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A. RESPONSE TO ASSIGNMENT OF ERROR

**I. THE TRIAL COURT DID NOT “REFUSE” TO
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ABUSE ITS DISCRETION IN FINDING THE TESTIMONY
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RELIABLE THAN THE STATE’S EXPERTS.**

B. STATEMENT OF THE CASE

Respondent accepts the Statement of the Case presented by the State in the Brief of Appellant, but wishes to add the following for the Court’s consideration:

In finding Mr. Sullivan not guilty by reason of insanity, the State and the Court had the following exchange:

Mr. Fairgrieve: “Your Honor, to clarify the record, did you grant Defense Counsel’s motion to strike the expert witness testimony?”

The Court: “What I did was, even assuming or denying—even if I allow that testimony to come in, my opinion is is the basis for which she testified to, that there is a presumption of sanity, is not the proper method of testimony.

Mr. Fairgrieve: “All right. Your Honor, the only reason I’m saying this Your Honor, is...you need to make a decision one way or the other, because there are going to be appeal applications, I think. So, I mean, if you’re saying that you made your decision and that you took into account the State’s witness testimony, you know, essentially denying their motion,

then there's not going to be grounds for appealing your decision on that basis."

The Court: "Well, I think that's correct. Since even allowing that in— because even allowing it on that basis, on a more probable or not basis, that the State's testimony failed to reach the proper measure, proper criteria for testifying."

Mr. Fairgrieve: "So it would be accurate for me to characterize it: You denied Defense's motion. You've taken into account all the evidence and made your decision. Is that accurate, Sir?"

The Court: "I think that would be accurate."

RP Vol. III, p. 500-01.

Mr. Sullivan, as Respondent, also incorporates the trial court's findings of fact and conclusions of law (found at Clerk's Papers 171-173) and the trial court's Clarification of Finding of Insanity (found at Clerk's Papers 177-178), attached to Appellant's Brief as appendices A and B, in his Statement of the Case.

C. ARGUMENT

I. THE TRIAL COURT DID NOT "REFUSE" TO CONSIDER THE STATE'S EVIDENCE AND DID NOT ABUSE ITS DISCRETION IN FINDING THE TESTIMONY OF THE DEFENSE EXPERTS MORE CREDIBLE AND RELIABLE THAN THE STATE'S EXPERTS.

Respondent accepts the citations to authority made by the State in its argument section which outline the standard for finding insanity in the State of Washington. Preliminarily, Mr. Sullivan contends that the State did not assign error to any of the trial court's findings of fact and conclusions of law (CP 171-173) or to any of the findings of fact in the court's Clarification of Finding of Insanity (CP 177-178). The State's Assignment of Error alleges that the trial court "refused" to consider the State's evidence, and thereby abused its discretion, but did not assign error to any finding of fact or conclusion of law. R.A.P. 10.3 (g) provides, inter alia, "A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto."

In referencing the findings of fact that it finds objectionable, the State refers to them in its Statement of the Case and merely states that it "takes exception" to them. The State does not assign error to these findings and this Court should treat them as verities on appeal. *In re Palmer*, No. 36339-9-II (July 1, 2008); *State v. Gaines*, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

The remainder of Appellant's assignment of error can be summarized as follows: The State believes that when it presents evidence, the trier of fact is required to believe it, trust it, and find it more reliable than any evidence which may be presented by a criminal defendant. The State complains repeatedly in its brief that because the trial court relied upon the testimony of defense experts in finding Mr. Sullivan insane, the trial court "refused to consider" the State's evidence, and thereby abused its discretion. In its opening sentence, Appellant's Brief states: "The State maintains that the Judge refused to consider all relevant and probative evidence and specifically refused to recognize testimony of four State's expert witnesses." Brief of Appellant at p. 20. The State went on to complain that "the trial court did not pay any attention to the expert witnesses called by the State of Washington." Brief of Appellant, p. 21.

The trial court's oral ruling, as well as its extensive findings of fact and the Clarification of Finding of Insanity, belies this complaint. The trial court gave substantial consideration to the evidence presented by both sides, and simply found the evidence presented by the defense experts to be more credible. As criminal defendants are frequently reminded on appeal, credibility determinations are for the trier of fact and cannot be reviewed or disturbed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). That the State did not get the result it wanted does

not translate into an abuse of discretion by the trial court. A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds. *State v. Magers*, No. 79332-8 (Washington Supreme Court, July 24, 2008); *State v. Powell*, 126 Wn.2d 244, 258, 893 P. 2d 615 (1995). If it were manifestly unreasonable for a trial court to do anything but rubber stamp the wishes of the State, this hearing on the question of insanity would have been a pretext. The finder of fact, in this case the trial court, was permitted and required to hear all of the evidence and to decide which witnesses were reliable and which were not. The trial court found Mr. Sullivan's witnesses more reliable and credible than the State's, and did not abuse its discretion when it found Mr. Sullivan not guilty by reason of insanity.

D. CONCLUSION

This Court should deny the Appellant's request that this matter be remanded for a new insanity hearing or, alternatively, reconsideration by different judge of the evidence already adduced. This Court should affirm the trial court.

RESPECTFULLY SUBMITTED this 4th day of August, 2008.


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9 and that said envelope contained the following:

- 10
11 (1) BRIEF OF APPELLANT
12 (2) R.A.P. 10.10 (TO MR. SULLIVAN)
13 (3) AFFIDAVIT OF FAXING
14

15 Dated this 4th day of August 2008,
16

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18 
19 ANNE M. CRUSER, WSBA #27944
20 Attorney for Respondent
21

22 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of
23 Washington that the foregoing is true and correct.
24

25 Date and Place:

August 4, 2008, Kalama, WA

Signature:

Anne M. Cruser