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NO. 57420-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

STEVE HEDDRICK,

Appellant.

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY I. YU

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Where there was never a threshold determination of reason to doubt Heddrick's competency, but rather the trial court granted defense an opportunity to establish a reason to doubt competency, and the defense was unable to establish such reason, did the trial court abuse its discretion by failing to hold an evidentiary hearing?

2. Where there are no disputed facts regarding a defendant's competency, a court's order finding the defendant competent is a ministerial act, and not a critical stage of the proceedings. Should this Court find that Heddrick was not denied the assistance of counsel when his assigned attorney was not present when the order was entered? Further, should this Court find that even if entry of the order was a critical stage, Heddrick was not denied the assistance of counsel because another attorney had agreed to sign off on the order?

3. Crawford v. Washington provides that "testimonial" hearsay may not be admitted at trial without an opportunity for cross-examination. A "testimonial" statement is a formal statement made in preparation for trial as a result of police interrogation. In this case, a corrections officer was permitted to testify about what it means when the jail nurse "clears" an inmate for transport to his cell. This statement was not "testimonial," and it was admissible under the evidence rules as an

implied assertion. Should the defendant's Crawford and hearsay claims be rejected?

4. A defendant may not assign error on appeal where the basis of the objection is different from that argued below. At trial, counsel objected to a question on grounds that the response called for hearsay. The court overruled the objection. On appeal, the defendant claims that the court erred because the response contained improper opinion evidence. Has the defendant waived appellate review of the issue?

5. Generally, when a prosecutor argues that either the state's witnesses or the defendant were not telling the truth, it constitutes misconduct. Here, the police's version of the incident was diametrically opposed to the defendant's version. Should this Court agree that the defendant's failure to object bars appellate review, that he has not shown the argument, which simply stated the obvious, amounted to misconduct, and that he has not proven that but for the alleged misconduct there is a substantial likelihood he would not have been found guilty?

6. In order to prevail on a claim of ineffective assistance of counsel, the defendant must prove both counsel's deficient performance, and that the deficiency prejudiced him. Having failed to establish error in his earlier arguments, appellate counsel recasts his claims as ineffective assistance of counsel. Even if this Court finds meritorious some of the

defendant's alleged errors, the unchallenged evidence overwhelmingly establishes the defendant's guilt. Has the defendant failed to establish actual prejudice?

7. Should this Court agree that the defendant's failure to prove multiple trial court errors, and substantial prejudice, bars him from prevailing in a claim under the "cumulative error" doctrine?

8. Before a trial court may impose mental health treatment as a condition of community custody, it must follow certain statutory procedures. Here, even though defense counsel acknowledged that Heddrick's mental illness contributed to his criminal behavior, the court did not make the required findings. Should this court remand for the trial court to determine whether it can comply with the statutory requirements?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

The State charged the defendant, Steve Heddrick, with one count of custodial assault. CP 1. The jury found Heddrick guilty as charged. CP 16. The court imposed a standard range sentence. CP 31-39. Heddrick timely appeals. CP 40-49.

The State has made a motion to consolidate this appeal with Heddrick's other pending direct appeal, COA No. 57469-8-I. A decision on the motion is pending before this Court.<sup>1</sup>

**2. SUBSTANTIVE FACTS.**

On February 17, 2005, the defendant, Steve Heddrick, an inmate at the King County Jail, was re-assigned to a different cell. 3RP 105, 108.<sup>2</sup> Two King County Corrections Officers, Steven Spadoni and Alan Braden, were assigned to transport Heddrick. 3RP 104-05, 109; 4RP 4-6. When the officers arrived at Heddrick's cell, Heddrick was packed and ready to go. 3RP 111; 4RP 6. Officer Spadoni asked Heddrick to turn around so that he could handcuff him. 3RP 113; 4RP 6. As Spadoni began to cuff Heddrick, Heddrick suddenly pulled away, turned, and punched Spadoni in the face with a closed fist. 3RP 113, 126; 4RP 7.

Heddrick's blow knocked Spadoni's eyeglasses off, and sent Spadoni reeling into the wall. 3RP 113; 4RP 7. Braden immediately grabbed Heddrick's arm. 4RP 7. He forced Heddrick onto the bunk bed. 4RP 7. Heddrick continued to struggle and resist. 3RP 114; 4RP 7.

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<sup>1</sup> The State will refer to the clerk's papers as CP followed by the appropriate number. In each instance it is clear by the context to which record the State refers.

<sup>2</sup> The State adopts the appellant's designation of the verbatim report of proceedings in this appeal.

After Spadoni found his glasses, he helped Braden try to control Heddrick. 3RP 113-14; 4RP 7. It was too hard to control Heddrick on the bed, so the officers forced him to the ground. 3RP 114; 4RP 7-8. They were finally able to cuff Heddrick. 3RP 114; 4RP 9.

Both officers and Heddrick saw medical personnel after the assault. 3RP 123-24; 4RP 9-10. Spadoni's face swelled up. 3RP 116-17. He also suffered a fractured hand or forearm, but was uncertain when or how during the struggle the injury occurred. 3RP 118. In less than two to three minutes, the nurse treated Heddrick's injuries, and then she authorized the officers to transport him to his cell. 3RP 124; 4RP 47-50, 55-56. Braden was unhurt. 4RP 14.

Heddrick testified at trial. 4RP 26-51. He said that he was in his cell gathering his personal belongings when a corrections officer “[c]harged in, and started attacking me.” 4RP 30. Heddrick stated that without any provocation, the officer “[p]roceeded just to pound the hell out of me, just started going off on me for no reason.” 4RP 31. As a result of the beating, Heddrick claimed he sustained multiple injuries: “I had a black eye, I had lumps all over the sides of my scalp, my head and face, like lumps, big lumps and stuff, and I had broken ribs, and my whole rib cage was broken.” 4RP 32. He stated that despite telling the nurse

about his injuries, after two to three minutes the nurse cleared him for transport to his newly assigned cell. 4RP 47-51.

C. **ARGUMENT**

1. **A COMPETENCY HEARING WAS NOT REQUIRED BECAUSE NO LEGITIMATE QUESTION OF COMPETENCY EXISTED.**

Heddrick contends that his due process rights were violated because, after making a threshold determination that he was incompetent, the trial court later found him competent without holding an evidentiary hearing. Heddrick is incorrect. Heddrick mischaracterizes the records from this case, and from the felony harassment case, COA number 57469-8-I. A careful review of the records establishes that competency was never challenged in this case, and the motion challenging competency in the felony harassment case was withdrawn after the defense expert concluded that Heddrick was competent. Consequently, there was no reason to hold an evidentiary hearing.

a. Relevant Procedural History.

i. Felony Harassment case.

On September 8, 2004, defense counsel, Ms. Brown, advised the court that she had reason to doubt Heddrick's competency and that she was

pursuing an independent psychological evaluation. 1RP 3-6.<sup>3</sup> Although Heddrick had been evaluated for a district court case, the report by Western State Hospital (WSH) staff psychiatrist, Brian Waiblinger, MD, did not specify whether Heddrick was, in fact, competent. CP 104-09.

On October 14, 2004, after reviewing Dr. David White's psychological report and addendum, and after the State and defense jointly asked the court to find Heddrick incompetent, the Honorable Michael J. Trickey signed an order committing Heddrick to WSH for a 90-day restoration period. 1RP 11-13; CP 94-96, 112-15, 118-28.

On January 20, 2005, after reviewing WSH staff psychiatrist Dr. Steven Marquez's report, CP 130-34, Judge Trickey asked defense counsel if she had a position regarding Dr. Marquez's finding of competency. 1RP 18-19. Defense counsel deferred to the court. 1RP 19. Judge Trickey ruled: "Looking at Dr. Marquez's report, I think there is a basis to find he's been restored to competency and that he can assist counsel and he

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<sup>3</sup> The State's designation of the verbatim report of proceedings in COA No. 57469-8-I is 1RP (9/8/04; 10/14/04; and 1/20/05); 2RP (7/14/05); 3RP (7/18/05); 4RP (7/19/05); 5RP (7/20/05); 6RP (7/21/05); 7RP (7/27/05); 8RP (8/29/05); 9RP (9/26/05 and 11/23/05); 10RP (10/10/05); 11RP (10/11/05); and 12RP (10/12/05).

understands the charges." 1RP 20. The parties then signed agreed findings of fact and conclusions of law. CP 7-8,141.<sup>4</sup>

On July 14, 2005, trial began before the Honorable Mary Yu. 2RP 1-2. Pretrial hearings were held July 14, 18-20. 3RP-5RP. Jury selection began on July 20. 5RP 73.

On July 21, 2005, court detail notified Judge Yu's bailiff that Heddrick refused to go to court; he threw himself on the floor of the elevator and fought with transport officers. 6RP 2-3. Defense counsel, Ms. Lapps, voiced concerns about mental health issues possibly contributing to Heddrick's absence. However, she did not have particular concerns regarding Heddrick's competency. 6RP 5.

Because Heddrick had the pending custodial assault charge (COA No. 57420-5-I), it was possible that his absence was attributable to ongoing strife with jail personnel. 6RP 6. Thus, in order to determine whether Heddrick had voluntarily absented himself from court, and to allow Lapps time to consult with Heddrick and to "assess the situation to see whether there are some issues that need further assessment in terms of

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<sup>4</sup> An evidentiary hearing was not needed to determine Heddrick's competency because neither party contested the findings contained in the report. *See, e.g., State v. Higa*, 38 Wn. App. 522, 685 P.2d 1117 (1984) (no error where court reviewed WSH report concluding that, although Higa had a paranoid personality with obsessive-compulsive traits, he was competent to stand trial, and defense made no request for a formal evidentiary hearing).

his own mental health," the court recessed the trial and set a status conference for July 27. 6RP 19-21, 28.

On July 27, Lapps indicated that given the applicable legal standard, she believed Heddrick was competent. 7RP 6. She expressed concern about Heddrick's mental health and his ability to assist counsel; however, she felt that she could not provide the court with any more substantive information without violating attorney/client communications. 7RP 6-7. The court noted that throughout the four days of pretrial hearings, and in particular, when the court advised Heddrick of his CrR 3.5 rights, it seemed "he truly and fully appreciated what the Court was advising him of." 7RP 7-8. Lapps agreed. 7RP 8. The court inquired, "What other evidence is there that he is legally incompetent at this point?" 7RP 8. Lapps replied, "Well, Your Honor, that's actually the struggle that I have had." 7RP 8. Lapps explained:

It has been very clear to me from the beginning that Mr. Heddrick understood that he has a right to trial, and that he has a right to a plea. He was offered a plea. He turned that down.

We are in trial. We've had numerous discussions about procedures for [CrR 3.5 hearings], for testifying.

And I would agree with the Court's assessment, he asked an intelligent question in terms of . . . distinguishing his testimony under three-five from in trial, and which applies....He asked intelligent questions in regard to that.

I think that, for the most part, he can recite what the charges are. His standard range, I think, is unclear to him, as well as to me, because there are a number of issues in terms of whether there's a community custody point.

....  
What it really comes down to is really the communication between attorney and client and the ability to assist.

7RP 8-9. Lapps then reiterated her concern that she could not be more specific without violating attorney/client privilege. 7RP 9.

The court then inquired:

So is the ultimate issue at this point for the Court to simply remain in recess until all of this is completed in terms of giving you an opportunity to submit a request to have a private evaluation, to allow the private evaluation to occur, and then perhaps for the Court to reconvene at a certain point in the future to reassess the situation? Is that what you are asking?

7RP 10. Lapps responded, "That would be my request. I think if the Court orders or allows a competency evaluation to go forward in this ... we would need to wait for a report." 7RP 10.<sup>5</sup>

Over Heddrick's strenuous objection ("I've already been evaluated and found competent." 7RP 18), the court signed the proposed order. CP 142. Judge Yu overruled Heddrick's objection: "[B]ased on what I've heard today from counsel, I'm going to go ahead and I'm going to order

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<sup>5</sup> It was immediately after this hearing that the parties appeared before the Honorable Ronald Kessler and discussed the issue of competency in the custodial assault case, which is addressed at § C.1.a.ii, *infra*.

this evaluation.” 7RP 20. On August 1, 2005, Judge Yu signed an agreed order for a pretrial competency evaluation by WSH. 38-41.<sup>6</sup>

On September 26, Lapps told the court that Dr. White had not yet seen Heddrick.<sup>7</sup> 9RP 3-4. Lapps felt she needed Dr. White's assessment, because she believed "there is a mental health issue or neurological issue" affecting Heddrick's ability to effectively communicate with counsel. 9RP 3. Judge Yu set a telephonic status conference for September 29. 9RP 5.

On September 29, the court entered a written order directing Dr. White to file a written report upon completion of his evaluation, and the court set another status conference for October 6. CP 143.

Trial resumed on October 10, 2005. CP 144-45. During the October 11<sup>th</sup> proceedings, Lapps summarized the October 6<sup>th</sup> telephonic hearing:

At that time, I informed the Court that an independent evaluation with an expert hired by the defense had been completed.

And when I speak of evaluation, I'm talking about a competency evaluation.

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<sup>6</sup> It is not clear from the record whether WSH ever conducted an evaluation or generated a report as a result of this order. The deputy prosecutor reported to the court that there was confusion at WSH over the scope of the evaluation because Heddrick informed WSH that the custodial assault case had been dismissed (it had not been) and that he was only to be evaluated for the felony harassment case. *See* 8RP 2-3, 5-6. The court file does not contain any psychological evaluations post Dr. Marquez's January 17, 2005 report.

<sup>7</sup> Lapps chose Dr. White because he had previously evaluated Heddrick. CP 126.

My evaluator's assessment was that Mr. Heddrick was, in fact, competent to proceed. Given his assessment, I am not – *I was not and am not contesting competency at this time.*

I did not feel it was necessary for Doctor White to produce a written evaluation, partially *because I was not contesting the issue*, and also in – out of consideration for the amount of money that it would have cost in addition to what he had already spent to produce a written evaluation, *so the defense's agreeing and has agreed that Mr. Heddrick is competent to proceed.*

11RP 14-15 (emphasis supplied).

ii. Custodial Assault case.

On July 27, 2005, after appearing before Judge Yu, the deputy prosecutor (Ms. Miller), Heddrick, and Heddrick's counsel on the custodial assault case, Mr. Jensen, appeared before the Honorable Ronald Kessler to address the procedural posture of that case. *See generally* 1RP.<sup>8</sup> Miller explained that Lapps had expressed concerns about Mr. Heddrick's competency and that:

[a]fter we spent over a half hour on the record on this issue with Judge Yu, she determined that it was in the Defendant's best interest as well as the State's best interest and the interest of justice to have the Defendant evaluated for competency.

1RP 4.

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<sup>8</sup> Miller had invited Jensen to attend the hearing in Judge Yu's court, but he did not do so. *See* 7RP 3-4.

Miller had relayed the information to Jensen, and Miller told the court, "I believe it's accurate to state that he sees some of the same issues that Ms. Lash (*sic*) sees and believes it's appropriate to have the competency evaluation done and to track that case with the other case."

1RP 5. Jensen addressed the court:

[T]he defense concurs with the State's assessment. I did speak with Ms. Lash (*sic*) about some of the issues. Mr. Heddrick and I also have the same concerns. I think it sort of ebbs and flows with Mr. Heddrick and it would be wise to have this case track with the other evaluation so we can get this resolved.

1RP 5-6. Judge Kessler responded,

Competency is time based and not case based. If a court has raised a doubt as to competency, I think I have no choice but to raise that same doubt. Is she ordering ... a private evaluation?

1RP 6.

Miller said that Lapps would be seeking a private evaluation:

And so Ms. Lash (*sic*) indicates that she's going to try and have the evaluation done as soon as possible. **We've filled out an order for [a State] evaluation, but I don't know; it may not be necessary, depending on what her evaluator finds.** So I could just do an order on criminal motion at this point in time indicating that the Court orders that a competency evaluation be done, and then, which is what Judge Yu ordered this morning.

1RP 6 (emphasis supplied). Judge Kessler inquired whether Judge Yu had agreed to a private evaluation, and Miller confirmed that Judge Yu had so

agreed. 1RP 6-7. Miller filled out an order for a pretrial competency evaluation by WSH, CP 4-7, indicating on the order that "[d]efense counsel, Tracy Lapps, raised competency on 04-1-12703-0 SEA. This case to track with it in terms of the evaluation." CP 7.

When Heddrick stated that he would not cooperate with the evaluator, Judge Kessler abandoned the plan to have him evaluated at the King County Jail and sent him to WSH. CP 4-7; 1RP 7-9. It appears from the absence of any WSH report that after Dr. White determined that Heddrick was competent, the State tacitly withdrew its motion to have Heddrick evaluated by WSH.<sup>9</sup>

b. Due Process Requirements.

An accused in a criminal case has a fundamental right not to be tried while incompetent to stand trial. Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); State v. Eldridge, 17 Wn. App. 270, 562 P.2d 276 (1977). The failure to observe procedures adequate to protect this right is a denial of due process. State v. Marshall, 144 Wn.2d 266, 279, 27 P.3d 192 (2001).

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<sup>9</sup> Ms. Miller filled out the pretrial competency evaluation order, CP 4-7, only as a contingency had Dr. White found Heddrick incompetent to stand trial. The State's tacit withdrawal of its motion explains the absence of any report by WSH post Dr. Marquez's January 17, 2005 report. Likewise, it appears from the absence of any paperwork seeking expert funding, and the absence of any report by a privately retained expert, that Heddrick was not evaluated in the instant case.

In Washington, an "incompetent person" may not be tried, convicted, or sentenced for an offense so long as the incapacity continues. RCW 10.77.050. A defendant is incompetent if he "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(14); *see also* State v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991). A competency evaluation is required whenever "there is reason to doubt" the defendant's competency. RCW 10.77.060(1)(a).<sup>10</sup> The defense bears the burden of establishing a reason to doubt the defendant's competency. Lord, at 903. A motion to determine competency must be supported by a factual basis and will not be granted merely because it was filed. Id. at 901. The motion is not of itself sufficient to raise a doubt regarding competency. Id. The question is whether "a legitimate question of competency" exists. Marshall, 144 Wn.2d at 279.

"'A reason to doubt' is not definitive, but vests a large measure of discretion in the trial judge." City of Seattle v. Gordon, 39 Wn. App. 437, 441, 693 P.2d 741 (1985). In exercising discretion in determining the

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<sup>10</sup> In pertinent part, RCW 10.77.060(1)(a) provides:

Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

threshold question, considerable weight should be given to the attorney's opinion regarding her client's competency and ability to assist in the defense. Id. at 442. A court may proceed without an evidentiary hearing based on counsel's representation that the defendant is competent. State v. Harris, 122 Wn. App. 498, 505, 94 P.3d 379 (2004). A trial judge's determination of competency to stand trial should not be disturbed on appeal absent an abuse of discretion. Eldridge, 17 Wn. App at 279.

- c. In This Case, There Never Was A Threshold Determination Of Reason To Doubt Heddrick's Competency.

Heddrick contends that Judge Kessler made a threshold determination of reason to doubt his competency, and that Judge Yu then violated his right to due process by finding him competent without an evidentiary hearing. However, Judge Kessler never made a threshold determination. Rather, he ruled that if another judge found reason to doubt Heddrick's competency, then he felt that he had no choice but to order an evaluation. Yet, Judge Yu ordered Heddrick's competency evaluation specifically to allow Lapps an opportunity to dispel or confirm any concerns about Heddrick's competency--the order was not predicated on Judge Yu's independent determination of reason to doubt Heddrick's competency. *See* State v. O'Neal, 23 Wn. App. 899, 600 P.2d 570, *review denied*, 93 Wn.2d 1002 (1979). This Court should reject his argument.

In O'Neal, prior to trial, the defense expressed concerns about the defendant's inability to appreciate his peril and to assist in his defense. O'Neal, 23 Wn. App. at 900. O'Neal's counsel requested the appointment of an expert to evaluate O'Neal "to support testimony concerning the competency and mental state of the defendant." Id. After completing his evaluation, the defense expert prepared a letter in which he opined that O'Neal was competent. Id. The trial judge denied defense counsel's request for a 15-day state hospital evaluation, but he agreed to appoint a second psychiatrist to assist him in deciding whether to reconsider his ruling. Id. at 900-01.<sup>11</sup>

At the same hearing, O'Neal offered the testimony of his wife and a police officer to establish his mental state, but in light of the expert's opinion, the trial judge rejected the testimony. Id. at 901. At trial, O'Neal did not produce any psychiatric testimony, there was no indication of irrational behavior by O'Neal, and O'Neal's counsel did not renew his request for a hearing on O'Neal's competency. Id.

In rejecting O'Neal's due process claim, predicated in part on the trial judge's failure to hold an evidentiary hearing on his competency, this Court concluded that neither due process nor RCW 10.77 required an

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<sup>11</sup> From the record in O'Neal, it does not appear as though defense counsel followed through and obtained a second psychiatric opinion. O'Neal, at 901.

evidentiary hearing. Id. at 902. In addition to the absence in the record of any indication that the judge observed any irrational behavior by O'Neal, this Court noted that the appointment of the defense expert "[m]erely provided the defense with an opportunity to establish a reason to doubt O'Neal's competency. It was not based upon the hearing judge's having already decided there was such a reason." Id.

Similarly, in this case, Judge Yu had not decided there was a reason to doubt Heddrick's competency; rather, she agreed to remain in recess to give the defense an opportunity to submit a request to have a private evaluation, to allow the private evaluation to occur, and then for the court to reconvene to reassess the situation. *See* 7RP 10.

Judge Kessler, operating under the misperception that Judge Yu had made such a determination, agreed to have an evaluation in this case. It is clear from Judge Kessler's phraseology that he did not make an independent determination about Heddrick's competency: "*If a court has raised a doubt as to competency, I think I have no choice but to raise that same doubt.*" 1RP 6 (emphasis added). Because Judge Yu had not raised such a doubt, there were no facts before Judge Kessler to support a motion for a competency evaluation.

Indeed, Jensen, Heddrick's counsel in the instant case, never brought an independent motion for a competency evaluation—the pretrial

competency evaluation order that Judge Kessler signed was the State's motion to have Heddrick evaluated by WSH, in the event that Dr. White found Heddrick incompetent. 1RP 6; CP 4-7. Jensen stated that he shared some of Lapps' concerns, that it "sort of ebbs and flows with Mr. Heddrick and it would be wise to *have this case track with the other evaluation so we can get this resolved.*" 1RP 6 (emphasis added). To the extent that the language "other evaluation" could be construed as implying a motion for a competency evaluation in this case, the motion is unsupported by any factual basis (or any pleadings), and it is, therefore, wholly insufficient. *See Lord*, 117 Wn.2d at 903. Moreover, the fact that defense counsel never pursued an independent competency evaluation or raised the issue at trial indicates that counsel lost his doubts about Heddrick's competency. *See O'Neal*, 23 Wn. App. at 902.

Heddrick claims that from the outset of the harassment case, Judge Yu expressed "persistent doubts about Heddrick's competency." Br. of App. at 10. That simply is not true. A review of the clerk's papers following the quoted language (CP 89-93) reveals that each was signed prior to Heddrick's 90-day restoration period, and none was signed by Judge Yu. And, as detailed above, Judge Yu did not have reason to doubt

Heddrick's competency; she simply granted Lapps' request for an opportunity to establish reason to doubt Heddrick's competency.<sup>12</sup>

d. Entry Of The Order Finding Heddrick Competent Was A Ministerial Act.

Heddrick claims that Judge Yu signed an order finding him competent without an evidentiary hearing. Heddrick argues that because Naylor was not present when Judge Yu "found Heddrick competent," he had no opportunity to request an evidentiary hearing.<sup>13</sup> However, it is clear from the record that there were no factual disputes and entry of the order was a ministerial act. *See City of Hoquiam v. Grays Harbor County*, 24 Wn.2d 533, 540, 166 P.2d 461 (1946) (an act is ministerial where it leaves nothing to the exercise of discretion or judgment).

On October 10, 2005, when the parties reconvened in the felony harassment case, Miller asked Judge Yu to sign an order finding Heddrick competent in the custodial assault case. 10RP 3. (This hearing occurred after the October 6<sup>th</sup> telephonic conference, during which Lapps told the

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<sup>12</sup> Heddrick claims that on September 8, 2004, Judge Yu ordered a competency evaluation in the felony harassment case. Heddrick is mistaken. The clerk's paper he cites, CP 92, is an order setting a review hearing signed by the Honorable Dean Lum. Similarly, Heddrick is mistaken about which judge found reason to doubt Heddrick's competency and ordered the 90-day restoration period in the felony harassment case. It was not Judge Yu; it was the Honorable Michael Trickey.

<sup>13</sup> Marcus Naylor substituted in as defense counsel, replacing Mr. Jensen in the custodial assault case. CP 50.

court that her expert, Dr. White, had found Heddrick competent.) *See*

11RP 14-15). Miller said:

[T]his is the case where Marcus Naylor is representing the defendant rather than Ms. Lapps, and they were talking to Angie at the end of last week. She indicated to me that it would be helpful for her to have the filing for a competency hearing on that cause number.... Basically that case has been tracking along with this one....

10RP 3. Miller requested an order so that Angie, the Superior Court Clerk, would have the necessary paperwork to lift the stay of proceedings and enable Naylor to set a trial date. *See* CP 8 (stamped Superior Court Clerk Angie Villalovos Deputy), 51 (order setting trial date); 10RP 3.

Miller informed Judge Yu that she, Lapps, and Naylor had met on the preceding Friday: "Mr. Naylor indicated to me originally that he agreed with Ms. Lapps that we would need to have those two things (the competency order and the trial set) taken care of." 10RP 4. Miller represented to Judge Yu that Lapps had "agreed to sign off on that order for Mr. Naylor." 10RP 3.

Lapps stated that she was hesitant to sign the order because Naylor worked in a different office than she, "and I don't know if they did a separate competency evaluation or anything." 10RP 4. She acknowledged that Naylor was present at the meeting with Angie and then said, "I guess I am less concerned signing off on an order for the Court's

finding of Mr. Heddrick's competency than I am scheduling another attorney that hasn't communicated with me for a trial date." 10RP 4.

However, as pointed out above, competency was never an issue in the instant case. Heddrick is presumed competent, and he failed to sustain his burden of producing any factual basis to contest competency. *See Lord*, 117 Wn.2d at 903. Furthermore, Judge Yu could proceed on counsel's October 6<sup>th</sup> representation that Heddrick is competent. *See Harris*, 122 Wn. App. at 505.

Even if this Court finds that Judge Kessler found reason to doubt Heddrick's competency, it is clear that just as Lapps withdrew her motion challenging competency, so, too, did Naylor. *See, e.g., O'Neal*, 23 Wn. App. at 902 (fact that defense counsel never pursued a second psychiatric evaluation or raised the concern at trial indicates that he had lost his doubts about the defendant's competency). On October 6, 2005, which was a Thursday, Lapps informed the court that Dr. White had found Heddrick competent. Miller, Lapps, and Naylor met on Friday, October 7<sup>th</sup>, and Naylor agreed with Lapps that they needed to take care of the competency order and trial set. 10RP 4. At that meeting, Naylor knew that Dr. White had found Heddrick competent. Thus, Naylor did not have a basis to seek an evidentiary hearing. *See, e.g. State v. Ortiz*, 119 Wn.2d 294, 300-01, 831 P.2d 1060 (1992) (defendant failed to establish

incompetency where he did not produce any evidence that his condition {mental retardation} had changed since his previous hearings in which he had been found competent). Moreover, the absence of any motion contesting Heddrick's competency after the entry of the October 10<sup>th</sup> order finding Heddrick competent supports the conclusion that, if any such motion had previously been raised, it was effectively withdrawn on October 10<sup>th</sup>. O'Neal, 23 Wn. App. at 902.

**2. HEDDRICK WAS NOT DENIED THE ASSISTANCE OF COUNSEL AT A CRITICAL STAGE.**

Heddrick asserts that he was denied the assistance of counsel at a critical stage of the proceedings because Naylor was not present when Judge Yu found Heddrick competent. This Court should reject this argument because it starts from the fallacious premise that Judge Yu *found* Heddrick competent, rather than signed an order that merely affirmed the presumption of his competency. Heddrick's argument is further flawed because he erroneously presumes that he is entitled to the same counsel to represent him throughout the proceedings. Yet, the law does not define "counsel" so narrowly. Rather, the representation by counsel includes any person authorized to practice law. Accordingly, when Lapps agreed to "sign off on the order for Mr. Naylor," Heddrick was represented by counsel. 10RP 4.

An accused has a right to counsel at any critical stage of a criminal prosecution. U.S. Const. amend. 6;<sup>14</sup> Const. art. 1, § 22 (amend. 10).<sup>15</sup> A critical stage is one "in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected." State v. Agtuca, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974). "'Counsel' as referred to in the Sixth Amendment refers to a person authorized to practice law." State v. S.M., 100 Wn. App. 401, 410, 996 P.2d 1111 (2000). The phrase "practice of law" includes rendering legal advice and "[t]he preparation of legal instruments that secure legal rights." Id. The right, however, is not absolute. State v. Cunningham, 23 Wn. App. 826, 833, 598 P.2d 756 (1979). An indigent defendant has no absolute right to a particular counsel. Id.

In this case, as argued above, Judge Yu's entry of the competency order was a ministerial act. As such, it was not a critical stage of the proceedings. *See* Agтуca, 12 Wn. App. at 404. However, even if this Court determines that the October 10<sup>th</sup> proceeding constituted a competency hearing, Heddrick was not denied the assistance of counsel.

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<sup>14</sup> "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

<sup>15</sup> "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...."

Lapps had agreed to represent Heddrick regarding the competency issue in the custodial assault case at the October 10<sup>th</sup> hearing, despite not knowing whether Naylor had arranged for a separate competency evaluation. 10RP 3-5. Thus, even if the hearing constituted a critical stage of the proceedings, for Sixth Amendment purposes, Heddrick was represented by counsel. S.M., 100 Wn. App. at 410.<sup>16</sup>

Heddrick's arguments, that he either proceeded pro se, but without validly waiving his right to counsel, or that the prosecutor represented him at the hearing, are not borne out by the record. It is clear that if the order finding Heddrick competent was more than a ministerial act, then Lapps represented Heddrick on Naylor's behalf. 10RP 3-5. Furthermore, Heddrick did not interpose any objection to Lapps standing in as his counsel on the custodial assault case. Likewise, Naylor never objected in any hearing after the October 10<sup>th</sup> proceeding to either the order finding Heddrick competent or to the procedure that Judge Yu followed.

Miller did not represent Heddrick at the hearing. As an officer of the court, Miller recounted what had occurred when she, Naylor, and Lapps met. 10RP 3-5. Those representations were not tantamount to Miller appearing as counsel for Heddrick.

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<sup>16</sup> Judge Yu did not require Lapps to actually sign the order—she accepted the representations of the parties. 10RP 3-5; CP 8 *herein*.

Accordingly, this Court should reject Heddrick's contention that counsel did not represent him at a critical stage of the proceedings.

**3. THE COURT'S ADMISSION OF AN IMPLIED ASSERTION DID NOT VIOLATE HEDDRICK'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES.**

Heddrick claims that his confrontation rights were violated when the court admitted Officer Braden's testimony regarding what it meant when the nurse "cleared" Heddrick for transport. Specifically, the defense objected on the basis of hearsay to Braden's explanation that when the medical staff cleared Heddrick for transport, it "means medical staff felt that he didn't have enough injuries--" This claim should be rejected for four reasons. First, Braden's statement is not "testimonial" under Crawford v. Washington.<sup>17</sup> Second, Braden's statement, which made explicit the nurse's implied assertion (that Heddrick was "cleared" for transport to his cell), is excluded from the definition of hearsay, and thus admissible. Third, if the statement was hearsay, it was a present sense impression, and the trial court may be affirmed on that basis as well. Finally, even if the court erred by admitting the statement, Heddrick's conviction should still be affirmed. The challenged statement is

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<sup>17</sup> Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

cumulative of other statements not challenged on appeal, and the evidence of Heddrick's guilt is overwhelming; thus, any alleged error is harmless.

a. The Relevant Testimony.

Heddrick testified that while one officer stood guard, “[t]he other officer just came, charged in, and started attacking me.” 4RP 30. According to Heddrick, the officer smashed the handcuffs down on his wrist bone, and then “proceeded just to pound the hell out of me, just started going off on me for no reason.” 4RP 31. As a result of the assault, Heddrick claimed that he “[h]ad bumps all over the side of my head and face, both sides, and my ribs had been broke (*sic*), the tips of my ribs had been broken, or they actually were punctured or something.” 4RP 48. Heddrick said that he could hardly breathe and that he was disabled “[f]or well over a month.” 4RP 48.

The State recalled Officer Braden in rebuttal:

Q. [By Prosecutor] 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 [cleared], 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 repose that question.

Q. (BY MS. MILLER) Can you describe for the jury, when you say someone gets cleared by medical staff, can you give a general definition of what that means?

A. If it's not substantial injuries of broken bones, life threatening or something of that nature, they are cleared to go to their assigned cell.

Q. So if they have something that needs to be treated, they're not cleared; if they don't, they are, is that accurate?

A. Yes, ma'am.

4RP 55-57.

b. The Statement Was Not Testimonial.

Heddrick claims that the nurse's statement, that Heddrick was "cleared," was testimonial because a reasonably objective person in the

nurse's position would "naturally surmise that her observations and statements" would have potential relevance in a future assault prosecution, and that she would be called as a witness. Heddrick's argument is fundamentally flawed in two respects. First, Heddrick did not object to the nurse's statement that Heddrick was "cleared" to go back to his cell. At trial, the hearsay objection was to **Braden's** testimony as to what the nurse meant when she said that Heddrick was cleared to return to his cell (that he did not have enough injuries to warrant transport to Harborview Medical Center). This significant distinction leads to Heddrick's second flawed argument, which is predicated upon a fundamental misunderstanding of Crawford. At the outset, Crawford does not apply, and neither does the right to confrontation in general, when the statement at issue is not within the definition of hearsay in the first place.

Crawford applies only when three prerequisites are met. First, the challenged statement must be hearsay; i.e., offered for the truth of the matter asserted. Crawford v. Washington, 541 U.S. 36, 50-51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); In re Personal Restraint of Theders, 130 Wn. App. 422, 432-33, 123 P.3d 489 (2005) (noting that when out-of-court assertions are offered for a purpose other than to prove the truth of the matter asserted, confrontation clause concerns do not arise). Second, the statements must be testimonial. While the Crawford Court did not

provide a comprehensive definition of the word "testimonial," Crawford, 541 U.S. at 68 and n.10, it did provide several specific examples of testimonial evidence: (1) ex parte in-court testimony or its functional equivalent, i.e., affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that a declarant would reasonably expect to be used in prosecution; (2) extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and (3) statements made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. Crawford, at 51-52. Third, the defendant must not have had an opportunity to cross-examine the declarant. Id. at 59.<sup>18</sup>

The Court did not hold that any and all statements made to a government employee are testimonial. To the contrary, the Court was concerned with "*structured* police questioning,"<sup>19</sup> and the "involvement of government officers in the *production of testimony with an eye toward trial* [that] presents unique potential for prosecutorial abuse[.]" Crawford, at 56 n.7 (emphasis supplied). However, Crawford did not alter prior law

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<sup>18</sup> The third prerequisite is not in dispute—the defense had the opportunity to cross-examine Braden, the declarant. Again, Heddrick did not object to the testimony that the nurse "cleared" Heddrick for transport to his cell.

<sup>19</sup> Crawford, at 53 n.4 (emphasis supplied).

with respect to non-testimonial statements. United States v. Saget, 377 F.3d 223, 227 (2d Cir.2004). In other words, when a statement is not "testimonial," the rules of evidence govern its admissibility.

The statement that Heddrick was "cleared" for transport, which impliedly meant that he did not have substantial injuries, does not constitute a "testimonial statement" within the province of Crawford. The statement was not (1) a response to structured questioning (2) within an investigative environment or courtroom setting (3) made with the expectation that it could be used in future judicial proceedings. *See Crawford*, at 51-52. Crawford specifically distinguished these formal statements from casual remarks. Id.

After examining Heddrick for less than three minutes, the nurse casually remarked that Heddrick was "cleared" for transport to his cell. 4RP 56. There is nothing in the record to indicate that the nurse's comment was in response to structured questioning. Rather, Braden testified that as he and Spadoni proceeded to transport Heddrick to his new cell, they passed by the sergeant's office. 4RP 54. The sergeant instructed Braden and Spadoni "[t]o call for medical staff, which is standard procedure, to have everybody checked out, the officers and the inmate." 4RP 54. The purpose of the visit to the nurse's office was for medical treatment, if needed, not for investigative purposes. If Heddrick had

received substantial injuries, then the officers would have transported him to Harborview Medical Center—to receive additional medical care, not to further their criminal investigation.

This Court should reject Heddrick's claim that the nurse's status as a government employee ("The nurse worked at the jail") *ipso facto* renders her statements "testimonial." Furthermore, no credible claim could be made that the nurse "interrogated" Heddrick, or that Braden or Spadoni "interrogated" the nurse.

The nurse's statement clearing Heddrick for transport to a cell was not made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use in future judicial proceedings. *See Crawford*, at 52.<sup>20</sup> It is what is implicit in that statement that is relevant; it is also what removes the statement from hearsay, and from a violation of Heddrick's confrontation clause rights.

Even if this Court finds that the statement at issue constitutes testimonial hearsay, its admission was harmless error. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (a violation of the right to confrontation is subject to harmless error

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<sup>20</sup> Heddrick relies on the fact that photographs were taken of Spadoni's injuries to buttress his claim that the nurse should have known that her observations and statements would potentially be relevant in a later assault prosecution; however, there is no evidence in the record that the nurse had any knowledge of the photographs having been taken.

analysis). A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. State v. Deal, 128 Wn.2d 693, 703, 911 P.2d 996 (1996).

Braden's response to what it means to be medically cleared for transport was wholly cumulative of testimony admitted without objection. Heddrick testified that he saw a nurse for two to three minutes, and then he was transported to a different cell as originally planned. 4RP 47-48. Without objection, Braden testified about standard procedure for treating inmates who sustain substantial injuries: they are transported by jail officers to Harborview Medical Center for additional treatment, and that in this case, Heddrick was not transported to the hospital, he was returned to a cell. 4RP 55-56. Thus, even if the admission of the statement was error, it was harmless beyond a reasonable doubt.

c. The Statement Was An Implied Assertion.

When a statement is not "testimonial," the rules of evidence govern its admissibility. Braden's statement defining what it means to be "cleared" by the medical staff was not "testimonial" under Crawford, and was properly admitted under the evidence rules.

The admission of evidence lies within the sound discretion of the trial court. State v. Norlin, 134 Wn.2d 570, 576, 951 P.2d 1131 (1998). A

decision to allow certain evidence will not be reversed absent a showing of abuse of discretion, a standard met only when the appellate court concludes that no reasonable person would have taken the position adopted by the trial court. State v. Demery, 114 Wn.2d 753, 758, 30 P.3d 1278 (2001). Where reasonable minds could take differing views, the court has not abused its discretion. Demery, 114 Wn.2d at 758.

The specific statement that drew an objection was Braden's response to what it *means* when an inmate gets "cleared" by medical staff. The trial court overruled the hearsay objection without elaborating on its reasoning. Nonetheless, this Court may uphold the trial court's evidentiary ruling, if the evidence was admissible for any proper purpose. State v. Mutchler, 53 Wn. App. 898, 903, 771 P.2d 1168, *review denied*, 113 Wn.2d 1002 (1989). Here, the evidence was properly admitted because the answer simply defined an implied assertion; i.e., what it *means* when an inmate gets "cleared" by medical staff, which is excluded from the definition of hearsay.

ER 801 defines the basic terms of hearsay as follows:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** “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.

Verbal conduct that is assertive, but is offered as a basis for inferring something other than the matter asserted, is not hearsay. State v. Collins, 76 Wn. App. 496, 499, 886 P.2d 243, *review denied*, 126 Wn.2d 1016 (1995). Under the definition of hearsay, nothing is an assertion unless intended to be one, and a person does not normally intend to assert an implied belief. Id.

Braden’s testimony, that the nurse cleared Heddrick to go to his assigned cell, was not offered to show that Heddrick was transported to his cell, but to infer that he did not have substantial injuries—because if he had, he would have been transported to Harborview Medical Center. Likewise, when the prosecutor asked Braden what it *meant* for someone to be cleared by the medical staff, Braden’s response did not contain hearsay. Rather, his response merely made explicit what was implicit in the nurse’s clearance of the patient; i.e., that the patient did not have substantial injuries. Accordingly, the court did not violate the hearsay rules in admitting the testimony.

Heddrick contends that the response was hearsay because the statement constituted “impeachment by contradiction.” Heddrick’s

argument is flawed in two respects. First, he misconstrues Braden's response as containing a "statement" by the nurse concerning Heddrick's injuries. However, when the nurse said that Heddrick was cleared to go back to his cell, she did not intend that statement to be an assertion regarding the absence of any injury. That is why the prosecutor had to ask Braden, "[W]hat does that mean?" 4RP 56. In other words, what does that *imply*?

Second, it is a misnomer to refer to Braden's testimony as impeachment evidence. The evidence was substantive, rebuttal evidence. *See State v. Hubbard*, 103 Wn.2d 570, 576, 693 P.2d 718 (1985) ("[I]mpeachment by contradiction actually constitutes rebuttal evidence."). The State offered controverting testimony that was admissible to rebut Heddrick's version of events, not just to show that he was generally unbelievable. *See id.* The evidence is no less admissible merely because it may by implication reduce the credibility of another witness. *See United States v. DiMatteo*, 716 F.2d 1361, 1366 (11<sup>th</sup> Cir. 1983), *cert. granted and judgment vacated*, 469 U.S. 1101, 105 S. Ct. 769, 83 L. Ed. 2d 767 (1985), *on remand*, 759 F.2d 831 (11<sup>th</sup> Cir. 1985).

Consequently, the evidence was properly admitted; it was an implied assertion and not objectionable as hearsay. However, even if this Court determines that the statement constitutes hearsay, it was nevertheless admissible as a present sense impression.

d. The Statement Could Properly Have Been Admitted As A Present Sense Impression.

Even if the comment that Heddrick was cleared to go back to his cell, or the statement defining what it meant to be cleared to go back to his cell, constituted hearsay, it was properly admitted as a present sense impression. *See Mutchler*, 53 Wn. App. at 903 (if the evidence was admissible for any proper purpose, this Court may uphold the trial court's evidentiary ruling).

Pursuant to ER 803(a)(1), "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is not excluded by the hearsay rule even if the declarant is available to testify. Assuming that the statement defining what it means to be cleared (that the medical staff "[f]elt that he didn't have enough injuries") constitutes hearsay, it is a statement made by Braden explaining a condition (Heddrick's medical condition) made immediately after perceiving the condition (Braden was present when the

nurse examined Heddrick for less than three minutes). Accordingly, the statement qualifies as a present sense impression.<sup>21</sup>

If this Court finds that the statement was hearsay, but does not qualify as a present sense impression, then it was error to admit the statement. The error, however, was harmless.

e. Error, If Any, Was Harmless.

This Court will not reverse due to an error in admitting evidence where the error does not prejudice the defendant. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). Where the error is from an evidentiary ruling, it is not prejudicial unless, within reasonable probabilities, the trial's outcome would have differed had the error not occurred. Id. In determining the effect of an irregularity at trial, an appellate court should examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it. State v. Bourgeois, 133 Wn.2d 389, 409, 945 P.2d 1120 (1997).

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<sup>21</sup> As a present sense impression, the statement was not testimonial in nature. *See* Government of the Virgin Islands v. Thompson, 2005 WL 641752 (V.I. Super. 2005). In Thompson, the court recognized that statements made by the deceased minor victim, overheard by another on the telephone, and later offered at trial did not create a Crawford concern because the comments, admitted pursuant to Federal Rules of Evidence 803(1) and 803(2), were not testimonial in nature. Id. at 4-7. "In sum, the statements at issue are non-testimonial and come within two (2) recognized exceptions to the hearsay rule, to wit: present sense impression and excited utterance. Accordingly, the statements are admissible." Id. at 7.

In this case, as pointed out above, the statement was entirely cumulative. Therefore, the statement did not reasonably affect the trial's outcome, and admitting it was harmless error.

**4. HEDDRICK OBJECTED AT TRIAL TO A RESPONSE ON THE BASIS THAT IT CALLED FOR "HEARSAY"; HE MAY NOT ASSIGN ERROR ON THE BASIS THAT THE RESPONSE CONTAINED IMPROPER OPINION EVIDENCE.**

Heddrick contends that when Braden defined what it means to be "cleared" (that the medical staff feels the inmate does not have enough injuries to warrant transport to Harborview Medical Center), the definition constituted improper opinion evidence. This claim is wholly without merit. The challenged statement was not Officer Braden's belief; rather, it was the belief of the nurse—or at least that was the basis of Heddrick's Crawford and hearsay arguments, *supra*. Moreover, Heddrick cannot assign error to the court's admission of the evidence on that basis, because it was not the basis of his objection at trial.

This Court should decline to review this assignment of error for two reasons. First, the admission of testimony alleged to constitute an opinion on guilt is not an error of constitutional magnitude, and thus may not be raised for the first time on appeal. City of Seattle v. Heatley, 70 Wn. App. 573, 583-86, 854 P.2d 658 (1993). Second, a party may only assign error in the appellate court on the specific ground of the evidentiary

objection made at trial. State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976). Because the specific objection made at trial, "hearsay," is not the basis Heddrick is arguing here, he has lost his opportunity for review. Id.

**5. THE PROSECUTOR DID NOT COMMIT MISCONDUCT.**

Heddrick contends that the prosecutor committed misconduct when she stated in closing argument that in order to accept Heddrick's version of events, the jurors would have to believe that the officers made up facts. Under the facts of this case, and in the context of her argument, the prosecutor did not commit misconduct. She simply stated the obvious.

In order to sustain a claim of prosecutorial misconduct, a defendant must show that the prosecutor's conduct was improper and that the misconduct had a prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). Prejudice is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1996). A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Failure to object to an improper remark constitutes a waiver of error, unless the misconduct was so flagrant

and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Comments in closing argument that seek to compare the honesty of the defendant with law enforcement officials are improper. See State v. Barrow, 60 Wn. App. 869, 875-76, 809 P.2d 209, *review denied*, 118 Wn.2d 1007 (1991). In Barrow, the defendant was charged with delivery of an uncontrolled substance in lieu of a controlled substance. The prosecutor stated in closing that "'in order for you to find the defendant not guilty on either of these charges, you have to believe his testimony and you have to completely disbelieve the officers' testimony. You have to believe that the officers are lying.'" Id. at 874-75. This Court held that the argument was improper because it misstated the jury's duty to return a verdict. Jurors need not "completely disbelieve" the officers' testimony in order to acquit the defendant; they need only entertain a reasonable doubt that it was the defendant who made the sale. Id. at 875-76.

Similarly, in State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997), this Court held:

The prosecutor's argument misstated the law and misrepresented both the role of the jury and the burden of proof. The jury would not have had to find that [the victim] was mistaken or lying in order to acquit; instead, it

was required to acquit unless it had an abiding conviction in the truth of her testimony.

83 Wn. App. at 213.

Here, during argument concerning the credibility of witnesses, the prosecutor began by citing the applicable law, reminding the jurors that they are "the sole judges of the credibility of the witnesses and to what weight is to be given to the testimony of each." 4RP 72 (quoting CP 19). The prosecutor then asked the jurors to consider the bias and prejudice of each witness. 4RP 73. She reminded the jurors that the corrections officers were not seasoned witnesses:

I ask you to consider the fact that these aren't officers that are going on the stand every day and testifying. Two of them have testified less than five times each, and one's only testified once. 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 73. There was no objection. And then the prosecutor immediately followed up by asking the jury "[t]o very carefully consider the credibility of the witnesses," and to "[g]o back and very carefully consider the evidence." 4RP 73.

Given the diametrically opposed version of events presented at trial—according to the officers, they went to transport Heddrick when he attacked Officer Spadoni for no apparent reason; according to Heddrick, in

an unprovoked attack, Spadoni pummeled him, breaking his ribs, while another officer stood guard—this was an instance in which at least one person was lying.

Furthermore, unlike in Barrow or Fleming, the prosecutor here never argued in closing or rebuttal that the jurors could acquit Heddrick only if they believed the State's witnesses were lying. The prosecutor's argument, read in context, demonstrates that she used it as a means of arguing to the jury that the facts supported only one reasonable conclusion: that the State's witnesses were being truthful. That is not misconduct. State v. Fiallo-Lopez, 78 Wn. App. 717, 731, 899 P.2d 1294 (1995). When the prosecutor does no more than argue facts in evidence or suggest reasonable inferences from that evidence, there is no misconduct. *See* State v. Smith, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985).

Moreover, the defense theory of the case was that the incident did not occur as the corrections officers said it did, and that what Officer Spadoni said happened was "not true," that Spadoni's version of events "never occurred." 4RP 34. Under these circumstances, there is nothing misleading or unfair in stating the obvious—someone is not telling the truth. *See* State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (a prosecutor may properly argue that the evidence does not support the defense theory of the case). Accordingly, the argument was not improper.

Even assuming that the argument constituted misconduct, Heddrick cannot show how a simple objection and curative instruction would not have obviated the potential prejudice. Consequently, Heddrick has failed to sustain his burden.

**6. HEDDRICK HAS FAILED TO ESTABLISH THAT HIS COUNSEL WAS INEFFECTIVE.**

Heddrick recasts all of his previous arguments under the catch-all theory of ineffective assistance of counsel. In essence, Heddrick argues that, if he has failed to demonstrate error under any of his prior theories, then this court should reverse his conviction because (1) the failure to preserve any of the alleged errors constitutes deficient performance; and (2) but for the failure to preserve the error, "there is a reasonable probability that the outcome may have been different." Br. of App. at 47. Heddrick's same arguments, re-couched as a claim of ineffective assistance, should be rejected.

To demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel performed deficiently, and (2) the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice results where there is a reasonable probability that, but for counsel's deficient performance, the

outcome would have been different. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). If Heddrick fails to satisfy either prong of this test, this Court need not address the other prong. Hendrickson, at 78.

Heddrick cannot sustain his burden. As argued extensively above, error did not occur. Consequently, counsel was not deficient for failing to object.

Furthermore, even assuming that counsel was deficient for failing to object to any of the alleged errors, and applying the more stringent constitutional harmless error standard, any error was harmless beyond a reasonable doubt. Therefore, Heddrick cannot show prejudice.

**7. HEDDRICK IS UNABLE TO SUSTAIN HIS BURDEN IN SEEKING REVERSAL PURSUANT TO THE “CUMULATIVE ERROR” DOCTRINE.**

Heddrick alleges that the cumulative effect of numerous trial errors deprived him of his right to a fair trial. An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). It is axiomatic, however, that to seek reversal pursuant to the “accumulated error” doctrine, the defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. Here, as explained above, Heddrick has failed to satisfy this burden.

**8. THIS COURT SHOULD REMAND FOR THE TRIAL COURT TO DETERMINE WHETHER IT CAN PRESENTLY COMPLY WITH RCW 9.94A.505(9).**

Heddrick contends that the trial court erred when it imposed the following condition of community custody: "[to] follow mental health treatment and take all meds." CP 39. Heddrick is correct. RCW 9.94A.505(9) authorizes a trial court to order mental health treatment as a condition of community custody only if it complies with certain procedures. The statute provides:

(9) 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.

In this case, although defense argued that Heddrick's mental illness contributed to his assaultive conduct, as well as his impaired cognitive abilities, the court did not make the required findings or obtain a presentence report or mental status evaluation. *See* 5RP 4-5. Accordingly, this Court should remand to enable the trial court to either

strike the condition or make a determination that it can "presently and lawfully comply with RCW 9.94A.505(9)." State v. Jones, 118 Wn. App. 199, 212 and n.33, 76 P.3d 258 (2003).

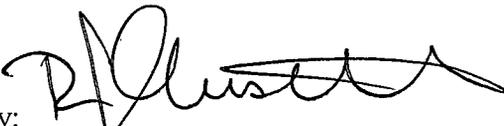
**D. CONCLUSION**

For all of the reasons stated above, the State respectfully asks this Court to affirm Heddrick's conviction for custodial assault, and to remand the matter for a determination by the trial court of whether it can presently comply with RCW 9.94A.505(9).

DATED this 22 day of November, 2006.

Respectfully submitted,

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King County Prosecuting Attorney

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. STEVE HEDDRICK, Cause No. 57420-5- I, in the Court of Appeals, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name Wynne Brame  
Done in Seattle, Washington

11/22/06  
Date

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