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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

HAYDEN VONBARGEN,

Respondent.

Appeal from the Superior Court of Washington for Lewis County
Case No. 17-1-00635-21

Appellant's Reply Brief

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I. ARGUMENT

A. TREATING ALL PEOPLE WITH RESPECT AND DIGNITY IS A FUDAMENTAL PRINCIPLE WE MUST CONTINUE TO PROTECT THROUGH THE USE OF RESPECTFUL LANGUAGE WHEN REFERRING TO INDIVIDUALS WITH DISABILITIES.

Hayden VonBargen, the Respondent in this matter, has been diagnosed with an intellectual disability. RP 13-14, 26, 34-35; CP 16, 22, 31. The only appropriate and respectful way to refer to VonBargen is as an individual with an intellectual disability, being intellectually disabled, or developmentally disabled. Absent directly quoting an antiquated portion of VonBargen's medical or school record, referring to VonBargen as retarded does not comply with the current, universally accepted and expected, standards for society, much less practitioners of the law.

In 2010, the federal government passed Rosa's Law, 111 P.L. 256, with the sole purpose of removing the word mental retardation in federal laws. "An Act [t]o change references in Federal law to mental retardation to references to an intellectual disability, and change references to a mentally retarded individual to references to an individual with an intellectual disability." 111 P.L. 256 (Synopsis). That same year, the Washington State Legislature passed a similar law when it passed HB2490 "RCW—Respectful Language—

Persons With Intellectual Disabilities." Laws of 2010, ch. 94. "The purpose of this act is to move towards the fulfillment of the goals stated in RCW 44.04.280, to remove demeaning language from the Revised Code of Washington and to use respectful language when referring to individuals with disabilities." Laws of 2010, ch. 94 § 1. The law removed over three dozen references to mental retardation and mentally retarded over numerous Titles of the RCWs. Laws of 2010, ch. 94.

The United States Supreme Court, in 2014, acknowledged the correct terminology was now intellectual disability rather than mental retardation. *Hall v. Florida,* 572, 701, 704-05, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014). The 9th Circuit, in a 2016 case, stated it would only use the words mental retardation when it was quoting directly from material that used the term. *Smith v. Schriro*, 813 F.3d 1175, 1178 n.4 (9th Cir. 2016). The DSM-V discusses the replacement of mental retardation with intellectual disability, stating "*intellectual disability* is the term in common use by medial, education, and other professions and by the lay public and advocacy groups." Diagnostic and Statistic Manual of Mental Disorders 33 (5th ed. 2013) (emphasis original).

Absent the need to cite direct quotations from other texts, using the term “retarded” or “mental retardation” is unnecessary. The use of such language is contrary to the fundamental principles of treating all people with dignity and respect, as outlined above.

> The continued existence of a free and democratic society depends upon the recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and the capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

RPC (Fundamental Principles of Professional Conduct, 2019 ed.). For nearly a decade, the legal community, through legislation and court opinions, has acknowledged using respectful language when referring to individuals with intellectual disabilities is the standard. This Court should demand this standard be met by all that comes before it.

B. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO ORDER INITIAL COMPETENCY RESTORATION FOR VONBARGEN, PURSUANT TO RCW 10.77.086.

Prior to 1973, there were no statutory procedures for dealing with incompetent individuals charged with criminal offenses in

Washington State. Laws of 1973, 1st Ex. Sess., ch. 117.[1] The Legislature created RCW 10.77, which has undergone numerous amendments since 1973, to create the framework the courts were to employ when dealing with a potentially incompetent defendant and conducting competency proceedings. Laws of 2019, ch. 326 § 4; Laws of 2007 ch. 375 §§ 3-5; Laws of 1998, ch. 297 §§ 31-37; Laws of 1973, 1st Ex. Sess., ch. 117; *Wicklund*, 96 Wn.2d at 801.[2] Before this statutory framework was put into place, the "courts relied exclusively on their inherent judicial powers to make determinations regarding competency." *State v. Wicklund*, 96 Wn.2d 798, 801, 638 P.2d 1241 (1982).

Prior to the statutory structure being in place, the Supreme Court listed a number of factors a trial judge may take into account when determining a defendant's competence, "including the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d

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[1] A review of the statutes listed as repealed in the 1973 Session law shows that the prior statutory structure, dating back to territorial times, all centers around criminal insanity procedures, not competency to stand trial procedures. *See* Laws of 1973, 1st Ex. Sess., ch. 117.

[2] The amendments cited here are by no way meant to be a complete listing of all of the amendments to RCW 10.77, but a sampling of a few to exemplify the amendments over the years.

302 (1967). The Supreme Court has reaffirmed its approval of these factors for the trial court's consideration, that such consideration lend to the trial court's ability to fully consider whatever evidence may be of relevance to assist the court in its determination of the defendant's mental capacity. *State v. Ortiz-Abrego*, 187 Wn.2d 394, 404, 387 P.3d 638 (2017) (citations omitted).

When the trial court considers and bases its decision in part on factors such as the defendant's demeanor, appearance, and conduct, these factors must be included somewhere in the record. *State v. Wilson,* 75 Wn.2d 329, 332, 450 P.2d 971 (1969). There was no testimony, no judicial notice, nor were there any findings in this matter, in regards to VonBargen's demeanor, appearance, or conduct, therefore the trial court could not have properly considered any of those factors when making its determination that competency restoration would not likely be successful. *See* RP; CP 52-53.

Conversely, the trial court indicated it had reviewed the reports filed by both experts prior to the competency hearing. RP 3. These reports contain VonBargen's personal history, including his educational history, which is of great importance to the competency restoration inquiry. CP 19-20. VonBargen asserts the trial court acted appropriately when it found competency restoration could not be

restored. Brief of Respondent 18-23. VonBargen argues the trial court appropriately exercised its discretion, found Dr. Oneal's testimony persuasive and well-reasoned, and therefore relied upon it rather than Dr. David's testimony. Brief of Respondent 17-19. Yet, the trial court disregarded the education history found within the reports, absent the IQ test, this critical piece of personal history it claims to have reviewed and considered. RP 3, 48. Failure to fully consider this piece of personal historical information was manifestly unreasonable because it explained how VonBargen learned, and the great strides he had made in his educational achievement with modifications listed in the report. CP 19-20.

VonBargen read at a seventh grade reading level and was working at 85 percent in his Life Skills math curriculum, a special education class. CP 20. The keys in his educational modifications were small groups, repetition, visual/tactile and verbal cues, positive reinforcement, additional time, providing a reader or a scribe when the material was presented in a lecture only format, and simplifying text and instructions. CP 19 (this is not an exhaustive list of what is included). The competency restoration procedures at Western State Hospital for the educational portion include a lot of repetition and visual aids, two things, according to VonBargen's educational

history, that would be highly beneficial to the possibility of successful restoration for VonBargen. CP 19, 25.

The trial court when it made its oral ruling stated, “And so experts do rely on some of the historical information that they have here. So we look at those things.” RP 48. The trial court also stated while the classes can teach people certain things, being able to “parrot back information” does not change IQ and suggestibility. RP 47-48. Apparently, according to the trial court, VonBargen’s seventh grade reading level is not actually an achievement, nor is any of his other educational courses he has completed, because VonBargen’s lower IQ means he just “parrot backs” the information. This complete disregard for VonBargen’s ability to learn new information, albeit at a slower rate, was an abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) (internal quotations and citation omitted).

The trial court rested its decision to not order competency restoration on its misguided determination VonBargen was unlikely to regain competency. This would have allowed the trial court to invoke the provision of RCW 10.77.086(1)(c), and dismiss the State’s charges. Yet the trial court never specified at the original hearing, or in the Findings of Fact and Conclusions of Law which statutory

provision allowed it to not send VonBargen for competency restoration. RP 47-48; CP 52-53. It was not until the motion for reconsideration that the trial court erroneously chose RCW 10.77.086(4), a provision that applies only after a restoration period has completed, which allows the court to dismiss the charges without prejudice if it finds the defendant unlikely to regain competency. The correct provision the trial court should have invoked was RCW 10.77.086(1)(c).

The statutory structure must be adhered to, the trial court cannot simply refuse to send a defendant for competency without properly following the requirements of RCW 10.77. The need is even greater in a case such as this, a sex offense, where the State's hands are tied once the charges have been filed. RCW 10.77.090(2). The trial court's erroneous reading of the statute is evidence of the trial court's erroneous interpretation of the law, an abuse of discretion. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). This coupled with the trial court's failure to consider highly relevant portions of the record it allegedly reviewed demands reversal. This Court should reverse the trial court's decision and allow the State to proceed with its prosecution by sending VonBargen for initial competency restoration proceedings.

II. CONCLUSION

For the reasons argued in the State's Opening Brief and this Reply Brief this court should reverse the trial court's ruling refusing to order the initial competency restoration for VonBargen and dismissing this case. VonBargen's case should be remanded back to the trial court for the State to reinitiate the prosecution and have VonBargen sent for competency restoration.

RESPECTFULLY submitted this 7th day of October, 2019.

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