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Court of Appeals Division I
State of Washington

Opinion Information Sheet

Docket Number: 63661-8
Title of Case: State Of Washington, Respondent V. James Dean Wilks, Appellant
File Date: 02/14/2011

SOURCE OF APPEAL

Appeal from King County Superior Court
Docket No: 07-1-06540-3
Judgment or order under review
Date filed: 05/29/2009
Judge signing: Honorable James Robert Orlando

JUDGES

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 63661-8-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JAMES DEAN WILKS,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: February 14, 2011
	)	
	)	

Cox, J. -- James Wilks appeals his judgment and sentence, contending that the trial court abused its discretion in admitting the testimony of complaining witness John Holden. Specifically, Wilks contends Holden was not competent to testify. Wilks also claims that his constitutional right to confrontation was violated by the admission of an allegedly testimonial statement by Holden to a police officer. He also claims that his trial counsel was ineffective for failing to have him evaluated for competency to stand trial despite knowing of Wilks' substantial history of mental illness. Wilks also raises numerous issues in a statement of additional grounds.

We hold that the trial court did not abuse its discretion in admitting the

testimony of Holden. Wilks failed in his burden to show that Holden was not competent to testify at trial. Assuming, without deciding, that the admission of Holden's statement through the police officer violated Wilks' right of confrontation, any error was harmless beyond a reasonable doubt. Wilks also fails in his burden to show his trial counsel was ineffective. Finally, the claims in his statement of additional grounds do not warrant reversal. We affirm.

On November 2, 2007, Wilks was charged by amended information with one count of attempted robbery in the first degree involving Holden and two counts of assault in the second degree against others. The charges arose out of events that took place on August 26, 2007. Each count also included a deadly weapon allegation.

On January 8, 2008, the matters proceeded to a jury trial before retired Judge Larry Jordan. At trial, Holden, the complaining witness with respect to the attempted robbery charge, testified over Wilks' objection that he was not competent to testify. Holden is a 77-year-old homeless man. He suffered a brain injury at some point that affects his balance, speech, sight, hearing, and memory.

After Holden testified, the State called Officer Michelle Gallegos. She testified that she responded to Holden's 911 phone call on August 26, 2007, reporting the alleged attempted robbery. Part way through taking Holden's statement, Officer Gallegos received a call dispatching her to Occidental Park. She left Holden and went to the park, where she found and arrested Wilks.

Officer Gallegos then placed Wilks in the back of her patrol car and drove back to Holden to conduct an identification showup and finish taking his statement. When she arrived back at Holden's location, she testified that Wilks was "staring at Mr. Holden with a fixed gaze, wouldn't look away at all, in what I thought was a threatening or glaring manner." Simultaneously, Holden stated, "Look at him. He is threatening me now." Officer Gallegos then finished taking Holden's statement, which he reviewed and signed.

At trial, Wilks objected to the admission of Officer Gallegos' testimony concerning Holden's statement during the identification showup that Wilks was threatening Holden by staring at him. The objection was based on both hearsay and confrontation clause grounds. The trial court overruled the hearsay objection on the basis that the statement was a present sense impression by Holden. The court also overruled a relevancy objection that Wilks subsequently made. After due consideration of the Crawford1 objection, the court concluded there was no violation of Wilks' constitutional right to confront Holden by admitting the officer's testimony concerning Holden's statement. The trial court later ruled that Holden's written statement to the officer was inadmissible on grounds not relevant to this appeal.

The jury convicted Wilks, as charged, on the attempted robbery of Holden. It also convicted Wilks of one count of second degree assault and one count of fourth degree assault, both of which involved other complaining

1 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

witnesses.

While the trial was in progress, the police were investigating Wilks for numerous threats he made against judges in Seattle Municipal and King County Superior courts during cases unrelated to matters before us. Following the jury verdict, the State arraigned Wilks on the new charges.

When the case came up for sentencing on February 8, 2008, the trial court noted that Wilks had been ordered to undergo a competency hearing in the unrelated "threats" case. The State recommended continuing the sentencing until after Western State Hospital had evaluated Wilks, and the court agreed.

A March 22, 2008, report from Western State reflected its finding that Wilks was incompetent to proceed to sentencing. The report concluded that Wilks had a clear understanding of court proceedings and the charges against him. But it also concluded that he lacked the capacity to rationally assist counsel. Accordingly, the trial court stayed sentencing until Wilks became competent.

A June 2, 2008, report from Western State found that Wilks was competent to proceed to sentencing. Following this recommendation, the court held that Wilks was competent to proceed to sentencing.

Wilks moved for a new trial and the trial court granted his motion. Because the motion for a new trial included claims of ineffective assistance of counsel, Wilks' original attorney withdrew and the court appointed new stand-by counsel. A few days later, Judge Jordan entered an order recusing himself from

further presiding in this matter. On June 30, 2008, the supreme court entered an order appointing Judge John Orlando as the new judge to preside.

Judge Orlando reviewed the mental health reports from Western State and found that Wilks was competent to proceed to sentencing. On October 10, 2008, defense counsel asked the court to return Wilks to Western State for further evaluation, contending that Wilks' mental health was decompensating.

The court deferred to counsel and ordered a new evaluation. The record in this case does not contain the third report from Western State. But it appears that a third report may have been filed under seal under a different case number. In any event, Judge Orlando appears to have reviewed that third report and found Wilks competent because the court set a hearing date on the motion for a new trial.

On March 27 and April 16, 2009, Judge Orlando heard testimony and considered exhibits in Wilks' motion for a new trial. Judge Jordan, Wilks' original trial attorney, and the prosecutor all testified. The court denied Wilks' motion for a new trial.

On April 30, 2009, Wilks moved to proceed pro se. The court granted the request and agreed to continue sentencing in order to allow Wilks to move for reconsideration of its order denying the motion for a new trial. Following a lengthy hearing, the court denied Wilks' motion for reconsideration. The court then sentenced Wilks to 42.75 months on the attempted robbery conviction, concurrent with 26 months on the second degree assault conviction, consecutive

to 12 months on the fourth degree assault conviction.

Wilks appeals.

WITNESS COMPETENCY

Wilks argues that the trial court abused its discretion in finding witness Holden competent to testify. Because he fails in his burden to show that Holden was incompetent to testify, we hold that the trial court did not abuse its discretion in admitting this evidence.

This court begins with the presumption that all witnesses are competent to testify.2 "An adult witness is incompetent to testify if he or she is of 'unsound mind' or appears incapable of receiving and relating accurate impressions of the facts about which they are examined."3 The test for competency is whether or not the witness understands the nature of the oath and is capable of giving a correct account of what he or she has seen and heard.4

The determination of competency rests primarily with the trial court judge who sees the witness, notices his manner, and considers his capacity and intelligence.5 An appellate court will not disturb a trial court's conclusion as to the competency of a witness to testify except for abuse of discretion.6 A trial

2 ER 601; CrR 6.12(a).

3 State v. Johnston, 143 Wn. App. 1, 13, 177 P.3d 1127 (2007) (citing RCW 5.60.050).

4 State v. Mines, 35 Wn. App. 932, 936, 671 P.2d 273 (1983).

5 State v. Swan, 114 Wn.2d 613, 645, 790 P.2d 610 (1990).

6 Faust v. Albertson, 167 Wn.2d 531, 545-46, 222 P.3d 1208 (2009).

court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."7

Here, a review of the record reveals that Holden's testimony was, as the trial court aptly observed, "in and out in terms of confusing." Due to his previous brain injury, Holden had difficulty remembering the timing and sequence of events, and tended to frequently veer into unrelated events. But, when the prosecutor used Holden's written police statement to refresh his memory, he was able to testify that Wilks demanded money and his shoes, and threatened him with a knife. He also testified that Wilks was "aggressive and violent" during the confrontation. This testimony supports the attempted robbery charge.

When Wilks initially objected to Holden's competence, the court reserved ruling. However, later, when Wilks objected to the admission of Holden's written statement to police, the court ruled as follows:

> I agree that the record is -- will reflect that [Holden] wasn't as lucid as some witness are, [but] I don't on this record find and can't find incompetency as that term is used in the rules. I think those issues go to his recollection and go more to the weight.[8]

This ruling is sound. Whether, under RCW 5.60.050 and other law, a witness is competent to testify is a question addressed to the sound discretion of the trial court. As the cases make clear, the credibility of testimony is for the trier of fact. Thus, the fact that Holden was not as lucid as some witnesses might be is not determinative. Rather, the question is whether Holden was incapable of

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

8 Report of Proceedings (Jan. 11, 2008) at 12.

receiving a just impression of the facts supporting the charge of attempted first degree robbery or of relating them truly at trial. Based on a thorough review of this record, we see nothing to indicate that the trial court abused its discretion when it ruled that Holden was competent to testify.

Wilks argues that Holden's inability to "retain an independent recollection of events and to recount them accurately" evidences incompetency. He is

mistaken.

First, this argument is based on the factors for determining the competency of a child witness as articulated in State v. Allen.9 Wilks argues that after the 1986 amendment to RCW 5.60.050(2) that substituted the word "those" for "children under ten years of age," the factors for determining the competency of a child witness apply equally to adult witnesses. But contrary to this argument, courts have continued to articulate the test for whether an adult witness is competent as whether the witness "appears incapable of receiving and relating accurate impressions of the facts about which they are examined."10 Wilks fails to cite to any persuasive case authority to support his argument to the contrary.

Wilks cites State v. S.J.W.11 to support the proposition that the Allen factors now apply to adult witnesses. But that case is distinguishable. In Webb,

9 70 Wn.2d 690, 424 P.2d 1021 (1967).

10 Johnston, 143 Wn. App. at 13 (citing RCW 5.60.050).

11 __ Wn.2d __, 239 P.3d 568 (2010).

the court addressed whether the 1986 revisions to RCW 5.60.050 changed the burden of proof with respect to which party must establish the competency of a child witness.12 In the course of its discussion, the court stated:

> The current statute provides that no person is competent to testify who is of unsound mind, intoxicated at the time of examination, or is incapable of receiving just impressions of the facts or of relating them truly. All persons, regardless of age, are now subject to this rule because there is no longer any requirement that a witness be of suitable age or any suggestion that children under 10 may not be suitable witnesses. A child's competency is now determined by the trial judge within the framework of RCW 5.60.050, while the Allen factors serve to inform the judge's determination.[13]

It appears that Wilks relies on the second sentence from the above excerpt to support his argument that the Allen factors now apply to adult witnesses, as well as child witness. But, read in context, this sentence merely indicated that RCW 5.60.050(2) now applies equally to adult and child witnesses. And contrary to Wilks' argument, the next sentence suggests that the Allen factors still only apply to child witnesses.

Second, regardless of which test is applied, Holden was able to testify about the facts regarding the attempted first degree robbery. Holden also testified about some facts that were unrelated to the events at issue. But, he testified about the events in question after his memory was refreshed with his written police statement. In short, Wilks' argument in this respect is unpersuasive.

12 Id. at 570-71.

13 Id. at 571-72 (emphasis added).

9

No. 63661-8-I/10

His reliance on State v. Karpenski14 is also misplaced. There, this court reviewed a trial court's finding that a seven-year-old child witness was competent to testify despite the fact that the child promised to tell the truth at a pretrial competency hearing but then told a clearly false story.15 On appeal, this court concluded that the only reasonable view of the record was that the child witness lacked the capacity to distinguish truth from falsehood and was therefore not competent to testify.16 But Karpenski is distinguishable from the facts of this case. Holden testified about numerous unrelated events, but he did not necessarily lie about the events in question.

The facts of this case are more like the facts in State v. Froehlich.17 There, the defendant argued that even if the witness was of sound mind, he was incompetent to testify because his memory was not sufficient to retain an independent recollection of events due to a medical condition.18 Like here, the witness explained his condition to the jury, and explained that due to the trouble with his memory he did not remember all of the details of the events at issue.19 On appeal, the supreme court concluded that the trial court did not abuse its

14 94 Wn. App. 80, 971 P.2d 553 (1999), overruled on other grounds by State v. C.J., 148 Wn.2d 672, 63 P.3d 765 (2003).

15 Id. at 95-96, 106.

16 Id. at 106.

17 96 Wn.2d 301, 635 P.2d 127 (1981).

18 Id. at 303-04.

19 Id. at 304.

10

No. 63661-8-I/11

discretion in ruling the witness was competent to testify, leaving the question of credibility to the jury.20

To the extent Wilks is really challenging Holden's credibility, credibility determinations are for the trier of fact and are not subject to review on appeal.21 As the trial court pointed out, Wilks was free to argue that Holden's testimony was not credible. Wilks did, in fact, make this argument.

RIGHT TO CONFRONTATION

Wilks argues that his Sixth Amendment right to confrontation was violated under Crawford v. Washington,22 because the court admitted an allegedly testimonial statement that witness Holden made to police during an identification showup without first eliciting the statement from Holden. The State counters that

there was no Crawford violation. Assuming, without deciding, that the admission of Holden's statement to police was a Crawford violation, we hold that any violation was harmless beyond a reasonable doubt.

Wilks argues that the statement was testimonial because it was made to a police officer during the course of a showup and police interrogation. According

20 Id.

21 State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

22 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

to him, these are circumstances which would lead an objective witness to reasonably believe that the statement would be available for use at a later trial. Wilks claims that the statement was testimonial and the evidence was not admissible.

The confrontation clause guarantees that a person accused of a crime "shall enjoy the right . . . to be confronted with the witnesses against him."23 Similarly, the Washington Constitution guarantees a defendant the right "to meet the witnesses against him face to face."24 "'[T]he Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.'"25 "The purposes of the confrontation clause are to ensure that the witness's statements are given under oath, to force the witness to submit to cross-examination, and to permit the jury to observe the witness's demeanor."26 Our supreme court has concluded that the right to full and fair cross-examination includes the right to have the State ask questions of the witness about the hearsay statement on direct examination.27

23 U.S. Const. amend. VI.

24 Wash. Const. art. I, § 22.

25 State v. Price, 158 Wn.2d 630, 640, 146 P.3d 1183 (2006) (quoting California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970)).

26 Id.

27 See, e.g., State v. Rohrich, 132 Wn.2d 472, 478, 939 P.2d 697 (1997) ("The opportunity to cross-examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross-

In Crawford, the United States Supreme Court held that out-of-court testimonial statements may not be admitted unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the adverse

witness.28 However, nontestimonial hearsay statements are exempt from confrontation clause scrutiny.29

The Supreme Court declined to offer a comprehensive definition of what constitutes "testimonial" evidence in Crawford, but the court did list classes of testimony that would be considered testimonial.30 This includes,

> (1) ex parte in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; (2) extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; (3) statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[31]

The Court also concluded that statements taken by police officers in the course of an interrogation would generally be testimonial.32 But the Court did not define

examine if he so chooses. In this context 'not only [must] the declarant have been generally subject to cross-examination; he must also be subject to cross-examination concerning the out-of-court declaration.'" (footnotes omitted)).

28 541 U.S. at 59.

29 Id. at 68.

30 Id.

31 Id. at 51-52 (internal quotation marks and citations omitted).

32 Id. at 53 n.4.

"interrogation," beyond indicating that it was using the term in the colloquial, rather the technical, legal sense.33

Two years later, in Davis v. Washington,34 the Court elaborated on when police interrogations produce testimonial statements.

> Without attempting to produce an exhaustive classification of all conceivable statements -- or even all conceivable statements in response to police interrogation -- as either testimonial or nontestimonial, it suffices to decide the present cases to hold as follows: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[35]

This definition applies equally to statements made in response to questioning and to volunteered statements.36

We may affirm the trial court on any basis supported by the record.37

Here, the focus of Wilks' argument is that Holden's apparently spontaneous statement to Officer Gallegos, "Look at him. He is threatening me now." is testimonial hearsay. Specifically, he argues that Holden made the

statement during an identification procedure and police interrogation that was

33 Id.

34 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

35 Id. at 822.

36 Melendez-Diaz v. Massachusetts, __ U.S. __, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

37 LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

intended to aid in the criminal investigation that led to the charges in this case. The State argues, at length, that this statement is not testimonial. Wilks also argues that the statement was admitted without the State first questioning Holden about the statement.

We need not and do not resolve these conflicting arguments because it is unnecessary to do so. Any error in admitting this statement over the Crawford objection was harmless beyond a reasonable doubt.

"A violation of the confrontation clause is . . . subject to harmless error analysis where the error was harmless beyond a reasonable doubt."38 Error in admitting testimonial statements is harmless if "the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt."39 Factors bearing on this inquiry include:

> [T]he importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.[40]

Here, Holden was the complaining witness for the first degree robbery charge. This obviously makes him an important witness in the State's case for the attempted robbery charge.

38 State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844 (2005).

39 Id. at 305.

40 Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

Moving to whether the challenged testimony was cumulative of other evidence, we conclude that it unquestionably was. Officer Gallegos testified that after initially responding to Holden's 911 call, she began to take his statement. She then left for a short time to respond to an incident at Occidental Park.

Officer Gallegos arrested Wilks at the park, placed him in the back of her patrol car, and returned to Holden to conduct a showup identification and finish taking his statement. The record reflects the following testimony of this police officer concerning the events when she returned to Holden with Wilks in custody:

> [Prosecutor:] And what was Mr. Holden's demeanor like when you drove up to the scene and the defendant was in the backseat of your patrol car?
>
> A. I don't remember exactly how it was initially.
>
> Q. Did you make any observations of what the defendant was doing when you were at the scene there with Mr. Holden?
>
> A. I did.
>
> Q. What was the defendant doing?
>
> A. The defendant was basically staring at Mr. Holden with a fixed gaze, wouldn't look away at all, in what I thought was a threatening or a glaring manner.
>
> Q. Okay. And did Mr. Holden have any response to that?
>
> A. Yes, he did.
>
> Q. What was his response?
>
> [Defense Attorney:] I object on hearsay, Your Honor.
>
> [Prosecutor:] Your Honor, I would ask the Court to find present sense impression and also excited utterance.
>
> The Court: Counsel, I'm not sure it's an excited utterance.

> There isn't any foundation about that. Mr. Holden didn't talk about this in his testimony. I'll overrule the objection -- sustain the objection.
>
> [Prosecutor:] Is the Court making a finding as to present sense impression?
>
> The Court: If you want to lay a foundation, Counsel; I don't think it satisfies that at this moment.
>
> [Prosecutor:] When you saw Mr. Wilks staring at Mr. Holden, did it appear to you that Mr. Holden was looking back at Mr. Wilks?
>
> [Defense Attorney:] I'm sorry. Officer, before you answer, I should make a relevance objection at this point too.
>
> The Court: Overruled. Relevance is overruled.
>
> A. Yes, I did.
>
> Q. How far away were they from each other?
>
> A. I would say we were approximately within ten feet.
>
> Q. Was it lit at that time of day?
>
> A. Yes.

Q. Was it afternoon still?

A. Yes.

Q. Okay. And how much time went by between the time that you saw the defendant glaring at Mr. Holden that Mr. Holden said something to you?

A. It was pretty much simultaneously.

Q. And at that point, what did Mr. Holden say to you?

[Defense Attorney:] Before you answer -- I'm sorry, Officer. I have an objection under Crawford. I think it's a confrontation issue because of the fact of the testimony we heard from Mr. Holden -- or the lack of, I should say, really, on this point.

17

No. 63661-8-I/18

The Court: I will excuse the jury, Counsel.

. . . .

Q. Officer Gallegos, where we left off was, when Mr. Holden was looking at Mr. Wilks looking at him, did Mr. Holden say anything?

A. Yes, he did.

Q. What did Mr. Holden say?

. . . .

A. He said, "Look at me" -- or "Look at" -- hold on. He said that "Look at him. He is threatening me now."[41]

The portion of the officer's testimony during which she explained that Wilks was staring at Holden with a fixed gaze in what she viewed as a threatening or glaring manner was admitted without objection. This is cumulative of the challenged testimony of Holden in which he expressed the same view from his perspective. Thus, the jury heard unchallenged evidence from the police officer of the threatening manner in which Wilks glared at Holden during the identification showup. Wilks does not and could not argue that this portion of the officer's testimony was insufficient evidence to show that he glared at Holden in a threatening manner. And the jury was free to infer from this unchallenged evidence that Holden's testimony regarding the earlier attempted robbery was credible.

As to the extent of the cross-examination of Holden, the court did not

41 Report of Proceedings (January 10, 2008) at 178-80, 203-04 (emphasis added).

18

No. 63661-8-I/19

impose any restrictions to which Wilks objected. In making this statement, we

acknowledge that the court stated that both direct and cross-examination were difficult due to Holden's tendency to wander off topic. But this does not diminish the fact that Holden did testify to events supporting the charge of attempted first degree robbery.

Finally, we note that both parties addressed during closing argument both the competency and the credibility issues arising from the testimony of Holden. The jury determined those issues adversely to Wilks. There is no basis to overturn the jury's finding in this respect.

Accordingly, we conclude that the untainted evidence was sufficient to necessarily lead to a finding of guilt on the attempted robbery charge. In short, any error in admitting the officer's testimony about Holden's statement at the showup was harmless beyond a reasonable doubt.

Wilks chiefly argues that Holden's statement to Officer Gallegos was not harmless because the statement implied that Wilks had previously threatened Holden, presumably during the alleged robbery. He claims the statement was especially prejudicial because Holden's trial testimony was replete with contradictions and memory lapses. Wilks argues that the jury must have relied on Holden's statement because of an inquiry to the judge during deliberations.

These arguments are unpersuasive. We will not speculate over the effect of a jury inquiry to the judge during deliberations.[42] The unchallenged testimony

42 State v. Ng, 110 Wn.2d 32, 43, 750 P.2d 632 (1988).

of the police officer of her observation that Wilks was glaring at Holden in a threatening manner made the challenged testimony cumulative. Holden was the most important witness for the attempted robbery charge. And his testimony was challenging due to his tendency to wander off topic. But he did testify in support of the attempted robbery charge, and the jury necessarily determined that he was credible. In short, we reject Wilks' arguments as unpersuasive.

INEFFECTIVE ASSISTANCE OF COUNSEL

Wilks argues that his trial counsel was ineffective because he failed to request a competency evaluation or bring his mental health issues to the attention of the judge. We disagree.

Claims of ineffective assistance of counsel are reviewed de novo.[43] When alleging ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense.[44] In order to meet the first prong, "the defendant must

show that counsel's representation fell below an objective standard of reasonableness."45 The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.46 The second prong

43 In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

44 Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

45 Id. at 688.

46 State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

requires the defendant to show that there is a reasonable probability that, but for counsel's errors, the results of the proceeding would have been different.47 Both prongs must be met and a failure to show one prong ends the inquiry.48

Wilks argues that his attorney acted unreasonably in failing to challenge his competency because of his known history of mental illness. An "incompetent person" may not be tried, convicted, or sentenced for an offense so long as the incapacity continues.49 A defendant is incompetent if he "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect."50

A competency evaluation is required whenever "there is reason to doubt" the defendant's competence.51 That doubt arises if there is reason to question whether the defendant: (1) understands the charge and consequences of conviction; (2) understands the facts giving rise to the charge; and (3) is able to relate the facts to his attorney to help prepare the defense.52 "In exercising its discretion in determining the threshold question, the court should give considerable weight to the attorney's opinion regarding a client's competency

47 Strickland, 466 U.S. at 694.

48 State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

49 RCW 10.77.050.

50 RCW 10.77.010(6).

51 RCW 10.77.010(6).

52 City of Seattle v. Gordon, 39 Wn. App. 437, 442, 693 P.2d 741 (1985).

and ability to assist in the defense."53

Here, there is no indication that defense counsel had reason to doubt Wilks' competence under any of these factors. A thorough review of the record does not reveal a single instance during trial that would have led Wilks' trial

counsel or the trial judge to question whether Wilks was competent to stand trial. Rather the record shows that Wilks understood the nature of the proceedings and was able to assist counsel in preparing his defense. This is further supported by the post trial hearing on Wilks' motion for a new trial before Judge Orlando.

After the jury returned its verdict, but before sentencing, Wilks filed a motion for a new trial alleging, among other things, that he received ineffective assistance due to counsel's failure to seek a competency evaluation. The trial court held a live hearing on the motion, at which Judge Jordan, Wilks' original trial attorney, and the prosecuting attorney testified. Judge Orlando denied Wilks' motion for a new trial. He concluded that, based on the information known to the trial judge and trial counsel at the time of trial, there was no reason to question Wilks' ability to understand the nature of the proceedings and to assist trial counsel. Specifically, Judge Orlando concluded:

> Looking at the information [defense counsel, the prosecutor, and the trial judge] possessed about Mr. Wilks and his presentation in January 2008 during the trial, I do not believe they had any reason to question his competency to stand trial, to understand the nature of the proceedings and to assist his legal counsel. Mr. Wilks was described by Judge Jordan as an active

53 Id. (citing State v. Crenshaw, 27 Wn. App. 326, 331, 617 P.2d 1041 (1980)).

> participant in the trial, taking notes, speaking with his attorney and engaging the trial judge in discussions on various matters.
>
> He was described by [trial counsel] as the brightest client he had defended with a full knowledge of the trial process. Mr. Wilks had successfully brought civil suit against King County while an inmate on a pro se basis. He had access to legal reference materials and filed many pro se motions while self-represented that were described by [the prosecutor] as being well written and appropriate for the issues presented.
>
> . . . .
>
> Looking at the evidence presented I do not find that Mr. Wilks received ineffective assistance of counsel by [trial counsel]. I also believe there was no reason for Judge Jordan to have ordered a competency evaluation during trial based on the high functioning of Mr. Wilks during the trial process.[54]

Wilks argues that despite the above evidence, In re Fleming55 demands reversal. We disagree.

In that case, the court found that counsel was ineffective because defense counsel knew of psychological evaluations concluding that Fleming was incompetent, but did not provide the court with the evaluations or raise the issue of competency prior to Fleming entering a plea of guilty.56 The court found that

counsel's representation fell below an objective standard of reasonableness because the evaluations provided an abundance of reason to suggest that Fleming was incompetent.57 Had the trial court been apprised of this, the

54 Clerk's Papers at 339-40.

55 142 Wn.2d 853, 16 P.3d 610 (2001).

56 Id. at 866-67.

57 Id.

outcome, the acceptance of the plea at that time, would likely not have been the same.58

Wilks argues that Fleming is persuasive here because his trial counsel was in possession of several jail infraction reports that found him incompetent to proceed to a disciplinary hearing. But these infraction reports are distinguishable from the psychological evaluations at issue in Fleming. In Fleming, the defendant had been subject to two full psychological evaluations, both of which included an opinion on the defendant's competency to stand trial. The first report concluded that the defendant was psychotic at the time of the crime and "marginally competent" to stand trial.59 The second report concluded that the defendant was incompetent to stand trial.60 In this case, on the other hand, the infraction reports do not include any evaluation of Wilks' competency. They merely state, "ruled incompetent by psych staff," without any further elaboration. In addition, the State points out that Wilks amassed a total of 115 jail infractions between August 27, 2007, and May 15, 2009. It appears that Wilks was found competent for a disciplinary hearing in all but 10 of these cases.

Likewise the psychological evaluations from Western State that were conducted after the jury returned the verdict in this case also do not shed light

58 Id. at 867.

59 Id. at 858.

60 Id.

on whether Wilks was competent to stand trial at the time of trial. The evidence in this case does not rise to the level of the evidence in Fleming. The evidence shows that defense counsel knew Wilks had a history of mental health problems, but had no reason to believe that his mental health was currently affecting his

competency.

Because trial counsel's performance did not fall below an objective standard of reasonableness, there is no reason to reach the prejudice prong of the test.61

STATEMENT OF ADDITIONAL GROUNDS

Wilks raises numerous arguments in his Statement of Additional Grounds (SAG). None have merit.

The issues briefed in Wilks' SAG are either argued by appellate counsel or involve discretionary determinations by the trial judge. Moreover, the challenges to the jury's determination that the facts of this case warranted a sentencing enhancement have no merit. In any event, most of these arguments were fully argued and rejected in the post-trial motions below. After thoroughly reviewing this record, we conclude Wilks has failed to show any reversible error.

We affirm the judgment and sentence.

61 Fredrick, 45 Wn. App. at 923.

No. 63661-8-I/26

WE CONCUR: