

No. 45315-1

COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

ISAIAH SUMMERS, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY  
THE HONORABLE JUDGE LINDA LEE

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BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

- A. The trial court when it made Conclusion of Law No. II: That there is a presumption of competency to stand trial in this matter and the defendant has failed to show by a preponderance of the evidence that he lacks competency to stand trial in this matter. (CP 92)
- B. The trial court erred when it made Conclusion of Law No. III: That the defendant in this matter has the capacity to assist his counsel if he chooses to do so. The defendant in this matter has the ability to make that choice. (CP 92).

## ISSUES RELATED TO ASSIGNMENTS OF ERROR

- A. Did the trial court err when it found Mr. Summers competent to stand trial?

## II. STATEMENT OF FACTS

Isaiah Summers was charged by information in Pierce County Superior Court on November 14, 2012, with one count of robbery in the first degree, one count of burglary in the first degree, one count of assault in the second degree, one count of theft in the second degree. Each count specially alleged that he was armed with a firearm at the time of the crime. CP 1-3.

### Competency Hearing

In a declaration, defense counsel stated that he had represented countless clients over the past 25 years, in which the issue of their competency to stand trial had been called into question. It was within the first few months of representing him that counsel questioned Mr. Summers' competency to stand trial. (CP 79-81).

He noted that Mr. Summers was quite confrontational with him and appeared to genuinely believe his legal skills were superior to those of counsel. (CP 80). Mr. Summers ignored counsel's opinions and advice, and reacted in loud, near violent outbursts when counsel pointed out the problems with Mr. Summers' analysis of and strategy for the case. (CP 80).

Counsel had represented many difficult non-mentally ill clients who had chosen to be uncooperative with counsel or assist with their defense. Counsel believed that Mr. Summers' thinking and behaviors were not the result of conscious choice, but rather, driven by a mental illness over which he had no control. (CP 80).

As a result of his observations and experience, defense counsel retained Dr. Joseph Nevrotti to assess whether Mr. Summers was currently competent to stand trial. (Exh. 1 Motion Hearing; 3/22/13 RP 2; CP 80).

At a March 22, 2013, hearing the State requested and the court ordered a second evaluation by an expert for the State. (3/22/13 RP 2; CP 15-19).

At a competency hearing on May 29, 2013, defense expert Dr. Joseph Nevrotti testified that Mr. Summers had several serious mental disorders that interfered with his ability to rationally assist his attorney. (5/29/13 RP 8). Dr. Nevrotti diagnosed Mr. Summers with an Axis I bipolar disorder recurrent, with the most recent episode being one of hypomania. (5/29/13 RP 8-9). He reported that when Mr. Summers was in the depressive phase of bipolar, he did not eat or sleep for days on end. In the past, he had made three suicide attempts. (5/29/13 RP 10-11). Additionally, he diagnosed Mr. Summers with alcohol dependence. (5/29/13 RP 23).

Dr. Nevrotti's greatest concern was that while not psychotic, the combination of the Axis I bipolar disorder combined with an Axis II diagnosis of narcissistic personality disorder, combined to render Mr. Summers quite delusional about his abilities and prospects at trial. (5/29/13 RP 11). He reported that Mr. Summers was rigid in this thinking and became confrontational and irrational when the realities of his situation was pointed out by others, in particular, his attorney. (5/29/13 RP 12-13).

When asked whether Mr. Summers was making a choice about his self-aggrandizing thoughts and confrontational behavior, Dr. Nevrotti stated that it was his belief that the mental illness actually drove the behavior, and it was not really within Mr. Summers' control. (5/29/13 RP 19). He agreed with defense counsel: Mr. Summers had serious difficulty with reality testing, which affected his ability to rationally assist his defense attorney, and could possibly be confrontational with his attorney during trial. (5/29/13 RP 21). He further added that the assessment tools he used, information from interviews, as well as the reports of other professionals, led him to believe that Mr. Summers looked competent in terms of the first prong of the *Dusky* standard. (5/29/13 RP 33-35). Dr. Nevrotti concluded however, that the bipolar illness, substance dependence and personality disorder were so pervasive that he did not have the volitional capacity to choose to rationally assist counsel. (5/22/13 RP 37-38;47-48).

Dr. Ronnei, testified for the State in the matter of competency. (5/29/13 RP40). She described her interactions with Mr. Summers as confrontational and believed Mr. Summers had aspects of both narcissistic and antisocial personality disorders. (5/29/13 RP 40-41). During her interview with him, Mr. Summers was markedly irritable, sullen, and uncooperative with the cognitive screening. (CP 33).

The Fairfax hospital records she reviewed showed that in 2010 Mr. Summers had been admitted after an unsuccessful attempt to hang himself. He told the psychiatrist he had been depressed for a long time, became irritable and angry at the slightest things, and had attempted to kill himself twice before. (CP 32). He also reported that when he felt “very very up” he did not feel depressed. (CP 32).

Although her report stated that during his hospitalization Mr. Summers had been diagnosed with bipolar disorder and prescribed lithium and Lamictal<sup>1</sup>, she did not believe he had bipolar disorder, but rather, just bad judgment. (5/29/13 RP 45; CP 31). She believed that Mr. Summers was simply being uncooperative with her and that he had the capacity to choose to be cooperative and to assist in his own defense. (5/29/13 RP 42-43; CP 36).

In making a ruling, the court agreed that the bottom line in the determination of Mr. Summers’ capacity to rationally assist counsel was a judgment call. (5/29/13 RP 67). Relying on the reports from both experts, the declaration of defense counsel, the court concluded that Mr. Summers had not shown by a preponderance of the evidence that he did not have the

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<sup>1</sup> Per the psychologist’s report, Lamictal is an anticonvulsant medication used as a mood stabilizer. Lithium is also a mood stabilizer. (CP 32).

capacity to rationally assist counsel. (5/29/13 RP 70-71). The court later entered Findings of Fact and Conclusions of Law. (CP 27-37).

### TRIAL

Twenty-six year old Isaiah Summers worked as a security guard for about nine years. (8/1/13 RP 104). He met Trysha Greeno through an online dating website. Over the course of several months, they progressed from sending online messages to telephone text messages to talking on the telephone off and on all day, every day. (7/31/13 RP 31). On November 12, 2012, Mr. Summers spoke with Ms. Greeno on the phone and she told him her address and apartment number and invited him over that evening. (8/1/13 RP 106;112; 7/31/13 RP 35). Ms. Greeno told police that she did invite him over that evening; however she later testified she did not give him her apartment number and it was just luck that he found her apartment out of the 20 apartments in the complex. (7/31/13 RP 62). At trial, she also denied she had invited him over for the evening. (7/31/13 RP 61-62; 8/1/13 RP 103).

Sometime before 9:00 pm, Mr. Summers who had been drinking, went to the apartment complex. (8/1/13 RP 111). He reported that she invited him in to her apartment, but quickly told him that she and her children had to leave. (8/1/13 RP 112). By contrast, Ms. Greeno testified that he knocked on her door and asked to use her phone. She believed he

was heavily intoxicated. (7/31/13 RP 62). She agreed to let him use the phone. She testified she did not invite him into the apartment. Rather, she reported that when she went to get her phone, he entered through the unlocked door without her knowledge. (7/31/13 RP 36). Ms. Greeno also testified that when Mr. Summers came in the front door, she sent her son out through the sliding glass door to the neighbor's apartment. (7/31/13 RP 57).

After she went to get the phone, she came back around the corner she saw that Mr. Summers had a gun and heard him call her names. (7/31/13 RP 39). She said he then ripped her 60- inch television off of the stand and ran out through the sliding glass door with it. (7/31/13 RP 60-61). Ms. Greeno said she subsequently left the apartment with her child and called 9-1-1 from the neighbor's home. (7/31/13 RP 41).

By contrast, Mr. Summers testified that he was not carrying a gun that evening. (8/1/13 RP 121). After Ms. Greeno told him she had to leave, he followed her out of her apartment. He then walked around back to her unlocked sliding glass door. (8/1/13 RP 114). He said he impulsively decided to take her TV, but it was so heavy that he had to push it and roll it end to end to move it to his car. (8/1/13 RP 116). This resulted in substantial damage to the TV frame. (7/31/13 RP 39; 65-66).

He drove to his mother's home and put the TV in her garage. (8/1/13 RP 119).

Police went to Mr. Summers' mother's home later that evening. Mr. Summers saw the patrol cars arrive and went out on the front porch. Officers used a taser gun to force him to comply with their directive to lie on the ground. (8/1/13 RP 77;81). After conducting a consensual search of the home, officers recovered the television as well as a small handgun from a jacket Mr. Summers reportedly wore that evening. (8/1/13 RP 88;90;115). At trial, Mr. Summers denied having worn that particular jacket that evening. (8/1/13 RP 107).

After a jury trial, Mr. Summers was found him guilty on all counts and by special verdict, armed with a firearm during the commission of each crime. CP 159-162. At sentencing, the trial court merged the robbery and assault counts and merged the theft and burglary counts. The court also found that the burglary conviction was the same criminal conduct as the robbery. CP 165-167. The court imposed two 60-month firearm enhancements and thirty-one months for the first-degree robbery count, for a total of 151 months. CP 171-183.

### III. ARGUMENT

The Trial Court Erred When It Found Mr. Summers Competent To Stand Trial.

In *Dusky*, the Court held the constitutional test for competency is whether a defendant has the 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). The Due Process Clause of the Fourteenth Amendment to United States Constitution prohibits the conviction of a person who is not competent to stand trial. *Pate v. Robinson*, 383 U.S. 375, 386, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). The state's procedures are required to be adequate to protect this right. *State v. P.E.T.*, 174 Wn.App. 590, 594, 300 P.3d 456 (2013).

Washington law provides an added safeguard, as it prohibits the court from trying, convicting or sentencing a defendant for the commission of an offense, so long as that incapacity continues. *State v. Heddrick*, 166 Wn.2d 898, 903-04, 215 P.3d 201 (2009); RCW 10.77.050. In Washington, a defendant is competent to stand trial only if he understands the nature of the charges against him *and is capable of* assisting in his own defense. *State v. Lewis*, 141 Wn.App. 367, 381, 166 P.3d 786 (2007). (Emphasis added). It is the second prong of the

competency test that Mr. Summers raises on appeal: whether the court erred when it determined he had the capacity to assist in his own defense. Whether an individual is competent is a mixed question of law and fact. *State v. Marshall*, 144 Wn.2d 266, 281, 27 P.3d 192 (2001).

Because an accused is presumed competent, he has the burden of showing that he is incompetent to stand trial by a preponderance of the evidence. *Grannum v. Berard*, 70 Wn.2d 304, 307, 422 P.2d 812 (1967); *State v. P.E.T.* 174 Wn.App. at 597. A preponderance of the evidence standard means the “greater weight of the evidence” and does not mean beyond a doubt or beyond a reasonable doubt. *State v. Harris*, 74 Wash. 60, 64, 132 P.735 (1913).

The primary test in reviewing a trial court’s competency determination is whether the trial court manifestly abused its discretion. *State v. Crenshaw*, 27 Wn.App. 326, 331, 617 P.2d 1041 (1980), *aff’d*, 98 Wn.2d 789, 659 P.2d 488 (1983). Discretion is abused if the decision is manifestly unreasonable, rests on facts unsupported by the record, or was reached by applying an incorrect legal standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

Here, as in many cases, the court was faced with dueling expert opinions. Dr. Nevrotti and Dr. Ronnei each examined Mr. Summers and expressed contrary opinions as to his capacity to rationally assist his

counsel. A court is not bound by the opinion of experts and may base its determination of competency on several factors, including the court's observations of the defendant's conduct, appearance and demeanor, and medical and psychiatric records. *State v. Benn*, 120 Wn.2d 631, 662, 845 P.2d 289 (1993).

Mr. Summers argues that the trial court's reliance on Dr. Ronnei's opinion in determining competency was misplaced and resulted in an abuse of discretion. The record does not support a conclusion that Mr. Summers was capable of rationally assisting his counsel.

In direct contradiction to the Fairfax Hospital records indicating that Mr. Summers had been hospitalized after a suicide attempt and prescribed medication to manage his bipolar disorder, Dr. Ronnei concluded Mr. Summers was not bipolar.

She further concluded:

“Mr. Summers presented as an individual whose primary clinical issue was one of personality pathology. He evidenced a personality pattern suggestive of limited coping skills, failure to conform to social or family norms, impulsivity, failure to plan ahead, irritability, aggressiveness, and reckless disregard for the safety of self and others. He expressed no remorse for his actions or any desire or need to change his behavior. While these aspects of Mr. Summers' character may lend towards interpersonal difficulties, they do not rise to the level of a *major mental illness*. A diagnosis of personality disorder not otherwise specified with antisocial and narcissistic traits is offered.” (CP 34)(Emphasis added).

In *Hahn*, the Court concluded that the test for incompetence to stand trial made no reference to mental disease or defect. *State v. Hahn*, 106 Wn.2d 885, 894, 726 P.2d 25 (1986). Without conceding the bipolar diagnosis, Mr. Summers argues the standard is not whether his difficulties rose to the level of a major mental illness. Rather, the standard is whether the enumerated difficulties prevented Mr. Summers from *rationaly* assisting his attorney in his own defense. The personality traits catalogued by both psychologists, limited coping skills, impulsivity, irrationality, grandiosity, and self-centeredness, were the very traits that alerted his attorney that Mr. Summers could *not* rationally assist in his own defense.

Dr. Ronnei also reported:

“Given Mr. Summer’s non-credible attempts to demonstrate memory impairments and an extremely poor fund of knowledge of the court system, and given that he does not demonstrate any major mental illness symptoms nor any actual significant intellectual impairment, it is my clinical opinion that Mr. Summers has the capacity to discuss his current legal situation and the basic elements of competency in a rational and goal-directed manner, although he does not always **choose** to demonstrate this ability. He demonstrates the **capacity** to maintain appropriate courtroom behavior and to communicate appropriately with his attorney regarding the decisions and eventualities involved in his case. **Consequently it is our opinion that Mr. Summers currently has the essential capacity to understand the nature of the proceedings against him and to assist in his own defense.** It is possible that he may not always **choose** to demonstrate this capacity; however it is my opinion that he has the capacity to think clearly, weigh and evaluate options and potential outcomes, and to participate in planning his own defense if he **chooses** to do so. (CP 36) (Emphasis in the original).

In other words, despite Axis I and Axis II diagnoses, Mr. Summers could simply choose to rationally assist counsel.

In 2008, the United States Supreme Court addressed the question of whether competency to represent oneself was a separate question from knowingly, voluntarily, and intelligently waiving the constitutional right to counsel. *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008). In making its ruling, the Court noted, “Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual’s functioning at different times in different ways.” *Id.* at 175. That framework of understanding the impact of mental challenges blends well with Washington case law, which requires the trial court to give considerable weight to the opinion of the defendant’s attorney on the issue of competency. *State v. Crenshaw*, 27 Wn.App. at 331; *State v. Israel*, 19 Wn.App. 773, 779, 577 P.2d 631 (1978). It is defense counsel who has the confidential relationship with a client and:

“Although an impaired defendant might be limited in his ability to assist counsel in demonstrating incompetence, the defendant’s inability to assist counsel can, in and of itself, constitute probative evidence of incompetence, and defense counsel will often have the best-informed view of the defendant’s ability to participate in his defense.”

*Medina v. California*, 505 U.S. 437,450, 112 S.Ct. 2572, 150 L.Ed.2d 353 (1992).

Defense counsel in this case told the court Mr. Summers' ability to participate in his defense was impaired. Counsel brought a deep well of over 25 years of experience and knowledge. Counsel's affidavit stated that the personality traits shown by Mr. Summers were not something foreign to him: his concern was that in this case it was alarming because his client was impaired to the point that he could not rationally assist in his own defense.

While the psychologists were each able to conduct their interviews and make an assessment, defense counsel had been meeting for months with Mr. Summers. It was the long process of discussing facts and strategy that allowed counsel to see that Mr. Summers' behavior "was not the result of some conscious choice but was in fact driven by some sort of mental illness and that he did not and could not control these behaviors." (CP 80).

Mr. Summers argues that he showed by a preponderance of the evidence that he could not manage the behaviors that impaired his ability to be rational with counsel.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Summers respectfully asks this court to reverse his conviction: he was not competent to stand trial.

Dated this 24<sup>th</sup> day of April 2014.

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Isaiah Summers, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that on April 24, 2014, a true and correct copy of the brief of appellant was emailed per agreement between the parties to:

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