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SUPREME COURT NO. 101140-7
COURT OF APPEALS NO. 82805-3-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON

V.

CHRISTOPHER MORISETTE,

Appellant.

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

The Honorable Michael Scott, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHERS

A. IDENTITY OF PETITIONER

Petitioner Christopher Morisette asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of State v. Christopher Morisette, COA No. 82805-3-I, filed on July 5, 2022, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court violated Morisette's right not to be convicted while incompetent and failed to comply with its statutory duty under RCW 10.77.060 to appoint a mental health expert to evaluate Morisette's competency once the court had reason to doubt his competency, and defense counsel no longer had confidence in Morisette's ability to assist in his defense?

2. Whether Morisette received ineffective assistance of counsel where counsel failed to pursue a

viable global defense that was supported by evidence in discovery and elicited at trial?

3. Whether this Court should accept review of these significant questions of law under the state and federal constitutions? RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Following a jury trial in King County superior court, Morisette was convicted of one count of first degree assault and three counts of second degree assault, all with accompanying deadly weapon enhancements. CP 77, 79-83. The state's evidence showed that on the morning of July 9, 2019, for no apparent reason, Morisette stabbed three random people and swung a knife at a fourth person as he walked down Sixth Avenue by the downtown Nordstrom's. CP 1-7; RP 476-617. Afterward, Morisette took off all his clothes and ran up Pike Street onto the 9th Avenue I-5 offramp where he was taken into custody without incident. RP 606-07, 639-40.

According to the state's main witness, Morisette had a glazed look on his face, was disheveled and appeared out of it. RP 611, 615. His actions had no rhyme or reason. RP 616.

Significantly, Morisette has a long history of mental health issues and drug abuse. CP 95-111. As a drug screen would show, Morisette had consumed methamphetamine that morning. CP 106. Yet, defense counsel did not present this evidence or request a voluntary intoxication instruction. RP 35-36, 469-73.

Instead, the defense theory of the case was that the jury should convict Morisette of second degree assault on count 1 instead of first degree assault. RP 469, 473, 713-14. Defense counsel presented no defense to the other charges. Id.

Throughout the course of the trial, Morisette's competency deteriorated, as evidenced by nonsensical outbursts and counsel's concerns Morisette was no

longer competent. See e.g. 839-43, 846-47. Despite this, the court denied counsel's request for a competency evaluation. RP 849.

On appeal, Morisette argued defense counsel's failure to present an available global defense – specifically voluntary intoxication – was not reasonable trial strategy and constituted ineffective assistance of counsel. Brief of Appellant (BOA) at 39-52; Reply Brief of Appellant (RBA) at 7-13. The court of appeals disagreed, finding the evidence did not support such an instruction:

> Second, Morisette asserts that defense counsel should have sought to introduce the results of a urine drug screen done the day of the incident at the jail, which detected the presence of amphetamine, methamphetamine and cannabis. However, contrary to Morisette's assertion, the mere presence of drugs in his system does not establish when the drugs were consumed or what its affect would have been. See State v. Lewis, 141 Wn. App. 367, 389, 166 P.3d 786 (2007) (observing that methamphetamine has a wide range of effects on different individuals).
>
> Effective assistance of counsel includes a request for pertinent instructions which the

> evidence supports. State v. Finley, 97 Wn. App. 129, 134, 892 P.2d 681 (1999). There was no evidence in the instant case that would have supported a voluntary intoxication instruction.

Appendix at 17.

On appeal, Morisette also argued the court's failure to appoint an expert to evaluate Morisette's competency during trial – as requested by defense counsel – violated the court's duty to ensure Morisette was not convicted while incompetent. BOA at 32-38; RBA at 1-6. The appellate court disagreed, reasoning that: counsel requested the evaluation "in an abundance of caution;" counsel later relayed his belief that Morisette was knowingly, intelligently and voluntarily waiving his right to be present for further proceedings; and a post-trial, pre-sentencing evaluation found Morisette competent. Appendix at 13-14.

The parties and the appellate court agreed the evidence was insufficient to support count 4. Appendix at

1. Accordingly, that count has been reversed and Morisette awaits resentencing. Appendix at 17-19.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THIS COURT SHOULD ACCEPT REVIEW OF MORISETTE'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BECAUSE IT PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the attorney's performance prejudiced the accused. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Thus, trial strategy or tactics are not immune from attack: "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. Id.

RCW 9A.16.090 provides:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but

> whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such a mental state.

Diminished capacity from intoxication is not a true "defense." State v. Coates, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987). Rather, "[e]vidence of intoxication may bear upon whether the defendant acted with the requisite mental state, but the proper way to deal with the issue is to instruct the jury that it may consider evidence of the defendant's intoxication in deciding whether the defendant acted with the requisite mental state." Id. (WPIC 18.10).

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking (or being under the influence of a drug), and (3) there is evidence that the drinking or drugging affected the

defendant's ability to form the requisite intent or mental state. State v. Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). In other words, the evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged. State v. Gabryschak, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996).

Effective assistance of counsel includes a request for pertinent instructions which the evidence supports. State v. Finley, 97 Wn. App. 129, 134, 982 P.2d 681 (1999). In State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003), Division Three held counsel's failure to request a voluntary intoxication instruction amounted to ineffective assistance of counsel.

Kruger was accused of third degree assault for headbutting a police officer. Kruger, 116 Wn. App. at 689. The evidence showed that Kruger showed up at

Jennifer Kuntz's house drunk and she asked him to leave. When Kruger refused, Kuntz called the police. Id. at 688.

Officer Joseph Pence responded and tried unsuccessfully to speak to Kruger. Ultimately, a struggle ensued in which Kruger attempted to strike Pence with a beer bottle and headbutted the officer. Id. at 689.

Officer Tracy Meidl arrived. Both officers attempted to subdue Kruger. Pepper spray had little effect on Kruger, which is often the case when one is highly intoxicated. Eventually, the officers subdued and handcuffed Kruger. Id.

At jail, Kruger began vomiting. Pence took Kruger to the hospital to have an evaluation done to see if he could sober up. Id.

On appeal, Kruger argued his attorney should have asked for a voluntary intoxication instruction. Division Three agreed. First, the court noted that intent is an element of assault. Thus, the crime charged included a

mental state. Second, the court noted there was substantial evidence of Kruger's drinking and level of intoxication. Third, the court noted there was ample evidence of his level of intoxication on both his mind and body, including his "blackout," vomiting at the station, slurred speech, and imperviousness to pepper spray. Thus, the appellate court found he was entitled to the instruction. Kruger, 116 Wn. App. at 692. Significantly, the court held no expert testimony was necessary. Id.

Counsel's failure to request the instruction amounted to deficient performance:

> Here, intent appears to be the focus of the defense. And the state does not argue otherwise. Its argument is that Mr. Kruger needed an expert to support the voluntary intoxication defense. Resp't's Br. at 9. And so we do not see how the failure to request this instruction would fit strategically or tactically in this case. Every witness testified to Kruger's level of intoxication. No one downplayed or hid Mr. Kruger's level of intoxication.

Kruger, at 693.

Moreover, Kruger was prejudiced by his attorney's deficient performance:

> Here, the jury was instructed on the elements of third degree assault, including intent. And Mr. Kruger's intoxication was brought to the jury's attention. But, it "was not instructed that intoxication could be considered in determining whether the defendant [ ] acted with the mental state essential to commit the crime of third degree assault. [State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)]. In Rice, the court held that even where there was testimony from which the jury could infer the absence of intent due to the defendant's intoxication, the court erred by not giving an intoxication instruction. This is because "the jury, without the requested instruction, was not correctly apprised of the law, and the defendants' attorneys were unable to effectively argue their theory of an intoxication defense. Id. The same is true here.

Kruger, at 694 (footnote omitted). The court therefore reversed the conviction and remanded for a new new trial.

Based on these authorities, particularly Kruger, Morisette argued on appeal that if counsel had elicited the drug screen evidence, which was positive for

amphetamine, methamphetamine and cannabis (CP 106), Morisette would have been entitled to a voluntary intoxication instruction:

> First, he was accused of four counts of assault, all of which required the state to prove intent. Second, the drug screen evidence would have provided evidence Morisette was under the influence the morning of the stabbings. Third, the testimony of the witnesses provided the required link between Morisette's intoxication and his inability to form the required level of culpability to commit the crimes charged.
>
> Marquis testified Morisette was behaving erratically. He testified that Morisette was just swinging the knife and Biruk happened to be in the way. Marquis described Morisette to 911 as a "crazy homeless guy." RP 483, 500.
>
> Similarly, Johnson testified Morisette had a "glazed look on his face" like many he sees downtown who are homeless." RP 612. To Johnson, Morisette looked "lost in his head." RP 612. Johnson further testified Morisette was "completely removed from the situation, just stab and just off you go." RP 615. "There was just no rhyme or reason." RP 616.
>
> Police officer Davenport testified similarly that Morisette was walking but did not seem to have any purpose. RP 628-632.

BOA at 49-50.

As in Kruger, this evidence showed the level of intoxication on Morisette's mind and body. He would have been entitled to a voluntary intoxication instruction had counsel properly researched the case and presented the drug screen.

But Morisette's attorney wrongly believed he needed an exert and that there was no evidence (such as the urine screen) to show drug use. BOA at 47-48.

Counsel's failure to present the drug screen evidence and request a voluntary intoxication instruction amounted to deficient performance. The defense centered on the question of intent. The defense theory of the case was that Morisette did not have intent to commit great bodily harm against Terry Sheets. The drug screen and voluntary intoxication instruction would have helped this argument. It also would have provided a global defense to all assault charges because it bore on whether Morisette acted with the requisite mental state.

(i) The Court of Appeals Decision is Wrong

The court of appeals disagreed defense counsel performed deficiently, however, based on a line of cases pertaining to methamphetamine use. Appendix at 17 (citing Lewis, 141 Wn. App. at 389). These cases recognize that the effects of methamphetamine vary widely and are dependent on the person and therefore evidence of methamphetamine use is typically excluded. See also State v. Jennings, 199 Wn.2d 52, 502 P.3d 1255 (2022); State v. Richmond, 3 Wn. App. 2d 423, 415 P.3d 1208 (2018).

Lewis and these other cases are inapposite, however. In these cases, the defense was attempting to introduce methamphetamine use by the homicide victims to suggest – based on generalities of methamphetamine use – that the victims were acting aggressively and therefore the defendant was justified in using self defense. Here, however, the evidence would have been

offered to cast doubt on Morisette's ability to form the requisite mens rea to the commit the charged assaults.

Moreover, that drugs may have disparate effects on different people should go to weight not admissibility. Alcohol likewise affects people differently. Here, Morisette had evidence of drug use and evidence through the witnesses of its effects on him. This case is no different than State v. Kruger, 116 Wn. App. 685 (2003).

Moreover, this Court in Jennings acknowledged that the methamphetamine evidence was at least minimally relevant. Jennings, 199 Wn.2d at 62. In that case, however, Jennings offered no witness to testify as to its potential affect on the victim. Accordingly, the toxicology report – on its own – might confuse the jury.

The same is not true here. Witness Marquis testified Morisette was behaving erratically. Marquis described Morisette to 911 as a "crazy homeless guy." RP 483, 500. Similarly, Johnson testified Morisette had a

"glazed look on his face" like many he sees downtown who are homeless. RP 612. To Johnson, Morisette looked "lost in his head." RP 612. Johnson further testified Morisette was "completely removed from the situation, just stab and off you go." RP 615. "There was just no rhyme or reason." RP 616. Officer Davenport testified similarly Morisette seemed to have no purpose. RP 628-632. Morisette was running up I-5 naked when apprehended. This is all evidence of how the methamphetamine affected him. Kruger, 116 Wn. App. at 692.

For all these reasons, the court of appeals analysis of deficient performance is wrong. This Court should accept review of Morisette's ineffective assistance of counsel claim. RAP 13.4(b)(3).

2. THIS COURT SHOULD ACCEPT REVIEW OF MORISETTE'S CLAIM THE TRIAL COURT VIOLATED HIS RIGHT NOT TO BE CONVICTED WHILE INCOMPETENT BECAUSE IT INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

A person accused of a crime has a fundamental right not to be incompetent to stand trial. U.S. Const. Amend XIV; Drope v. Missouri, 420 U.S. 162, 171–72, 95 S. Ct. 896, 43 L.Ed.2d 103 (1975); In re Pers. Restraint of Fleming, 142 Wn.2d 853, 861, 16 P.3d 610 (2001); State v. Heddrick, 166 Wash. 2d 898, 904, 215 P.3d 201, 204 (2009), as corrected (Sept. 15, 2009)

Washington law affords even greater protection than federal law by specifying "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050. The statutory procedural requirements, set forth in chapter 10.77 RCW, are mandatory, not merely directory. Heddrick, 166 Wn.2d at 904, 906. "'The failure

to observe procedures adequate to protect this right is a denial of due process.'" Id. at 904 (quoting State v. O'Neal, 23 Wn. App. 899, 901, 600 P.2d 570 (1979)).

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 a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.

This statutory language is clear: whenever there is reason to doubt the defendant's competency, the court shall appoint an expert to evaluate his mental condition. State v. Sisouvanh, 175 Wn.2d 607, 620-21, 290 P.3d 942 (2012); State v. DeClue, 157 Wn. App. 787, 792, 239 P.3d 377 (2010) (recognizing a formal competency hearing is required under RCW 10.77.060 whenever a legitimate question of competency arises).

A person is legally incompetent if he lacks the capacity to understand the nature of the proceedings against him, to consult with counsel, or to assist in his own defense. RCW 10.77.010(15); State v. Ortiz-Abrego, 187 Wn.2d 394, 387 P.3d 638, 642 (2017). In essence, the defendant must have the "'ability to make necessary decisions at trial.'" Ortiz-Abrego, 387 P.3d at 646 (quoting State v. Jones, 99 Wn.2d 735, 746, 664 P.2d 1216 (1983)).

While there are no fixed signs of incompetency, factors to be considered include the defendant's irrational behavior, his demeanor, medical opinions on competency, and defense counsel's opinion. O'Neal, 23 Wn. App. at 902. "[T]he court should give considerable weight to the attorney's opinion regarding a client's competency and ability to assist in the defense." City of Seattle v. Gordon, 39 Wn. App. 437, 442, 693 P.2d 741 (1985); accord Drope v. Missouri, 420 U.S. AT 177 n.13 ("[A]n expressed doubt in that regard by one with the closest contact with the

defendant, is unquestionably a factor which should be considered." (internal quotation marks omitted) (citation omitted)).

(i) The Court of Appeals Decision is Wrong

Based on Morisette's nonsensical outbursts and fixations on being in a movie or show – over which he had no control – defense counsel believed Morisette was no longer capable of making necessary decisions at trial, such as whether he would be present, testify or put on a case. The trial court wrongly denied counsel's motion for a competency evaluation. BOA at 32-38.

The appellate court disagreed, reasoning that: counsel requested the evaluation "in an abundance of caution;" counsel later relayed his belief that Morisette was knowingly, intelligently and voluntarily waiving his right to be present for further proceedings; and a post-trial, pre-sentencing evaluation found Morisette competent. Appendix at 13-14.

Despite the appellate court's reasoning, there was abundant reason to doubt Morisette's competency. BOA at 15-31; RBA at 1-7. The court failed to protect Morisette's constitutional right not to be convicted while incompetent when it failed to order the evaluation.

First, whether counsel said the request was "in an abundance of caution" matters not. Defense counsel clearly expressed that he was no longer confident in Morisette's competency. The court failed to give defense counsel's opinion due weight. City of Seattle v. Gordon, 39 Wn. App. 437, 442, 693 P.2d 741 (1985) ("[T]he court should give considerable weight to the attorney's opinion regarding a client's competency and ability to assist in the defense"); Drope, 420 U.S. 162, 177 n.13 ("[A]n expressed doubt in that regard by one with the closest contact with the defendant, is unquestionably a factor which should be considered") (internal quotation marks omitted) (citation omitted)).

And significantly, the court itself expressed doubt about Morisette's competency, acknowledging that it could not discern whether Morisette's nonsensical outbursts were attempts to disrupt or evidence of a true mental break. RP 849.

Second, whether defense counsel believed Morisette understood his right to be present or absent from trial does not compel the finding he was capable of assisting in his own defense. Significantly, when Morisette chose to absent himself, defense counsel's motion for a competency evaluation had already been denied. It would have been cruel in that circumstance for counsel to propose a "reasonable force" order to ensure Morisette's presence. In short, there was nothing more defense counsel could do at that point to ensure Morisette's right to competency was protected.

Third, the fact Morisette was evaluated one month after trial does not diminish the necessity of a competency

evaluation during trial. As the Drope court recognized, competency is fluid. The stress of the trial was over by the time of this second competency evaluation. Morisette had the right to competency during trial, not just at sentencing. The court failed to ensure that right.

Finally, Dr. Mundt's post-hoc opinion of Morisette's trial behavior was done without the benefit of a contemporaneous interview with him. Monday morning quarterbacking cannot suffice for a timely competency evaluation. Because the court failed to ensure Morisette's competency during trial, this Court should accept review. RAP 13.4(b)(3).

F. CONCLUSION

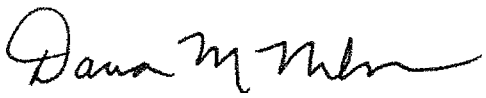
For the reasons stated above, this Court should accept review. RAP 13.4(b)(3).

This document contains 3,622 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 4th day of August, 2022.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER MORISETTE, Appellant.	No. 82805-3-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — Christopher Morisette stabbed three unrelated strangers in downtown Seattle. He then stripped off his clothes and ran. Soon after, he complied with police commands and submitted to his arrest. He was found competent to stand trial but disrupted jury selection and trial multiple times. The trial court denied defense counsel's request during trial for a second competency evaluation. Morisette appeals that decision and also argues that his counsel was deficient for not requesting a voluntary intoxication instruction. A jury convicted Morisette of one count of assault in the first degree and three counts of assault in the second degree. The State agrees with Morisette that insufficient evidence supports the conviction of Count 4. We reverse Count 4 and remand for resentencing but otherwise reject Morisette's other claims and affirm the convictions for Counts 1-3.

Citations and pin cites are based on the Westlaw online version of the cited material.

FACTS

On July 9, 2019, Andrew Marquis passed by and later identified Christopher Morisette who was holding a four-inch knife in downtown Seattle. Morisette held the knife with the blade faced toward himself doing a "light like tapping motion, just kind of rhythmically. . . ." Around the same time, bystander Richard Johnson approached and warned Morisette to put the knife away and said that whatever he was thinking of doing was not worth it. Morisette turned and asked, "You want some of this?" and then walked toward Johnson. Johnson again told Morisette to put down the knife. Morisette pointed the knife at himself and said, "I want to die."

Around the same time, a car pulled out of a nearby parking garage. Morisette banged on the hood of the car, and he started swinging his knife around. Marquis then called 911. At that point, Biruk Haile was walking by while looking at his phone when Morisette cut Haile's arm. Before Haile realized what was happening, Haile dropped his phone. As he attempted to pick up his phone, he noticed blood on his hand and saw Morisette swing the knife at him again. Haile grabbed an orange traffic cone to block any further advances by Morisette.

Morisette then walked toward a nearby entrance of the Nordstrom building when security officer Gregory Grady came outside. Grady had heard someone yelling on the street, "I've been stabbed. Somebody call the police, I've been stabbed." Morisette lunged at Grady and took a swipe at him, but Grady moved

out of the way.

Morisette continued walking up the sidewalk. Terry Sheets, who was working as a Nordstrom valet attendant, stood on the sidewalk near the store entrance. He heard some commotion, and as he turned, Morisette stabbed him in the neck.

Morisette then walked across the street, stabbed the back of another person, Robert Desjarlais, and then walked away. As he walked past a delivery truck, he threw the knife inside. He then took off his clothes and sprinted toward the freeway before police made contact. Morisette immediately complied with police orders and was arrested.

The State charged Morisette with four counts: (1) assault in the first degree of Terry Sheets, (2) assault in the second degree of Robert Desjarlais, (3) assault in the second degree of Biruk Haile, and (4) assault in the second degree of Gregory Grady.

Before trial, at defense counsel's request, the court ordered an evaluation of Morisette to determine his competency to stand trial. Dr. Cynthia Mundt, a forensic psychologist, conducted the evaluation. She was unable to complete the interview because Morisette would speak very low, then eat pieces of paper, and then responded loudly in a manner that suggested he was attempting to speak in a foreign language and not respond to questions in English. Mundt reviewed his relevant clinical history, including his history of inpatient and

outpatient assessments and treatment dating back to at least 2009. This review included his most recent evaluation from December 2018. Mundt also reviewed King County Correctional Facility mental health records. Records revealed disruptive behavior such as throwing feces or his food tray, spitting, flooding, banging on doors, and not following directions. Mundt reported that at times, Morisette "informed jail staff that he would continue engaging in the above behaviors until his requests or demands were met, such as a desire to move to psychiatric housing."

Morisette had been previously diagnosed with unspecified schizophrenia spectrum and other "psychotic disorder," unspecified substance abuse disorder, personality disorder with antisocial traits, bipolar disorder, autism spectrum disorder, and possible ADHD. He also had a history of attempting to feign symptoms to manipulate housing in jail and to influence the outcome of forensic mental health evaluations. In 2018, forensic evaluator Dr. George Nelson concurred with clinical opinions offered by prior evaluators in general but concluded that Morisette's presentation was suggestive of efforts to exaggerate his symptoms and that he had the capacity to understand the proceedings and assist in his defense. Mundt reported that Morisette's presentation during her attempted interview was an attempt to do the same. Mundt reported,

> It is my opinion that Mr. Morisette did not present during my attempt to interview him with genuine symptoms of a mental illness. A review of recent collateral records from the jail suggests that he has

> been compliant with medications for an extended period of time and has not presented with objective evidence of hallucinations, delusions, or bizarre or unusual beliefs. He has consistently presented with evidence of organized and goal-directed thought processes, as demonstrated by his interactions with jail staff and his written requests. Mr. Morisette has a history of interaction with the legal system and therefore has some familiarity with typical court proceedings. He has also been assessed on multiple prior occasions and has been opined on more than one occasion to have sufficient factual knowledge to demonstrate a capacity to understand his charges and proceedings.

Dr. Mundt's diagnostic impressions of Morisette were malingering; unspecified schizophrenia and other psychotic disorders, by history; substance use disorders (methamphetamine and ecstasy), by history; rule-out, unspecified personality disorder, with mixed traits, by history. She concluded there was currently insufficient evidence available to suggest that, due to symptoms of a mental illness, Morisette lacked the capacity to understand the nature of the proceedings against him or lacked the capacity to assist in his own defense. The trial court entered an order finding Morisette competent to stand trial.

Voir dire began on March 23, 2021. Morisette asked if he could dismiss himself if he had no say in which jurors would be showing up. The court responded that if he was making a knowing and thoughtful decision to not observe the proceedings, he has that right. The court took a recess so that he could speak with counsel about that decision. When trial resumed, a transport officer informed the court that he was not comfortable bringing Morisette back to court based on sanitary conditions. Later, his counsel testified through a

declaration that Morisette had put his head in the toilet. Trial concluded for the day, and jury selection continued the next day with Morisette present. Morisette's counsel explained that because of his client's psychotic disorders and Asperger's disorder, it would be helpful if the court could take additional scheduled breaks. The court granted that request.

On March 29, Morisette refused to be transported. The court signed an order allowing use of reasonable force, if necessary, to transport him. The transport officer stated that jail staff was able to transport him without using reasonable force but requested that he remain in restraints because of his "erratic behavior." Defense counsel objected. When the court inquired, the jail staff explained it was a concern of more "erratic decision-making today" than erratic behavior. Jail staff noted that Morisette was "very polite, but he was adamant that he was not going to court," but then they were able to convince him to go to court without using force.

During voir dire, Morisette interrupted the court saying he had the right to speak, told a juror "you do take things too far," discussed the abuse of the justice system, and told his attorney he was not helping his case "by any means." When a juror told the court they thought the case was a "slam dunk," Morisette started singing loudly, making it hard to hear. Morisette made a motion to represent himself for many reasons including that he had not been allowed to go to Western State Hospital, but the court denied the request.

When the State was in the middle of its opening statement, Morisette interrupted with "I don't think he has his facts straight." The court recessed and told Morisette that if he had another outburst, the court would have him removed from the courtroom or gagged. When trial resumed, he did not interrupt for the rest of the State's opening statement.

Morisette's courtroom behavior during a witness's testimony caused the court to have to take a recess. The court again warned Morisette that if he could not stop his outbursts, the court would have him removed.

On April 6, while Sheets testified about being stabbed in the neck, Morisette mimicked a stabbing motion with a ballpoint pen into his own neck. Morisette also clenched his hand around a pen and thrust his hand toward his counsel but stopped short of striking her. He made a similar motion with a closed fist shortly after. Additionally, at some point that morning, Morisette walked toward a jail officer and expressed that he wanted to leave but sat down at the direction of counsel. The parties were not aware if the jurors had seen these incidents because it was during witness testimony, and Morisette was not in the jurors' line of sight to the witness stand. Defense counsel requested a mistrial, and the court denied that request, reasoning that any irregularity was caused by Morisette.

On April 7, the court addressed whether Morisette's conduct raised security issues and a need for restraints. Morisette told the court that restraints

were not necessary and that he understood he was being recorded and in a movie—but whoever the actor was, Chris Morisette is not him. He stated,

> I'm not claiming to be him, nor do I have any identification on me or paperwork to match this name or any of the numbers on it, sir, that I'm redacted discovery short of even providing anything of a competent trial, and I – I am sorry about whoever comes in or whatever this stuff is, I do not claim to be involved, and that is all.

When Morisette interrupted the court's discussion regarding restraints, the court told Morisette not to make any more outbursts. The court once again warned Morisette that it could remove him. Morisette responded, "Then remove me." Defense asked for a recess to allow them to talk to Morisette outside the courtroom. The court recessed, and when it resumed, counsel returned without Morisette.

Defense counsel then requested another competency evaluation "in an abundance of caution." Counsel stated, "I think we were comfortable proceeding through trial, but I think the stress of trial has been overwhelming for him, and I think that's been the change that we've seen in the last 24 hours or so." The court denied the motion, stating,

> It has been my observation that most of Mr. Morisette's outbursts have been rational, at least within the realm of rationality as far as I can tell. Some of the things he said in court this morning were nonsensical – that's true – but I can't tell whether he's saying that as part of a disruption or whether he's truly having an episode of some sort that's beyond my competence to evaluate. What I do know is Mr. Morisette has been previously evaluated by those who are trained to evaluate such matters and he's been found competent and he has for the most part been able to participate in

> this trial when he has chosen to do so although he has from time to time chosen not to participate and has frequently put his head down on the table at counsel table even when he's been present in court.

The court then asked counsel to comment on Morisette's lack of presence in the courtroom. Counsel responded, "I think he understands he has the right to be here and we're comfortable relaying to the Court that he's waiving that right." Counsel further told the court that Morisette was not explicitly made aware he had the option of observing the trial via video in another courtroom. The court directed counsel to make Morisette aware of this option, which counsel then did, and later conveyed that Morisette declined and asked to be moved back to jail. The court inquired if Morisette's counsel was satisfied that Morisette's decision to no longer be present in the courtroom were "knowing, intelligent, and voluntary," and counsel responded "yes." Counsel stated that he still had concerns about "the overall issue" as to the motion for evaluation. All that remained after Morisette waived his presence was closing arguments. When the jury reached its verdict, Morisette still waived his presence. The court asked defense counsel if she had consulted with her client regarding his attendance. Counsel answered that she had and that she believed "he's decided to not attend voluntarily and intelligently." The jury convicted Morisette on all counts.

On April 21, after trial concluded, defense counsel filed a motion requesting a competency evaluation. In the defense declaration supporting the motion, counsel listed the various times Morisette disrupted trial, but also

disruptive observations made after closing arguments. Counsel wrote that when she went to the jail after closing arguments to discuss the taking of the verdict, the jail staff informed her that Morisette had smeared feces in his cell and that counsel had to visit him at the cuff port of his cell. Counsel also wrote that she had met with her client two more times and that his appearance and demeanor had not noticeably changed.

The court granted the motion requesting a competency evaluation. Dr. Mundt completed the evaluation. She attempted twice to interview Morisette, but he refused to participate. Accordingly, she based her opinion on collateral information. At the recommendation of defense counsel, Mundt reviewed the April 7 audio recordings of the trial. Mundt also reviewed Morisette's jail mental health records from September 26, 2020 through April 28, 2021. Mundt explained,

> Since the time of my prior evaluation, Mr. Morisette has remained compliant with medication and has had frequent contact with and observation by jail mental health staff. There is no indication in records of any decreases in his functional capacities at any time during the last eight months or in recent history. He has increasingly presented in multiple contexts in recent history of increasingly bizarre and unpredictable behavior. This behavior is not consistent with symptoms of psychosis and as noted above is better attributed to an attempt to feign symptoms of psychosis. Mr. Morisette mentioned to jail mental health staff on multiple occasions that he needed documentation or information to support his belief that he was not competent to stand trial and sought to recruit their support in achieving this goal. His behavior in this regard, as well as his behavior as described in records related to episodes of aggression, housing manipulation, medication seeking, and

> attention seeking are all suggestive of logical, linear, goal-directed, and volitional behavior.

Mundt opined that there was insufficient evidence to suggest that, due to symptoms of mental illness, Morisette was unable to understand the proceedings or assist counsel. The court entered an order finding Morisette competent. He was sentenced on all four counts and now appeals.

DISCUSSION

Competency Evaluation

Morisette contends that the court should have ordered a competency evaluation during trial.[1] We disagree.

The due process clause of the Fourteenth Amendment to the United States Constitution guarantees an accused the fundamental right not to stand trial if he is legally incompetent. State v. Ortiz-Abrego, 187 Wn.2d 394, 402-03, 387 P.3d 638 (2017). Further, under Washington law, "No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050. A defendant is incompetent when he or she "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(16).

[1] Morisette filed a statement of additional grounds that also raises this same issue.

A defendant suffering delusions does not necessarily prevent him from being competent to understand the proceedings and assist with his defense. See State v. Benn, 120 Wn.2d 631, 661-62, 845 P.2d 289 (1993); see also State v. Hahn, 106 Wn.2d 885, 887-88, 726 P.2d 25 (1986). A defendant who has the ability to assist with his defense does not mean he must be able to suggest or choose trial strategy. Benn, 120 Wn.2d at 662; State v. Ortiz, 104 Wn.2d 479, 483, 706 P.2d 1069 (1985).

RCW 10.77.060 provides that if a court finds there is reason to doubt a defendant's competency, the court must have the defendant evaluated by a qualified professional who will report on the defendant's mental condition. RCW 10.77.060(1)(a). The trial court's determination of competence is a matter within its discretion, reversible only upon a showing of abuse of discretion. Ortiz, 104 Wn.2d at 482. An abuse of discretion occurs only when no reasonable judge would have reached the same conclusion. State v. Hager, 171 Wn.2d 151, 156, 248 P.3d 512 (2011).

After a competency determination is made, the court need not revisit competency unless new information presented alters the status quo ante. State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992). The factors a trial judge may consider in deciding whether or not to order a competency evaluation include the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of

counsel." In re Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001) (quoting State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)).

Morisette argues that based on his nonsensical outburst about being in a movie, he was no longer capable of making necessary decisions at trial, such as whether he would be present and able to testify. However, at trial, defense counsel only made a motion to establish competency out of an "abundance of caution" based on Morisette's behavior on April 6 and 7. The court was aware of the previous competency report indicating that the diagnostic impression was malingering. Also, indications of delusions do not necessarily prevent someone from being competent to understand the proceedings and assist with his defense. And disruptive behavior does not necessarily give rise to a doubt as to whether someone understands the proceedings and can assist in a defense. As the trial court noted, with the exception to his reference to a movie, Morisette's outbursts were in relation to what was happening in court. After the court would threaten him with being gagged or removed, he responded by either complying, or in the last instance telling the court that he wanted to be removed. These responses did not necessarily create a doubt as to competency.

Additionally, after defense counsel made his motion for a competency evaluation, he spoke with Morisette regarding whether he waived his right to be present in the courtroom. Defense counsel relayed to the court that Morisette had knowingly, intelligently, and voluntarily waived his right, therefore indicating

he was competent at the exact time that counsel had made a motion for a competency evaluation. Defense counsel again represented to the court at the taking of the verdict that Morisette waived his presence voluntarily and intelligently.

Finally, the competency evaluation conducted after trial considered Morisette's behavior during trial both in the courtroom on April 7 and his behavior in the jail between September 26, 2020 and April 28, 2021. The evaluator, Mundt, again found Morisette to be malingering and that "[t]here is no indication in records of any decreases in his functional capacities at any time during the last eight months or in recent history."

The court did not abuse its discretion when it did not order a competency evaluation during trial. It had no reason to believe that circumstances had changed from the first competency report that attributed the conduct to malingering.

Ineffective Assistance of Counsel

Morisette next contends that he had ineffective assistance of counsel because his attorneys did not pursue a voluntary intoxication defense based on his consumption of methamphetamine. We disagree.

"To prevail on a claim of ineffective assistance of counsel, [the defendant] must establish both deficient performance and prejudice." State v. Jones, 183 Wn.2d 327, 330, 352 P.3d 776 (2015) (citing Strickland v. Washington, 466 U.S.

668, 339, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

"Deficient performance is performance falling 'below an objective standard of reasonableness based on consideration of all the circumstances.'" State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). We are highly deferential to the performance of counsel in evaluating the reasonableness of their actions. State v. Crawford, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). "There is a strong presumption that trial counsel's representation was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions." State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Deficient performance prejudices a defendant when a "substantial" likelihood of a different outcome exists; it is not enough for a different outcome to be merely "conceivable." In re Pers. Restraint of Lui, 188 Wn.2d 525, 538-39, 397 P.3d 90 (2017). If a defendant fails to satisfy showing deficient performance or prejudice, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Morisette argues it was deficient for his counsel not to present evidence or request an instruction for voluntary intoxication. RCW 9A.16.090 provides the following regarding a voluntary intoxication defense:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular

> mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of consumption of the drugs, and (3) there is evidence that the drugs affected the defendant's ability to form the requisite intent or mental state. See State v. Kruger, 116 Wn. App. 685, 691, 67 P.3d 1147 (2003). The evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." Id. at 691-92 (quoting State v. Gabryschak, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996)).

Morisette argues that his defense counsel should have elicited evidence that was at its disposal so that Morisette would have been entitled to this instruction. First, Morisette argues that his statement to an officer, indicating he had taken methamphetamine earlier that morning and could not remember anything since four days earlier, should have been introduced. Id. However, Morisette could have only introduced this evidence if he testified at trial, which he elected not to do. Whether to testify or not testify at trial is a decision that is held by the defendant. State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996).

Second, Morisette asserts that defense counsel should have sought to introduce the results of a urine drug screen done the day of the incident at the

jail, which detected the presence of amphetamine, methamphetamine and cannabis. However, contrary to Morisette's assertion, the mere presence of drugs in his system does not establish when the drugs were consumed or what its affect would have been. See State v. Lewis, 141 Wn. App. 367, 389, 166 P.3d 786 (2007) (observing that methamphetamine has a wide range of effects on different individuals).

Effective assistance of counsel includes a request for pertinent instructions which the evidence supports. State v. Finley, 97 Wn. App. 129, 134, 982 P.2d 681 (1999). There was no evidence in the instant case that would have supported a voluntary intoxication instruction. Counsel was not deficient for not requesting an instruction he could not support with evidence. Because Morisette cannot show deficiency, the inquiry ends.

To-Convict Instruction

Morisette lastly contends that the conviction on Count 4 must be vacated because the to-convict instruction as to that count included an alternative means of committing assault in the second degree, which was not supported by the evidence. The State concedes that this count should be vacated, and we agree.

Under the Washington Constitution, criminal defendants have the right to a unanimous verdict. WASH. CONST. art. I, § 21. If there is insufficient evidence to support a conviction of a crime based on one of multiple alternative means set out in the to-convict instruction, that conviction must be reversed unless it has

been established that the jury unanimously concluded that the defendant was guilty based on the alternative means that was supported by the evidence. State v. Woodlyn, 188 Wn.2d 157, 165, 392 P.3d 1062 (2017).

In Count 4, the State charged Morisette with two alternative means of committing assault against Grady—with a deadly weapon and/or by recklessly inflicting substantial bodily harm. The jury was instructed:

> To convict the defendant of the crime of assault in the second degree, as charged in Count 4, each of the following two elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 9, 2019, the defendant:
>
> (a) intentionally assaulted Gregory Grady and thereby recklessly inflicted substantial bodily harm; or
>
> (b) assaulted Gregory Grady with a deadly weapon; and
>
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that element (2) and either alternative element (I)(a) or (I)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (I)(a) or (I)(b) has been proved beyond a reasonable doubt , as long as each juror finds that either (I)(a) or (I)(b) has been proved beyond a reasonable doubt.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to either element (1) or (2), then it will be your duty to return a verdict of not guilty as to Count 4.

(Emphasis added.)

Here, there was no evidence that Grady was harmed by Morisette

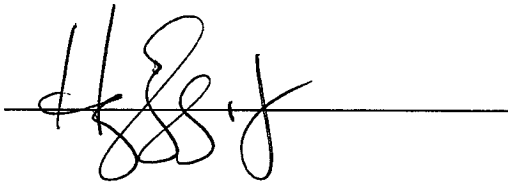
because Grady testified that Morisette attempted to stab Grady but missed. Therefore, there was no evidence supporting the alternative means involving infliction of harm. Further, the jury was not asked to indicate whether it was unanimous as to either means. Accordingly, we reverse Morisette's conviction on Count 4.

CONCLUSION

We affirm the convictions on Counts 1, 2, and 3, but we reverse the conviction on Count 4 and remand for resentencing.

Colum, J.

WE CONCUR:



Mann, J.