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King County Prosecutor
Appellate Unit

80841-4

No. _____

COA No. 57420-5-I

consolidated with COA No. 57469-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent

v.

STEVEN RAY HEDDRICK, Jr.,

Petitioner.

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STATE OF WASHINGTON
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STATE OF WASHINGTON

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

The Honorable Mary Yu, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Steven Ray Heddrick, Jr., the appellant below, asks this Court to review a portion of the following Court of Appeals decision, referred to in Section B.

B. COURT OF APPEALS DECISION

Heddrick requests review of the Court of Appeals decision in State v. Steven Ray Heddrick, Jr., Court of Appeals Nos. 57420-5-I and 57469-8-I, filed August 27, 2007. The decision is attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The state charged Heddrick with felony harassment in one case and custodial assault in the other case. Pretrial, the court in both cases found reason to doubt Heddrick's competency. Did the court violate Heddrick's constitutional right to procedural due process by proceeding to trial without first holding an evidentiary hearing to determine competency?

2. Heddrick had different counsel for each case. Counsel for the assault case was absent when the court ruled Heddrick was competent to stand trial. Did the court violate Heddrick's right to assistance of counsel at a critical stage of the proceeding by finding him competent to stand trial in the absence of counsel?

D. STATEMENT OF THE CASE

1. Trial Proceedings.

The state charged Heddrick with felony harassment. 2CP¹ 1-6, 126. Throughout the course of proceedings, the court, defense counsel, and the state expressed recurrent doubts about Heddrick's competency because of his troubling behavior, which included repeated refusals to meet with his attorney or voluntarily come to court. 2CP 89-93; 1RP² 3-17. Psychiatric reports diagnosed Heddrick as suffering from chronic psychotic problems and severe delusions, including paranoid schizophrenia. 2CP 103-09, 110-15, 116-28.

In September 2004, the trial court ordered a competency evaluation pursuant to RCW 10.77.060. 2CP 92; 1RP 3-11. Dr. David White, retained by defense counsel to conduct the evaluation, described Heddrick as suffering from "chronic mental health problems that result in strong persecutory and somatic delusions." 2CP 125. Dr. White concluded

¹ This petition refers to the clerk's papers in the assault case as "1CP" and the clerk's papers in the harassment case as "2CP."

² This petition refers to the verbatim report of proceedings in the harassment case as follows: 1RP - 9/8/04, 10/14/04, 1/20/05; 2RP - 7/14/05; 3RP - 7/18/05; 4RP - 7/19/05; 5RP - 7/20/05; 6RP - 7/21/05; 7RP - 7/27/05; 8RP - 8/29/05; 9RP - 9/26/05 and 11/23/05; 10RP - 10/10/05; 11RP- 10/11/05; 12RP - 10/12/05. This petition refers to the verbatim report of proceedings in the assault case as follows: 13RP- 7/27/05; 14RP - 10/12/05; 15RP - 10/13/05 (morning); 16RP - 10/13/05 (afternoon); 17RP - 11/18/05; 18RP - 11/23/05.

Heddrick was incompetent to stand trial because he was unable to assist his attorney in his defense due to mental illness. 2CP 115, 126.

In October 2004, the trial court found Heddrick incompetent based on White's report and the mutual agreement of the state and defense counsel. 2CP 94-96; 1RP 11-17. The court ordered Heddrick committed to Western State Hospital for 90 days pursuant to RCW 10.77.060. 2CP 94-96.

Pursuant to court order, Heddrick was forcibly medicated to restore competency while involuntarily confined. 2CP 132. In January 2005, the court found Heddrick competent after reviewing a written report from an examining doctor. 2CP 7-8, 129-34; 1RP 18-20.

In February 2005, Heddrick allegedly attacked a guard while in custody pending the harassment case. 1CP 1-3. The state charged Heddrick with custodial assault on July 12, 2005. 1CP 1-3.

On July 27, 2005, defense counsel Tracy Lapps advised the court there was a problem with whether Heddrick could assist in his own defense and communicate with his attorney, and that the "same issues" had again materialized. 7RP 9-10. The prosecutor shared defense counsel's concern and agreed further inquiry was warranted based on her own observations. 7RP 5, 13-14. Judge Yu, presiding over the harassment case, determined there was "reason to doubt" Heddrick's competency and

ordered another competency evaluation. 2CP 38-41; 7RP 19-20.

At about the same time, the Honorable Ronald Kessler also concluded there was "reason to doubt" Heddrick's competency and likewise ordered a competency evaluation. 1CP 4-7. Heddrick's original attorney for the assault case stated he shared the "same concerns" as those expressed by counsel in the harassment case. 13RP 5-6. The prosecutor again expressed misgivings regarding Heddrick's competency. 13RP 3-5.

Judge Kessler's competency order was substantially identical to the one entered in the harassment case. The orders in both cases stated "[t]his action is stayed during this examination period and until this court enters an order finding the defendant competent to proceed." 1CP 7; 2CP 41. The assault case "tracked" with Heddrick's harassment case for competency evaluation purposes. 1CP 7. Judge Yu, who was already presiding over the harassment case, later reassigned the assault case to herself. 1CP 51. Attorney Marcus Naylor represented Heddrick in the assault case after substituting for a previous attorney. 1CP 50.

On October 6, 2005, Lapps told the court during a telephonic status conference that the evaluator, Dr. White, had orally informed her Heddrick was competent. 11RP 14-15. The evaluator, however, failed to produce a written report. 11RP 14-15. Lapps also told the court she no longer contested competency. 11RP 14-15. Naylor, Heddrick's attorney

for the assault case, did not participate in this telephonic conference.
11RP 14-15.

On October 10, 2005, Lapps and the prosecutor appeared before Judge Yu in the harassment case. 10RP 3-5. Naylor was not present. 10RP 3-5. The prosecutor asked the court to sign an order finding Heddrick competent. 10RP 3-4. Lapps disclaimed authority to act for Naylor because Naylor worked in a different office and she did not know if Naylor had arranged for a separate competency evaluation. 10RP 4. When the court suggested Naylor be contacted to confirm his position on the competency issue, the prosecutor said Naylor had already agreed that the competency issue "needed to be taken care of." 10RP 4.

Without reviewing any written report or conducting an evidentiary hearing, the court entered a written order finding Heddrick competent in the assault case. 1CP 8; 10RP 4-5; 11RP 14-15. Naylor, being absent, did not sign this order. 1CP 8. For unknown reasons, the court did not enter a written order finding Heddrick competent in the harassment case. 10RP 3-5; 11RP 14-15.

The cases proceeded to separate trials. 10RP-12RP; 14RP-16RP. Heddrick was found guilty in both cases. 1CP 16; 2CP 102.

2. Court Of Appeals.

a. Lack of competency hearing.

Heddrick argued the trial court violated his due process rights by finding him competent without conducting an evidentiary hearing on the matter. 1Brief of Appellant (1BOA) at 7-17; 2Brief of Appellant (2BOA) at 7-15³ (citing Pate v. Robinson, 383 U.S. 375, 377, 385-86, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); State v. Israel, 19 Wn. App. 773, 776, 577 P.2d 631 (1978)). Heddrick pointed out a defendant whose competency is in doubt cannot waive his right to a competency hearing. 1BOA at 14-15; 2BOA at 9 (citing Medina v. California, 505 U.S. 437, 449, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992); Pate, 383 U.S. at 378, 384)). Heddrick's due process right to an evidentiary hearing therefore remained intact despite defense counsel's decision not to contest competency, as it was incumbent upon the court to conduct a formal hearing on its own motion. 1BOA at 14-15; 2BOA at 9 (citing Williams v. Woodford, 384 F.3d 567, 603 (9th Cir. 2004) ("state trial judge must conduct a competency hearing, regardless of whether defense counsel requests one, whenever the evidence before the judge raises a bona fide doubt about the defendant's competence to stand trial.")).

³ "1Brief of Appellant" refers to the corrected opening brief in the assault case. "2Brief of Appellant" refers to the corrected opening brief in the harassment case.

The Court of Appeals held Heddrick received due process in both cases, notwithstanding the absence of evidentiary hearings to determine competency. Slip op., at 1, 4, 10. The Court acknowledged the trial court in both cases found reason to doubt Heddrick's competency, thereby rejecting the state's claim that the trial court had no reason to doubt Heddrick's competency in the harassment case and that the judge in the assault case merely deferred to the judge in the harassment case. Slip op., at 8-9.

The Court also recognized due process requires adequate procedures to protect the right not to be tried while incompetent, and noted Pate's holding that "the defendant's constitutional, not merely statutory, rights were abridged by the trial court's failure to provide him 'an adequate hearing on his competence to stand trial.'" Slip op., at 5, 6 n.10. The Court rejected the state's argument that the standard of review is abuse of discretion because "[t]he question is not one of discretion. Rather, the question is whether Heddrick received the due process to which he was entitled once there *was* reason to doubt his competency." Slip op., at 10 (emphasis in original).

The Court, however, refused to acknowledge an evidentiary hearing is needed once there is a legitimate reason to doubt competency. Instead, the Court said due process turns on the demands of the particular

situation and applied a Mathews⁴ balancing test to determine the amount of due process owed to Heddrick. Slip op., at 6. Accordingly, the three factors it considered were (1) the private interest to be protected; (2) the risk of erroneous deprivation of that interest by the government's procedures; and (3) the government's interest in maintaining the procedures. Slip op., at 6.

The Court recognized Heddrick's right not to be tried while incompetent is fundamental, but concluded "the risk of erroneous deprivation of that right was minimal in this case" because an expert concluded Heddrick was competent to stand trial in the harassment case and defense counsel in the harassment case believed Heddrick was competent based on the expert's conclusion. Slip op., at 10. In concluding the state's interest in prosecuting Heddrick outweighed the risk he was tried while incompetent, the Court further opined an evidentiary hearing would not have "added anything" because no other expert reported Heddrick was incompetent and the record did not indicate issues regarding competency arose during either of the two trials. Slip op., at 10.

⁴ Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

The Court cited no applicable authority for its novel proposition that a Mathews balancing test is the appropriate measure of due process owed to a defendant whose competency is at issue in a criminal case.

b. Lack of counsel at a critical stage.

Heddrick also argued the trial court violated his right to assistance of counsel in the assault case by finding him competent to stand trial in the absence of his attorney. 1BOA at 17-21. A defendant is guaranteed the right to the assistance of counsel at every critical stage of a criminal prosecution. United States v. Cronin, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). A competency hearing is a critical stage of a criminal proceeding. See, e.g., Appel v. Horn, 250 F.3d 203, 215 (3d Cir 2001); United States v. Collins, 430 F.3d 1260, 1264 (10th Cir. 2005); Sturgis v. Goldsmith, 796 F.2d 1103, 1109 (9th Cir. 1986), cert. denied, 508 U.S. 918, 113 S. Ct. 2362, 124 L. Ed. 2d 269 (1993). Judge Yu's determination that Heddrick was competent to stand trial in the assault case was a critical stage, and prejudice is presumed where counsel is absent from a critical stage. 1BOA at 19, 22 (citing Cronin, 466 U.S. at 658-59, 659 n. 25; Davis, 152 Wn.2d at 673-74; State v. Robinson, 138 Wn.2d 753, 768, 982 P.2d 590 (1999)).

The Court of Appeals acknowledged a defendant has the

constitutional right to representation at all critical stages of criminal proceedings. Slip op., at 15. It accepted a competency hearing is a critical stage. Slip op., at 15.

The Court, however, concluded there was no hearing constituting a critical stage that required the presence of Heddrick's counsel for the assault case. Slip op., at 15. Judge Yu signed the order finding Heddrick competent to stand trial in the assault case. Slip op., at 15. Judge Yu determined Heddrick competent to stand trial in the harassment case as well, although the record in the assault case does not reflect this action. Slip op., at 15. Based on these facts, the Court reasoned no critical stage arose in the assault case because "[t]here was no separate proceeding in the custodial assault case in which the court found Heddrick competent to stand trial." Slip op., at 15. In other words, the trial court's determination that Heddrick was competent to stand trial in the assault case was not a critical stage because the court failed to hold a separate hearing to address competency in that case, even though the court indisputably entered an order finding Heddrick competent in that case when Heddrick's counsel was absent.

The Court also maintained Heddrick showed no prejudice from the absence of counsel when Judge Yu determined Heddrick was competent to proceed in the assault case. Slip op., at 16. The Court did not address

established precedent that actual absence of counsel at a critical stage merits automatic reversal because of presumed prejudice.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS DECISION THAT HEDDRICK WAS NOT DENIED DUE PROCESS WHEN HE WAS FOUND COMPETENT WITHOUT AN EVIDENTIARY HEARING CONFLICTS WITH THIS COURT'S DECISIONS AND A PREVIOUS COURT OF APPEALS DECISION, AND INVOLVES SIGNIFICANT QUESTIONS OF CONSTITUTIONAL LAW.

Once a trial court finds a reason to doubt competency, it is constitutionally required to hold an evidentiary hearing to determine competency before proceeding to trial. The trial court in both of Heddrick's cases found reason to doubt competency but failed to hold a hearing before ultimately finding him competent and proceeding to trial. The Court of Appeals wrongly decided the trial court did not violate Heddrick's right to procedural due process in so doing.

"It is fundamental that no incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues." State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982). The conviction of an accused while he is legally incompetent violates his constitutional right to a fair trial under the Fourteenth Amendment's due process clause. Pate, 383 U.S. at 378, 385.

The "[f]ailure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process." In re Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). In Pate, the state competency statute at issue directed the trial court to hold a competency hearing on its own motion whenever there was a "bona fide reason" to doubt competency. Pate, 383 U.S. at 378. The United States Supreme Court held the trial court's failure to hold a hearing violated due process because the evidence before the trial judge was sufficient to raise a genuine doubt regarding competency. Id. at 385. It is now settled that a defendant's due process right to a fair trial requires the trial court to conduct an evidentiary hearing whenever there is reason to doubt a defendant's competency, even if the defendant does not request such a hearing. See, e.g., Odle v. Woodford, 238 F.3d 1084, 1087 (9th Cir. 2001); United States v. Denkins, 367 F.3d 537, 547 (6th Cir. 2004); Johnson v. Norton, 249 F.3d 20, 26 (1st Cir. 2001); Carter v. Johnson, 131 F.3d 452, 459 n.10 (5th Cir. 1997); Silverstein v. Henderson, 706 F.2d 361, 369 (2d Cir. 1983).

Consistent with this constitutional mandate, once the trial court makes a threshold determination that there is "reason to doubt" the defendant's competency pursuant to RCW 10.77.060, the court must order a formal hearing to determine competency before proceeding to trial.

State v. Marshall, 144 Wn.2d 266, 278, 27 P.3d 192 (2001); State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). At minimum, due process requires the trial court to make findings of fact and conclusions of law after an evidentiary hearing on the matter of competency. Israel, 19 Wn. App. at 776, 777-78.

The Court of Appeals ignored this established precedent and instead applied a Mathews balancing test to determine what process Heddrick deserved. As described above, the courts have already determined the amount of process due and concluded that an evidentiary hearing is required whenever the trial court has reason to doubt competency. The Court of Appeals decision cannot be squared with its previous decision in Israel, this Court's decisions in Marshall and Lord, or with Pate and its progeny.

The Court of Appeals cites no applicable authority for the proposition that a Mathews balancing test provides the proper analytical framework for determining whether a defendant received due process after a trial court finds reason to doubt competency in a criminal case. The one case it does cite, Morris v. Blaker, is a civil case in which the City of Tacoma revoked a firearm permit because the applicant was treated for a mental disorder pursuant to the civil involuntary commitment law. Slip op., at 6; Morris v. Blaker, 118 Wn.2d 133, 136, 821 P.2d 482 (1992).

The Court in Morris applied a Mathews balancing test to the question of whether the applicant had a procedural due process right to notice and a hearing prior to revocation of the permit. Id. at 144-145. The protected interest at issue was the constitutional right to bear arms. Id. Whether the civil involuntary commitment procedure violated due process was not an issue. Id. at 140, 144-45.

In Medina, the United States Supreme Court held the Mathews balancing test does not provide the appropriate framework for assessing the validity of state procedural rules that are part of the criminal process, including rules related to competency in criminal cases. Medina, 505 U.S. at 443. The Court recited settled law that a state's "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Id. at 449. The Court then cited Pate for the proposition that a defendant whose competence is in doubt cannot waive his right to a competency hearing. Id. In light of Medina, the Court of Appeals decision to apply a Mathews balancing test was clearly wrong.

2. THE COURT OF APPEALS DECISION THAT HEDDRICK WAS NOT DENIED COUNSEL AT A CRITICAL STAGE CONFLICTS WITH THIS COURT'S DECISIONS AND INVOLVES SIGNIFICANT QUESTIONS OF CONSTITUTIONAL LAW.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to the assistance of counsel at critical stages of a criminal proceeding. Davis, 152 Wn.2d at 672, 674; State v. Everybodytalksabout, ___ Wn.2d ___, 166 P.3d 693, slip op. at 5-6. (2007).⁵ The Court of Appeals held Heddrick was not denied counsel at a critical stage of the proceeding because there was no critical stage at which the trial court determined competency. Specifically, its holding turns on the fact that "[t]here was no separate proceeding in the custodial assault case in which the court found Heddrick competent to stand trial." Slip op., at 15.

The Court of Appeals reasoning is circular at best. Had the trial judge conducted an evidentiary hearing in the assault case as required by due process, there would be no question that counsel's presence would be constitutionally required. See Medina, 505 U.S. at 450. ("Once a competency hearing is held . . . a defendant is entitled to the assistance of

⁵ Official pagination for State v. Everybodytalksabout was unavailable at the time this petition was filed. A copy of the opinion is attached as appendix B.

counsel."). But the trial judge never held the hearing. The Court of Appeals seized on the trial court's failing as justification for its holding that no critical stage arose.

Even if separate hearing for the assault case were not constitutionally required, it is undisputed the trial court entered an order finding Heddrick competent in the assault case when Heddrick's counsel was absent. The fact that the trial court did not formally divide its determination of competency in the assault and harassment cases into separate hearings does not make the determination of competency in the assault case any less critical. Critical stages are those steps of a criminal proceedings that hold significant consequences for the accused. Bell, 535 U.S. at 695-96. "For the defendant, the consequences of an erroneous determination of competence are dire." Cooper v. Oklahoma, 517 U.S. 348, 364, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996).

The fact is that Naylor, Heddrick's attorney for the assault case, was absent from the October 10, 2005 proceeding in which the court found Heddrick competent to stand trial. 1CP 8; 10RP 3-5. While Lapps, Heddrick's attorney for the harassment case, was present, Lapps had no authority to act as Heddrick's attorney for the assault case. 10RP 3-5. Naylor, not Lapps, represented Heddrick for the assault case. Because an erroneous determination of competence threatens the basic fairness of the

trial itself, Heddrick had the right to have Naylor present at this critical stage.

In further support of its decision, the Court of Appeals stated Heddrick cannot establish prejudice from the absence of counsel. Slip op., at 16. This determination directly conflicts with this Court's prior decisions and well-established principles of constitutional due process.

The United States Supreme Court in Cronic established certain failings of counsel mandate reversal of a defendant's conviction without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial. Cronic, 466 U.S. at 650, 658. Actual absence of counsel at a critical stage of the proceeding gives rise to a presumption that the trial was unfair and requires reversal of the conviction. Id. at 658-59, 659 n. 25; Bell v. Cone, 535 U.S. 685, 695, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); Davis, 152 Wn.2d at 674; Robinson, 138 Wn.2d at 768.

Harmless error analysis under Strickland v. Washington, which requires a showing of actual prejudice, is inapplicable to this circumstance. Davis at 673-74 (citing Cronic and Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Structural defects in the trial mechanism, such as the outright deprivation of counsel, defy harmless error analysis and require automatic

reversal because they infect the entire trial process. Brecht v. Abrahamson, 507 U.S. 619, 629-630, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993); Penson v. Ohio, 488 U.S. 75, 88, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988). The absence of Heddrick's counsel during a critical stage of the assault case requires automatic reversal of his conviction.

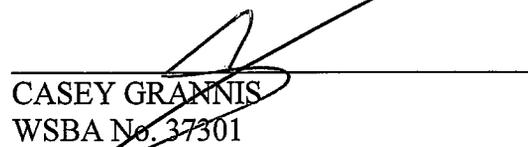
F. CONCLUSION

For the reasons stated above, Heddrick respectfully requests this Court grant review.

DATED this 26th day of September, 2007.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 57420-5-1
)	(Consolidated with No.
Respondent,)	57469-8-1)
)	
v.)	DIVISION ONE
)	
STEVEN RAY HEDDRICK, JR.,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>August 27, 2007</u>
)	

COX, J. -- In these consolidated cases, Steven Heddrick appeals his convictions of felony harassment and custodial assault. The trial court did not follow the procedures mandated by statute following the court's determination that Heddrick's competency to stand trial was at issue. Nevertheless, he received the due process to which he was entitled under the circumstances of this case. Moreover, he was not denied the assistance of counsel at that stage of the proceedings. Admission of testimony by police officers regarding the statements Heddrick made to them that resulted in the charge of felony harassment is not reversible as opinion testimony. The testimony was proper to show that Heddrick's statements constituted a true threat. The State properly concedes that the trial court failed to make the relevant findings of fact to support its imposition of community custody conditions requiring Heddrick to submit to involuntary medication and to participate in mental health treatment. Heddrick's

other arguments are unpersuasive. We affirm in part, reverse in part, and remand with instructions.

Felony Harassment Case

In May 2004, Department of Corrections Officer Eric Steffes and King County Sheriff's Deputy Mark Wojdyla were transporting Heddrick from Clallam Bay Correctional Facility to King County to face charges for alleged violations of a no-contact order. Heddrick began making threatening statements about his ex-partner, Patricia Anderson, and her mother. Concerned with the nature of the statements, Officer Steffes took notes of Heddrick's comments. Later, Deputy Wojdyla told Anderson about the comments, reading from his report. Anderson reacted with fear. Based upon Heddrick's comments and Anderson's reaction to them, Deputy Wojdyla referred the matter to the prosecutor's office. The State charged Heddrick with felony harassment.

During pre-trial proceedings, Heddrick's counsel questioned his competency to stand trial. Upon agreement by both parties, and based in part upon a report by defense expert Dr. David White, the court found Heddrick incompetent to stand trial. The court referred him to Western State Hospital for 90 days. In January 2005, after his stay at Western State, the trial court reviewed Heddrick's status and found that he had been restored to competency for trial.

Jury selection began in late July 2005. On July 21, newly retained defense counsel raised concerns about Heddrick's competency, based upon his history as well as the fact that he refused to attend his trial. On July 27, defense

counsel again expressed her concerns about Heddrick's competency and requested a private evaluation. The superior court judge agreed to "remain in recess" to await a private expert evaluation of his competency by Heddrick's expert. On August 2, 2005, the judge entered an order for pretrial competency evaluation by Western State Hospital.¹

During an October 6 status conference, defense counsel orally informed the court that the private evaluation was complete, and their expert, Dr. White, had found Heddrick competent to stand trial. Counsel advised the court that she no longer had concerns about her client's competency. She also stated that she had asked the expert not to prepare a written report on his findings because of the expense of taking that additional step.

Based on counsel's representations, the matter proceeded to trial. The jury found Heddrick guilty of felony harassment.

Custodial Assault Case

While Heddrick was in custody for the felony harassment charge, two officers in the King County Jail were assigned to move Heddrick to a different cell. When they attempted to do so, a fight broke out between Heddrick and Officer Steven Spadoni. The officers succeeded in restraining Heddrick. A nurse examined Officer Spadoni and Heddrick, finding that Officer Spadoni had sustained injuries, but Heddrick did not need medical attention.

¹ Clerk's Papers at 38-41 (King Co. No. 04-1-12703-0 SEA).

Heddrick contended that the officer attacked him without cause. The officers disagreed. As a result of this incident, the State charged Heddrick with custodial assault.

Heddrick had separate counsel in the custodial assault case from that in the felony harassment case. On the second day that counsel in the felony harassment case raised questions about Heddrick's competency, the judge in the custodial assault case decided it would be wise to track competency procedures with the felony harassment case. Accordingly, on July 29, 2005, the judge in the custodial assault case also entered an order for pretrial competency evaluation by Western State Hospital.²

The custodial assault case was later transferred for trial to the judge who had the felony harassment case. The jury found Heddrick guilty of custodial assault.

These appeals, which we consolidated, followed.

COMPETENCY

Heddrick claims the trial court violated his right to due process by finding him competent to stand trial in both cases without observing adequate procedural safeguards. Specifically, he argues the court proceeded to trial without the evidentiary hearings the statute requires after threshold determinations in both cases that there was reason to doubt his competency. On this record, we hold that in both cases, he received the due process to which he was entitled, notwithstanding the absence of evidentiary hearings.

² Clerk's Papers at 4-7 (King Co. No. 05-1-08886-5 SEA).

Criminal defendants have a fundamental right not to be tried or convicted while incompetent to stand trial.³ In Washington, “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.”⁴ A person is incompetent if he “lacks the capacity to understand the nature of the proceedings against him . . . or to assist in his . . . own defense as a result of mental disease or defect.”⁵ Due process requires that State procedures must be adequate to protect this right,⁶ which is essential to a person’s right to a fair trial.⁷

RCW 10.77.060 provides one such procedure. If the trial court determines that “*there is reason to doubt*” the defendant’s competency, the statute sets forth the mandatory procedures to follow:

According to the controlling statute, where there is reason to doubt a defendant’s competency the trial court *must* appoint experts and order a formal competency hearing.

.....

This competency hearing is mandatory whenever a legitimate question of competency arises.^[8]

³ Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975).

⁴ RCW 10.77.050.

⁵ RCW 10.77.010(14).

⁶ Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966).

⁷ Drope, 420 U.S. at 172.

⁸ State v. Marshall, 144 Wn.2d 266, 278-79, 27 P.3d 192 (2001) (emphasis in original); see also RCW 10.77.060.

This statutory scheme is not constitutionally mandated, and may be waived.⁹ If this statutory scheme is waived in a given case, a defendant is still entitled to minimal due process, which cannot be waived.¹⁰

Due process is a flexible concept and should be applied based on the demands of the particular situation.¹¹ In general, courts look to three factors in determining what process is due:

(1) the private interest to be protected; (2) the risk of erroneous deprivation of that interest by the government's procedures; and (3) the government's interest in maintaining the procedures.^[12]

We may affirm the trial court on any ground supported by the record.¹³

Here, the jury trial in Heddrick's felony harassment case was in progress when he refused to attend the July 21, 2005 day of trial. There had been some disturbance in the jail area, and the court recessed the matter until July 27.

On this latter date, his counsel raised concerns about his competency based on her interaction with him the previous week and his prior history of temporary incompetence. In response, the deputy prosecutor stated, "I believe that defense counsel's making an astute observation that probably does need to

⁹ State v. O'Neal, 23 Wn. App. 899, 901-02, 600 P.2d 570 (1979).

¹⁰ See Pate, 383 U.S. at 386 (the defendant's constitutional, not merely statutory, rights were abridged by the trial court's failure to provide him "an adequate hearing on his competence to stand trial").

¹¹ Morris v. Blaker, 118 Wn.2d 133, 144, 821 P.2d 482 (1992).

¹² Id. at 144-45 (citing Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

¹³ State v. White, 137 Wn. App. 227, 230, 152 P.3d 364 (2007).

be followed up on.”¹⁴ This comment was apparently based on the prosecutor “having observed some of [Heddrick’s] behaviors.”¹⁵ Defense counsel requested a competency evaluation by *their* expert, Dr. White. The court agreed to the examination by the private expert.

Thereafter, the deputy prosecutor prepared an order for pretrial competency evaluation by Western State Hospital. That order expressly states that “***there being reason to doubt*** the defendant’s fitness to proceed,” and expressly finds that “the defendant is in need of forensic mental health evaluation”¹⁶ Both counsel signed that order, and the judge in the felony harassment case entered it on August 2, 2005.

The trial deputy also prepared a substantially similar order for the custodial assault case. It also recites that “***there being reason to doubt*** the defendant’s fitness to proceed,” and expressly finds that “the defendant is in need of forensic mental health evaluation”¹⁷ Defense counsel in that case signed that order, and the judge in the custodial assault case entered the order on July 29, 2005.

Thereafter, Dr. White examined Heddrick and determined that he was competent to stand trial. Defense counsel in the felony harassment case

¹⁴ Report of Proceedings (July 27, 2005) at 14 (King Co. No. 04-1-12703-0 SEA).

¹⁵ *Id.*

¹⁶ Clerk’s Papers at 38 (King Co. No. 04-1-12703-0 SEA) (emphasis added).

¹⁷ Clerk’s Papers at 4 (King Co. No. 05-1-08886-5 SEA) (emphasis added).

reported the doctor's finding to the judge in that case and further represented that she had decided that a written report of the doctor's finding was unnecessary. In short, she had no further concerns about her client's competency to stand trial. Based on the representations of counsel, the trial court proceeded to trial on both cases without any further hearings on the question of competency.

The State argues that the trial court had no reason to doubt Heddrick's competency in the felony harassment case. It also argues that the court in the custodial assault case merely deferred to the judge in the felony harassment case, having no independent reason to doubt Heddrick's competency. The record directly contradicts both arguments.

First, the plain language of both orders entered by the two judges states "***there being reason to doubt*** the defendant's fitness to proceed," and expressly finds that "the defendant is in need of forensic mental health evaluation" These express statements in both orders are sufficient to refute the State's argument that the two trial judges did something other than finding that Heddrick's competency was at issue.

Second, the trial deputy's comments at the hearing before the judge in the felony harassment case further undermine the position the State now takes on appeal. The deputy stated during that hearing, "I believe that defense counsel's making an astute observation [that there were concerns about Heddrick's competency] that probably does need to be followed up on."¹⁸ As we stated

¹⁸ Report of Proceedings (July 27, 2005) at 14 (King Co. No. 04-1-12703-0 SEA).

previously in this opinion, this comment was apparently based on the prosecutor “having observed some of [Heddrick’s] behaviors.”

The State cites State v. Hicks,¹⁹ State v. Higa,²⁰ and State v. Harris²¹ to support its argument that the trial court need not hold an evidentiary hearing before deciding that an accused is competent to stand trial under these circumstances. Hicks is inapplicable because in that case, the court actually held an evidentiary hearing to determine the defendant’s competency to stand trial.²² In Higa, Division Two emphasized the trial court’s discretion in making the initial determination whether to inquire formally into a defendant’s competency.²³ There is nothing in the opinion addressing whether the court must hold an evidentiary hearing once such a determination has been made. Competence was not even at issue on appeal in Harris, so any statements from Division Three regarding the issue are dicta.²⁴ Moreover, it appears from the facts that the trial court only ordered a competency evaluation based on stipulation by the parties, not based upon its own finding that there was reason to doubt competency.

¹⁹ 41 Wn. App. 303, 704 P.2d 1206 (1985).

²⁰ 38 Wn. App. 522, 685 P.2d 1117 (1984).

²¹ 122 Wn. App. 498, 94 P.3d 379 (2004).

²² 41 Wn. App. at 305, 308-09.

²³ 38 Wn. App. at 524.

²⁴ 122 Wn. App. at 504 (sole issue on appeal was tolling the speedy trial period).

Finally, the State argues that the trial judges had considerable discretion to decide whether a hearing was required, and Heddrick has not shown that they abused that discretion. The question is not one of discretion. Rather, the question is whether Heddrick received the due process to which he was entitled once there was reason to doubt his competency.²⁵

We conclude that due process was satisfied. We recognize that Heddrick's right not to be tried while incompetent is fundamental. But the risk of erroneous deprivation of that right was minimal in this case. Heddrick's own expert, Dr. White, examined him for the second time and concluded that he was competent to stand trial. This satisfied defense counsel that Heddrick was competent. Heddrick does not make a compelling argument that an evidentiary hearing would have added anything under the circumstances of this case. No other expert had examined him or come to a different conclusion about his competence at that time. Moreover, the record does not indicate that any issues regarding competency arose during either of the two trials that followed. Balanced against the State's interest in trying Heddrick for his crimes, we hold that an evidentiary hearing was not required under the facts of this case.

Heddrick received the due process to which he was entitled under the circumstances, notwithstanding that the trial court did not follow the statutory procedures of RCW 10.77.060. There was no error in either the felony harassment or the custodial assault cases in not having any further hearings on competency.

²⁵ See Marshall, 144 Wn.2d at 279.

CHARACTER EVIDENCE

Heddrick argues that the trial court erred in admitting evidence of his character in the felony harassment case. We disagree.

Evidence of a person's character or trait is generally inadmissible to prove that he acted in conformity with that trait.²⁶ Decisions as to the admissibility of evidence are within the discretion of the trial court, and are reversible only for an abuse of that discretion.²⁷ A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.²⁸ An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial.²⁹

An objection to evidence must specify the particular ground upon which it is based to preserve the error for review.³⁰ A party may only appeal the admission of evidence based on the specific ground made at trial.³¹

Here, Deputy Wojdyla stated, "[H]e is telling us basically that he has a disregard for the law."³² Defense counsel objected to the statement as

²⁶ ER 404(a)(1).

²⁷ State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

²⁸ State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

²⁹ State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

³⁰ State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).

³¹ Id.

³² Report of Proceedings (October 12, 2005) at 20 (King Co. No. 04-1-12703-0 SEA).

“speculation.”³³ The trial court sustained the objection, but refused to grant counsel’s motion to strike, stating, “I am not going to strike that. I sustained the objection, again, in that it was based on speculation. Go ahead.”³⁴

Heddrick objected to the statement only on the basis of “speculation.” The trial court properly sustained the objection. He cannot now appeal on the basis that the statement is improper character evidence because that was not the basis of his objection below.

Heddrick has not shown that the trial court abused its discretion in refusing to strike the statement. He now argues that this alleged error affected his constitutional right to a fair trial. But he fails to explain why he should qualify under this narrow exception to permit review on the basis of an argument not raised below. We do not see any basis for him to claim that RAP 2.5(a) applies in this case.

JURY INSTRUCTIONS

Heddrick next argues that the “to-convict” jury instruction in the felony harassment case did not contain each essential element of the crime. We disagree.

A “to convict” instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to

³³ Id.

³⁴ Id. at 21.

determine guilt or innocence.³⁵ If it does not, the missing element supplied by other instructions does not cure the defect.³⁶ Omission of an element relieves the State of its burden to prove every essential element beyond a reasonable doubt.³⁷ Such an omission requires reversal unless the error is harmless beyond a reasonable doubt.³⁸ This court reviews de novo the adequacy of a challenged “to convict” jury instruction.³⁹

According to statute, a person is guilty of the crime of harassment when two elements are met: (1) “Without lawful authority, the person knowingly threatens” to cause any of certain enumerated types of bodily injury or physical damage; and (2) that person places the victim in “reasonable fear that the threat will be carried out.”⁴⁰ The person is guilty of a felony if an additional element is met – he has previously been convicted of harassment against the victim or the victim’s family, or he threatens to kill the victim.⁴¹

Here, the to-convict instruction listed six elements: (1) Heddrick knowingly threatened to cause bodily injury to Patricia Anderson on May 13, 2004; (2) the

³⁵ State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)).

³⁶ DeRyke, 149 Wn.2d at 910.

³⁷ Smith, 131 Wn.2d at 265.

³⁸ State v. Williams, 158 Wn.2d 904, 917, 148 P.3d 993 (2006).

³⁹ State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

⁴⁰ RCW 9A.46.020(1).

⁴¹ RCW 9A.46.020(2)(b).

threat placed Anderson in reasonable fear that the threat would be carried out; (3) Heddrick was previously convicted of domestic violence against Anderson; (4) he acted without lawful authority; (5) the threat was a true threat; and (6) the acts occurred in Washington. This instruction properly lists every element in the statute.

Heddrick relies on State v. Kiehl⁴² and State v. J.M.⁴³ to support his argument that an additional element is required.⁴⁴ In Kiehl, the court held that the to-convict instruction, which had listed the two statutory elements (plus a sub-element describing the applicable type of injury), was improper because it had listed one individual as the victim of the threat and a different individual as the person placed in fear as a result.⁴⁵ The court explained that the same person who was threatened must find out about the threat and be placed in fear.⁴⁶ Nothing in the opinion suggests that the to-convict instruction must separately list the requirement that the victim of the threat must learn of it.

In J.M., the court did not consider jury instructions or specific elements of the crime, but rather interpreted the term “knowing” in the statute. The court concluded that the defendant need not have known that the threat would reach

⁴² 128 Wn. App. 88, 92, 113 P.3d 528 (2005), review denied, 156 Wn.2d 1013 (2006).

⁴³ 144 Wn.2d 472, 28 P.3d 720 (2001).

⁴⁴ 128 Wn. App. at 92.

⁴⁵ Id. at 93.

⁴⁶ Id.

his intended victim, but the victim must actually have found out about the threat.⁴⁷

These cases do not support Heddrick's position that there is an additional element to the crime. We reject his arguments.

ASSISTANCE OF COUNSEL DURING CRITICAL STAGE

Heddrick contends he was denied the assistance of counsel during a critical stage of the proceedings in the custodial assault case. We hold that he has failed to show he was deprived of the assistance of counsel at this stage.

The federal and state constitutions guarantee a defendant the right to be represented by counsel at all critical stages of criminal proceedings.⁴⁸ It is well established in other jurisdictions that a competency hearing is a critical stage of proceedings.⁴⁹ This issue can be raised for the first time on appeal because it is a manifest error affecting a constitutional right.⁵⁰

Here, the trial judge in the felony harassment case signed the order finding Heddrick competent to stand trial on October 10. The trial judge then apparently applied that ruling to both cases, although the record in the custodial assault case does not reflect this action. There was no separate proceeding in the custodial assault case in which the court found Heddrick competent to stand trial, so there was no hearing constituting a critical stage at which his presence was required.

⁴⁷ J.M., 144 Wn.2d at 482.

⁴⁸ U.S. CONST. amend. VI; WASH. CONST. art. I, § 22.

⁴⁹ E.g., Sturgis v. Goldsmith, 796 F.2d 1103, 1109 (9th Cir. 1986).

⁵⁰ State v. Holley, 75 Wn. App. 191, 197, 876 P.2d 973 (1994).

Moreover, defense counsel in the custodial assault case signed the substantially similar order for a competency evaluation that the State prepared for the felony harassment case. The respective trial judges in each case entered substantially similar orders triggering the statute. There is no showing of prejudice simply because counsel for the custodial assault case was not physically present at the hearing when Tracy Lapps represented that Dr. White, the expert in the felony harassment case, found him competent and ordered that no report be done.

Heddrick was not denied his right to counsel at a critical stage of the proceedings.

RIGHT TO CONFRONTATION/HEARSAY

Heddrick argues that the trial court in the custodial assault case violated his right to confrontation under the Sixth Amendment and abused its discretion in admitting hearsay testimony. We disagree.

Hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”⁵¹ Hearsay evidence is inadmissible unless an exception applies.⁵² We review a trial court’s evidentiary rulings for an abuse of discretion.⁵³

⁵¹ ER 801(c).

⁵² ER 802.

⁵³ City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004).

The Confrontation Clause of the Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.”⁵⁴ To enforce this right, Crawford v. Washington dictates that out-of-court testimonial statements are inadmissible against a defendant unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.⁵⁵ Non-testimonial statements do not implicate the Confrontation Clause.⁵⁶

The United States Supreme Court did not provide a precise definition of “testimonial,” but stated that the term “applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”⁵⁷ The most important factor in determining whether a statement is testimonial is the witness’ purpose in initiating police contact and making the statement. A statement is only testimonial if the declarant would reasonably expect his or her statement to be used at a later trial.⁵⁸

⁵⁴ U.S. CONST. amend. VI.

⁵⁵ 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

⁵⁶ State v. Shafer, 156 Wn.2d 381, 388, 128 P.3d 87, cert. denied, 127 S. Ct. 553 (2006) (citing Crawford, 541 U.S. at 68).

⁵⁷ Id.

⁵⁸ State v. Mason, 127 Wn. App. 554, 563, 126 P.3d 34 (2005), aff’d, No. 77507-9, 2007 WL 2051541 (July 19, 2007).

Whether a statement is testimonial and covered by Crawford is an issue of law we review de novo.⁵⁹ So long as it had “practical and identifiable consequences,” it may be raised for the first time on appeal because a violation of the Confrontation Clause is a manifest error affecting the defendant’s Sixth Amendment right.⁶⁰

Heddrick challenges statements made by Officer Alan Braden at trial when he was describing the nurse’s medical examination of Heddrick after the alleged assault.

Officer Braden stated that after the nurse examined Heddrick for two or three minutes, Heddrick “was cleared to go back [to his cell].” When asked what that meant, Officer Braden responded, “It means medical staff felt that he didn’t have enough injuries” Heddrick objected on the basis of hearsay. The court stated that it would allow the question and the answer to stand, but directed the witness to carefully listen to the question and how it was posed. The court further directed the prosecutor to rephrase the question. The prosecutor then asked:

Q. (By Ms. Miller) Can you describe for the jury, when you say someone gets cleared by medical staff, can you give a general definition of what that means?

A. If it’s not substantial injuries of [sic] broken bones, life threatening or something of that nature, they are cleared to go to their assigned cell.

⁵⁹ State v. Mohamed, 132 Wn. App. 58, 63-64, 130 P.3d 401, review denied, 158 Wn.2d 1021 (2006).

⁶⁰ State v. Price, 158 Wn.2d 630, 638-39 n.3, 146 P.3d 1183 (2006) (citing State v. Clark, 139 Wn.2d 152, 156, 985 P.2d 377 (1999)).

Q. So if they have something that needs to be treated, they're not cleared; if they don't, they are, is that accurate?

A. Yes, ma'am.^[61]

Heddrick did not object.

Heddrick appears to argue that the nurse's statement that he was cleared to return to his cell is testimonial hearsay, excludable as a violation of the Confrontation Clause.

Assuming, without deciding, that the nurse's statement was hearsay, it was not testimonial and therefore does not implicate the Confrontation Clause. Her purpose in making the statements was to provide medical attention and treatment, not to make a formal statement or further a prosecution.⁶² Her process of clearing patients is not of the type Crawford was concerned with – prior testimony, answers to police interrogation, and the like. Thus, it was not testimonial and the trial court did not violate Heddrick's Sixth Amendment right in admitting Officer Braden's testimony.

Even if we concluded that the officer's trial testimony relating the nurse's statement was hearsay, the admission of the testimony was harmless. The trial court directed the State to rephrase the question, and Heddrick did not object to the new questions or the answers. Moreover, the officer's testimony was also

⁶¹ Report of Proceedings (October 13, 2005, Vol. II) at 56-57 (King Co. No. 05-1-08886-5 SEA).

⁶² See Mason, 127 Wn. App. at 564 (declarant's statement while seeking police protection is not testimonial because the purpose is to get help, not to "make a formal statement" or prove a fact to "further a prosecution").

cumulative of other evidence that Heddrick was returned to his cell without further medical attention.

OPINION TESTIMONY

Heddrick challenges statements in both cases as improper opinion testimony regarding his veracity or guilt. We conclude that the testimony, to which he made no objections, was properly admitted.

It is improper for a witness to testify in opinion form regarding the guilt or veracity of a defendant.⁶³ A lay person's testimony as to another's credibility is not helpful because the jury is better able to assess credibility, and an expert may not opine as to another's credibility because there is no scientific basis for such an opinion.⁶⁴ But testimony that is not a direct comment on the defendant's guilt or veracity, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper.⁶⁵ This is true even if that testimony reaches ultimate issues of fact.⁶⁶ Likewise, a witness may testify about his direct knowledge of facts and inferences therefrom, even if those facts support a finding of guilt.⁶⁷

⁶³ State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

⁶⁴ State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995).

⁶⁵ City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993).

⁶⁶ Id.; ER 704.

⁶⁷ State v. Saunders, 120 Wn. App. 800, 812-13, 86 P.3d 232 (2004), review denied, 156 Wn.2d 1034 (2006).

To determine whether testimony constitutes an impermissible opinion on guilt or veracity, or a permissible opinion on an ultimate issue, a court should consider the totality of the circumstances, including the type of witness, the nature of the testimony and charges against the accused, the type of defense, and the other evidence.⁶⁸ The jury may especially be likely to be influenced by opinion testimony from a police officer, whose opinion may carry a special aura of reliability.⁶⁹

Improper opinion as to the veracity of a defendant may be raised for the first time on appeal if it is a manifest error affecting the defendant's constitutional right to a jury trial.⁷⁰ To show a manifest error, "[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial."⁷¹ Recently, the state supreme court held,

"Manifest error" requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.^[72]

In the felony harassment case, Deputy Wojdyla directly opined on Heddrick's veracity, but Heddrick did not object:

⁶⁸ Demery, 144 Wn.2d at 759.

⁶⁹ Id. at 762.

⁷⁰ See RAP 2.5(a)(3).

⁷¹ State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

⁷² Id. at 936; accord State v. Warren, 134 Wn. App. 44, 55, 138 P.3d 1081 (2006) ("[W]hen a witness does not expressly state his or her belief of the victim's account, the testimony does not constitute manifest constitutional error.").

Q. And did you take that threat seriously when he said it?

A. I did.^[73]

....

Q. When you were in the car on the 13th, did you have any question about the sincerity of Mr. Heddrick's threats?

A. I believed that he was sincere in what he was saying. He definitely seemed agitated.

Q. Did you ever ask him if he was sincere in what he was saying?

A. I believe there was a question that was asked. I can't remember if I asked it or if Officer Steffes did, and Mr. Heddrick said he wasn't serious. But he said it with such conviction when he was talking that he was agitated enough, it left no doubt in my mind that he was sincere about the comments that he had made as to the Anderson family.^[74]

Officer Steffes likewise stated that he believed Heddrick's alleged threats, but did not believe Heddrick when he said he had been joking:

Q. What was your reaction to that comment?

A. I took it seriously based on the tone of his voice and the conviction of his words. I took it seriously. I took it as a threat.^[75]

....

Q. Did you take him as being serious?

A. I took him, I definitely took him as being serious. Yes.

....

⁷³ Report of Proceedings (October 12, 2005) at 21 (King Co. No. 04-1-12703-0 SEA).

⁷⁴ Id. at 25.

⁷⁵ Id. at 36.

Q. When he told you he wasn't serious about the things he was saying, what was your reaction to that?

....

[Q.] Did you take him as being sincere in his comment?

A. No, I did not.^[76]

Because the statements were direct statements regarding Heddrick's veracity, we consider this issue on appeal even though Heddrick did not object below.

Under the specific circumstances of this case, however, we conclude that it was not error for the trial court to allow the officers' statements. The State was required to prove beyond a reasonable doubt that the statements Heddrick made to the officers constituted a "true threat." A "true threat" is "a statement made in a context or under such circumstances where a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to carry out the threat."⁷⁷ In this case, Deputy Wojdyla and Officer Steffes were the only ones who heard Heddrick make the alleged threats, and thus the only ones who could speak to their serious nature. In order to meet its burden of proof, therefore, the State elicited specific testimony from the officers that they were witnesses to a true threat.

The jury was instructed that it was the sole judge of the credibility of the witnesses. We presume the jury followed its instructions. We will not presume

⁷⁶ Id. at 40.

⁷⁷ Clerk's Papers at 52 (King Co. No. 04-1-12703-0 SEA) (Jury Instruction No. 6).

that the officers' testimony in this case caused the jury to depart from following these instructions.

Whether testimony is impermissible opinion on veracity depends on the specific circumstances of each case.⁷⁸ Under the specific circumstances of this case, we conclude that the admission of the testimony to which Heddrick now objects on appeal was proper to allow the State to meet its burden of proof.

Next, Heddrick claims that the witnesses' reference to Heddrick's statements as "threats," was improper opinion testimony of his guilt. Pre-trial, the court asked the parties not to refer to the statements as "threats" other than to explain why the officers decided to tell Ms. Anderson about them. Of the several times at trial the officers and the prosecutor used the word "threat," Heddrick only objected once. The court sustained the objection, and Heddrick did not move to strike.

A "threat" is an element of the crime of harassment, but it is also a commonly used word in the English language. This is to be contrasted with a "true threat," which is a term of art and also a separate element of the crime of harassment.⁷⁹ Assuming without deciding that the use of this word was an error, we conclude that it was not prejudicial. Even though Heddrick may have had a standing objection given his pre-trial motion, he failed to make a motion to strike or request a curative instruction. Simple use of the word "threat" is not

⁷⁸ Heatley, 70 Wn. App. at 579.

⁷⁹ See State v. Kilburn, 151 Wn.2d 36, 41-43, 84 P.3d 1215 (2004).

sufficiently flagrant or inflammatory that a curative instruction would have been ineffective.

In the custodial assault case, Heddrick challenges Officer Braden's testimony that the nurse "felt" that Heddrick did not sustain serious injuries. This is not an opinion on Heddrick's guilt or veracity.⁸⁰ It is a summary of the medical assessment the nurse made of Heddrick immediately after the alleged assault. She concluded that he was well enough to go back to his cell, and he did so. Officer Braden's explanation of what occurred is not improper opinion.

PROSECUTORIAL MISCONDUCT

Heddrick alleges several instances of prosecutorial misconduct in both cases. We conclude that any error did not prejudice his trials.

A prosecutor's comment deprived a defendant of a fair trial if: (1) the statement was improper, and (2) there is a substantial likelihood that the statement prejudiced the jury by affecting its verdict.⁸¹ We review a trial court's ruling on prosecutorial misconduct for an abuse of discretion.⁸²

Appealing to the jury's "passion and prejudice" through the use of inflammatory rhetoric is misconduct.⁸³ Similarly, prejudicial allusions to matters outside the evidence are improper because they encourage the jury to render a

⁸⁰ See State v. Sanders, 66 Wn. App. 380, 388-89, 832 P.2d 1326 (1992) (officer's conclusion based on the physical evidence and his experience in investigating drug crimes was not improper opinion testimony regarding guilt).

⁸¹ State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

⁸² State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999).

⁸³ State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

verdict based on something other than admitted evidence.⁸⁴ For the same reasons, referring to the “golden rule” by name, or urging the jury to put themselves into the shoes of a party in order to grant the kind of relief they would want in those circumstances, constitutes misconduct.⁸⁵ Finally, it is misconduct for a prosecutor to argue that in order to acquit a defendant, *or* “in order to *believe* a defendant, a jury must find that the State’s witnesses are *lying*.”⁸⁶

In determining whether prejudice has occurred, a court must examine the context in which the statements were made, including defense counsel’s own statements.⁸⁷ Prejudice exists if there is a “substantial likelihood” that the misconduct affected the jury’s verdict.⁸⁸ A defendant may only raise the issue of prosecutorial misconduct for the first time on appeal if the improper remark is so “flagrant and ill intentioned” that it causes prejudice that could not have been cured through a jury instruction.⁸⁹

In the felony harassment case, there was no misconduct. In closing argument, the prosecutor did not refer to matters outside the evidence in

⁸⁴ Id.

⁸⁵ Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 139-40, 750 P.2d 1257 (1988).

⁸⁶ State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995) (emphasis in original), superseded by statute on other grounds by, RCW 9.94A.364(6).

⁸⁷ State v. Ramirez, 49 Wn. App. 332, 337, 742 P.2d 726 (1987) (citing United States v. Young, 470 U.S. 1, 12, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)).

⁸⁸ Reed, 102 Wn.2d at 145.

⁸⁹ State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

summarizing all of Heddrick's alleged threats contained in the officers' reports. Although by the time of trial Ms. Anderson may not have remembered each and every alleged threat, she and Deputy Wojdyla testified that the deputy read Heddrick's statements to Ms. Anderson from the report the day after they were made. Thus, evidence supports the arguments.

Heddrick also argues that the prosecutor's use of the word "threat" and elicitation of testimony of Heddrick's guilt and veracity amounted to prosecutorial misconduct. We reject these arguments for the reasons already discussed.

Likewise, the State did not commit misconduct in asking the jurors to put themselves in Heddrick's and Anderson's positions in order to ascertain whether his conduct and her fear were reasonable. The prosecutor did not ask the jurors to render a verdict based upon what they would want if they were in Heddrick's or Anderson's positions, which would have been a violation of the "golden rule" prohibition.⁹⁰ The State did not encourage the jury to render a verdict based upon sympathies, but only to analyze whether the reasonable person standard had been met. This was not misconduct.

In the custodial assault case, the prosecutor's comments were improper. She argued that in order to believe Heddrick, the jury would have to conclude the State's witnesses were being dishonest:

[C]ontemplate whether or not these [officers] are guys who are getting up on the stand schmoozing and making up facts, and

⁹⁰ See Adkins, 110 Wn.2d at 139-40.

because that's what you'd have to accept and believe if you accept the defendant's version to be true.⁹¹

Heddrick did not object to these statements. They were not so flagrant that a jury instruction would have been ineffective in curing any prejudice.⁹² Accordingly, there is no basis to reverse.

INEFFECTIVE ASSISTANCE OF COUNSEL

Heddrick argues that his counsel was ineffective in both cases. We disagree.

To prevail on a claim of ineffective assistance of counsel a defendant must first establish that his counsel's representation was deficient.⁹³ To show deficient performance, he has the "heavy burden of showing that his attorneys 'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'"⁹⁴ He may meet this burden by establishing that, given all the facts and circumstances, his attorney's conduct failed to meet an objective standard of reasonableness.⁹⁵ Deficient performance

⁹¹ Report of Proceedings (October 13, 2005, Vol. II) at 73 (King Co. No. 05-1-08886-5 SEA).

⁹² See State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209 (1991) (a curative instruction "particularly" could have obviated prejudice caused by a remark that in order to acquit defendant, the jury would have had to find that the testifying officers were lying).

⁹³ State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

⁹⁴ State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

⁹⁵ State v. Huddleston, 80 Wn. App. 916, 926, 912 P.2d 1068 (1996).

is not shown by matters that reflect trial strategy or tactics.⁹⁶ Deciding whether and when to object to the admission of evidence is “a classic example of trial tactics.”⁹⁷ Only in egregious cases where the evidence is central to the State’s case will the failure to object constitute deficient performance under this standard.⁹⁸ This court employs a strong presumption that counsel’s representation was effective.⁹⁹

Second, he must show that the deficient performance resulted in prejudice that, with reasonable probability, affected the outcome of the trial.¹⁰⁰

Heddrick received the due process to which he was entitled. Thus, he cannot show any prejudice by any actions of his counsel.

In both cases, Heddrick claims his counsel was also ineffective for failing to object to all of the alleged errors discussed above that were not properly preserved for review. Whether to object to evidence is usually a matter of trial tactic, and Heddrick has not shown that this is an egregious case in which any of the objectionable testimony was either central or otherwise prejudicial.

CUMULATIVE ERROR

Heddrick argues that cumulative error denied him a fair trial in both cases. We disagree.

⁹⁶ Hendrickson, 129 Wn.2d at 77-78.

⁹⁷ State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

⁹⁸ Id.

⁹⁹ State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

¹⁰⁰ Hendrickson, 129 Wn.2d at 78.

Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effects of the errors denied the defendant a fair trial.¹⁰¹ We ask whether the errors combined materially affected the outcome of the trial.¹⁰² We may exercise discretion and consider the cumulative effect of both preserved and unpreserved errors.¹⁰³

In the felony harassment case, there was no error. In the custodial assault case, the only error is the prosecutor's arguments that in order to believe Heddrick, the jury would have to conclude the State's witnesses are lying. Thus, the cumulative error doctrine does not apply to these cases.

INVOLUNTARY MENTAL HEALTH TREATMENT

Heddrick contends that the trial court in the custodial assault case violated its statutory requirement to enter particular findings of fact before requiring a defendant to undergo mental health treatment as a condition of community custody. The State properly concedes this sentencing error. Thus, the only remaining question is the nature of the remedy to be applied.

RCW 9.94A.505(9) provides that a court may require mental health treatment as a condition of community custody only "if the court finds that reasonable grounds exist to believe the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the

¹⁰¹ State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

¹⁰² State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

¹⁰³ State v. Alexander, 64 Wn. App. 147, 151, 822 P.2d 1250 (1992).

offense.” The finding “must be based on” a pre-sentence report as well as mental evaluations if available.¹⁰⁴

The State concedes that the trial court did not make the required findings or obtain a pre-sentence report or evaluation. But it argues that the court on remand should have the opportunity to make the required findings.

We question whether the trial court can make the required finding of fact in retrospect.¹⁰⁵ There are “inherent difficulties” in making a determination about a defendant’s mental competence at some earlier date “under the most favorable circumstances.”¹⁰⁶ We nevertheless remand the case to the trial court for further proceedings. On remand, the trial court should take the steps it believes are appropriate under the circumstances.

We affirm the judgment and sentence in the felony harassment case. We affirm the conviction in the custodial assault case, reverse the part of the judgment and sentence to which the State properly concedes error, and remand for further proceedings.

Cox, J.

WE CONCUR:

Schindler, ACS

Colman, J

¹⁰⁴ RCW 9.94A.505(9).

¹⁰⁵ See Pate, 383 U.S. at 386-87.

¹⁰⁶ See Drope, 420 U.S. at 183.

Appendix B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 78514-7
)	
v.)	
)	
DARRELL)	EN BANC
EVERYBODYTALKSABOUT,)	
)	
Petitioner.)	Filed September 6, 2007
)	
PHILLIP LARA LOPEZ,)	
)	
Defendant.)	
_____)	

FAIRHURST, J. – Darrell Everybodytalksabout seeks review of a published decision by Division One of the Court of Appeals affirming his conviction for first degree and second degree felony murder. He claims his rights under the Fifth¹ and Sixth² Amendments to the United States Constitution were violated when

¹ Everybodytalksabout’s Fifth Amendment claim is based on the clause that states “[n]o person shall be . . . compelled in any criminal case to be a witness against himself.”

² Everybodytalksabout’s Sixth Amendment claim is based on the clause that states “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.”

incriminating statements he made to a Department of Corrections (DOC) community corrections officer (CCO) during a presentence interview were used in a subsequent proceeding.

We reverse the Court of Appeals and remand for retrial without Everybodytalksabout's incriminating statements. Because we hold Everybodytalksabout's Sixth Amendment right to assistance of counsel was violated, we do not decide Everybodytalksabout's Fifth Amendment claim.

I. FACTUAL AND PROCEDURAL HISTORY

The parties do not dispute the essential facts of this case. In February 1997, the State charged Everybodytalksabout and Phillip Lopez jointly with the crime of first degree murder for stabbing Rigel Jones to death during the course of a robbery. *State v. Everybodytalksabout*, 131 Wn. App. 227, 231, 126 P.3d 87 (2006). The court declared a mistrial as to Everybodytalksabout because the State discovered that some of the testimony presented at trial was perjured. *Id.* at 231.

In July 1997, the State proceeded against only Everybodytalksabout for first degree and second degree murder while armed with a deadly weapon, and he was convicted. *State v. Everybodytalksabout*, 145 Wn.2d 456, 460, 39 P.3d 294 (2002). On July 29, 1997, the trial court ordered a presentence investigation report pursuant to CrR 7.1(a). Defense counsel was copied on the order. Diane Navicky, a CCO

with DOC, prepared the report.

As part of her routine procedure for preparation of the presentence investigation report, Navicky interviewed Everybodytalksabout in the King County Jail on August 21, 1997. She did not contact Everybodytalksabout's attorney before conducting the interview, nor did she know if Everybodytalksabout had advance notification of the date of the interview. Report of Proceedings (RP) (Oct. 16, 2003)³ at 70-71, 74.

After asking some preliminary questions, Navicky invited Everybodytalksabout to talk about his offense. In her presentence investigation report, Navicky wrote that Everybodytalksabout “admit[ted] that he assisted in the robbery but would not comment any further.” Ex. 1, at 4. He also “stated that he was not the one who murdered Rigel Jones.” *Id.* Once the interview started to focus on Everybodytalksabout’s offense, however, he abruptly ended it, saying, “I don't want to talk about this any more.” RP (Oct. 16, 2003) at 50; Clerk’s Papers (CP) at 854. Navicky did not attempt to detain Everybodytalksabout or continue the interview. Everybodytalksabout was sentenced to a maximum term of life and community placement for two years. *Everybodytalksabout*, 145 Wn.2d at 460.

Everybodytalksabout filed a notice of appeal from his second trial on

³ There are 29 nonsequentially paginated volumes in the report of proceedings.

September 29, 1997, and in November 2000, Division One affirmed in an unpublished opinion. *Id.* Everybodytalksabout petitioned this court for review, and in February 2002, we reversed, finding that the trial court erred in admitting evidence demonstrating Everybodytalksabout's leadership qualities. *Id.* at 481.

The State proceeded against Everybodytalksabout a third time in December 2003. At the CrR 3.5 hearing, Navicky testified about Everybodytalksabout's statements to her at the presentence interview. Everybodytalksabout moved to exclude the statements, but the trial judge ruled them admissible. In its oral findings, the court concluded that Everybodytalksabout's Sixth Amendment rights were not violated because Navicky had no reason to believe Everybodytalksabout would make any incriminating statements, and Navicky did not take any action that was deliberately designed to elicit an incriminating statement. RP (Nov. 6, 2003) at 20-24.

Navicky testified at Everybodytalksabout's third trial. Everybodytalksabout was convicted of first degree and second degree murder, and he appealed.⁴ *Everybodytalksabout*, 131 Wn. App. at 230-31. Division One affirmed, concluding that Everybodytalksabout's Sixth Amendment rights were not violated because although the presentence interview constituted a critical stage of the proceeding, due

⁴ The second degree murder charge was merged with the first degree murder charge for sentencing purposes.

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to the fact that Everybodytalksabout's appeal was pending, Navicky did not "deliberately elicit" his statements. *Id.* at 237-39.

We granted Everybodytalksabout's petition for review. *State v. Everybodytalksabout*, 158 Wn.2d 1019, 149 P.3d 377 (2006).

II. ISSUE

Did Navicky violate Everybodytalksabout's Sixth Amendment right to assistance of counsel?

III. ANALYSIS

The Sixth Amendment guaranty of assistance of counsel attaches when the State initiates adversarial proceedings against a defendant. *Brewer v. Williams*, 430 U.S. 387, 401, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). After the right has attached, a government agent may not interrogate a defendant and use incriminating statements the defendant made in the absence of or without waiver of counsel. *Id.* at 401-04. The accused need not make an affirmative request for assistance of counsel. *Id.* at 404.

The right to assistance of counsel is specific to a particular offense and protects the accused throughout a criminal prosecution and following conviction. *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991). It applies to every "critical stage" of the proceedings." *State v. Tinkham*,

74 Wn. App. 102, 109, 871 P.2d 1127 (1994) (quoting *United States v. Wade*, 388 U.S. 218, 224-27, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). The United States Supreme Court has interpreted the right to apply “whenever necessary to assure a meaningful ‘defence.’” *Wade*, 388 U.S. at 225.

Courts apply the “deliberately elicited” standard in determining whether a government agent has violated a defendant’s Sixth Amendment right to assistance of counsel. *Fellers v. United States*, 540 U.S. 519, 524, 124 S. Ct. 1019, 157 L. Ed. 2d 1016 (2004); *Kuhlmann v. Wilson*, 477 U.S. 436, 459, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986); *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 911, 952 P.2d 116 (1998)). The Sixth Amendment “deliberately elicited” standard has been expressly distinguished from the Fifth Amendment “custodial-interrogation” standard. *Fellers*, 540 U.S. at 524.

“‘[T]he Sixth Amendment provides a right to counsel . . . even when there is no interrogation and no Fifth Amendment applicability.’” *Id.* (alterations in original) (quoting *Michigan v. Jackson*, 475 U.S. 625, 632 n.5, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986)). “[T]he Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached.” *Maine v. Moulton*, 474 U.S. 159, 176, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). The Sixth Amendment is also not violated if the

government agent “made ‘no effort to stimulate conversations about the crime charged.’” *Kuhlmann v. Wilson*, 477 U.S. 436, 442, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (alteration in original) (quoting *United States v. Henry*, 447 U.S. 264, 271 n.9, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980)). To show that Everybodytalksabout’s Sixth Amendment rights were violated, the State must show that Navicky made “some effort to ‘stimulate conversations about the crime charged.’” *Randolph v. California*, 380 F.3d 1133, 1144 (9th Cir. 2004) (quoting *Henry*, 447 U.S. at 271 n.9).

The State concedes that Navicky is a government agent. Suppl. Br. of Resp’t at 10. Thus, we need resolve only two questions in determining whether Everybodytalksabout’s Sixth Amendment rights were violated. First, whether the presentence interview constituted a “critical stage of the proceedings.” Second, whether Navicky “deliberately elicited” Everybodytalksabout’s statements.

A. Critical stage of the proceedings

Everybodytalksabout claims that “[c]onsidering the gravity of what was at stake,” and the fact that his statements were used at retrial, “the presentence interview [was] a critical stage of the proceedings.” Suppl. Br. of Pet’r at 19-20 (first alteration in original) (citing *Everybodytalksabout*, 131 Wn. App. at 237). The State concedes that the “sentencing hearing” is a critical stage of the proceedings.

Suppl. Br. of Resp't at 21 (citing *Tinkham*, 74 Wn. App. at 109-10 (citing *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977))). It also does not directly challenge the Court of Appeals' conclusion that the presentence interview in this case was a critical stage of the proceeding.⁵ But it cites a series of federal cases for the general proposition that a presentence interview does not constitute a critical stage for Sixth Amendment purposes, emphasizing the neutral role of the probation officer in the presentence interview process. Suppl. Br. of Resp't at 21-22 (citing *United States v. Jackson*, 886 F.2d 838 (7th Cir. 1989); *Brown v. Butler*, 811 F.2d 938 (5th Cir. 1987)).

As the State notes, some federal courts have concluded that a presentence interview does not constitute a critical stage of the proceeding, but only if the interview is conducted by a probation officer for sentencing purposes and the interview is nonadversarial in nature. For example, the *Jackson* court noted the "district judge's use of a defendant's statement to a probation officer . . . is

⁵ The Court of Appeals based its conclusion on the fact that Everybodytalksabout's appeal was pending and his statements were used to convict him in a subsequent proceeding. *Everybodytalksabout*, 131 Wn. App. at 237. However, as noted, *supra*, at 3, Everybodytalksabout's appeal was not pending at the time of the presentence interview. The presentence interview took place on August 21, 1997, but Everybodytalksabout did not file his notice of appeal until September 29, 1997. The trial court also noted there was no evidence that Navicky was aware that Everybodytalksabout intended to appeal his conviction at the time of the interview. RP (Nov. 6, 2003) at 24. Thus, the Court of Appeals erred in concluding that Everybodytalksabout's pending appeal was the basis for concluding the presentence interview was a critical stage of the proceedings.

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markedly unlike the *prosecutor's* adversarial use of a defendant's pretrial statement to a psychiatrist to carry the state's burden of proof before a jury." 886 F.2d at 844.

The court commented that because the defendant's statement was

used only by the sentencing judge, the presentence interview was not a critical stage of the proceeding. *Id.* Similarly, information obtained by probation officers in the presentence interview in *Brown* was used only for sentencing purposes, not by prosecutors in adversarial proceedings. *Brown*, 811 F.2d at 941; *see also Baumann v. United States*, 692 F.2d 565, 578 (9th Cir. 1982). In contrast, the presentence interview here was ultimately adversarial because although Everybodytalksabout's statements aided the court in determining his sentence after his second trial, it also provided crucial evidence used at his third trial.

Moreover, at the time of the presentence interview, Everybodytalksabout was still “‘faced with a phase of the adversary system’ and was ‘not in the presence of [a] perso[n] acting solely in his interest.’” *Estelle v. Smith*, 451 U.S. 454, 467, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981) (alterations in original) (quoting *Miranda v. Arizona*, 384 U.S. 436, 469, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)). *Estelle* involved a criminal defendant denied advice of counsel as to whether he should submit to a pretrial psychiatric examination about his future dangerousness. *Id.* at 458 n.5, 459. The psychiatrist who conducted the examination ultimately testified about the defendant's statements during the penalty phase of his trial. *Id.* at 458-60. The United States Supreme Court held that a defendant should be provided with assistance of counsel during the penalty phase of his trial because “[i]t is central to

[the Sixth Amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State *at any stage of the prosecution.*" 451 U.S. at 470 (emphasis added) (alteration in original) (quoting *Wade*, 388 U.S. at 226-27). The court noted that defendant's counsel were not "notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, and [the defendant] was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed."⁶ *Id.* 470-71 (footnote omitted). As in *Estelle*, Everybodytalksabout's counsel was not aware that the presentence interview would encompass questions about the crime that Everybodytalksabout had been convicted and Everybodytalksabout was denied his counsel's assistance in determining whether to submit to the interview.

The Court of Appeals also overlooked a Ninth Circuit Court of Appeals case that, while not binding, is instructive and squarely addresses Everybodytalksabout's unique circumstances. *Cahill v. Rushen*, 678 F.2d 791 (9th Cir. 1982). *Cahill*

⁶ Federal courts have applied *Estelle* narrowly on the issue of whether a presentence interview constitutes a critical stage of the proceeding, distinguishing *Estelle*'s bifurcated trial and capital sentencing proceedings from routine sentencing proceedings. See *Baumann*, 692 F.2d at 576; *Brown*, 811 F.2d at 941; see also *Jackson*, 886 F.2d at 843-46. However, as we have already noted, *supra*, at 8-9, the statements obtained in *Baumann*, *Brown*, and *Jackson* were used solely for sentencing purposes, not for subsequent adversarial trial proceedings against the defendants, and those cases are readily distinguishable from this case. *Baumann*, 692 F.2d at 576-78; *Brown*, 811 F.2d at 941; *Jackson*, 886 F.2d at 844.

involved a man arrested on suspicion of murder who promised a sheriff's captain that he would confess if convicted. *Id.* at 792. After Cahill's conviction, and without offering Cahill the opportunity to consult with counsel, giving him *Miranda* warnings, or informing his attorney of the meeting, the sheriff's captain obtained the promised confession. *Id.* at 793. When Cahill's conviction was overturned on appeal, the State used Cahill's confession in his retrial. *Id.* Cahill claimed the confession was inadmissible in the second trial because the sheriff's captain had violated his Sixth Amendment right to assistance of counsel. *Id.* The court agreed, holding the fact that a defendant's conviction is not yet final does not create "a temporal hiatus in the right to counsel." *Id.* at 795. Emphasizing the narrowness of its ruling, it concluded "any incriminating statements deliberately elicited by the State without at least affording defendant the opportunity to consult with counsel, must be excluded at any subsequent trial on the charges for which defendant [wa]s then under indictment." *Id.* The court further noted "[e]ven a brief consultation with his attorney would have corrected Cahill's erroneous impression that a confession at that point could have no adverse consequences." *Id.* at 794. As in *Cahill*, the fact that Everybodytalksabout had been convicted at the time of the presentence interview did not alleviate his need for counsel. Even a brief consultation with his attorney could have alerted him to the consequences of

discussing questions about the crime with which he was charged.

We conclude that because the statements Everybodytalksabout made in his presentence interview were used for the adversarial purpose of convicting him in a subsequent trial, the presentence interview was a critical stage of the proceeding.

B. Deliberately elicited

Everybodytalksabout argues that Navicky deliberately elicited his incriminating statements by inviting him to describe his version of the offense because she understood that an admission of complicity even at the presentencing stage could have “far-reaching” effects. Suppl. Br. of Pet’r at 21. He contends she “‘knew or should have known’ a further inquiry into Everybodytalksabout’s ‘version of the offense’ would be likely to elicit an incriminating response.” *Id.* at 21-22.

The State argues that in order for Navicky’s actions to be deliberate, they must have been “premeditated” and “intentional,” and Navicky’s actions were neither because she acted in a neutral role rather than on behalf of “law enforcement or the prosecutor’s office.” Suppl. Br. of Resp’t at 23. The State also cites the trial court’s conclusion that Navicky did not use secretive or evasive tactics in conducting the interview. *Id.* at 24-25.

The appellate court concluded that Navicky did not deliberately elicit

Everybodytalksabout's incriminating statements because she merely asked for Everybodytalksabout's version of the offense "within a series of impartial questions," and "created a situation where Everybodytalksabout could proclaim his innocence once more." *Everybodytalksabout*, 131 Wn. App. at 239.

The Court of Appeals applied the incorrect analysis. Regardless of whether all Navicky's other questions in the interview were impartial, the pertinent question asked about Everybodytalksabout's version of the offense for which he had been charged and convicted. Under Sixth Amendment analysis, the government agent need only "stimulate conversations about the crime charged" to deliberately elicit incriminating statements. *Randolph*, 380 F.3d at 1144 (quoting *Henry*, 447 U.S. at 271 n.9). Navicky's questions were more than just an effort to stimulate conversation, and they were clearly about the crime charged. She explicitly asked Everybodytalksabout to discuss the very crime for which he was charged and convicted, and the State subsequently used Everybodytalksabout's own words to retry him for the same crime.

We conclude that because Navicky stimulated conversations about the crime for which Everybodytalksabout was charged and convicted, Navicky deliberately elicited Everybodytalksabout's incriminating statements.

IV. CONCLUSION

We reverse the Court of Appeals and remand for retrial without Everybodytalksabout's incriminating statements. We hold the State violated Everybodytalksabout's Sixth Amendment right to assistance of counsel because the presentence interview constituted a critical stage of the proceedings and Navicky deliberately elicited Everybodytalksabout's statements.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Tom Chambers

Justice Charles W. Johnson

Justice Susan Owens

Justice Barbara A. Madsen

Justice Richard B. Sanders

Justice James M. Johnson

Justice Bobbe J. Bridge
