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Court of Appeals  
Division III  
State of Washington

NO. 31318-2-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

BRANDON L. VAN WINKLE, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 12-1-00907-8

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BRIEF OF RESPONDENT

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## **I. NATURE OF THE CASE**

The defendant, Brandon Van Winkle, brought this action to appeal his conviction for one count of Custodial Assault.

## **II. STATEMENT OF FACTS**

The defendant was charged with Custodial Assault for assaulting Benton County Jail Sergeant Dennis Schaefer on July 27, 2012. (CP 1). The defendant was arraigned on August 2, 2012, by the Honorable Vic Vanderschoor. (RP 08/02/2012 at 1-2). In response to the court appointing attorney Michelle Alexander to represent him, the defendant immediately responded, “Your Honor, I don’t need no counsel. I am going to do this myself. She will just get in the way.” (RP 08/02/2012 at 2). In response to the court’s statement that Ms. Alexander would be standby counsel, the defendant stated, “I don’t need no standby or nothing like that.” The court indicated that the issue could be addressed at a later date. (*Id.*).

At the State’s request, the Honorable Craig Matheson addressed the issue of the defendant’s wishes to represent himself at a hearing on August 9, 2012. (RP 08/09/2012 at 1-2). In response to the court’s inquiry about whether he wished to be represented by an attorney, the

defendant confirmed that he wished to represent himself. (RP 08/09/2012

at 3). The court then had the following exchange with the defendant.

Court: ...[W]e need to address this issue on the attorney. If you're innocent, you need an attorney more than if you're guilty.

Defendant: No, it would just get in my way. I've been to business law.

Court: How far did you go in college.

Defendant: Far enough to beat this case.

Court: Did you finish high school?

Defendant: Oh, yeah.

Court: Do you know anything? Do you know, for example, what you're facing in terms of punishment in this case?

Defendant: Most definitely. You just told me. Five years.

Court: And do you know the standard range?

Defendant: That's neither here nor there really. It's really going – it's going to be real simple. It probably won't even make it past the 3.5 hearing, but if you guys let it do it, then it does.

Court: And you're able to read and write English?

Defendant: Very well.

Court: And do you have some experience with the court system?

Defendant: Directly, yeah, a lot.

Court: Do you understand that, if you come into court representing yourself, you will not be assisted by the judge?

Defendant: Yeah. I don't need no assistance.

Court: And you will be held to the standard of a practicing attorney. So the errors you make will not be forgiven on appeal. Do you understand that?

Defendant: Yeah, we won't have to worry about that.

Court: I'm satisfied that he wants to go without an attorney and has the ability, at least nominally, to do that. So I will accept the waiver...

(RP 08/09/2012 at 3-4).

The court advised the defendant that Ms. Alexander was available to assist the defendant as a standby attorney. (RP 08/09/2012 at 6). The defendant responded, “OK. Yeah, I don’t need that. Thank you, though.” (*Id.*).

On August 23, 2012, the parties were back in court and the State moved to continue the 3.5 hearing because Ms. Alexander was unavailable, as was one of the State’s witnesses. (RP 08/23/2012 at 7). The defendant advised the court that he did not need Ms. Alexander to be present because “...I’m pro se, and I don’t need a lawyer present. I am the lawyer, and I am not even going to have her at the trial...” (RP 08/23/2012 at 8). The defendant became agitated and advised the judge, “This is your courtroom, you’re working for me.” (RP 08/23/2012 at 9). After the court advised the defendant the 3.5 hearing was being continued one week, the defendant began reading from a document. (RP 08/23/2012 at 10). He made multiple discovery demands, including that witness interviews be scheduled, that disciplinary records be turned over for jail officers involved in the incident, that criminal histories be provided for all witnesses, and that multiple witnesses be subpoenaed on his behalf. (RP 08/23/2012 at 10-11). While the defendant referenced many witnesses who were jail employees or former inmates, he also mentioned singer

Christina Aguilera and President Obama as potential witnesses (RP 08/23/2012 at 11-12).

Only in response to the defendant's references to Ms. Aguilera and President Obama as witnesses (and not based on previous interactions with the defendant as stated in the defendant's brief), the State expressed concern about the defendant's competency. (RP 08/23/2012 at 12). The defendant responded directly to the State, "You might want to go read the Bible." (*Id.*). The defendant also stated, "Trust me. And they are a part of my --- they are a part of my case." (RP 08/23/2012 at 13). The court responded, "I would entertain a motion for evaluation at Eastern State." (RP 08/23/2012 at 14). An order for mental health evaluation for competency was entered the same day. (CP 12-16).

On October 18, 2012, the parties were back in court after Eastern State Hospital had completed an evaluation of the defendant. (RP 10/18/2012 at 15). The report indicated that the defendant did not have a mental disease or defect and had the capacity to understand court proceedings and productively participate in his own defense. (CP 30). The report described the defendant as having Antisocial Personality Disorder with Narcissistic Traits. (CP 31). The report noted that the defendant, age 34, had no history of being treated for or diagnosed with any mental health disorders. (CP 30, 32). The report detailed the

defendant's behavior while at Eastern State Hospital, including being fully oriented and alert, friendly and cooperative at times, but then becoming rude and threatening when ward rules and limitations were enforced upon him. (CP 32). The report documented that over the course of several days the defendant threatened staff, attempted to assault a staff member, and assaulted another patient. (CP 32-33).

During the defendant's interview with a licensed psychologist, the defendant was able to describe the roles of the prosecuting attorney, defense attorney, judge, jury, and witnesses. (CP 33). The defendant stated that he planned on representing himself even though he knew that Ms. Alexander had been appointed as standby counsel and was ready to assist him. (*Id.*). The defendant correctly explained the concept of a plea bargain, knew that sentencing follows a guilty plea, and was able to name both his pending Superior Court and District Court pending charges and explain the meaning of those charges. (CP 33-34). The psychologist noted, "There was no delusional or psychotic content when discussing his [the defendant's] charges or his plan for defense." (CP 34).

At the October 18, 2012 hearing, Ms. Alexander addressed the court, stating that the defendant was adamant that he wanted to represent himself. (RP 10/18/2012 at 15). She also stated that if she was representing the defendant instead of acting only as standby counsel, she

would request a second competency evaluation. (*Id.*). The following exchange then took place.

Court: We have a report indicating he's competent?

State: Yes, your Honor.

Court: All right. Then, Mr. Van Winkle, I guess at this stage you can decide to have an additional evaluation with regard to your competency, or you can proceed to trial. How would you like to proceed?

Defendant: I have been ready for trial since this alleged assault. I actually went up there to do this evaluation.

Court: I just need an answer to my question. Do you want an additional evaluation?

Defendant: I'm ready for trial right now.

Court: Would you answer me on the record? Do you want an additional ---

Defendant: Oh, no, your Honor, I don't need another ---

Court: Then we'll go to trial. We'll set trial dates.

State: I have an order of competency prepared.

Court: We'll have him sign off on it.

Defendant: Your honor, I was actually assaulted up there.

Court: Listen, if you're going to represent yourself, you're going to follow the rules.

Defendant: I can't speak as a lawyer?

Court: You can speak when I'm ready. I'm ---

Defendant: Oh, OK.

Court: I'm signing these papers. Right now we're setting trial dates. Don't just jump in and interrupt. OK? Pay a little attention to what's going on. OK?

Defendant: Oh, yeah.

Court: Alright, I signed the order of competency...

(CP 17; RP 10/18/2012 at 15-17).

After the competency order was entered, the parties discussed motions the defendant was planning to file. (RP 10/18/2012 at 19-21).

The defendant agreed to promptly file his motions in writing and provide the State copies. (RP 10/18/2012 at 22). The defendant expressed frustration that the court and the State were treating him like he was crazy and stated that he graduated from Pierce College and had completed business law classes there. (RP 10/18/2012 at 18).

When the parties were in court on November 1, 2012, before the Honorable Robert Swisher, Ms. Alexander made a lengthy record that the defendant did not want her assistance as standby counsel and asked that she be removed from the case. (RP 11/01/2012 at 2-6). Ms. Alexander also stated that she continued to believe the defendant was not competent to stand trial. (RP 11/01/2012 at 7). The court noted that competency had already been addressed by Judge Matheson at a prior hearing and the court declined to readdress it. (*Id.*). The court ruled that Ms. Alexander would not be removed as standby counsel. (RP 11/01/2012 at 14).

The parties then proceeded to address the witness list the defendant had filed, which was composed of a total of seven witnesses: two retired jail employees, three current jail employees, the deputy prosecutor assigned to the case, and a man who had been awarded a judgment for excessive force by a local police department. (CP 28-29; RP 11/01/2012 at 10). The witness list did not include Ms. Aguilera or President Obama,

and the defendant in fact noted on his witness list that, “Cristina and the president were just a tactic to get to Eastern State...” (CP 29).

The defendant became frustrated that the court would not order subpoenas for all of his witnesses for trial, which was scheduled to begin on November 5, 2012, given that he had not already properly subpoenaed them through his standby attorney. (RP 11/01/2012 at 16-21). The court did order the State to produce three jail employees for trial who the defendant wanted to call as witnesses. (RP 11/01/2012 at 18-19). The defendant told the court, “You ain’t going to sit here and bully me. This is my courtroom. Believe that.” (RP 11/01/2012 at 21). The court responded, “Take him out. This is over.” (*Id.*).

In actuality, the hearing was not over because the scheduled 3.5 hearing had still not occurred. The court indicated that jail officers should bring the defendant back into court in a few minutes. (RP 11/01/2012 at 22). The defendant was brought back into court and discussed additional issues without any outbursts. (RP 11/01/2012 at 22-27). Regarding courtroom security, the defendant stated, “Your Honor, there’s not going to be no issues as far as in the courtroom. I’m trying to present my innocence, so I wouldn’t be acting -- I wouldn’t be acting out ridiculous in the trial.” (RP 11/01/2012 at 27-28).

The 3.5 hearing was then conducted. (RP 11/01/2012 at 29-52). The State called a total of four witnesses: the jail officer who was the victim of the assault and the three jail officers who were present when this occurred. (*Id.*). The defendant cross-examined each of the officers, who all stated that the defendant was yelling threatening and derogatory statements at them after they moved him to a new cell. (*Id.*). All four also testified that the defendant's statements were not in response to any questions by jail officers. (*Id.*). After being advised by the court about his rights regarding testifying at the 3.5 hearing, the defendant elected not to testify. (RP 11/01/2012 at 50-51). In closing argument, the defendant commented that "all their [the officers'] stories are mix-matched...And pretty much I'll bring in the files of all their statements. They are all three different statements....So I mean I'm ready for trial, really." (RP 11/01/2012 at 52). The court then made the following ruling.

Court: Okay. Then I am finding that the comments made by Mr. VanWinkle were -- are admissible. They were not in response to questions. He was in custody at the time, obviously.

Defendant: Yeah.

Court: He was in custody at the time, but the questions were not elicited -- or the results of questioning of Mr. VanWinkle, so they are admissible.

(*Id.*).

The hearing ended uneventfully with the defendant asking the court some procedural questions about jury selection. (RP 11/01/2012 at 58-59).

Trial commenced the following Monday, on November 5, 2012, before the Honorable Bruce Spanner. (RP 11/05/2012 at 1, 3). Before calling in the jury, the court addressed security issues at trial and the State's motions in limine. (RP 11/05/2012 at 3-95). The defendant repeated that he would not act out in front of a jury, stating that, "We're in trial today, and to do something, act out in some kind of manner that would be inappropriate for the courtroom would be -- it wouldn't be beneficial to my trial. . . . I think that would be ---it would be very unsmart [sic] on my end." (RP 11/05/2012 at 4).

During the hearing on courtroom security, the defendant cross-examined the State's only witness, Lt. Robert Guerrero, including about whether his testimony was coached by the State and why the defendant was a security threat. (RP 11/05/2012 at 25-30). At the end of his cross-examination, the defendant advised the court that he did not object to the courtroom security measures being suggested by Lt. Guerrero with the exception that he wanted to be able to move freely about the courtroom when presenting his case. (RP 11/05/2012 at 30-31). When the court ruled that the jury should be removed in lieu of conducting any

proceedings at sidebar and that both the defendant and counsel for the State should ask permission during trial to leave counsel table, the defendant responded to both rulings, "That's perfectly fine." (RP 11/05/2012 at 35-36).

Later in the hearing, the defendant objected to the court's order that he be strip-searched by the jail before coming back into court. (RP 11/05/2012 at 42-43). The defendant advised the court that he would not allow jail officers to strip search him prior to jury selection. The court responded:

Court: You obviously misunderstand who's in charge here.

Defendant: No, I understand, and I object.

Court: Your objection has been noted.

(RP 11/05/2012 at 43).

The defendant later consented to a strip search by jail officers. (RP 11/05/2012 at 102).

The court next addressed the State's motions in limine. During lengthy discussions over these issues, the defendant became agitated when the State's motions were repeatedly granted. (RP 11/05/2012 at 48-73). The defendant accused a judge from a previous hearing of conspiring with the deputy prosecutor, stated that he, the defendant, worked for the federal government, and claimed that he was Jesus Christ. (RP 11/05/2012 at 71-

73). At that point, the State asked the court to make a record about competency. (RP 11/05/2012 at 73-74). The defendant responded:

I set a motion, and she [the deputy prosecutor] got really --- she got really --- here it is. This is what I read.

Okay, I read this to the courtroom, and then she went, “Oh shoot” and then gives a signal to [Judge] Matheson, and then she asked for an evaluation so she could prolong the hearing.

(RP 11/05/2012 at 74-75).

The court asked standby counsel Ms. Alexander to address the court regarding competency and the defendant responded, “We’ve already done this, your Honor. We’ve already done this with two different judges.” (RP 11/05/2012 at 76). Ms. Alexander advised the court that the defendant had declined the court’s invitation to obtain a second competency evaluation at a prior court hearing, but that based on his behavior in court, she would ask for a second evaluation if the defendant was her client. (RP 11/05/2012 at 77). The defendant responded that he did not feel that Ms. Alexander was a good attorney because she did not represent his interests. (RP 11/05/2012 at 79). The defendant also pointed out that another deputy prosecutor who had prosecuted him in several previous cases was in the courtroom and she could attest that he was competent to stand trial from her previous interactions with him. (*Id.*).

In response to the State’s request, the following colloquy occurred.

Court: All right. What counsel for the State is suggesting to me is that some of your comments here this morning may be indicative of a lack of competency to stand trial, and she was reminding me that I need to be mindful of that and reminding me that I need to consider that because it would violate your due process --

Defendant: Right.

Court: -- if you were to be tried at a time when you're not competent.

Defendant: Can I say something?

Court: So, I appreciate the suggestion that she's made, and now I'll make a ruling.

Defendant: Okay, can I say something before you make a ruling? Just to help you guys out, okay, what competency is, is to figure out if an inmate is competent to stand trial has to know exactly what she does in the courtroom [indicating], what she does in the courtroom [indicating], what she does in the courtroom [indicating], what she does in the courtroom [indicating]. What I -- what place I take in the courtroom and what your ruling as a judge is. That's what competency is, to know, is what it means in trial. It's what all of us -- what all of us we take place, what part we play in the courtroom. That's competency, okay, if you guys need to know. That's what competency is, and I went through several tests up there with the doctors up there in, um, Eastern State. Talked to 'em. They're like, "You're perfectly fine. You're perfectly -- you understand everything that goes on in the courtroom." Of course I know everything that goes on in the courtroom. I took law at Pierce College. Business law. For two years I took business law just for this simple fact...

(RP 11/05/2012 at 79-81).

After the defendant made additional comments, the court made the following ruling.

Court: All right. The comments regarding your working for the federal government and being part of a 16-year investigation, if true, would not impact your competency at all.

Defendant: Correct.

Court: If they're not true, then I guess there's a couple possibilities. One would be you're delusional.

Defendant: Uh-huh.

Court: The other would be that, oh, you're trying to strong arm the court or the prosecutor into trying the case in a certain way. That latter one I don't believe has an impact on competency either, and --

(RP 11/05/2012 at 81-82).

After a brief interruption from the defendant, the court continued.

Court: And even if you are delusional on that, I do find that you have a very good appreciation of this court process --

Defendant: Uh-huh.

Court: -- of the potential consequences if you're convicted, of the various roles of the parties involved here, and so even if these are the products of delusions, which I don't think they are --

Defendant: Right.

Court: -- you're competent --

Defendant: Definitely.

Court: -- in my judgment.

(*Id.*).

Court reconvened that afternoon and the parties proceeded to select a jury. (RP 11/05/2012 "Jury Voir Dire" at 35-63). Ms. Alexander continued to be present as standby counsel and over the course of the trial she conferred with the defendant on a number of occasions at his request. (RP 11/07/2012 at 461, 512, 584-85, 626; RP 11/08/2012 at 706). The

defendant actively participated in jury selection, asking jurors questions about whether they or their family members had ever been victims of assault, whether they had relatives in law enforcement, whether they had relatives who were incarcerated, and whether jurors had opinions about police corruption. (RP 11/05/2012 “Jury Voir Dire” 35-38, 40-41, 50-51). The defendant challenged a juror for cause who was having difficulty hearing and utilized six of his seven peremptory challenges. (CP 43, RP 11/05/2012 “Jury Voir Dire” at 53-57). The defendant elected to present an opening statement after the conclusion of the State’s opening statement. (RP 11/05/2012 “Jury Voir Dire” at 66-80). The defendant repeatedly attempted to cover topics prohibited by the court’s rulings on the State’s motions in limine and the court sustained numerous objections from the State. (*Id.*). After multiple personal attacks against the deputy prosecutor and multiple warnings from the court, the defendant was ordered to sit down prior to the conclusion of his opening statement and court was in recess for the rest of the day. (RP 11/05/2012 “Jury Voir Dire” at 75-80).

Trial reconvened the following morning on November 6, 2012. (RP 11/06/2012 at 130, 133). Outside the jury’s presence, the State complained that the defendant was ignoring the court’s rulings regarding the motions in limine. (RP 11/06/2012 at 133-34). The court reminded

the defendant that he must follow the court's rulings and that he was being held to the same standard as an attorney. (RP 11/06/2012 at 138).

The State called its first witness, Lt. Guerrero, who had previously testified the day before at the courtroom security hearing. (RP 11/06/2012 at 144). After the State's direct examination, the defendant cross-examined Lt. Guerrero extensively regarding jail procedures, security threats, and his supervisory duties. (RP 11/06/2012 at 161-246).

The State next called Sgt. Schaefer, who testified that the defendant spit at him through an opening in the defendant's cell and that the spit landed on Sgt. Schaefer's head, face, and shoulder. (RP 11/06/2012 at 272-73). The defendant conducted an extensive cross-examination of Sgt. Schaefer, which started the morning of November 6, 2012 and continued throughout the afternoon until court adjourned for the day. (RP 11/06/2012 at 275-85, 308-66, 371-93, 404-27). The defendant's cross-examination of Sgt. Schaefer did not conclude until the following morning. (RP 11/07/2012 at 442-82). The defendant successfully argued to the court to allow him to present impeachment evidence against Sgt. Schaefer that had previously been ruled inadmissible pursuant to the State's motions in limine. (RP 11/06/2012 at 294-301).

At the conclusion of testimony on November 6, 2012, outside the presence of the jury, the court addressed five findings of contempt against

the defendant that occurred throughout the day for not complying with court orders. (RP 11/06/2012 at 429). When the court was leaving the bench for the day, the defendant referred to the judge as “homeboy” and the defendant was found in contempt of court a sixth time. (RP 11/06/2012 at 430-31). Prior to testimony resuming on November 7, 2012, the defendant apologized repeatedly to the court for any disrespect he had shown the court the previous two days (RP 11/07/2012 at 433, 437). He stated that he was frustrated, anxious, and overwhelmed but would try to slow down and think about what he was saying going forward. (RP 11/07/2012 at 437-38). The defendant asked the court to reconsider its final contempt finding of the day since he was going to make a good faith effort to follow the court’s rules and the court agreed to take that into consideration. (RP 11/07/2012 at 441).

The jury next heard testimony from Officer Albert Montelongo (RP 11/07/2012 at 492-501). The defendant cross-examined Officer Montelongo extensively about the incident in question and about security procedures. (RP 11/07/2012 at 502-03, 511-64, 570-96, and 601-02,). During the course of the defendant’s lengthy cross-examination of Officer Montelongo, the court commented outside the presence of the jury that it appreciated that the defendant was now conducting himself in the

courtroom in a more professional manner than earlier in the trial. (RP 11/07/2012 at 564).

The jury next heard testimony from Officer Jose Ruiz. (RP 11/07/2012 at 603-06). In a similar vein as with previous officers, the defendant questioned Officer Ruiz regarding details of the incident and the procedures followed by jail staff pertaining to security. (RP 11/07/2012 at 607-15). At the conclusion of Officer Ruiz's testimony, the defendant verified that the State intended to call one additional witness and asked whether the court thought the parties would be able to proceed to closing arguments that afternoon or the following morning. (RP 11/07/2012 at 616).

The State called its final witness, Officer Matt Lewis, during the afternoon of November 7, 2012. (RP 11/07/2012 at 618-21). The defendant cross-examined and re-crossed Officer Lewis in regards to the incident and jail security procedures. (RP 11/07/2012 at 621-64, 669-72). The State rested its case at the conclusion of Officer Lewis's testimony. (RP 11/07/2012 at 672). After the State rested, the defendant advised the court that he had tentatively decided he would not testify because he did not want the State to attempt to impeach him with his prior criminal history. (RP 11/07/2012 at 677-78).

On the morning of November 8, 2012, the defendant recalled Officer Ruiz as his first and only witness. (RP 11/08/2012 at 695-97). The defendant attempted to highlight a statement made by Officer Ruiz in his earlier testimony in the trial that the defendant believed showed Officer Ruiz did not actually witness any assault by the defendant. (RP 11/08/2012 at 695). The defendant also asked Officer Ruiz questions on redirect. (RP 11/08/2012 at 699-700). The defendant then elected not to call Officer Bond or Officer Rees as witnesses, stating that he had already accomplished what he wanted to do and that further testimony would waste the court and jury's time. (RP 11/08/2012 at 701).

The State and the defendant both presented closing arguments (RP 11/08/2012 at 718-42). The defendant argued that the officers' statements were not credible, that he was the victim of an assault, and there was insufficient evidence to convict him of a crime. (RP 11/08/2012 at 730-42).

After the jury began deliberations, the court addressed the issue of its numerous contempt findings with the defendant. (RP 11/08/2012 at 745-47). The court indicated that on approximately six different occasions during the trial, the defendant was either found in contempt by the court or the court indicated that there would be a later discussion of a contempt finding regarding the defendant's behavior. (RP 11/08/2012 at 745).

While the court described the defendant's behavior as contemptuous, the court declined to impose any sanction because the court had not followed proper procedure in handling the issue. (RP 11/08/2012 at 745-46).

The jury returned a guilty verdict for one count of Custodial Assault later that afternoon. (RP 11/08/2012 at 759-60). The defendant asked to poll the jury on their verdict, which the court did. (RP 11/08/2012 at 761-62). After the jury was released, the defendant asked the court about an appeal bond. (RP 11/08/2012 at 769).

On November 27, 2012, the defendant was sentenced. (RP 11/27/2012 at 778). The defendant asked for an exceptional sentence downward so he could participate in a Residential DOSA or that he be sentenced to a prison DOSA. (*Id.*). The defendant requested that his standby counsel, Ms. Alexander, also speak on his behalf. (RP 11/27/2012 at 780). Ms. Alexander made the same request of the court as the defendant regarding a DOSA sentence and also asked for an exceptional sentence downward based on the mitigating factor of the defendant not appreciating the wrongfulness of his actions. (RP 11/27/2012 at 780-81).

The court determined that there was no evidence that suggested that the defendant's behavior stemmed from substance abuse and denied a DOSA sentence. (RP 11/27/2012 at 788). The court also did not find any

evidence in support of a mitigating factor for an exceptional sentence downward. (*Id.*). Based on the defendant's offender score of 7, additional gross misdemeanor assaultive history that the State provided certified copies of Judgment and Sentences regarding, the defendant's lack of remorse, and the defendant's "profound, profound rejection of authority," the Court sentenced the defendant to a top of the range sentence of 43 months. (RP 11/27/2012 at 788-89). After hearing his sentence, the defendant asked a clarifying question about his appeal rights and timelines for filing an appeal, which he indicated that he had also already discussed with Ms. Alexander. (RP 11/27/2012 at 792).

### III. ARGUMENT

**1. Remand to enter Findings of Fact and Conclusions of Law regarding the 3.5 hearing is unnecessary.**

Failure to enter findings of facts and conclusions of law after a 3.5 hearing is harmless error if the trial court's oral findings are sufficient to permit appellate review. *State v. Cunningham*, 116 Wn.App. 219, 226, 65 P.3d 325 (2003), *citing State v. Smith*, 67 Wn.App. 81, 87, 834 P.2d 26 (1992), *aff'd*, 123 Wn.2d 51, 864 P.2d 1371 (1993). Here, the defendant is not seeking appellate review of any 3.5 issue, only that findings be

entered. However, Judge's Swisher's oral findings make clear that none of the statements the defendant made were in response to any questions by the jail officers. (RP 11/01/2012 at 52).

**2. The defendant was competent to stand trial.**

Due process prohibits a court from convicting a person who is not competent to stand trial. *See Drope v. Missouri*, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). No incompetent person can be tried, convicted, or sentenced as long as the incapacity continues. RCW 10.77.050. "Incompetency" means a person lacks the capacity to understand the nature of the proceedings or to assist in his defense "as a result of mental disease or defect." RCW 10.77.010(15).

Washington courts generally presume that a defendant is competent to stand trial and assist in his own defense. *State v. Coley*, 171 Wn.App. 177, 179, 286 P.3d 712 (2012), *review granted*, 176 Wn.2d 1024, 301 P.3d 1047 (2013). If a trial court has reason to doubt a defendant's competency, the trial court must determine that the defendant is competent to stand trial. *State v. Heddrick*, 166 Wn.2d 898, 904, 215 P.3d 201 (2009); RCW 10.77.060(1)(a). The trial court may consider many factors when determining competency, such as "the defendant's appearance, demeanor, conduct, personal and family history, past

behavior, medical and psychiatric reports and the statements of counsel.”

*State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967).

The trial court's competency decision is entitled to great deference. *Dodd*, 70 Wn.2d at 519-20. The trial court's determination of a defendant's competency to stand trial is reviewed under an abuse of discretion standard. *State v. Sisouvanh*, 175 Wn.2d 607, 621–22, 290 P.3d 942 (2012). Under this standard, the reviewing court will find error only when the trial court's decision “(1) adopts a view that no reasonable person would take and is thus ‘manifestly unreasonable,’ (2) rests on facts unsupported in the record and is thus based on ‘untenable grounds,’ or (3) was reached by applying the wrong legal standard and is thus made ‘for untenable reasons.’” *Sisouvanh*, 175 Wn.2d at 623 (quoting *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

The mere existence of a mental disorder or the existence of delusions does not prevent a defendant from being competent. *State v. Smith*, 74 Wn.App. 844, 850, 875 P.2d 1249 (1994). In *State v. Lord*, for example, the defendant exhibited signs of mental illness including delusions that the devil asked him to drink a cup of blood to prove his innocence yet the trial court ruling denying a competency hearing was still not in error. *State v. Lord*, 117 Wn.2d 829, 901-903, 822 P.2d 177 (1991).

There is a distinction between substantive competency and procedures used to discern whether a defendant is competent regarding waiver of a competency challenge. *Heddrick*, 166 Wn.2d at 907. Statutory competency procedures may be waived while a substantive determination of competency may not. *Id.* at 905, 908.

In the instant case, the State brought the issue of competency to the court's attention on two occasions. (RP 08/23/2012 at 12; RP 11/05/2012 at 73-74). The defendant's standby counsel advised the court on three occasions that if she were representing the defendant, she would have asked for a second competency evaluation. (RP 10/18/2012 at 15; RP 11/01/2012 at 7; and RP 11/05/2012 at 77). In response to this, three different judges addressed the issue of competency of the defendant.

Judge Matheson agreed to entertain a motion for a competency evaluation on August 23, 2014, and signed an order for a mental health evaluation for competency. (CP 12-16; RP 08/23/2012 at 14) On October 18, 2012, Judge Matheson was again on the bench when the defendant's competency was addressed, this time because Eastern State Hospital had completed a report and opined that the defendant was competent. (RP 10/18/2012 at 1, 15-17). While it appears from the context of Judge Matheson's comments that he had not read the evaluation from Eastern State Hospital, he was advised by the State that the evaluation stated the

defendant was competent. (RP 10/18/2012 at 15-17). He was certainly free to accept a representation from the State regarding Eastern State Hospital's opinion on competency in lieu of actually reading the competency report himself. Deferring to the opinion of a mental health expert is a tenable basis to find competency. *State v. Lawrence*, 166 Wn.App. 378, 389, 271 P.3d 280, *review denied*, 174 Wn.2d 1009, 281 P.3d 686 (2012). Judge Matheson inquired if the defendant, who was already representing himself before the issue of competency was brought to the court's attention, would like a second competency evaluation; the defendant clearly indicated he did not. (RP 10/18/2012 at 16). At that point, the parties were free to waive statutory procedural competency procedures and the court accepted the defendant's waiver. (RP 10/18/2012 at 17).

The defendant's competency was briefly addressed before Judge Swisher on November 1, 2012, after standby counsel brought it to the court's attention. (RP 11/01/2012 at 1, 7). She did not present any additional information to the court regarding why the court should reconsider the issue of competency. Judge Swisher certainly could have readdressed competency if he felt it was necessary, but he declined to do so. (RP 11/01/2012 at 7).

Finally, Judge Spanner made a record regarding the defendant's competency immediately before the start of trial. (RP 11/05/2012 at 79-82). He did so after listening to standby counsel's concerns as well as hearing from the defendant, who provided an explanation as to what it meant to be competent. (RP 11/05/2012 at 76-77, 79-81). At that point, Judge Spanner had already had an opportunity that morning to see how the defendant conducted himself during a courtroom security hearing with one witness as well as during argument regarding the State's motions in limine. (RP 11/05/2012 at 1-73). Judge Spanner ruled that he did not believe that the defendant was delusional, and that even if he was, that the delusions did not cause the defendant to be incompetent. (RP 11/05/2012 at 81-82).

While the defendant's behavior throughout the trial was less than professional on many occasions, bad behavior alone does not equate to the defendant being incompetent. While it is not difficult to find examples in the record of that unprofessional, and at times even bizarre, behavior (such as insulting opposing counsel or referring to himself as Jesus Christ), a review of the entire record shows a defendant who clearly understood his role and the role of others in the proceedings. The defendant was able to cross-examine witnesses and mount an appropriate defense given the facts of the case and the overwhelming evidence against him. The record does

not establish that the rulings by Judge Matheson and Judge Spanner regarding the defendant's competency were so unreasonable that no other judge would adopt them, or that the court based its decision on unsupported facts or an erroneous legal standard.

**3. The court did not err in permitting the defendant to represent himself.**

A criminal defendant has a right to self-representation under the Sixth Amendment to the United States Constitution and the Washington Constitution. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). But a defendant can only waive his right to counsel if he is competent to stand trial and the defendant makes an unequivocal, knowing, intelligent, and voluntary request. *State v. Hahn*, 106 Wn.2d 885, 895, 726 P.2d 25 (1986); *State v. Madsen*, 168 Wn.2d 496, 504, 229 P.3d 714 (2010). If a defendant is not competent to stand trial, a request to proceed pro se is "equivocal, involuntary, unknowing, or unintelligent." *Madsen*, 168 Wn.2d at 510. The law does not require the court to apply a different standard to a mentally ill defendant seeking to proceed pro se than a defendant who is not mentally ill. *In re Pers. Restraint of Rhome*, 172 Wn.2d 654, 666, 260 P.3d 874 (2011). The standard of review for a trial court's decision allowing a defendant to proceed pro se is abuse of

discretion. *State v. Breedlove*, 79 Wn.App. 101, 106, 900 P.2d 586 (1995).

In the instant matter, the defendant's argument regarding any error associated with the court allowing him to proceed pro se is based on the assumption that the defendant was not competent. If the defendant was competent, the defendant's claim that it was error to allow him to proceed pro se fails. It is important to note that the defendant in the instant case was permitted to proceed pro se several weeks before the issue of competency was ever raised in court by any of the parties. The court had a colloquy with the defendant about his desire to proceed pro se on August 9, 2012, but it was not until August 23, 2012, that the State for the first time raised the potential issue of competency after the defendant referenced witnesses Christina Aguilera and President Obama. (RP 08/09/2012 at 1-6; RP 08/23/2012 at 12).

The record is clear that the court engaged the defendant in a colloquy about his desire to represent himself and strongly cautioned the defendant of the dangers in doing so. (RP 08/09/2012 at 2-6). The defendant explained his educational background to the court, including that he had taken some business law classes in college, and stated that he was familiar with the court system through his previous interactions with the criminal justice system. (RP 08/09/2012 at 3-4). Nothing in the

colloquy suggests that the defendant is incompetent or even suffering from a mental disorder. From the date the defendant was arraigned on August 2, 2012, through his trial, he made clear that he wanted to represent himself. He was even openly hostile to the idea of standby counsel being present at trial. (RP 11/05/2012 at 79).

Given that Eastern State Hospital concluded that the defendant was competent, that the defendant agreed with that finding, and that the court signed an order to that effect, the court was under no obligation to revisit the issue of whether the defendant should be able to represent himself after already ruling on that issue almost two months earlier. With the exception of the defendant's odd statements in court after he had already been permitted to represent himself, nothing in the record suggested the defendant was mentally ill or that there was any need to reevaluate the court's earlier ruling that he could represent himself. Eastern State Hospital specifically found that the defendant did not have any mental diseases or defects. (CP 30). Given that the court accepted that opinion as accurate, it would seem odd for the court to then take a contrary position and reevaluate whether the defendant should be able to represent himself based on an undiagnosed mental illness. The defendant made an unequivocal, knowing, intelligent, and voluntary request to proceed pro se on August 2, 2012. (RP 08/02/2012 at 1-3). He never equivocated on that

request throughout the trial. The trial court did not err in permitting the defendant to proceed pro se.

#### **IV. CONCLUSION**

The State's failure to enter findings of fact and conclusions of law was harmless error given that the court's oral ruling is clear that the statements are admissible. There is no need to remand the case for entry of findings. Review of the court proceedings and trial as a whole, rather than looking at isolated inappropriate or odd statements by the defendant, shows that the court did not err in finding the defendant was competent to stand trial or in permitting the defendant to represent himself.

**RESPECTFULLY SUBMITTED** this 22<sup>nd</sup> day of May, 2014.

**ANDY MILLER**  
Prosecutor



Kristin M. McRoberts, Deputy  
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## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

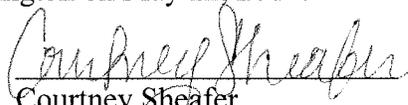
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Prepaid

Signed at Kennewick, Washington on May 22, 2014.

  
Courtney Sheaffer  
Legal Assistant