge would have continued trial against a defendant who was plainly no longer competent.

B. The trial court applied the wrong standard when determining whether it needed to evaluate Fedoruk for competency

In reviewing counsel’s concerns about his client’s competency, the trial court applied the standard for waiver of presence at trial through misconduct rather than the standard for determining whether a defendant is competent. That was error.

To be competent, a defendant must have the capacity to (1) understand the proceedings and (2) assist in his own defense. RCW 10.77.010(15).

The issue of a defendant's right to be present involves a different standard. A defendant may be removed from trial where, after being warned, his conduct is "severe enough to justify removal" and removal is the least-restrictive alternative. *State v. Chappel*, 145 Wn.2d 310, 320, 36 P.3d 1025 (2001).

Although Fedoruk's lawyer told the court that he "couldn't discuss anything, really" with Fedoruk, the trial court viewed Fedoruk's behavior as an issue of "composure." RP 9/29/16 at 11, 12. Fedoruk removed his translation device. RP 9/29/16 at 18. Fedoruk sat in his chair, mumbling. RP 9/29/16 at 12. The court noted that Fedoruk's behavior was "concerning to all, including the corrections staff." RP 9/29/16 at 14. The court was so concerned about Fedoruk's behavior that he had him placed in restraints and, over counsel's objection, moved the interpreter away from him. 9/26/16 at 15.

Fedoruk's counsel raised his competency, in part because he was "chanting stuff in some indecipherable Russian." RP 9/29/16 at 16. When counsel tried to talk about the trial, he was unable to have a meaningful conversation with Fedoruk. RP 9/29/16 at 16. The court, however, responded that Fedoruk was simply "upset." RP 9/29/16 at 17. The court also emphasized that the trial was almost over after two weeks. RP 9/29/16 at 17.

The record is clear that the trial court was trying to determine if Fedoruk's continued presence was necessary under the standard of "is his presence disruptive," not under the "is he competent" standard.

For instance, the trial court failed to take seriously counsel's statements that he could no longer communicate with Fedoruk. In determining whether to order a competency evaluation, "considerable weight should be given to the attorney's opinion regarding his client's competency and ability to assist the defense." *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). Instead, the trial court emphasized something irrelevant to the competency determination: that "Fedoruk is currently calm, and I think we can continue to proceed." 3/29/16 at 17. "Composure" and "calmness" go to presence, not competency. Despite this, the trial court admitted it questioned Fedoruk's competency during trial, while the parties were putting together jury instructions. RP 9/30/16 at 107. The court did not consider that important because it was trying to determine if Fedoruk would have future "meaningful participation" in the trial. RP 9/29/16 at 54. But in Washington, an accused may not be "tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050. In applying the wrong legal test after Fedoruk's counsel raised competency, the trial court abused its discretion.

C. The trial court erred by failing to give deference to counsel's concerns about competency

A trial court should give considerable weight to the attorney's opinion regarding a client's competency and ability to assist in the defense. *State v. Crenshaw*, 27 Wn. App. 326, 331, 617 P.2d 1041 (1980). While

courts need not “accept without question a lawyer’s representations concerning the competence of his client,” the opinion of counsel, the “one with the closest contact with the defendant, . . . is unquestionably a factor which should be considered.” *Drope*, 420 U.S. at 177 n. 13.

Here, however, the trial court gave no deference to counsel’s concerns. And the court failed to conduct a colloquy sufficient to insure that Fedoruk was still able to communicate with counsel after counsel told the court that communication had become impossible.

Counsel first expressed concerns about Fedoruk’s “mood” and counsel hoped Fedoruk could “keep it together.” RP 9/29/16 at 9. But when the court took a recess so that counsel could assess the situation, all the signs were that Fedoruk was no longer competent. Between 9:21 and 9:38, Fedoruk was placed in restraints by corrections staff. RP 9/29/16 at 11. Counsel then stated that he and Fedoruk “couldn’t discuss anything, really.” RP 9/29/16 at 11. The trial court admonished Fedoruk to “maintain composure,” but Fedoruk’s response was “unintelligible mumbling.” RP 9/29/16 at 12. That colloquy signaled that Fedoruk had lost the ability to communicate with counsel and was no longer competent.

Fedoruk then asked to go to the bathroom. During that time, between 9:45 and 9:55, Fedoruk “was very loud in the back hall and was having some difficult controlling himself.” RP 9/29/16.

Counsel raised concerns about Fedoruk’s competency. RP 9/29/16 at 15. Fedoruk was “chanting stuff that is some indecipherable Russian.” RP 9/29/16.

The court, however, insisted that Fedoruk “can converse with his attorney.” The court did not explain why its “observations” trumped counsel’s actual experience. The trial court noted that Fedoruk had once again become “calm,” RP 9/29/16 at 17, but that is an issue for the presence inquiry, not for the competency inquiry. Fedoruk’s indecipherable Russian chanting made it difficult for anyone, even the translator, to know what he was saying. *Ortiz-Abrego*, 187 Wn.2d at 413 (discussing importance of language and cultural competency in evaluating defendant for competency for trial).

The trial court abused its discretion when it failed to defer to trial counsel’s statement that communication was no longer possible. The trial court compounded that failure to defer by also failing to have a sufficient colloquy to show that Fedoruk was able to communicate. *Compare Ortiz-Abrego*, 187 Wn.2d at 399 (discussing trial court’s colloquy to determine competency during trial).

D. Fedoruk was not competent during his trial

Fedoruk could not communicate with his counsel during trial. Since he was unable to communicate with counsel, he could not assist in his defense. To be competent, a defendant must be able to assist in his defense. Fedoruk was not competent during his trial because he could not assist in his defense.

The trial court’s failure to seriously consider Fedoruk’s competency during trial was an abuse of discretion. Immediately after the

jury verdict—within a minute—the trial court referred Fedoruk for a competency evaluation because it was concerned he would not be able to “consult with his attorneys pending sentencing.” RP 9/30/16 at 107. This demonstrates that the court knew that Fedoruk was not competent prior to the end of trial. Indeed, the trial court noted that it questioned Fedoruk’s competency during trial. RP 9/30/16 at 107 (conduct that “might have caused me to question his competency at all didn’t occur until we were reading jury instructions”).

The trial court’s familiarity with Fedoruk and his fleeting periods of competence are well documented. It should have had him evaluated, not shackled, and then banished him from the courtroom, when signs of mental illness became apparent and his counsel reported he could no longer communicate with his client.

1. The trial court knew of Fedoruk’s history of mental illness and need for medication

The trial court was well-acquainted with Fedoruk’s “long history of serious mental illness.” *Fedoruk*, 184 Wn. App. at 871; CP 91. The court also knew that “Fedoruk has a history of poor compliance with the medication regimes.” *Id.*; CP 94. The court failed to check if Fedoruk was medication-compliant during trial, even after there were clear signs that Fedoruk was losing his competency, and even after there were clear signs that Fedoruk was no longer competent. The court failed to ensure Fedoruk was medication compliant, although the parties and the court had agreed that a *Sell* order for forced medication was still in place. RP 4/12/16 at 76-

77. The court was on notice from mental health evaluators that if he failed to take his medication, “his condition could deteriorate and he could require re-evaluation regarding his competency.” CP 154.

Given the trial court’s knowledge of Fedoruk’s mental state, the failure to insure he was medication-compliant after there were signs of a deteriorating mental state was an abuse of discretion.

2. The trial court knew of Fedoruk’s quick shifts from competency to lack of competency

The trial court was well-acquainted with Fedoruk’s sudden swings between competence and lack of competence. For instance, the court knew that an evaluator found Fedoruk competent on October 1, 2015, CP 86-96, but two days later he had a “psychiatric episode” that led to a court-ordered restoration at Western State. CP 139.

While in the Cowlitz County jail in the autumn of 2015, Fedoruk would improve and then have manic periods, “yelling and pounding on his cell door, throwing liquid all over the floor, [and] pacing his cell.” CP 148. And at Western State in the winter of 2015-16, he would have “periods of instability” where he could not “attend his competency restoration groups for safety reasons.” CP 149.

Just before trial began, in the hearings on the courtroom renovations, Fedoruk’s counsel had emphasized that the window for trial would be narrow because Fedoruk’s competency came and went. RP 9/9/16 at 87. And the court was on notice from competency evaluations, and common sense, that “increased stress one would expect during a court

trial” would destabilize Fedoruk. CP 95. That evaluator suggested that forced medication “may be necessary at some point should his symptoms increase and behaviors deteriorate.” CP 95. When he was found not competent after the verdict was read, the evaluation confirmed that trial stress was likely a trigger. CP 381.

3. The trial court knew that Fedoruk had no history of malingering

The court also knew that Fedoruk had not been accused of malingering or exaggerating his symptoms. CP 91, 87. The court knew that, “once medicated,” Fedoruk became “docile, respectful, pretty quiet [and did not] cause any problems.” 184 Wn. App. at 874 (internal record citations omitted). He was often cooperative with evaluators. CP 147; 230.

While the trial court stated that when Fedoruk began chanting and acting out he was simply “upset” by testimony, that is unlikely. Fedoruk had been through the trial before and would have heard the same or similar testimony. If he was competent, he knew what he was accused of and would not have been surprised about the testimony.

During a competency evaluation, he had promised to “be quiet” even if someone told a lie at trial. CP 153. But then on Thursday, September 29, he shouted “he’s lying” about a witness. RP 9/29/16 at 8. This is consistent with his pattern of cooperation when medicated and acting out when off his medication.

Finally, there is no indication in the record that Fedoruk was acting out simply to get a mistrial. Indeed, Fedoruk had told an evaluator that he

preferred prison to jail, because he was allowed outside, had better food, and access to other activities. CP 87.

4. The court was on notice of Fedoruk’s physical pain and lack of sleep

The court was on notice that Fedoruk was in significant physical discomfort. The court also knew that Fedoruk needed sleep. Lack of sleep was a major sign of an impending psychiatric break. CP 88. Fedoruk believed that sleep and rest “would go a long way toward making tomorrow more tolerable.” RP 9/28/16 at 59-60. Yet even after the court sent Fedoruk back to jail because of his pain, causing him to miss part of the trial, the court did not ensure that Fedoruk received treatment for his physical pain. RP 9/28/16 at 58 (no treatment for back pain to that point); RP 9/29/16 (no colloquy on medication for back pain).

Trial courts “should consider the specific mental qualities that impact the defendant’s capacity to understand a trial, including any relevant disability.” *Ortiz-Abrego*, 187 Wn.2d at 410. Here, the trial court failed to consider the impact of Fedoruk’s significant physical pain on his mental health, and failed to take any steps to ensure that Fedoruk received relief from his physical pain.

E. The trial court’s calendar was not a sufficient reason to “push through” to the end of a trial where Fedoruk was no longer competent

Instead of giving deference to Fedoruk’s counsel, and instead of taking into account all the things the court knew about Fedoruk and his

mental illness, the court focused instead on its upcoming calendar and that some jurors might be not be available if the trial experienced any delay. Those considerations, while important, do not outweigh the constitutional requirement that Fedoruk be competent throughout his trial.

While there “are no fixed signs which invariably require a [competency] hearing, but the factors to be considered include evidence of a defendant’s irrational behavior, his demeanor, medical opinions on competence and the opinion of defense counsel.” *State v. O’Neal*, 23 Wn. App. 899, 902, 600 P.2d 570, 572 (1979). Here, each of these signs signaled that Fedoruk was not competent, or at least that he needed a formal competency determination. He was acting irrationally, such as chanting in Russian; his demeanor had changed over the course of trial and his actions became uncontrolled and even violent; he had been found not competent many times, and even evaluators who found him competent stressed his need to be medication compliant and warned that the stress of trial might undermine his competency; and his counsel told the court that he could no longer communicate with Fedoruk.

It is also possible that the court’s concern with its calendar was over-emphasized. The five-week trial the trial court used as a reason to deny a continuance had been scheduled for July and moved to October, RP 4/12/16 at 67, RP 9/9/16 at 90, and trials move frequently for a variety of reasons.

The court’s calendar, and the possibility that jurors would have difficulty with a trial that rolled over into a third week, simply cannot

outweigh the need for a defendant to be competent, and the court abused its discretion in privileging convenience over the constitution.

F. The trial court violated Fedoruk’s right to be present

The trial court violated Fedoruk’s right to be present on two different days.

On Wednesday, September 28, the court sent Fedoruk back to jail because he was in physical pain. The court rejected requests for a continuance, including one request for a recess as short as the rest of Wednesday afternoon. RP 9/28/16 at 7, 8, 58-9. Fedoruk wished to be present. RP 9/28/16 at 58-9. The court stated that “Given witnesses, jurors who are going to be gone, we don’t have any choice but to go forward with your trial.” RP 9/28/16 at 58. Indeed, the trial court had apparently sat jurors who could only sit for two weeks—the anticipated length of the trial—and perhaps lacked sufficient alternates to avoid a mistrial if there were any delays at all. RP 9/28/16 at 61.

On Friday September 30, Fedoruk was left in the holding cell after spending the night “essentially without sleeping and mostly practicing boxing moves.” RP 9/30/16 at 98, 99. Fedoruk was “refusing to come over” and “was not following directions at all this morning.” RP 9/30/16.

A criminal defendant has the right to attend all critical stages of his trial. *State v. Pruitt*, 145 Wn. App. 784, 798, 187 P.3d 326 (2008). This includes a right “to be present at every stage of his trial for which ‘his presence has a relation, reasonably substantial, to the ful[l]ness of his

opportunity to defend against the charge.’” *Id.* (internal citation omitted). This is true even in situations where the defendant is not actually confronting witnesses or evidence against him. *Id.* Only where the defendant’s presence would be “useless” may the court proceed without the defendant. *Id.* Both the return of the verdict and the presentation of evidence are critical stages of criminal trials. *Id.* Closing is also a critical stage. *Herring v. New York*, 422 U.S. 853 (1975).

Trial courts must follow guidelines in deciding whether to remove a disruptive defendant. *State v. Chappel*, 145 Wn.2d 310, 320, 36 P.3d 1025 (2001). First, the defendant should be warned; second, the defendant’s conduct must be severe enough to justify removal; third, the least severe alternative that will prevent the defendant from disrupting the trial is preferable; and finally, the defendant should be allowed back upon assurances that his conduct will improve. *Id.* Only the third issue, whether the trial court chose the least severe option, is contested here.

The trial court had at least three less severe options than having defendant absent from the presentation of evidence, closing, and return of the verdict.

First, the trial court could have granted the short, overnight continuance requested by defendant on Wednesday so that he could recover from his physical pain. A rested, and medicated, defendant might well have been able to maintain his composure.

Second, the trial court could have ensured that Fedoruk was taking his medications. Given Fedoruk’s mental illness, it was likely a lack of

medication, rather than a lack of willpower, was leading to Fedoruk’s behavior. The trial court itself seemed unsure if Fedoruk was responsible for his behavior: “whether he can or can’t control that [his behavior], whichever the situation is . . .” RP 9/29/16 at 55.

Third, the trial court could have asked for a “brief recess” to allow for a competency evaluation. *Ortiz-Abrego*, 397 P.3d at 640. That would have allowed the trial court to determine “whether he can or can’t control” his behavior.

G. The trial court wrongly denied Fedoruk’s request for a continuance because of severe pain

The trial court also erred in denying the requests for a continuance because of disabling back pain.

The court’s error stemmed from two mistakes. The court sat a jury that had to finish a murder trial, including deliberations, within two weeks, although the court knew the defendant was extremely mentally ill and should have anticipated the need for delays—even if it was just a delay of an afternoon.

The second issue was that the court’s own calendar seemed to give no flexibility, as the court felt it needed to start another trial soon after. “I have to hear this case; I have a sexual predator matter that’s scheduled to start October 11, and I’m being told we’ll go about five weeks.” RP 9/9/16 at 90.

Denial of a continuance is reviewed for abuse of discretion. *State v. Henderson*, 26 Wn. App. 187, 190, 611 P.2d 1365 (1980).

The court should have seen that it was unrealistic to seat a jury that could only hear the case if everything went perfectly, and to schedule a trial when the court's own schedule required everything to go perfectly. A failure to anticipate any delays at all in a complex murder trial with a mentally ill defendant, and to prioritize the court's calendar over the due process rights of Fedoruk, were abuses of discretion. *See, e.g., United States v. Brown*, 785 F.3d 1337, 1349 (9th Cir. 2015) (noting that efficient administration of justice not normally sufficient "basis for denial of the constitutional right" (there, to choice of counsel)).

Fedoruk was in severe pain that made it hard to focus on witnesses and even sit. RP 9/28/16 at 7. He had had to slouch on Tuesday and Wednesday. RP 9/28/16 at 8. While the court suggested the Fedoruk talk to the jail medical staff over the lunch hour on Wednesday about medical treatment, there is no evidence that Fedoruk received any treatment for his back pain. RP 9/28/16 at 8, 58. An accommodation for dealing with this severe pain would have been appropriate, whether that accommodation was ensuring proper medication or granting a short continuance to reduce Fedoruk's pain. *Ortiz-Abrego*, 187 Wn.2d at 402, 409 (discussing trial court accommodating special needs of defendants).

H. Fedoruk was wrongly shackled and prejudiced by having the interpreters moved away from him

A "defendant may be shackled during trial only as a last resort." *In re Davis*, 152 Wn.2d 647, 693, 101 P.3d 1 (2004). Shackling a defendant violates the presumption of innocence, "it restricts the defendant's ability

to assist his counsel during trial, it interferes with the right to testify in one's own behalf, and it offends the dignity of the judicial process.” *State v. Finch*, 137 Wn.2d 792, 844-45, 975 P.2d 967 (1999). Whenever a “courtroom arrangement is challenged as inherently prejudicial, . . . the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether an unacceptable risk is presented of impermissible factors coming into play.” *Id.* at 695 (internal citation omitted).

“A courtroom practice might present an unacceptable risk of impermissible factors coming into play” because of “the wider range of inferences that a juror might reasonably draw” from the practice. *State v. Jaime*, 168 Wn.2d 857, 862, 233 P.3d 554 (2010), as amended on denial of reconsideration (Sept. 30, 2010) (internal citation omitted).

Unconstitutional shackling is subject to constitutional harmless error analysis. *Finch*, 137 Wn.2d at 859, 861. When there is a constitutional error, it is presumed to be prejudicial unless the State can prove that the error is harmless beyond a reasonable doubt. *Id.* at 859. Unconstitutional shackling is only harmless when there is overwhelming evidence of guilt or when the evidence shows that the shackles were not visible and there was no prejudice to the defendant. *Id.* at 861.

Moving the translators away from Fedoruk was a clear indication to the jury that Fedoruk was dangerous. RP 9/29/16 at 13-15. And moving the translator and shackling Fedoruk also interfered with his ability to consult with counsel.

I. Fedoruk was found indigent and no costs should be assessed against him

No costs should be awarded where “an adult offender does not have the current or likely future ability to pay such costs.” RAP 14.2. Furthermore, a trial court’s “finding of indigency remains in effect . . . unless the commissioner or clerk determines by a preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency.” RAP 14.2.

This Court should direct that costs not be imposed in this case. The imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to pay [appellate costs] plus accumulated interest can be quite a millstone around the neck of an indigent offender. *State v. Sinclair*, 192 Wn. App. 380, 391-92, 367 P.3d 612 (2016). Although *Blazina* is not binding for appellate costs, some of the same policy considerations apply. *Id.* In addition, if a person is considered indigent, “courts should seriously question that person’s ability to pay” *Id.*

Fedoruk was found indigent and counsel was appointed for this appeal. CP 414-15. Fedoruk struggles with mental illness and is serving a 216-month sentence. It is unlikely that Fedoruk will be able to pay

appellate costs after his release from prison. Therefore, this Court should exercise its discretion and not award appellate costs in this matter, if Fedoruk does not substantially prevail.

Conclusion

The verdict should be reversed and the case remanded for a new trial.

Respectfully submitted on July 26, 2017

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Certificate of Service

On July 26, 2017, I served all parties by electronic service, and served
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I declare under penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct.

Dated July 26, 2017 in Seattle, Washington.

s/Harry Williams IV, WSBA #41020

LAW OFFICE OF HARRY WILLIAMS LLC

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