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Court of Appeals
Division I
State of Washington

NO. 73261-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

IBRAHIM ADAM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN S. LUM

BRIEF OF RESPONDENT

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A. ISSUES

1. A defendant is presumed competent to stand trial. To establish incompetence, a defendant has the burden of proving that as a result of mental illness or defect he cannot understand the nature of the proceedings or is unable to assist his attorney. Where the psychologist who opined that Adam was incompetent applied an incorrect and heightened legal standard, has Adam failed to show that the trial court abused its discretion by rejecting the expert's opinion and finding him competent?

2. A judicial comment on the evidence is presumed prejudicial. The trial court's instruction that "a prolonged period of time" means "more than a few weeks" was a comment on the evidence. But Adam stalked four women over a period exceeding two and a half years and Adam never argued that his stalking behavior did not amount to a prolonged period of time. Has the State shown that the comment on the evidence was not prejudicial?

3. The comment on the evidence affected only one of four aggravating factors found by the jury, and the trial court made clear that any one of the four aggravating factors was sufficient to warrant the exceptional sentence that the court imposed. Even if the comment on the evidence is determined to have been prejudicial, is it unnecessary to

remand to the trial court for reconsideration of the duration of the sentence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Ibrahim Adam was charged by amended information with one count of felony stalking for incidents alleged to have occurred between September 30, 2013 and February 21, 2014. CP 26-27. The State further alleged four aggravating factors: 1) that the stalking occurred within the sight or sound of the victim's minor child; (2) that the offense was part of an ongoing pattern of abuse of the same victim or multiple victims over a prolonged period of time; (3) that Adam committed the offense shortly after having been released from incarceration; and (4) that one of the purposes for which Adam committed the crime was for his sexual gratification. CP 26-27.

After a pretrial evidentiary hearing, Adam was found competent to stand trial. CP 69-71. A jury found Adam guilty of felony stalking. CP 83. The jury also found that the crime was sexually motivated and that each of the aggravating factors had been proven. CP 84, 85, 116. Adam's standard range sentence, including the mandatory 18 months for sexual motivation, was 30 to 32 months. CP 130. Based on the aggravating factors, the court imposed an exceptional sentence of 84 months

incarceration. CP 132. In its findings of fact and conclusions of law for the exceptional sentence, the court stated:

> Each one of these aggravating circumstances is a substantial and compelling reason, standing alone, that is sufficient justification for the length of the exceptional sentence imposed. In the event that an appellate court affirms at least one of the substantial and compelling reasons, the length of the sentence should remain the same.

CP 201.

2. SUBSTANTIVE FACTS

Before being charged with the current felony stalking offense involving victim Sheila LaRose, occurring between September 30, 2013 and February 21, 2014, Ibrahim Adam had been convicted three times for stalking violations against three different women. In Seattle Municipal Court, Adam was convicted of stalking his first victim with an offense date of August 9, 2011. Exhibits 16, 17. In King County Superior Court, Adam was next convicted of stalking his second victim between January 14, 2012, and February 24, 2012. Exhibits 18, 19. His next stalking conviction, again in King County Superior Court, was for victimizing a third woman between September 13, 2012, and September 17, 2012. Exhibits 20, 21. Thus, including his offense against LaRose, Adam was convicted of stalking four women over a period exceeding two years and six months.

LaRose is a public defender with the King County Public Defense Office. 5RP[1] 32. At the time of this offense, LaRose lived in her West Seattle home with her ten year old daughter. 5RP 34. LaRose met Adam in November of 2012 when she was appointed to represent him. 5RP 36. She represented him until the end of July, 2013, when she withdrew from his case. 5RP 37-38. Immediately upon her withdrawal, LaRose began receiving "repeated and ongoing" phone calls from Adam. 5RP 38. Initially, because of the prior professional relationship, LaRose took his calls. 5RP 39. She started screening his calls because Adam was repeatedly professing his love for her and asking her to marry him. 5RP 39. In August and September, 2013, he called her every day, sometimes five times a day. 5RP 39. Before she started letting his calls go to voicemail, LaRose told Adam that she wasn't interested in him and that she wanted his calls to stop. 5RP 40.

The calls continued unabated into November, at which time LaRose encountered Adam at a coffee shop and told him to stay away from her. 5RP 40. A few minutes later, when she got back to her office, the calls continued. 5RP 40. LaRose had her supervisor, Leo Hamaji,

[1] This brief refers to the verbatim reports of proceedings as follows: 1RP (April 15, 16, 30; May 16; September 29; November 19; and December 23, 2014); 2RP (January 20, 2015); 3RP (January 21, 2015); 4RP (January 22, 2015); 5RP (January 26, 2015); 6RP (January 27, 2015); 7RP (January 28, 2015); 8RP (January 29, 2015); and 9RP (February 27, 2015).

answer one of the calls. 5RP 40-41. Hamaji told Adam that LaRose no longer represented him and to stop calling her. 5RP 41-42; 6RP 61-62. In an effort to convince him to stop, Hamaji told Adam that LaRose would get into trouble if he kept calling her. 5RP 42; 6RP 61-62. But Adam continued to call LaRose from November through the end of the year, sometimes numerous times per day. 5RP 42.

The calls were so persistent and obsessive that she became very afraid. 5RP 43. The calls were typically of this nature: "I love you, I love you, please baby, I love you. I want to marry you, I love you." 5RP 44. In February, 2014, Adam left a message that LaRose described as follows:

> He indicated he had been watching me through my back bedroom door. He had seen my body. And that he wanted to touch my body. And that he had seen my body naked. And that he had been watching through my back door, which is a divided French glass door. He had been watching into my bedroom for the last three months since November.

5RP 44.

As a public defender, LaRose was extremely reluctant to call the police to report a former client. 5RP 46. But she did so when she realized, in February, 2014, that Adam had been coming to her home. 5RP 46-47. She and her daughter were leaving her house when she saw that a manila envelope with no postage had been placed on top of her mailbox. 5RP 47. The envelope contained pamphlets "on how to convert

a white woman to the Muslim faith." 5RP 47. LaRose drove to the police precinct and made a report. 5RP 47-48. The next morning there was a voicemail from Adam saying, "I saw your daughter, I saw your dog," and LaRose knew Adam had been to her home. 5RP 48. LaRose testified that realizing that Adam had found where she lived "took it to an entirely different level." 5RP 49.

The day after leaving the message referencing LaRose's dog and daughter, Adam left a message saying he had seen her cats. 5RP 50. LaRose's cats were kittens that she never allowed outside. 5RP 50. Later that same day, LaRose looked out a window and saw Adam standing with his face pressed against her gate. 5RP 51. LaRose screamed and called 911. 5RP 51. LaRose's daughter armed herself with a toy bow and arrow and advanced toward the front door but her mother told her to get into her room. 5RP 52. While LaRose was on the phone with 911 Adam stared at her through the window. 5RP 54. By the time police arrived Adam had disappeared. 5RP 55.

The next day, LaRose received several messages from Adam saying he wanted to come to her house and leave her a gift. 5RP 55. When she left work that evening she saw that a bag had been left on her van in a downtown parking garage. 5RP 55-56. Without touching the bag, she called 911 and began to retreat and leave the parking garage when

Adam "popped out" of a stairwell. 5RP 56. LaRose screamed and fled, finding two men on an adjacent floor who agreed to accompany her out of the garage. 5RP 57. When the police arrived, two officers escorted LaRose to her van and removed the bag and photographed the contents. 5RP 58. The "most disturbing" contents for LaRose were "very skimpy panties and a lingerie set." 5RP 59. Those items were of "grave concern" to LaRose because Adam had been leaving her messages saying that he wanted to touch her body. 5RP 63. Police officers were unable locate Adam in or around the parking garage. 5RP 98.

After the incident in the parking garage, LaRose moved her daughter into a "safe house" with instructions that she not return home or even go to school until the situation was resolved. 5RP 99. Later that same night, at about 1:30 a.m., with LaRose alone in her house there was a knock at her backdoor. 5RP 100. LaRose saw Adam through the glass-partitioned door. 5RP 101. LaRose made a gesture like, "give me a moment," then retreated into her bedroom and called 911. 5RP 101. Police arrived with lights flashing but did not catch Adam. 5RP 102. LaRose asked the police to stay with her but they could not. 5RP 103. At that point, LaRose was in fear for her life. 5RP 104. She called her ex-husband who drove over to her house with an aluminum baseball bat. 5RP 105. With her ex-husband on the couch, LaRose, who hadn't slept in

five days, went into her room to try to sleep. 5RP 105. From her bedroom she heard an "incredibly angry knock" at her backdoor. 5RP 106. She immediately called 911 and less than 30 seconds later a rock was thrown through her bedroom window, shattering two panes of glass. 5RP 106-07. It took police 20 minutes to arrive and, again, Adam was not located. 5RP 108.

The next morning, Adam left LaRose a message admitting that he had been hiding in the bushes until after police left. 5RP 108. He left another message that morning in which he said:

> I saw that tall bald man driving a silver car. I see him coming into your house. You better not be sleeping with him. I'll get a gun. I'll find him. I'll shoot him. I'll kill that bitch.

5RP 108-09. Because Adam had been successfully evading the police, LaRose developed a plan to apprehend him. 5RP 110-11. She decided to accept his next phone call and agree to a meeting. 5RP 110-12. Later that same day, Adam called and suggested they meet at a coffee shop near her office at 5:00 p.m. 5RP 113, 120. LaRose arranged for some of her colleagues to be in and around the coffee shop. 5RP 120. When Adam arrived and sat down with LaRose in the shop her colleagues called the police. 5RP 122. Three officers arrived and arrested Adam. 5RP 122-23.

The jury found Adam guilty of stalking LaRose. In a bifurcated proceeding it was established that Adam had been released from jail on his previous stalking conviction on August 30, 2013. 8RP 20-21; Ex. 22. LaRose testified that after her withdrawal from representing Adam in July, 2013, his repeated phone calls professing his love for her were occurring several times per week beginning in August, 2013. 5RP 38-39.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FINDING ADAM COMPETENT TO STAND TRIAL.

Adam claims that the trial court erred by finding him competent to stand trial despite an expert's opinion that he was not competent. Adam is wrong. The trial court had the discretion to reject an expert's opinion that was unsupported by sufficient facts and applied an incorrect legal standard. The trial court did not err by finding that Adam had a sufficient understanding of the proceedings and was capable of assisting his attorney, and that the presumption of competency had not been overcome.

a. Proceedings Leading Up To The Competency Determination.

Although he had been appointed counsel, while his case was pending trial, Adam, over the course of a three-day hearing, requested and was granted the right to represent himself. 1RP 5-32. While interacting

with the court, Adam was insistent on exercising his right to a speedy trial. 1RP 13-15. As part of the *pro se* colloquy, Adam said he understood that the prosecutor was seeking an exceptional sentence based on aggravating circumstances. 1RP 30-31. After a few weeks of representing himself, Adam asked to abandon his *pro se* status and asked for an attorney to be appointed. 1RP 44. That request was granted. Id.

A few months later, the court ordered a competency evaluation when Adam's attorney, John Hicks, indicated that he was in agreement with a request for a competency evaluation that had notably been filed by *Adam*. 1RP 48-49. Robert Powers, a psychologist with Western State Hospital, conducted an 80-minute clinical interview of Adam, and reviewed case discovery materials, King County Jail medical records, and other Western State records of Adam's previous mental evaluations. Pretrial Ex. 1, at 2 (hereinafter referred to as "Report"). On three occasions since 2011, each associated with a prior stalking case, Adam was evaluated by Western State psychologists and deemed competent to stand trial. Report at 3.

Regarding Adam's intellectual functioning, Powers wrote:

> His language ability and higher level cognitive functioning appeared generally intact. His fund of information was average and he appeared to be functioning in the low-average range of intellectual abilities based on his vocabulary, history, and erudition.

Report at 4. Adam told Powers that he had been born in Eritrea and emigrated to the U.S. in 2005. Report at 2. Adam said he had been involved in a war in Sudan and reported that he had ongoing auditory and visual hallucinations related to traumatic war events. Report at 3, 5. Powers noted that jail mental health staff had diagnosed Adam with PTSD and had prescribed medication to help with his war-related nightmares and auditory hallucinations. Report at 4.

About the pending charge, Adam told Powers:

> Everything I say is being worked against me....the police department, the FBI all are going against me, they are fabricating this....the detective and everybody else who is working in the system and the government want to destroy my life.

Report at 2. At another point in his report, Powers wrote, without elaboration: "He also voiced delusional themes directly pertaining to his legal situation." Report at 4. Powers noted that Adam expressed the belief that "the police, the detectives, all the people who do work in court" were against him. Report at 5. Powers wrote that during the interview:

> Mr. Adam voiced paranoid beliefs about a certain detective working with the alleged victim to fabricate information and arrest him. He continued to voice his belief that the government, FBI, and court personnel are working together against him. Mr. Adam also stated that he would be released by having the alleged victim "tell the truth."

Report at 5.

Powers, in his report, rendered a "diagnostic formulation" that Adam had (1) an Unspecified Schizophrenia Spectrum and Other Psychotic Disorder, and (2) Posttraumatic Stress Disorder (per History). Report at 5.

Adam was able to accurately define the role of his defense attorney, but complained that he wasn't doing a good job and said he was trying to get his attorney to withdraw. Report at 6. Regarding the judge's role, Powers wrote: "Mr. Adam talked about how he believed the judge was not following the law but he also discussed how he respected the judge and had written the judge letters...". Report at 6. Regarding the prosecutor's role, Adam said: "I don't have any problem [with the prosecutor]. I don't know what his job is. He can ask my lawyer. I don't know." Report at 6. About the victim, Adam stated, "I'm happy she'll tell the truth. She knows the story so she'll get me out." Report at 6.

Powers expressed his ultimate opinion on Adam's competency as follows:

> Overall, Mr. Adam appeared to have a very limited understanding of the criminal justice system, even after having several cases adjudicated over the past several years. More importantly, he voiced persecutory beliefs about government agencies fabricating information in order to destroy his life and he voiced delusional beliefs about the alleged victim being able to testify for him in order to have him released from custody. *These symptoms of his mental illness will prevent Mr. Adam from rationally discussing*

> *the alleged offenses with his defense attorney and his symptoms will also prevent him from developing a logical defense strategy. Mr. Adam's delusional beliefs will also impair his ability to provide salient information should he testify in his own defense.* Therefore, it is my opinion that due to the symptoms of his mental illness, Mr. Adam lacks the capacity to understand the nature of the proceedings against him and lacks the capacity to assist in his defense.

Report at 6 (emphasis added).

The issue of Adam's competency went to a contested evidentiary hearing. The State did not retain an independent expert. Under direct examination by Adam's attorney, Powers explained why he believed Adam to be incompetent:

> He was focused on persecutory themes, that people were basically conspiring to fabricate information and destroy his life. He was very delusional about the relationship with the alleged victim and he had a difficult time staying focused on information that was being discussed during the interview. ... He kind of kept going back to his very firm beliefs about being persecuted and paranoid beliefs and that basically, all he had to do was have the victim, the alleged victim, testify and she would tell the truth and the judge would release him.

1RP 68-69. Powers testified that his opinion that Adam did not have the capacity to understand the nature of the proceedings was "largely based on [Adam's] belief that all of this is fabricated." 1RP 69. Because of Adam's "delusional" beliefs, Powers opined that Adam's attorney would not "be able to have a factual, realistic conversation with him about the facts of the case, kind of the best way to proceed with the case." 1RP 71.

Still on direct examination, Powers seemed to acknowledge Adam had the capacity to understand the proceeding:

> And he's been through kind of stalking charges several times before. And he has the, again, the mechanical or the cognitive abilities to know right and wrong, what's legal, what's not. But his delusions kind of overwhelm that. And I think that's apparent in the fact that he keeps doing these same sorts of behaviors that lead to stalking charges.

1RP 72. Powers went on to testify that his view that Adam "had a very limited view of the criminal justice system" was supported by Adam's "delusional beliefs" about "why he was arrested, why he's kept in jail, why he's being persecuted by these people." 1RP 74. At this point, the trial court, Judge North, interrupted the direct examination of Powers by asking, essentially, how this case differs from other stalking cases:

> [JUDGE NORTH]: If I could interrupt for just a second. I guess what I'm having a hard time understanding, Doctor, is how that I get people in here regularly who don't have any questions about their mental competency at all, and that they're asserting that everything is fabricated and it's all a bunch, you know, it's a bunch of guys who are out to get them and they think that they put this whole thing together. So, how is that different than what's going on with Mr. Adam? I mean, I guess -- guess we're -- I realize you're trying to say it's something else, but I'm not -- but the words sound like the same thing, and so I'm trying to figure out what -- what the difference is here.

1RP 75-76. In response, after again referencing Adam's belief that government agencies and court personnel were conspiring to fabricate

information and destroy his life, Powers did not disagree with the Court that Adam seemed a lot like other stalkers:

> And the rigidity of that, you know, that he couldn't be persuaded otherwise, you know, it's -- it's something that you see a lot in stalking cases. The person might function very well in most areas of their life, but when they're focused or when they ask questions about the stalking relationship and what -- what is going on around that, they get very delusional, you know, that the relationship is wonderful, that there's kind of love being reciprocated to them, and that anything that -- that kind of, anybody else from the outside looking in would say, well, the reality is that this person does not love you and these people are concerned about your behavior, takes on a -- it becomes delusional in itself. So anybody who would tell him, you know, this isn't true, this woman does not love you, they become part of the conspiracy. This is pretty common when you're talking about people with delusional disorder and a lot of stalking cases have that element to it.

1RP 76-77.

The prosecutor began her cross examination of Powers by having him acknowledge that at the jail Adam was being given anti-anxiety medication for his war-related PTSD, but that he had not been prescribed antipsychotic medication nor was he housed in the psychiatric unit. 1RP 86. Powers acknowledged that his diagnosis was essentially a "catch-all term" for a thought disorder, and that he had been unable to diagnose schizophrenia. 1RP 90-91. Powers admitted that the jail health records showed that Adam had "reality-based" conversations with jail treatment staff and that he did not exhibit any "overt delusions." 1RP 94. Powers

agreed that Adam had a normal range of recent and remote memory. 1RP 95. Powers stated that Adam's intellectual functioning was "a little bit below average," but that was not a concern in terms of his competence to stand trial. 1RP 107.

Referring to Powers' assertion in his report that Adam's symptoms would prevent him from "developing a logical defense strategy," the prosecutor asked Powers what he required of a defendant in terms of capacity to assist his attorney. 1RP 122. Powers replied:

> They have to be able to relay, again, on a reality-based manner, the facts of the case. They have to be able to understand that maybe what they want to happen is not a good idea legally, in the courtroom for their case and consider the pros and cons of things like that. They need to be able to look at different options, they need to be able to have, again, stay focused, have a rational discussion about the case, some give and take in the discussion with the attorney.

1RP 122-23. Powers testified that a defendant must be able to provide information to his attorney in a sequential and organized manner. 1RP 123-24. Powers was unable to say what "minimum level of functioning" he would require to find a defendant capable of assisting his attorney. 1RP 125.

Powers was the only witness to testify at the hearing. Asking the trial court to find Adam competent, the prosecutor argued, *inter alia*, that Adam's letter to King County Prosecutor Satterberg showed that he

understood he was accused of stalking Sheila LaRose and revealed his fixation with her (1RP 152; Pretrial Ex. 2); and that the writings and motions made by Adam to the court,[2] including his request to go pro se and his insistence on his right to speedy trial, indicate that he understood the role of the court and the legal process. 1RP 152-53; Pretrial Ex. 4. The prosecutor argued that Adam's belief that he was being railroaded by the system and that LaRose loved him did not make him incompetent. 1RP 155-56. The State argued that Powers applied an incorrect heightened standard — that a defendant must be capable of developing a logical defense strategy — in determining that Adam was not capable of assisting his attorney. Id.

The trial court found that "there's no question that he has a basic understanding of the legal process, I think, and the nature of the legal proceedings." 1RP 158-59. Further, the court found Adam capable of assisting his attorney, despite recognizing that "it's difficult because of the fact that he has a tendency to go off on a tangent of talking about conspiracy theories and so on...." 1RP 159. The court found that Adam's attorney could obtain information from him, even though "it may be more difficult than it would be with a client who didn't have the particular fixation that Mr. Adam has, but the – it is possible for an attorney to work

[2] Pretrial exhibit 4 includes a number of Adam's writings, but the Court also took judicial notice of the entire record of proceedings in the case. CP 70.

with him and get the basic information to provide a defense." 1RP 159.

The trial court concluded his remarks:

> I don't think that it's appropriate to basically determine that simply a whole category of clients who simply have a -- a fixation on somebody become incapacitated and unable to -- to assist their counsel simply because whenever you ask them about that subject they tend to digress into various conspiracy theories, as long as they are genuinely capable of answering the questions, even if there are long digressions in between, and I think they are capable of assisting their attorney and meet -- meet the basic standards of competency.

1RP 159.

b. The Trial Court Did Not Abuse Its Discretion By Rejecting The Flawed Opinion of Dr. Powers.

The Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial. Medina v. California, 505 U.S. 437, 439, 112 S. Ct. 2572, 120 L. Ed 353 (1992). It is fundamental that no incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity remains. RCW 10.77.050; State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982). "Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." Godinez v. Moran, 509 U.S. 389, 402, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993); State v. Marshall, 144 Wn.2d 266, 27 P.3d 192 (2001).

States may impose the burden to prove incompetence on the defendant. Medina, 505 U.S. at 449. In Washington, a defendant is presumed competent and the burden is on the criminal defendant to establish his incompetence. State v. Coley, 180 Wn.2d 543, 551, 326 P.3d 702, cert. denied, 135 S. Ct. 1444, 191 L. Ed. 2d 399 (2015); State v. Benn, 120 Wn.2d 631, 662, 845 P.2d 289 (1993). The test for competency to stand trial is whether as a result of mental disease or defect the accused lacks the capacity to understand the nature of the proceedings against him or assist in his own defense. RCW 10.77.010(15); In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001). The standard of proof regarding the issue of competency is a preponderance of the evidence. RCW 10.77.086(3); Coley, at 551.

The trial court has wide discretion in judging the mental competency of a defendant to stand trial. State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). Accordingly, the trial court's determination will not be disturbed absent a manifest abuse of discretion. Id. at 482; State v. Hicks, 41 Wn. App. 303, 306, 704 P.2d 1206 (1985). Deference is given to the trial court's competency determination because of the court's opportunity to observe the defendant's behavior and demeanor. Hicks, 41 Wn. App. at 306 (citing State v. Crenshaw, 27 Wn. App. 326, 330, 617 P.2d 1041 (1980)).

The trial judge may make his or her competency determination from many things, including the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports, and the statements of counsel. State v. Johnston, 84 Wn.2d 572, 576, 527 P.2d 1310 (1974). Expert opinion testimony on the issue of a defendant's competency is not binding on the trial court. State v. Osborne, 102 Wn.2d 87, 98, 684 P.2d 683 (1984) (citing State v. Loux, 24 Wn. App. 545, 548, 604 P.2d 177 (1979)). This is particularly the case where the medical expert applies legal standards to arrive at a competency conclusion, since he is performing a task at which only a judge is truly an expert. United States v. Makris, 535 F.2d 899, 908 (5th Cir. 1976). In the final analysis, the determination of competency is a legal conclusion and the judge must independently decide if the defendant is legally capable of reasonable consultation with his attorney and able to rationally and factually comprehend the proceedings against him. Id.

Here, the trial court acted within its discretion in rejecting Powers' opinion that Adam was incompetent because Powers used an incorrect legal standard in assessing Adam's ability to assist his lawyer, and because his opinions were not sufficiently supported by facts. The "ability to assist" aspect of the competency test imposes only a "minimal requirement," and the defendant is not required to be capable of assisting

in every facet of the defense. State v. Harris, 114 Wn.2d 419, 429-30, 789 P.2d 60 (1990). Ability to assist does not mean that the defendant must be able to choose or suggest trial strategy, nor does it mean that he must be able to choose among alternative defenses. See Benn, 120 Wn.2d at 662; Harris, 114 Wn.2d at 428. Powers' opinion that Adam was incompetent was based on his view that Adam's delusions made him unable to choose a legal strategy. He stated, "These symptoms of his mental illness will prevent Mr. Adam from rationally discussing the alleged offenses with his defense attorney and **his symptoms will also prevent him from developing a logical defense strategy**." Report at 6 (emphasis added). However, to be competent a defendant need not be able to "suggest a particular trial strategy," or "choose among alternative defenses." State v. Gwaltney, 77 Wn.2d 906, 908, 468 P.2d 433 (1970). In Ortiz, our supreme court specifically rejected the argument "that a person must be able to help with trial strategy in order to be found competent to stand trial," and upheld a trial court's determination that the defendant with an IQ of between 49 and 59 was competent. 104 Wn.2d at 482-83. Powers applied a demonstrably incorrect and heightened legal standard to the "ability to assist" question.

Powers' opinion on the other competency prong, Adam's ability to understand the nature of the proceedings, was also faulty. Powers was

unable to support his opinion with even a minimally convincing factual basis. In his report, Powers stated simply, "Overall, Mr. Adam appeared to have a very limited understanding of the criminal justice system, even after having several cases adjudicated over the past several years." Report at 6. In his testimony, Powers said that his opinion that Adam did not have the capacity to understand the nature of the proceedings was "largely based on [Adam's] belief that all of this is fabricated." 1RP 69. He also contradicted himself by appearing to admit that Adam had the capacity to understand the proceedings:

> And he's been through kind of stalking charges several times before. And he has the, again, the mechanical or the cognitive abilities to know right and wrong, what's legal, what's not. But his delusions kind of overwhelm that.

1RP 72.

The only evidence relied on by Powers in support of his opinion that Adam did not understand the nature of the proceedings was his view that Adam's insistence that he was being framed was delusional. In his report, Powers acknowledged that "Mr. Adam was able to accurately define the role of his defense attorney." Report at 6. Powers reported that Adam talked about how the judge was not following the law and that he had written letters to the judge, but Powers did not conclude that Adam did not understand the judge's role. Report at 6. Powers reported that

when asked about the prosecutor's role, Adam responded: "I don't have any problem with [the prosecutor]. I don't know what his job is. He can ask my lawyer. I don't know." Report at 6. Powers did not indicate that he followed up on the response in any way, nor did he document any conclusion from the response.

The trial court did not abuse its discretion in rejecting Powers' unsupported opinion that Adam did not understand the nature of the proceedings. Contrary to Adam's assertion that "the State presented no evidence which would refute Powers' conclusion that Adam was not competent to stand trial" (Brief of Appellant at 14), at the competency hearing the State provided as exhibits a letter sent by Adam to the King County Prosecuting Attorney Dan Satterberg, and a collection of Adam's letters and motions filed in the case.[3] Moreover, the trial court's findings indicate that, in addition to considering the exhibits, the court took judicial notice of the entirety of the court proceedings in the case. CP 70. In addition to the fact that Adam had been convicted of three stalking charges in the preceding three years, from the exhibits and court record we know that Adam interacted frequently with the trial court with letters and motions; that after a colloquy during which he acknowledged understanding that the prosecutor was seeking an exceptional sentence

[3] Pretrial exhibit 2, Adam's letter to Satterberg was admitted at 1RP 142; Pretrial exhibit 4, Adam's writings and motions, was admitted at 1RP 143.

based on aggravating circumstances, the presiding court allowed Adam to represent himself; that after a few weeks Adam asked to abandon his *pro se* status and the court reappointed his attorney; that Adam regularly insisted on his right to speedy trial when interacting with the presiding court; and that Adam attempted to justify leniency in his letter to Satterberg. It is no wonder that the trial court rejected Powers' unsupported opinion that Adam did not understand the nature of the legal proceedings.

In concluding that Adam was incompetent to stand trial, Powers put undue weight on his opinion that Adam experienced delusions that he was being framed by law enforcement and court employees and that the victim would clear him through her testimony. Washington courts have upheld a trial court's finding of competency to stand trial even where defendants are suffering from delusions. See State v. Hahn, 41 Wn. App. 876, 879-80, 707 P.2d 699 (1985) (defendant found competent even though he was delusional about his role as an undercover agent). See also Harris, 114 Wn.2d at 429 (defendant found competent despite being diagnosed with paranoid schizophrenia). Here, based on the court's own questions of Powers, and the psychologist's responses, the trial court was obviously unimpressed by Powers' attempts to distinguish Adam from the multitudes of defendants who believe they are being railroaded by the

system and the numerous stalkers who have concrete but unfounded beliefs that they are not harming their victims. Expert opinion testimony is not binding on the trial court, and the credibility of witnesses testifying is exclusively within the province of the trier of fact. Brewer v. Copeland, 86 Wn.2d 58, 74, 542 P.2d 445 (1975); State v. Edwards, 5 Wn. App. 852, 855, 490 P.2d 1337 (1971). "A trial court has the right to reject expert testimony in whole or in part in accordance with its views as to the persuasive character of that evidence." Brewer, 86 Wn.2d at 74.

Here, the trial court was well within its discretion in finding that Adam had failed in his burden to establish his incompetency. It certainly cannot be said that no reasonable judge would have rejected expert opinion based on erroneous legal standards and unsupported by the evidence.

2. THE JURY INSTRUCTION DEFINING "A PROLONGED PERIOD OF TIME" AS "MORE THAN A FEW WEEKS" WAS A COMMENT ON THE EVIDENCE BUT IT DOES NOT REQUIRE VACATION OF THE EXCEPTIONAL SENTENCE.

Adam alleges that an erroneous jury instruction given in the bifurcated penalty phase of the trial requires vacation of his exceptional sentence. While it is true that the trial court erred in giving an instruction that defined a "prolonged period of time" as "more than a few weeks," the error does not require vacation of the sentence for two reasons. First, the

error did not prejudice Adam because the evidence established he had stalked four women over a period of two and a half years. Second, the trial court made clear that any of the other aggravating factors found by the jury, presence of a minor child, rapid recidivism, and sexual motivation, was a sufficient basis to warrant the exceptional sentence of 84 months.

In the bifurcated penalty phase the trial court provided the jury with what was at the time WPIC pattern instruction 300.17:

> To find that this crime is an aggravated stalking offense, the State must prove beyond a reasonable doubt that the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of multiple victims manifested by multiple incidents over a prolonged period of time. An "ongoing pattern of abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks.

CP 124. Subsequent to the trial, in State v. Brush, 183 Wn.2d 550, 558-60, 353 P.3d 213 (2015), the supreme court held that WPIC 300.17, the pattern jury instruction defining "a prolonged period of time" as "more than a few weeks," was an impermissible comment on the evidence. Thus, the State acknowledges that the trial court erred in giving the instruction.

However, a comment on the evidence does not automatically require reversal. State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076

(2006). "Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." Id. at 723. In Brush, the court determined that the State failed to show that the comment on the evidence was not prejudicial. 183 Wn.2d at 559-60. In that case, the State presented evidence showing that the "abuse occurred during a two-month period." Brush, at 559. Thus, the State could not show that the impermissible comment stating that a prolonged period of time was more than a few weeks was not prejudicial. Id. at 559-60.

In contrast, in Levy, the supreme court held that a comment on the evidence was not prejudicial. 156 Wn.2d at 726-27. In that case, the court instructed the jury that the apartment in question constituted a "building" for the purposes of the burglary statute. Id. at 716, 721. Although this was improper, Levy never challenged that the apartment was a building. Id. at 726. Under the facts of that case, the court held "that the jury could not conclude that [the] apartment was anything other than a building." Id.

This case is similar to Levy. Here, Adam did not challenge that the two and a half years over which he stalked four separate women was a prolonged period of time. Rather, Adam argued only that his behavior toward LaRose did not amount to the required "pattern of abuse" because

most of his conduct was giving her gifts and repeating, "I love you." 8RP 37-38. He conceded only that the throwing of the rock through the window was violent, but argued that it was not sufficient evidence:

> That is a single incident, not abuse. That does not constitute a pattern as described, and that's all the State has to hang on to.

8RP 38. To paraphrase Levy, given that Adam was convicted of stalking four women over a period of over two and a half years, the jury could not conclude that the pattern of abuse had not occurred over a prolonged period of time. Because the evidence of the prolonged nature of Adam's stalking of multiple women was indisputable (and undisputed), the erroneous instruction defining "prolonged period of time" as "more than a few weeks" did not prejudice Adam.

Moreover, even if Adam was prejudiced by the instruction, vacation of the sentence is not required because the trial court clearly stated that the other aggravating factors were sufficient to justify the same sentence. An exceptional sentence may be upheld on appeal even where all but one of the trial court's reasons for the sentence have been overturned. State v. Gaines, 122 Wn.2d 502, 512, 859 P.2d 36 (1993) (citing State v. Harding, 62 Wn. App. 245, 813 P.2d 1259 (1991) (exceptional sentence upheld where two of three aggravating factors invalidated). Remand for resentencing is necessary only where it is not

clear whether the trial court would have imposed an exceptional sentence on the basis of only the one factor upheld. Gaines, at 512 (citing State v. Henshaw, 62 Wn. App. 135, 140, 813 P.2d 146 (1991) (remand is necessary where sentencing court placed considerable weight on invalid factors, even if other factors were valid).

Here, only one of four bases for the exceptional sentence is challenged by Adam. The trial court's order contained a crystal clear statement of the court's intent:

> Each one of these aggravating circumstances is a substantial and compelling reason, standing alone, that is sufficient justification for the length of the exceptional sentence imposed. In the event that an appellate court affirms at least one of the substantial and compelling reasons, the length of the sentence should remain the same.

CP 201. The court's statement makes it clear that remand for resentencing is unnecessary. State v. Gore, 143 Wn.2d 288, 321, 21 P.3d 262 (2001) (exceptional sentence affirmed despite the aggravating circumstance of high degree of sophistication or planning held improper when trial court indicated vulnerability of victims justified exceptional sentence), reversed on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).

Adam argues that under State v. Smith, 123 Wn.2d 51, 58, 864 P.2d 1371 (1993), this court should remand for resentencing. In Smith,

despite similar language expressing the trial court's intent to impose the same exceptional sentence if any one of the aggravating factors were upheld on appeal, the supreme court remanded the case for resentencing after invalidating two of four aggravators. 123 Wn.2d at 58. But Smith is distinguishable, not just in that two of four aggravators were invalidated compared to here with only one of four even being challenged, but also in the degree to which the Smith trial court's exceptional sentence exceeded the standard range sentence. In Smith, the defendant's standard range sentence for three burglaries was 43 to 57 months to be served concurrently, but the trial court imposed three consecutive 100-month sentences. 123 Wn.2d at 53, 58 n.4. The Smith court stressed this point in remanding:

> Given the great disparity between the presumptive sentence and the exceptional sentence, it is unclear whether the trial judge would have imposed the same sentence had he considered only the two valid aggravating factors. In such an instance, a remand is appropriate.

123 Wn.2d at 58. Here, the standard range sentence was 30 to 32 months. CP 130. The disparity between the presumptive sentence and the 84-month exceptional sentence is far less and there is no reason to question the trial court's statement of intent.

Here, the erroneous comment on the evidence was not prejudicial, and even if this Court were to find it so, there is no need to remand for reconsideration of the duration of the sentence.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Adam's judgment and sentence.

DATED this 29 day of August, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Jared Steed, containing a copy of the BRIEF OF RESPONDENT, in STATE V.IBRAHIM ADAM, Cause No. 73261-7-I, in the Court of Appeals, Division I, 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.

Date : Aug. 29, 2016

Done in Seattle, Washington