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NO. 67409-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

RAYMEL CURRY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

SAMANTHA D. KANNER
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. A defendant has a Sixth Amendment right to have counsel present at every "critical stage" of the proceedings. A "critical stage" is a stage where counsel's absence might derogate from the accused's right to a fair trial. A forensic psychology fellow and staff psychiatrist conducted an intake assessment of the defendant, Raymel Curry, without the presence of counsel, upon his admission to Western State Hospital. The assessment served the dual purposes of formulating a working diagnosis for the treatment of Curry during his stay and learning of any safety issues that might concern Curry, other patients and hospital staff. Did the trial court correctly find that the intake assessment was not a critical stage of the proceedings?

2. The Sixth Amendment is violated only when the State "deliberately elicits" incriminating statements from the accused in the absence of defense counsel. In order to meet the "deliberately elicited" standard, the government agent must have made some effort to stimulate conversation about the crime charged. Curry's counsel was not present for the intake assessment where Curry was informed not to discuss, and did not discuss, the charged offense. In response to questioning, however, Curry made

statements that linked his belief that he could read people's minds to his drug use. These intake statements were not specifically used to rebut his insanity defense as Curry made similar statements at a forensic interview in the presence of defense counsel. Did the trial court correctly find that incriminating statements were not "deliberately elicited" from Curry during the intake assessment?

3. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that the finder of fact would have reached the same result absent any error. As the right to counsel in a psychological interview is limited to presence and disallows participation, counsel's presence at the intake assessment could not have altered the State's rebuttal evidence. Further, the testimony offered by the State to rebut Curry's insanity defense did not reference any statements Curry had made during the intake assessment. Where the finder of fact, in reaching its verdict, did not rely on any information obtained in violation of the Sixth Amendment, was any error in conducting an intake assessment outside the presence of counsel harmless beyond a reasonable doubt?

4. The remedy for a harmful violation of the Sixth Amendment is remand for retrial without the use of the incriminating

statements obtained during counsel's absence. The extraordinary remedy of dismissal is only appropriate where prejudice cannot be remedied by granting a new trial. If Curry's intake assessment constituted a harmful violation of the Sixth Amendment, this Court can remand and specifically delineate what information may not be used in a retrial. Where prejudice can be prevented by limiting the State's rebuttal evidence at retrial, is the extraordinary remedy of dismissal inappropriate?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Curry was charged by Information with Assault in the Second Degree. CP 1. The State alleged that, on September 17, 2010, Curry struck Howard Hui, a mentally disabled man, causing substantial bodily harm. CP 3-7. Curry waived his right to a jury trial and proceeded by way of a bench trial in front of Judge Richard Eadie. CP 50. Judge Eadie found Curry guilty of Assault in the Second Degree and made oral findings of fact. 7RP 2-13.[1] The court also found that Curry had not proved the defense of insanity

[1] This brief refers to the verbatim report of proceedings in accordance with the system set out in App. Br. at 3 n.1.

by a preponderance of the evidence. Id. Judge Eadie later signed and entered written findings of fact and conclusions of law. CP 52-55.

2. SUBSTANTIVE FACTS.

On September 17, 2010, at approximately 11:15 a.m., defendant Raymel Curry boarded a Route 7 King County Metro bus in downtown Seattle in front of Benaroya Hall. Ex. 1; 3RP 90. The bus was traveling southbound toward the Rainier Valley neighborhood. Ex. 1; 3RP 64. The bus was equipped with seven cameras that recorded video and audio (the front-most camera did not record audio). Ex. 1; 3RP 62. Curry's entire bus ride was captured on the video system and his voice is audible throughout much of the ride. Ex. 1. Curry was seated in the second-to-last row of the bus. Id. He could be seen and heard speaking and rapping loudly along with music coming from a personal music player. Ex. 1; 3RP 68-70. Other people seated on the bus turned to look at Curry, and a few people changed seats presumably due to Curry's loud and disruptive behavior. Ex. 1; 3RP 69.

About ten minutes later, Howard Hui boarded the bus in the Chinatown neighborhood of Seattle and sat two rows in front of

Curry. Ex. 1; 3RP 63, 90. Hui is a 57-year-old mentally disabled man who does not speak English. 3RP 98; 4RP 28, 34. Hui contracted meningitis as a child, which impaired his intellectual functioning. 4RP 28.

While Hui was on the bus, Curry continued his loud verbal behavior and also clapped loudly. Ex. 1; 3RP 129-30. Hui turned around and looked at Curry. Id. In response, Curry yelled at Hui and got up from his seat. Ex. 1; 3RP 69-71. Curry then approached Hui, who was still seated on the bus, and verbally confronted Hui by yelling in his face. Ex. 1; 3RP 73. Hui did not respond to Curry's statements, challenges, profanity and threats, and did not appear to understand what was going on. Ex. 1; 3RP 72-73.

During the verbal tirade against Hui that lasted approximately ten minutes, Curry looked directly into two of the on-bus cameras and stated that he was going to punch Hui on camera. Ex. 1; 3RP 71. Curry also stated that he did not care if he would "catch an assault four," that he would "wait for the police to come," that he would "go to jail," and that he would "take the case to trial and tell the jury he slapped [Hui]." Ex. 1.

When Hui was exiting the bus at the intersection of Rainier Avenue and McClellan Street in South Seattle, Curry followed him. Ex. 1; 3RP 73, 131. Just after Curry exited the bus, he struck Hui in the head from behind. Id. Hui immediately fell into the side of the adjacent building and then to the ground. Ex. 1; 3RP 132. Curry fled the area. Id. As this interaction happened right outside the front door of the bus, it was captured on the bus's video system (although no audio was captured). Id.

Hui suffered significant physical injuries, including a large gash across his head, a fractured jaw and cheek bone, and a fractured orbital floor (bottom of the eye socket). 3RP 75, 117, 120. The gash had to be stitched closed at the hospital, and the fractured jaw and cheek bone required surgery to repair. Id.

Curry was initially identified by circulating still frames from the video to law enforcement in the area, and then identified by two witnesses using photomontages. 3RP 93-95. A week after the incident Curry was arrested in Kent, Washington. 3RP 102-04. After reading Curry his Miranda[2] warnings, Detective Jason Escobar of the King County Sheriff's Office showed Curry a picture

[2] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

of the victim's injuries and asked Curry why he had struck the victim. 3RP 105-06. Curry responded, "The most frivolous reason." Id.

3. PRETRIAL TESTIMONY OF DOCTORS SIMPLER AND HENDRICKSON.

In order to address Curry's motion regarding an alleged Sixth Amendment violation, the State called two witnesses to testify in a pretrial hearing. The first witness was Dr. Amber Simpler, a forensic psychology post-doctoral fellow who was doing a fellowship at Western State Hospital (WSH). The second witness was forensic psychologist Dr. Ray Hendrickson who is an employee of WSH and supervises Dr. Simpler.

Dr. Simpler participated in the February 24, 2011 intake assessment at issue in this case and also participated in the March 9, 2011 forensic evaluation. Dr. Hendrickson participated only in the March 9th evaluation where defense counsel was present. Doctors Simpler and Hendrickson co-authored a forensic evaluation report regarding Curry's mental status at the time of the charged offense. 2RP 34. Dr. Hendrickson was called by the State as a rebuttal witness at trial. Dr. Simpler did not testify at trial.

a. Process And Purpose Of Intake Assessments.

In pretrial testimony, both Dr. Simpler and Dr. Hendrickson explained the process and purpose of intake assessments. 2RP 12-21, 97. An intake assessment at WSH, much like an intake screening at a medical hospital, is an admission procedure through which staff verbally obtain historical information from a patient. 2RP 13, 97. Regardless of the reason for a patient's admission to WSH, all patients participate in this admission procedure. Id. An intake assessment is usually attended and conducted by a multidisciplinary team that often includes a psychiatrist, a psychologist, a social worker and a registered nurse. 2RP 14-15.

Administratively, an intake assessment is a mandatory part of the admission procedure at WSH. 2RP 13. The underlying purpose of the intake is twofold: to obtain information from the patient in order to develop a working diagnosis to determine the course of treatment during the stay at WSH, and to learn of any safety issues that may arise by the patient's admission so that the hospital can ensure the safety of all patients and staff. 2RP 13, 97. In order to serve these goals, every patient being admitted to WSH is asked about social (family, education, and employment), medical, psychiatric, and substance abuse history. 2RP 14, 98-99.

Prior to an intake assessment, a forensic psychologist does not typically review the discovery materials, including any prior forensic reports, as they receive those materials only the day before the patient's admission. 2RP 16. However, they normally review the court order directing an evaluation to determine what type of evaluation is being requested. Id.

Upon initiating an intake assessment with a patient in a criminal context, the forensic psychologist provides a standard notification to the patient that an evaluation has been ordered by the court, that a report will be provided to the judge, the prosecutor and the defense attorney, and that *anything the patient says and does* at WSH may be included in the report. 2RP 16-17. The patient is also informed that the doctors do not want to discuss the charged offense. 2RP 16, 103. Further, the patient is reminded that he has the right to have his attorney present for the forensic evaluation, and that the patient should let the doctors know if he wants to have his attorney present so that WSH can make arrangements for that to happen. 2RP 19.

A forensic psychologist is present for and participates in an intake assessment. 2RP 99. Although forensic psychologists do not treat patients, they are required to be present and, if necessary,

consult with the treatment team (usually the staff psychiatrist) as a patient's diagnosis determines what treatment will be provided by WSH. 2RP 83-84, 99-101.

At the intake assessment, if a patient attempts to speak about the charged offense, the forensic psychologist will stop the patient from discussing it. 2RP 103-04. Further, if one of the other members of the multidisciplinary team improperly asks about the charged offense, or an ill-phrased question prompts the patient to speak about it, the forensic psychologist will stop the patient and rephrase the question to ensure there is no discussion of the charged offense. 2RP 104-05. Unlike the other members of the team, the forensic psychologist understands the legal significance of offense-specific discussion. Id.

b. Dr. Simpler's Pretrial Testimony.

i. Dr. Simpler's account of the February 24th intake assessment.

Dr. Simpler, along with the staff psychiatrist, Dr. Rana Khan, conducted the intake assessment of Curry on February 24, 2011. 2RP 30-31. A pre-doctoral psychology intern was also present. 2RP 30. Dr. Simpler and/or Dr. Khan gave Curry the standard

notification described above. 2RP 16-17. Because the referral was for an insanity evaluation, Dr. Simpler explicitly told Curry that they did not want to discuss the charged offense and that those events would be discussed at a later date. 2RP 20. After the notification, the doctors asked Curry questions about the various topics outlined above. 2RP 21.

During a discussion about substance abuse, Curry told the doctors that sherm[3] was his favorite substance. 2RP 22. Dr. Khan then asked Curry what his next favorite substance was and continued through each drug Curry endorsed. 2RP 22-23. The doctors then proceeded to ask Curry about his history with each drug and whether he experienced withdrawal symptoms or blackouts with any of the drugs. 2RP 23-24. With regard to sherm, Curry indicated that on an average day he probably used four sticks of sherm. 2RP 25. He also indicated that he has blacked out from sherm use and alcohol use, but that he cut back on alcohol after he began blacking out. 2RP 24.

Next, Curry was asked about psychotic symptoms (paranoia, hallucinations, and beliefs regarding special powers). 2RP 25.

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[3] Sherm is a hallucinogenic drug. A sherm stick is generally understood to be a tobacco cigarette or a marijuana cigarette that has been dipped in PCP and embalming fluid. 2RP 25; 5RP 134.

Dr. Simpler explained that questioning about psychotic symptoms is important to ask upon intake in order to diagnose mental illnesses such as schizophrenia or schizoaffective disorder, and for the treatment of the patient using prescription medications. 2RP 16, 27. She also explained that it is important to ask about these things to find out if a person "has any beliefs that could cause them to have concerns or act in a way that could be harmful to themselves or harmful to other people." 2RP 27.

When asked if he was concerned that people were following him or out to get him, Curry denied any symptoms of paranoia. 2RP 25, 27. Curry was next asked about auditory and visual hallucinations. 2RP 27. When asked if "you ever have experiences where you hear or see things that other people can't hear or see[?]" Curry indicated that he had experienced hearing voices and volunteered that it only happened on one occasion when he was high. 2RP 27-28. Curry denied visual hallucinations. Id.

Dr. Simpler then asked Curry what kind of special powers he had. Curry responded that he could read people's thoughts. 2RP 28. Dr. Simpler restated Curry's statement in question form and asked, "you can read people's thoughts[?]" 2RP 28-29. Curry

responded that he could not read Dr. Simpler's thoughts[4] and then volunteered that he can read other people's thoughts, mostly when he is high. 2RP 29. Dr. Simpler then asked how Curry reads people's thoughts. Id. Curry responded that he did not know how but that he believes he can. Id. Curry explained that he has never tested whether he is actually reading people's thoughts. Id. When asked for examples of things he would hear, Curry said he would hear things like "crazy guy, nice coat, lots of things." Id. He also volunteered that "it's scary to read people's thoughts, that he has to be high to do this." Id. When Dr. Simpler asked what was scary, Curry responded, "with a sherm high, you don't know when you're coming down." Id.

During the intake, Curry was never questioned about events of the charged offense or anything surrounding the events of the charged offense. 2RP 10-93. He was never questioned regarding drug use or any symptoms related to the date of the charged offense or the days surrounding the charged offense. Id. Nor did Curry volunteer any such information during the intake. Id. After the intake, Dr. Simpler had a brief consultation with the treating

[4] The transcript reads "well, not mind" but should read "well, not mine" as Dr. Simpler testified at trial. 2RP 29.

psychiatrist, Dr. Khan, regarding a possible diagnosis of substance-induced psychosis. 2RP 85-89.

ii. Dr. Simpler's account of the March 9th forensic evaluation.

On March 9, 2011, Dr. Simpler and Dr. Hendrickson conducted a forensic evaluation of Curry with other persons present as observers. 2RP 31. The observers included defense counsel and a pre-doctoral psychology intern, and possibly other hospital trainees. Id. Prior to the evaluation but after the intake, Dr. Simpler reviewed the discovery materials for this case. 2RP 32-33. After reviewing these materials, Dr. Simpler became aware that some of the data obtained at the intake would likely be discussed again. 2RP 32-33. Dr. Simpler opined that Curry's sherm use was potentially relevant to his mental status at the time of the charged offense. Id. Because of this, Curry's sherm use was re-evaluated and discussed further in the March 9th evaluation. Id.

More important, and discussed for the first time in the March 9th evaluation, was Curry's use of sherm and how he experienced the effects of this drug on the date of the charged

offense. 2RP 33-34. Curry again explained that he could read other people's thoughts only when he was using sherm. 2RP 35.

During cross examination, defense counsel asked Dr. Simpler if she recalled speaking with him prior to Curry's arrival at WSH. 2RP 39. Dr. Simpler stated that she did recall speaking with counsel and confirming the evaluation date. Id. Defense counsel also asked if Dr. Simpler recalled counsel having mentioned that Curry's drug use might be an issue in the case. Id. Dr. Simpler stated that she did not recall having that discussion but that it was possible that it occurred. Id. Dr. Simpler admitted that she did not specifically mention an intake assessment to defense counsel but explained that she understood it to be a standard procedure at any hospital. 2RP 40-41.

Curry is mistaken when he asserts that, at the March 9th evaluation, Dr. Simpler "did not revisit the questions of whether Curry ever heard voices apart from times he was using sherm." App. Br. at 14, 15. Dr. Simpler conceded only that her March 9th notes were not as extensive on that issue. 2RP 66-69. In fact, Dr. Simpler specifically testified, on redirect examination, to the following conversation that she and Dr. Hendrickson had with Curry at the March 9th forensic evaluation:

> A. Well, I asked him what he's like when he's using sherm, and he says, it's out of this world. [Court interrupted momentarily]
> When he said, it's out of this world, I followed up, tell me more about that...He added or he noted, when asked about benefits, he said that he can hear people's thoughts.
>
> Q. Let me stop you there. So he attributed that benefit of reading people's thoughts directly to questioning about sherm use?
>
> A. Yes.

2RP 73-74. When the prosecutor clarified, "So in your March 9th, 2011 interview, there is a direct endorsement that the powers that he has exist when he is on sherm?" Dr. Simpler responded, "Correct." 2RP 75.

On appeal, Curry states that Dr. Simpler agreed that she would have "steered clear" of certain questions at the intake had she known them to be relevant to the forensic evaluation. App. Br at 14. This is a gross mischaracterization of the record. On cross examination the following exchange took place:

> Q: So presumably if that information had been read prior to the intake, you would have known to steer clear of those questions or to contact the defense attorney.
>
> A: Yes.

Q: Does that make sense?

A. Well, yes and no.[5]

2RP 45.

When later discussed on cross examination, Dr. Simpler explained that it is unavoidable for the doctors at intake to obtain information that might be relevant to a forensic opinion, as both involve a determination of whether the patient suffers from a mental disease or defect. 2RP 48-49. For example, in redirect examination, Dr. Simpler explained that even if she knew substance abuse might be a relevant issue for the forensic evaluation, a patient would still have to be asked about substance abuse at intake because it is necessary for WSH to know that information upon admission. 2RP 79. While Dr. Simpler admitted that she referenced the intake information in the forensic report, she explained that she would have reached the same opinion regarding Curry's insanity defense even if she did not consider the information obtained during the intake assessment, as Curry gave

[5] As is apparent from the follow-up question, there must have been a non-verbal cue, not adequately captured by the record, that Dr. Simpler's first answer was equivocal or that she was confused by the initial question. Curry's brief importantly mischaracterizes Dr. Simpler's testimony as agreement by not explaining how the question was posed, by omitting any reference to the follow-up question and answer, and by the failure to reference her later testimony.

the same information regarding his special powers on both dates. 2RP 34.

c. Dr. Hendrickson's Pretrial Testimony.

Dr. Hendrickson testified that he was present for the March 9th forensic evaluation, but not present during the intake assessment. 2RP 105. With the assistance of his notes, Dr. Hendrickson recounted that Curry told the doctors that sherm caused him to be high or spaced out. Dr. Hendrickson relayed Curry's description of the effects of sherm as follows:

> A.[I]t's like a displacement out of body, gives him the sense of [in]vincibility or ability to do just about anything he tries. It gives him a sense of awareness and power. It gives him almost an ability to read people's thoughts or to hear people's thought, not to read, but to hear them, actually hear the thoughts, and he said it was very useful for him when he was carrying out his gambling and that he would do-- earn money on the street.
>
> Q. And the hearing people's or reading people's thoughts, however he expressed it, that was specific to when he's on sherm; is that fair to say, that that was clear to you?
>
> A. That's what he said, yes.

2RP 107-08. When the prosecutor asked whether Curry had indicated that he had that power at any other time, Dr. Hendrickson

responded that Curry attributed it specifically to being high on sherm or after using sherm. 2RP 208.

It was only at the March 9th evaluation that Curry spoke about his sherm use at the time of the charged offense. 2RP 66, 109. Likewise, it was at the March 9th evaluation that Curry explained that he could hear the victim's thoughts at the time. 2RP 108. Dr. Hendrickson noted that Curry's March 9th admission to being on sherm during the incident and his resulting ability to hear people's thoughts was a factor used in determining whether Curry suffered from a substance-induced or mental-illness-induced delusion at the time of the offense. 2RP 109. Dr. Hendrickson stated in pretrial testimony that his opinion would not have been different even if he excluded the information obtained at the intake assessment. 2RP 110-12.

In direct examination, Dr. Hendrickson was asked to assume, hypothetically, that Curry suffered from a mental disease or defect that caused a delusion at the time of the offense. 2RP 112-13. When asked about his opinion regarding the second prong of the insanity defense (discussed further in argument below), he maintained that Curry had the capacity to know right from wrong with respect to the assault on Hui. 2RP 113. While

Dr. Hendrickson's opinion of Curry's capacity to appreciate wrongfulness took Curry's March 9th description of the offense into consideration, the doctor noted that it was primarily supported by Curry's acts and words that were captured on video. 2RP 113-14.

C. ARGUMENT

Curry contends that the trial court erred in denying his motion to dismiss charges or, alternatively, suppress the State's rebuttal testimony from Dr. Hendrickson at trial. He maintains that the State violated his Sixth Amendment right when doctors at WSH interviewed him without his attorney present during the intake assessment upon admission to the hospital. Curry argues that the intake assessment was a critical stage of the proceedings, and that the doctors deliberately elicited information that was later used against him at trial in rebuttal testimony.

These claims fail. In denying Curry's motion to exclude his statements under the Sixth Amendment, the trial court properly held that the intake assessment was not a critical stage of the proceedings, as it was not adversarial in nature and did not impact Curry's right to a fair trial. Further, the court held that doctors did not deliberately elicit incriminating statements, as there was no

questioning about or discussion of the charged offense. These rulings, based in part on the court's credibility determinations in the pretrial hearing, should be upheld in this appeal. Even if the doctors violated Curry's Sixth Amendment right to counsel, any error resulting from defense counsel's absence was harmless beyond a reasonable doubt; counsel's presence would not have altered the testimony, and the court did not rely on any information obtained outside counsel's presence in reaching its verdict. Further, even if the alleged error cannot be found to be harmless, dismissal is not the appropriate remedy.

The appellate court reviews a trial court's decision on the admissibility of evidence under an abuse of discretion standard. The trial court's decision will be upheld unless it is manifestly unreasonable or is based upon untenable grounds or reasons. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). The trial court's credibility determinations are not subject to review on appeal. In re Personal Restraint of Benn, 134 Wn.2d 868, 910, 952 P.2d 116 (1998). However, whether a proceeding is a "critical stage" is a question of law subject to *de novo* review. See State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011) (reviewing *de novo* whether email agreement to strike prospective jurors was a "critical

stage" at which defendant had a right to be present). Likewise, whether the State deliberately elicited incriminating statements from Curry is also a legal question, which the appellate court reviews *de novo*. State v. Everybodytalksabout, 131 Wn. App. 227, 237-38, 126 P.3d 87 (2006), rev'd on other grounds, 161 Wn.2d 702, 166 P.3d 693 (2007).

1. THE INTAKE ASSESSMENT WAS NOT A "CRITICAL STAGE" OF THE PROCEEDINGS.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the assistance of counsel at every "critical stage" of the proceedings. State v. Tinkham, 74 Wn. App. 102, 109, 871 P.2d 1127 (1994) (citing United States v. Wade, 388 U.S. 218, 224-27, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967)). A "critical stage" is a stage of the prosecution, "formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." Estelle v. Smith, 451 U.S. 454, 470, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). A court-ordered psychological evaluation is a "critical stage" in a criminal prosecution that gives rise to a *limited* right to counsel. State v. Nuss, 52 Wn. App. 735, 741, 763 P.2d 1249

(1988). That is, counsel "may be present, but his attendance is strictly as an observer rather than an active participant." Id. at 741.

Curry's February 24th intake assessment was not a "critical stage" of the proceedings, as counsel's absence did not derogate from Curry's right to a fair trial. At WSH, the intake assessment is a routine admission procedure done to ensure that staff addresses a patient's current medical and psychological needs as well as any safety issues that may arise by the patient's presence at the hospital. 2RP 13, 40-41. Because the questioning of Curry at the intake assessment related to his current presentation, rather than to his status at the time of the crime charged, counsel's absence during the course of the intake did not negatively impact Curry's right to a fair trial. As such, the intake assessment cannot be considered a "critical stage."

The purpose and timing of the intake supports this conclusion. Forensic psychologists at WSH do not typically read a defense expert's report, police reports, or other materials in advance of an intake assessment. Rather, they read only the court's order of commitment to determine the purpose of a patient's stay at WSH. Additionally, patients are advised, as Curry was, not to talk about the

offense, and that anything they say and do can be included in the later report to the court.

Division Three has rejected the argument that any interaction with a defendant that produces information considered by a forensic psychologist in a court-ordered evaluation and relevant to his or her opinion is a "critical stage." State v. Cochran, 102 Wn. App. 480, 8 P.3d 313 (2000). Cochran argued that because the State-appointed forensic psychologist based his opinion, in part, on information gathered while defense counsel was not present (ward notes and progress charts prepared by other staff at Eastern State Hospital), his right to counsel was violated. Id. at 484. The court rejected this argument, noting that Cochran had been informed of his rights, counsel had been present for forensic interviews, and there was no evidence that counsel was impaired in cross examination of the State's expert. Id. at 485-86. Implicitly, the court held that, even though information gathered during the course of a defendant's stay in the hospital might later be used in rebutting a mental status defense, not all contact with personnel at a psychiatric hospital constitutes a "critical stage." Id. at 484.

The intake assessment, considered by Dr. Hendrickson as a part of all of the information available to him in forming an opinion

regarding Curry's insanity defense, is akin to the expert's consideration of ward notes and progress charts in Cochran. Id. at 485. The Cochran court stated that it would be impractical to require constant presence of counsel during the entire evaluation period, or when supporting reference material is collected and examined by the State's expert. Id. The court further reasoned that, under ER 703, experts are permitted to refer to facts collected outside their presence even if those underlying facts would not otherwise be admissible. Id. Thus, Dr. Hendrickson, like the State's expert in Cochran, could appropriately rely upon information gathered by other staff, while defense counsel was absent, during Curry's stay at WSH without violating Curry's Sixth Amendment right to counsel.

Curry contends that Everybodytalksabout stands for the proposition that whether something is a "critical stage" must be determined in hindsight, based on how the State later used that evidence. App. Br. at 26. However, the Washington Supreme Court's determination in that case that the presentence interview was a "critical stage" rested on more; the court also relied upon the fact that the defendant was still "faced with a phase of the adversary system and was not in the presence of a person acting solely in his interest." Everybodytalksabout, 161 Wn. 2d at 710 (quoting Estelle

v. Smith, 451 U.S. 454, 467, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981)) (internal quotations removed).

Curry's situation is distinguishable on both grounds. First, the State did not use *any* of the statements made by Curry at the intake assessment against him at trial. Although Curry told the doctors at the February 24th intake that he only has his special power of reading people's thoughts while high on sherm, which is the statement at issue in this case, he also attributed this ability to his use of sherm in the March 9th evaluation, at which defense counsel was present. 2RP 73. Additionally, it was at the March 9th evaluation only that Curry admitted to having smoked sherm a couple of hours before the charged offense, and explained that he was reading the victim's thoughts at the time of the incident. 2RP 108-09. Thus at trial, Dr. Hendrickson testified only to the information he obtained from Curry in the presence of defense counsel. 2RP 107-09; 5RP 139-41, 148-52. Contrary to the State's offering Everybodytalksabout's confession at trial through the probation officer who conducted a presentence interview (Everybodytalksabout, 161 Wn.2d at 710), the State did not offer any statements Curry made during the intake and did not call any of the persons present as witnesses.

Second, while the presentence interview in Everybodytalksabout was a "phase of the adversary system" because the government agent was not acting in the defendant's interest (id.), that cannot be said about Curry's intake assessment. The intake assessment was clearly *not* adversarial in nature and the doctors *were* acting in Curry's interest. At the intake, the doctors were attempting to formulate a diagnosis to treat Curry during his stay at WSH and to assess any safety issues. Further, if Curry had attempted to speak about the charged offense at the intake, in counsel's absence, Dr. Simpler would have acted directly in his interest and stopped him. 2RP 104-05. Although Dr. Hendrickson ultimately formed an opinion after the March 9th evaluation that did not support Curry's insanity defense, the February 24th intake was not an adversarial phase where the doctors were acting against Curry's interest.

2. DOCTORS DID NOT "DELIBERATELY ELICIT" INCRIMINATING STATEMENTS FROM CURRY AT THE INTAKE ASSESSMENT.

Even if the constitutional right to counsel applies to an intake assessment, the Sixth Amendment is not violated every time the State obtains an incriminating statement from a defendant after the

right to trial has attached. Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). A court must apply the "deliberately elicited" standard in determining whether a government agent has violated a defendant's Sixth Amendment right to assistance of counsel. Everybodytalksabout, 161 Wn.2d at 708-09. Even if an agent's questions are neutrally worded, if the agent is clearly asking about the charged crime or purposefully stimulates discussion about the crime, the Sixth Amendment is violated. Id. at 713.

In order to meet the "deliberately elicited" standard, the government agent must have made some effort to stimulate conversation about the crime charged. Id. at 708-09. If a government agent makes no such effort, the Sixth Amendment is not violated. Kuhlmann v. Wilson, 477 U.S. 436, 442, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986). "The 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." Everybodytalksabout, 161 Wn.2d at 708 (quoting Maine v. Moulton, 474 U.S. 159, 176, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985)).

Here, the doctors did not elicit any information about the crime charged, nor did they know the nature of the defendant's insanity defense at the time of the intake. Curry argues that because Dr. Simpler *may* have known that his case related to drug use, based on a phone conversation with defense counsel, she should have avoided this topic entirely because questioning about drug use *might* elicit an incriminating response. 2RP 39-40.

This argument is not supported by the facts. The only intake statement at issue—that Curry had to be high on sherm to read people's thoughts—did not come out during a discussion of Curry's drug use. Rather, the relevant statements were made by Curry when he was asked about having "special powers." This questioning did not pertain to the charged offense and was important to ask upon admission so that the treating psychiatrist could decide what, if any, medications should be prescribed and what must be done to meet the safety needs of the patient and others at the hospital.[6] 2RP 27.

Here the trial court found, based on the credible testimony of Dr. Simpler and Dr. Hendrickson, that the purpose of the intake

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[6] As the prosecutor argued in pretrial motions, it is important to ask about special powers for safety reasons. 2RP 173. For example, if a patient believed that he had the ability to fly, hospital staff would need to be aware so they could ensure that the patient did not jump off the roof or out a window. Id.

interview was to administer appropriate treatment to Curry during his stay and to reasonably provide for the safety of both patients and staff. Distinguishing this case from Everybodytalksabout, supra, the trial court concluded:

> I don't find that there's any evidence that there's any effort to stimulate conversations about the crime. So as it appears to me that the questions were asked, including the questions that led to the information that about the relationship of the drugs and the hearing of the thoughts of other people weren't deliberately elicited.

2RP 192.

Based on the trial court's unique ability to evaluate the credibility of the witnesses, Judge Eadie properly found that the doctors did not "deliberately elicit" incriminating statements. Although some of the information gathered at the intake interview turned out to be relevant to Curry's insanity defense, it is undisputed that the doctors made no attempt to stimulate conversation about the crimes charged. The defendant cannot show a violation of his Sixth Amendment right to counsel.

3. ANY ERROR IN CONDUCTING AN INTAKE ASSESSMENT OUTSIDE THE PRESENCE OF DEFENSE COUNSEL WAS HARMLESS.

Even if this Court finds a violation of the Sixth Amendment where counsel was not present during a "critical stage" of a criminal proceeding, this Court must determine that the error was harmless. See State v. Aamold, 60 Wn. App. 175, 183, 803 P.2d 20 (1991) (holding that it was harmless error to announce a jury verdict absent counsel's presence even though receipt of the verdict is a "critical stage"). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable finder of fact would have reached the same result in the absence of the error. State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995). Here, any error was harmless because there is no reasonable probability that Curry would have been acquitted had the error not occurred. See State v. Banks, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003) (holding an error is harmless beyond a reasonable doubt if there is "no reasonable probability that the outcome of the trial would have been different had the error not occurred").

a. Counsel's Presence At The Intake Assessment Would Not Have Impacted The Evidence At Trial.

As discussed above, a defendant's right to have counsel present at a psychiatric evaluation is a limited one; counsel may be present as a silent observer, under the rationale that observation will assist in preparation of cross examination. Cochran, 102 Wn. App. at 484-85 (citing Nuss, 52 Wn. App. at 741). Counsel may not inhibit the examination. State v. Hutchinson, 111 Wn.2d 872, 884, 766 P.2d 447 (1989).

Under RCW 10.77.020(5), during a court-ordered sanity evaluation, "if a defendant refuses to answer questions or to participate in an examination conducted in response to the defendant's assertion of an insanity defense, the court shall exclude from evidence at trial any testimony or evidence from any expert or professional person obtained or retained by the defendant." Under this law, if counsel were to interrupt and advise a defendant to assert his Fifth Amendment right, and the defendant followed that advice, counsel would be precluding his own presentation of the insanity defense at trial. Therefore, if he had been present, defense counsel would not have advised his client to assert his

right to silence, as the entire offense was caught on high-quality video (Ex. 1) and the only defense raised in this case was insanity.

Counsel's absence at Curry's intake assessment was harmless beyond a reasonable doubt because his presence would not have impacted the evidence in any way. Based on the rule explained in Nuss, supra, if counsel had been present for the intake assessment, as he was for the forensic evaluation, he would not have been allowed to participate in any way and would have been a silent observer. Thus, his presence would not have changed the questions asked, the answers given, or the resulting opinions or testimony of the experts. The court in Nuss explained that the sole purpose for counsel's presence is for effective cross examination at trial. Nuss, 52 Wn. App. at 741.

In Cochran, discussed above, Division Three held that there had been no error when the State's expert relied upon progress notes and ward charts prepared by other hospital professionals regarding interactions with the defendant during which counsel was not present. Cochran, 102 Wn. App. at 485. Division Three also noted that, while both attorneys received copies of the notes and charts at trial, the defense attorney had an opportunity to read them

before cross examining the State's expert, and defense counsel did not request additional time to review them. Id.

The court further held that, logically, there was little use for the notes and charts in cross examination because the expert did not prepare them but referred to them merely in support of his opinions. Id. The court held that defense counsel was able to prepare for cross examination without impediment because he had been present during the testifying expert's interview of Cochran. Id. at 485-86.

Curry's counsel had even more preparation for cross examination than Cochran's did. The record here reflects that defense counsel had received all of Dr. Simpler's notes from both the February 24th intake assessment and the March 9th forensic evaluation well in advance of trial; he was able to thoroughly review the notes in preparation for trial and use them throughout the pretrial hearing. 2RP 10-145. In counsel's memorandum in support of the motion to dismiss, filed with the trial court, counsel extensively referenced Dr. Simpler's notes and provided them to the court as an attachment. CP 26-49. Moreover, because Dr. Simpler and Dr. Hendrickson were both examined extensively in the pretrial hearing, counsel had significant opportunity to prepare

for trial cross examination of Dr. Hendrickson, as almost a week had passed between the expert's pretrial testimony and his trial testimony. Further, like in Cochran, defense counsel had an unhindered ability to prepare for cross examination because he had been present during the only time that Dr. Hendrickson interviewed Curry. Id. Thus, even if counsel had been present for the intake assessment, the trial testimony, including cross examination, would not have been different.

b. The Intake Assessment Did Not Impact The Court's Finding That Curry Failed To Prove Either Prong Of The Insanity Defense.

While it is difficult to determine harmlessness when a jury verdict does not reflect the evidence upon which the finder of fact relied, that same problem does not exist in a bench trial. Judge Eadie was the finder of fact here and he clearly outlined, in oral and written findings, which evidence he relied upon in finding Curry guilty. 7RP 2-9; CP 52-55. Moreover, he specifically explained which evidence he relied upon in finding that Curry was not insane at the time of the offense. Id. Whether or not Curry was insane was the only contested issue, as the entire event was clearly

captured on video and the elements of the crime were conceded by the defense at trial.

In order to prove the insanity defense, Curry needed to show, by a preponderance of the evidence, that he suffered from a mental disease or defect, not attributable to voluntary intoxication, at the time of the offense (the first prong), *and* that he was unable to tell right from wrong with regard to the charged act (the second prong).[7] RCW 9A.12.010; State v. Wicks, 98 Wn.2d 620, 657 P.2d 781 (1983). The trial court relied upon Dr. Hendrickson's opinion that the defendant did not suffer from a mental illness and that the defendant could appreciate the wrongfulness of his actions. 7RP 2-9; CP 52-55. The court found, in its written findings, that the defendant had told Dr. Hendrickson at the March 9th evaluation that sherm was his drug of choice, in part because it gave him the power to read minds. CP 54. It was at that interview that Curry admitted to smoking sherm on the morning of the incident, and maintained that he read Hui's mind on the bus before striking him. Id. Thus, the court held that the behavior was, as Dr. Hendrickson

[7] Both experts agreed that Curry was able to perceive the nature and quality of the act with which he was charged under the alternative second prong of the insanity defense.

testified, consistent with the voluntary ingestion of sherm rather than a mental illness. Id.

Based on the written findings, it is apparent that the court relied upon Dr. Hendrickson's opinion in determining that Curry had not proved the first prong of the insanity defense. CP 52-55. It is also clear from the court's findings and the trial testimony that the expert's opinion was not based upon statements Curry had made outside of counsel's presence. Id. This is further supported by Dr. Hendrickson's credible pretrial testimony that his opinion would not change if he eliminated consideration of information collected by others during the intake. 2RP 110-12.

Rather, the court's conclusions on the first prong were based on Curry's lack of any personal or family history of mental illness, his admissions regarding sherm use and his account of the offense at the forensic interview, and the lack of symptoms of mental illness during Curry's two-week stay at WSH. CP 54. Therefore, the court would have reached the same result regarding Curry's failure to prove the first prong of the insanity defense, as Dr. Hendrickson's testimony would not have been altered by defense counsel's presence at the intake assessment.

Further, the court found that Curry did not prove the second prong of the insanity defense. CP 54-55. On this issue, the court's ruling was based purely on Curry's statements caught on the bus cameras. CP 54. Specifically, the court referenced Curry's statements that he did not care if he would "catch an assault four," that he would "wait for the police to come," that he would "go to jail," that he would "take the case to trial and tell the jury he slapped [Hui]." Id. These acknowledgements by Curry, captured on video, directly negated his defense of insanity.

Even if the alleged Sixth Amendment violation could have affected the court's more complex reasoning on the first prong of the insanity defense, it would not have altered the court's ruling on the second prong. Thus, even if the State's rebuttal evidence had been weakened by counsel's presence at intake, the court would still have found Curry guilty because he failed to prove that he was unable to tell right from wrong with regard to the charged act.

4. DISMISSAL IS NOT THE APPROPRIATE REMEDY.

The appropriate remedy for a violation of the Sixth Amendment by counsel's absence at a critical stage of the proceedings is remand for retrial without the use of incriminating

statements made during counsel's absence. Everybodytalksabout, 161 Wn.2d at 705. Curry requests an alternative remedy—dismissal of the information. To this end he cites State v. Cory, 62 Wn.2d 371, 382 P.2d 1019 (1963), where the court dismissed the information after finding that a detective's purposeful eavesdropping upon an attorney-client conference violated the Sixth Amendment.

After Cory, the Washington Supreme Court clarified that dismissal of charges is an extraordinary remedy that should only be used where prejudice cannot be remedied by granting a new trial. State v. Baker, 78 Wn.2d 327, 332-33, 474 P.2d 254 (1970). The court explained:

> In Cory we assumed that the prosecutor had taken advantage of a simple means of 'obtaining evidence and knowledge of the defendant's trial strategy' because there was no way of determining exactly what had been overheard. The basis for that assumption is not present in the instant case. The report of the psychiatrist is in evidence. This court is able to ascertain what, if any, prejudice resulted from the prosecutor's obtaining a copy of the report. As stated previously, prejudice cannot adhere when there is no nexus between official misconduct and a right of the accused.

Id. As in Baker, this Court can easily determine what evidence was obtained outside counsel's presence based on the pretrial testimony of the witnesses, the notes of Dr. Simpler and Dr. Hendrickson, and the forensic evaluation report, all of which were marked as exhibits in the pretrial hearing.

Assuming, *arguendo*, that a harmful violation is found here, this Court could reverse and remand for a new trial and ensure that Curry suffers no prejudice at retrial. For example, while onerous on the State, this Court could prohibit the testimony of both Dr. Hendrickson and Dr. Simpler, and require the State to hire a new forensic psychologist to evaluate Curry if the State wanted to present rebuttal evidence at a retrial. Under that scenario, the order could disallow the State's new expert from reviewing Dr. Simpler's notes from the February 24 intake assessment and could require the State to redact any reference to, or information from, the intake assessment before providing its new expert with a copy of the co-authored forensic evaluation report. This could be ordered despite the fact that the information would normally be permissibly considered by an expert under ER 703.

Or, this Court could prohibit a new State expert from reviewing Doctors Simpler and Hendrickson's forensic report in its

entirety. Even more onerous on the State, but still short of the extraordinary remedy of dismissal, this Court could prohibit a new expert from reviewing *any* of the materials prepared by personnel at WSH. Thus, even if this court finds a harmful violation of the defendant's Sixth Amendment right, dismissal is not appropriate as other alternatives would ensure Curry a fair trial absent any alleged prejudice.

5. CURRY HAS WAIVED ANY CHALLENGE TO FINDING OF FACT 34(g).

Curry's opening brief assigns error to finding of fact 34(g) which states: "The court finds Dr. Hendrickson's opinion to be more persuasive for a number of reasons including but not limited to...g) The defendant's clear awareness of the wrongfulness of his acts as evidenced by his statements on the bus (ie. "catch an assault four" that he would "wait for the police to come," that he would "go to jail" that he would "take the case to trial and tell the jury he slapped [the victim]."" CP 54.

Curry provides no argument or analysis for why this challenged finding is not supported by substantial evidence, and

cites to nothing in the record that casts doubt on this critical finding. Where a party makes no argument pointing to the absence of evidence to support a finding of fact, the party waives the assignment of error. State v. Radcliffe, 139 Wn. App. 214, 220, 159 P.3d 486 (2007), aff'd, 164 Wn.2d 900, 194 P.3d 250 (2008). Curry's challenge to this finding is thus waived.

As Curry fails to provide any argument as to why this Court should reverse the trial court's finding, the State is unable to adequately respond to the assignment of error. However, if this Court decides *sua sponte* that this assignment merits review, the record substantially supports this finding. Dr. Hendrickson explained, in trial testimony that was found to be credible, that Curry's own statements, captured on video, were the basis for his opinion that Curry had the capacity to appreciate the nature and quality of his acts and appreciated their wrongfulness. 5RP 152-55. Further, Judge Eadie specifically referenced this testimony in his oral findings of fact made on May 25, 2011. 7RP 9. This finding is supported by substantial evidence.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Curry's conviction and find that no Sixth Amendment violation occurred.

DATED this 24 day of May, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By:
SAMANTHA D. KANNER, WSBA #36943
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana M. Nelson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. RAYMEL CURRY, Cause No. 67409-9-I, in the Court of Appeals, Division I, for the State of Washington.

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

Name
Done in Seattle, Washington

05/24/12
Date