

NO. 63052-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHN HURST,

Appellant.

REVIEW FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. FOX

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the legislature has established a standard of proof of a preponderance of the evidence in determining all issues related to competency and competency restoration in RCW 10.77.086.

2. Whether the preponderance of the evidence standard of proof as to competency is consistent with fundamental principles of justice, as the United States Supreme Court has concluded.

3. Whether application of the preponderance of the evidence standard to the issue of dangerousness, whether the defendant is a "substantial danger to others" or "presents a substantial likelihood of committing criminal acts jeopardizing public safety or security," is consistent with principles of justice rooted in the traditions and conscience of this country.

4. Whether application of the preponderance of the evidence standard to the issue of whether there is a substantial probability that the defendant will regain competency within a reasonable period of time is consistent with principles of justice rooted in the traditions and conscience of this country.

B. STATEMENT OF THE CASE

John Hurst was charged with one count of assault in the third degree—the State alleged that he punched a nurse at Swedish Hospital in the face when she asked him to move and then told a second nurse, "I should have killed her, I made her bleed." CP 1-2. Hurst has a history of other violent acts, as shown in the Prosecuting Attorney Summary and Request For Bail that was part of the charging documents in this case. CP 3. Hurst has seven convictions for assault in Washington State since 1999 and two convictions for assaults on officers in Nebraska in 1995 and 1996. CP 3. Hurst has additional convictions for harassment (in 2003), malicious mischief (in 2004 and 1996) and property destruction (in 2004, 2003, and 2000). CP 3. He was under the supervision of the Department of Corrections at the time of this assault. CP 3.

While this case was ongoing, Hurst told a psychologist that he needed to kill Scott Jordan and that he had access to a gun.

2/3/09A RP 19, 35.¹

Hurst was twice found incompetent to stand trial and committed to Western State Hospital for restoration of competency.

¹ The verbatim report of proceedings is referenced by the date of each volume, with the exception of the two volumes for 2/3/09, which are referenced as 2/3/09A (reported by Dean) and 2/3/09B (reported by Kennedy).

CP 12-17. After the second commitment, two mental health professionals concluded that Hurst was incompetent—a defense expert as well as a psychologist at Western State Hospital. 2/3/09A RP 19-20, 26; 2/4/09RP 56-58. In addition, two independently appointed defense attorneys concluded that there was no dispute – Hurst was incompetent. 1/15/09RP 5; 1/23/09RP 4-5.

One of Hurst's two trial attorneys, Devon Gibbs, requested a jury trial on the issue of the restorability of Hurst's competency. 12/16/08RP 3, 9. Gibbs stated that Hurst denied that he was incompetent and that Hurst demanded a jury trial on the issue of competency. Id. at 8.

Gibbs asked the court to appoint independent counsel to assist Hurst on the issue of competency. 1/15/09RP 9-10. The court appointed a third attorney as independent counsel. 1/20/09RP 11; 1/23/09RP 2. That attorney concluded that there was no material issue as to competency, so a jury trial on that issue was not warranted. 1/23/09RP 10-11.

After Hurst addressed the court, the court concluded that Hurst was incompetent. 1/23/09RP 13-18, 22-23. It found that Hurst was not entitled to a jury trial on the issue of competence. Id.

The court conducted a jury trial pursuant to RCW 10.77.086 on the issues of Hurst's dangerousness and the likelihood that his competency could be restored. 2/3/09A RP 3. The jury found that there was a substantial likelihood that Hurst would commit criminal acts jeopardizing public safety or security and there was a substantial probability that Hurst would regain competency within a reasonable period of time. Supp. CP__ (Sub. no. 51, Verdict Form as to Competency, 2/5/09). On February 5, 2009, the trial court ordered Hurst be returned to Western State Hospital for treatment to restore his competency. CP 66-68.

On August 3, 2009, Hurst again was found incompetent to proceed and this case was dismissed without prejudice. Supp CP__ (Sub no. 69, Order of Dismissal, 8/3/2009).

Hurst moved for discretionary review of the February 2009 restoration order on several grounds. A Commissioner of this Court granted review only as to the applicable standard of proof. The Commissioner concluded that although the issue is moot as to this case, the issue is of substantial public interest and likely to recur, so review is appropriate. The matter now having been fully briefed, the State has no objection to the Court's review of this issue.

C. ARGUMENT

1. RCW 10.77.086 ESTABLISHES A BURDEN OF PROOF OF A PREPONDERANCE OF THE EVIDENCE AS TO COMPETENCY, DANGEROUSNESS, AND RESTORABILITY.

The defendant does not offer any interpretation of the burden of proof in RCW 10.77.086(4) based on rules of statutory construction. The preponderance of the evidence is the standard of proof applicable to all findings required in that statute. The defendant offers no argument that the statute establishes any burden of proof other than a preponderance of the evidence.

In Washington, an incompetent person may not be tried, convicted, or sentenced for an offense so long as the incapacity continues. RCW 10.77.050. A defendant is incompetent if he or she "lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(14).

RCW 10.77.060 provides that if a court finds there is a reason to doubt a defendant's competency, the court shall have the defendant evaluated by professionals who will report on the defendant's mental condition. RCW 10.77.060(1)(a).

RCW 10.77.086² provides the procedures applicable when a defendant who is charged with a felony is found incompetent to proceed. The process begins with 90 days of treatment to restore competency. RCW 10.77.086(1). At the end of that period, if the court finds "by a preponderance of the evidence" that the defendant is still incompetent, the court may extend the period of treatment for another 90 days. RCW 10.77.086(3).

If at the end of the second 90-day restoration period,³ the defendant is still incompetent, additional findings must be made to justify continued restoration: "that (a) The defendant (i) is a substantial danger to other persons; or (ii) presents a substantial likelihood of committing criminal acts jeopardizing public safety or security; and (b) there is a substantial probability that the defendant will regain competency within a reasonable period of time." RCW 10.77.086(4). If the court or jury makes these findings, the court may extend the commitment for restoration for up to six months. Id.

The treatment that is ordered pursuant to RCW 10.77.086 may be either in a treatment facility of the Department of Social and Health Services (here, Western State Hospital), in another

² The full text of RCW 10.77.086 is set out in Appendix A.

³ If the defendant has a developmental disability, this determination must be made after the first 90-day restoration period. RCW 10.77.086(4).

treatment facility, or out of custody and under the care of a treatment provider. RCW 10.77.086(1)(b).

During any restoration period, if a mental health professional determines that competency has been restored or is not likely to be restored, the defendant is returned to court for a hearing. RCW 10.77.084(1)(c). If the court at any point finds that the defendant is incompetent and unlikely to be restored, the case is dismissed without prejudice. RCW 10.77.084(1)(c), (d).

At the hearing described in RCW 10.77.086(4), the State is required to prove competency or incompetency, dangerousness and probable restorability, by a preponderance of the evidence. The meaning of a statute is a question of law reviewed de novo. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001). The court's fundamental objective is to ascertain and carry out legislative intent. State v. Alvarez, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). The plain meaning of a statute is determined based on the language used, the context of the statute, related provisions, and the statutory scheme as a whole. State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The previous subsection of the statute explicitly imposes a standard of proof of the preponderance of the evidence. RCW 10.77.086(3). There is

no reference to any other standard of proof anywhere in this statute or in related statutes that address the determination of competency. See RCW 10.77.084, 10.77.088.

The Washington Supreme Court has stated that the legislature provided for the preponderance standard in felony restoration proceedings and intended the same standard apply to those charged with nonfelonies. Born v. Thompson, 154 Wn.2d 749, 776-78, 117 P.3d 1098 (2005). The Court was addressing the standard of proof applicable to the finding of a "violent act," a finding that was necessary at that time for commitment for restoration of incompetent defendants who were charged with nonfelonies. The Court ultimately concluded that the preponderance standard was constitutionally inadequate in that context, but its analysis began with the conclusion that the preponderance standard was what the legislature provided. Id.

The Court in Born v. Thompson noted the legislative intent that was set out in RCW 10.77.2101 when the legislature added a competency restoration provision for nonfelony defendants—the legislature recognized that even an incompetent misdemeanor could pose as great a threat to public safety as a felony defendant. Id. at 776-77. The Court also noted that the legislature amended

the nonfelony restoration provisions after the Court of Appeals decision in that case, and the legislature let stand the lower court's determination that the standard of proof was a preponderance of the evidence. Id. at 777-78.

In 2007, two years after the Supreme Court decision in Born v. Thompson, the legislature reorganized the provisions relating to restoration of competency. Laws of 2007, ch. 375. The provisions formerly were all included in RCW 10.77.090, which was repealed by that act and reenacted as RCW 10.77.084, 10.77.086 and 10.77.088. Knowing that the Court had interpreted the standard of proof applying throughout RCW 10.77.090 as a preponderance of the evidence, the legislature made no change to the provisions relating to felony defendants.

The defendant has offered no analysis in support of any other statutory construction of RCW 10.77.086. The statutory standard of proof is a preponderance of the evidence.

2. THE PREPONDERANCE OF THE EVIDENCE
STANDARD OF PROOF SATISFIES THE
REQUIREMENTS OF DUE PROCESS.

Hurst argues that the Due Process Clause of the United States Constitution⁴ requires that the State prove by clear, cogent, and convincing proof all of the facts that are predicate to a 180-day commitment for restoration of the competency of a felony defendant. That argument is without support in the law and should be rejected by this Court. The United States Supreme Court has approved the use of a preponderance of the evidence standard for determination of incompetency. Cooper v. Oklahoma, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996); Medina v. California, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). Due process demands no more for the determination of dangerousness and restorability that is the basis of a 180-day commitment for restoration under Washington law. The trial court properly instructed the jury as to that standard of proof.

The United States Supreme Court articulated the due process analysis to be applied to burdens of proof in criminal cases

⁴ U.S. Const. amend. XIV, § 1.

in Cooper v. Oklahoma, supra. The Court first considered historical and contemporary practices in England and in this country, to determine whether the challenged burden of proof "offends a principle of justice that is deeply 'rooted in the traditions and conscience of our people.'" Id. at 356-62 (quoting Medina v. California, 505 U.S. at 445). Then the Court evaluated whether the challenged provision exhibited fundamental fairness in operation, based on the interests and risks of an erroneous decision. Cooper, 517 U.S. at 362-64.

This due process analysis was first described in Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). In that case the United States Supreme Court explained that it is normally within a State's power to regulate the burden of producing evidence and the burden of persuasion without limitation by the due process clause, unless it offends "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Patterson, 432 U.S. at 201-02.

This due process test is a narrower, "far less intrusive" inquiry than that applied in civil cases. Medina v. California, 505 U.S. at 445-46. This greater deference to the States recognizes

the States' expertise in criminal procedure, and that the criminal process is grounded in centuries of common-law tradition. Id.

The Washington Supreme Court recently recognized that the due process analysis articulated in Medina is the analysis applicable in criminal cases. State v. Heddrick, 166 Wn.2d 898, 904 n.3, 215 P.3d 201 (2009). The Mathews v. Eldridge⁵ balancing test that is the backbone of the defendant's argument in this case is not applicable to this criminal case.⁶ Heddrick, 166 Wn.2d at 904 n.3.

a. Historical And Contemporary Practice

Historical practice is probative of whether a procedural rule can be characterized as fundamental. Medina v. California, 505 U.S. at 446. In Cooper v. Oklahoma, the United States Supreme Court noted that, beginning in the late 18th century, English cases phrased the competency issue in a simple disjunctive, suggesting a preponderance of the evidence standard was well-established. Cooper, 517 U.S. at 356-58. Modern English cases confirm that

⁵ 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

⁶ Although the Court in Born v. Thompson, supra, applied the Mathews balancing analysis, it cited only civil cases in which that analysis had been applied. Born, 154 Wn.2d at 754-62. The proper due process analysis apparently was not contested by the parties in Born and the distinct analysis in Medina, supra, apparently was not considered.

the preponderance standard has been consistently applied. Id. at 358.

By the turn of the 20th century, American courts were explicitly applying the preponderance standard and mentioned its common law roots. Cooper, 517 U.S. at 359-60. That also is the contemporary American practice. Id. at 360-62. That historical practice supported the United States Supreme Court's conclusion that Oklahoma's practice of requiring a defendant to prove his incompetence by clear and convincing evidence offended a principle of justice deeply rooted in tradition and the conscience of the American people. Id. at 362.

The standard of proof adopted by the Washington legislature is the same standard of proof traditionally applied to competency decisions, the preponderance standard. The claim by this defendant that in a hearing under RCW 10.77.086(4) the State should be required to prove the defendant's incompetence by clear and convincing evidence would be contrary to the holding in Cooper, which concluded that such a burden resulted in an unacceptable risk that a defendant who is probably incompetent will be forced to stand trial. Cooper, 517 U.S. at 363-64.

Further, application of the preponderance standard to the issues of dangerousness and restorability of an incompetent felony defendant does not offend deeply rooted principles of justice. Historically, the finding of incompetency resulted in possibly indefinite commitment, until competency was restored. See Greenwood v. United States, 350 U.S. 366, 76 S. Ct. 410, 100 L. Ed. 412 (1956) (indefinite commitment of incompetent defendant, despite slim chance of restoration). No separate findings were necessary to justify unlimited commitment for restoration of competency until 1972, when the United States Supreme Court decided Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

In Jackson, the Court held that a defendant who is found incompetent may not be indefinitely committed without further protection. Id. at 738. A defendant who is committed solely because he is incompetent to stand trial can be held only for a reasonable period to determine whether there is "a substantial probability that he will attain that capacity in the foreseeable future." Id. Continued commitment must be justified by progress toward that goal. Id. The Court refused to establish arbitrary time limits. Id.

Congress and the vast majority of States that have incorporated the requirement established in Jackson and specify a standard of proof in their statutory incompetency procedures have continued to apply a preponderance standard to these findings.⁷ All but five of the remaining states do not specify a standard of proof,⁸ indicating that the preponderance standard is applied. E.g., Loomer v. State, 768 P.2d 1042 (Wyo. 1989); Diaz v. State, 508 A.2d 861 (Del. 1986). The preponderance standard is applied even where the potential commitment is indefinite,⁹ is limited only by the statutory maximum sentence,¹⁰ or where the term of commitment is

⁷ E.g., 18 U.S.C. §4241; Alaska Stat. § 12.47.110; Cal. Penal Code § 1369-1370; Colo. Rev. Stat. § 16-8.5-103; Conn. Gen. Stat. §54-56d; 725 Ill. Comp. Stat. 5/ 104-11; Iowa Code §§ 812.5, 812.8; La. Code Crim. Proc. Ann. art. 648; Mass. Gen. Laws ch. 123, § 15; 49 Minn. Stat. Ann., Rules Crim. Proc., Rule 20.01; Mo. Ann. Stat. § 552.020; N.D. Cent. Code § 12.1-04-08; Ohio Rev. Code Ann. §2945.37; Okla. Stat. Ann. § 1175.4; 50 Pa. Cons. Stat. § 7402-03; R.I. Gen. Laws 1956 § 40.1-5.3-3; S.D. Codified Laws § 23A-10A-6.1, 23A-10A-14; Tex. Crim. Proc. Code Ann. § 46B.003; Utah Code Ann. 1953 § 77-15-5, 77-15-6(4); Va. Code Ann. § 19.2-169.1; W. Va. Code § 27-6A-3.

⁸ E.g., Fla. Rule Crim. Proc., Rule 3.212; Ga. Code Ann. § 17-7-130; Haw. Rev. Stat. § 704-404; Me. Rev. State. Ann. tit. 15, § 101-D; Md. Code Ann., Crim. Proc., §3-106; Mich. Comp. Laws Ann. § 330.2030; Neb. Rev. Stat. § 29-1823; N.J. Stat. Ann. § 2C:4-6; NY Crim. Proc. Law § 730.40, 730.50; Or. Rev. Stat. § 161.365; Tenn. Code Ann. § 33-7-301; Wyo. Stat. Ann. 1977 § 7-11-303.

⁹ E.g., Haw. Rev. Stat. § 704-406; Mass. Gen. Laws ch. 123, § 18; Miss. Unif. Rules of Cir. & County Prac., Rule 9.06; Mo. Ann. Stat. § 552.020; N.J. Stat. Ann. § 2C:4-6; Okla. Stat. Ann. § 1175.6a; Tenn. Code Ann. § 33-7-301; Wyo. Stat. Ann. 1977 § 7-11-303.

¹⁰ E.g., Colo. Rev. Stat. § 16-8.5-116; Pa. Cons. Stat. § 7403 (maximum term up to 10 years, or life if murder charge); S.D. Codified Laws § 23A-10A-15 (for Class A or B felony); W. Va. Code § 27-6A-3.

limited to a specific term ranging from 18 months to 20 years.¹¹

Of the five States that do not explicitly or by implication apply the preponderance standard as to all competency issues, each allocates the burdens differently. Alabama applies the preponderance standard to competency and restorability but requires proof of dangerousness by clear and convincing evidence. Ala. Rule Crim. Proc., Rule 11.6. Arizona and New Hampshire require commitment for restoration unless there is clear and convincing evidence that the defendant will not regain competency. 16 Ariz. Rev. Stat., Rules Crim. Proc., Rule 11.5(b)(3); N.H. Rev. Stat. Ann. § 135:17. New Mexico requires clear and convincing proof of dangerousness to commit the defendant to a secure facility. N.M. Stat. Ann., Rules Crim. Proc., Rule 5-602. Finally, the burden of proof in Wisconsin depends on the position that the defendant takes. Wis. Stat. Ann. § 971.14.

The first statutory competency procedure in Washington was enacted in 1973, the year after the Jackson v. Indiana decision, and

¹¹ E.g., Cal. Penal Code § 1370 (3 years); Conn. Gen. Stat. §54-56d (18 months); Fla. Rule Crim. Proc., Rule 3.213 (5 years, possibly longer); Iowa Code §§ 812.9 (18 months); Md. Code Ann., Crim. Proc., §3-107 (5 years for felonies, 10 years for capital crime, unless State petitions for more time); NY Crim. Proc. Law § 730.50 (two-thirds of maximum term); Or. Rev. Stat. § 161.370 (3 years); R.I. Gen. Laws 1956 § 40.1-5.3-3 (two-thirds of maximum term, or if term is life, 20 years); Va. Code Ann. § 19.2-169.1 (lesser of 5 years or maximum term, no limit for capital murder).

included the preponderance of the evidence standard of proof. Laws of 1973, ch. 117, § 9. Prior to that law, the courts relied on their inherent authority to resolve competency issues. State v. Wicklund, 96 Wn.2d 798, 801, 638 P.2d 1241 (1982); e.g., State v. Henke, 196 Wash. 185, 192-93, 82 P.2d 544 (1938).

There is no support in historical or contemporary legal standards for the defendant's position that a higher standard of proof is constitutionally required to justify the commitment authorized in RCW 10.77.086(4).

b. The Preponderance Standard Is Fundamentally Fair

The second prong of the due process analysis also is satisfied by the preponderance standard. This standard of proof is fundamentally fair in operation, based on the competing interests at stake and the risks of an erroneous decision.

The matters that must be found by a preponderance under RCW 10.77.086 are that the defendant is incompetent and that:

(a) The defendant (i) is a substantial danger to other persons; or (ii) presents a substantial likelihood of committing criminal acts jeopardizing public safety or security; and (b) there is a substantial probability that the defendant will regain competency within a reasonable period of time.

RCW 10.77.086(4). The addition of the qualifier "substantial" in each of these clauses creates a higher bar to commitment of the defendant, even as the preponderance standard of proof is applied.

The competing interests at stake in RCW 10.77.086 are the State's interests in prosecuting felony criminal charges and in protecting the public, and the felony defendant's interest in being free from up to six months of court-ordered treatment, possibly confined to a mental hospital.¹²

The government has a strong interest in bringing a person accused of a serious crime to trial. The "power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace." Illinois v. Allen, 397 U.S. 337, 347, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (Brennan, J., concurring); United States v. Bush, 585 F.3d 806, 813 (4th Cir. 2009).

The State's interest in promoting public safety also must be weighed in the due process analysis. The defendant who is committed under RCW 10.77.086(4) is charged with a felony and either is a substantial danger to other persons, or presents a

¹² There was no request for an order authorizing forced medication in this case. Determination of that issue is controlled by Sell v. United States, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003), RCW 10.77.092, and RCW 10.77.093.

substantial likelihood of committing crimes that jeopardize public safety or security. RCW 10.77.080(4). This defendant was charged with a felony assault and had a long history of violent acts. CP 1-3.

Moreover, any greater constitutional standard grafted onto the statutory procedure in RCW 10.77.084(4) would apply to all felony defendants, including those charged with robbery, rape, and murder. The State's interest in bringing these defendants to trial can hardly be overstated.

Hurst cites no cases addressing the burden of proof on competency restoration issues in a felony case. He cites cases adopting higher standards of proof relating to involuntary civil commitment,¹³ and cases involving deprivation of parental rights and the statutory standard of proof for civil commitment of sexually violent predators.¹⁴ As the liberty interests and the State's interests in each of those situations are substantially different than in a felony prosecution, these cases are not analogous.

Hurst's reliance on Born v. Thompson, *supra*, is misplaced. Born analyzed the appropriate burden of proof relating to the

¹³ Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); In re McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984).

¹⁴ App. Brief at 9-10.

finding of a "violent act" necessary at that time for commitment for restoration of competency of persons charged with nonfelony offenses. Born v. Thompson, 154 Wn.2d at 751. Born analyzed at length the difference between the State's interest in prosecuting felonies and in prosecuting nonfelonies. Id. at 756-57.

The Court in Born found an additional important distinction in the facts to be determined in felony and nonfelony competency restoration proceedings. Under the statute in effect at that time, to obtain an order for restorative treatment for a nonfelony defendant, the State was required to prove that the defendant had a history of or a pending charge of one or more "violent acts." RCW 10.77.090(1)(d)(i) (2001).¹⁵ The Court found that the incompetence of the defendant could impede the defense effort to rebut the claim that the current offense involved a violent act. Born, 154 Wn.2d at 761. The Court noted that this concern does not arise as to felony defendants because that issue is not presented. Id. at 761 n.12.

The Court stated that a conclusion as to dangerousness, such as is

¹⁵ Former RCW 10.77.090(d)(i) provided: "If the defendant is: (A) Charged with a nonfelony crime and has: (I) A history of one or more violent acts, or a pending charge of one or more violent acts; or (II) been previously acquitted by reason of insanity or been previously found incompetent under this chapter or any equivalent federal or out-of-state statute with regard to an alleged offense involving actual, threatened, or attempted physical harm to a person; and (B) Found by the court to be not competent; then (C) The court shall order the secretary to place the defendant: (I) At a secure mental health facility" for restorative treatment. RCW 10.77.090(d) (2001).

required in the felony context, does not present the same concern.

Id. at 761-62.

Born recognized that the burden of proof in the felony context was established by statute as a preponderance of the evidence. Id. 757 and n.10. The Court concluded that a higher standard of proof should apply in the nonfelony context, because the government has a less important interest in prosecuting nonfelony crimes than felonies and because the incompetent nonfelony defendant would be at a disadvantage in the litigation of whether a violent act was involved. Id. at 756, 761.

In its analysis of relative risks, the Court in Born also noted that no proof of dangerousness was required in order to commit a nonfelony defendant for restoration. Id. at 761. Proof of dangerousness is required in the felony context – that dangerousness intensifies the public safety risk that is inherent in release of a felony defendant without bringing that person to trial. The necessity of proof of dangerousness in the felony context also lessens the risk of commitment to the defendant.

Hurst attempts to minimize the State's interest in public safety in this case. He argues that the charge is little more than a misdemeanor. Hurst does not contend that this case was not

properly charged as a felony, he simply notes that only one element (the status of the victim as a nurse) distinguishes it from a misdemeanor. Nevertheless, it is the legislature's prerogative to determine the seriousness of crimes, and it is certainly common for only one element to distinguish a misdemeanor from a felony.

In addition, although the nurse who was the object of the unprovoked attack in this case was not seriously injured, Hurst clearly does pose a danger to the community. The nurse was lucky not to be more seriously injured, as Hurst had assaulted and injured a staff member at Western State Hospital in 2004. 2/4/09RP 72073. He also assaulted another patient at the Hospital in 2006. Hurst has many prior convictions for assault. CP 3; 2/3/09A RP 36. He told Dr. Gallagher that he wanted to kill Scott Jordan and had access to a gun. 2/3/09A RP 35. He readily admits a temper problem. 2/4/09RP 114. Hurst has a history of drinking, using cocaine, and not taking prescribed medication when he is out of custody. 2/3/09A RP 43; 2/4/09RP 60-61. The determination of whether he was dangerousness was a matter for the jury to decide, based on the current charge and Hurst's history.

The defendant provides no support for his assertion that the risk of erroneous deprivation of liberty is high because he had not

become competent during the initial two 90-day commitments to Western State Hospital. App. Br. at 11. Whether the defendant's competency could be restored in the foreseeable future was the issue of fact presented to the jury in this case and was the subject of expert testimony by both parties. Compare 2/3/09A RP 21, 26, 31-33, 37-44, 50-51, and 2/4/09RP 30-33 with 2/4/09RP 59-60.

Likewise, the term of this commitment is of minimal significance. Much longer terms of commitment for restoration are common in the federal courts and other states.¹⁶ The statutory structure provides for an immediate hearing and dismissal of the case if a professional person at any time concludes that the defendant is not restorable within a reasonable period and the court makes that finding. RCW 10.77.084(1)(c). The risk of error in the finding of restorability is minimized by this continuing safeguard.

The legislature has specifically provided the standard of proof to be applied to competency determinations in felony cases. Hurst cites no case indicating that the standard specified, the

¹⁶ E.g., Federal: 18 U.S.C. §4241 (unlimited period); United State v. Magassouba, 544 F.3d 387 (2nd Cir. 2008) (no set outside limit to commitment for reasonable period to restore competency; commitment beyond 19 months proper); United State v. Ecker, 30 F.3d 966, 969 (8th Cir.), cert. denied, 513 U.S. 1064 (1994) (four years). E.g., States with indefinite term: fn. 9, supra; States with term limited by statutory maximum: fn. 10, supra; States with specific terms of 18 months to 20 years: fn. 11, supra.

preponderance standard, is constitutionally inadequate for felony prosecutions. The Due Process Clause does not require the State to adopt a procedure simply because that procedure may produce results more favorable to the defendant. Medina, 505 U.S. at 451.

[A] state procedure 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.'

Medina, 505 U.S. at 451 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). Due process requires only the most basic procedural safeguards; "more subtle balancing of society's interests against those of the accused ha[s] been left to the legislative branch." Medina, 505 U.S. at 453 (quoting Patterson v. New York, supra, 432 U.S. at 210).

This court, therefore, should reject the defendant's claim that before a commitment of a felony defendant for 180 days for restorative treatment, the State must prove the defendant's competency, dangerousness, and the likelihood of restorability by clear, cogent and convincing evidence. The legislatively adopted preponderance standard satisfies the requirements of due process.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to reject the defendant's claim that before a commitment of a felony defendant for 180 for restorative treatment, the State must prove the defendant's competency, dangerousness, and the likelihood of restorability by clear, cogent and convincing evidence. The preponderance of the evidence standard imposed by the legislature is consistent with principles of justice rooted in the traditions and conscience of this country.

DATED this 16TH day of February, 2010.

Respectfully submitted,

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Appendix A

Appendix A

RCW 10.77.086. Commitment--Procedure in felony charge

(1) If the defendant is charged with a felony and determined to be incompetent, until he or she has regained the competency necessary to understand the proceedings against him or her and assist in his or her own defense, or has been determined unlikely to regain competency pursuant to RCW 10.77.084(1)(c), but in any event for a period of no longer than ninety days, the court:

(a) Shall commit the defendant to the custody of the secretary who shall place such defendant in an appropriate facility of the department for evaluation and treatment; or

(b) May alternatively order the defendant to undergo evaluation and treatment at some other facility as determined by the department, or under the guidance and control of a professional person.

(2) On or before expiration of the initial ninety-day period of commitment under subsection (1) of this section the court shall conduct a hearing, at which it shall determine whether or not the defendant is incompetent.

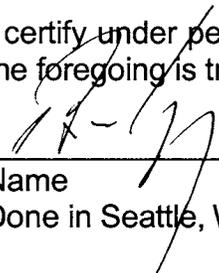
(3) If the court finds by a preponderance of the evidence that a defendant charged with a felony is incompetent, the court shall have the option of extending the order of commitment or alternative treatment for an additional ninety-day period, but the court must at the time of extension set a date for a prompt hearing to determine the defendant's competency before the expiration of the second ninety-day period. The defendant, the defendant's attorney, or the prosecutor has the right to demand that the hearing be before a jury. No extension shall be ordered for a second ninety-day period, nor for any subsequent period as provided in subsection (4) of this section, if the defendant's incompetence has been determined by the secretary to be solely the result of a developmental disability which is such that competence is not reasonably likely to be regained during an extension.

(4) For persons charged with a felony, at the hearing upon the expiration of the second ninety-day period or at the end of the first ninety-day period, in the case of a defendant with a developmental disability, if the jury or court finds that the defendant is incompetent, the charges shall be dismissed without prejudice, and either civil commitment proceedings shall be instituted or the court shall order the release of the defendant. The criminal charges shall not be dismissed if the court or jury finds that: (a) The defendant (i) is a substantial danger to other persons; or (ii) presents a substantial likelihood of committing criminal acts jeopardizing public safety or security; and (b) there is a substantial probability that the defendant will regain competency within a reasonable period of time. In the event that the court or jury makes such a finding, the court may extend the period of commitment for up to an additional six months.

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 Mindy Ater, 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 Respondent, in STATE V. JOHN HURST, Cause No. 63052-1-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.



Name
Done in Seattle, Washington

02/16/2010

Date

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