67894-9

67894-9

NO. 67894-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

ALEXANDER ORTIZ-ABREGO,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN CRAIGHEAD

BRIEF OF APPELLANT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JAMES M. WHISMAN
Senior Deputy Prosecuting Attorney
Attorneys for Appellant

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

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by entering an order finding that the defendant was no competent to be sentenced, and by granting a new trial.

2. The trial court erred when it found that "the defendant was unable to understand the trial process, the testimony of witnesses, and argument as a result of the combination of his borderline intellectual functioning and his auditory processing disability" and that "he lacked the capacity to assist his attorney in the absence of accommodations outline by Dr. Judd. . ." CP 346-47 (Conclusion of Law 2).

3. The trial court erred when it ruled that "the defendant was not competent to stand the trial we gave him, because he was not capable of properly understanding the nature of the trial proceeding or rationally assisting his legal counsel in the defense of his cause." CP 347 (Conclusion of Law 3).

4. The trial court erred when it ruled that "the defendant is not competent to be sentenced because even if the Court were to adopt the accommodations recommended by Dr. Judd, he did not understand the proceeding that led to his conviction." CP 347 (Conclusion of Law 4).

5. The trial court erred in faulting attorney Samuel for not doing more to ensure the defendant's understanding of the trial process. CP 336-337 (Findings of Fact 30-36); CP 346-47 (Conclusions of Law 1, 2)

6. The trial court erred when it found that Dr. Judd had not found the jail phone calls to bear significantly on the issue of competency. CP 345 (Findings of Fact 52, 53).

7. The trial court erred when it concluded that Dr. Judd's report was sufficient to find that the defendant was not competent to stand trial. CP 335 (Finding of Fact 29); CP 345-46 (Findings of Fact 54, 55).

B. ISSUES PRESENTED

1. A defendant is competent to stand trial if he understands the charges and can assist his attorney by relaying information about the case. Ortiz-Abrego understood the charges and was able to relay and discuss case-specific information to his lawyer. Did the trial court err in finding that Ortiz-Abrego was not competent because he failed to "properly" understand the trial process, the testimony of witnesses, and argument, and thus could not assist his attorney in the absence of accommodations?

2. Did the trial court err in finding that a more skilled attorney utilizing the type of accommodations suggested by Dr. Judd could have helped the defendant understand . . ." where the court never analyzed whether counsel's performance was truly deficient, and where the court

never asked whether the recommended accommodations were possible under the circumstances.

3. Did the trial court err in disregarding the information in the jail phone records based on Dr. Judd's testimony on direct examination, where on cross-examination he acknowledged that he had not read all the transcripts of the jail phone call records, and that passages the prosecutor recited would be significant to assessing the defendant's level of understanding?

4. Did the trial court err in relying on Dr. Judd's report to find the defendant incompetent where Dr. Judd never tested for competency, did not offer an opinion on competency, and simply recommended accommodations to improve chances that the defendant would fully understand the proceedings?

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Alexander Ortiz-Abrego was charged on October 17, 2008 with two counts of Rape of a Child in the First Degree for oral sexual contact with a six-year old girl that occurred between 1999 and 2002. CP 1. Attorney Paige Garberding represented Ortiz-Abrego from October, 2008 until December, 2009. Attorney Anna Samuel replaced Garberding in late December, 2009, and Samuel remained Ortiz-Abrego's counsel through trial. Trial was originally set for February 20, 2009, but was continued until May 10, 2010. A third count of Rape of a Child in the First Degree was added on May 12, 2010. CP 7.

Trial lasted from May 10 to 27, 2010. Although concerns about Ortiz-Abrego's competence were raised early in the trial, the court held a colloquy and found that Ortiz-Abrego was competent and trial proceeded. RP 5/10/10, 37. Ortiz-Abrego was found guilty as charged on May 27, 2010. CP 37-39.

On June 3, 2010, defense counsel moved for a new trial based on concerns about Ortiz-Abrego's competency. CP 39-43. The court ordered that Ortiz-Abrego be re-evaluated for competency prior to sentencing. CP 59-65. Due to delays in securing a court-certified translator, Ortiz-Abrego was not evaluated until October 14, 2010. CP 88. On October 27,

2010, the court found that Ortiz-Abrego lacked the capacity to understand the charges against him. CP 93-95. Ortiz-Abrego was then sent to Western State Hospital (WSH) for a 90-day period of competency restoration treatment, from November 17, 2010 to February 22, 2011. CP 96. On February 24, 2011, WSH issued a report stating that it was unable to reach a conclusion on Ortiz-Abrego's competency. CP 101, 145-56. Anna Samuel withdrew as Ortiz-Abrego's counsel on March 2, 2011, because Samuel needed to testify as a witness in the competency hearing. RP 4/22/11, 7; CP 103-06. She was replaced by James Koenig. CP 103.

After several hearings about procedure, a contested competency hearing was held from June 8, 2011 to June 30, 2011. On July 5, 2011, the court ruled that Ortiz-Abrego lacked "the capacity to understand or assist counsel, and was not competent to stand trial." CP 264. The trial court granted the defense motion for a new trial on October 3, 2011 and filed detailed written findings of fact and conclusions of law. CP 326-48. The State timely appealed this order for a new trial. Proceedings continue in the trial court to determine competency; no stay has yet been requested or ordered.

2. SUBSTANTIVE FACTS

The criminal charges against Ortiz-Abrego centered on four incidents of coerced oral sex that took place between 1999 and 2002. CP 3-4. The alleged victim was between six and seven years old during this time, and was the daughter of Ortiz-Abrego's cousin. Id. The girl did not disclose these events until July of 2008, and her mother contacted the King County Sheriff's Office a short time later. Id.

Detective Chris Knudsen of the King County Sheriff's Office first approached Ortiz-Abrego in September of 2008. RP 6/8/11, 10. Detective Knudsen is proficient in Spanish, and conducted all of his conversations with Ortiz-Abrego in Spanish without the use of a translator. Id. Detective Knudsen first contacted Ortiz-Abrego at his home in Seattle, and asked to interview him. Id. Ortiz-Abrego informed him that he was on the way to his son's funeral, and did not have time to speak with him. Id. They arranged for Ortiz-Abrego to meet with Detective Knudsen at his office in Kent at 9 a.m. the next morning. Id. at 10-13. Detective Knudsen observed that Ortiz-Abrego had no difficulty speaking with or understanding him. Id. Furthermore, Detective Knudsen did not write anything down, or give Ortiz-Abrego any directions beyond a business card with an address. Id. at 13.

Ortiz-Abrego arrived at the Regional Justice Center in Kent, Washington at 9 o'clock the next morning. Prior to the interview, Detective Knudsen asked if Ortiz-Abrego had been to the Regional Justice Center before, and he replied that he had been there after being accused by his neighbors of rape; he said he had been targeted because he was Hispanic. RP 6/8/11, 14. The rape allegation was investigated, but charges were not filed. Id. at 35.[1]

After reading his Miranda rights in Spanish, Detective Knudsen asked Ortiz-Abrego about his time living with his cousin and her daughter several years ago. RP 6/8/11, 16-17. Ortiz-Abrego immediately volunteered a story about how he had found the victim asleep on the couch one night and had attempted to wake her or carry her to her room. The victim woke up and started yelling, at which time her mother, Ortiz-Abrego's cousin, came into the room and accused Ortiz-Abrego of "doing something" to the victim. Id. at 21. This story is substantially similar to the one given by the complaining witness, with the exception of the nature of the touching. Id. at 22.

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[1] The report from this prior event was admitted as exhibit 7 in the competency hearing. It was offered by the prosecutor to show the defendant's ability to recall past facts and to stand up for himself in the face of criminal accusations. Ortiz-Abrego was accused of sexual intercourse with a developmentally delayed high school student, a girl who functioned at about the 12 year-old level. Investigation cast doubt on the intercourse claim, and the girl subsequently moved away, so charges were never brought. Still, Ortiz-Abrego gave a statement to authorities denying intercourse but admitting that he allowed the girl to masturbate him to ejaculation.

In addition to offering his version of events, Ortiz-Abrego told Detective Knudsen specific rules of the house dictated to him by his cousin while he lived there. Id. Ortiz-Abrego suggested two possible explanations for the victim's allegations: first, that she was confused about what happened, or second, that another man living in the house committed the crime. RP 6/8/11, 24. Ortiz-Abrego appeared calm during the interview, and Detective Knudsen did not notice any apparent issues with auditory comprehension. Id. at 26. Furthermore, Ortiz-Abrego's replies were on-topic, coherent, and there were no abnormal delays between Detective Knudsen's questions and Ortiz-Abrego's responses. Id. at 27-28. Additionally, when Detective Knudsen did not know or understand a word in Spanish, Ortiz-Abrego explained it to him. Id.

After the interview, Ortiz-Abrego agreed to take a polygraph test about the incident. Id. at 28. Due to issues with arranging a translator, the polygraph had to be rescheduled twice. Rescheduling took place over the phone between Ortiz-Abrego and Detective Knudsen, and Ortiz-Abrego showed up on time to the polygraph appointment. Id. at 29. Ortiz-Abrego told the same story during the polygraph, and continued to deny that he had done anything wrong. Id. at 31. The polygraph indicated deception, and when confronted, Ortiz-Abrego told Detective Knudsen that he could "give him charges" if it would make the victim feel better. Id. at 44.

Ortiz-Abrego was charged with two counts of Rape of a Child in the First Degree on October 17, 2008. CP 1.

3. FACTS RELATED TO COMPETENCY

a. Background And Pre-Trial.

Ortiz-Abrego is a 38-year old El Salvadoran who immigrated to the United States at the age of 17. See CP 44 (Judd Report, 5/17/10), 1. He lives with a common law wife and they have two small children. Id. Ortiz-Abrego was educated through the 6th grade in El Salvador. Id. He has held several jobs including construction, bagging at a grocery store, and working at a car dealership. RP 6/29/11, 58.*[2] Prior to this conviction, Ortiz-Abrego had never sought or obtained mental health services. CP 133-43. He pays his bills on time, and was able to pass his driver's license test on the second try without studying. CP 48 (Judd Report, 5/17/10). Additionally, he has an active social life and plays soccer regularly. Id.

Anna Samuel inherited Ortiz-Abrego's case as a part of Paige Garberding's caseload on December 7, 2009. RP 6/8/11, 60. Samuel had limited felony experience, but had spent the past two years working in

[2] On two days of the competency proceedings, a substitute report took over for the assigned reporter, and later prepared a transcript using different pagination. In this brief, an asterisk after an RP cite will indicate that the citation is to the substitute's report of proceedings for that date.

mental health court. RP 6/29/11, 78.* During her time in mental health court, Samuel became familiar with the process of screening defendants for mental illness, as well as the competency evaluation process. Id. It did not initially occur to Samuel to screen Ortiz-Abrego for mental illness because his case had already been scheduled for trial, and Garberding's notes did not indicate any mental health concerns. RP 6/8/11, 60, 82-83.[3]

Samuel spoke with Ortiz-Abrego approximately ten to fifteen times prior to trial. Id. Samuel never spoke with Ortiz-Abrego in English, and all of their meetings were facilitated by an interpreter. Id. at 64. During Samuel's initial meetings with Ortiz-Abrego, she discovered that he did not know his date of birth, his exact age, or his wife's birthday. Id. at 69-70. In another meeting, Samuel asked Ortiz-Abrego if his previous attorney had spoken with him about plea or treatment options, rather than going to trial. Id. at 80. Ortiz-Abrego did not appear to have any understanding of what treatment options were available, or that he had opted to go to trial. Id. Samuel then inquired further about Ortiz-Abrego's understanding of the trial process, and discovered that Ortiz-Abrego did not appear to understand the roles of the prosecutor, defense attorney, or jury. Id. at 81-82.

[3] Garberding is one of the most senior and experienced lawyers at the Associated Counsel for the Accused; she has a reputation for thoroughness. RP 6/29/11, 81.

Samuel was concerned by this apparent lack of understanding, and used the skills she had learned from her time in mental health court to screen for mental health issues. Id. at 82. During these conversations, Samuel noticed that Ortiz-Abrego appeared to have difficulty remembering dates, and called his wife on two or three occasions to get that information. RP 6/29/11 (Hunt), 14-15. Although Ortiz-Abrego's comprehension issues concerned Samuel, she did not observe any symptoms associated with mental illness. Id. at 23.

Because of Ortiz-Abrego's difficulty in understanding oral explanations about the trial process, Samuel attempted to use several other methods to explain trial proceedings to him. These methods included the use of pictures to diagram the courtroom and the use of Ortiz-Abrego's past conviction for criminal trespass as an example to explain the criminal justice process. Id. at 12-13, 7-8. However, Ortiz-Abrego still did not seem to understand that he had pled guilty to a crime several years prior. Id. After a meeting on January 8, 2010, Samuel put in a request for the social worker attached to her office to examine Ortiz-Abrego because she had concerns about his competency to stand trial. Id. at 10. The social worker did not find any mental health issues, and recommended that Samuel speak slowly and repeat explanations as much as possible. Id. at 22-23. Samuel followed this recommendation, and met with Ortiz-Abrego

several times between January and May to explain the trial process and his options. Id.

Shortly before trial, on May 6-8, 2010, Samuel attended a continuing legal education conference. In one of the sessions, Samuel explained her interactions with Ortiz-Abrego and asked for advice in communicating with him. She further explained that neither she, nor the social worker were able to find any signs of mental illness. Id. at 23. She was told by one of the presenters that only a neuropsychologist would be able to tell if Ortiz-Abrego had cognitive disabilities, and that a social worker would not be able to recognize or diagnose these issues. Id. at 24. Samuel called a co-worker and asked them to schedule an appointment with a neuropsychologist as soon as possible, because the trial was due to start on May 10, 2010. Id. Her paralegal later secured an appointment with Dr. Ted Judd on May 17, 2010. Id. at 27-28.

b. Trial And Competency Issues.

Pre-trial motions began on May 10, 2010. Id. at 28. Ortiz-Abrego brought his five-year old son to trial with him that day because his wife had just given birth the previous night and was in the hospital. RP 5/10/10, 5. Ortiz-Abrego did not know the exact name of his son's school or have a telephone number for the school. Id. at 7. The bailiff was able to determine the name of the boy's school and arrange for child

care for him. After a discussion about Ortiz-Abrego's son, the prosecutor noted that the information was to be amended to add another count, and he expressed concern that the consequences of the amendment be carefully explained to Ortiz-Abrego so that he could decide whether to accept a plea offer. Id. at 11. Samuel replied that she had concerns about Ortiz-Abrego's competency and comprehension, and that she was in the process of arranging for a neuropsychologist to evaluate him. Id. at 12-13. The trial court indicated that it shared the parties' concerns about Ortiz-Abrego's competency, and engaged in a colloquy with Ortiz-Abrego to resolve this issue. Id. at 15.

During the colloquy, Ortiz-Abrego demonstrated a basic but unsophisticated level of understanding about the trial process. First, he indicated that he understood that he was on trial because "it is said I raped somebody." Id. at 18. Second, he said that he understood that Samuel was his attorney, and that her job was "to defend him." Id. at 19. Third, he indicated that he knew it was his choice to either "declare myself guilty or come to trial." Id. at 20. Fourth, he demonstrated that he knew who the prosecutor was, and that he was the one accusing him of a crime. Id. Fifth, he understood that if he was found guilty of the charges levied by the prosecutor that he could spend the rest of his life in jail. Id. at 20-21. Sixth, he understood the jury was the one who would determine his guilt

or innocence. Id. at 22. Seventh, Ortiz-Abrego demonstrated that he had the ability to understand what he was told and ask questions when he asked the court what would happen if a witness lied. Id. at 24. Eighth, Ortiz-Abrego stated that his lawyer had talked to him about pleading guilty and possibly getting a two-year sentence, as well as the possibility of treatment. Id. at 25-26. Ortiz-Abrego indicated that he did not want treatment because he wasn't "crazy." Id. at 26. Finally, Ortiz-Abrego stated that he could recall the events in question and relay them to his attorney. Id.

After hearing remarks from counsel, the court found that Ortiz-Abrego met the competency standards set out by State v. Lawrence, 108 Wn. App. 226, 31 P.3d 1198 (2001). Id. at 37-38. The court took a recess to allow Samuel and the prosecutor to discuss a plea offer, and communicate it to Ortiz-Abrego. RP 5/10/10, 41. In the end, Ortiz-Abrego rejected the offer and chose to go to trial. RP 5/10/10, 41.

After trial had begun, the court allowed a recess on May 17, 2010 for Ortiz-Abrego to be evaluated by Dr. Ted Judd, a psychologist who specializes in neuropsychology and cross-cultural communication with Latin Americans. RP 6/8/11, 89-93. Dr. Judd evaluated both Ortiz-Abrego's cognitive functioning, and his ability to adapt and cope with

everyday activities. Id. at 109. He authored a report based on his observations. CP 44-58.

Dr. Judd diagnosed Ortiz-Abrego as having a borderline retarded level of intellectual functioning (IQ of 71) relative to U.S. population. CP 51-55. Dr. Judd opined that Ortiz-Abrego had an auditory learning disability that would make it difficult for him to track courtroom proceedings. CP 55. Dr. Judd also said that Ortiz-Abrego had "notably concrete thinking," meaning that he had difficulty understanding abstract, hypothetical scenarios. CP 55; RP 6/8/11, 127-28. Dr. Judd made several recommendations to accommodate Ortiz-Abrego's cognitive issues including: slower proceedings with frequent breaks, the assistance of a Spanish-speaking cognitive aide, and written memos. CP 56.

Dr. Judd did not conclude – in either his report or his later testimony at the competency hearing – that Ortiz-Abrego was incompetent to stand trial. See RP 6/8/11, 133. In fact, Dr. Judd's report expressly says: "a specific evaluation of competence to stand trial was not requested and a full evaluation of this capacity was not completed." CP 55.

Dr. Judd expressed concerns with Ortiz-Abrego's ability to understand and evaluate the complexities involved in trial. CP 56. He opined that Ortiz-Abrego would have the most difficulty with "rapid speech, abstract concepts, and unfamiliar material." In testimony,

Dr. Judd explained that ". . . as a clinical neuropsychologist, I'm always thinking of disability accommodations. . ." and that his report was designed to suggest steps to "facilitate his meaningful inclusion in proceedings." RP 6/9/11, 21.

After receiving Dr. Judd's report, Samuel "didn't have any more hope that [she] was going to be teaching [Ortiz-Abrego] anything. RP 6/29/11, 49-50.* While Ortiz-Abrego consistently demonstrated the ability to recall and communicate his version of events, Samuel decided to not have Ortiz-Abrego testify at trial because he was unable to understand the need to avoid topics excluded in motions *in limine*. Id. at 46-47. Despite repeated explanations by Samuel, Ortiz-Abrego did not appear to appreciate the risk of a guilty verdict, until it was delivered. Id. at 53.

Ortiz-Abrego was found guilty as charged on May 27, 2010, and he was taken into custody. CP 36-38. Samuel testified that she went to visit Ortiz-Abrego after the guilty verdict, and he still did not seem to understand that he had been convicted of a crime and would be "living" in jail. Id. at 55-56.

c. Post-Trial Competency Evaluations And Proceedings.

On June 3, 2010, Samuel filed a motion to arrest judgment or for a new trial a new trial because she was concerned about Ortiz-Abrego's

competency. On June 11, 2010, the trial court ordered Ortiz-Abrego evaluated for competency prior to sentencing. CP 61-65. He was sent to WSH on July 14, 2010, as a part of a 15-day competency evaluation. His intake assessment was performed by Dr. Roman Gleyzer, a psychiatrist. RP 6/9/11, 48. While Dr. Gleyzer was unsure if he had read Dr. Judd's report when he did the initial assessment, he noted that the social history in Dr. Judd's report was consistent with what Ortiz-Abrego shared during the evaluation. Id. at 51. Ortiz-Abrego presented as having no major psychological issues during the interview, and while he did present with some cognitive and intellectual disabilities, Dr. Gleyzer stated that Ortiz-Abrego's level of functioning in society was average. RP 6/9/11, 52-53.

As a part of the intake process, Dr. Ray Hendrickson, a psychologist, did a mental status evaluation of Ortiz-Abrego. RP 6/28/11, 40. Dr. Hendrickson found Ortiz-Abrego could understand and respond to questions. Id. at 44. Dr. Hendrickson also noted Ortiz-Abrego's work history, and the fact that he indicated he was receiving state unemployment compensation at the time of the intake process, as signs of Ortiz-Abrego's ability to function in society. Id. 44-45. Dr. Hendrickson felt that Ortiz-Abrego had a below average level of mental functioning, and a "fairly high" level of adaptive functioning. Id. at 59. The final diagnosis at the end of the intake process was that Ortiz-Abrego had an

adjustment disorder with a depressed and anxious mood, as well as having borderline intellectual functioning. RP 6/9/11, 54.

There were difficulties in securing a court-certified translator for the competency evaluation, so the 15-day commitment was extended to approximately 30 days. RP 6/15/11, 86. During this time, Ortiz-Abrego demonstrated the ability to both speak and understand a certain amount of English, and interacted with non-Spanish-speaking patients and staff. Id. at 82. Furthermore, he was able to achieve the highest level of privileges, allowing him face to face meals with his wife. RP 6/9/11, 77. To obtain this status, Ortiz-Abrego had to follow all of the ward rules, have no behavioral issues, and fill out at least two forms to apply for the higher status. RP 6/15/11, 88. After approximately 30 days, Ortiz-Abrego was eventually returned to the King County Jail to wait until the evaluation could be scheduled at a time a court certified interpreter was available. Id. at 86.

While Ortiz-Abrego was in jail post-trial, he exchanged telephone calls with his wife. These calls were recorded and the prosecutor presented certain calls as evidence of Ortiz-Abrego's mental functioning.

The first of these calls occurred on June 1, 2010, a few days after Ortiz-Abrego was found guilty and during a time that Samuels reports the defendant seemed confused. In the recorded conversation, Ortiz-Abrego

demonstrates a higher level of understanding of the legal process than he indicated to Samuel. First, he clearly understood that he had been found guilty, and that the amount of time he faced in jail had not yet been determined. See Ex.11, 5 [quotes]. Furthermore, Ortiz-Abrego stated that he understood that he had the right to appeal his guilty verdict. Id. Moreover, he corrected his wife when she said that Samuel didn't explain the consequences of trial to him. Id. at 14. Finally, he illustrated that he understood the value of a plea deal when he criticized another inmate at the jail for rejecting a three-month plea deal when he was subsequently sentenced to five years. Id. at 12.

In a call placed on October 14, 2010, the same day as his evaluation with Dr. Nelson, Ortiz-Abrego and his wife discussed possible places his family could move and he told his wife that he did not like one possible residence because it had a pool, and their son would "want to be in it all the time." Ex. 14 at 19. Furthermore, Ortiz-Abrego told his wife about another inmate who had pled guilty, again indicating that he understood the meaning of a guilty plea. Ex. 14 at 12. Additionally, he discussed conversations with another attorney, Peter, who Ortiz-Abrego said did not know anything about his criminal charges because "he is just for immigration." Id. at 10.

Beyond insight into Ortiz-Abrego's understanding of the trial process, there are other exchanges in the calls that bear on Ortiz-Abrego's competency. First, Ortiz-Abrego instructed his wife as to preparations should he be jailed for a long time. Specifically, he told his wife to have tenants move into their apartment, and instructed her not to sell some of his equipment until they knew how long his sentence would be. Id. at 10. In the second exchange, Ortiz-Abrego indicated that he had the ability to communicate in English when he relayed to his wife a conversation he had with another inmate who did not speak Spanish. Id. at 20.

The competency evaluation for the initial commitment was eventually performed on October 14, 2010 by Dr. George Nelson, a psychologist and developmental disabilities professional from WSH. RP 6/15/11, 108-09. Ortiz-Abrego's demeanor was very different during this evaluation than his behavior during the 30 day commitment, trial, or his evaluation with Dr. Judd. Rather than appearing calm and attentive, Ortiz-Abrego was often crying and produced a moaning sound that concerned those present. RP 6/29/11, 64-66;* RP 6/15/11, 112.

Dr. Nelson was surprised at the level of difficulty Ortiz-Abrego had with the evaluation, stating that Ortiz-Abrego was having more difficulty than he had observed in people with an IQ of 50. RP 6/15/11, 115. Furthermore, Dr. Nelson had a hard time reconciling Dr. Judd's

report from 5/17/10 with his observations of Ortiz-Abrego in October. Id. at 116. For example, Dr. Nelson noted that he would be surprised if someone with the level of difficulty Ortiz-Abrego was showing could hold a job, have a family, or pass a driver's test. RP 6/21/11, 27. Dr. Nelson said that in the hundreds of competency evaluations he had performed, he had only seen five or six people with the performance Ortiz-Abrego demonstrated, and none of those people were able to function independently in the community. Id.

Dr. Nelson diagnosed Ortiz-Abrego as having an adjustment disorder with mixed anxiety and depression as a result of the stress of trial and time in jail. CP 141. Dr. Nelson concluded that Ortiz-Abrego's emotional distress was exacerbating his borderline intellectual functioning, and found that he was incompetent to be sentenced at the present time. Id. at 9. Furthermore, it was Dr. Nelson's belief that the emotional distress Ortiz-Abrego displayed during the evaluation was a major component of Ortiz-Abrego's incompetence. RP 6/21/11, 25. Although puzzled by the overall picture that was presented, Dr. Nelson believed that medication could resolve Ortiz-Abrego's emotional issues, and allow further evaluation of his underlying cognitive issues. Id. at 52.

On October 15, 2010, the day after Dr. Nelson evaluated Ortiz-Abrego; there was another call between Ortiz-Abrego and his wife. In this

call, Ortiz-Abrego's wife told him about a possible job offer. They discussed the type of work, number of hours, and days the work might be. After a back-and-forth conversation, Ortiz-Abrego told her to take the job. Exhibit 12, 6-7. Ortiz-Abrego does not moan in the jail called like he moaned in the forensic psychiatric evaluation.

Ortiz-Abrego was sent to WSH for a 90-day competency restoration treatment from November 17, 2010 to February 22, 2011. CP 96. At this time, Dr. Gleyzer performed another intake assessment of Ortiz-Abrego, and submitted a report on November 30, 2010. Ortiz-Abrego gave several answers that were inconsistent with the initial intake assessment in July, 2010; he alleged abuse as a child and claimed injuries from a beating at the hands of gang members. RP 6/9/11, 59. Ironically, in spite of these select, newly-recovered memories, Ortiz-Abrego illustrated general memory loss, and appeared "unwilling, or unable to provide information." Id. at 60. Dr. Gleyzer stated that there were two possible reasons for this change: a serious medical condition like injury or infection, or deliberate malingering or exaggeration. Id. at 61. Dr. Gleyzer's diagnoses on the November 30, 2010 report were substantially similar to the July 15, 2010 assessment. Id. at 62.

After this initial intake, Ortiz-Abrego was assigned to the most basic competency restoration classes, which focused on the basics of the

legal system. RP 6/15/11, 83. This class had two other students for whom English was not their first language. The class was conducted in a slower, less complex fashion. Id. at 83-84. Ortiz-Abrego did not appear to be very focused on the classes, and made little to no progress in learning about the trial process. Id. at 103. For example, WSH staff told Dr. Hendrickson that Ortiz-Abrego could and did engage in activities that interested him, like discussions about mental health and sports activities. RP 6/28/11 (Vitrano), 19. However, he would withdraw and not engage on the topics he did not enjoy, like discussions of the legal system. Id. Just like his initial commitment, Ortiz-Abrego had no disciplinary issues, and he was again able to obtain the highest level of patient privileges. RP 6/9/11, 77.

Although Ortiz-Abrego maintained privileges, there were several differences between his behavior at the first WSH commitments, and his behavior at the 90-day competency restoration period. While Ortiz-Abrego had communicated with non-Spanish-speakers in a limited way during the initial commitment, he insisted he understood no English during the 90-day restoration period. 6/9/11, 82. Additionally, Ortiz-Abrego self-reported a high level of memory and general knowledge deficiencies that he did not report during the first admission. Id. at 88.

Ortiz-Abrego received his final competency evaluation from Dr. Hendrickson and Dr. Gleyzer on February 9, 2011. Dr. Hendrickson noted that Ortiz-Abrego responded to most of the questions presented in this evaluation with "I don't know" or "I don't remember." These responses were given to questions like, "what is your mother's name," and others that Ortiz-Abrego had previously answered without difficulty. RP 6/28/11, 70-71. Although Dr. Hendrickson stated that the change in Ortiz-Abrego's responsiveness could be caused by disease or trauma, he noted that there was no evidence of either disease or trauma in jail or hospital records. Id. at 72. Dr. Gleyzer stated that a subject's inability to remember information is often a sign of malingering, because even severely impaired individuals will be able to answer some questions. RP 6/9/11, 91. Neither Dr. Hendrickson nor Dr. Gleyzer were able to test for malingering because neither spoke Spanish, which would be needed to conduct a viable malingering test on Ortiz-Abrego. Id. at 94.

The final report on Ortiz-Abrego's competency was published on February 24, 2011. CP 145-156. The report stated that the evaluators were unable to make a determination on Ortiz-Abrego's competency because his non-responsive answers did not yield enough information. Furthermore, Dr. Gleyzer explained that while there were no indications that Ortiz-Abrego lacked the capacity to understand a trial, the evaluators

could not make an exact determination because of Ortiz-Abrego's non-responsive answers. RP 6/9/11, 95-95. Although Dr. Hendrickson did not include this in the February report, he was of the opinion based on the contrast between his presentation at the evaluation, and his previous behavior, that Ortiz-Abrego was exaggerating the level of his impairment. RP 6/28/11, 18.* Ortiz-Abrego was returned to the King County Jail in March of 2011.

On April 22, 2011, Dr. Judd was asked to evaluate Ortiz-Abrego in the King County Jail. RP 6/8/11, 136. Prior to that meeting, Dr. Judd had reviewed Dr. Nelson and Dr. Hendrickson's reports. Id. During the meeting, Dr. Judd was surprised by Ortiz-Abrego's poor performance so he performed a test for malingering that showed that Ortiz-Abrego was obviously exaggerating his symptoms. Id. at 138. Furthermore, Dr. Judd repeated several of the tests he had performed on May 17, 2010, and found that Ortiz-Abrego's performance was substantially worse. Id. at 139. Dr. Judd reviewed the medical records for the past year, and stated that there were no medical reasons for Ortiz-Abrego's performance to have declined. Id. Additionally, he stated that neither depression nor anxiety could have caused the drop in performance he observed. Id.

d. Competency Hearing.

Drs. Gleyzer, Hendrickson, Nelson, and Judd all testified during a contested competency hearing that ran from June 8, 2011 to June 30, 2011. Additionally, they had all been given additional new information that they had not seen while making their past determinations on competency. For example, at the time the February 24, 2011 report was drafted, neither Dr. Gleyzer, nor Dr. Hendrickson had the transcripts of the jail phone calls, Ortiz-Abrego's interview with Detective Knudsen, or the colloquy on competency that took place on 5/10/10. Dr. Hendrickson had since reviewed that information, and changed his opinion to conclude that Ortiz-Abrego was exaggerating his cognitive issues during the February, 2011 evaluation. RP 6/28/11, 20.* Further, Dr. Hendrickson concluded that Ortiz-Abrego possesses the capacity to understand the nature of the charges against him and assist his attorney in his defense. Id. at 25-26.

Dr. Gleyzer similarly changed his opinion based on this new information, and concluded that Ortiz-Abrego was competent to stand trial. RP 6/9/11, 99. "I still believe that there's no real clinical reason that would explain any opinion of incapacity. So with the belief that he is capable of doing what the legal system expects from him, and in the light of this additional information, there's no reason to believe otherwise." Id. at 99-101. In response to the court's questions about how to explain his

decline in apparent cognitive ability from trial to June, 2011, Dr. Glyzer said, "the only explanation we could come up with is that, again, based on inconsistency of his performance at the time of his first admission compared to the second hospitalization, that it is all or in big part malingered or exaggerated." RP 6/15/11, 66.

Additionally, after reading transcripts of the jail phone calls, Dr. Nelson testified that they demonstrated that Ortiz-Abrego had a much higher level of abstract thinking, sequential planning and problem-solving than Dr. Nelson's initial evaluation had led him to believe. RP 6/21/11, 69-72. The fact that several of these phone calls happened around the time of that evaluation further led Dr. Nelson to question his opinion that Ortiz-Abrego was incompetent. Still, he indicated that he did not have enough information to determine Ortiz-Abrego's competency. Id. at 81.

Unlike the WSH doctors, Dr. Judd did not immediately change his opinion about Ortiz-Abrego's competency after reviewing the new information. Rather, he felt that the calls demonstrated an unsophisticated person similar to the one he had met in May of 2010. RP 6/8/11, 142. However, on cross-examination, Dr. Judd revealed that he had not received all of the transcripts of jail calls, and acknowledged that some discussions brought to his attention by the prosecutor would have altered his opinion of Ortiz-Abrego. For example, Dr. Judd said that the back and

forth conversation about a potential job would alleviate some of his concerns about auditory comprehension and he agreed that those conversations would be "significant." RP 6/9/11, 17-18. Furthermore, Dr. Judd agreed that the fact that Ortiz-Abrego was making a deliberate decision to malinger did indicate that Ortiz-Abrego had some understanding of the peril of his situation. Id. at 169. He did not address the passages where Ortiz-Abrego discusses guilty pleas or mocks the other defendant for not taking a favorable plea offer.

e. Findings Of The Court.

After the contested competency hearing, the trial court issued findings of fact and conclusions of law that found Ortiz-Abrego incompetent to be sentenced. The court also ruled retroactively that Ortiz-Abrego was incompetent for "the trial we gave him." CP 346. Specifically, the court ruled that:

> 1. I find by the preponderance of the evidence that at the time of trial, the defendant understood the charges made against him. I have significant doubts about the defendant's ability to appreciate his peril, but I cannot make the finding that he lacks this ability because it is possible a more skilled attorney utilizing the type of accommodations suggested by Dr. Judd could have helped the defendant understand this.
>
> 2. However, because none of the accommodations Dr. Judd suggested were made, I find by a preponderance of the evidence that the defendant was unable to understand the trial process, the testimony of witnesses, and argument

> as a result of the combination of his borderline intellectual functioning and his auditory processing disability. Therefore, I find that he lacked the capacity to assist his attorney in the absence of the accommodations outlined by Dr. Judd, as set forth in Exhibit 4.
>
> 3. I find by a preponderance of the evidence that the defendant was not competent to stand the trial that we gave him, because he was not capable of properly understanding the nature of the trial proceeding or rationally assisting his legal counsel in the defense of his cause.
>
> 4. I find that the defendant is not competent to be sentenced because even if the Court were to adopt the accommodation's recommended by Dr. Judd, [the defendant] did not understand the proceeding that led to his conviction.

CP 346-47.[4]

The trial court granted the defense motion for a new trial, and Ortiz-Abrego was sent to WSH for a second 90-day competency restoration on August 11, 2011. CP 279. As noted above, competency proceedings are on-going.

D. ARGUMENT

Alexander Ortiz-Abrego clearly has intelligence deficits. However, he has a much greater capacity to understand the charges against him and to assist his lawyer than many delusional and psychotic defendants who have been found competent to stand trial under the very minimal legal standards

[4] Although denominated "conclusions of law", these rulings are actually a mixture of findings of fact and conclusions of law.

for competency. Three experts opined that Ortiz-Abrego was competent under the normal legal standards. One expert expressed reservations about his ability to understand proceedings without accommodations, but did not test for competency and did not offer an opinion on competency. The trial court also found – and each expert agreed – that "the defendant has been exaggerating his lack of understanding since at least the fall of 2010..." Yet, this trial court found – one year after trial – that Ortiz-Abrego "was not competent for the trial we gave him."

The State respectfully suggests that the trail court erred in many ways in reaching its decision to vacate the jury's verdict.[5] However, rather than focus on a number of lesser criticisms of the court's ruling, the State will focus in this brief on two principal errors, each of which is sufficient to undermine the ruling. First, the trial court erred by demanding a greater level of understanding of trials and trial processes than is required by competency law – essentially requiring that a defendant actually understand nuances of the trial process in order to assist his counsel. Second, the trial court erred in blending notions of ineffective assistance of counsel with aspects of competency law, without expressly conducting any analysis of what constitutes effective representation of an admittedly low-functioning defendant, or any analysis as to whether counsel could have made a

[5] The State objected to many of the court's proposed findings of fact and conclusions of law, with specific objections interlineated in italics. CP 281-314.

difference in Ortiz-Abrego's understanding such that it would have changed the result of the trial.

These errors involve application of the incorrect legal standards and, thus, constitute an abuse of discretion. These failings also explain, however, why the trial court made a number of subsidiary errors, and why it continues to be so difficult to manage this case as it moves haltingly forward in the trial court. The matter should be remanded to the trial court for consideration of the competency issue under the correct legal standard.

1. COMPETENCY TO STAND TRIAL IS A LOW THRESHOLD AND IS MEASURED BY CAPACITY TO UNDERSTAND AND THE ABILITY TO ASSIST TRIAL COUNSEL.

Constitutional due process dictates that an incompetent person may not be tried, convicted, or sentenced as long as that incapacity continues. U.S. CONST. AMEND. XIV; State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982). Statutes governing competency proceedings, set forth in Chapter 10.77 RCW, presume that a defendant is competent and require court findings of incompetency. According to RCW 10.77.050, "[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." Under former RCW 10.77.060, when there is reason to doubt a defendant's

competency, the court shall order an examination and report of the defendant's mental condition.[6] "Incompetency" means "a person who lacks the capacity to understand the nature of the proceedings against him or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(15).

The federal constitutional standard for competency is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational, as well as factual, understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). Washington follows this rule: "[A] person is competent to stand trial if he has the capacity to understand the nature of the proceedings against him and if he can assist in his own defense." State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). "Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." Godinez v. Moran, 509 U.S. 389, 402, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). Defendants with serious mental illnesses have been deemed competent to stand trial.

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[6] In 2012, the legislature amended Chapter 10.77 RCW. Laws 2012 c 256 § 3, eff. May 1, 2012. The State cites to the statutes that were in effect during the pendency of the instant case.

See e.g. State v. Hahn, 106 Wn.2d 885, 894, 726 P.2d 25 (1986) (delusional and paranoid schizophrenic who was not medicated).

The trial court has discretion in judging the mental competency of a defendant to stand trial, and a trial court's decision will not be reversed unless it has abused its discretion. State v. Ortiz, 104 Wn.2d at 482. A trial court abuses its discretion when it "takes a view no reasonable person would take," or applies the wrong legal standard. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

As to the first prong, courts analyze a defendant's capacity to understand the nature of the charges against him by examining his comprehension of the peril he faces if found guilty, as well as his basic understanding of the nature of a trial. Ortiz, 104 Wn.2d at 482-83. The defendant needs to demonstrate only a very basic understanding of courtroom procedure, including the roles of the judge, prosecutor, defense counsel, and jury. Id. It is the defendant's *capacity* to understand the *nature* of the proceedings that is relevant, not whether he actually understood trial subtleties. See RCW 10.77.010(15) (emphasis added).

As to the second prong, a court should consider a defendant's ability to relate past events that his attorney might need for his defense. See State v. Harris, 114 Wn.2d 419, 428, 789 P.2d 60 (1990) (citing Ortiz, 104 Wn.2d 479, 483); see also State v. Gwaltney, 77 Wn.2d 906, 908, 468

P.2d 433 (1970) (reversing finding of incompetence largely because defendant's "memory of the event remains intact"). Furthermore, a defendant need not be able to "suggest a particular trial strategy," or "choose among alternative defenses." Id. A defendant need only be able to recall past facts and relate them to his attorney to meet the threshold for assisting in his own defense. See Ortiz, 104 Wn.2d at 483; State v. Minnix, 63 Wn. App. 494, 497, 820 P.2d 956 (1991); State v. Lawrence, 108 Wn. App. 226, 233, 31 P.3d 1198 (2001).

There have been many cases where defendants with intelligence quotients and metal limitations much more serious than Ortiz-Abrego's have been found competent to stand trial. For example, in State v. Ortiz, 104 Wn.2d at 483, the defendant had an IQ that ranged from 49-59, placing him in the category of mildly retarded. Id. at 482. He knew the flag was red, white and blue, that there are 12 months in a year, and that a thermometer shows how hot it is. Id. On the other hand, Ortiz did not know what shape a ball is, or where rubber comes from, he could not name four presidents, he thought Longfellow was Jesus, and he believed there was 1 day in a week. Id. Ortiz also claimed it was very difficult, if not impossible, for him to remember past events. Id. Following a hearing, the trial court found that the defendant understood there is a judge in the courtroom, that a prosecutor would try to convict him of a criminal charge,

and that he has a lawyer who will try to help him. Id. at 482-83. The trial court also found that the defendant had the ability to recall past facts and could relate these facts to his attorney. Id. at 483. The appellate court upheld the trial court's finding of competence, and further held that there is no requirement that a defendant be able to choose a trial strategy or defense in order to be competent. Id.

In State v. Minnix, 63 Wn. App. at 498, the court held a competency hearing at which six witnesses agreed that the defendant was mildly retarded with an IQ between 49 and 67. Minnix, 63 Wn. App. at 497. The court also considered a previous finding of incompetency in which seven counts against the defendant were dismissed because of lack of competency to stand trial. Id. Despite these facts, the trial court concluded that the defendant was competent. Id. The ruling was affirmed because the defendant understood the role of the judge, knew that the prosecutor was trying to charge him with a crime, knew that he had an attorney to assist him, understood that he was charged with rape, could recall past facts, and could develop his defenses and understand guilt because he offered explanations for blood stains when first confronted. Id.

Finally, in State v. Lawrence, 108 Wn. App at 233, the defendant had an IQ of 60, which classified him as mildly retarded, and a speech impediment that occasionally caused there to be long pauses between

when he was asked a question and when he would answer. Id. at 231. Lawrence tried to distinguish himself from Ortiz and Minnix because he was more than developmentally disabled. Id. at 232. He argued that his "mental impairment and response latencies made communication during trial impossible." Id. The appeals court affirmed, noting that the defendant had the capacity to respond, was aware of his own self-interest, and was able to follow his attorney's directives. Id. Moreover, the defendant's own expert agreed that the defendant understood the charges against him, was able to give a detailed factual account of the allegations, and was able to give his version of the facts. Id. The court concluded that "[t]he fact that [the defendant] was unable to respond promptly, or that he had a slow thought process, does not prove that he was unable to comprehend what was being said, or unable to communicate his thoughts to counsel." Id. "Based on Lawrence's ability to articulate to the experts a description of the allegations and his version of what happened on the night of the alleged rape, we conclude that he had the ability to assist his counsel in a defense. Id. at 232-33.

These authorities establish that competency is a low standard, that a defendant need not be able to articulate understanding of nuances, and that assisting counsel means being able to provide counsel with the basic facts to fashion a defense.

2. THE TRIAL COURT APPLIED AN INCORRECT LEGAL ANALYSIS FOR COMPETENCY.

a. The Trial Court Required A New and Higher Level Of "Understanding" And Blended That Requirement Into a More Demanding Test For "Assisting Counsel."

At the beginning of trial, the court applied the normal competency standard and found that Ortiz-Abrego understood the charges against him and was able to assist in his own defense. RP 5/10/10, 37-38. It ruled that Ortiz-Abrego met the standard in State v. Lawrence "in terms of his understanding of what a trial is." RP 5/10/10, 38. The court hinted, however, that it thought the standard should be higher:

> I had a chance to review the case law, and, you know, most of our case law has developed in a mental illness context, but I did have a chance to review State vs. Lawrence . . . It was also a sex case, although it did not involve a child, and apparently the Court of Appeals sets an extremely low standard, which is what I remembered, but I kind of wanted to -- it's sort of hard for me to believe, so I went back and reread it and that's exactly what it says.

RP (5/10/10) 33.

However, a year after the original competency colloquy, and after consideration of a great deal of evidence gathered during a period where the defendant was unquestionably malingering, the court found Ortiz-Abrego incompetent to stand trial because he did not demonstrate *actual* understanding of more subtle aspects of the trial process. CP 346-47. The

trial court arrived at this conclusion based on several missteps in analysis that amounted to applying a new and incorrect legal standard.

The court's first step was proper; it considered whether the defendant understood the proceedings against him and the basic component and actors in a criminal trial. As it had done before trial, the court ruled that Ortiz-Abrego understood the charges against him, and that he had the capacity to understand the peril of his situation. CP 346, Conclusion of Law 1.

All the evidence supported this finding. When asked by the court why he was present in court that day, Ortiz-Abrego replied that it was "because it is said I raped somebody." RP 5/10/10, 17. Later, when asked the identity of the woman sitting next to him, Ortiz-Abrego replied "she says she is my attorney." Id. at 18. When asked what his attorney does, Ortiz-Abrego replied, "she says that she is going to defend me." Id. When the court asked Ortiz-Abrego if he knew what the prosecutor's job was, Ortiz-Abrego replied that he could see that "he's accusing me." Id. When asked by the court if he knew what could happen if the jury believed the prosecutor, Ortiz-Abrego replied that he could, "spend the rest of my life in jail." Id. at 24. When asked if his attorney had told him if he had any choices to make, Ortiz-Abrego replied that he had to decide if he "should declare myself guilty or come to trial." RP 5/10/10, 19. He

demonstrated that he knew he had the option of a two-year sentence if he accepted a plea, and that he understood that his five year old son would be twenty by the time he was released from prison if he was found guilty at trial. Id. at 21-23. This evidence shows that Ortiz-Abrego understood not only the roles of the parties in the courtroom, but the nature of the peril before him and the possible outcome of his choices.

These facts also show a level of capacity equal to or greater than many defendants cited in the case law above. Defendants Gwaltney, Hahn, Harris, Ortiz, Minnix, Lawrence, and Godinez all had cognitive limits more serious than Ortiz-Abrego's challenges.

Moreover, there are elements to this case that show greater understanding, sophistication, awareness, and ability to assist counsel than is found in the reported cases discussed above. For instance, the trial court found that Ortiz-Abrego began to malinger at least beginning in the fall of 2010, prior to his evaluation by Dr. Nelson. CP 346. Drs. Hendrickson, Judd, and Nelson agree that at some point, Ortiz-Abrego began to malinger, or exaggerate the extent of his disability. RP 6/28/11, 20* (Dr. Hendrickson); RP 6/21/11, 69-72 (Dr. Nelson); RP 6/8/11, 136 (Dr. Judd). The fact that Ortiz-Abrego recognized a benefit to exaggeration of his symptoms shows that he had the capacity to recognize his peril and to

strategize to minimize that peril. Thus, the court's first step in the analysis was correct.

However, after starting correctly with the first step in the analysis, the court made two missteps. The second step of the analysis should have focused on the defendant's capacity to assist his lawyer, where that ability is tied to his basic ability to relate past events in a manner that will permit counsel to mount a defense. This court's second analytical step injected, instead, a new requirement for a higher level of "understanding" and then it blended that "understanding" requirement with the ability to assist counsel. CP 347 (Conclusion of Law 2).

The normal "understanding" analyzed in the first step is, as discussed above, the basic ability to understand the court procedures, the participants, and their respective roles. This court substituted a measure of higher understanding of "the trial process, the testimony of witnesses, and argument." Id. There is no precedent for demanding a showing of this higher level of understanding.

Moreover, the court's newly-created standard is opaque. The ruling simply asserts that the defendant did not understand "trial process, the testimony of witnesses, and argument" without any elaboration as to which processes, which testimony, and which argument. There is simply no statutory or case law framework for deciding which trial processes,

how much testimony, or which and how much argument the defendant must understand; nor is there any guidance as to what level of qualitative or quantitative understanding is required. It is difficult to know how to assess a defendant's understanding of, for example, the rules of evidence, or arguments about competency, for that matter. The ruling does not say.

Additionally, there was no testimony as to what the defendant *actually* did not understand during this trial. Ortiz-Abrego certainly never testified that he did not understand process, testimony and argument. And, in any event, his testimony on the topic would be wholly unreliable since it was acknowledged by everyone that he was malingering or exaggerating his level of understanding for at least eight months, since the fall of 2010. CP 338-39 (Findings of Fact 41, 42). Samuels described the defendant as somewhat unresponsive when she asked him to assess witnesses, but that hardly proves he did not understand what they were saying.[7] And, there was no testimony as to his level of understanding of trial processes and argument.

[7] Samuels is likely a poor gauge of Ortiz-Abrego's level of understanding. She thought immediately post-trial that he did not understand that he had been convicted. The jail calls prove that he did understand. Also, Samuels and her assistant were quite indignant with WSH evaluators because they suggested Ortiz-Abrego might be exaggerating his disability, see CP 97-110, but it turned out that Samuels was incorrect in her assessment on this point, too. Also, Samuel's immediate predecessor on the case – an experienced and thorough lawyer -- never raised a single question about his competency.

A showing of actual understanding of processes, testimony and arguments is not required by the competency standards because such a standard would be completely unworkable. First, it would require reliance on the defendant's self-reported subjective state of mind, rather an objective analysis of capacity that is tied to inferences from testing and observation. Attaching the legal standard to a defendant's self-report of his subjective states of mind would be particularly problematic with malingering defendants like Ortiz-Abrego.

Moreover, the competency statute clearly states that "capacity" is the true measure of competency, and capacity is not equal to understanding. See RCW 10.77.010(15). In other words, a defendant can have the capacity to understand, but because he is inattentive or malingering, he may not *actually* or *fully* understand many things that occur during trial. Courts have repeatedly said that competency to stand trial is a "modest aim" that seeks to ensure that the defendant has "the capacity to understand the proceedings and to assist counsel." State v. Marshall, 144 Wn.2d 266, 277, 27 P.3d 192, 198 (2001) (citing Godinez v. Moran, 509 U.S. 389, 402 (1993)).

For the above reasons, the court erred by injecting a higher "understanding" requirement into the second step of the analysis. Taken in its proper form, the standard as to the defendant's ability to assist in his

own defense merely requires that he should be able to relate his version of the events around the crime. Samuel testified that she had no concerns about Ortiz-Abrego's ability to recall past events, including the facts of the crime. RP 6/29/11, 83. She declared after trial that "[h]e is aware of the facts of the case." CP 40. He described the crime in detail to Det. Knudson, RP 6/29/11, 86, and the detective testified that Ortiz-Abrego's story was substantially similar to that of the complaining witness, further showing that Ortiz-Abrego had no difficulty in communicating his version of events to others, even over a period of years. RP 6/8/11, 14-26. Thus, Ortiz-Abrego's ability to recount facts was sufficient to meet the normal competency standard.

Courts have consistently rejected attempts to add requirements to the two-pronged competency test. See Hahn, 106 Wn.2d 885, 894 (holding that the appellate court erred in holding that ability to understand and choose trial strategies is necessary for competency to stand trial); Gwaltney, 77 Wn.2d at 908 (reversing finding of incompetence based on defendant's inability to control odd facial expressions because inability to control behavior is not part of the competency analysis). The trial court erred by modifying the existing standard.

b. The Trial Court Treated Counsel As Ineffective Without Conducting The Proper Analysis.

The second erroneous part of the court's ruling is the court's apparent belief that Samuels failed her client by not providing the accommodations recommended by Dr. Judd. See CP 336-337 (Findings of Fact 30-36); CP 346-47 (Conclusions of Law 1, 2). The trial court appears to have injected notions of ineffective assistance of counsel into the competency determination, but without applying the accepted ineffective assistance of counsel standards. In re Fleming, 142 Wn.2d 85316 P.3d 610 (2001) (counsel ineffective for not advising defendant on competency issues).

It is not obvious what more could have been done to boost Ortiz-Abrego's understanding of the trial process. Even Dr. Judd acknowledged that "teaching" the defendant about the criminal justice system would be a lengthy, difficult task. RP 6/9/11, 135. And, when would the teaching stop? When would the lawyer know that the client actually understood, especially if he recognized that it was in his interest to not understand? What impact would that have had on the trial? The trial court's ruling addresses none of these questions; it simply assumes, without analysis, that counsel's performance was deficient, and that a better lawyer would have made Ortiz-Abrego competent.

3. TWO KEY TRIAL COURT FINDINGS ARE NOT SUPPORTED BY THE RECORD AND FURTHER UNDERMINE THE COURT'S CONCLUSIONS.

a. Recorded Jail Telephone Calls – Findings 52 And 53.

A key part of the State's argument that Ortiz-Abrego was competent was his interaction with his wife in recorded jail phone calls. Ex. 11-15. The calls show his understanding of and ability to navigate the world around him as well as his understanding of his case. The calls were a major reason Drs. Nelson and Hendrickson changed their opinions about Ortiz-Abrego's competency. See RP 6/28/11 (Vitrano), 20 (Dr. Hendrickson); RP 6/21/11, 69-72 (Dr. Nelson).

For instance, in Exhibit 11, the June 1, 2010 phone call, it is clear that Ortiz-Abrego has a greater understanding of the trial process than he demonstrated during the colloquy. Despite what he may have indicated to attorney Samuel, he clearly shows in the tape that he knows he was found guilty, and he illustrates that he understands that his sentence will be long, but as yet is undetermined. Furthermore, he mocks another inmate for refusing to take a plea and getting a longer sentence:

> ...there's another one here who has a case just like mine. Same thing happened to him like with me, everything the same and he was given five years. He was offered three months staying at home and the dumbshit said no. Now he'll go to the slammer for five years.

Ex 11 at 12. This level of understanding of plea bargaining and sentencing far exceeds the basic standard required by law, and indicates that Ortiz-Abrego was likely malingering far earlier than the trial court thought.

In two other phone calls that took place on October 14, 2010 and October 15, 2010, right around the time of Ortiz-Abrego's initial competency evaluation with Dr. Nelson, Ortiz-Abrego shows that he has the ability to extrapolate information and assess the likely outcome of certain actions. Moreover, he demonstrates that he understands the nature of a guilty plea and the fact that certain attorneys focus on certain areas of the law. The fact that he has the ability to advise his wife to rent out a room in their house to make money, and direct his wife to sell his equipment only if his sentence is longer than a year show that he has the capacity to understand fairly abstract concepts. These exchanges show that he understands far more about the legal system than he was relating to Samuel, Dr. Judd, and the doctors at WSH, and that he has the capacity to understand fairly complicated concepts.

The trial court's findings of a fact 52 and 53 touch on the subject of the jail telephone calls but they do not discuss these key points in much detail. Rather, as described below, the findings contradict other findings,

and misstate the record. They are thus not supported by the record, and undermine rather than support the court's ultimate ruling on competency.

First, as to contradiction, Finding 52 notes that in Exhibit 11 – a telephone call made on June 1, 2010, shortly after the verdict – Ortiz-Abrego ". . .articulated some idea of what he was facing..." but he does not do so in the remaining three calls. But, as the court noted in Finding 55, "the defendant has been exaggerating his lack of understanding since at least the fall of 2010." It is no wonder that the calls made later evince confusion whereas the calls contemporaneous with the verdict do not; he was exaggerating disabilities by the time of the later calls. The court's findings make no attempt to reconcile this conflict.

Second, Finding 53 is not supported by the record. The court found:

> Dr. Judd reviewed transcripts of some of these phone calls and concluded that, to the extent he could follow them at all,[8] they reflected accurately the person he met in May 2010. Dr. Judd acknowledged that there were glimpses of abstract thinking in the calls, and agreed that it was important to consider the transcripts in determining whether the defendant is competent to stand trial. *Nonetheless, it appeared that Dr. Judd did not find the transcripts he read to bear significantly on the issue.*

[8] Dr. Judd did not say he was unable to follow the conversation, as this clause suggests. At most, he remarked that, because this was a conversation between spouses, some names, pronouns, and context was unavailable. As the court can see from its own review of the exhibits, although some detail is opaque, much conversation is readily understood.

CP 345 (italics added). The italicized sentence ignores the fact that Dr. Judd admitted he had not seen key portions of the recordings. RP 6/9/11, 17-18. He agreed that he had not seen the portions that were read to him by the prosecutor, and he agreed that those portions were significant to the analysis.

b. The Court Erred By Relying on Dr. Judd's Report and Testimony to Conclude That Ortiz-Abrego Was not Competent to Stand Trial.

At the time of the belated competency hearing in June 2011, no expert testified that Ortiz-Abrego was incompetent. Furthermore, none of the experts testified that Ortiz-Abrego had been incompetent at the time of trial, as both Dr. Nelson and Dr. Hendrickson altered their original opinions of Ortiz-Abrego after reviewing additional information of his mental capacity at the time of evaluation. Although the trial court relies heavily on Dr. Judd's report and testimony, Dr. Judd never tested for competency and he never offered an opinion on competency.

The closest Dr. Judd was willing to come to making that assertion is that he has concerns about Ortiz-Abrego's ability to understand a trial absent accommodations. Furthermore, when pressed, Dr. Judd reminded the court that the purpose of his report was to provide a way for Ortiz-Abrego to more fully participate in the trial process. This is a laudable goal but Dr. Judd's report and testimony do not support a finding of incompetency as to a trial that occurred a year before.

These mistaken findings, unsupported by the record, compound the errors in legal analysis discussed above. Ortiz-Abrego was clearly competent during his trial, and remains so now. The evidence clearly shows that Ortiz-Abrego understood the nature of the charges against him as well as the roles of the players in the courtroom, and that he had a sufficient recall of the facts of the case to assist his lawyer in preparing a defense. Had the trial court applied the usual legal standard, it would have arrived at this conclusion.

E. CONCLUSION

For the forgoing reasons, the State respectfully asks this court to reverse the ruling that the defendant was not competent to stand trial, as well as the decision to set aside the verdict and grant a new trial, and the State respectfully asks that the trial court be required to apply the correct standard .

DATED this 13th day of August, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
JAMES M. WHISMAN, WSBA #19109
Senior Deputy Prosecuting Attorney
Attorneys for Appellant
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 Washington Appellate Project, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Appellant, in STATE V. ALEXANDER ORTIZ-ABREGO, Cause No. 67894-9-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.

CBrame
Name

8/13/12
Date 8/13/12

Done in Seattle, Washington