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NO. 57420-5-I

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

REC'D
DEC 21 2006
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

STEVE HEDDRICK,

Appellant.

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

The Honorable Ronald Kessler, Judge
The Honorable Mary Yu, Judge

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BRIEF OF APPELLANT
(Corrected)

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding appellant competent to stand trial without adhering to adequate procedural safeguards.

2. The trial court erred in denying actual assistance of counsel to appellant at a critical stage of the proceeding.

3. The trial court erred in admitting testimonial hearsay evidence against appellant.

4. The trial court erred in admitting improper opinion testimony regarding the veracity and guilt of appellant.

5. Prosecutorial misconduct deprived appellant of his constitutional due process right to a fair trial.

6. Ineffective assistance of counsel deprived appellant of his constitutional due process right to a fair trial.

7. Cumulative error denied appellant of his constitutional due process right to a fair trial.

8. The trial court erroneously sentenced appellant to submit to mental health treatment and involuntary medication as a condition of community custody.

Issues Pertaining to Assignments of Error

1. Did the trial court violate appellant's constitutional right to due process when it found appellant competent without holding an

evidentiary hearing on the issue, where the court had previously made a threshold determination that there was reason to doubt competency?

2. Did the trial court violate appellant's right to assistance of counsel at a critical stage of the proceeding when it found appellant competent to stand trial in the actual absence of counsel?

3. Did the trial court violate appellant's constitutional right to confront the witnesses against him when it admitted testimonial hearsay evidence that undermined appellant's defense?

4. Did the trial court violate appellant's constitutional right to a jury trial when it admitted a law enforcement officer's improper opinion testimony regarding appellant's veracity and guilt?

5. Did prosecutorial misconduct deny appellant a fair trial where the prosecutor argued that, in order to believe appellant's version of events, the jury must conclude that the state's witnesses lied?

6. Was appellant denied effective assistance of counsel because counsel failed to preserve the above-referenced confrontation, opinion or prosecutorial misconduct errors for appellate review?

7. With reference to the errors cited above, did cumulative error deprive appellant of his constitutional right to a fair trial?

8. Did the trial court violate appellant's statutory and constitutional due process rights when it imposed mental health treatment

and medication as a condition of community custody without making required findings of fact?

B. STATEMENT OF THE CASE

1. Procedural History

On July 12, 2005, the state charged appellant Steven Ray Heddrick Jr. with one count of custodial assault. CP 1-3; RCW 9A.36.100(1)(b). On October 13, 2005, a jury trial was held before the Honorable Mary Yu, and a guilty verdict returned. CP 16; 3RP-4RP.¹ The court sentenced Heddrick to a maximum standard range sentence of 22 months. CP 34. The court also ordered mental health treatment and medication as a special condition of community custody. CP 39. This appeal timely follows. CP 40.

2. Substantive Facts

a. Pre-trial

On July 27, 2005, the Honorable Ronald Kessler made a threshold determination that there was "reason to doubt" Heddrick's competency and ordered an expert evaluation pursuant to RCW 10.77.060. CP 4-7. The instant case "tracked" with Heddrick's pending felony harassment case for

¹ The verbatim report of proceedings is contained in six volumes referenced as follows: 1RP - 7/27/05; 2RP - 10/12/05; 3RP - 10/13/05 (morning); 4RP - 10/13/05 (afternoon); 5RP - 11/18/05; 6RP - 11/23/05.

competency evaluation purposes. CP 7.² Earlier that same day, Judge Yu, presiding over the harassment case, had also found reason to doubt competency and ordered an evaluation. 2CP 38-41; 8RP 19-20.³ Judge Yu later reassigned the assault case to herself.⁴ Attorney Marcus Naylor represented Heddrick in the assault case after substituting for Erik Jensen.⁵

² Because Heddrick's assault case tracked with his felony harassment case (cause no. 04-1-12703-0 SEA) for competency purposes, critical portions of the record involving competency proceedings for the assault case are contained only in the harassment case, which was pending when the assault case began and is now under appeal in State v. Heddrick, No. 57469-8-I. Reference to the record contained in the harassment case is necessary to set forth the issues raised in the assault case, which include the failure to hold an evidentiary hearing prior to determining competency and counsel's absence at the proceeding at which this determination was made. This Court should therefore take judicial notice of the relevant record contained in the harassment case pertaining to competency as an "engrafted, ancillary, or supplementary" proceeding. ER 201(f); Spokane Research & Defense Fund v. City of Spokane, 155 Wn.2d 89, 98, 117 P.3d 1117 (2005).

³ The Clerk's Papers for the felony harassment case are designated as "2CP."

Relevant portions of the Verbatim Report of Proceedings for the felony harassment case are contained in four volumes, designated as follows: 7RP - 9/8/04, 10/14/04, 1/20/05; 8RP - 7/27/05; 9RP - 10/10/05 (first paginated volume only); 10RP - 10/11/05.

Judge Yu expressed her intention to order a competency evaluation on July 27, 2005, but the order for evaluation is actually dated August 1, 2005.

⁴ Supp. CP __ (sub no. 20A, Order on Criminal Motion, 10/10/05).

⁵ Supp. CP __ (sub no. 17A, Notice of Substitution of Counsel, 9/20/05); 1RP 1.

Attorney Tracy Lapps represented Heddrick in the harassment case after substituting for Dana Brown. 2CP 97, 98-100; 8RP 1.

On October 6, 2005, Lapps told the court during a telephonic status conference that the evaluator had orally informed her Heddrick was competent. 10RP 14-15. The evaluator, however, failed to produce a written report. 10RP 14-15. Lapps also told the court she no longer contested competency. 10RP 14-15. The record indicates Naylor, Heddrick's attorney for the instant case, did not participate in this telephonic conference. 10RP 14-15. On October 10, 2005, Judge Yu found Heddrick competent in the instant case without an evidentiary hearing. CP 8; 9RP 3-5. Naylor was absent from the October 10 proceeding at which the court found Heddrick competent. 9RP 3-5.

b. Trial

Heddrick was at the King County jail when the alleged assault took place. 3RP 105-06. On February 17, 2005, Correctional Officer Steven Spadoni and Correctional Officer Alan Braden went to Heddrick's cell in order to transport him to another cell within the facility. 3RP 105, 109; 4RP 5-6. Spadoni and Braden testified that when Spadoni entered the cell and attempted to handcuff Heddrick in preparation for transport, Heddrick struck him in the face without provocation and for no reason. 3RP 111-13; 4RP 6-7. A struggle ensued between Heddrick and the two officers. 3RP

113-14; 4RP 7-8. Officer Timothy Murphy testified he arrived on the scene after the incident started and saw Spadoni and Braden "rolling around with an inmate," but did not see who or what started the incident, and did not witness Heddrick striking Spadoni. 4RP 20-22, 24.

Heddrick, however, testified that an officer entered the cell and attacked him for no apparent reason, and that he offered no resistance to the beating. 4RP 30-31, 33-35. Heddrick denied striking anyone. 4RP 34. Heddrick further testified he suffered a black eye, welts and what he believed to be broken ribs as a result of the attack. 4RP 32, 48. Heddrick also claimed he was "disabled for well over a month," could not lay on his stomach, and could "hardly breathe." 4RP 48. Spadoni fractured his hand during the incident. 3RP 117

Spadoni and Braden eventually handcuffed Heddrick inside the cell and all three went to a jail nurse for medical attention. 4RP 54-55. Braden told the nurse he was fine. 4RP 14. The nurse examined Spadoni and photographs were taken of his face and upper body. 3RP 116-17, 123-24. The nurse's examination of Heddrick lasted two to three minutes. 4RP 47-48. In response to the state's question of whether the nurse approved Heddrick's transport to another cell as originally planned, Braden testified, over counsel's hearsay objection, that the nurse cleared Heddrick for transport because medical staff "felt that he didn't have enough injuries."

4RP 55-56. Aside from Braden's concession that he could not remember whether there was redness or marks on Heddrick's face, none of the three officers offered any personal observations regarding the extent of Heddrick's injuries. 4RP 58.

C. ARGUMENTS

1. THE COURT VIOLATED HEDDRICK'S DUE PROCESS RIGHTS BY FINDING HIM COMPETENT TO STAND TRIAL WITHOUT OBSERVING ADEQUATE PROCEDURAL REQUIREMENTS.

After Judge Kessler made a threshold determination that there was reason to doubt Heddrick's competency to stand trial, Judge Yu violated Heddrick's due process rights in finding him competent without conducting an evidentiary hearing on the matter. CP 4-7, 8. Reversal is required.

a. The Court Must Conduct An Evidentiary Hearing When There Is Reason To Doubt Competency.

"It is fundamental that no incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues." State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982). The conviction of an accused while he is legally incompetent violates his constitutional right to a fair trial under the Fourteenth Amendment's due process clause. Pate v. Robinson, 383 U.S. 375, 378, 385, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). 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." In re Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001) (citing Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)) (internal quotation marks omitted). Under Washington statute, a criminal defendant is incompetent if (1) he lacks an understanding of the nature of the proceeding; or (2) is incapable of assisting in his defense due to mental disease or defect. RCW 10.77.010(14).

The "[f]ailure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process," which includes the right to a fair trial. Fleming, 142 Wn.2d at 863. Accordingly, if the court makes a threshold determination that there is "reason to doubt" the defendant's competency pursuant to RCW 10.77.060, the court must appoint experts and order a formal competency hearing. State v. Marshall, 144 Wn.2d 266, 278, 27 P.3d 192 (2001); State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). This is not merely a statutory mandate. Once the court finds reason to doubt competency, a defendant is *constitutionally* entitled to an evidentiary hearing on whether he is competent to stand trial. Pate, 383 U.S. at 377, 385-86; State v. Israel, 19 Wn. App. 773, 776, 577 P.2d 631 (1978).

Here, despite Judge Kessler's finding there was reason to doubt competency, Judge Yu ultimately found Heddrick competent without the required evidentiary hearing. CP 4-7, 8; 9RP 3-5; Pate, 383 U.S. at 386; Israel, 19 Wn. App. at 776, 777-78.

b. There Were Bona Fide Reasons To Doubt Heddrick's Competency.

The instant case tracked with Heddrick's pending felony harassment case for competency purposes. CP 7. Judge Yu found Heddrick competent in both the harassment and assault cases. CP 8; 9RP 3-5; 10RP 14-15.⁶ The record in the harassment case, which demonstrates Judge Yu's awareness of Heddrick's ongoing competency issues, provides needed context for why Judge Yu should have held an evidentiary hearing prior to determining competency in the instant assault case.

From the outset of the harassment case, Judge Yu, defense counsel, and the state expressed persistent doubts about Heddrick's competency because of his troubling behavior, which included repeated refusals to meet with his attorney or voluntarily come to court. 2CP 89-90, 91, 92, 93; 7RP 3-17. Psychiatric reports provided to the court diagnosed Heddrick

⁶ A written order finding Heddrick competent to stand trial in the harassment case is not present in the superior court file.

as suffering from chronic psychotic problems and severe delusions, including paranoid schizophrenia. 2CP 103-09, 110-15, 116-28.

On September 8, 2004, Judge Yu ordered a competency evaluation in the harassment case pursuant to RCW 10.77.060. 2CP 92; 7RP 3-10. Dr. David White, who was retained by defense counsel Dana Brown to conduct the evaluation in the harassment case, described Heddrick as suffering from "chronic mental health problems that result in strong persecutory and somatic delusions." 2CP 125. Dr. White concluded Heddrick was incompetent to stand trial because he was unable to assist his attorney in his defense due to mental illness. 2CP 115, 126. Heddrick repeatedly refused to meet with his attorney or attend court hearings in July and August 2004. 2CP 112. When Heddrick finally allowed defense counsel Brown to meet with him, Heddrick denied he had ever refused to meet with her in the past. 2CP 112. Based on his examination of Heddrick and discussion with defense counsel, Dr. White concluded Heddrick had difficulty grasping that Brown represented him on the harassment charge and had difficulty remembering information she told him. 2CP 115. Dr. White also noted Heddrick exhibited delusional beliefs about his former attorney Pamela Studeman, (who had recently represented him in another criminal matter) and the prosecuting attorney in that case. 2CP 124, 126.

Specifically, Heddrick believed his attorney was replaced by an imposter and that an imposter had replaced the original prosecutor as well. 2CP 124.

On October 14, 2004, Judge Yu found Heddrick incompetent based on Dr. White's report and the mutual agreement of the state and defense counsel. 2CP 94-96; 7RP 11-17. The court ordered Heddrick committed to Western State Hospital for 90 days pursuant to RCW 10.77.060 and authorized involuntary medication to restore competency if necessary. 2CP 94-96. Heddrick was not present, as he had once again refused to come to court. 7RP 11.

Following a period of involuntary confinement and forced medication, the court, on January 20, 2005, granted the state's motion to find Heddrick competent. 2CP 7-8, 132; 7RP 18-20. Contrary to the order's assertion, the transcript shows the court did not question Heddrick prior to finding him competent. 2CP 7; 7RP 18-20. In making its determination, the court reviewed a report prepared by Dr. Steven Marquez but did not conduct an evidentiary hearing. 2CP 129-134; 7RP 18-20. Although Dr. Marquez's report concluded Heddrick was competent to stand trial, it also stated Heddrick was "fundamentally paranoid and delusional, and clearly lacking in insight." 2CP 132, 133. The state conceded "the report is not (inaudible) strongest he's competent." 7RP 18. Defense counsel deferred to the court despite her own concerns about Heddrick's

competency. 7RP 19. Curiously, Dr. Marquez's report made no mention of Dr. White's earlier report that concluded Heddrick was incompetent. 7RP 19.

On July 27, 2005, Judge Yu, presiding over the harassment case, once again made a threshold determination there was reason to doubt Heddrick's competency and ordered another evaluation pursuant to RCW 10.77.060. 2CP 38-41; 8RP 19-20. By this time, Lapps had replaced Dana Brown as Heddrick's attorney in the harassment case. 2CP 97, 98-100; 8RP 1. In support of her motion for evaluation, Lapps advised the court there was a problem with whether Heddrick could assist in his own defense and communicate with his attorney, and that the "same issues" had again materialized. 8RP 9-10. The prosecutor, Jennifer Miller, shared defense counsel's concern and agreed further inquiry was warranted based on her own personal observations. 8RP 5, 13-14.

Like Judge Yu, Judge Kessler, presiding over the assault case, also made a finding there was reason to doubt Heddrick's competency and ordered an evaluation. CP 4-7. Heddrick's original attorney for the assault case, Erik Jensen, stated he shared the "same concerns" as those expressed by Lapps in the harassment case. 1RP 5-6. Miller, who served as the prosecuting attorney in both cases, again expressed her misgivings regarding Heddrick's competency. 1RP 3-5.

On October 6, 2005, defense counsel Lapps informed Judge Yu during a telephonic conference that her evaluator had concluded Heddrick was competent.⁷ Lapps stated she did not feel it was necessary for the evaluator, Dr. White, to produce a written report because she no longer contested competency and "out of consideration for the amount of money that it would have cost in addition to what we already spent to produce a written evaluation." 10RP 15. There is no indication in the record that Marcus Naylor, who by this time had replaced Jensen as Heddrick's attorney for the assault case,⁸ was a participant in this conference.

On October 10, 2005, Lapps and prosecutor Miller appeared before Judge Yu in the harassment case. 9RP 3-5. Naylor, Heddrick's counsel in the assault case, was not present. 9RP 3-5. Miller asked the court to sign an order finding Heddrick competent. 9RP 3-4. Lapps expressed reluctance to speak for Naylor on the matter because Naylor worked in a different office and because she did not know if Naylor had arranged for a separate evaluation. 9RP 4. In response, Miller made an oral representation that Naylor "had agreed" that the competency order "needed to be taken care of [sic]." 9RP 4. Without reviewing any written report,

⁷ 10RP 14-15. As reflected in the record made of the October 6, 2005 telephonic conference on October 11, 2005.

⁸ Supp. CP __ (sub no. 17A, supra).

conducting an evidentiary hearing or questioning Heddrick himself, the court found Heddrick competent to stand trial in the both the assault and harassment cases. CP 8; 9RP 4-5; 10RP 14-15.

c. The Due Process Right To An Evidentiary Hearing Cannot Be Waived.

Defense counsel Naylor had no opportunity to request an evidentiary hearing on the competency matter because he was not present when the court found Heddrick competent. 9RP 3-5. Indeed, Judge Yu did not assign the assault case to herself until the October 10 proceeding took place, and so Naylor did not have prior notice that Judge Yu intended to address whether Heddrick was competent to stand trial in the assault case at that time. Supp. CP __ (sub no. 20A, supra). In any event, a defendant whose competency is in doubt cannot waive his right to a competency hearing and the issue can be raised for the first time on appeal. Medina v. California, 505 U.S. 437, 449, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992); Pate, 383 U.S. at 378, 384. Heddrick's due process right to an evidentiary hearing therefore remained intact despite defense counsel Naylor's apparent decision not to contest competency, as it was incumbent upon the court to conduct a formal hearing on its own motion. Pate, 383 U.S. at 385; Williams v. Woodford, 384 F.3d 567, 603 (9th Cir. 2004) ("state trial judge must conduct a competency hearing, regardless of whether defense counsel

requests one, whenever the evidence before the judge raises a bona fide doubt about the defendant's competence to stand trial.")

d. The Court Erred In Failing To Conduct An Evidentiary Hearing To Determine Competency.

Judge Kessler made an initial finding there was reason to doubt Heddrick's competency. CP 4-7. Because the right to a competency hearing cannot be waived, and in light of Heddrick's significant history of mental illness and inability to assist in his own defense, Judge Yu erred in not conducting an evidentiary hearing to determine competency. Pate, 383 U.S. at 377, 385; Williams, 384 F.3d at 603; Israel, 19 Wn. App. at 776, 777-78. At minimum, due process requires the court make findings of fact and conclusions of law after an evidentiary hearing on the matter of competency. Israel, at 776, 777-78. Although a defendant may waive his statutory right to a written expert report, no court has ever held that due process is satisfied in the absence of both a report and an evidentiary hearing. Id. at 779.

Due process was not satisfied where the court found Heddrick competent to stand trial based on prosecutor Miller's oral representation that defense counsel Naylor had agreed to competency. As Naylor was not even present in the courtroom when the court made this crucial determination, the court had no opportunity to question Naylor regarding his basis

for believing his client was competent. While counsel's opinion about a client's competency is a factor that should be considered, the prosecutor's perfunctory representation that Naylor agreed to "take care of" the competency issue was an inadequate basis to find Heddrick competent, especially in light of Judge Yu's previous finding that Heddrick was incompetent and Heddrick's extensive history of severe mental problems.

Id.

Similarly, Lapps' oral representation regarding Heddrick's competency to stand trial in the harassment case was an insufficient basis to find Heddrick competent in the assault case. 9RP 4. Naylor and Lapps worked in different organizations. 9RP 4. While they shared Heddrick as a client, they each represented Heddrick in a separate case, and each had their own individual experiences with him.

The court had an independent duty to make its own competency determination. Pate, 383 U.S. at 385; Williams, 384 F.3d at 603. Without a written report, the court had no means to determine whether the doctor's ultimate conclusion regarding Heddrick's competence was justified in the absence of an evidentiary hearing. Heddrick's protestations that he was competent, meanwhile, were immaterial because it is "contradictory to argue that a defendant who may be incompetent should be presumed to possess sufficient intelligence that he will be able to adduce evidence of his

incompetency which might otherwise be within his grasp." Medina, 505 U.S. at 450 (citation omitted); 8RP 18-20. The court therefore needed to hold an evidentiary hearing so it could make findings of fact and conclusions of law on competency. Israel, 19 Wn. App. at 777-78.

e. Reversal Of The Conviction Is The Appropriate Remedy.

Remand on the competency issue is impractical at this point due to the passage of time, the absence of a contemporaneous written competency report, and the otherwise total lack of an adequate record on which to base a determination that Heddrick was competent to stand trial. Pate, 383 U.S. at 387; Drope v. Missouri, 420 U.S. 162, 183, 95 S. Ct. 896, 904, 43 L. Ed. 2d 103 (1975). This Court should therefore reverse the conviction because the court's failure to adhere to adequate procedural safeguards in determining competency violated Heddrick's right to a fair trial. Pate, 383 U.S. at 377, 385-86; Israel, 19 Wn. App. at 776, 777-78.

2. THE COURT VIOLATED HEDDRICK'S RIGHT TO ASSISTANCE OF COUNSEL AT A CRITICAL STAGE OF THE PROCEEDING.

The court violated Heddrick's right to assistance of counsel in finding him competent to stand trial in the absence of his attorney. CP 8; 9RP 3-5. Reversal is required.

Under the Sixth Amendment and Article I, § 22 of the Washington State Constitution, a defendant is guaranteed the right to the assistance of counsel at every critical stage of a criminal prosecution. United States v. Cronin, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); In re Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004); State v. Roberts, 142 Wn.2d 471, 515, 14 P.3d 713 (2000). The constitutional right to counsel is "fundamental and essential to a fair trial." Gideon v. Wainwright, 372 U.S. 335, 339-40, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (internal quotation marks omitted). The United States Supreme Court in Cronin established that certain failings of counsel mandate reversal of a defendant's conviction without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial. Cronin, 466 U.S. at 650, 658. Actual absence of counsel at a critical stage of the proceeding gives rise to a presumption that the trial was unfair and requires reversal of the conviction. Id. at 658-59, 659 n.25; Bell v. Cone, 535 U.S. 685, 695, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); Davis, 152 Wn.2d at 674; State v. Robinson, 138 Wn.2d 753, 768, 982 P.2d 590 (1999).

Whether a competency hearing is a critical stage of a criminal proceeding is an issue of first impression in Washington. The federal circuit courts, however, have uniformly held that a competency hearing is a critical stage. See, e.g., Appel v. Horn, 250 F.3d 203, 215 (3rd Cir

2001); United States v. Collins, 430 F.3d 1260, 1264 (10th Cir. 2005); Sturgis v. Goldsmith, 796 F.2d 1103, 1109 (9th Cir. 1986), cert. denied, 508 U.S. 918, 113 S. Ct. 2362, 124 L. Ed. 2d 269 (1993). Critical stages are those steps of a criminal proceedings that hold significant consequences for the accused. Bell, 535 U.S. at 695-96. The conviction of an accused while legally incompetent violates the right to a fair trial, while the failure to observe procedures adequate to protect an accused's right not to be tried while incompetent is a denial of due process. Pate, 383 U.S. at 378, 385; Fleming, 142 Wn.2d at 863. This Court should likewise hold that the determination of a defendant's competency to stand trial is a critical stage, as it cannot be seriously disputed that such a determination has significant consequences for the defendant.

Heddrick's conviction for custodial assault must be reversed because his attorney, Naylor, was absent from the October 10, 2005 proceeding in which the court found Heddrick competent to stand trial. CP 8; 9RP 3-5; Cronic, 466 U.S. at 658-59. While Lapps, Heddrick's attorney for the harassment case, was present, the record reveals Lapps had no authority to act as Heddrick's attorney for the assault case. 9RP 3-5. Lapps told the court Naylor worked in a different office and she did not even know if Naylor had arranged for a separate competency evaluation. 9RP 4. Naylor, not Lapps, represented Heddrick in the assault case, and Heddrick

had the right to have Naylor present when the court determined Heddrick's competency to stand trial for assault.

The court did not ask Heddrick whether he waived his attorney's absence from the hearing. Indeed, the court did not ask Heddrick any questions at all. Heddrick therefore did not waive his right to have Naylor present at the competency hearing. Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (waiver of right to assistance of counsel must be knowing and intelligent); State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991) (waiver of counsel must be unequivocal); City of Bellevue v. Acrey, 103 Wn.2d 203, 205, 211-12, 691 P.2d 957 (1984) (record must show express waiver of counsel and understanding of disadvantages to self-representation).

The prosecutor's unsubstantiated representation that she could speak for Naylor at the competency hearing was a patently inadequate substitute for the actual presence of counsel. 9RP 4. It is axiomatic that a prosecutor cannot stand in for defense counsel and represent the defendant in his place at a critical stage of the proceeding. Cronic, 466 U.S. at 654 (core purpose of right to counsel is to assure assistance when the accused is "confronted with both the intricacies of the law and the advocacy of the public prosecutor."). The adversarial nature of the criminal process is the "very premise" underlying the Sixth Amendment right to counsel. Id. at 655-56.

The right to counsel requires that the accused have "counsel acting in the role of an advocate" and where "the process loses its character as a confrontation between adversaries," the constitutional guarantee to assistance of counsel is violated. Id. at 656-57.

Prejudice will be presumed where counsel is absent from a critical stage. Id. at 658-59, 659 n. 25; Davis, 152 Wn.2d at 673-74; Robinson, 138 Wn.2d at 768. Harmless error analysis under Strickland v. Washington, which requires a showing of actual prejudice, is inapplicable to this circumstance. Davis, at 673-74 (citing Cronic and Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Structural defects in the trial mechanism, such as the deprivation of counsel, defy harmless error analysis and require automatic reversal of the conviction because they infect the entire trial process. Brecht v. Abrahamson, 507 U.S. 619, 629-630, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993); Penson v. Ohio, 488 U.S. 75, 88, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988). Heddrick's conviction must therefore be reversed.

3. THE COURT VIOLATED HEDDRICK'S RIGHT TO CONFRONT THE WITNESSES WHEN IT ADMITTED DAMAGING HEARSAY TESTIMONY.

The trial court erred when it admitted a testimonial hearsay statement made by the nurse who examined Heddrick after the assault. 4RP 55-56.

Reversal is required because the nurse did not testify at trial and Heddrick did not have a prior opportunity to cross-examine her.

This hearsay testimony was prohibited by the confrontation clause of the federal and state constitutions. U.S. Const. Amend. VI (a person accused of a crime "shall enjoy the right . . . to be confronted with the witnesses against him."); Wash. Const. art. I, § 22 ("In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face."). The primary interest secured by the confrontation clause is the right of cross-examination, "the principle means by which the believability of a witness and the truth of his testimony are tested." State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998) (citing Kentucky v. Stincer, 482 U.S. 730, 736, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) (internal quotation marks omitted)). A defendant's constitutional right to confront adversarial witnesses bars admission of testimonial hearsay statements when the declarant is unavailable and the defendant has not had a previous opportunity to cross-examine the declarant. Crawford v. United States, 541 U.S. 36, 53-54, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

a. The nurse's statement was hearsay.

Admission of hearsay triggers the right to confrontation. Crawford, 541 U.S. at 59 n.9; State v. Davis, 154 Wn.2d 291, 301, 111 P.3d 844

(2005), aff'd, Davis v. Washington, 126 S. Ct. 2266, 2273, 165 L. Ed. 2d 224 (2006); In re Pers. Restraint of Theders, 130 Wn. App. 422, 433, 123 P.3d 489 (2005). Here the right to confrontation was triggered because the nurse's statement was hearsay.

The portion of Officer Braden's testimony containing the nurse's statement provides:

Q: In terms of an inmate, if someone in the jail receives substantial injury, is it normal for that injury to be treated or would it normally just be left alone?

A: Substantial injury? They would be transported to the hospital.

Q: And what hospital do you normally transport to?

A: Harborview Medical Center.

Q: And normally would officers go along with the inmate on that transport?

A: Yes, ma'am.

Q: And in this case Mr. Heddrick didn't get transported to a hospital, according to your knowledge, is that correct?

A: No, he didn't.

Q: In actuality, after speaking with the nurse for less than three minutes, you were given the go ahead to transport him to his cell as was originally planned, is that correct?

A: He was cleared to go back--to go to his assigned cell on seven north.

Q: And when you say he was, what does that mean?

A: It means medical staff felt that he didn't have enough injuries--

MR. NAYLOR: Your Honor, I would object. This would be hearsay.

THE COURT: I'll allow the question and the answers, but I want the witness to carefully listen to the question and how it was posed, and I want you to go ahead and rephrase that question.

4RP 55-56.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). A "statement" is an "assertion." ER 801(a). Assertions are "intentional expressions of fact or opinion." In re Dependency of Penelope B., 104 Wn.2d 643, 652, 709 P.2d 1185 (1985).

Officer Braden's testimony that "medical staff felt that he didn't have enough injuries" to justify transport to the hospital is a "statement" because it is an intentional expression of fact or opinion regarding the extent of Heddrick's injuries. Id. The statement is hearsay because it is an out of court statement offered to prove Heddrick did not suffer the injuries he claimed he suffered.

The state's purpose in seeking admission of the nurse's statement is readily apparent from the context of the trial. Heddrick had just testified he suffered broken ribs as a result of being attacked by an officer and as a result, he was "disabled for well over a month," could not lay on his stomach, and could "hardly breathe." 4RP 48. During cross-examination of Heddrick, the state attempted to introduce evidence that there was no medical documentation to support Heddrick's contentions, explaining at side-bar the state's need to rebut his claim of severe injury. 4RP 43-46. When this attempt at impeachment failed due to defense counsel's sustained

objection, the state recalled Officer Braden as a rebuttal witness and elicited the hearsay testimony. 4RP 43, 53-57.

Where one witness is used to impeach another, the veracity of the conflicting stories is necessarily at issue and the impeaching statement therefore constitutes hearsay. State v. Williams, 79 Wn. App. 21, 26-27, 902 P.2d 1258 (1995) (using a witness's own statement to impeach is not hearsay, but using another person's statement to do so is hearsay). The alleged statement of the nurse was offered to contradict Heddrick's testimony that he suffered significant injuries. Such "impeachment by contradiction" is actually nothing more than the process of offering substantive evidence to rebut the opponent's evidence and does not fall within any exception to the hearsay rule. Jacqueline's Washington, Inc. v. Mercantile Stores Co., 80 Wn.2d 784, 788-89, 498 P.2d 870 (1972). Thus, the nurse's statement qualifies as hearsay for confrontation purposes.

b. The nurse's statement was testimonial.

Only "testimonial" statements are barred by the right to confrontation. Davis, 126 S. Ct. at 2273. While the United States Supreme Court in Crawford declined to provide a comprehensive definition of "testimonial statement," it described "various formulations" of a "core class" of testimonial statements, which include "statements that were made under circumstances which would lead an objective witness reasonably to believe

that the statement would be available for use at a later trial." Crawford, 541 U.S. at 52. Washington courts have embraced this formulation as a guide to determine when a statement may be deemed "testimonial." See, e.g., State v. Shafer, 156 Wn.2d 381, 389, 389 n.6, 128 P.3d 87 (2006); State v. Walker, 129 Wn. App. 258, 267, 118 P.3d 935 (2005); State v. Ohlson, 131 Wn. App. 71, 79-80, 125 P.3d 990 (2005); State v. Powers, 124 Wn. App. 92, 96-97, 99 P.3d 1262 (2004). The unifying feature common to all testimonial statements is "some degree of involvement by a government official." Shafer, 156 Wn.2d at 389. By way of contrast, "casual remarks made to family, friends, and nongovernment agents are generally not testimonial statements because they were not made in contemplation of bearing formal witness against the accused." Id.

The nurse's statements were "testimonial" because, in keeping with Crawford, they were made under circumstances that would lead a reasonably objective person in the nurse's position to believe her statements would later be used at an assault trial. The nurse worked in the jail. She spoke with a county correctional officer after an assault for which there was two competing version of events -- the officers claiming that Heddrick assaulted Officer Spadoni, and Heddrick claiming an officer assaulted him. A reasonably objective nurse, in examining both Heddrick and the officers after the incident, would naturally surmise that her observations and

statements would be potentially relevant to a later prosecution for assault and that she would be called to testify as a witness in such a case. The results of her examination and diagnosis of any injuries suffered, or whether any injuries were suffered at all, comprise significant evidence directly relevant to the assault. As a trained medical professional, she presumably had expert knowledge regarding the medical diagnosis of internal injuries such as the broken ribs Heddrick claimed he suffered. 4RP 49. The correctional officers, not being medical experts themselves, were not in a position to properly offer their own testimony regarding the extent of Heddrick's injuries. The nurse therefore had unique testimony to offer and a singular role to fulfill in any subsequent prosecution. The fact that evidentiary photographs were taken of Officer Spadoni's injuries immediately after the incident confirms there was an expectation that Heddrick would be the subject of prosecution. 3RP 116-17.

Additionally, the nurse, in speaking with the correctional officer, would reasonably be aware she was speaking to someone "whose regular employment calls on them to pass information on to" prosecutorial authorities. See Powers, 124 Wn. App. at 98-99 (holding statements made during non-emergency 911 call were testimonial). Correctional officers are in the same position as any law enforcement officer in this regard. RCWA 9.94.050 provides that "[a]ny correctional employee, while acting

in the supervision and transportation of prisoners, and in the apprehension of prisoners who have escaped, shall have the powers and duties of a peace officer." Correctional officers are law enforcement officers because both have a duty to "preserve the peace." McLean v. State Dept. of Corrections, 37 Wn. App. 255, 257-58, 680 P.2d 65 (1984). The nurse spoke to a law enforcement officer whose colleague had allegedly been assaulted by Heddrick, and who had a professional duty to inform the district attorney of that crime. Under such circumstances, the nurse would have been reasonably aware she might be called to bear witness against Heddrick in a later criminal prosecution. Her statements were therefore testimonial.

The United States Supreme Court's analysis in Davis supports this conclusion. Davis reached its holding that statements made during an emergency 911 call were non-testimonial by recognizing such statements made for the purpose of obtaining emergency assistance were not "a weaker substitute for live testimony" at trial, whereas in cases involving testimonial statements, "the ex parte actors and the evidentiary products of the ex parte communication aligned perfectly with their courtroom analogues." Davis, 126 S. Ct. at 2277 (citation omitted).

The hearsay statement elicited from Officer Braden is a carbon copy substitute for what the nurse herself presumably would have testified to at trial. The nurse's statement that Heddrick was cleared for transport because

he had did not have "enough injuries" supported the state's theory that Heddrick lied when he said an officer broke his ribs and otherwise significantly injured him during a beating. The nurse allegedly said out-of-court exactly what the state would expect her to say on the stand. Her statement stands as a stalwart example of a "weaker substitute for live testimony" -- the chief evil against which the right to confrontation was designed to protect.

Although the facts of both Davis and Crawford involve statements elicited by police interrogation or its functional equivalent (i.e. interrogation of victim by 911 operator), the United States Supreme Court has expressly cautioned that a statement can be testimonial without being the product of law enforcement interrogation. Davis, 126 S. Ct at 2274 n.1 ("The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation.") That the nurse's statement may not have been the result of law enforcement questioning does not change its testimonial nature. Because the nurse did not testify at trial and the defendant did not have a prior opportunity to cross-examine her, Officer Braden's hearsay testimony about what the nurse allegedly said regarding Heddrick's medical condition falls squarely within that class of testimonial

hearsay statements prohibited by the confrontation clause. Crawford, 541 U.S. at 53-54, 59.

c. The Confrontation Clause Error Is Preserved For Review.

Defense counsel objected to the nurse's statement as "hearsay," but did not specifically raise an objection on confrontation clause grounds. SRP 56. However, an error will be preserved for review if the ground for objection asserted on appeal was apparent from the context at trial. State v. Black, 109 Wn.2d 336, 340, 745 P.2d 12 (1987). Therefore, defense counsel's hearsay objection was sufficient to preserve the confrontation error because hearsay is an integral element of confrontation clause violations. Crawford, 541 U.S. at 59 n. 9; Davis, 154 Wn.2d at 301. Regardless, the right to confront adverse witnesses is an issue of constitutional magnitude that may be considered for the first time on appeal. RAP 2.5(a)(3); State v. Clark, 139 Wn.2d 152, 155-56, 985 P.2d 377 (1999); Ohlson, 131 Wn. App. at 78; State v. Price, 127 Wn. App. 193, 199, 110 P.3d 1171 (2005). It is beyond dispute that the admission of testimonial hearsay violates the constitutional right to confront adversarial witnesses. Crawford, 541 U.S. at 53-54, 59. A constitutional error is "manifest" if it had "practical and identifiable consequences in the trial of the case." State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2000) (internal

quotation marks omitted). The testimonial statement here was manifest because it demolished Heddrick's account of what happened and reinforced the officers' credibility in a case where the believability of these eyewitnesses was crucial to the state's case as well as Heddrick's defense.

d. The Confrontation Clause Error Was Not Harmless Beyond A Reasonable Doubt.

Confrontation clause violations are subject to constitutional harmless error analysis. Davis, 154 Wn.2d at 305. The state bears the burden of proving harmlessness. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Such an error is harmless only when the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. The reviewing court must be convinced beyond a reasonable doubt that "any reasonable jury would reach the same result absent the error." Id. In reaching its conclusion, the court must assume that the damaging potential of the hearsay testimony was fully realized. State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006). Relevant factors include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the

prosecution's case." Id. (quoting Delaware v. Van Arsdall, 475 U.S. 673, 686-87, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)).

The erroneous admission of the nurse's statement here cannot be considered harmless beyond a reasonable doubt. Credibility was a crucial issue. There was a direct conflict in the eyewitness testimony presented by the officers and Heddrick. Heddrick testified he suffered disabling injuries as a result of being beaten by an officer -- an account integral to his defense that he, not an officer, was the victim of assault. 5RP 48. The state expended considerable energy to rebut Heddrick's testimony that he suffered severe injuries from the incident. 4RP 43-46, 53-57. The nurse's hearsay statement that Heddrick had not suffered enough injuries to justify transport to a hospital accomplished this goal, as it contradicted Heddrick's claim and impugned his veracity as a witness in his own defense. The prosecutor expressly recognized the case revolved around issues of credibility in closing argument, as she repeatedly challenged the jury to compare the different versions of events offered by Heddrick and the officers, pointedly asked the jury to consider the plausibility of Heddrick's story, and argued that if the jury believed Heddrick's version, then it must also conclude the officers lied on the stand. 4RP 67-68, 69, 72, 73.

It was important for the state to introduce evidence that someone other than the correctional officers could dispute Heddrick's version of

events. Unlike the officers involved in the assault, the nurse could not be expected to have any bias towards Heddrick or vested interest in contributing to his conviction. The nurse, through her hearsay statement, effectively acted as a neutral witness whose credibility or observations could in no way be legitimately challenged in the absence of cross-examination.

To make matters worse, the hearsay evidence came from Officer Braden. In assessing the prejudicial effects of improper testimony, a law enforcement officer's testimony may particularly affect a jury because of its "special aura of reliability." State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001). The jury was more likely to believe the nurse made the hearsay statement because a law enforcement officer swore she did. At the same time, the statement unfairly bolstered the credibility of the officers' testimony, as it was consistent with the officers' version of events.

Finally, the erroneously admitted hearsay evidence uniquely bulwarked the state's case. Only the nurse, as a trained medical professional, had the competency to testify as an expert witness regarding the extent of Heddrick's injuries. The nurse's hearsay statement was far from cumulative, as it conveyed a key piece of information the officers themselves could not provide. In fact, except for Braden's admission that he could not remember whether there were marks on Heddrick's face, none

of the three officers offered any personal observations about the extent of Heddrick's injuries. 4RP 58.

Because the nurse did not actually appear as a witness and testify, however, Heddrick was entirely deprived of his constitutional right to confront her as a witness by means of cross-examination. Foster, 135 Wn.2d at 455. As a result, the hearsay statement retained an invincible shield of inviolability. See State v. Chapin, 118 Wn.2d 681, 685, 826 P.2d 194 (1992) (theory behind hearsay prohibition is that cross-examination is best way to reveal whatever untrustworthiness lies beneath the assertion of a witness). Because the nurse's testimonial statement undermined Heddrick's version of events and thus his entire defense, the state should have called her as a witness so defense counsel could test her observations in "the crucible of cross-examination." Crawford, 541 U.S. at 61. Taking all these factors together, and assuming, as this Court must, that the damaging potential of the hearsay testimony was fully realized, the confrontation clause error cannot be considered harmless beyond a reasonable doubt.

- e. Even If The Nurse's Hearsay Statement Was Not Prohibited By The Confrontation Clause, The Court Still Committed Reversible Evidentiary Error In Allowing Its Admission.

Only "testimonial" statements are prohibited by the right to confrontation. Davis, 126 S. Ct. at 2273. The improper admission of a non-testimonial hearsay statement under Washington's evidentiary rules, however, may still constitute reversible error. ER 802. Assuming, arguendo, that the nurse's statement was not testimonial, the court erroneously admitted the statement because it constituted hearsay and did not fall within any exception to the rule against hearsay.

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A trial court abuses its discretion when it is based upon untenable grounds or untenable reasons. State v. Vermillion, 112 Wn. App. 844, 855, 51 P.3d 188 (2002). As described above, the nurse's statement is hearsay because it was admitted for the truth of the matter asserted -- that Heddrick did not suffer substantial injuries. ER 802 prohibits the admission of a hearsay statement unless it falls within an enumerated exception. The nurse's statement to the correctional officer, which was offered to contradict Heddrick's version of events, did not fall under a hearsay exception. Jacqueline's Washington Inc., 80 Wn.2d at 788-89; Williams, 79 Wn. App.

at 26-27. The court therefore abused its discretion in admitting the nurse's hearsay statement.

An evidentiary error is prejudicial and requires reversal if, "within reasonable probabilities, the trial's outcome would have been materially affected had the error not occurred." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The outcome would not have been affected if the evidence erroneously admitted is of minor significance in reference to the evidence as a whole. Id.

The hearsay evidence here cannot be considered insignificant. The case came down to who the jury believed. Questions of credibility were paramount. The hearsay statement admitted against Heddrick amounted to "impeachment by contradiction" and likely had a devastating effect on the jury's view of the veracity of Heddrick 's account. Under such circumstances, there is a reasonable probability the hearsay error materially affected the outcome of the trial and this Court should therefore reverse Heddrick's conviction.

4. THE COURT VIOLATED HEDDRICK'S RIGHT TO A JURY TRIAL BY ALLOWING OFFICER BRADEN TO GIVE AN IMPROPER OPINION REGARDING HEDDRICK'S VERACITY AND GUILT.

Officer Braden's testimony regarding what the medical staff "felt" about the extent of Heddrick's injuries, in addition to qualifying as hearsay,

also constitutes an improper opinion on Heddrick's veracity and guilt. 4RP 56. This requires reversal of Heddrick's conviction.

No witness, lay or expert, may opine as to the defendant's veracity or guilt. Demery, 144 Wn.2d at 759; Black, 109 Wn.2d at 348; State v. Jones, 117 Wn. App. 89, 92, 68 P.3d 1153 (2003). A witness may not offer such an opinion by direct or indirect statement. Black, 109 Wn.2d at 348; Jones, 117 Wn. App. at 92. Opinion testimony on the guilt or veracity of the defendant violates the defendant's constitutional right to a jury trial and is unfairly prejudicial to the defendant because it invades the exclusive fact-finding province of the jury. Demery, 144 Wn.2d at 759.

a. Officer Braden's Testimony Qualifies as an Improper Opinion.

Opinion testimony is that "based on one's belief or idea rather than on direct knowledge of the facts at issue." Demery, 144 Wn.2d at 760 (citation omitted). Every opinion admitted into evidence at trial must be based on knowledge. ER 701; ER 702; State v. Kunze, 97 Wn. App. 832, 850, 988 P.2d 977 (1999). Proper lay opinion is based on personal knowledge, while proper expert opinion is based on scientific, technical, or specialized knowledge. ER 701, 702; Kunze, 97 Wn. App. at 850. The opinion offered by Officer Braden that "medical staff felt that he didn't have enough injuries" was not based on either type of knowledge, and hence was

inadmissible. 4RP 56. Braden is not a mind reader nor is he a medical expert. It was sheer speculation on his part that medical staff "felt" Heddrick did not have enough injuries to justify transport to a hospital rather than his cell.

Officer Braden's opinion was an inferential, yet unmistakable, attack on Heddrick's veracity as a witness. The state introduced this opinion to rebut Heddrick's claim he suffered significant injuries -- a claim central to his defense that he, and not an officer, had been assaulted. 4RP 43-45, 54-57. Braden's opinion regarding the medical staff's perception of Heddrick's condition was offered to contradict Heddrick's testimony. Where one witness is used to impeach another, the veracity of the conflicting stories is necessarily at issue. Williams, 79 Wn. App. at 26-27.

A witness cannot testify, directly or indirectly, that the defendant lied about a material fact at issue. Jones, 117 Wn. App. at 92; State v. Stevens, 127 Wn. App. 269, 275-76, 110 P.3d 1179 (2005). The officers' testimony that medical staff "felt" Heddrick did not have enough injuries to justify transport to the hospital was an inferential opinion Heddrick lied when he said he suffered substantial injuries. The officers' testimony constituted an opinion regarding Heddrick's credibility and, by extension, his guilt.

b. The Improper Opinion Error is Preserved for Appeal.

Defense counsel objected to Braden's testimony base on hearsay rather than improper opinion. 4RP 56. Nevertheless, an error of improper opinion testimony that goes to the guilt or veracity of a defendant may generally be raised for the first time on appeal pursuant to RAP 2.5(a) because it is a manifest error affecting a constitutional right. State v. Saunders, 120 Wn. App. 800, 811, 86 P.3d 1194 (2004); State v. Barr, 123 Wn. App. 373, 375, 380-81, 98 P.3d 518 (2004); State v. Dolan, 118 Wn. App. 323, 330, 73 P.3d 1011 (2003); see also State v. Kirkman, 126 Wn. App. 97, 99, 106, 107 P.3d 133 (2005) (opinion regarding credibility of victim witness). It is well established that opinion testimony on the veracity of the defendant invades the fact-finding province of the jury and is a violation of the constitutional right to a trial by jury. Demery, 144 Wn.2d at 759. A constitutional error is "manifest" if it had "practical and identifiable consequences in the trial of the case." Roberts, 142 Wn.2d at 500. The improper opinion testimony given by Officer Braden was manifest because the opinion simultaneously destroyed Heddrick's veracity and bolstered the officers' credibility in a case where the relative believability of these eyewitnesses was a central issue.

c. The Improper Opinion Testimony Was Prejudicial.

A constitutional error is harmless only when the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Easter, 130 Wn.2d at 242. The reviewing court must be convinced beyond a reasonable doubt that "any reasonable jury would reach the same result absent the error." Id.

Because the case turned on who the jury believed, the credibility of Officer Braden and Officer Spadoni was essential to convict Heddrick. By bolstering the officers' testimony through improper opinion regarding what the medical staff felt about Heddrick's claimed injuries, the jury was told it should believe the officers' instead of Heddrick.

Opinion testimony from a law enforcement officer is especially likely to influence the jury and thereby deny the defendant a fair and impartial trial. Barr, 123 Wn. App. at 384; State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992). The opinion testimony, in reinforcing the officers' story and undermining the veracity of Heddrick's account, tainted the officers' testimony as well as that given by Heddrick. Under these circumstances, the untainted evidence against Heddrick cannot be deemed so overwhelming that it necessarily leads to a finding of guilt. The conviction should therefore be reversed.

5. PROSECUTORIAL MISCONDUCT VIOLATED HEDDRICK'S RIGHT TO A FAIR TRIAL WHERE THE STATE ARGUED THAT THE JURY, IN ORDER TO BELIEVE HEDDRICK'S TESTIMONY, MUST CONCLUDE OFFICERS PERJURED THEMSELVES.

The prosecutor committed misconduct during closing argument when she told the jury that, in order to believe Heddrick's version of events, it must conclude that law enforcement officers lied on the stand. 4RP 72. Reversal is required.

Prosecutorial misconduct violates a defendant's due process right to a fair trial when there is a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A prosecutor commits misconduct when he or she argues that, in order to believe the defendant's version of events, the jury must find the state's witnesses are lying. State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995), overruled on other grounds by State v. Aten, 130 Wn.2d 640, 657-58, 927 P.2d 210 (1996); State v. Barrow, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991); State v. Riley, 69 Wn. App. 349, 353 n.5, 848 P.2d 1288 (1993). It is also unfair to make it appear that an acquittal requires the jury to conclude that the state's witnesses are lying. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991). Such

arguments are intrinsically misleading because they misstate the nature of reasonable doubt and misrepresent the role of the jury in reaching its verdict. Fleming, 83 Wn. App at 213, 216; Wright, 76 Wn. App. at 825, 826.

The state in closing argument asked the jury to consider the credibility of Heddrick and the officers who testified against him and the relative believability of their accounts of what happened. 4RP 71-72. The state then improperly argued, with reference to the officers:

So when you hear those things, contemplate whether or not these are guys who are getting up on the stand schmoozing and making up facts, and because that's what you'd have to accept and believe if you accept the defendant's version to be true.

4RP 72.

This argument is misleading because "the testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved." Casteneda-Perez, 61 Wn. App. at 363. "A jury does not necessarily need to resolve which, if any, of the witnesses is telling the truth in order to conclude that one version is more credible or accurate than another." Wright, 76 Wn. App. at 825. Contrary to the prosecutor's argument, the jury did not need to conclude that the state's witnesses were "making up facts" to believe Heddrick's testimony.

The prosecutor, in making its improper argument, essentially told the jury that to acquit Heddrick, the jurors would need to believe that the officers perjured themselves. The danger lurking behind this tactic is that jurors will be inclined to find the defendant guilty rather than believe officers deliberately attempted to deceive them. Casteneda-Perez, 61 Wn. App. at 360. This argument is improper because it misstates the jury's role, which is to determine whether the state has met its burden of proving each element of its case beyond a reasonable doubt. Wright, 76 Wn. App. at 826. A jury need only find the state has not proven its case beyond a reasonable doubt in order to acquit. The jury may find reasonable doubt for a multitude of reasons that have nothing to do with whether a state's witness lied. Id., at 826; Fleming, 83 Wn. App. at 213. The argument made here presented the jury with a false choice between concluding the state's witnesses lied or convicting Heddrick. Wright, at 825.

Defense counsel did not object to the prosecutor's improper argument. Absent an objection, reversal is required only if the misconduct is so flagrant or ill-intentioned that it creates incurable prejudice. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Incurable prejudice exists where there is a substantial likelihood the misconduct affected the jury's verdict, and a curative instruction could not have prevented the potential prejudice. Id. The prosecutor's misconduct here was flagrant

and ill-intentioned because it clearly violated established case law. Fleming, 83 Wn. App. at 214. It stands to reason that, the greater the importance of credibility to the state's case and the defendant's defense, the greater the likelihood of incurable prejudice where prosecutorial misconduct taints the jury's credibility determination. Here, there is a substantial likelihood the improper argument affected the verdict and created incurable prejudice because the state's case, as well as Heddrick's defense, hinged on who the jury believed. The error therefore requires reversal of Heddrick's conviction.

6. HEDDRICK WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In the event this Court rules defense counsel failed to preserve the confrontation clause error, improper opinion or prosecutorial misconduct errors for review, then Heddrick's counsel was ineffective. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980) (failure to preserve error can constitute ineffective assistance and justifies examination of substantive issues on appeal).

Effective assistance of counsel is necessary to ensure a fair and impartial trial. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); Ermert, 94 Wn.2d at 849. The standard of review for an assertion of ineffective assistance of counsel involves a two-prong test. State v.

Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. 668). First, the defendant must show counsel's performance was deficient. Thomas, 109 Wn.2d at 225. Second, the defendant must show the deficient performance prejudiced the defense. Id. at 225-26. To satisfy the first prong, the defendant must show counsel's performance fell below an objective standard of reasonableness. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); Strickland, 466 U.S. at 688. To satisfy the second prong, the defendant must show a reasonable probability that but for counsel's performance, the result would have been different. McNeal, 145 Wn.2d at 362; Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. The defendant need not show that counsel's deficient performance more likely than not altered the outcome. Id. at 693.

Analysis of the confrontation clause, improper opinion and prosecutorial misconduct issues and their prejudicial impact need not be repeated here. Suffice to say, if indeed counsel failed to preserve any one of these errors for review, that failure constitutes deficient performance and but for that failure, there is a reasonable probability the outcome may have been different. McNeal, 145 Wn.2d at 362; Strickland, 466 U.S. at 693, 694.

7. CUMULATIVE ERROR DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant deserves a new trial when errors, although individually not reversible error, cumulatively produce an unfair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The doctrine mandates reversal if the cumulative effect of these errors materially affected the outcome of the trial. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Even where some errors are not properly preserved for appeal, the court has discretion to examine them for their cumulative on the fairness of the trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). In addition, the failure to preserve errors can constitute ineffective assistance of counsel and should be taken into account in determining whether cumulative error denied the defendant a fair trial. Ermert, 94 Wn.2d at 848.

Here, an accumulation of errors materially affected the outcome of the trial: (1) Heddrick was found competent in the absence of procedural due process; (2) Heddrick was denied assistance of counsel at a critical stage of the proceeding; (3) hearsay was improperly admitted; (4) improper opinion testimony was admitted; (5) the state committed misconduct in closing argument; and (6) defense counsel was ineffective in failing to

preserve one or more prejudicial errors. Reversal is required because the cumulative of these errors denied Heddrick a fair trial.

8. THE COURT ERRED IN ORDERING HEDDRICK TO SUBMIT TO INVOLUNTARY MEDICATION AND TO PARTICIPATE IN MENTAL HEALTH TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

The court erred when it sentenced Heddrick, as a special condition of community custody, to "follow mental health treatment and take all meds [sic]." CP 39. Pursuant to RCW 9.94A.505(9), a court may not order an offender "to participate in mental health treatment or counseling" as a condition of community custody "unless the court finds, based on a presentence report and any applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime." State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003).

RCW 9.94A.505(9) provides:

The court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

The court, in sentencing Heddrick, did not make a statutorily mandated finding that Heddrick was a "mentally ill person" as defined by RCW 71.24.025, or that a mental illness influenced the crime for which he was convicted. CP 31-39; 5RP 45-54; 6RP 2-7. The pre-sentence report offered by the state, meanwhile, made no mention of mental illness. Supp. CP (sub no. 30, Presentence Statement of King County Prosecuting Attorney, 11/28/05). The court thus erred when, without following statutory prerequisites, it ordered Heddrick to submit to mental health treatment and medication. Jones, 118 Wn. App. at 202.

These sentencing errors may be raised for the first time on appeal. Jones, 118 Wn. App. at 204; State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993); State v. Julian, 102 Wn. App. 296, 304, 9 P.3d 851 (2000) ("sentence imposed without statutory authority can be addressed for the first time on appeal"). On remand, this Court should order the trial court to strike the conditions pertaining to mental health treatment and medication. Jones, 118 Wn. App. at 212.

D. CONCLUSION

For the reasons stated, this Court should reverse Heddrick's conviction. In the event this Court declines to reverse conviction, this

Court should order the trial court to strike the special conditions relating to community custody.

DATED this 21st day of December, 2006.

Respectfully Submitted,

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