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Court of Appeals
Division III
State of Washington

No. 29924-4-III

IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

ERIK JON CSIZMAZIA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KLICKITAT COUNTY, STATE OF WASHINGTON
Honorable Brian P. Altman, Judge
Superior Court No. 11-1-00014-3

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Did the court err in accepting Mr. Csizmazia's unequivocal, knowing and voluntary waiver of counsel?

2. Did the court err in denying the State's motion for a competency evaluation where no legitimate question as to Mr. Csizmazia's competency was raised?

3. Were comments made by the court impermissible comments on the evidence though they did not convey to the jury any particular feeling the court had about the merits of the case or about the evidence?

II. STATEMENT OF THE CASE

The facts and procedural history recited in The Brief of Appellant are sufficient to give the Court an outline of the conduct of Mr. Csizmazia which resulted in the jury convicting him of Malicious Mischief in the First Degree. Additional facts are added to supplement those facts when necessary.

III. ARGUMENT

A. BECAUSE MR. CSIZMAZIA'S WAIVER OF COUNSEL WAS UNEQUIVOCAL AND WAS KNOWINGLY AND INTELLIGENTLY MADE, THE COURT WAS WELL WITHIN ITS DISCRETION IN ALLOWING MR. CSIZMAZIA TO REPRESENT HIMSELF AT TRIAL.

Criminal defendants have a constitutional right to represent themselves. *State v. DeWeese*, 117 Wn.2d 369, 375, 816 P.2d 1 (1991); *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525 (1975). "[A]lthough he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta*, 422 U.S. at 834. "To protect defendants from making capricious waivers of counsel, and to protect trial courts from manipulative vacillations by defendants regarding representation...a defendant's request to proceed . . . pro se . . . [must] be unequivocal." *DeWeese*, 117 Wn.2d at 376. This requirement "derives from the fact that . . . a defendant's request for self-representation can be a 'heads I win, tails you lose' proposition for the trial court." *Id.* at 377 (citations omitted). "If the court too readily accedes to the request, an appellate court may reverse, finding an ineffective waiver of the right to counsel. But if the trial court rejects the request, it runs the risk of depriving the defendant of his right to self-representation." *Id.* (citation

omitted).

Denial of the right to self-representation must be based on some identifiable fact relating to one of the following limited grounds: that the defendant's request is equivocal, untimely, involuntary, or made without a general understanding of the consequences. *State v. Madsen,* 168 Wn.2d 496, 504-505, 229 P.3d 714 (2010). There is no checklist of the particular legal risks and disadvantages attendant to waiver which must be recited to the defendant." *DeWeese*, 117 Wn.2d at 378 (citing *State v. Imus*, 37 Wn. App. 170, 173-174, 679 P.2d 376 (1984), *review denied*, 101 Wn.2d 1016). "[V]alid [waiver] depends on the facts and circumstances of each case. *Id.*

A criminal defendant's unequivocal waiver of counsel must be knowing and intelligent, with at least a minimal knowledge of the task involved. *DeWeese*, 117 Wn.2d at 377-378 (citing *State v. Bebb*, 108 Wn.2d 515, 525, 740 P.2d 829 (1987); *Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984)). Absent the preferred method of a colloquy, the record must reflect that the defendant understood the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of his defense. *Id.* at 378.

Waiver of counsel is reviewed for abuse of discretion. *State v. Lawrence*, 166 Wn. App. 378, 394, 271 P.3d 280, 288 (2012). "Discretion is

abused when it is exercised on untenable grounds or for untenable reasons [or] . . . when a court uses an incorrect legal standard in making a discretionary decision." *Id.* at 385-386 (citations omitted).

Unequivocal Waiver

The following exchange took place between Mr. Csizmazia and the court during his February 24, 2011 preliminary appearance:

> THE COURT: And let me ask you whether or not you're going to request an attorney in this. I know you did not want one in the other case. Would you like to talk to a lawyer in this case? I will appoint --
>
> MR. CSIZMAZIA: No. No, your Honor--
>
> THE COURT: I will appoint Mr. Matosich if you wish to have a lawyer.
>
> MR. CSIZMAZIA: No, your Honor.
>
> THE COURT: You -- Do you know Mr. Matosich?
>
> MR. CSIZMAZIA: Yes.
>
> THE COURT: Would you like to have him as an attorney?
>
> MR. CSIZMAZIA: No, sir.
>
> THE COURT: Okay. I'm going to have to have more discussions with you about that issue, of course. I've got to make a record in this case also that you do not want a lawyer but we'll not -- we're not going to do that today. But at some point soon I'm going to have to go through that litany again with you to make sure that you are voluntarily waiving your right to a lawyer—
>
> MR. CSIZMAZIA: I would also like to take this moment to fire Joy

Duggan as my pro se attorney, and just go -- without counsel.

4RP at 5[1]. At his arraignment on March 7, 2011, Mr. Csizmazia again insisted that he be allowed to represent himself without counsel. The court engaged him in the following colloquy:

> THE COURT: Mr. Csizmazia, I'm going to try to talk you out of representing yourself one more time. And we have to go through this . [if] I can't talk you into it, then –
>
> MR. CSIZMAZIA: But--
>
> THE COURT: If I can't talk you into it, then--
>
> MR. CSIZMAZIA: Thus far in all my experience in this court I believe I'm the -- I've filed the only two legal documents I've ever seen in the court. I believe I'm the only viable attorney in the state, to tell you the truth, at this point. I'm still confident that I--
>
> THE COURT: Okay.
>
> MR. CSIZMAZIA: --can represent myself.
>
> THE COURT: Okay. Have you ever studied law?
>
> MR. CSIZMAZIA: I'm -- I probably am the world's best knowledge on Latin and foreign languages, so I can handle legalese and -- pretty fairly easily.

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[1] Citations to the verbatim report of proceedings are to the transcripts filed with this Court in State of Washington v. Erik Csizmazia COA No. 29924-4-III. The various volumes of transcripts will be cited as follows:

1RP	April 18, 2011 and May 3, 2011	3RP	May 6, 2011
2RP	May 5, 2011	4RP	February 24, 2011 and March 7, 2011

> THE COURT: Have you ever represented yourself or anyone else in a criminal action?
>
> MR. CSIZMAZIA: Just -- on that prior case, where I'm now 1 and 0.
>
> THE COURT: It's 1 and 0. You won. Okay. You mean the case right here in this court; is that right?
>
> MR. CSIZMAZIA: What's that?
>
> THE COURT: You mean the case--
>
> MR. CSIZMAZIA: Yes,--.
>
> THE COURT: --we just finished--
>
> MR. CSIZMAZIA: Yes, sir.

4RP at 15-16. The court then cautioned Mr. Csizmazia that he would be "on his own," that the court would be unable to help him, and that he would be governed by the rules of evidence in the case whether he agreed with them or not. 4RP at 16, 21-22. Mr. Csizmazia affirmed that he understood both these things. 4RP at 21-22. The court also inquired of Mr. Csizmazia whether he was familiar with the rules of criminal procedure; Mr. Csizmazia replied that he was, at least generally. 4RP at 23.

After hearing argument from Mr. Csizmazia regarding his speedy trial period, the proof required for the State to bring charges against him, his trial date, and numerous other matters, the court stated:

> THE COURT: In my view, the things -- the very things we're discussing are reasons for you to have an attorney. But you may not agree with that... I

> must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise for you to try to represent yourself. You are not familiar with the law in my opinion, you are not familiar with the Rules of Evidence, and you are not familiar with court procedure. I would strongly urge you not to try to represent yourself. Now, considering the dangers and disadvantages of self-representation is it still your desire to represent yourself and to give up your right to be represented by a lawyer?

4RP at 23. Mr. Csizmazia again affirmed that he wished to represent himself. He guaranteed the court that no one had promised or threatened anything to get him to waive his right to counsel. The court then made a finding that he had knowingly and voluntarily done so and granted his request to represent himself at trial. 4RP at 24.

At a May 3, 2011 pretrial hearing before Pro Tem Judge Robert Weisfield, Mr. Csizmazia himself acknowledged that Judge Altman had held lengthy and thorough discussions with him regarding his right to counsel. At that hearing, the State filed an amended information which alleged a single count of Malicious Mischief in the First Degree. 1RP at 25-42. In response to Judge Weisfield's inquiry into whether Judge Altman had discussed his right to counsel with him, Mr. Csizmazia responded: "It has been addressed in probably an hour and a half of court appearances over three different appearances." 1RP at 31. Mr. Csizmazia again asserted his right to represent himself and refused Judge Weisfield's offer to provide standby counsel. 1RP at 31.

Mr. Csizmazia's persistent and unequivocal assertion of his right to proceed pro se forced the court to choose between granting his request or depriving him of a constitutional right. The steadfastness of his decision was made clear over the course of two hearings, during which Mr. Csizmazia invoked his constitutional right to represent himself three times in front of two different judges. Each time he firmly rejected the court's invitation to reconsider. 4RP at 5, 14; 1RP at 31. His waiver was unequivocal.

Full Understanding of Seriousness and Consequences

Mr. Csizmazia clearly understood the seriousness of the charged offenses, including potential consequences both of self-representation and conviction. Mr. Csizmazia was informed of the maximum penalties for both the Malicious Mischief in the First Degree and the Escape charges at his initial appearance. 4RP at 4. He was advised a second time at his arraignment. 4RP at 16.

Mr. Csizmazia's assertion that he was misled about the seriousness of the charges simply isn't reasonable. His assertion is based on the court's comment categorizing the charges against him as "relatively minor offenses". This comment was taken out of context. The court referred to the charges as "relatively minor" in response to Mr. Csizmazia's insistence that they were

"strike offenses." 4RP at 14-15. Any confusion Mr. Csizmazia may have had was remedied when the court ordered the State to "give him offender scoring sheets and show him what he would be looking at if he were convicted of both as they are." *Id.*

Finally, any remaining shred of confusion about the potential penalties was rectified when Mr. Csizmazia was advised, for the third time, of the maximum penalty of Malicious Mischief in the First Degree. At the pretrial hearing, held after the "relatively minor" comment was made, Judge Weisfield advised Mr. Csizmazia, as Judge Altman had done twice before, that Malicious Mischief in the First Degree was punishable by up to ten years in prison and/or a twenty-thousand ($20,000) fine. 1RP at 28. It is not reasonable to maintain that the gravity of Mr. Csizmazia's circumstances remained unknown to him.

The court was confronted with a defendant who was undeterred by his disadvantages. The court was not empowered to protect Mr. Csizmazia from himself by interfering with his constitutional right to self-representation. Assistance of counsel is to "be an aid to a willing defendant, [it] is not to be thrust[ed] . . . upon the accused, against his considered wish." *Faretta*, 422 U.S. at 820. "[Al]though he may conduct his own defense ultimately to his own detriment, his choice must be honored." *Id.* at 834. Mr. Csizmazia's

decision to represent himself may have been unwise, but it was his decision to make. The court did not abuse its discretion when it accepted his waiver of counsel.

B. BECAUSE THERE WAS NO LEGITIMATE REASON TO DOUBT MR. CSIZMAZIA'S COMPETENCY, THE COURT WAS WITHIN ITS DISCRETION IN DENYING THE STATE'S MOTION FOR A COMPETENCY EVALUATION.

Due process prohibits subjecting an incompetent defendant to criminal proceedings. *Pate v. Robinson*, 383 U.S. 375, 378-386, 86 S. Ct. 836 (1966), *State v. Wicklund*, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982). RCW 10.77.050 reflects this constitutional protection: "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 competent to stand trial when he is able to understand the charges against him and capable of assisting in his own defense. *State v. Hahn*, 106 Wn.2d 885, 894, 726 P.2d 25 (1986). RCW 10.77.060(1)(a) mandates that the trial court convene a hearing to determine the defendant's competency to stand trial whenever "there is reason to doubt his or her competency." RCW 10.77.060.

Competence to stand trial is within a court's discretion, reversible

only upon a showing of abuse of that discretion. *State v. Ortiz,* 104 Wn.2d 479, 482, 706 P.2d 1069 (1985), *cert. denied,* 476 U.S. 1144, 106 S.Ct. 2255 (1986). Deference is to be given to the trial court's determination because of the court's opportunity to observe the defendant's behavior and demeanor. *State v. Crenshaw*, 27 Wash. App. 326, 330, 617 P.2d 1041 (1980) *affirmed*, 98 Wn.2d 789, 659 P.2d 488 (1983).

A motion to determine competency must be supported by facts and will not be granted merely because it was filed. *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). If the trial court is not provided with sufficient information regarding the defendant's competency, or if there is no reason to doubt the defendant's competency, the court does not abuse its discretion by declining to order a mental examination and convene a hearing. *Id.* at 901-904. Whether a formal inquiry is warranted depends upon all the facts and circumstances known to the court, including 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).

At the April 14, 2011 status hearing, the State requested a competency evaluation. 1RP at 3. The deputy prosecutor filed her Motion for Examination and Report Upon the Mental Condition of the Defendant

and Commitment to Eastern State Hospital for Examination prior to the hearing. CP 31-34. In the affidavit supporting her motion, the deputy prosecutor told the court that she had concerns about Mr. Csizmazia's "grasp of reality" based on answers he was reported to have given to his Community Corrections Officer in a monthly offender report. CP 32. The deputy prosecutor also listed as a concern that twelve "Spice[2]" packets, some of which were empty, were found in Mr. Csizmazia's room after his arrest. *Id.* The deputy prosecutor did not go into detail about which answers in the monthly offender report she was referring to, nor did she explain why those answers or the empty packets of "Spice" led her to question Mr. Csizmazia's competency to stand trial. She did, however, attach the monthly offender report as well as Department of Correction notes regarding the spice packets to her motion. CP 32-34. Also attached was a 2007 mental health evaluation conducted by Eastern State Hospital in which Mr. Csizmazia was determined to be competent to stand trial. CP 37-49.

At the hearing on her motion, the deputy prosecutor cited concerns that she and Ronda Nielsen[3], Mr. Csizmazia's Community Corrections

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[2] "Spice" is a brand of synthetic Marijuana.

[3] Mr. Csizmazia incorrectly implies that Ms. Nielsen is a staff member at Eastern State

Officer, had that the competency evaluation results might no longer be relevant because they were too old. The deputy prosecutor essentially asked the court to grant her motion for a competency evaluation to increase the State's comfort level with Mr. Csizmazia's self-representation at trial. 1RP at 8. Mr. Csizmazia vehemently objected to the competency evaluation, stating "I mean, I've gone through the system [at Eastern State Hospital] and I'm more sane now than I have ever been in my life." 1RP at 10.

The court denied the State's motion. In making its ruling, the court stated "I'm making a finding one more time that you are competent to represent yourself...you can assist yourself, you do have an independent recollection of what occurred, you are able to communicate that recollection, you understand the consequences of it." 1RP at 15.

The record reveals that the court was familiar with Mr. Csizmazia. 4RP at 5. It is clear that the court had observed him and his behavior prior to his first appearance on these charges. Additionally, the court was able to observe Mr. Csizmazia both at his first appearance and at his arraignment prior to the status hearing. 4RP at 3-11, 12-35; 1RP at 3-24.

Hospital. Brief of Appellant at 11. Nowhere in the record does it reflect that someone at Eastern State Hospital expressed concern to Ms. Mathews regarding the 2007 competency

The court was provided with a prior medical opinion establishing competence. This document reveals that Mr. Csizmazia's behavior at the time of the hearing and throughout prior court appearances was relatively consistent with that displayed during his 2007 evaluation. *See* CP 37-49. It can also be likened to some of the admittedly strange statements on his Monthly Offender Report. These behaviors, which caused the State to question Mr. Csizmazia's "grip of reality," were apparently not of concern to evaluators at Eastern State Hospital when addressing his competency to stand trial.

The facts in *State v. Lord*, 117 Wn.2d at 829, are similar. There defense counsel filed a motion for a competency evaluation supported by testimony of a corrections officer that Lord had told him "he had a conversation with the Lord and the devil and the devil asked him to drink a cup of his own blood to prove his innocence". *Id.* at 901. The corrections officer testified that Lord was "ranting and raving" when he made the statement. *Id.* at 902. At the hearing, the defendant stated he was competent and wanted to fire his attorney. *Id.* The court denied the motion, holding that the defense did not establish a sufficient record by testimony, affidavit, medical reports or their own statements to trigger a

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results being too old.

competency hearing. *Id.* at 903. Specifically, the court noted that defense counsel had not made any assertion that Lord was unable to recall or relate facts sufficient for defense counsel to proceed. The Supreme Court upheld this decision on review, concluding that the trial court did not abuse its discretion in determining that defense counsel failed to meet its burden. *Id.* at 904.

As in *Lord*, the threshold burden of establishing that there was reason to doubt Mr. Csizmazia's competency was not met in this case. The fact that Mr. Csizmazia expressed himself in ways that seem odd or that he held unconventional ideas did not make him incompetent to stand trial. This record does not show any legal error in denying the motion without holding a competency hearing. Based upon the court's own dealings with Mr. Csizmazia, and the report of the psychological evaluation done on him, the trial court did not abuse its discretion in denying the State's motion.

If this Court determines that there was a legitimate question concerning Mr. Csizmazia's competency, the proper remedy is remand for a competency hearing in the trial court, not reversal. The passage of time between the trial and the competency hearing would not be great; the competency hearing could be held less than two years from the May 5,

2011 trial, making it likely that Mr. Csizmazia's competency at the time of trial can be determined.

If this Court is not inclined to remand this case for a competency hearing, it could instead remand the case for additional evidence under RAP 9.11. The rule provides, in pertinent part:

> **(a) Remedy limited.** The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.
>
> **(b) Where taken.** The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

RAP 9.11. Additional evidence regarding the denial of the State's motion for a competency order could be taken on review. Even if this Court were to find that the six criteria of RAP 9.11 have not been satisfied, additional evidence may still be accepted to serve the ends of justice. RAP 1.2, RAP 18.8. See also *State v. Elmore*, 139 Wn.2d 250, 302, 985 P.2d 289 (1999). The appropriate remedy is remand, either for a competency hearing to be held now, or for additional evidence to be taken on review.

C. BECAUSE NONE OF THE COURT'S STATEMENTS CONVEYED TO THE JURY ITS PERSONAL OPINION AS TO THE MERITS OF THE CASE OR TO ANY EVIDENCE PRESENTED, NO ERROR OCCURRED.

Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const Art. 4, §16. "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (citing *State v. Hansen*, 46 Wn. App. 292, 300, 730 P.2d 706 (1986), *affirmed as modified*, 737 P.2d 670 (1987)). "The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury." *Id.* (citing *State v. Trickel*, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), *review denied*, 88 Wn.2d 1004 (1977)).

Mr. Csizmazia asserts as problematic three exchanges with the trial court, but none of the comments made were comments on the evidence because they did not reveal to the jury the court's personal belief in either

the merits of the case or the evidence.

The first of the court's comments occurred when the court overruled an objection made by the State. The court explained to Mr. Csizmazia that he was giving him some latitude and let him know where the boundaries of that latitude lay. The court was clearly explaining its reasoning for an evidentiary ruling. It is well settled that this type of comment does not constitute a comment on the evidence. See *State v. Surry*, 23 Wn. 655, 63 P. 557 (1900); *State v. Lane*, 4 Wn. App. 745, 484 P.2d 432 (1971), *review denied,* 79 Wn.2d 1007; *State v. Studebaker*, 67 Wn.2d 980, 410 P.2d 913 (1966); *State v. Estill*, 50 Wn.2d 245, 310 P.2d 885 (1957) ; *State v. Frost*, 134 Wn. 48, 234 P. 1021 (1925); *State v. Elder*, 130 Wn. 612, 228 P. 1016 (1924).

Mr. Csizmazia next assigns error to comments made to him during a disagreement with the court about the relevance of certain testimony. Appellant's Brief at 25. These comments are of the same type as those at issue in *State v. Bowen*, where the judge admonished a key defense witness by stating "Will you listen to me a minute? I run this courtroom. You don't . . . You answer the question and don't interject all of your personal ideas about it!" *State v. Bowen*, 12 Wn. App. 604, 611, 531 P.2d 837 (1975). Division Two held that these statements did not amount to comments on the evidence. *Id.* The court relied on *State v. Haye*, in

which the Supreme Court held that a judge's comment to defense counsel to "just keep quiet...this is all trivia anyway" was not prejudicial error. *Id.*, citing *State v. Haye*, 72 Wn.2d 461, 433 P.2d 884 (1967). The court's comments in this case, like those in *Bowen* and *Haye*, did not convey a personal attitude about the merits of the case. They cannot be construed as comments on the evidence.

The third alleged comment on the evidence that Mr. Csizmazia refers to involves the court's statement that "the entire day and a half we've been here the state has been putting on facts against you, fact after fact after fact. Now is your opportunity to say whatever you want about those facts." 3RP at 259. The implication from this comment is clear; the court was letting Mr. Csizmazia know that his opportunity to put forth his theory of the case was at hand. This comment does not convey to the jury the court's particular feeling about the case or the evidence. Even the characterization of the State's evidence as "facts," once put into context, would not have inferred that the court believed the State's evidence any more than Mr. Csizmazia's. In relation to the comment at issue, the court stated:

> THE COURT: I'm going to allow you to argue later on if you want. Right now is your opportunity to talk about facts—

> THE COURT: No. No. You get to argue later. Right now, just like all the witnesses that have been here for a day and a half, you only get to talk about the facts as you saw them.
>
> THE COURT: [W]hat you saw, what you know, what you heard, and so forth. You're a fact witness.

3RP at 259, 270-271. The context of this statement makes it clear that the word "fact" was being used to distinguish testimony regarding observation and experience -- factual matters -- from argument. The court was simply telling Mr. Csizmazia that now was the time to put forth his facts, just as the State put forth "fact after fact after fact". Because there was no inference to the jury that the court believed the State's evidence to be true or even more compelling than facts Mr. Csizmazia could put forth, there was no comment on the evidence.

The final statement with which Mr. Csizmazia takes issue is:

> THE COURT: Mr. Csizmazia having not filed a witness list is not entitled to call witnesses at this time, therefore I assume you rest at this point. Is that correct?

3RP at 291. This statement relays to the jury nothing other than what it says: that because Mr. Csizmazia didn't file a witness list, he is not entitled to call witnesses. The fact that the jury may not have been familiar with the court rules is irrelevant. In fact, if the court had failed to mention that Mr. Csizmazia did not file a witness list and simply

prohibited him from calling witnesses, the jury would have been more likely to infer that the court held a negative personal opinion of the case or of Mr. Csizmazia. The comment in no way conveyed that the court disbelieved Mr. Csizmazia or believed the State. It was not a comment on the evidence.

Even assuming any error in any of the statements made by the court, such error was harmless. Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial and the burden "rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment." *Lane*, 125 Wn.2d at 838, citing *State v. Stephens*, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), *affirmed and reversed in part*, 83 Wn.2d 485, 519 P.2d 249 (1974). In assessing prejudice, the test is whether there is overwhelming untainted evidence supporting the conviction. *State v. Sivins*, 138 Wn. App. 52, 155 P.3d 982 (2007).

The jury heard testimony from six corrections officers about various acts committed by Mr. Csizmazia in the Klickitat County Jail during the month of January, 2011. 2RP at 70-205; 3RP at 221-251.

These acts included flooding cells with a mixture of water and feces, causing permanent damage to a cell door, spreading feces throughout a cell, and digging up the floor of a padded cell. *Id.* The corrections officers and a maintenance worker for the county also testified in detail about the way in which jail operations were seriously and regularly disrupted. *Id.*, 2RP at 205-215. Mr. Csizmazia did not present any evidence that he did not commit the alleged acts, but rather asserted that he did not have the requisite intent required for the Malicious Mischief charge. He testified that he committed these acts while in the midst of a "mad spaz attack" (2RP at 152), or, in the case of the flooding, that his cell was so filthy he was trying to help clean it up by flooding his toilet. 3RP at 278, 283. Several of the corrections officers testified that Mr. Csizmazia seemed to be able to turn his odd behavior on and off like a switch whenever it suited him and that he was completely capable of controlling his behavior with no change in medication or routine. 2RP at 117, 129-130, 161-162, 169-170. They also testified that they believed, and had been told by mental health professionals, that Mr. Csizmazia was doing these things to get attention. 2RP at 162, 169. The evidence supporting Mr. Csizmazia's conviction was overwhelming.

In addition to the overwhelming evidence presented at trial, the

jurors were cautioned in the written instructions prior to deliberation that a trial judge is not allowed to comment on the evidence, and that if they believed that he had, they were to disregard that comment. 3RP at 312-13. They are presumed to have followed this instruction. *State v. Ingle*, 64 Wn.2d 491, 499, 392 P.2d 442 (1964).

Because there was overwhelming, untainted evidence at trial to support Mr. Csizmazia's conviction, and because the jury is presumed to have followed the instructions of the court to disregard any apparent comment on the evidence, any statements made by the trial court that this Court deems to have been comments on the evidence did not result in prejudice to Mr. Csizmazia and were therefore harmless.

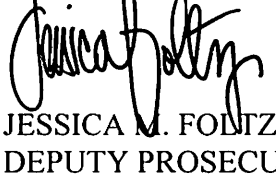
IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that Mr. Csizmazia's conviction be affirmed.

DATED July 5, 2012.

Respectfully submitted,

LORI LYNN HOCTOR
Prosecuting Attorney



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COURT OF APPEALS OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. ERIK JON CSIZMAZIA, Appellant.	COURT OF APPEALS NO. 29924-4-III DECLARATION OF MAILING

I, Jessica M. Foltz, state that on July 5, 2012, I sent a copy of the Brief of Respondent in this case to: David Gasch at gaschlaw@msn.com. Email service was per agreement.

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

DATED this 5 day of July, 2012.

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