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NO. 67409-9-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D
MAR 05 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

RAYMEL CURRY,

Appellant.

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

The Honorable Richard D. Eadie, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>INTRODUCTIONS</u>	1
B. <u>ASSIGNMENTS OF ERROR</u>	2
<u>Issues Pertaining to Assignments of Error</u>	2
C. <u>STATEMENT OF THE CASE</u>	3
1. <u>Altercation on Route 7</u>	3
2. <u>Notice of Insanity Defense</u>	6
3. <u>Motion to Dismiss and/or Suppress Hearing</u>	8
4. <u>Bench Trial</u>	19
D. <u>ARGUMENT</u>	20
THE INTAKE ASSESSMENT VIOLATED CURRY'S SIXTH AMENDMENT RIGHT TO COUNSEL.....	20
1. <u>The Intake Assessment Was a Critical Stage</u>	23
2. <u>Simpler Stimulated Conversations About the Crime Charged</u>	27
3. <u>Dismissal Is the Appropriate Remedy</u>	29
E. <u>CONCLUSION</u>	32

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Benn</u> 134 Wash.2d 868, 952 P.2d 116 (1998).....	22
<u>State v. Cory</u> 62 Wn.2d 731, 382 P.2d 1019 (1963)	30
<u>State v. Everybodytalksabout</u> 161 Wn.2d 702, 166 P.3d 693 (2007)	18, 24, 25, 26, 27, 32
<u>State v. Nuss</u> 52 Wn. App. 735, 763 P.2d 1249 (1988)	23
<u>State v. Perrow</u> 156 Wn. App. 322, 231 P.3d 853 (2010)	30
<u>State v. Tinkham</u> 74 Wash.App. 102, 871 P.2d 1127 (1994)	21
<u>State v. Wicks</u> 98 Wn.2d 620, 657 P.2d 781 (1983)	4
<u>FEDERAL CASES</u>	
<u>Brewer v. Williams</u> 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).....	21
<u>Estelle v. Smith</u> 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 694 (1981).....	27
<u>Fellers v. United States</u> 540 U.S. 519, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004).....	22
<u>Kuhlmann v. Wilson</u> 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986).....	22, 23
<u>Maine v. Moulton</u> 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985).....	22

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>McNeil v. Wisconsin</u> 501 U.S. 171, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991).....	21
<u>Michigan v. Jackson</u> 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986).....	4, 22
<u>Randolph v. California</u> 380 F.3d 1133 (9 th Cir. 2004)	27
<u>United States v. Crouch</u> 478 F.Supp. 867 (E.D.Cal.1979)	23
<u>United States v. Henry</u> 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980).....	23
<u>United States v. Wade</u> 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).....	21

OTHER JURISDICTIONS

<u>Alston v. Alston</u> 331 Md. 496, 629 A.2d 70, 80 (1993).....	20
---	----

RULES, STATUTES AND OTHER AUTHORITIES

13 R. Ferguson <u>Wash.Prac., Criminal Practice and Procedure § 2810 (1984)</u>	23
Gertrude Stein <u>Sacred Emily (1913).....</u>	20
CrR 6.1	2
ER 703	31

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 10.77.020.....	7, 23
U.S. Const. Amend. V	22, 24
U.S. Const. Amend. VI	1, 2, 18, 20, 21, 22, 24, 27, 29, 30, 32

A. INTRODUCTION

Before his transfer to Western State Hospital (WSH) for a court ordered evaluation following his notice of an insanity defense, appellant Raymel Curry indicated he wished to exercise his right to counsel at the evaluation. The official "forensic" evaluation occurred on March 9, 2011, and accommodation was made for defense counsel's presence.

Unbeknownst to defense counsel, however, WSH forensic evaluator Amber Simpler performed an "intake assessment" of Curry (without notice to counsel) on February 24. During this intake assessment, and in response to questioning, Curry indicated his "special powers" exist only when he is high. The state's experts relied on this statement in forming their opinions that Curry's bizarre behavior during the assault for which he was charged was the result of voluntary drug use as opposed to mental illness. The state, in turn, used these opinions to defeat Curry's insanity defense. As will be argued infra, the state violated Curry's Sixth Amendment right to counsel in doing so.

B. ASSIGNMENTS OF ERROR

1. The intake assessment conducted by WSH forensic evaluator Amber Simpler violated appellant's Sixth Amendment right to counsel.

2. The trial court erred in denying the motion to dismiss and alternatively, the motion to exclude the state's experts' opinions and testimony, which relied on facts obtained from the intake assessment.

3. The court erred in entering finding of fact 34(g) in its Findings of Fact and Conclusions of Law Pursuant to CrR 6.1(d). CP 54.

Issues Pertaining to Assignments of Error

1. Where the statements made at the intake assessment were used for the adversarial purpose of defeating Curry's insanity defense, was the intake assessment a critical stage for which Curry had the right to counsel?

2. Where WSH forensic evaluator Simpler stimulated conversation about Curry's mental state at the time of the offense, did she deliberately elicit information about the crime charged, in violation of his right to counsel?

3. Is dismissal the sole adequate remedy here, where the prejudice resulting from the constitutional violation cannot be isolated in that it could have a continuing impact on any retrial?

C. STATEMENT OF THE CASE¹

1. Altercation on Route 7

Raymel Curry is appealing from a second degree assault conviction, based on an altercation that took place on a King County Metro bus on September 17, 2010. CP 1-8; 57-65, 80-89. The crux of the case was whether Curry was legally insane at the time he assaulted Howard Hui, whom Curry believed was threatening him “through his eyes.” CP 24; See also 5RP 133. There was no dispute among the defense and state’s experts that Curry was cognitively impaired and behaved “in a bizarre fashion.” 2RP 70; 5RP 34, 132, 164; 6RP 43.

¹ This brief refers to the transcripts as follows: 1RP – pretrial hearings 11/10/10 and 2/11/11, and sentencing 6/17/11; 2RP – pretrial hearing 5/17/11; 3RP – bench trial 5/18/11; 4RP – bench trial 5/19/11; 5RP – bench trial 5/23/11; 6RP – bench trial 5/24/11; and 7RP – findings 5/25/11.

The question was whether his bizarre behavior was the result of mental illness or attributable to voluntary drug use – the latter of which forecloses the availability of the insanity defense.² 5RP 22, 134, 174; 6RP 32-33.

Curry, who was thirty-two years old at the time of trial, reported to evaluators he started smoking “sherm”³ as a teenager and used the drug on a daily basis. 5RP 83, 135-136, 150. Curry later told evaluators he smoked two “sticks” the morning of the altercation. Id.; see also 5RP 47-48.

According to the bus video later obtained by police (3RP 63), Curry boarded the route 7 bus on Third Avenue by Benaroya Hall. 3RP 64, 90; 5RP 49. The bus was headed to South Jackson Street and on to Rainier Avenue. 3RP 64-65.

Dwyane Lyles boarded the bus on Rainier Avenue and South Dearborn Street. 3RP 67. As he walked to the back, he noticed a man, whom he later identified as Curry, rapping “just

² Voluntary intoxication cannot alone give rise to the insanity defense. State v. Wicks, 98 Wn.2d 620, 623, 657 P.2d 781 (1983). Alcohol and drug related insanity may be used as an insanity defense only when the influence of intoxicants triggers an underlying psychotic disorder of a settled nature, such as a delirium tremens. Wicks, 98 Wn.2d at 623.

³ “Sherm” is a cigarette or marijuana dipped in formaldehyde, which may be used to break down phencyclidine (PCP), which may be the active ingredient. 2RP 25; see also 5RP 134.

really out loud” in the back. 3RP 68-70, 77. Curry was rapping, “fuck this, fuck that” and said he was God. 3RP 69-70.

After Curry said he was God, Lyles turned to look at him. Curry reportedly said, “what are you looking at, with your hat on backwards?” 3RP 70. Lyles thought Curry was addressing him, until Curry got up, passed Lyles and gave a soliloquy to the bus camera, before turning to the Asian man seated to Lyles’ left, who was also wearing a baseball cap. 3RP 71.

According to Lyles, Curry said “What are you looking at and just what are you looking at and I’m going to fuck you up if you keep looking at me.” 3RP 71-72. At one point, possibly when speaking to the camera, Curry reportedly said: “I’ll beat your ass and I’ll wait for the boys to come. That’s not a threat, that’s a mother fucking decree.” 6RP 37 (closing by prosecutor); see also 3RP 72. But he also spoke of Santa Claus, reindeer, about being God, “and a lot of other things that make absolutely no sense.” 6RP 43 (closing by defense counsel); see also 5RP 35 (“I’m God, I’m Jesus”).

Lyles testified Curry “just basically said that I’m going to get you as soon as you get off the bus.” 3RP 72. Hui appeared not to understand what was going on. 3RP 72-73. As it turned out, Hui

was developmentally disabled due to contracting meningitis as a child. 4RP 28.

When the bus reached South McClellan Street, Hui got up to exit. 3RP 73. Curry got up behind him, pushing past another passenger. 3RP 73; 5RP 34. As soon as Hui got off the bus, Curry hit him with one punch to the jaw. 3RP 131; 4RP 36; 5RP 34, 145. Hui fell into a wall and then onto the pavement. 5RP 34. He suffered significant injuries to his face, including a gash to his forehead and broken jaw. 3RP 75, 117, 120.

1. Notice of Insanity Defense

In advance of trial, the defense gave notice of its intent to present an insanity defense. CP 15. Curry had been evaluated by Dr. Kenneth Muscatel, who opined Curry was suffering from mania associated with bipolar disorder at the time of the offense, which included the delusion that Hui was threatening him, leaving him no choice but to strike Hui first. CP 24. In that respect, Curry was unable to appreciate the wrongfulness of his conduct at the time of the offense. CP 18, 24-25.

As Muscatel would later testify at Curry's bench trial, the evaluation occurred while Curry while he was incarcerated at King County Jail, six weeks after the altercation, on November 4, 2010.

5RP 20. Curry told him he could read the victim's thoughts at the time of the assault and he was threatening him.⁴ 5RP 53. Although Muscatel was fully aware of Curry's chronic drug use, he attributed Curry's bizarre behavior to a delusional belief system associated with bipolar disorder as opposed to drug use. 5RP 29, 36-37, 68-69. Significantly, Muscatel saw lingering symptoms of mania during the evaluation, which accordingly, could not be attributed to drug use, as Curry had been incarcerated for approximately six weeks at the time. 5RP 29-30, 36-37, 39, 41, 43, 68-69.

Pursuant to Curry's insanity defense, the court entered an order committing him to Western State Hospital (WSH) for an evaluation by state's experts. The order specifically provided:

3. At Western State Hospital, the defendant shall be evaluated to determine whether he suffered from a mental disease or defect, including insanity and diminished capacity, at the time of the crime alleged in the information.

4. Consistent with RCW 10.77.020,^[5] the defendant requests that his attorney, Daniel Norman,

⁴ Curry told Muscatel Hui "was trying to smash me like a bug with his eyes." 5RP 53. As Curry described, "it's telepathy, the transfer of thoughts through the eyes; you might not see it unless you're in the mood feeling good[.]" 5RP 53. When asked what he meant by "looking through at you through his eyes," Curry said: "fuck you, you're shit, I will crush you, you shit, death with daggers through the eyes." 5RP 53.

⁵ Under RCW 10.77.020, "[a]ny time the defendant is being examined by court appointed experts or professional persons pursuant to the provisions of this chapter, the defendant shall be entitled to have his or her attorney present."

be present during this examination. The defendant's attorney may be present during this evaluation.

Supp. CP __ (sub. no. 25, Order Committing Defendant for Evaluation, 2/11/11).

2. Motion to Dismiss and/or Suppress Hearing

Upon receiving the WSH evaluation, the defense moved to dismiss the charge, or alternately, to exclude the state's expert witnesses on grounds they had violated Curry's right to counsel by conducting an evaluation without informing defense counsel. CP 26-49.

The motion was based on an "intake assessment" WSH evaluators conducted without counsel's knowledge:

Shortly after the court's Order [for the WSH evaluation] was signed, Dr. Amber Simpler called Mr. Curry's defense attorney and March 9th was selected as a mutually agreeable date for the evaluation to take place, with the presence of defense counsel. On February 23rd, Dr. Simpler sent an email to defense counsel confirming the March 9th evaluation date. No mention was made of any additional evaluation dates.

Mr. Curry was transported from King County Jail to WSH on February 23rd. According to Dr. Simpler's final report and notes, on February 24th, an "intake assessment" was conducted by Dr. Simpler along with a "multi-disciplinary team." At this "intake assessment," Mr. Curry was apparently interviewed by Dr. Simpler, based upon a review of Dr. Simpler's notes. (See attachment). Defense counsel was not informed of this intake interview and therefore was not present. On March 9th, the "official" evaluation of Mr.

Curry was conducted with the presence of defense counsel for Mr. Curry. Dr. Simpler conducted the majority of the interview along with her supervisor, Dr. Hendrickson.

CP 26-27 (Motion); see also CP 17 (Declaration).

According to Simpler's notes, during the "intake assessment," Curry reportedly described being able to read other people's thoughts, but with the caveat: "I have to be high." CP 29. This was a primary reason Simpler concluded Curry's bizarre behavior on the bus was attributable to drug use as opposed to mental illness. CP 29.

As summarized by defense counsel in his Motion to Dismiss:

In Dr. Simpler's final report, she quotes directly from Mr. Curry's answers given during the "intake assessment," such as the above quoted comment that Mr. Curry is able to read thoughts, but has to be high to do so. In addition, in her conclusion, she writes:

Mr. Curry related these hallucinatory experiences only occur when he has smoked sherm. Because his hallucinations are directly induced by his voluntary ingestion of sherm, it would appear that insanity as a defense is not a viable strategy for Mr. Curry at this time.

CP 29-30. Defense counsel argued the state should not be allowed "to exempt a court-ordered psychological evaluation from sixth amendment guarantees, . . . simply by deeming it an 'intake assessment.'" CP 29.

At the hearing held May 17, 2011, the state presented the testimony of: WSH psychologist Amber Simpler, who performed the "intake assessment," as well as the latter forensic evaluation; and WSH psychologist Ray Hendrickson, who supervised Simpler's work and participated in the forensic evaluation. 2RP 10, 31, 93.

Simpler testified the purpose of the intake assessment is two-fold: to formulate a working diagnosis; and to learn of any safety issues for the patient and staff. 2RP 12-13. Every patient admitted to the hospital undergoes an intake assessment. 2RP 13. Simpler testified she had never conducted an intake evaluation with counsel present. 2RP 36.

Typically present at the intake assessment is a psychiatrist, a forensic psychologist (such as herself), a social worker and registered nurse. 2RP 14. According to Simpler, the information gained assists each of the participants to perform his or her function at the hospital. 2RP 14.

Areas of inquiry at the assessment usually include the patient's current mental state and drug use. According to Simpler, WSH staff needs to know whether the individual is in danger of drug withdrawal. 2RP 15.

Simpler testified she does not typically read the defense expert's report in advance of the intake assessment, just the court's order of commitment. 2RP 16. Customarily, Simpler advises the patient not to discuss the offense, that the hospital will eventually provide a report to all parties, as well as the court, and admonishes the patient that anything he or she says could be included in that report. 2RP 17.

Simpler performed Curry's intake assessment on February 24, 2011. 2RP 18. Also present were Rana Khan, the staff psychiatrist, and a WSH pre-doctoral intern. 2RP 30. Simpler recalled asking about Curry's social history, substance abuse, psychiatric and medical history. 2RP 21. Simpler testified substance abuse history questions are relevant to diagnosis. 2RP 23. Curry reported smoking sherm, typically 4 sticks daily. 2RP 25.

The next topic of inquiry concerned the presence of psychotic symptoms, such as paranoia and hallucinations. 2RP 25. Simpler testified this area of inquiry was, again, relevant to formulating a diagnosis (and treatment of the patient) and safety issues. 2RP 26-27.

According to Simpler's notes, when asked about auditory or visual hallucinations, Curry indicated that "on one occasion he had

experienced hearing voices,” and volunteered “that this happened in 2009 and indicated that he was using sherm at the time, and he denied ever having visual hallucinations.” 2RP 28. Simpler also asked Curry about “special powers.” 2RP 28. Curry “indicated that he could read people’s thoughts.” 2RP 28. Simpler testified that when she restated what Curry said, he volunteered that “he can read other people’s thoughts mostly when he is high.” 2RP 29.

Simpler followed up with more questions, such as “how [is] the mechanism for that [sic], how do you do that, how do you read people’s thoughts?” 2RP 29. When Curry indicated he did not know, but “just believes it to be true,” Simpler asked him to provide examples. 2RP 29. Curry said he could hear “that crazy guy, nice guy, nice coat, lots of things.” 2RP 29. According to Simpler, Curry also volunteered: “it’s scary to read other people’s thoughts, that he has to be high to do this.” 2RP 29. When Simpler asked the “follow-up question, what’s scary about that,” Curry reportedly responded: “With a sherm high, you don’t know when you’re coming down.” 2RP 29.

The “forensic evaluation” occurred on March 9, 2011, with Simpler, Hendrickson, Curry’s attorney and possibly the pre-doctoral intern as well. 2RP 31. Simpler testified that upon reading

the defense report a day or two beforehand, she realized there was “some overlap” in information she had gathered at the intake and information she would need to complete her forensic evaluation. 2RP 32. Simpler acknowledged: “It became apparent, reading some of the discovery materials, that his sherm use was relevant in this particular case, so that would have been an overlap, and it’s certainly an issue that we re-evaluated or went over again during the second part of this evaluation.” 2RP 32 (emphasis added).

On cross-examination, Simpler acknowledged she had a telephone conversation with defense counsel prior to Curry’s arrival at WSH. 2RP 39. Simpler and defense counsel scheduled a mutually agreed-upon date for the evaluation. 2RP 39. Simpler also acknowledged she and defense counsel may have discussed that Curry’s drug use was an issue in the case. 2RP 40. Simpler admitted she did not mention there would be an intake evaluation. 2RP 40. In fact, it was her custom not to inform counsel prior to an intake evaluation that such would be occurring. 2RP 41. Simpler explained, “It’s a standard hospital procedure[.]” 2RP 41.

Simpler also acknowledged that discovery arrives at WSH a day before the patient arrives, including the court order indicating defense counsel wishes to be present, and in Curry’s case,

Muscatel's evaluation. 2RP 42-43. If she had so desired, Simpler could have read the report prior to the intake assessment. 2RP 44. Simpler also agreed that she would have known to "steer clear" of "some of the information [obtained] during intake that was going to overlap with your evaluation," had she read the discovery in advance. 2RP 45.

Simpler acknowledged further that, even during the "intake assessment," her job is as a forensic evaluator, not as a treatment provider. 2RP 50. In her words, "that's the psychiatrist's job." 2RP 50.

During the intake, Curry was asked whether sherm made him aggressive. 2RP 62-63. Simpler testified she wasn't sure whether she was the one who asked the question and she was "not really sure what they were getting at with that question." 2RP 63. Curry reportedly responded that people have said so, but he disagreed. 2RP 63.

As indicated in her report, cited in the defense motion to dismiss (CP 29-30), Simpler's testimony corroborated that she used information gained during the intake assessment in her final report. 2RP 64. She admitted she did not revisit the question of whether Curry ever heard voices apart from times he was using sherm:

Q (BY MR. NORMAN [defense counsel])
There's nothing in your notes that are as specific from the intake about whether or not the only time Mr. Curry can hear people's thoughts when he's on sherm?

A. I already obtained that information, so I didn't review it here, that's correct.

2RP 68-69.

Simpler testified that "Curry's statement that he had to be high before he could hear people's voices" was a prominent consideration in formulating her opinion. 2RP 71. If Curry had not said he had to be high to read other people's thoughts, Simpler might not have reached the same conclusion that drugs – as opposed to mental disorder – prompted his actions on the bus. 2RP 71-72. She also reiterated that she did not revisit the issue on March 9th, because she already obtained that information in February. 2RP 72.

Upon further questioning of Simpler on redirect, she testified her objective was to get the information needed, whether it was at intake or the later forensic evaluation:

A. Well, it's just kind of standard policies the way we do things when the person comes into the hospital. . . .

So – and so the purpose of that intake interview is so that everybody gets the same data, everybody is on the same page. My role is to get that

information. As I mentioned, if I had not been in on that day, I would have had to ask all of those questions again on the day of the forensic portion of the interview. So my role is to get data at that point, and certainly that information is used later.

Again if I were not there on the day that the admission interview occurred, I would have asked the exact questions on another day –

2RP 82-83.

At this point, the court interrupted and the following colloquy occurred:

THE COURT: But the information that you get at the intake interview that you say you will use later is used in the forensic evaluation; is that correct?

THE WITNESS: Yes, sir.

THE COURT: Do you use it in any other way?

THE WITNESS: Me personally?

THE COURT: Yes.

THE WITNESS: Well, that's not my role, so no. The information I would use is to help that first prong in understanding if this person suffers from a mental disease or defect.

2RP 83.

Psychologist Hendrickson did not take part in Curry's "intake assessment." 2RP 105. However, he had access to Simpler's notes and engaged in discussions with her about the case and the intake assessment. 2RP 105.

It was Hendrickson's recollection that during the March forensic evaluation, Curry indicated his "special powers," i.e. relating to reading other people's thoughts, was specific to sherm use. 2RP 108, 140. Hendrickson did not believe Curry indicated he had this power at other times: "To my knowledge, no, he did not. I think it was specific to being high on sherm or after using sherm, and he used the word hear the thoughts." 2RP 108. Hendrickson opined Curry was deluded at the time of the offense, but that it was drug-induced, rather than the result of mental illness.⁶ 2RP 110.

On cross-examination, Hendrickson admitted that even if he weren't part of the intake evaluation, he would consider the intake in reaching his ultimate forensic opinion: "the better practice is to have the person, the same person who does the evaluation, participate in all the interviews because it gives them more information." 2RP 132.

Before ruling on the defense motion, the court noted a "systemic problem" with WSH and its intake interviews:

⁶ Hendrickson was also aware – in concurring with Simpler's opinion – that Curry had reportedly related at the intake assessment that he only heard voices or read people thoughts when he was on sherm. 2RP 138-139.

THE COURT: Okay. I would say – I just wanted to add a comment, because I am concerned about the way – regardless of how this comes out, I'm concerned about the way some of the questioning happened at the intake interview, particularly the statement that was attributed, I took my notes from Mr. Norman's argument, rather than back finding them in my own notes, but that this morning's witness testified that the goal was to get the data so I don't have to ask it again in the forensic evaluation.

Now, that to me implicates that language in Everybodytalksabout,⁷ where you cannot use a non-Sixth Amendment protected proceeding to obtain information that you're going to use in a proceeding that's protected by the Sixth Amendment. That seems to me, if that quote is a correct quote, that seems to me exactly what she was saying. That's a problem. I mean it may not – I mean that's – that's a systemic problem.

2RP 181-182.

Nonetheless, in the end, the court denied the motion to dismiss and/or suppress in its entirety, reasoning that there was a reasonable basis for the questions asked, namely, relating to diagnosis and safety. 2RP 191-192. The court found no deliberate attempt to stimulate conversation about the crime in question. 2RP 192.

⁷ State v. Everybodytalksabout, 161 Wn.2d 702, 166 P.3d 693 (2007) (unrepresented defendant's statements in presentence interview could not constitutionally be used to convict him in subsequent retrial).

3. Bench Trial

As indicated above, Muscatel testified he concluded Curry's behavior was more consistent with an underlying mental disorder, exacerbated by drug use, than simple drug use. 5RP 36-39, 49-56, 66, 68-69. In his opinion, Curry suffered from a mental illness at the time of the offense, and a delusional belief system that caused him to believe it was necessary to strike Hui first in order to protect himself. 5RP 53-54. Muscatel opined Curry met the criteria for legal insanity at the time of the offense. 5RP 56-59, 78.

Although Hendrickson acknowledged many of Curry's behaviors during the offense (5RP 162-63), and even while at WSH (5RP 173), were consistent with a manic phase of bipolar disorder, he disagreed that Curry suffered from mental illness. 5RP 149-50. Hendrickson opined Curry's bizarre behavior on the bus was more consistent with acute or chronic drug use, and Curry therefore did not meet the criteria for legal insanity at the time of the offense. 5RP 134, 149.

The court found Hendrickson more credible than Muscatel and convicted Curry of second degree assault. 7RP 8.

D. ARGUMENT

THE INTAKE ASSESSMENT VIOLATED CURRY'S SIXTH AMENDMENT RIGHT TO COUNSEL.

Whether there is a systemic problem with the way WSH conducts its evaluations, the intake assessment here was part and parcel of the forensic evaluation, as clearly evidenced by Simpler's and Hendrickson's testimony. Whether it will create an inconvenience to the hospital to provide an opportunity for counsel's presence at the intake assessment when counsel's presence is requested at the court-ordered evaluation, the accused's right to counsel must be honored. When an accused exercises his right to have counsel present at the court-ordered evaluation, as is his statutory and constitutional right, his counsel must be provided the opportunity to attend the *entire* evaluation, not just the second part of it,⁸ regardless of what it called. A "[r]ose is a rose is a rose is a rose." See Alston v. Alston, 331 Md. 496, 515, 629 A.2d 70, 80 (1993), quoting Gertrude Stein, *Sacred Emily* (1913).

Here, the hospital's forensic evaluators provided no such opportunity. As will be argued infra, the intake assessment was a

⁸ See e.g. 2RP 32, where Simpler refers to the forensic evaluation as "second part of this evaluation."

“critical stage” of the proceedings and Simpler deliberately elicited information about the offense. The intake assessment therefore violated Curry’s Sixth Amendment right to counsel. The court erred in concluding otherwise.

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, 97 S.Ct. 1232. The accused need not make an affirmative request for assistance of counsel. Id. at 404, 97 S.Ct. 1232.

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 Wash.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, 87 S.Ct. 1926.

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 Wash.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, 124 S.Ct. 1019.

“[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)).

1. The Intake Assessment Was a Critical Stage

A court ordered psychological evaluation is a “critical stage” for purposes of a defendant’s right to counsel under Washington law:

We hold a court-ordered psychiatric examination is a “critical stage” in a criminal prosecution, which gives rise to the right to counsel. Where the examination is in response to a plea of insanity or a claim of diminished capacity, however, the right to counsel is limited. Counsel may be present, but his attendance is strictly as an observer rather than an active participant. This precaution allows for an unhampered psychiatric examination and provides counsel with a firsthand observation necessary for effective cross examination. It is similar to counsel's presence at a police line up. United States v. Crouch, 478 F.Supp. 867 (E.D.Cal.1979); see also 13 R. Ferguson, Wash.Prac., Criminal Practice and Procedure § 2810, at 79 (1984).

State v. Nuss, 52 Wn. App. 735, 741, 763 P.2d 1249 (1988). This constitutional right is also codified in RCW 10.77.020(3) (“Any time the defendant is being examined by court appointed experts or

professional persons pursuant to the provisions of this chapter, the defendant shall be entitled to have his or her attorney present”).

As defense counsel argued below, the state should not be allowed to circumvent the right to counsel by characterizing a forensic evaluation as an “intake assessment.” As indicated in the above-cited cases, the key issue is whether the “intake assessment” qualified as a “critical stage” in order for the right to counsel to have attached. As that term has been defined by our state Supreme Court, the intake assessment here – as the trial court initially seemed to recognize – qualified as a “critical stage.” State v. Everybodytalksabout, 161 Wn.2d 702, 166 P.3d 693 (2007).

Darrell Everybodytalksabout sought review of a court of appeals decision affirming his conviction for felony murder. He argued his Fifth and Sixth Amendment rights were violated when incriminating statements he made to a corrections officer during a presentence interview were used in a subsequent proceeding, after his conviction was reversed on appeal and remanded for a new trial. Everybodytalksabout, 161 Wn.2d 705-706.

Following his initial conviction in 1997 (that was later reversed), the court ordered a presentence investigation report.

Defense counsel was copied on the order. The report was prepared by corrections officer Diane Navicky. Everybodytalksabout, 161 Wn.2d at 705.

As part of her routine procedure, Navicky interviewed Everybodytalksabout in the King County Jail. She did not contact Everybodytalksabout's attorney before conducting the interview; now did she know whether Everybodytalksabout had advance notification of the date of the interview. Id. at 706.

After some preliminary questions, Navicky invited Everybodytalksabout to talk about his offense. In her presentence investigation report, Navicky wrote that Everybodytalksabout admitted that he assisted in the robbery but would not comment further. Navicky did not attempt to detain Everybodytalksabout or continue the interview. Id.

At his retrial following a successful appeal of his felony murder conviction, the state was allowed to elicit Everybodytalksabout's statements to Navicky. Although Everybodytalksabout objected the statements were obtained in violation of his right to counsel, the trial court disagreed, reasoning that 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. Id. at 706-707.

In concluding that the presentence interview was indeed a “critical stage” of the proceedings, the Supreme Court focused on how the statements were used:

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

Everybodytalksabout, 161 Wn.2d at 712.

Applying this standard to Curry’s case, the statements Curry made during the intake assessment were likewise used for the adversarial purpose of convicting him and the intake assessment therefore constituted a critical stage of the proceeding. As indicated above, Curry reportedly told Simpler – in response to her questioning – that he has to be high in order to read people’s thoughts. 2RP 29. This was a prominent consideration by Simpler in formulating her opinion that Curry’s bizarre behavior was the result of voluntary drug use, as opposed to mental illness, which the state subsequently used to defeat Curry’s insanity defense and thereby convict him. While not part of the state’s case-in-chief, it

became a necessary part of the state's case to convict Curry. In other words, it was used for the adversarial purpose of convicting him at trial. The intake assessment here was as much of a critical stage as the presentence interview in Everybodytalksabout. See e.g. Estelle v. Smith, 451 U.S. 454, 467, 101 S. Ct. 1866, 68 L. Ed. 2d 694 (1981) (pretrial psychiatric evaluation to determine future dangerousness constituted critical stage where psychiatrist who conducted the examination ultimately testified at penalty phase of defendant's trial).

2. Simpler Stimulated Conversations About the Crime Charged.

The next question is whether Simpler "deliberately elicited" Curry's statements that he had to be high in order to read other people's thoughts. The answer should be a resounding yes. Under Sixth Amendment analysis, the government agent need only "stimulate conversations about the crime charged" to "deliberately elicit" incriminating statements. Randolph v. California, 380 F.3d 1133, 1144 (9th Cir. 2004) (quotation omitted).

Simpler more than stimulated conversations about the crime charged. She was put on notice Curry's drug use was an issue in the case. 2RP 40. Moreover, her questions were designed to elicit

information about Curry's potential mental illness or diminished capacity, which was the point of the court-ordered evaluation to begin with. Simpler acknowledged that even during the intake assessment, her job is as forensic evaluator, not as a treatment provider. 2RP 50. She also testified her objective was to get the information needed, whether it was at the intake or the later forensic evaluation. 2RP 82-83. As Simpler explained: "if I had not been in on that day [intake], I would have had to ask all of those questions again on the day of the forensic portion of the interview. So my role is to get data at that point, and certainly that information is used later." 2RP 82-83. When the court interrupted to ask whether that meant information gained at the intake would be used in the forensic evaluation, Simpler did not hesitate in answering, "Yes, sir." 2RP 83. Hendrickson corroborated that as an evaluator, he would also consider information obtained at the intake as part of ultimate forensic opinion. 2RP 132.

It is clear that it is standard operating procedure for WSH forensic evaluators to obtain as much information as possible at the initial intake assessment for later use in the official "forensic" evaluation. Where the crux of the case boils down to the accused's mental state at the time of the offense, this pattern of practice, as

evidenced in this case, amounts to stimulating conversation about the crime for which the accused is charged. Because Curry had exercised his right to have counsel present for this critical stage of the proceedings, Simpler's questioning violated Curry's Sixth Amendment right to counsel.

3. Dismissal Is the Appropriate Remedy

As indicated, "Curry's statement that he had to be high before he could hear people's voices" was a prominent consideration for Simpler in formulating her opinion. 2RP 71. If Curry had not said he had to be high to read other people's thoughts, Simpler might not have reached the same conclusion that drugs – as opposed to mental disorder – prompted Curry's actions on the bus. Simpler also reiterated that she did not revisit the issue on March 9th, because she already obtained that information in February. 2RP 72.

Although it was Hendrickson who ultimately testified at trial, he had access to Simpler's notes and engaged in discussions with her about the case and intake assessment. 2RP 105. His testimony at the motion hearing was somewhat equivocal as to whether Curry indicated on March 9th that his "special powers" were specific to being high on sherm. 2RP 110. And Simpler testified

she did not revisit the issue at the March 9th evaluation. Accordingly, Hendrickson's opinion was influenced by Curry's reported statements to Simpler during the intake assessment. For this reason, there is no way to isolate the prejudice resulting from Simpler's violation of Curry's right to counsel.

There is clear precedent supporting a trial court's discretion to dismiss criminal charges for violating a defendant's Sixth Amendment and related statutory rights. The seminal case in this area is State v. Cory, 62 Wn.2d 731, 382 P.2d 1019 (1963). In Cory, the trial court had excluded evidence based upon the state's violation of the defendant's Sixth Amendment rights relating to attorney-client privilege. The Supreme Court reversed the trial court's exclusion of evidence and instead found that the appropriate remedy was dismissal of the charges:

There is no way to isolate the prejudice resulting from an eavesdropping activity, such as this. If the prosecution gained information which aided it in the preparation of its case, that information would be as available in the second trial as in the first.

State v. Cory, 62 Wn. App. at 377; see also State v. Perrow, 156 Wn. App. 322, 231 P.3d 853 (2010) (dismissal affirmed where police violated attorney-client privilege in seizing notes Perrow wrote to his attorney).

E. CONCLUSION

For the reasons stated above, dismissal is the sole adequate remedy for the state's violation of Curry's Sixth Amendment rights. Assuming arguendo this Court disagrees that the prejudice from Simpler's evaluation cannot be isolated, Curry alternatively seeks suppression of Simpler's and Hendrickson's opinions and testimony at any retrial. Everybodytalksabout, 161 Wn.2d at 714 (reversing and remanding for retrial without Everybodytalksabout's incriminating statements from the presentence investigation).

Dated this 5th day of March, 2012.

Respectfully submitted

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 67409-9-1
)	
RAYMEL CURRY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 5TH DAY OF MARCH 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RAYMEL CURRY
DOC NO. 821654
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF MARCH 2012.

x *Patrick Mayovsky*

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STATE OF WASHINGTON
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