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DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

No. 44923-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

STEVEN DANIEL KRAVETZ,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE RICHARD BROSEY, JUDGE

AMENDED BRIEF OF RESPONDENT

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RESPONDENT'S COUNTER STATEMENT OF THE CASE

Procedural Background

The defendant was charged by Information on April 4, 2012, with Attempted Murder in the Second Degree - Count I, RCW 9A.28.020, RCW 9A.32.0520(1)(a), Assault in the First Degree - Count II, RCW 9A.36.011(1)(a), Disarming a Law Enforcement Officer - Count III, RCW 9A.76.033(1), and Assault in the First Degree - Count IV, RCW 9A.36.011(1). Counts I and II, were alleged to have been committed against Grays Harbor Deputy Sheriff Polly Davin. Counts I and II each contained an allegation that the defendant was armed with a firearm and a further allegation that the acts were committed against a law enforcement officer who was performing her official duties. RCW 9A.94A.533, RCW 9.94A.535(2)(v). Count IV was alleged to have been committed against Judge David Edwards. Count IV included an allegation that the defendant was armed with a deadly weapon other than a firearm. RCW 9.94A.533(4).

On April 18, 2012, the court entered an order for a 15 day competency evaluation. (CP 32-33). After an initial evaluation done in the Mason County Jail and a subsequent evaluation done at Western State Hospital, a hearing was held on August 29, 2012. The defendant was found competent to stand trial. (RP 805-812, CP 105).

Following a change of venue, the matter was tried to a jury in Lewis County beginning on March 26, 2013. As part of the State's case in chief, the State introduced a lengthy recorded interview by law enforcement investigators with the defendant. (Exhibits 31, 32, 50).

The defense presented testimony from a forensic psychologist. It was his opinion that the defendant's ability to form intent and to do intentional acts was impaired by a delusional mental disorder at the moment Deputy Davin approached him. (RP 457-58). The defense also called the defendant's mother in support of the mental defense. Thereafter, the defendant rested. (RP 492). The State presented rebuttal evidence from Brett Trowbridge, Ph.D. and Marilyn Ronnei, Ph.D.

Following the completion of the State's rebuttal testimony, the defendant was offered the opportunity for surrebuttal. The defendant declined. (RP 543). The court and counsel began working on jury instructions. (RP 544). The jury was sent home early.

The following morning, the defendant addressed the court. He told the court that he believed that he had been misinformed by his attorney. He asserted that he had not been told that he needed to testify before resting his case. He told the court that he thought that he "might have a chance to testify after the rebuttal witnesses". (RP 567). He stated that the misinformation from counsel "... maybe sort of affected my decision possibly not to testify" and stated "I am just raising that he should have been more informative about me and that's all." The defendant never did

say that he wanted the opportunity to testify. The court acknowledged this in its comments (RP 571). Thereafter, defense counsel informed the court regarding conversations he had with the defendant concerning his right to testify at trial, including the fact that the defendant had ultimately made the decision not to testify at trial. The defendant was specifically told by counsel about the process and when he would testify if he chose to do so. (RP 568-570).

The matter was submitted to the jury for deliberation. They returned the following verdicts:

Count I, Attempted Second Degree Murder - Not guilty;

Count II, Assault in the First Degree - Guilty; Firearm Enhancement; Law Enforcement Officer Aggravation.

Count III, Disarming a Law Enforcement Officer - Guilty;

Count IV, Assault in the Second Degree as a lesser included offense - Guilty, Deadly Weapon Enhancement.

The defendant was sentenced as follows:

Count I, 300 months

Count II, 364 days

Count IV, 32 months

The court entered findings in support of the exceptional sentence on Count I.

Factual Background

In 2005, the defendant was living with his mother in rural Grays Harbor County, Washington. (RP 489). On one occasion, his mother called law enforcement to report that she believed her son was suicidal. (RP 474-493). The defendant was taken to Mark Reed Hospital in McCleary by law enforcement. During the examination, the defendant was asked for a urine sample. He went into the bathroom and tried to escape out the window. He was recaptured. Criminal charges were filed in Grays Harbor District Court. At the time of these events, that case had not been resolved. There was an outstanding warrant for his arrest for failing to appear.

On March 9, 2012, the defendant took the bus from Olympia to Montesano. He arrived at the Grays Harbor County Courthouse before noon. His intent was try to steal his District Court file. He armed himself with a knife. (RP 497-99). Courthouse employees saw the defendant standing in the courthouse without any apparent purpose and became suspicious. (RP 40-43, 54-55, 103-106). One of the courthouse employees reported her concerns to the Sheriff. (RP 41-43).

Deputy Polly Davin responded from the squad room, walking over to the courthouse. (RP 62-65). She spoke briefly with the defendant, asking him what he was doing in the courthouse. (RP 66-67).

The defendant lied, stating that he was waiting for his attorney. Deputy Davin asked for identification. She put her hand on the defendant's elbow, intending to guide him to an area outside the courthouse. Once Deputy Davin touched the defendant, he pulled out his knife, grabbed Deputy Davin by the neck with his free hand and repeatedly tried to stab her. He continued the attack after knocking her to the floor. (RP 68, 71-74). Deputy Davin received cuts to her face and bruises to her body.

During this time, Superior Court Judge David Edwards walked out of his office and was standing at the top of the stairs on the third floor of the courthouse. When he saw the commotion, he ran down the steps to assist Deputy Davin. (RP 128-130). The defendant immediately began focusing his attention on Judge Edwards. He stabbed Judge Edwards in the neck. (RP 135-137, 141). As this was occurring, Deputy Davin sat up, pulled out her pistol and ordered the defendant to stop. (RP 73-74). The defendant grabbed the pistol from Deputy Davin and fired twice. One of the bullets went through Deputy Davin's arm. (RP 73-74, 136-137). The defendant then walked out the front door of the courthouse, leaving Deputy Davin and Judge Edwards on the floor. (RP 95-96; 138-139).

The defendant walked to the office of Robert Ehrhardt, the attorney who was representing him on the District Court matter. He asked the secretary to call his mother for a ride home. (RP 199-205). The attorney and staff were unaware of what had happened at the courthouse. (RP 203-

205, 222-224). His mother arrived later and gave him a ride home. (RP 219-220, 222-23).

Investigation identified the defendant as the assailant. Law enforcement officers went to the defendant's residence in Olympia the following day. They arrested the defendant as he came out of the back door to his residence and later searched the house pursuant to a search warrant that had been issued. (RP 245-246, 304-306, 370-373). Officers recovered the knife that the defendant had used the day before as well as Deputy Davin's firearm.

The defendant was taken to the Mason County Sheriff's Department where he consented to a video taped interview. He initially explained that he had gone to the Grays Harbor County Courthouse to steal his District Court file. He told the investigators that a crime had been committed against him and that he wanted to identify the people who had committed that crime so that they could be prosecuted. (Exhibit 31, p. 7-8). He explained in great detail, from his perspective, what had occurred on May 24, 2005 that resulted in his arrest and prosecution in Grays Harbor District Court. By his account, the sheriff's deputies had contacted him because his mother had reported that he was suicidal. (Exhibit 31, p. 12-13). He was detained and taken to Mark Reed Hospital where he was "raped" by hospital staff. (Exhibit 31, p. 48-50).

In the course of telling his story, the defendant explained that he deliberately failed to appear for court on that charge. He told the investigators he was going to conduct his own investigation. He went on to explain his version of events of an incident that occurred in the Centralia Library where he had gone to do his investigation. He was arrested and ultimately charged with Assault in the Third Degree in Lewis County. (Exhibit 31, p. 76-79). The defendant told investigators that he was convinced that the sheriff and the courts had "... financial, political, criminal interest... they must have had some sort of notes or some document that tells me what they should do concerning my matter. Something that they wouldn't want somebody to see, that would incriminate them if it was exposed". (Exhibit 31, p. 129).

The defendant eventually told his version of the events surrounding the assault upon Deputy Davin and Judge Edwards. He described his initial contact with Deputy Davin and admitted giving her a false name. (Exhibit 32, p. 12-14). He explained that "based upon my past experiences with Grays Harbor County, I felt I couldn't trust this person". He told investigators that he was afraid that he would be arrested on the bench warrant and that he needed to "physically stop" this person [Deputy Davin]. He admitted stabbing Deputy Davin with his knife. (Exhibit 32, page. 15-17, 78). He recalled being knocked down by a man who intervened (Exhibit 32, p. 23). He admitted grabbing Deputy Davin's firearm and shooting at her. (Exhibit 32, p. 26, 33-34).

RESPONSE TO ASSIGNMENT OF ERROR

The trial court did not deny the defendant his right to testify.

First of all, this court needs to understand the context in which this claim arose. The State of Washington had presented its case and rested. The defendant presented its case, including testimony from a forensic psychologist and the defendant's mother. The defense then rested without presenting testimony from the defendant. The State presented the rebuttal testimony of Dr. Trowbridge and Dr. Ronnei concerning their opinion of the defendant's mental state at the time of the commission of the offense. The State then rested. The defendant declined to offer surrebuttal. The jury was sent home for the balance of the day at approximately 3:00 p.m. on Monday, April 1, 2013.

The following morning, counsel for the defendant addressed the court stating that the defendant had "raised a concern that he [the defendant] would like to address the court about his decision to not testify at trial". Counsel did not tell the court that the defendant now wished to testify. Had the defendant made this request to counsel one would have expected counsel to relay that request to the court. (RP 566).

When asked by the court, there was the following exchange. (RP 567-568):

> THE DEFENDANT: Last time I had spoken with David Arcuri in the jail, he told me that regarding the presentation of the defense yesterday that he would call his witnesses

> and then the prosecution would call the rebuttal witnesses, but he never told me that the defense was required to rest, before the rebuttal witnesses, and I thought that I might have a chance to testify after the rebuttal witnesses, because he never informed me of that, so that's just - - basically, that's maybe sort of affected my decision possibly to not testify, and so I'm just raising that he should have been more informative about me and that's all.
>
> THE COURT: Well, are you telling me that you wanted to take the stand and testify in your own defense and that somehow you misunderstood Mr. Arcuri's advice and as a result of that chose not to or are you just telling me you wanted an opportunity to rebut the State's rebuttal witnesses?
> THE DEFENDANT: No, I don't want to do that, but I just wanted to raise the fact that he did not inform me properly, so that I didn't have a chance to think about this as much as I could have.

In essence, the defendant told the court that he had decided not to testify but that because of this alleged misinformation that he didn't have the "chance to think about this as much as I could have". In short, he was simply stating that he was having second thoughts about his original decision not to testify.

When asked by the court, counsel for the defendant explained that he talked to his client on the weekend prior to Monday, April 1, 2013. Counsel explained to the defendant that the State was going to be resting its case. Counsel for the defendant explained the process and gave his advice to the defendant, telling the defendant that, in his opinion, he should not testify at trial. (RP 570). The defendant was given the

weekend to think about it. The following Monday morning, prior to presentation of the defense case, the defendant was asked by counsel and made it "abundantly clear" that he decided that he did not want to testify. (RP 570). The defendant was told by counsel that after the testimony of Dr. Dickson and his mother was completed, that the defense would rest. (RP 570).

Following this exchange, the court concluded, quite correctly, that the defendant was not asking that he be allowed to testify.

> THE COURT: Mr. Kravetz, is there anything else you would like to say on this topic? Again, you are not required to say anything. Anything you say is being taken down by the reported and may be used against you.
> THE DEFENDANT: No, that's all right.
> THE COURT: From your statements, it is my understanding that you are not telling me that you are not telling me that you, the defendant, in fact did want to testify on your own behalf merely that you apparently did not understand or so you say today the procedure that the Court follows with respect to a trial, RP 571-572).

The court found that the defendant made an informed decision not to testify in light of the fact that the defendant was allowed to put on his entire case through the video taped statement without being subjected to cross examination. (RP 572-573).

A criminal defendant does have the constitutional right to testify at his trial. Rock v. Arkansas, 483 U.S. 44, 49, 107 Sup. Ct., 2704, 97 L.Ed.2d 37 (1987). A defendant may waive his right to testify at trial so

long as that decision is made knowingly and intelligently with the advice of counsel. The court has no obligation to advise the defendant of his right to testify at trial. State v. Thomas, 128, Wn.2d 553, 556-559, 910 P.2d 475 (1996). In fact, the court should not attempt to determine if the defendant intends to waive his right to testify. Thomas, 128 Wn.2d at p. 560.

This court need only be satisfied that the decision not to testify was knowingly and intelligently made. Thomas, 128 Wn.2d at p. 559. The trial court, based on the record herein, concluded that the defendant's decision not to testify was knowingly and intelligently made. This court should do likewise.

In the case at hand, there is no allegation that the court or counsel prohibited the defendant from testifying at trial. See State v. Robinson, 138 Wn.2d 753, 759, 982 P.2d 590 (1999). In fact, the record before the court is that the defendant was fully and completely advised of his right to testify at trial by his attorney and made a knowing and intelligent decision that he did not wish to testify at trial. His decision not to testify was a matter of trial strategy. He cannot now complain. State v. King, 24 Wn. App. 495, 499, 601 P.2d 982 (1979).

When the defendant addressed the court, he did not tell the court that he wished to testify. Nor did counsel when he raised the matter with the court. When asked by the court whether he wished to testify, the defendant stated that he "just wanted to raise the fact that he [Arcuri] did

not inform me properly". He told the judge that he "didn't have a chance to think about it as much as [he] could have". (RP 568). This was not a request to testify.

The judge addressed the defendant. He specifically told the defendant "... it is not my understanding that you are not telling me that you, the defendant, in fact did want to testify on your own behalf..." (RP 571). The defendant was asked if he had anything more to say. (RP 573). The defendant, at this point, could have said "I would like to testify now". He did not do so. (RP 571)

This court should take guidance from the analysis in Strickland v. Washington, 466 U.S. 668, 104 Sup. Ct., 2052, 80 L.Ed.2d 674 (1984). The first question should be whether the decision of the court, in fact, violated the right of the defendant. The answer is clearly no. The defendant did not ask to testify. The court did not refuse the defendant that opportunity. The second question is whether the defendant suffered prejudice. Prejudice cannot be presumed under these circumstances. Robinson, 138 Wn.2d at p. 768. The defendant can show no prejudice. His decision not to testify was, as recognized by the trial judge, a matter of strategy. (RP 571-73).

The State presented the six hour video taped interview with the defendant. This allowed the jury to hear the defendant's entire story, starting with the incident in 2005 and leading to why he was at the Grays Harbor County Courthouse on March 9, 2012. The jury had the

opportunity to see the defendant's manner and demeanor and to hear him talk about his beliefs. The jury's view of the video taped interview gave real life to the defendant's delusional beliefs as described by Dr. Dixon. (RP 455-457). The was all presented without subjecting the defendant to cross examination.

Even if the defendant had made a request to testify, it would have been within the discretion of the court to deny that request. State v. Barnett, 104 Wn.App. 191, 198-99, 16 P.3d 74 (2001). In Barnett, the defendant made a knowing an intelligent decision not to testify. The following day, after both sides had rested, and after the instructions conference, the defendant told the court that he wished to testify. The trial court refused to allow the defendant to reopen his case to testify. The court in Barnett, held that this was not an abuse of discretion by the trial court. The Court in Barnett, held as follows, 104 Wn.App. at p. 198-99:

> Simply put, Mr. Barnett changed his mind. But he did so too late. The defense had rested. The decision to reopen a proceeding ton introduce additional evidence is one left to the sound discretion of the trial court. State v. Brinkley, 66 Wn.App. 844, 848, 837 P.2d 20 (1992)... A trial court's decision on whether or not to reopen a case will not be reversed absent a "showing of manifest abuse of discretion and prejudice resulting to the complaining party". Brinkley, 66 Wn.App at p. 848... A court abused its discretion when it basis a decision on untenable grounds of untenable reasons.
>
> Had Mr. Barnett asked to testify before the defense rested, there would be no question of his right to testify. But he did not. And

> so he waived his right to testify. The defense then rested. The court then recessed for the evening. When all returned the next morning, the court was prepared to instruct the jury and move forward with closing argument. The court's decision not to disrupt the trial schedule to accommodate Mr. Barnett's testimony - testimony which arguably would have hurt Mr. Barnett's case - appears to be a sound one. On this record, we can hardly say that the trial judge abused his discretion.

An abuse of discretion occurs when the court exercises its discretion on untenable grounds or for untenable reasons. State v. Vickers, 18 Wn.App. 111, 113, 567 P.2d 675 (1977). Judge Brosey's decision to proceed was not an abuse of discretion let alone a manifest abuse of discretion. State v. Sanchez, 60 Wn.App. 687, 695-96, 806 P.2d 782 (1991).

CONCLUSION

For the reason set forth, the defendant's conviction must be affirmed.

DATED this 15 day of August, 2014.

Respectfully Submitted,

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GRF/ws

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STATE OF WASHINGTON, Respondent, v. STEVEN DANIEL KRAVETZ, Appellant.	No.: 44923-4-II **DECLARATION OF MAILING**

DECLARATION

I, Rikki Thompson, hereby declare as follows:

On the 18 day of August, 2014, I mailed a copy of the Amended Brief of Respondent to Attorney John Hays, 1402 Broadway, #103, Longview, WA 98632 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 18 day of August, 2014, in Montesano, Washington.

Rikki Thompson

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