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

STATE OF WASHINGTON, Respondent

v.

SERGEY FEDORUK, Appellant

FROM THE SUPERIOR COURT FOR COWLITZ COUNTY
COWLITZ COUNTY SUPERIOR COURT CAUSE NO.11-1-00827-1

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court properly denied Fedoruk's motion for a mistrial and determined that Fedoruk's behavior was not related to competency concerns.**
- II. The trial court properly removed Fedoruk from the courtroom for disruptive behavior.**
- III. The trial court did not proceed with Fedoruk's trial while he was incompetent in order to prevent a calendar conflict and the trial court properly denied Fedoruk's motion to continue.**
- IV. Fedoruk was properly shackled and this did not prejudice him.**
- V. The State does not intend to seek appellate costs.**

STATEMENT OF THE CASE

Sergey Fedoruk (hereafter 'Fedoruk') was initially charged in 2011 with the murder of his brother's brother-in-law, Sehiy Ischenko. CP 1-4. The case initially went to trial and Fedoruk was found guilty of Murder in the Second Degree. *See State v. Fedoruk*, 184 Wn. App. 866, 339 P.3d 233 (2014). This Court reversed Fedoruk's conviction because counsel had failed to retain a mental health expert or investigate a mental health defense. *Id.* At 871. On retrial in Cowlitz County Superior Court in September 2016, the evidence showed as follows:

In 2011, Yelena Fedoruk lived in Kelso, Washington with her husband and 7 of their 10 children. 9/22/16 RP at 19. Yelena's¹ brother-in-law, the defendant, Sergey Fedoruk (hereafter 'Fedoruk'), lived with them as well in 2011, as did Yelena's own brother, Serhiy Ischenko. 9/22/17 RP at 20, 27.

On a Saturday night the last weekend in July 2011, Fedoruk woke Yelena up, banging on her bedroom door, and demanded that she call her daughter, Rimma, who was out with friends. 9/22/16 RP at 28. Fedoruk indicated to Yelena that something was wrong and someone was going to rape Rimma. *Id.* Rimma was currently out with friends and Yelena was not worried about her. 9/22/16 RP at 29.

The next morning, Sunday morning, Yelena's family got ready for and went to church. 9/22/16 RP at 29-30. Fedoruk also got ready for church, but was running late; Serhiy offered to drive Fedoruk to church later. 9/22/16 RP at 30. Fedoruk arrived at church towards the end, and he was acting abnormally. *Id.* Fedoruk was rude to other churchgoers. *Id.* The rest of that Sunday passed as a normal day; Yelena went to bed around 11pm, and at that time her brother, Serhiy, was at their home, asleep on the couch in the living room. 9/22/16 RP at 31.

¹ The State refers to most of the witnesses by their first names to avoid confusion. The State intends no disrespect.

Yelena woke up the following morning, Monday, at about 6am. 9/22/16 RP at 32. Yelena went downstairs to make her brother, Serhiy, lunch. *Id.* Serhiy was not on the couch any longer, but Yelena did not think anything of it at the time. *Id.* However, when the time for Serhiy to leave for work came without Yelena seeing him, she became concerned. 9/22/16 RP at 32-33. Yelena looked around the house for him, and outside the house, and could not find Serhiy Ischenko. 9/22/16 RP at 33. Yelena asked Fedoruk, who was in the basement of the house, if he had seen Serhiy and he told her no. 9/22/16 RP at 33. Yelena then sent her son to Serhiy's workplace to see if he had gone into work early, but he was not there. 9/22/16 RP at 33.

Yelena decided to take her children to her sister-in-law, Svetlana Dzhumaniyazov's, house because she had to go to work and she did not want to leave her children in the house alone with Fedoruk as he was behaving abnormally. 9/22/16 RP at 34. Yelena was due to go to work, but she was worried about her brother. *Id.* Yelena only worked for about 30 minutes before asking to go home for the day. *Id.* She returned to Svetlana's residence and found out something had happened to Serhiy. 9/22/16 RP at 35.

Yelena indicated that Fedoruk had a history of mental health problems. 9/22/16 RP at 38-40. When Fedoruk was not doing well, Yelena

had concerns with Fedoruk being around her children; she had locks on her bedroom doors that they used when Fedoruk was not doing well. 9/22/16 RP at 40. Fedoruk's behavior had escalated in the week prior to the last weekend in July. 9/22/16 RP at 40-45. The family was concerned Fedoruk was not taking his medication and this was a constant problem. 9/22/16 RP at 48.

Lyuba Kurelchuck is a friend of Rimma, Yelena's daughter. 9/22/16 RP at 51-52. Lyuba spent the evening of Saturday, July 31, 2011, with Rimma at her house. 9/22/16 RP at 52-53. Lyuba and Rimma recalled seeing Serhiy at the dining room table when they came home; Serhiy wanted someone to make borscht for him and after Rimma suggested Fedoruk make borscht for Serhiy, Serhiy said that he did not want any borscht made by Fedoruk as he would probably try to poison him. 9/22/16 RP at 54; 9/23/16 RP at 15-17.

After that, Lyuba and Rimma went to Rimma's bedroom and went to sleep. 9/22/16 RP at 55. Around 4am, Fedoruk came into Rimma's bedroom, apparently looking for the cat. 9/22/16 RP at 55-56; 9/23/16 RP at 17-18. Lyuba saw the cat right behind Fedoruk though. 9/22/16 RP at 56. Fedoruk then asked Rimma if anyone had hurt her in any way and told her that he would kill the person if they had hurt her. 9/22/16 RP at 56. When he said this, Fedoruk was punching in the air as if fighting someone

and indicated he felt strong. 9/22/16 RP at 56-57; 9/23/16 RP at 18. After about 5-10 minutes, Fedoruk left Rimma's bedroom and went upstairs. 9/22/16 RP at 57. Rimma went with him to try to calm him down. 9/23/16 RP at 18. Fedoruk was convinced that Rimma had been hurt by someone and did not accept her answer to him that nothing had happened. 9/23/16 RP at 18. Fedoruk insisted that he wanted the story by morning. 9/23/16 RP at 18-19. Rimma then went back down to her room and locked the door and went to sleep. 9/23/16 RP at 19.

Lyuba was not able to fall back asleep because she heard a lot of sound coming from upstairs, the sounds of someone walking back and forth, doors being opened and closed, and running water from the bathroom. 9/22/16 RP at 57. Lyuba also heard Fedoruk singing or mumbling. 9/22/16 RP at 58. Rimma heard the sound of someone running upstairs, and noise outside and the garage door opening. 9/23/16 RP at 19. Some of the sound Rimma heard was the wheel barrow, and she noted that the wheel barrow had been moved the next day. 9/23/16 RP at 19.

A few hours later that Sunday morning, Rimma woke up and Lyuba was looking for her phone, and Yelena came downstairs asking the girls if they had seen Serhiy. 9/23/16 RP at 20. Lyuba and Rimma got out of bed and in searching for Lyuba's cell phone they found some metal barbeque skewers in Rimma's bedroom underneath a bookshelf. 9/22/16

RP at 58; 9/23/16 RP at 20. They also found a large screwdriver, and a stick with string on it. 9/23/16 RP at 20-22. When they asked Fedoruk about the items in Rimma's room, he told them he wanted to go camping. 9/22/16 RP at 60; 9/23/16 RP at 22. Rimma told Fedoruk she didn't believe he wanted to go camping and then Fedoruk said he needed the items he put in Rimma's bedroom to protect himself from the police. 9/23/16 RP at 23. Lyuba also remembered seeing a wheel barrow outside Rimma's bedroom window when they were woken up by Fedoruk around 4am. 9/22/16 RP at 61.

Roman Fedoruk is Fedoruk's nephew, another child of Yelena's. 9/23/16 RP at 41. Roman testified that on Sunday night of the weekend that Serhiy was killed he walked home from his cousin's house down the street and saw Fedoruk standing outside by the garage. 9/23/16 RP at 43. Roman asked Fedoruk why he wasn't sleeping and Fedoruk said he couldn't sleep. 9/23/16 RP at 45. Roman went inside the house and saw no one on the couch. 9/23/16 RP at 46. It was late and everyone was asleep so Roman attempted to not make much noise as he proceeded to bed. 9/23/16 RP at 47.

The next morning, Roman's mother woke him up, worried, saying she couldn't find Serhiy. 9/23/16 RP at 47. At his mother's request,

Roman drove to Serhiy's work to see if he was there, but Serhiy was not there. 9/23/16 RP at 48.

Tatyana Varyvoda testified that she was Fedoruk's sister. 9/23/16 RP at 52. On the Friday of the weekend of July 30, 2011, Fedoruk came over to Tatyana's house and brought her a goat to graze her yard. 9/23/16 RP at 53. As she talked with Fedoruk, his behavior changed and she became scared of him when he suddenly started yelling at her and seemed angry. 9/23/16 RP at 53. Tatyana turned around and ran inside the house; she tried to close the door, but Fedoruk put his foot inside the door to prevent it from being closed. 9/23/16 RP at 53. Tatyana was able to escape away from Fedoruk and ran into the street. 9/23/16 RP at 53. Fedoruk followed Tatyana and asked her why she was in the street; she told Fedoruk that she wanted there to be an audience to prevent him from doing anything to her. 9/23/16 RP at 55. Fedoruk apologized and then walked away towards Yelena's house. 9/23/16 RP at 55.

Tatyana described that in the past her family has called police in to come take Fedoruk; he would get angry and agitated about them calling the police. 9/23/16 RP at 54-55. Tatyana and her sisters were familiar with Fedoruk's behavior when he was well versus when he was not well. 9/23/16 RP at 58-61. When he is sick, Fedoruk's behavior fluctuates – he can seem very normal and then become scary. 9/23/16 RP at 61.

On Monday morning of the weekend of July 30, 2011, Svetlana called Tatyana to convey that Yelena was worried that Serhiy was missing. 9/23/16 RP at 56. They discussed that Fedoruk and Serhiy had been spending some time together lately as Serhiy was trying to help Fedoruk calm down. 9/23/16 RP at 56. After that phone call, Tatyana took all of her children to Svetlana's house; as they went there, they saw Fedoruk driving his four-wheeler on the road where he waved at them, seemingly very happy. 9/23/16 RP at 57.

Yuliya Belov is another of Fedoruk's sisters. 9/23/16 RP at 65. On August 1, 2011, Svetlana called Yuliya to tell her that Serhiy was missing. 9/23/16 RP at 68. Amongst her and her sisters, they decided Yuliya should call DOC to come check in on Fedoruk because they were worried he may have hidden Serhiy somewhere. 9/23/16 RP at 69.

Svetlana testified that Fedoruk is her brother. 9/23/16 RP at 79. She has also known Serhiy since childhood. 9/23/16 RP at 81. Svetlana last saw Serhiy on July 31, 2011, on Sunday, at her house for lunch. 9/23/16 RP at 81. Serhiy was in a good mood and had no injuries that Svetlana could see. 9/23/16 RP at 81. Serhiy left at about 4pm to go to Portland to see his daughter. 9/23/16 RP at 82.

The following morning, Svetlana received a call from Yelena saying that Serhiy was missing. 9/23/16 RP at 82-83. After hearing from

Yelena, Svetlana called her husband to see if he had Serhiy out fishing, and then her sisters and their husbands to try to find out if anyone gave Serhiy a ride to work. 9/23/16 RP at 83. Svetlana testified that Serhiy was a very responsible person and would not miss work, so if he was not at work then something had to have happened to him. 9/23/16 RP at 84. At some point the police arrived and Serhiy's body was found in the backyard. 9/23/16 RP at 86.

Svetlana spoke to Fedoruk a few times on the phone over the next several days. 9/23/16 RP at 86. Fedoruk told Svetlana that he had not heard anything the night Serhiy was killed and that he had been asleep. 9/23/16 RP at 86. But when Svetlana confronted him with the fact that Roman had seen Fedoruk outside Fedoruk told Svetlana that he had heard his dog barking so went outside to investigate and saw blood on the soil, took off his pants and cleaned the blood. 9/23/16 RP at 87. Fedoruk told Svetlana he thought his dog had attacked a child. 9/23/16 RP at 87. Fedoruk used his pants to clean up the blood and then hid his pants in the jet ski. 9/23/16 RP at 87.

Later, Svetlana talked to Fedoruk and he told her he and Serhiy fought and Fedoruk killed him. 9/23/16 RP at 96.

Richard Dzhumaniyazov is Svetlana's husband. 9/23/16 RP at 112. Richard also worked with Serhiy. 9/23/16 RP at 112. Richard last saw

Serhiy after church on Sunday August 1, 2011 when Serhiy came to his house for lunch. 9/23/16 RP at 113. The following day, Richard saw police come to Yelena's house and decided to go talk to them. 9/23/16 RP at 119. Richard walked through a path between their houses and on his way discovered Serhiy's body with spruce twigs or branches on top of it. 9/23/16 RP at 120. Richard checked to see if there was a pulse, but there was none and Serhiy's body was already cold. 9/23/16 RP at 121.

Chris Napolitano works for the Department of Corrections and his boss received a call that Fedoruk's family was concerned because another family member was missing and Fedoruk was off. Chris, another DOC officer, and a couple Sheriff's deputies approached Yelena's house, where they saw Fedoruk outside the front door. 9/23/16 RP at 126. Fedoruk appeared disheveled: his hands were dirty, he had abrupt body movements, and nervous movements. 9/23/16 RP at 126. It appeared to Chris that Fedoruk was "off his baseline." 9/23/16 RP at 126.

While Chris and other officers were at Yelena's house, they went into the backyard where Richard came out from the treeline at the back of the property and said either "shoot" or "shot" and motioned for them to make an arrest. 9/23/16 RP at 129. Richard seemed panicked. 9/23/16 RP at 129. Richard showed the officers the body he had found. 9/23/16 RP at

130. Chris saw the body, covered in branches, and it appeared the person had been dead for awhile. 9/23/16 RP at 133-34.

Mitchell Coulter was working at the coroner's office at the time of Serhiy's death. 9/27/16 RP at 39. He went to the scene where Serhiy's body was found and saw it covered in branches, about 80 yards from the rear of the residence. 9/27/16 RP at 40. The body was in full rigor at the time they observed it at the scene. 9/27/16 RP at 45. Mitchell transported the body from the scene to the coroner's office where he was put into refrigeration until the autopsy was performed by a pathologist. 9/27/16 RP at 51.

Dr. Clifford Nelson is a Deputy State Medical Examiner for the State of Oregon and is the contracted forensic pathologist for Cowlitz, Wahkiakum, and Pacific counties. 9/27/16 RP at 57. He performed the autopsy on Serhiy. 9/27/16 RP at 111. Dr. Nelson listed Serhiy's death as caused by multiple blunt force traumatic injuries and strangulation. 9/27/16 RP at 111.

Katarina Ischenko is Serhiy's daughter. 9/27/16 RP at 121. She last saw her father on Sunday evening when they went out to dinner. 9/27/16 RP at 122. The last night of her father's life, her father was calm and happy and did not express any anger or animosity towards Fedoruk. 9/27/16 RP at 123.

The State presented testimony from Dr. Ray Hendrickson, a psychologist and forensic evaluator at Western State Hospital. 9/28/16 RP at 67. Dr. Hendrickson had evaluated Fedoruk and opined that he was not insane at the time of the murder. 9/28/16 RP at 80. There was evidence that Fedoruk knew what he was doing, from the chatting over wine with Serhiy, to hitting him playfully and then engaging in a heated, physical dispute. 9/28/16 RP at 81. As relayed by Fedoruk, Dr. Hendrickson believed Fedoruk knew what he was doing. 9/28/16 RP at 81. Dr. Hendrickson also indicated there was significant evidence from which to infer that Fedoruk knew the consequences of his actions, as he realized the victim was unconscious and started CPR. 9/28/16 RP at 82. And then Fedoruk engaged in behaviors to cover up his actions, which also establishes understanding of his actions. 9/28/16 RP at 82. Dr. Hendrickson also opined that Fedoruk was able to form the intent necessary to commit the crime. 9/28/16 RP at 89.

Nearing the end of trial, on September 28, 2016, a Monday, defense counsel informed the court that Fedoruk had significant back pain and asked to continue the matter for 8 days until the following Tuesday. 9/28/16 RP at 6-7. The State's witnesses would not be available the following week however, and the trial court instructed the defendant to discuss his pain and medical issue with the jail medical staff and to

readdress the matter with the court after he had done so and if there were additional concerns. 9/28/16 RP at 8. After taking the testimony of the defense's expert witness, Dr. Muscatel, the court returned from the mid-morning break at 10:43am. 9/28/16 RP at 57. At that time, Fedoruk was in restraints and wanted to be taken to the hospital due to back pain. 9/28/16 RP at 57. Fedoruk had not been treated at the jail for any back pain. 9/28/16 RP at 57. Fedoruk became insistent about his back pain, and it appears from the transcript that this insistence and some behavior around that was why he was placed in restraints. 9/28/16 RP at 58. The trial court decided to break early for lunch and gave the defendant a more than two hour break. 9/28/16 RP at 57. The trial court told Fedoruk that he understood he was in physical pain, but that he needed to maintain his composure for the remainder of the trial. 9/28/16 RP at 57.

After the long lunch break, Fedoruk asked for a motion to continue until the following morning, indicating he thought he would feel better if he could sleep for the rest of the day and overnight. 9/28/16 RP at 59-60. The trial court indicated it was not in a position to grant a continuance due to the number of witnesses and scheduling that had gone into planning for the trial. 9/28/16 RP at 61. The court indicated it could not grant the continuance Fedoruk was asking for without declaring a mistrial due to the conflicting schedules of witnesses. 9/28/16 RP at 61. Fedoruk then moved

to waive his presence for the remainder of the day. 9/28/16 RP at 61-62. Defense counsel specifically indicated at this time that there were no concerns relating to Fedoruk's competency and that counsel believed Fedoruk to be competent. 9/28/16 RP at 65.

The following day, September 29, 2011, all parties returned to court for another day of trial, including Fedoruk. The State's first witness to testify that day was Detective Lincoln of the Cowlitz County Sheriff's Office. 9/29/16 RP at 6. Detective Lincoln testified that Fedoruk's sister Tatyana had described threats Fedoruk had made to the family regarding them calling police on him. 9/29/16 RP at 7-8. Upon hearing this testimony, Fedoruk said out loud during trial that the detective was lying and that what he said was not true. 9/29/16 RP at 8. Defense counsel then asked to address the court. 9/28/16 RP at 9. After the jury left the courtroom, defense counsel indicated he was concerned about Fedoruk as he was animated and had reactions to the witness that he had not observed previously. 9/29/16 RP at 9. The defense attorney said that Fedoruk was able to understand him, but that he was concerned about his mood, though he hoped they could keep it together as trial was nearing the end. 9/29/16 RP at 9. The defendant again said that the testimony of the witness was not accurate. 9/29/16 RP at 9. The prosecutor indicated that it appeared Fedoruk was upset by the testimony and that it was not due to his lack of

understanding the proceedings or in assisting his counsel, only that he was upset. 9/29/16 RP at 10. The prosecutor then stated,

So, I'm not quite sure what Counsel is asking for, but I'm going to ask him to be very specific if he thinks at this point that there's a competency issue and he cannot proceed, that's one thing. If it's just that his client is having issues with what's being said, well, that's quite another matter.

9/29/16 RP at 10. Defense asked for another recess prior to addressing the prosecutor's statements. 9/29/16 RP at 11. Upon returning, defense counsel indicated it was concerned for Fedoruk's ability to maintain in the courtroom. 9/29/16 RP at 11. Counsel stated that it intended to call the defendant's brother and then rest. 9/29/16 RP at 11. Counsel also said he was not able to really discuss anything regarding the issue he was upset about. 9/29/16 RP at 11.

The trial court then stated,

I understand that Mr. Fedoruk is upset by some of the testimony he has heard. I don't fault him for that in any way.

Mr. Fedoruk, the question becomes whether or not you can maintain your composure as we go forward. I would rather have you here in court. The benches here are covered in front so if you're seated, the jury does not see any of the restraints that are on you; but, we are concerned about your behavior at this point and whether or not you're going to be able to maintain that composure.

9/29/16 RP at 12. The defendant said he was fine at this point. 9/29/16 RP at 13. The court then allowed the defendant time to go to the bathroom, but he was very loud in the back hall and had difficulty controlling himself. 9/29/16 RP at 16. Defense counsel then raised the issue of competency, telling the court that he was concerned about his behavior. 9/29/16 RP at 16-17.

In response, the trial court found that Fedoruk was responsive to what he is hearing in the courtroom and can converse with his attorney, but that he was emotionally upset. The trial court found this did not rise to the level of a competency concern. 9/29/16 RP at 17. The court noted that Fedoruk was calm and the trial was nearly complete, so the court decided to proceed. 9/29/16 RP at 17.

Defense presented multiple witnesses on Fedoruk's behalf. Dr. Kenneth Muscatel testified that he was a licensed psychologist who practiced as a neuropsychologist, doing evaluations for criminal and civil cases. 9/28/16 RP at 12. Dr. Muscatel was hired by Fedoruk to perform an evaluation on Fedoruk's mental health and state of mind. 9/28/16 RP at 15. Fedoruk had been diagnosed with Bipolar Disorder, type 1, and schizoaffective disorder. 9/28/16 RP at 20. Fedoruk would suffer from manic states in which he was psychotic. 9/28/16 RP at 20-21. Dr. Muscatel described being in a psychotic state as being out of touch with

reality, hearing things, seeing things, having beliefs or ideas that others don't think are true, possibly having conspiracies and delusions, confusion, disorganization, impulsivity, and impairment in their interactions with others. 9/28/16 RP at 21. Someone with these issues can rapidly get out of control. *Id.* In order to stay functioning, Fedoruk needs to stay on medication, but he, like others with similar mental issues, tend to discontinue medications once he's feeling better, which then leads to a manic/psychotic state. 9/28/16 RP at 25.

Fedoruk described his version of the murder to Dr. Muscatel as follows: Fedoruk and Serhiy talked late at night, they drank some wine, and had an initially playful dispute. 9/28/16 RP at 29. Serhiy started strangling Fedoruk and they jostled back and forth and it soon became serious. 9/28/16 RP at 29. Fedoruk kicked Serhiy and Serhiy "flew thirty feet," which Dr. Muscatel opined was not true, but that was how Fedoruk perceived the event. 9/28/16 RP at 30. After Serhiy flew or fell as a result of Fedoruk kicking him, Serhiy hit his head on a rock and blood formed in a puddle from his head. 9/28/16 RP at 30. Serhiy was able to get up and the two engaged in a hand-to-hand fight. 9/28/16 RP at 30. Fedoruk told Dr. Muscatel that he beat up on Serhiy for 20 minutes. 9/28/16 RP at 32. Fedoruk then used a wheel barrow to move Serhiy's body down into a creek area and covered it with branches. 9/28/16 RP at 32-33.

Dr. Muscatel opined that Fedoruk's ability to form intent could have been impaired by mental illness. 9/28/16 RP at 33. Fedoruk was able to perceive that he was having a fight, and knew he was hitting Serhiy, but Dr. Muscatel expressed concern that Fedoruk may not have been able to monitor or control his behavior during this manic episode. 9/28/16 RP at 34.

On cross-examination, Dr. Muscatel agreed that Fedoruk could form the intent to engage in a fight and could form the intent to intentionally kill someone. 9/28/16 RP at 35.

Fedoruk also presented the testimony of his brother, Vladim Fedoruk, at trial. 9/29/16 PR at 19. Vladim indicated that he was 32 and was Fedoruk's younger brother. 9/29/16 RP at 20. Vladim is also familiar with Serhiy, and remembers the week leading up to Serhiy's death. 9/29/16 RP at 21. During that week prior to Serhiy's death, Vladim saw Fedoruk's mental health decline. 9/29/16 RP at 22. Fedoruk began sleeping less, became nervous, and his speech became rapid, he was not making sense and began talking more with a religious bent. 9/29/16 RP at 23-24. This behavior was similar to past times when Fedoruk's mental health would decline. 9/29/16 RP at 23. During that week, Vladim did not want Fedoruk at his own house because he has children, so he talked Fedoruk into going to Yelena's house. 9/29/16 RP at 24.

Vladim was the last witness to testify and at that point the court and counsel began going over jury instructions. 9/29/16 RP at 26. This was approximately 10:15am; there was initial discussion with Fedoruk as to whether he wanted to remain in the courtroom for the discussion of jury instructions or if he wanted to go get some rest. 9/29/16 RP at 27. After the defendant asked whether the witnesses were all done and whether the trial would be over that day or the next, the defendant said he wanted to stay. 9/29/16 RP at 28. At this time Fedoruk engaged in an appropriate back and forth with the court on this subject. Then, Fedoruk began speaking in Russian while the court and attorneys were discussing a matter, and the interpreter translated it as Fedoruk asking about his relatives who were testifying and if they will come back to the courtroom. 9/29/16 RP at 28-29. Defense counsel assured Fedoruk he would ask his brother to come into the courtroom. 9/29/16 RP at 29.

Jail staff then asked if they could restrain Fedoruk as the jury was not in the courtroom. 9/29/16 RP at 29. While jail staff put restraints on Fedoruk he discussed previous times he had been tazed and how they had tazed him previously. 9/29/16 RP at 30.

The court then proceeded with discussion of jury instructions; then Fedoruk said he needed to use the restroom. 9/29/16 RP at 32. As the court was nearly finished with instructions, the judge told Fedoruk he needed to

wait and he would soon be taken back to the jail for the lunch break.
9/29/16 RP at 32. The court recessed at 10:41am and returned at 1:30pm.
At 1:30pm, the court confirmed the order of instructions with counsel.
9/29/16 RP at 36-37. During that discussion, Fedoruk was talking, most of
which was not able to be transcribed by the court reporter. 9/29/16 RP at
36-37.

Defense indicated that Fedoruk wanted to remain present for
closing arguments; and the court noted that he had been advised that
Fedoruk was having some problems over the lunch hour, taking his cell
apart, but that he was now doing better and had taken some medication.
9/29/16 RP at 38. The court then brought the jury in and began reading
them jury instructions. 9/29/16 RP at 39. At 1:44pm, the record indicates
Fedoruk collapsed on the floor. 9/29/16 RP at 47. Fedoruk's attorney told
the court that while the court was reading the instructions to the jury
Fedoruk slipped off the chair and hit his head on the table. 9/29/16 RP at
48. Jail staff attended to Fedoruk, who was crying, and indicated that he
was sleepy and fell unconscious. 9/29/16 RP at 49. The jail staff helped
Fedoruk up and the court indicated Fedoruk could stay with one more
chance, but he was speaking or chanting in Russian and the court decided
to remove Fedoruk, keeping him nearby to see if things improved. 9/29/16
RP at 49-50.

At this point defense counsel indicated to the court that he believed Fedoruk was not competent. 9/29/16 RP at 54. The court found that due to his behavior Fedoruk had waived his presence and that after the court finished reading instructions to the jury it would check in to see if Fedoruk had calmed down enough to return to the courtroom. 9/29/16 RP at 54-55. Defense then moved for a mistrial. 9/29/16 RP at 55. The trial court denied the mistrial as it found any error or problem came from the defendant's behavior. 9/29/16 RP at 55. The court then finished instructing the jury and the parties gave their closing arguments. 9/29/16 RP at 55-93.

The trial court noted on the record that at 2:03pm he was told by his bailiff that the defendant was lying on the floor in the holding cell, refusing to get up, and saying he wished to return to the jail. 9/29/16 RP at 94. The jail corrections captain told the court on the record then that they asked Fedoruk multiple times if he wanted to come back into the courtroom or go to the jail and that Fedoruk said he wanted to go to the jail. 9/29/16 RP at 94. The jury was given the case to begin deliberating at about 3:30pm.

The following morning, the jury returned its verdict at about 10am. 9/30/16 RP at 98. Prior to taking the verdict though, the court heard testimony from Captain Lux who said that officers went to Fedoruk's cell this morning to let him know there was a verdict and to bring him over for

court. 9/30/16 RP at 98. Fedoruk refused to come to court and would not follow jail staff's instructions. 9/30/16 RP at 99. Captain Lux testified they would have to use force to get Fedoruk over to the courthouse. 9/30/16 RP at 99. Captain Lux also testified that Fedoruk did not sleep the night before and that he was practicing boxing moves and kicks throughout the night. 9/30/16 RP at 99.

The court then took the verdict in Fedoruk's absence. 9/30/16 RP at 101.

After the jury was released, defense again indicated it questioned Fedoruk's competence to proceed and requested that he be evaluated. 9/30/16 RP at 107. The trial court indicated that at the time of reading the jury instructions he did not have a basis to think Fedoruk was not competent, but based on his behavior overnight – between finishing closing arguments and allowing the jury to come back to deliberate – the court now had enough information to question competence. 9/30/16 RP at 107. The court ordered an evaluation for Fedoruk's competency and held a *Sell* hearing that same morning and ordered forced medication. 9/30/16 RP at 114-16.

Fedoruk was evaluated at the jail for competency approximately 5 days later, and found to be incompetent. CP 381-82. Fedoruk was sent to Western State Hospital for restoration; he was found competent on

January 10, 2017 and was sentenced on January 19, 2017. CP 396-408. Fedoruk was sentenced to 216 months of confinement and 36 months of community custody. CP 400-01. This appeal follows.

ARGUMENT

Fedoruk makes various arguments and assignments of error related to the trial court's handling of his requests for continuances due to back pain, the denial of his motion for a mistrial, failing to have the defendant evaluated for competency mid-trial, failing to find the defendant incompetent mid-trial, failing to defer to defense counsel's opinion of his competency, refusing a continuance due to scheduling issues, violating his right to be present, and improperly shackling him. All of these arguments rest on the mistaken premise that Fedoruk clearly and obviously lacked the competence to continue with trial starting mid-way through September 28, 2016. However, the record supports the trial court's and the prosecutor's clear beliefs that Fedoruk's behavior was a result of him being upset with how a particular witness testified and that his back hurt. The trial court did not err in failing to continue the matter, in failing to order a competency evaluation mid-trial, or in finding that Fedoruk's ability to understand the proceedings and ability to assist in his own defense had been compromised. Fedoruk received a fair trial and the trial court properly

evaluated the issues and exercised its discretion. Fedoruk's conviction should be affirmed.

I. The trial court properly denied Fedoruk's motion for a mistrial and determined that Fedoruk's behavior was not related to competency concerns.

Fedoruk argues the trial court erred in denying his motion for a mistrial after he slid off his chair during the trial court's concluding instructions to the jury, and was eventually taken from the courtroom because he would not stop talking, chanting or singing, and was being disruptive to the court proceedings. The trial court did not abuse its discretion in denying Fedoruk's motion for a mistrial. Fedoruk also claims he was not competent to stand trial and that the trial court failed to defer to his attorney's opinion on his competence. The claims are without merit.

A defendant has a fundamental and constitutional right not to stand trial unless he is legally competent. *State v. Wicklund*, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982) (citing *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975)). Washington codified this right in RCW 10.77.050 which indicates that "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." A defendant is incompetent if he lacks the capacity to understand the nature of the proceedings or to assist in his defense because of a mental disease or defect. RCW 10.77.010(15).

The determination that an accused is competent to stand trial is within the sound discretion of the trial court and will not be reversed absent a manifest abuse of discretion. *State v. Johnston*, 84 Wn.2d 572, 527 P.2d 1310 (1974); *State v. Eldridge*, 17 Wn.App. 270, 562 P.2d 276 (1977). To be competent, a defendant must understand the nature of the charges against him, and be capable in assisting in his own defense. *State v. Hahn*, 106 Wn.2d 885, 894, 726 P.2d 25, (1986); *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). In deciding whether to order a formal inquiry into a defendant's competence, the judge may consider the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports, and statements of counsel. *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967).

A trial court's decision to deny a motion for mistrial is reviewed for an abuse of discretion. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). "A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *State v. Hampton*, 184 Wn.2d 656, 670, 361 P.3d 734 (2015) (internal quotations omitted). The court's decision must be supported by facts on the record and reached by applying the correct legal standard. *Id.* A decision is "manifestly unreasonable" if the court reaches a decision "outside the range of acceptable choices" and "adopts a view that

no reasonable person would take.” *Id.* at 670-71 (citations omitted). An appellate court will only overturn a trial court’s denial of a mistrial motion when there is a substantial likelihood that the error affected the jury’s verdict. *Id.* Further, a trial court should only order a mistrial “when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); *State v. Garcia*, 177 Wn.App. 769, 776, 313 P.3d 422 (2013). In reviewing a trial court’s denial of a motion for a mistrial, an appellate court applies three factors to determine whether the trial irregularity warranted a mistrial: 1) the irregularity’s seriousness; 2) whether the irregularity involved cumulative evidence; and 3) whether the trial court properly instructed the jury to disregard it. *Id.* (quoting *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012)). In the context of competency to stand trial, when a defendant’s competence is initially called into question, or if the trial court has already adjudicated the defendant to be competent, the burden is on the defendant to prove he is not competent, or is no longer competent. *State v. P.E.T.*, 174 Wn.App. 590, 596, 300 P.3d 456 (2013). Fedoruk had already gone through competency proceedings, had his competence restored at Western State Hospital, and had been found to be competent by the trial court. Fedoruk therefore had the burden of showing he was no longer competent to

proceed at his trial in order to support his motion for a mistrial, a burden which he fell short of meeting.

Fedoruk relies on *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) and *State v. Anene*, 149 Wn. App. 944, 205 P.3d 992 (2009), to argue that a mistrial must be granted where mental illness causes behavior that leads to the removal of the defendant during trial. These cases are inapplicable where, as here, the defendant was removed because of his intentionally disruptive behavior in the courtroom and not because of an act of his incompetence.

In both *Drope* and *Anene*, the Courts considered circumstances surrounding how to proceed when a defendant is absent from trial due to incompetence. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *State v. Anene*, 149 Wn. App. 944, 205 P.3d 992 (2009). In *Drope*, the defendant failed to appear one morning in the middle of trial because he was recovering in the hospital following an attempted suicide. *Drope*, 420 U.S. at 166-67. Previously, the defendant's wife had testified that the defendant had tried to choke her to death the Sunday before trial and that the defendant was sick and needed psychiatric care. *Id* at 166. The trial court decided to proceed with trial denying a motion for a mistrial after determining that the absence was brought about by the defendant. *Id* at 166-67. After conviction, a motion for a new trial, and a motion to

vacate, the defendant appealed arguing, among other issues, that the trial court should have doubted his competence to stand trial. *Id* at 178. The Supreme Court determined that the trial court failed to give proper weight to the evidence suggesting the defendant was incompetent during trial. *Id* at 179-80. Important to the Supreme Court's decision in *Drope*, was the fact that prior to trial defense filed a motion to continue to allow the defendant to undergo a psychiatric examination and potential treatment, but no action was taken on the motion and the defendant was not examined or treated. *Id.* at 164-65. The motion to continue had a psychiatrist's report about the defendant's emotional condition, and the Court concluded that this evidence created sufficient doubt as to the defendant's competence so as to require the trial court to act. *Id.* at 180.

Similarly, in *Anene, supra*, the defense moved for a mistrial after the defendant failed to appear because he had overdosed on medication the night before in a suicide attempt and was in a coma. *Anene*, 149 Wn. App. at 948-50. The trial court decided to proceed with the trial reasoning that the defendant's actions constituted a voluntary absence from the trial even though it knew that the suicide attempt "suggest[ed] a rather substantial degree of mental instability." *Id.* at 949-51, 956. On appeal, the Court determined that the defendant was incompetent to stand trial and that

continuing the trial was a violation of the defendant's due process rights. *Id.* at 956.

Both *Drope, supra* and *Anene, supra* dealt with defendants who had attempted suicide and were not present at trial due to receiving medical care or being in a coma. The two defendants in those cases were actually incapacitated and incompetent due to their unconsciousness. These cases are inapposite to Fedoruk's situation. Fedoruk had not attempted suicide, was not medically unavailable for trial due to presently being comatose or in a hospital, and there was not significant evidence that he was incompetent to stand trial at the time the Court chose to deny defense counsel's motion for a mistrial and proceed with closing arguments.

The trial court properly denied Fedoruk's motion for a mistrial as Fedoruk did not show that he was incompetent and unable to assist in his defense; his attorney failed to make an offer of proof or request an offer of proof be made, and failed to establish any facts other than those made known by the verbatim report of proceedings, which clearly show the judge and prosecutor, and for the majority of the time his own counsel, believing Fedoruk's behavior to be due to anger or upset about a witness' testimony and with how the trial was proceeding. As Fedoruk had the burden of establishing a legal basis and reason for granting a mistrial and

failed to do so, he cannot now argue the trial court improperly denied his unsupported motion for a mistrial.

Fedoruk also frames this issue as one in which the trial court did not give sufficient deference to defense counsel's opinion on Fedoruk's competence. However, defense counsel's opinion concerning a client's competence is not determinative and it is one of many factors the court can weigh in determining whether a defendant's competency is at issue. *State v. Harris*, 122 Wn.App. 498, 94 P.3d 379 (2004). The determination of whether a competency examination should or should not be ordered rests within the broad discretion of the trial court. *State v. Heddrick*, 166 Wn.2d 898, 215 P.3d 201 (2009). A trial court should consider the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports, and the statement of counsel in determining whether to order a competency evaluation. *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967). From the statements made by the trial court on the record, it is clear the court was aware of Fedoruk's history, (and indeed this judge had previously presided over prior hearings involving competency, *See* CP 84, 101, 140, 145, 160, 162), and considered Fedoruk's appearance, demeanor and conduct, as well as counsel's stated concerns. The trial court properly evaluated this situation, and the determination of whether Fedoruk was remaining competent was

an ongoing issue that the court continuously checked in on. The trial court in no way abused its discretion here.

In *In re Fleming*, the Court on Appeal found the trial court did not abuse its discretion in not ordering a competency evaluation of the defendant because the trial court was not presented sufficient information to cause doubt as to Fleming's competence. *In re Fleming*, 142 Wn.2d 853, 861-64, 16 P.3d 610 (2001). A trial court need only inquire further into a defendant's competence if it first makes a threshold determination that there is reason to doubt his competence. *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). A motion to determine competency is not of itself sufficient to raise a doubt concerning competency. *Seattle v. Gordon*, 39 Wn.App. 437, 441, 693 P.2d 741 (1972).

In *Lord, supra*, the defendant told a corrections officer that he had had a conversation with God and the devil and the devil asked him to drink a cup of his own blood to prove his innocence. *Lord*, 117 Wn.2d at 901. The defendant also indicated he should be restrained as he wasn't sure what he would do to his attorney if he wasn't; jail staff also saw the defendant ranting and raving. *Id.* The trial court found that there was not sufficient evidence presented to trigger a competency hearing. *Id.* The court indicated it had observed the defendant throughout the trial and heard him respond to questions and interact with counsel and the court did

not find sufficient evidence to hold a hearing on the issue. *Id.* On appeal, the Court affirmed the trial court's decision not to allow a competency hearing as insufficient evidence had been presented to put doubt onto the defendant's competence.

In comparison to *Lord, supra*, Fedoruk counsel presented nearly no evidence to support a claim of incompetency. No offer of proof was made or requested, no evidence was proffered on the matter, and the trial court repeatedly indicated its opinion from watching Fedoruk that there was insufficient evidence to show he was incompetent. As the trial court has vast discretion in these issues, and is in the best position to make these decisions, given their front and center observations of the defendant over a protracted period of time. This Court should defer to the trial court's clearly reasoned and appropriate judgment of Fedoruk's competence in this case and find the trial court did not abuse its discretion in its handling of Fedoruk's claimed incompetence and behavioral issues.

II. The trial court properly removed Fedoruk from the courtroom for disruptive behavior.

Fedoruk became disruptive in the courtroom nearing the end of trial, and the trial court eventually removed him from the courtroom for disruptive behavior. The trial court understood the appropriate standards under CrR 3.4(e) for removal of a disruptive defendant and reasonably and

fairly applied this law to Fedoruk's case. The trial court did not deny Fedoruk his right to be present.

Trial courts have discretion to remove a defendant due to his disruptive behavior at trial. Under CrR 3.4(a), the defendant shall be present at trial except as excused or excluded by the court for good cause shown. The right to be present at trial is thus not an absolute right and a defendant may be removed from the courtroom for disruptive behavior. *State v. DeWeese*, 117 Wn.2d 369, 381, 816 P.2d 1 (1991). Removal of a disruptive defendant is within the discretion of the trial court. *Id.* To remove a defendant for disruptive behavior, the trial court must first warn the defendant that his conduct could lead to removal, the conduct must be severe enough to justify removal, the court should consider whether removal is the least severe alternative, and the defendant must be allowed to return if his behavior improves. *State v. Chapple*, 145 Wn.2d 310, 320, 36 P.3d 1025 (2001).

“Courts have only occasionally held that removal of a disruptive defendant was not appropriate.” *State v. Chapple*, 145 Wn.2d at 322. Where a defendant is represented by counsel, mere interruptions of the proceeding are enough to remove a defendant. *Id.* at 322-23 (citing *Badger v. Cardwell*, 587 F.2d 968, 974-75 (9th Cir. 1978) and *United States v. Kizer*, 569 F.2d 504, 506-07 (9th Cir. 1978)). This is because “a trial judge

should be afforded extensive discretion in determining how to deal with a disruptive criminal defendant.” *Chapple*, 145 Wn.2d at 322. Appellate courts “give substantial deference to the trial judge’s decisions about courtroom management.” *Illinois v. Allen*, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). And a trial court’s decision to remove a disruptive defendant shall not be reversed absent a showing of a manifest abuse of discretion.

The trial court in Fedoruk’s case followed the law for removing Fedoruk due to disruptive behavior. The trial court warned the defendant that his talking during discussions and the trial court’s reading of the instructions could lead to removal; at the time of the motion for a mistrial, the court had removed the defendant due to a scene he created when he slouched so far down in his chair that he fell off his chair and was unable to secure his own person because of the restraints he had around his legs. *See 9/29/17 RP at 53-55*. The trial court considered whether Fedoruk’s behavior was due to a potential competency issue, but in analyzing the totality of the circumstances, and especially given the timing of Fedoruk’s change in demeanor – coinciding with a witness’ testimony with which Fedoruk disagreed – the trial court reasonably concluded that Fedoruk’s actions were more likely behavior-related as opposed to a sign of incompetency. *See id.* Fedoruk’s attorney expressed some concern over

whether Fedoruk had deteriorated to the point of being unable to assist in his defense, but his concern was speculative, and defense counsel did not attempt to offer evidence that Fedoruk's behavior was consistent with a decline in his mental functioning and competence. Instead, Fedoruk's attorney only equivocally stated Fedoruk's behavior was different, but then the trial court and prosecutor noted that the timing of Fedoruk's outbursts were more consistent with an emotional response and displeasure at the testimony of a witness whom Fedoruk believed was not being truthful.

Fedoruk specifically argues that the trial court did not impose the least severe option available for controlling the courtroom and that by removing Fedoruk from the courtroom the trial court violated his right to be present. However, Fedoruk's arguments for alternatives are not persuasive and in some instances are directly contradicted by the evidence in the record. Fedoruk argues one less severe alternative would have been to grant a one night continuance at the time he complained of back pain, and that would have cured all the behavioral issues. This argument fails to consider the actual proceedings and that Fedoruk did indeed receive the break a one night continuance would have given and still did not confine his behaviors to what was appropriate in the courtroom. Specifically, Fedoruk argues that a one night continuance would have enabled him to

recover from physical pain and that “[a] rested, and medicated, defendant might well have been able to maintain his composure.” Br. of Appellant, p. 36. However, Fedoruk did return to the jail Wednesday afternoon as he voluntarily waived his presence, and he was medicated, and yet still returned Thursday to trial just to lose his composure when a witness for the state testified in a way that upset him. Clearly the trial court granting a one night continuance would have done nothing as Fedoruk was already in a position as if he had been granted that continuance.

Fedoruk also argues that the trial court should have ensured Fedoruk was taking his medications, or have ordered a competency evaluation. As discussed above, the trial court did not abuse its discretion in not ordering a competency evaluation, and there is no legal support for the idea that a judge should inquire into whether a defendant is taking prescribed medications. Further, Fedoruk’s own counsel indicated during the afternoon on the day before closing arguments that Fedoruk was competent at the time. 9/28/16 RP at 65. The following day, counsel continued to indicate that what concerned him about his client was his reactions to the witnesses, but that Fedoruk was able to understand him, he was only worried about Fedoruk’s ability to maintain himself in the courtroom. 9/29/16 RP at 11. When the trial court engaged Fedoruk in a colloquy about maintaining his composure going forward the defendant

said he was fine. 9/29/16 at 12-13. It is clear from defense counsel's statements, the prosecutor's statements, and the judge's findings on the record that they all believed Fedoruk to be competent, but having an emotional reaction, such as anger and upset, to what he perceived to be a lying witness. 9/29/16 RP at 10-13. The trial court properly found at this time that Fedoruk's behaviors were not an issue of competence, but rather were properly evaluated as a courtroom disruption issue. The trial court attempted to give Fedoruk a significant number of chances, breaks, and opportunities to maintain himself prior to exercising its discretion in removing Fedoruk from the courtroom. The trial court absolutely imposed the least restrictive alternative given Fedoruk's behaviors and the totality of what the trial court observed in court.

Fedoruk's right to be present was not infringed upon. Prior to removing the defendant for being disruptive, the trial court warned him numerous times that he was in danger of being removed due to his behavior. It became clear that Fedoruk's continued interruptions of the proceedings justified removal, and the trial court kept Fedoruk nearby and checked in on his status to determine whether he was ready and able to return to court, thus granting the least severe option after Fedoruk refused, multiple times after multiple warnings, to abide by the rules of the courtroom for courtroom decorum. The trial court absolutely employed the

least restrictive means possible, trying to allow the defendant back into the courtroom as soon as he would keep his outbursts from becoming inappropriate. That he was never able to do so does not equate to an overly severe remedy. The trial court must be afforded broad discretion in dealing with a disruptive defendant and this court's decision was made based on the appropriate legal standard and reasoned application of that standard to the situation at hand. The trial court did not abuse its discretion and this Court should affirm the trial court's actions here.

III. The Trial court did not proceed with Fedoruk's trial while he was incompetent in order to prevent a calendar conflict and the trial court properly denied Fedoruk's motion to continue.

Fedoruk argues the trial court was overly concerned with its calendar and keeping the jurors longer than anticipated and let this concern prevent him from guaranteeing Fedoruk his constitutional right to be competent during trial. From the discussion above, the State continues its argument that Fedoruk was competent through the end of the trial, and that the trial court never used concerns over scheduling to prevent it from ordering any necessary competency evaluations.

The trial court was concerned with its calendar but only in as much as counsel asked for an 8 day continuance mid-trial due to the defendant suffering back pain, for which he had never sought treatment. When

determining a defendant's motion to continue, the calendar of the court and availability of witnesses are appropriate considerations to take into account. The trial court properly did so here and found that the difficulty in scheduling the professional witnesses who were being flown in and traveling from other locations, was sufficient to outweigh the defendant's desire for a continuance of the case due to back pain.

Appellate courts review a trial court's denial of a motion to continue for abuse of discretion. *State v. Hampton*, 184 Wn.2d 656, 670, 361 P.3d 734 (2015). "A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." *Id.* (quotations omitted). The court's decision must be supported by facts on the record and reached by applying the correct legal standard. *Id.* A decision is "manifestly unreasonable" if the court reaches a decision "outside the range of acceptable choices" and "adopts a view that no reasonable person would take." *Id.* at 670-71 (citations omitted).

The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *State v. Kelly*, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982). This decision is "discretionary because the court must consider various factors such as diligence, materiality, due process, a need for an orderly procedure and the possible impact on the result of the trial." *Id.* (citing *State v. Eller*, 84 Wn.2d 90, 524 P.2d 242

(1974)). “The decision to deny [a] defendant a continuance will be disturbed on appeal only upon a showing that the defendant was prejudiced or that the result of the trial would likely have been different had the motion been granted.” *Id.* (citing *Eller*, supra; *State v. Turner*, 16 Wn.App. 292, 555 P.2d 1382 (1976)); *State v. Staten*, 60 Wn. App. 163, 172-73, 802 P.2d 1384 (1991). An appellate court examines the totality of the circumstances, and in particular the reasons presented to the trial judge when requesting the continuance, to determine whether the continuance resulted in prejudice or otherwise denied the defendant the right to a fair trial. *Id.* at 114-15.

A trial court may consider its calendar when deciding whether to deny a motion to continue. *State v. Castillo-Lopez*, 192 Wn. App. 741, 747-48, 370 P.3d 589 (2016) (stating “[t]rial courts have discretion to manage their docket and deny continuances in order to do so.”). Specifically, a court may consider “whether the request came at a point sufficiently in advance of trial to permit the trial court to readily adjust its calendar.” *Hampton*, 184 Wn.2d at 669. Furthermore, a trial court may also consider whether the motion for a continuance was brought to delay trial. *Staten*, 60 Wn. App. at 172-73.

Fedoruk cites to *United States v. Brown*, 785 F.3d 1337 (9th Cir. 2015) to argue that it is an abuse of discretion for a trial court to consider

its calendar. Br. of Appellant, p. 38. However, in reviewing *Brown* the Ninth Circuit concluded that the trial court had not denied a motion to continue due to concerns for delay or the demands of its calendar based on the record. *United States v. Brown*, 785 F.3d 1337, 1349 (9th Cir. 2015). Thus *Brown* does not support the argument that considering the efficient administration of justice is an abuse of discretion in this circumstance.

Fedoruk never discusses, nor can he show, prejudice from the trial court's denial of his motion to continue the case mid-trial. In an earlier part of his brief, Fedoruk argues that had a continuance been granted then Fedoruk could have dealt with his back pain and been able to maintain decorum while at trial, and maintain his competence. However, there is no support for this argument in the record, and in fact the evidence showed that Fedoruk taking time off from the trial to rest, get medication for his back, etc., was not helpful here.

The court never discussed the defendant's competency in its analysis of whether it should grant a continuance; these issues only overlapped in so far as the trial court was aware that the trial stressed the defendant out and that his competency waxed and waned and therefore they may be on a short string to complete the trial so as not to drag it out and make life more uncomfortable and unbearable for the defendant.

At the time of counsel's request for a continuance, defense had no concerns about Fedoruk's competence, and still later assured the court that Fedoruk was competent. The trial court did not prioritize its calendar over the defendant's right to be competent. Instead, the trial court analyzed the issue as one of physical discomfort for the defendant due to his back pain, which is the exact way defense counsel framed the issue at the time of his motion to continue. The trial court was not rigid or unrealistically attempting to make the trial go "perfectly" as Fedoruk now argues, but did in fact give Fedoruk a long, over two hour, lunch break to give him time to visit the jail medical staff to see if there was any relief they could provide for his back pain. The record shows Fedoruk did not ask to see medical staff to address his back pain. In this situation, it is entirely reasonable, and entirely within its discretion, for the trial court to decide not to continue the matter for back pain, and especially not for the 8 days defense requested, given all the other considerations the court must give weight to, such as undue delay, the victim's family's interest in completion, the harm to the jurors in extending a case and the potential that they would not be able to maintain the entire panel, and also the witnesses' schedules. The trial court did not abuse its discretion in denying Fedoruk's motion to continue.

IV. Fedoruk was properly shackled and this did not prejudice him.

Fedoruk claims he was improperly shackled during trial and that the interpreters moved position in the courtroom thus prejudicing him. The jury never saw Fedoruk shackled and there is insufficient support in the record to show that the movement of the interpreters prejudiced Fedoruk. The trial court properly allowed Fedoruk to be shackled in such a way as to allow him to remain present in the courtroom despite disruptive behavior, and to maintain the safety and decorum of the courtroom.

The presumption of innocence is a basic component of a fair trial. *State v. Jaime*, 168 Wn.2d 857, 861, 233 P.3d 554 (2010). To preserve this presumption in front of a jury, the defendant is “entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man.” *Id.* at 861-62 (citation omitted). Measures that suggest a defendant is particularly dangerous or guilty threaten his right to a fair trial because they erode the presumption of innocent. *Id.* at 862. These practices are inherently prejudicial. *Id.*

However, under certain circumstances shackles or other restraints may be necessary where the defendant is found to present a serious safety

risk. *Id.* at 865 (citing *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)). A trial judge may restrain a defendant when necessary “to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent escape. *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981). An appellate court reviews the imposition of courtroom security measures that are necessary to maintain order and prevent injury for an abuse of discretion. *Jaime*, 168 Wn.2d at 865 (citing *Hartzog*, 96 Wn.2d at 400). The decision to restrain a defendant during trial must be based on specific facts set forth in the record regarding the defendant. *Jaime*, 168 Wn.2d at 866.

A trial judge has “broad discretion to provide for order and security in the courtroom and to shackle the defendant if such measures are necessary.” *State v. Breedlove*, 79 Wn. App. 101, 114, 900 P.2d 586 (1995). Where there are legitimate reasons to believe that shackling a defendant’s ankles is a necessary precaution, a court does not abuse its discretion by doing so. *Id.* When deciding whether to restrain a defendant, the court should consider

[T]he seriousness of the present charge against the defendant; defendant’s temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and the evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of

attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Hartzog, 96 Wn.2d at 400. Considering only one of these factors is arguably error. *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998).

If a defendant is unconstitutionally shackled, appellate courts in Washington review the error to determine if it is harmless. *Hutchinson*, 135 Wn.2d at 888. In order to show that the error was not harmless, a defendant must show that “the shackling had a substantial or injurious effect or influence on the jury’s verdict.” *Id.* There is no prejudice to the defendant when a jury never sees him in shackles. *Id.* In *Hutchinson*, the Washington Supreme Court determined that there is no prejudice to the defendant and any error in the decision to shackle is harmless where the method of restraint prevented the jury from seeing that the defendant was restrained, the record contains no evidence that jurors saw the defendant in restraints, and the trial judge assures that the restraints are not visible to the jury. *Id.*

The facts of Fedoruk’s case fall squarely within the holding of *Hutchinson, supra*. There, the record showed that the trial court assured the jury would not see the defendant in restraints, and there was no

evidence in the record that the jurors ever saw the defendant in restraints. *Hutchinson*, 135 Wn.2d at 888. As in *Hutchinson*, there is no evidence the jury saw Fedoruk in restraints, the trial court assured that the setup of the courtroom and the design of the table where Fedoruk sat was such that the jury would not be able to visualize the leg restraints. As the jury never saw Fedoruk in any restraints he cannot show prejudice. *Id* (citing *Rhoden v. Rowland*, 10 F.3d 1457, 1459-60 (9th Cir. 1993)). Fedoruk does not argue how the shackling prejudiced him or why the holding in *Hutchinson* should not apply. Accordingly, this Court should find that the trial court took appropriate precautions to ensure the jury never saw Fedoruk in restraints and that the decision to have Fedoruk in restraints was an attempt by the trial court to ensure Fedoruk's right to remain present in the courtroom despite his disruptive behavior, essentially employing a less restrictive alternative than exclusion, as Fedoruk previously argued the court should have done more.

Fedoruk's argument that moving the interpreters was prejudicial is without any support. The record does not contain any facts from which this Court could conclude any particular distance that the interpreters were moved. Furthermore, it is reasonable to assume they were still close enough to effectively translate the proceedings as they occurred. Fedoruk also, in one sentence, claims the shackles and movement of the

interpreters prevented him from consulting with counsel, but there is no evidence in the record to support this and this type of claim may be more appropriate in the form of a personal restraint petition where Fedoruk can present evidence to support such a claim. The record below is wholly absent as to any prevention of Fedoruk of his access to his attorney, and the record below makes no showing as to how the interpreters were moved and their positioning in the courtroom after the movement. This Court simply cannot presume any facts one way or the other and without additional evidence the record is not sufficient for this Court to review this issue. Fedoruk should file a personal restraint petition, appending further evidence to support those claims.

V. The State does not intend to seek appellate costs.

Fedoruk asks this Court not to award appellate costs in this matter; the State has no intent on seeking appellate costs and therefore does not object to the Court ruling no appellate costs should be imposed.

CONCLUSION

The trial court's implicit findings that Fedoruk remained competent were reasonable and based on the totality of the circumstances known to the court. The trial court properly allowed the trial to continue as Fedoruk had not supported his claim of incompetence and the court's

conclusion Fedoruk's behavior was due to anger, upset, or other emotion surrounding the testimony of witnesses was reasonable. The trial court did not abuse its discretion in the variety of decisions it made surrounding Fedoruk's request for a continuance, motion for a mistrial, his disruptive behavior, his competence, and the decision to restrain him during trial. Fedoruk's conviction for Murder in the Second Degree should be affirmed.

DATED this 3 day of November 2017.

Respectfully submitted:

By:



RACHAEL R. PROBSTFELD, WSBA #37878
As Special Deputy Prosecutor for Cowlitz County
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

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