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Division II
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NO. 50517-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES R. VINES,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLALLAM COUNTY

The Honorable Erik Rohrer, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to observe adequate procedural safeguards regarding appellant's competency to stand trial

2. Appellant was deprived of his constitutional right to effective assistance of counsel when defense counsel, being aware of compelling information that appellant was suffering severe mental health problems prior to and throughout the trial process, failed to seek a competency evaluation.

3. The trial court erred by adopting the following statement contained in the statement of probable cause, which the court designated as a finding of fact:

I heard the wheels spinning as James shifted into drive and was attempting to flee in his vehicle toward Sergeant Hollis's patrol truck.

Clerks' Papers (CP) 14, 163.

4. The conviction for attempting to elude a pursuing police vehicle violates due process because the evidence was insufficient to allow any rational trier of fact to find the elements beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court had been informed about appellant's bizarre behavior in pretrial proceedings, had received numerous lengthy letters from the appellant expressing nonsensical ideas and arguments, and had been told by the appellant's first counsel that competency was a potential issue. Additionally, before sentencing the trial court continued to receive letters from

the appellant. After conviction and prior to sentencing, defense counsel moved for a mental health evaluation for the appellant. Despite this, the trial court never ordered a competency evaluation. Is reversal required because the trial court abused its discretion in failing to order an evaluation of appellant's competency to stand trial as mandated by RCW 10.77.060 where there was reason to doubt Mr. Vines' competency based on his consistent interruptions of the court and counsel, his irrational, compulsive behavior of interrupting the court and insisting on speaking, the fact that he had previously been found not guilty by reason of insanity, his compulsive habit of writing letters to the judge containing details of the case and his previous cases, and apparent inability to control his behavior despite repeated admonishments by the court? Assignments of Error 1 and 2.

2. Prior to trial defense counsel suspected appellant, who had previously been found not guilty by reason of insanity in another matter, was suffering from mental health problems. Mr. Vines' first counsel notified the court that competency was a potential issue that may be raised by the appellant's new attorney. Defense counsel did not request a competency evaluation despite appellant's continued bizarre behavior prior to and during trial. Did counsel fail to provide effective representation? Assignment of Error 2.

3. The Sixth and Fourteenth Amendments along with Article I, section 22 require the State prove each element of the offense beyond a

reasonable doubt? Evidence is insufficient if no rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. Was there insufficient evidence to prove the charge of attempting to elude a pursuing police vehicle where no evidence was introduced establishing that the officer was “pursing” Mr. Vines or that the police vehicle was equipped with a siren as required by statute? Assignment of Error 4.

C. STATEMENT OF THE CASE

1. Procedural facts:

James Vines was charged in Clallam County Superior Court by information filed October 26, 2016, with attempting to elude a pursuing police vehicle. Clerk’s Papers (CP) 159. RCW 46.61.024. The State alleged that on October 21, 2016, Mr. Vines willfully failed or refused to immediately stop his vehicle and drove in a reckless manner while attempting to elude a pursuing police vehicle after having been given a visible or audible signal to stop, by a uniformed officer whose vehicle was equipped with a lights and sirens. CP 159.

a. *CrR 3.6 hearing*

The court heard a CrR 3.6 motion hearing on January 24, 2017, challenging the initial investigatory stop. Report of Proceedings (RP)¹ at 41-

¹The record of proceedings consists of the following transcribed hearings: October 24, 2016, October 26, 2016, November 4, 2016, December 2, 2016, December 23, 2016, January 12, 2017, January 13, 2017, January 24, 2017 (CrR 3.6 hearing), February 10, 2017, February 17, 2017, March 3, 2017, March 27, 2017 (CrR 3.5 motion, motion in limine), March 28, 2017 (jury trial, day 1), March 29, 2017 (jury trial, day 2), April 20, 2017, April

51. Clallam County Deputy Sheriff Paul Federline was dispatched to a call regarding an alleged assault by Benjamin Wyatt at 266 Deer Park Road, Port Angeles, Washington. RP at 41. Deputy Federline saw a vehicle that was leaving the property and contacted the occupants, who said that they thought Mr. Wyatt may have left in another vehicle. RP at 42. After contacting the alleged victim, John Hann, the deputy, who was on foot, saw a Toyota Camry come up the driveway from Deer Park Road and thought that the car may be driven by or contain Mr. Wyatt and that he was returning to the house. RP at 42. The car passed the deputy, but he did not see who was driving. Deputy Federline walked behind the vehicle and yelled “stop, police.” The Camry accelerated, made a three-point turnaround in the driveway and then went past the deputy a second time. Deputy Federline stated that as the car went past he could see that the driver was James Vines, who was known to the deputy. After, the Camry turned around and went back down the driveway toward Deer Park Road and toward Sgt. Hollis, who was driving up the driveway toward the house in a police vehicle. RP at 42. After stopping in front of Sgt. Hollis’ vehicle, the Camry traveled in reverse back up the driveway for several seconds and then stopped. Defense counsel argued that Deputy Federline’s attempted investigatory stop was unlawful because the officer had no reason to believe that Mr. Wyatt was in the Camry. RP at 42-43. The prosecution argued that (1) there was

27, 2017 (sentencing), May 2, 2017, May 19, 2017, and June 2, 2017.

no seizure because the vehicle accelerated without stopping, and (2) the lawfulness of the initial stop is not an issue in cases involving attempting eluding of a pursuing police vehicle. RP at 44. The court denied the motion to suppress. RP at 51.

The court also heard a CrR 3.5 motion and found that Mr. Vines' statements to law enforcement were admissible. RP at 87-99.

Subsequent to the CrR 3.5 and 3.6 motion hearings, findings of fact and conclusions of law were entered on June 2, 2017. RP at 51; CP 14, 26.

b. Facts pertaining to Mr. Vines' mental health problems

The court and counsel were aware of Mr. Vines' mental health problems. Throughout the pre-trial proceedings, trial, and after conviction, Mr. Vines showed signs that he was suffering from severe mental illness. Mr. Vines consistently asked the court for a mental health evaluation during court appearances and also in numerous letters to the court. RP 25; CP 33, 35, 39, 56, 61, 65, 69, 117, 119, 121, 122, 144. Mr. Vines had been found not guilty by reason of insanity in a previous case in 2010. At a hearing on December 23, 2016, after the court appointed new counsel, Mr. Vines asked for a mental health evaluation. RP at 25. His attorney- who had just been permitted to withdraw- stated that a competency evaluation was "probably going to happen with new counsel." RP at 25.

Mr. Vines' counsel asked for a mental health evaluation for her client at a hearing after conviction on March 17, 2017. RP at 82. Mr.

Vines, who frequently and consistently interrupted both the court and counsel during proceedings before and after trial, stated that he believed that he was competent to go to trial, but that he believe[d] there's issues that come into sentencing, when it comes to sentencing that I . . .” RP at 82-83. The court made no further inquiry regarding the issue, and instead informed Mr. Vines that there may not be sentencing and that they would not “have to have this discussion.” RP at 83. Trial counsel did not file a written request for an evaluation and made no further request for a competency evaluation until after her client was convicted. RP at 83.

Both prior to and after conviction for attempted eluding, Mr. Vines wrote numerous lengthy letters to the court explaining that he was stabbed 57 times and had his throat slashed in 1994, that he did not receive crime victim compensation, his history of panic attacks, that he spent nine months in Western State Hospital, his mistrust of the courts in general, and his version of the facts of the pending case. CP 117, 119, 121, 122, and 144. In his letters he showed difficulty understanding the judge's role in the proceeding, discussed aspects of the pending case, and frequently referred to his mental health difficulties. In one of two letters dated March 2, 2017, he discussed (1) a previously-adjudicated sex offense case, (2) requested a psychological evaluation, (3) asked other court to scheduled “a fact-finding hearing on this trumped up change of “attempt to elude”” and that the judge subpoena a specific witness and three officers involved in the

incident, and (4) requested that a dash cam video and police radio traffic be “subpoenaed,” CP 121, 122. A second letter addressed to Judge Melly was filed March 2, discussed the sex offense and incident in which he was stabbed 57 times. CP 121. In a letter to Judge Melly filed March 7, Mr. Vines (1) complains about his attorney Karen Unger, (2) again writes about the incident in which he was stabbed 57 times, (3) discusses the incident which resulted in his plea to rape in the third degree and his remorse for having accepted the plea agreement, and (4) engages in a long recitation of attorneys he has known in other cases. In a letter filed March 3, Mr. Vines asked Judge Melly for a polygraph test. CP 117.

Following the CrR 3.5 ruling on March 27, 2017, the State noted that Mr. Vines was writing copious letters to the court and addressed the possibility that the defense was going to rely on a diminished capacity defense. RP at 100. Defense counsel emphasized that the defense was general denial and that the defense was “focused on what happened,” and not whether the alleged offense was “related to a mental defect or something.” RP at 101.

After expressing concern that Mr. Vines will take “the stand he may just say, if he does, anything he wants to, uncontrollably.” RP at 101. The court responded by stating that Mr. Vines is:

uncontrollable. Uncontrollable means he can't stop. I can tell him 35 times not to do it, he'll do it anyway, I know Mr. Vines well enough to say that that's the one constant here, he'll blurt things out, regardless of what you say, regardless of

what I say, regardless of what Ms. Unger says.

RP at 101.

During this exchange, defense counsel acknowledged that Mr. Vines “has a mental health issue.” RP at 103.

At a pretrial hearing, Judge Rohrer stated that he had received letters from Mr. Vines and stated that he did not think that the letters contain “things I should know about [,]” and asked Mr. Vines why he kept sending letters to the court. RP at 83.

Following conviction on March 29, 2017, Mr. Vines continued to write to the court. Mr. Vines wrote to Judge Rohrer in a letter dated April 6, 2017, stating that his attorney did not subpoena a tow truck driver who would testify reading the location of his car when it stopped, and that Ms. Unger did not talk to him. CP 65. He wrote to Judge Rohrer again on April 11, 2017, using large block letters, asking the judge for a polygraph and stating that he was “framed” by the police. CP 61. He wrote to Judge Rohrer on April 21, 2017, again asking for a polygraph and alleging that the police lied and that even his own witness lied, after being “threatened” by the police. CP 56. A similar letters continued on April 28, 2017. CP 39.

c. Verdict, motion for mental health evaluation, and sentencing

The jury found Mr. Vines guilty of attempted eluding of a pursuing police vehicle as charged. RP at 399; CP 78. At a hearing on April 20, 2017, defense counsel said that a mental health evaluation would not serve

as a basis for a mitigating factor for a sentence below the standard range and also stated “I don’t believe we had a competency issue when this matter first came before the court.” RP at 417, 418. Mr. Vines, however, said that he had “been asking for a mental health evaluation for five months” and that his attorney had only seen him at the jail once, and that was for “three to four minutes.” RP at 418. Defense counsel, without filing a written motion, asked the court for a mental health evaluation following entry of the verdict. RP at 405, 414. The court ruled that the relevant time for an evaluation would have been in October 2016 when the case started and denied the motion for an evaluation at public expense. RP at 424, 425.

After being denied an evaluation on April 20, 2017, Mr. Vines stated:

They see it all happen all the time. This is a gross injustice. I’ve already written the attorney general. I’m going to write to the President. I’m gonna write until the day I die, to expose this mockery.

RP at 430. As Mr. Vines continued to talk, Ms. Unger prepared a handwritten motion for evaluation and handed it to court. RP at 431; CP 60. The motion was heard prior to sentencing. RP at 431, 434-39. The court denied the request for an evaluation, noting that Mr. Vines had had an evaluation in a previous Clallam County case and was found to be competent in September 2014. RP at 438.

Mr. Vines had a standard range of 22 to 29 months and an offender

score of “9.” RP at 444. CP 42. Defense counsel argued for a sentence at the low end of the standard range; the State requested a sentence of 29 months. RP at 440, 442. The court sentenced Mr. Vines to 26 months and imposed legal financial obligations including \$500.00 victim assessment, and \$200.00 filing fee, and \$100.00 DNA collection fee. CP 48-49.

Timely notice of appeal was filed May 2, 2017. This appeal follows.

2. Trial testimony:

The case came on for trial on March 28 and March 29, 2017, Judge Rohrer presiding. RP at 123-415.

Deputy Paul Federline was dispatched to a house on Deer Park Road on October 21, 2016, following report of an assault. RP at 243-45. At the property he was told by two people leaving in a car that the suspect, Ben Wyatt, had left the property in a vehicle. RP at 245.

The residence has a curving drive way approximately 300 feet in length leading to Deer Park Road. RP at 283. Deputy Federline knew the residents of the house and had previously contacted them during his search for Mr. Wyatt. While searching for Mr. Wyatt on foot, Deputy Federline saw a Toyota Camry approaching the house on the driveway from Deer Park Road. RP at 246. He testified that he thought the approaching Camry could be Mr. Wyatt returning to the house. RP at 246. The Camry passed him and he loudly shouted “stop, police,” and the car, which had been traveling a normal speed, “accelerated down the hill”, performed a three

point turn-around then then proceeded back down the driveway back in the direction of Deer Park Road. RP at 246, 250. The deputy ran behind the vehicle and gave the license number and description of the vehicle to dispatch. RP at 247. He recognized the driver as James Vines, who had an outstanding arrest warrant. RP at 249, 274. Deputy Federline stated that he “had to move out of the way” for the vehicle to go past him. RP at 250.

Deputy Federline stated that Mr. Vines accelerated up the hill, traveling toward Deer Park Road. Clallam County Deputy Sheriff John Hollis was traveling on the driveway in a SUV toward the house. RP at 251. Deputy Federline stated that Mr. Vines appeared to be trying to go around Deputy Hollis’ approaching vehicle. RP at 252. As he approached the oncoming police vehicle driven by Sgt. Hollis, Mr. Vines stopped the Camry close to Sgt. Hollis’ bumper, and then reversed his vehicle back up the driveway toward the house. RP at 253. Deputy Federline, who was still on foot, ran down the driveway toward Mr. Vines’ Camry after it stopped bumper to bumper with Sgt. Hollis’ vehicle and Mr. Vines then reversed the Camry and drove back up the driveway. RP at 252. Deputy Federline stated that Mr. Vines “almost hit me with his vehicle” and that he had to “dive out of the way, into the wood line”. RP at 252. Mr. Vines’ vehicle continued in reverse down the driveway and then came to a stop. RP at 253, 269.

Deputy Federline testified that the Camry traveled 55 feet in reverse.

RP at 259. Defense counsel moved for mistrial following Deputy Federline's testimony regarding his estimation of the distance of travel on the driveway, arguing that the photos introduced of the scene and the deputy's contention that the car traveled 55 feet was not provided until the previous day. RP at 259-60. The court ruled that Deputy Federline could testify as to his observation of the distance involved. RP at 262, 267-68.

Sgt. Hollis was in an SUV equipped with overhead lights and wearing a sheriff's uniform. RP at 305. Deputy Federline transmitted to Sgt. Hollis information that a car was leaving the residence where he was looking for Mr. Wyatt, and that the car needed to be stopped "to identify who was leaving." RP at 306. While on the driveway at the top of the hill, Sgt. Hollis stated that he could hear Deputy Federline yell "stop. Police" and then saw a small car approaching his SUV. He stated that he turned on his overhead lights, and the approaching car went to the left and Sgt. Hollis "mirrored" the driver's movement in order to block the car. RP at 307. He also pointed a spotlight at the approaching car. RP at 308. The approaching car stopped inches from the SUV's bumper. RP at 301, 309. Sgt. Hollis stated that after stopping, Mr. Vines reversed the vehicle and "drove further down the hill." RP at 309. The Camry stopped near a parked green Explorer. Sgt. Hollis testified that after stopping, he drove the police SUV "right up bumper-to-bumper" with the front of the stationary Camry. RP at 310. He stated that the car's front wheel drive wheels were spinning, and

the car appeared to be stuck in mud. RP at 310.

When asked if he followed him, Sgt. Hollis said that he did follow Mr. Vines after he drove his car in reverse but was unclear if the Camry was still moving when Sgt. Hollis followed the path of the Camry down the driveway:

A: No, I was getting ready to get out, so I wasn't, exactly, on the ball, with that, but he was able to back up, before me, and then. .

Q: And then you followed him down?

A: Followed him right down.

RP at 323.

After pulling up to the stopped Camry, Sgt. Hollis got out of his vehicle and ordered Deputy Federline to break out the passenger side window because the door handle did not open the passenger door. RP at 269. Sgt. Hollis had his gun at a "low ready" position and gave commands to Mr. Vines. RP at 310. Deputy Federline used his flashlight to break a window in the car and after "a pretty good yelling, screaming match," took him out of the car and handcuffed him. RP at 310.

Deputy Federline testified that after breaking the window, Mr. Vines put up his hands and said "okay, okay." RP at 269. Mr. Vines was removed from the car and was taken into custody. RP at 270. After being given his Miranda warnings, Deputy Federline asked Mr. Vines why he ran and he responded that he "was scared." RP at 270.

Sgt. Hollis estimated that Mr. Vines drove the Camry a distance the equivalent from his location in the courtroom to spectators seating in the

second row from the front of the courtroom. RP at 311. He testified that Mr. Vines drove in reverse on the driveway for “few seconds” and agreed with defense counsel that it could have been “five seconds.” RP at 321.

D. ARGUMENT

1. MR. VINES WAS DENIED DUE PROCESS WHEN THE TRIAL COURT FAILED TO ORDER A COMPETENCY EVALUATION

Criminal defendants have the fundamental right not to be tried while incompetent. *Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S.Ct. 89, 43 L.Ed.2d 103 (1975); RCW 10.77.050. And, “the trial court has a duty to establish a defendant’s competency...” *State v. Douglas*, 173 Wn. App. 849, 295 P.3d 812, 816 (2013). Mr. Vines demonstrated that a competency evaluation was necessary and the court erred by failing to refer Mr. Vines for the mandatory competency evaluation.

The conviction and sentencing of an accused while he is legally incompetent violates his constitutional right to a fair trial under the Fourteenth Amendment's due process clause. *State v. Wicklund*, 96 Wn.2d 798, 638 P.2d 1241 (1982); *Pate v. Robinson*, 383 U.S. 375, 377, 15 L. Ed. 2d 815, 86 S.Ct. 836 (1966); RCW 10.77.050. The constitutional standard for competency to stand trial is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and to assist in his defense with a rational as well as factual

understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

Washington law affords greater protection by providing that “[n]o incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050; *In re Personal Restraint of Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). A person is “incompetent” when he “lacks the capacity to understand the nature of the proceedings against him...or to assist in his...own defense as a result of mental disease or defect.” RCW 10.77.010(14); *State v. Lord*, 117 Wn.2d 829, 900, 822 P.2d 177 (1991).

Where there is reason to doubt a defendant's competency, the trial court is required to appoint experts and order a formal competency hearing. RCW 10.77.050. The statute directs: “Whenever...there is reason to doubt [a defendant’s] competency, the court on its own motion or on the motion of any party **shall** either appoint or request the secretary to designate a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.” RCW 10.77.060(1)(a) (emphasis added); RCW 10.77.060(3) (professional to evaluate whether the defendant suffers from a mental disease or defect and provide an opinion as to mental status and competency). “The failure to

observe procedures adequate to protect this [competency] right is a denial of due process.” *State v. O’Neal*, 23 Wn. App. 899, 901, 600 P.2d 570 (1979).

A trial court’s determination of whether a competency examination should or should not be ordered is reviewed for abuse of discretion. *State v. Heddrick*, 166 Wn.2d 898, 903, 215 P.3d 201 (2009); *State v. Lawrence*, 166 Wn. App. 378, 385-86, 271 P.3d 280 (2012). Discretion is abused when it is exercise on untenable grounds, for untenable reasons, or using an incorrect legal standard. *Id.*

Trial courts look at a variety of factors when determining whether there is reason to doubt a defendant’s competency, including medical reports, the defendant’s appearance and conduct, and statements of counsel. *State v. Marshall*, 144 Wn.2d 266, 280, 27 P.3d 192 (2001); *In re Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). Once “there is reason to doubt” the competency of the accused, the trial court is required to comply with RCW 10.77.060 and its failure to order an evaluation is a denial of due process. *Marshall*, 144 Wn.2d at 279 (citations omitted).

a. The trial court abused its discretion in failing to order an evaluation of Mr. Vine’s competency to stand trial.

Under RCW 10.77.060, when there is reason to doubt the competency of a defendant, the trial court must order an expert to evaluate the defendant’s mental condition. Following the evaluation, if the court finds the

defendant incompetent, it must stay the proceedings against the defendant. RCW 10.77.086(1)(a). The record here substantiates that the trial court had reason to doubt Mr. Vines' competency to stand trial.

Here, the record is characterized by statements and in particular voluminous letters to the court by the defendant that reflected possible psychosis, obsessive and delusional thinking, paranoia, and other potential mental defects or disorders that would prevent the defendant from understanding the proceedings or assisting in his own defense. Mr. Vines consistently told the court that he wanted a mental health evaluation, and his first attorney agreed, telling the court that a mental health evaluation was "probably going to happen with new counsel." RP at 25. The trial court was aware of enough facts regarding Mr. Vines' bizarre, inappropriate, seemingly compulsive behavior to prompt an extensive warning to him by the court about blurting things out and noting that he was "uncontrollable." RP at 101. Mr. Vines wrote numerous letters to the court asking for a mental health evaluation and habitually referred to an incident that took place on October 13, 1994, in which he was stabbed 57 and then slashed on the throat with three different knives, and how he was denied crime victim compensation after the case was adjudicated. He also frequently referred to a conviction for third degree rape and his regret in accepting a plea bargain and his

mistrust of the judicial system, based on foregoing, a reasonable person to have a legitimate doubt as to Mr. Vines' competency. The trial court observed Mr. Vines' bizarre behavior during pretrial hearings, which including constantly interrupting, and arguing his version of events. RP at 53, 71, 74, 76, 77, 78, 79, 83, 101.

Even if this Court finds the trial court did not have reason to doubt Mr. Vines' competency prior to and during trial, there is no question that by the time of sentencing, the trial court had reason to doubt his competency. Mr. Vines' letters to the court became even more prolific and even more bizarre; rearguing and disputing the facts presented at trial, asking for a mental health evaluation, and stating in a letter that his attorney Karen Unger said that "we don't need an evaluation, we already know he is deranged." CP 61, 65, 69. Some of the letters apparently refer to a hearing that took place on April 20, 2017, during which the following exchange occurred:

MS. UNGER: Your Honor, I know there was some discussion of getting a psych evaluation for Mr. Vines.

THE COURT: Right.

MS. UNGER: But I know there has already been an evaluation done of Mr. Vines in a previous case and I don't know, to be honest, how that would—well, first of all, if anything's changed. I think its 2010 case or 2012 case.

THE COURT: I know there's been at least one. I just don't remember.

MS. UNGER: And, frankly, reading, doing some research about

what mitigating factors would be for purposes of going below the guideline range, I don't see that as a basis to sentence outside the range. I realize that the factors can be somehow, there's not cast in stone, the ones that are set out, but Mr. Vines, I don't believe we had a competency issue when this matter first came before the court. There was not claim that he didn't understand what was going on, which would have addressed his competency.

RP at 416-17.

Instead of following the mandatory procedures provided for in RCW 10.77.060, the trial court simply proceeded with sentencing. This was an abuse of discretion. *Marshall*, 144 Wn.2d at 280.

Given the facts known to the trial court about Mr. Vines his chronic, overt, pervasive, consistent mental health issues, the court was required to order a full competency evaluation. There was clearly reason to doubt Mr. Vines' competency. As such, this matter should be remanded for competency proceedings that comply with 10.77 RCW.

The court's failure to do so violated RCW 10.77.050 and .060 and denied Mr. Vines his constitutional right to a fair trial. Thus, reversal is required. *Marshall*, 144 Wn.2d at 280.

2. MR. VINES WAS DENIED HIS RIGHT TO EFFECTIVE REPRESENTATION WHEN DEFENSE COUNSEL FAILED TO SEEK A COMPETENCY EVALUATION PRIOR TO CONVICTION.

In court and in his numerous letters to the judge, Mr. Vines repeatedly

asked for a mental health evaluation and his first counsel told the court that new counsel would probably request a competency evaluation. RP at 25.

It was not until after conviction and after repeated requests by Mr. Vines that defense counsel finally, at the eleventh hour, wrote a hand-written motion on document captioned “Minute Order” for an evaluation. CP 60.

In light of Mr. Vines’ severe mental health issues at the time began his trial, defense counsel should have sought a formal competency hearing. Counsel’s failure to take this reasonable step to ensure Mr. Vines’ due process right not to be tried or sentenced while incompetent constituted ineffective assistance.

Effective assistance of counsel is guaranteed by the United States Constitution Sixth Amendment and Washington State Constitution, Article I, Section 22. Ineffective assistance of counsel is established when the party asserting it shows (1) deficient performance and (2) resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1997). To show deficient performance, the party must show performance that fell below an objective standard of reasonableness, considering all the circumstances. *Thomas*, 109 Wn.2d at 226 (citing *Strickland*, 466 U.S. at 688). To show prejudice, the party must show that the result would have been

different but for the deficient performance. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions by exercising reasonable professional judgment. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). A criminal defendant can rebut the presumption of reasonable performance by showing that there “is no conceivable legitimate tactic that explains counsel’s performance.” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If counsel’s conduct can be characterized as “legitimate trial strategy or tactics,” it cannot serve as a basis for a claim of ineffective assistance of counsel. *Lord*, 117 Wn.2d at 883.

In light of Mr. Vines’ obsessive, paranoid, bizarre behavior prior to and during trial, and his repeated pleas for an evaluation which was ignored and denigrated by counsel until Mr. Vines essentially confronted counsel about the failure to move for an evaluation on March 29 and April 20, defense counsel’s representation was deficient in failing to bring Mr. Vines’ mental problems to the court’s attention and move for an evaluation of his competency to stand trial. Mr. Vines was prejudiced by defense counsel’s deficient performance because he was subjected to standing trial in violation of his due process right to a fair trial.

Mr. Vines was denied his right to effective assistance of counsel where there was no strategic or tactical reason for defense counsel to allow her client to proceed in an unconstitutional trial. Defense counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, under the circumstances, if counsel had moved for a competency evaluation the court would have stayed the proceedings and ordered an evaluation as required under RCW 10.77.

Mr. Vines' conviction must therefore be reversed. See *Fleming*, 142 Wn.2d at 865-67 (when defense counsel knows or has reason to know of a defendant's incompetency, tactics cannot excuse failure to raise competency at any time).

3. THE CONVICTION FOR ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE VIOLATES DUE PROCESS BECAUSE THERE WAS INSUFFICIENT EVIDENCE FOR ANY RATIONAL TRIER OF FACT TO FIND ALL THE ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT

- a. *The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.***

A challenge to the sufficiency of the evidence may be raised for the first time on appeal as a due process violation. *State v. Hickman*, 135 Wn.2d 97, 954 P. 2d 900 (1998); *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972).

The due process clauses of the federal and state constitutions require the prosecution prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 21, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 220- 22, 616 P.2d 628 (1980). Further, when the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the prosecution and interpreted against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. The evidence was insufficient to prove that Sgt. Hollis pursued the Camry before the vehicle came to a stop

Mr. Vines was charged and convicted of attempting to elude a police vehicle. The offense is defined by RCW 46.61.024(1) as follows:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a *pursuing police vehicle*, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be

equipped with lights and sirens.

(emphasis added).

Questions of statutory interpretation are reviewed de novo. *State v. Evans*, 177 Wash.2d 186, 192, 298 P.3d 724 (2013). When interpreting a statute, the court’s fundamental objective is to ascertain and carry out the legislature’s intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The starting point is the statute’s plain language and ordinary meaning. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When the plain language is unambiguous, the legislative intent is apparent, and courts will not employ principles of construction to construe the statute otherwise. *J.P.*, 149 Wn.2d at 450. In determining the plain meaning of a provision, courts look to the text of the statutory provision in question as well as “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Sweany*, 174 Wn.2d 909, 914-15, 281 P.3d 305 (2012); *Jacobs*, 154 Wn.2d at 600. Courts give “undefined terms their plain and ordinary meaning unless a contrary legislative intent is indicated.” *State v. Gonzalez*, 168 Wash.2d 256, 263, 226 P.3d 131 (2010).

Under the plain language of RCW 46.61.024, a conviction for the charged offense requires proof that the driver is attempted to elude “a pursuing police vehicle.” The statute does not define “pursuing police vehicle.” When a term is not defined by a statute, judicial opinion, or pattern

jury instruction, courts employ the common understanding of the term rather than its technical definition. *State v. Brown*, 132 Wn.2d 529, 611, 940 P.2d 546 (1997). To determine the ordinary meaning of a term, courts look to standard English language dictionaries. *State v. Gonzales*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). Standard dictionary definitions make clear that the meaning of “pursuing” requires the element of “following.” Webster’s Dictionary defines “pursue” as “to follow [] determinedly in order to overtake, capture, kill, or defeat. WEBSTER’S THIRD NEW INT’L DICTIONARY 1848 (2002). Merriam–Webster Dictionary Online definition of “pursue” is “ ‘to follow in order to overtake, capture, kill or defeat,’ “ and lists “chase” as a synonym.² The American Heritage College Dictionary 1112 (3rd ed.1997), defines “pursue” as “1. To follow in an effort to overtake or capture; chase[.]”

As expressed in closing argument, the State’s theory was that Sgt. Hollis was in “the pursuing vehicle.” RP at 377. Under this plain meaning, however, Sgt. Hollis was not pursuing Mr. Vines because initially both vehicles were moving toward each other on the driveway; Mr. Vines was not being followed by Sgt. Hollis in his vehicle. Moreover, the record does not show that Sgt. Hollis was a “pursuing police officer” after Mr. Vines reversed his Camry because the record is not clear that he proceeded down the driveway

²<https://www.merriam-webster.com/dictionary/pursue?src=search-dict-box>

following Mr. Vines *before* the Camry stopped. Sgt. Hollis stated that he was in the process of getting out of the Explorer when Mr. Vines reversed his car and that he was not “on the ball.” RP at 322. He testified that Mr. Vines drove in reverse for three to five seconds and then stopped. RP at 309. Sgt. Hollis moved his vehicle forward and went forward until he was again bumper to-bumper with the Camry. RP at 310. The record fails to establish whether the Camry stopped or became stuck before Sgt. Hollis moved his vehicle forward on the driveway during the five second period that the Camry was in motion away from the sergeant’s position. If the Camry was stationary before Sgt. Hollis moved forward to follow the Camry, the record does not support that he was pursuing or following the car.

On this record, the State did not carry its burden of proving that Sgt. Hollis was in pursuit of the Camry before the vehicle stopped, therefore the State failed to prove each essential element of attempt to elude a pursuing police vehicle.

c. There was no evidence that sergeant Hollis’ vehicle was equipped with a siren as required by statute.

Assuming *arguendo* that Sgt. Hollis was in pursuit of the Camry before that vehicle came to a stop, the appellant argues that the State failed to prove the Explorer was equipped with a siren. RCW 46.61.024 requires that office giving a signal to “shall be in uniform *and the vehicle shall be*

equipped with lights and sirens.” (emphasis added).

Statutes should be construed as a whole and all language used should be given effect. *State v. Walter*, 66 Wn. App.862, 870, 833 P.2d 440 (1992). Criminal statutes are strictly construed. *State v. Rinkes*, 49 Wn.2d 664, 667, 306 P.2d 205 (1957). The term “shall” in a statute is mandatory unless contrary legislative intent is apparent. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

Sgt. Hollis described his vehicle as a “marked Ford Explorer Cross-Over.” RP at 305. He stated that the vehicle is marked with “Sheriff’s office stickers and a light bar,” and that the vehicle has overhead lights and a spot lights, and flood lights on top.” RP at 305-06. He also noted that he was wearing a uniform. RP at 305. The record does not establish, however, if the vehicle was equipped with a siren as required by statute. Because proof that Sgt. Hollis’ vehicle was equipped with a siren is mandatory under RCW 46.61.024(1), no rational trier of fact could find Mr. Vines guilty of the crime of attempting to elude a pursuing police vehicle.

d. The Court must reverse and dismiss the conviction

The State failed to prove all the elements of the charge. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. *Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment’s Double Jeopardy

Clause bars retrial of a case where the State fails to prove an element. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

Consequently, this Court should reverse and dismiss the attempting to elude a pursuing police vehicle conviction with prejudice.

4. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

If Mr. Vines does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. At sentencing, the court imposed fees, including \$500.00 victim assessment, \$200.00 in court costs, and \$100.00 felony DNA collection fee. The trial court found him indigent for purposes of this appeal. CP 29. There has been no order finding Mr. Vines' financial condition has improved or is likely to improve. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

This Court has discretion to deny the State's request for appellate costs. Under RCW 10.73.160(1), appellate courts "may require an adult offender convicted of an offense to pay appellate costs." "[T]he word 'may' has a permissive or discretionary meaning." *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk "will" award costs to the State if the

State is the substantially prevailing party on review, “unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in “compelling circumstances.” *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, the Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Vines’ indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

E. CONCLUSION

For the foregoing reasons, Mr. Vines respectfully requests this Court reverse his conviction.

DATED: November 17, 2017.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on November 17, 2017, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Jesse Espinoza, Clallam County Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 17, 2017.



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