IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27766-6-III**
Respondent,	)	
	)	**Division Three**
v.	)	
JORDAN DAVID KNIPPLING,	)	**UNPUBLISHED OPINION**
Appellant.	)	

Brown, J.—Jordan D. Knippling appeals his third degree assault conviction, contending the trial court erred by denying his midtrial motion for a mental health evaluation and that he was denied due process based on alleged outrageous police conduct. We reject these contentions, but accept the State's concession that Mr. Knippling's sentence needs correction because it exceeds the statutory maximum.

FACTS

While Mr. Knippling was standing on a street corner holding a cardboard sign, Spokane County Sheriff Deputy Jeff Elliott approached Mr. Knippling because he was in an unsafe place for panhandling. The deputy asked for identification. Mr. Knippling refused and reached for his backpack. The deputy ordered Mr. Knippling to keep his

hands in view. Deputy Elliott called for backup. Mr. Knippling then put his hands in his pockets and began throwing the contents on the ground. The deputy removed his taser from its holster. When told to put his hands above his head and to kneel down, Mr. Knippling responded by ripping off his shirt and yelling. Mr. Knippling was arrested by backup officers for obstructing an officer.

At the police station, Mr. Knippling rammed his body into Deputy Elliott, injuring the deputy's shoulder. The State charged Mr. Knippling with third degree assault.

Before trial, the parties agreed to a sanity commission to assess Mr. Knippling's ability to understand the charges against him and to assist in his defense. Mr. Knippling, however, refused to cooperate and declined to be interviewed by medical evaluators. Defense counsel told the court Mr. Knippling had been evaluated four months prior and was found competent. Counsel believed the proceedings should proceed because she "no longer believes there is a need for a mental health evaluation in this case, and that her client is competent." Clerk's Papers at 2.

During both pretrial proceedings and trial, Mr. Knippling repeatedly injected comments and occasionally whistled. The court and/or defense counsel repeatedly reprimanded Mr. Knippling. At the conclusion of the State's case, defense counsel requested another competency evaluation based on Mr. Knippling's trial behavior and on his decision to testify against defense counsel's advice. The court denied the motion, finding Mr. Knippling had been previously evaluated, had been generally

compliant as the trial progressed, and it was Mr. Knippling's decision to testify.

The jury found Mr. Knippling guilty as charged. The court sentenced him to the 50 months' incarceration plus 9 to 18 months' community custody. The statutory maximum for his offense is 60 months. The sentencing court did not indicate on the judgment and sentence that his incarceration plus community custody shall not exceed the maximum sentence. Mr. Knippling appealed.

ANALYSIS

A. Motion for Competency Evaluation

The issue is whether, considering Mr. Knippling's trial behavior, the trial court erred by abusing its discretion in denying Mr. Knippling's midtrial motion for a competency evaluation.

We review a trial court's decision about whether to order a competency evaluation for abuse of discretion. *State v. Lord,* 117 Wn.2d 829, 901, 822 P.2d 177 (1991). A court abuses its discretion if its decision is "'manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.'" *State v. Rohrich,* 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Blackwell,* 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

A competency hearing is required when reason exists to doubt a defendant's competency. RCW 10.77.060(1)(a). "'A reason to doubt' is not definitive, but vests a large measure of discretion in the trial judge." *City of Seattle v. Gordon,* 39 Wn. App.

437, 441, 693 P.2d 741 (1985). If the trial court determines a reason exists to doubt the defendant's fitness, the court must hold a competency hearing in accordance with statutory procedures. *Lord,* 117 Wn.2d at 901 (citing *Gordon,* 39 Wn. App. at 441).

Here, Mr. Knippling first requested an evaluation prior to trial. He then refused to cooperate with evaluators. However, he had been evaluated by the same evaluators four months prior and was found to be competent. Defense counsel believed he was competent. During trial, Mr. Knippling made several outbursts and chose to testify against the advice of counsel. However, the record shows his outbursts somewhat diminished as trial progressed, and after being admonished by the court he was immediately compliant. Mr. Knippling's decision to testify does not render him incompetent. Considering this record, the trial court had tenable grounds to deny Mr. Knippling's motion and did not abuse its discretion in denying the midtrial motion for a competency evaluation.

B. Police Conduct

The next issue is whether Mr. Knippling was denied state and federal due process based on alleged outrageous police conduct.

We review de novo whether government conduct is sufficiently outrageous to bar prosecution. *State v. O'Neill,* 91 Wn. App. 978, 990-91, 967 P.2d 985 (1998). In doing so, we consider all the circumstances in the particular case, focusing on the State's behavior. *State v. Lively,* 130 Wn.2d 1, 21-22, 921 P.2d 1035 (1996).

In determining whether police conduct violates due process, the conduct must be so shocking that it violates fundamental fairness. *Lively,* 130 Wn.2d at 19. A claim based on outrageous conduct requires the defendant to demonstrate more than mere flagrant police conduct. *State v. Myers,* 102 Wn.2d 548, 551, 689 P.2d 38 (1984). Dismissal based on outrageous conduct is reserved solely for the most egregious circumstances and must be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *United States v. Russell,* 411 U.S. 423, 431-32, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973).

Mr. Knippling argues Deputy Elliott's behavior "created the circumstances leading to the crime of his own assault." Appellant's Br. at 15. Deputy Elliott approached Mr. Knippling for panhandling near a street corner where he perceived it unsafe for Mr. Knippling to approach vehicles. Mr. Knippling then began acting strangely and refused to cooperate with the deputy. The deputy called backup and removed his taser from its holder for protection. Mr. Knippling was arrested without major incident. While at the police station, Mr. Knippling then assaulted the officer.

These facts do not amount to outrageous conduct by Deputy Elliott or rise to the level requiring reversal. Moreover, Mr. Knippling does not show he was resisting an attempt to inflict injury on him during the arrest process and he may not use force against a law enforcement officer if he is merely facing, even illegally, a loss of

freedom. *State v. Valentine*, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997).

C. Excessive Sentence Conceded

Mr. Knippling contends, and the State concedes, that the sentencing court exceeded its authority by imposing a sentence in excess of the statutory maximum for third degree assault. The court sentenced Mr. Knippling to 50 months. The maximum sentence for a class C felony is 60 months. RCW 9A.36.031(2); RCW 9A.20.021(1)(c). The community custody range for third degree assault is 9 to 18 months. WAC 437-20-010. "'[A] court may not impose a sentence providing for a term of confinement or . . . community custody which exceeds the statutory maximum for the crime.'" *State v. Torngren*, 147 Wn. App. 556, 566, 196 P.3d 742 (2008). A recent decision of the Supreme Court, *In re Personal Restraint of Brooks,* 166 Wn.2d 664, 675, 211 P.3d 1023 (2009), held that when a defendant's term of confinement and community custody could potentially exceed the statutory maximum, the appropriate remedy is to remand to the trial court "to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum."

Because 50 months' confinement plus a potential of 18 months' community custody totals more than the 60-month maximum, the sentencing court exceeded its authority. We remand for the trial court to amend the judgment and sentence to clarify that confinement plus community custody shall not exceed the 60-month maximum.

Affirmed, and remanded with instruction.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.