

63906-4

63906-4

NO. 63906-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

RUSSELL C. HOHF,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the trial court employ an incorrect standard of proof when deciding whether to order the defendant be involuntarily medicated in order to restore his competency to stand trial?

2. Was the evidence sufficient to support the conclusion that the defendant should be forced to take medications to restore his competency to stand trial?

3. Was the evidence sufficient to support the court determination that the defendant was not competent to stand trial?

4. Did the court appropriately consider the defendant's competency before addressing the defendant's request to represent himself?

II. STATEMENT OF THE CASE

A. THE ASSAULT.

Matthew Locke lives on a parcel of land in Stanwood that is owned by his brother, Kevin Perrin. Mr. Locke, his partner and his 7 year old daughter, lived in a separate home from Mr. Perrin. 7-6-09 RP 62-63, 80.

On October 12, 2007 Matthew Locke was taking his daughter and her friend to dinner when he passed by the defendant Russell Hohf's home. They stopped to look at some deer. The

defendant came down his driveway screaming at Mr. Locke demanding to know if Mr. Locke had a problem with the defendant. Mr. Locke tried to talk to the defendant to no avail. Mr. Locke then drove off. 7-6-09 RP 62-68.

The next day Kevin Perrin went to work. When he came home around 4:30 p.m., Mr. Perrin's son, Kyle, told Mr. Perrin about Mr. Locke's confrontation with the defendant the day before. Mr. Perrin got in his truck and drove down to the defendant's property to talk to him. Mr. Perrin parked on the road and waited for the defendant to come down the driveway on his tractor. Mr. Perrin stood with his hands at his side as the defendant approached. As the defendant got closer to Mr. Perrin he pulled a gun from his pocket and pointed it at Mr. Perrin. As Mr. Perrin told the defendant that he did not need to shoot, the defendant shot Mr. Perrin in the face. Mr. Perrin ran to his truck and drove home, bleeding heavily. There his wife and friend called 911. 7-6-09 RP 83-88, 98-99; 7-7-09 RP 10-21, 96-98.

Mr. Perrin was transported to Harborview Hospital where he stayed until November 10. The bullet entered Mr. Perrin's philtrum (the crease between the upper lip and nose) and exited out the right side of the back of his neck. Mr. Perrin had to be put on a

ventilator which resulted in developing ventilator associated pneumonia. He also had bilateral lower extremity thrombosis. He developed a psedoaneurysm at the location of the gunshot wound. On October 30 Mr. Perrin underwent surgery to place a stint his right internal carotid artery. 7-7-09 RP 100-101; 7-8-09 RP 132-133, 137, 142-143.

After the shooting, police began looking for the defendant. The defendant had fled the area in his car. He buried the gun near Big Lake. When he returned home there were a number of police in the area. The defendant concealed his car in some bushes. He then made his way home on foot. After about one hour police entered the defendant's home and the defendant surrendered. The defendant agreed to talk to police. The defendant said that he had been harassed the day before. He denied owing a handgun, but admitted he owned a shotgun. The defendant denied shooting anyone. 7-7-09 RP 130-136; 7-9-09 RP 29-31.

B. PRE-TRIAL PROCEDURES.

The defendant was charged with one count of First Degree Assault with a firearm allegation. 1 CP 197-198. The defendant was initially assigned public defender Rob O'Neil. 2 CP ____ (Sub. 7, order on motion). Shortly thereafter the David Gehrke

substituted as defense counsel. 3 CP ___ (sub 25 Notice of withdrawal and substitution). Within two months the defendant sought to discharge Mr. Gehrke. 3 CP ___ (sub 29, Motion Withdrawal Discharge of Attorney. The defendant asked the court to order Mr. Gehrke return the retainer the defendant had paid, "so I can get myself a proper attorney." 3 CP___ (sub 43 page 6). The motion was continued one week for the defendant to appear with new counsel. 3 CP ___ (sub 43 page 9-11).

The next week the defendant asserted that he wanted to represent himself. 3 CP ___ (sub 44, page 3). The court discussed what would be expected of the defendant if he represented himself and urged the defendant to seek new counsel. In the end the court permitted the defendant to represent himself. 3 CP ___(sub 44, page 5-10).

Two weeks later on February 7 the defendant asked the court to appoint him a new attorney. He requested an attorney who did not work in Snohomish County, because he believed attorneys in that county were all working against him and with the prosecution. 2-7-08 RP 10-15. Accordingly the Office of Public Defense appointed Ms. Kelli Armstrong-Smith. One week later the defendant asserted he wanted Ms. Armstrong-Smith dismissed

because he did not think that she was a Skagit County attorney. He claimed he was representing himself. The Court refused to entertain a motion to proceed pro se absent a written motion. 2-14-08 RP 2-3.

Thereafter the Court ordered a series of competency evaluations which were conducted in April, June, and September 2008. In accordance with those orders two reports were prepared by Dr. Gleyzer of Western State Hospital, and one report was prepared by Dr. Muscatel. 2 CP 202-203; 3 CP ____ (sub 78 order on motion), 3 CP ____ (sub 90, order on motion), Ex. 1, 2, 3.

In the first report Dr. Gleyzer reported that the “defendant’s extreme suspiciousness and paranoia clearly interfere with his ability to establish a trusting relationship with his attorney.” Dr. Gleyzer opined that the defendant was not competent because he was not able to assist in his own defense. Ex. 1, page 8. In July Dr. Muscatel reported that when he evaluated the defendant in early June the defendant stated that he trusted his attorney and was willing to work with her. Dr. Muscatel opined the defendant was competent as of the date of the evaluation, but that the defendant’s condition may later deteriorate. Ex. 3, page 4,6. In September the Dr. Gleyzer expressed his opinion that the defendant was

marginally able to assist in his own defense, but the true test would be whether he was able to work meaningfully with his attorney should be made in court. Ex. 2, page 6.

On October 14 the court scheduled a competency hearing. The prosecutor asked the court to find the defendant not competent based on Dr. Gleyzer's initial report and the letters and motions filed by the defendant between the final evaluation and the hearing date, and defense counsel's declaration. 10-14-08 RP 4. In some of those letters and motions the defendant expressed his belief that his attorney was conspiring with the prosecution to secure his conviction. 3 CP ___(sub 92, page 2), 1 CP 187-188, 3 CP ___(sub 98, page 1-3). Ms. Armstrong-Smith confirmed she was unable to effectively communicate with the defendant because he believed that she was part of the Snohomish County conspiracy to get him. Ms. Armstrong-Smith stated that the defendant's beliefs went so far as to cause him to lie to her in an apparent attempt to "test her". She stated the defendant had learned what to say to evaluators to make him appear competent, but his delusion that she was part of a conspiracy to see that he was convicted persisted. She concluded that the defendant was not competent to stand trial. Ms. Armstrong-Smith also asked the court for

permission to withdraw as counsel. 1 CP 136-138; 10-14-08 RP 6-7.

The court denied defense counsel's motion to withdraw. The court stated its threshold issue was whether or not the defendant was competent to stand trial, not who if anyone would represent the defendant. The court was not prepared to decide the issue on the record before it, and continued the matter for a full evidentiary hearing. 10-14-08 RP 20, 23.

On November 12, 2008 the court conducted the competency hearing. At the end of the hearing the court decided that defendant was not competent to stand trial. Further it determined that the defendant should be required to take medication in order to restore his competency. 11-12-08 RP 153-156; 1 CP 130-135.

On February 26, 2009 the court held another competency hearing. Based on the report from Western State Hospital the court found the defendant competent to stand trial. The court also ordered further medication to maintain the defendant's competency. 2-26-09 RP 186-189.

In a pre-trial hearing held in March 2009 the defendant stated that he did not want to continue taking the oral medication because it cost too much. The defendant stated a preference for

being transported to Western State Hospital to receive the medication by shots. Defense counsel explained to the court that the oral medication had side effects that the shots did not have. The court then ordered that the defendant receive the medication as requested. In a second pre-trial hearing in March 2009 defense counsel represented that the medications were helping the defendant. Counsel asserted that he and the defendant were able to have a good working relationship. The defendant stated that he trusted his lawyer when his lawyer asked for a final continuance to prepare for trial. 3-10-09 RP 3-8; 3-27-09 RP 12-13, 19.

The defendant was later tried for the assault on Kevin Perrin. At trial the defendant testified that he acted in self defense. The jury rejected that claim and found the defendant guilty as charged. 7-9-09 RP 18-28; 1 CP 16.

III. ARGUMENT

A. THE TRIAL COURT APPROPRIATELY CONSIDERED WHETHER TO ORDER THE DEFENDANT'S INVOLUNTARY MEDICATION IN ORDER TO RESTORE COMPETENCY TO STAND TRIAL.

At the November 12, 2008 hearing the trial court considered two distinct issues. First the court considered whether the defendant was incompetent to stand trial. 11/12/08 RP 143-153. The standard of proof for that inquiry was a preponderance of the

evidence. RCW 10.77.086(3). In rendering its decision the court articulated that it found the defendant not competent to stand trial by a preponderance of the evidence. 11/12/08 RP 153.

The second issue addressed by the court was whether the court should order forced medications in order to restore the defendant's competency to stand trial. 11/12/08 RP 153-160. There are two important competing interests which must be considered when assessing whether a defendant who has been found incompetent should be forced to take medications to restore competency. The individual has an interest in avoiding the unwanted administration of antipsychotic medications. Washington v. Harper, 494 U.S. 210, 221-22, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990). In contrast the State has an interest in bringing an accused person to trial. Riggins v. Nevada, 504 U.S. 127, 135-36, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), State v. Adams, 77 Wn. App. 50, 56, 888 P.2d 1207, review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995). In order to balance those competing interest the Court has articulated four factors which must be met before the court may order a defendant to take medication involuntarily in order to restore his competency to stand trial. Sell v. United States, 539 U.S. 166, 180-82, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003).

The court must find (1) there are important governmental interests at stake; (2) administration of medication is substantially likely to render the defendant competent to stand trial and substantially unlikely to have side effects that may undermine the fairness of the trial; (3) involuntary medication is necessary to further the State's interests; and (4) administration of medication is medically appropriate. Sell, 539 U.S. 180-81, State v. Hernandez-Ramirez, 129 Wn. App. 504, 510, 119 P.3d 880 (2005).

Neither Sell nor 10.77 RCW articulate the standard of proof to be applied when considering this question. The Court has determined the burden of proof is by clear, cogent, and convincing evidence in Hernandez-Ramirez, at 510-11. The Court relied on former RCW 71.05.370(7) (re-codified as RCW 71.05.217) which is Washington's statement of rights for mental patients. Clear, cogent, and convincing evidence is evidence which establishes the facts in issue are "highly probable." In re LaBelle, 107 Wn.2d 196, 209, 728 P.2d 138 (1986).

The defendant argues the trial court improperly used a preponderance of the evidence standard when determining whether to force him to take medications to restore his competency. The trial court did not specifically articulate the standard of proof it

employed when considering the question of forced medications. However, the record does support the conclusion that the trial court did employ the correct standard. The trial judge repeatedly stated the evidence was “clear” and the required result based on that evidence was “clear.” 11-12-08 RP 154-155, 161.

As to the first Sell factor the court stated “Clearly, this instance, there is a serious crime that Mr. Hohf stands accused of, and that is first degree assault.” 11/12/08 RP 154. As to the third factor the court stated “I think it was clear from Dr. Gleyzer’s testimony that for this type of situation, this is really the first line of action, that therapy may provide some assistance, but, really, medication is the key.” 11/12/08 RP 155. In summarizing its ruling the court stated “[t]he Court is convinced, with all due respect to Mr. Hohf, that this is in his best interests and it is clearly at this point in time the right thing to do.” 11/12/08 RP 161. These comments indicate that the court employed the required standard of proof.

Moreover, the evidence presented supports the trial court’s determination that the Sell factors had been satisfied. The record clearly established the first Sell factor that there is an important governmental interest at stake. “The Government’s interest in bringing to trial an individual accused of a serious crime is

important.” Sell, 539 U.S. at 180. First Degree Assault qualifies as a serious offense for this factor. RCW 10.77.092(1)(a), RCW 9.94A.030(50)(a), RCW 9A.36.011(2).

The defendant suffered from a delusional disorder resulting in his unfounded belief that any attorney who represented him was not working in his best interest, but rather was working against him. Ex. 1, page 5-7, 10/14/08 RP 5-7; 11/12/08 RP 52, 55, 60-62. Counsel stated in her declaration to the court that she has “concluded that his (Mr. Hohf’s) conspiracy theories are too severe and he sees me as the enemy and part of the conspiracy...it is clear to me that he does not trust me and believes I am against him like everyone else is against him. I have listened to Mr. Hohf’s beliefs that there is a conspiracy by law enforcement in Snohomish County and I do not find that they are realistic. . . Mr. Hoff feels that I am siding with the conspirators when I question him about how realistic his beliefs are.” 1 CP 137-38. The defendant’s letters to the court and motions confirmed Dr. Gleyzer’s and counsel’s assessment of the defendant’s mental state. 1 CP 169, 181,184, 188, 3 CP ____ (Sub 92, page 2, Sub 98, page 2.)

As to the second and third Sell factors the evidence clearly established that medication could restore the defendant to

,competency with minimal side effects and that it was necessary to administer medications in order to restore the defendant's competency. Because of the nature of this disorder and its low incidence rate much information on the effectiveness of medication in treating delusional disorder came from case reports and case series describing treatment response. In addition there was one retrospective study of offenders which found a 77% of people who suffered from the disorder were restored to competency. Dr. Gleyzer stated that there was a substantial likelihood that medications would help the defendant to the point that he could assist his attorneys and become competent. Dr. Muscatel agreed that medications do help persons with delusional disorders.¹ Although the defendant characterizes this study as "slim scientific evidence" his own expert relied on that study when he agreed that medications can restore competency when addressing delusional disorder. Dr. Muscatel stated he had no concerns about the validity of the study. He also agreed that the defendant could benefit from administration of antipsychotic medications. 10/14/08 RP 8;

¹ The defendant's reference to Dr. Muscatel's testimony that he was not sure if medications would help the defendant refer to the paranoid personality disorder diagnosis, not the delusional disorder. 11-12-08 RP 98-99. Dr. Muscatel was clear that medications could treat the delusional disorder.

11/12/08 RP 56, 62-63, 69-71, 95-96, 101-102.

The court carefully balanced the need for medications, and the potential intrusion it could create on the defendant's ability to defend himself. The evidence showed there was a newer group of psychotropic medications that did not have the type or extent of side effects that an older group of medications had. When side effects are detected they can be treated. Dr. Gleyzer would not use the older group of medications to treat the defendant's delusional disorder. 11/12/08 RP 62-67. The court specifically limited its order to permit only the lowest dosage of the newer group of medications necessary to restore competency. 11-12-08 RP 156-159. Although the defendant complained of some side effects at a later hearing, the court altered its order at the defendant's request to diminish those side effects. 2-18-09 RP 117; 3-10-09 RP 8.

As to the fourth Sell factor there was also substantial evidence which established administration of drugs was medically appropriate. Dr. Gleyzer stated that for all psychotic disorders including delusional disorders the first line of treatment is psychotropic medications. Dr. Gleyzer concluded that there is a substantial likelihood that medication would restore the defendant's competency, that it was medically necessary to treat the defendant,

and that without medications he would be unlikely to improve sufficiently to be competent to stand trial. 11/12/08 RP 62-66, 69-71.

B. THE EVIDENCE SUPPORTS THE TRIAL COURT'S DETERMINATION THAT THE DEFENDANT WAS NOT COMPETENT TO STAND TRIAL.

“No incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” RCW 10.77.050. “[T]he conviction of an accused while he is legally incompetent violates his constitutional right to a fair trial under the Fourteenth Amendment’s due process clause.” State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982). The test for competency is whether the defendant is capable of properly understanding the nature of the proceedings against him and whether he is capable of rationally assisting his legal counsel in his defense. Id. When assessing the defendant’s competency to stand trial the court may consider many things including the defendant’s appearance, demeanor, conduct, medical and psychiatric reports and the statements of counsel. State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302, cert. denied, 387 U.S. 948, 87 S.Ct. 2086, 18 L.Ed.2d 1338 (1967). Counsel’s opinion regarding the defendant’s competence to stand trial is afforded

considerable weight. State v. Harris, 122 Wn. App. 498, 505, 94 P.3d 379 (2004).

The trial court's decision in a competency hearing is reviewed for an abuse of discretion. State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985), cert. denied, 476 U.S. 1144, 106 S.Ct. 2255, 90 L.Ed.2d 700 (1986). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds or reasons. State v. Adamy, 151 Wn. App. 583, 587, 213 P.3d 627 (2009). Application of the incorrect legal standard is an abuse of discretion. Id.

The defendant argues the trial court erred when it concluded that he was not competent based on his inability to assist counsel. He argues the court applied the wrong standard when assessing this question. Specifically he states the court erred when it concluded the defendant was not competent simply because he did not wish to cooperate with his attorneys. He asserts that the court failed to sufficiently inquire into whether the defendant's complaints about counsel were credible. He further states the court should have considered his request to represent himself when analyzing whether he could assist in his own defense.

The trial court found the defendant understood the nature of the proceedings against him, but that he was unable to rationally assist his legal counsel in his defense and to consult with his lawyer with a reasonable degree of understanding. 1 CP 131. In so finding the trial court applied the correct legal standard for determining whether the defendant was competent to stand trial.

The court's determination was supported by the evidence. Both Dr. Gleyzer and Dr. Muscatel diagnosed the defendant with paranoid personality disorder and delusional disorder. Ex. 1 page 7, Ex. 3 page 4. Dr. Gleyzer concluded that the defendant's pervasive delusion that his attorney was involved in a conspiracy with the court and prosecutor to see him convicted interfered with his ability to form a trusting relationship with his attorney. That delusion "interfered with his ability to communicate relevantly with his attorney and to perceive his situation realistically." Ex. 1, page 8.

Dr. Muscatell's conclusion that the defendant met the second prong of the competency inquiry was based on the defendant's assertion during his June interview with the doctor that he trusted his attorney. Ex. 3, page 4, 6. The defendant repeated this position and stated he was willing to work with counsel in his

third evaluation. That led Dr. Gleyzer to conclude the defendant was marginally competent. Ex. 2, page 6. These conclusions were undermined by counsel's declaration that the defendant's statements were contrived to fool the evaluators into declaring him competent to stand trial. She stated that the defendant's delusional beliefs persisted. She could not talk to the defendant about the case because the defendant consistently insisted on pressing his allegations against her and "we get nowhere in the progress of the case." 3 CP ___ (sub 67, page 2). Ms. Armstrong-Smiths statements were corroborated by the defendant's letters to the judge insisting that his attorney was out to get him.

The testimony of the two psychologists also supported the court's conclusion that the defendant was not competent to stand trial on the basis that he was unable to assist in his attorneys in the defense of his case. The evidence showed that the delusional disorder could be fluid; there could be times when it was more disabling than others. While the defendant may be able to control his delusional belief system in a less stressful environment, he may not be able to do so in the more stressful courtroom environment. At the time of the competency hearing the defendant was significantly impaired by his disorder. 11-12-08 RP 49, 58-59.

The defendant's argument that the court erred relies on a mischaracterization of the evidence. The defendant did not simply choose to distrust his attorneys or not cooperate with them. Rather he was unable to rationally decide whether or not to trust and work with his attorneys due to his delusional disorder. It was that disability that prevented him from rationally assisting his defense. That is a different situation than disliking his attorney, or not wanting to cooperate with her because he was a cantankerous person. As Dr. Muscatel stated

It really depends on whether the individual's mental disorder is the cause for his inability to work with counsel. If the mental disorder is the reason that he can't work with counsel, then that meets the second prong for incompetence.

If on the other hand, he is not able to work with counsel because he is just an irritable guy and as a cranky guy and just, frankly, works better, you know, on his own and not due to mental disorder but sort of a personality characteristics, then the needle is going to tilt toward competence.

11-12-08 RP 90.

The defendant's claim that the court did not sufficiently inquire into whether the defendant's complaints about counsel were credible is also not supported by the record. Ms. Armstrong-Smith was the defendant's third attorney. The trial judge chose to appoint a fourth attorney to assist in representing the defendant at the

competency hearing on the assumption that the problem may be a personality conflict between Ms. Armstrong-Smith and the defendant. 11-12-07 RP 152. The defendant's conduct confirmed that it was not just a personal conflict between them. Instead it was the defendant's mental disorder that prevented him from rationally assisting in his defense with any attorney.

The defendant's argument that the court should have inquired into the nature of the rift between the defendant and counsel and whether that rift could be repaired misses the point. The entire competency hearing inquired into the nature of the problem between the defendant and counsel; that problem was the defendant's mental illness which prevented him from making rational decisions about his relationship with counsel. The only hope of addressing that problem was to require the defendant to take psychotropic medications to treat the delusional disorder, so the defendant could make rational decisions regarding representation.

Finally, the defendant does not specify what kind of inquiry the court should have made into the legitimacy of the defendant's complaints against his attorney. There was nothing in the record to suggest that Ms. Armstrong-Smith was not complying with her

obligations under RPC 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.6 (Confidentiality of Information), or 3.3 (Candor toward the Tribunal). There was ample evidence that the defendant's claims were not based in reality.

C. THE TRIAL COURT WAS REQUIRED TO DETERMINE WHETHER THE DEFENDANT WAS COMPETENT BEFORE ENTERTAINING THE DEFENDANT'S REQUEST TO REPRESENT HIMSELF PRO SE.

Prior to the November competency hearing the defendant sent the trial judge a number of letters and motions in which he asserted that he wanted to discharge his attorney and represent himself. The defendant filed a motion entitled "Motion Showing Defendant Acting Pro Se" in which he asserted that he had a right to represent himself, and had previously been granted that right by another judge. 1 CP 175. In a letter to the judge the defendant stated "Russell Hohf writing in support of my ability in (sic) prove of competency...my only assureness (sic) to any sort of fair trial, is that I am assured my right Pro se." 1 CP 168. The court stated as a preliminary issue it must determine whether the defendant was competent. "The issue before me is not who, if anyone, shall represent Mr. Hohf at trial. It's the basic threshold issue of

competency.”² 10-14-08 RP 20. The defendant argues this position was error.

A criminal defendant also has a right to represent himself or be represented by counsel. Washington Constitution Art. 1, §22. The right to self representation is not absolute and must be balanced against the right to a fair trial and due process of law. State v. Kolocotronis, 73 Wn.2d 92, 99, 436 P.2d 774 (1968). In Hahn the Court considered the “difficult question of the standard for waiver of that right by a criminal defendant who is psychotic yet competent to stand trial.” State v. Hahn, 106 Wn.2d 885, 889, 726 P.2d 25 (1986). The Court concluded that the standard to be applied required a determination that the defendant was competent to stand trial and that the waiver is made knowingly and intelligently. Id. at 893. The Court clarified the standard for competency to stand trial was a 2-part test which required the court to find the defendant (1) understood the nature of the offense, and (2) was capable of assisting in his defense. Id. at 894-895.

Similarly a defendant’s statutory right to represent himself at a competency hearing is also not absolute. The court may only

² This statement was made in the context of defendant's motion and defense counsel's motion to withdraw.

grant a defendant's motion to represent himself if the court makes a determination that the defendant is competent to waive his right to counsel at that hearing. RCW 10.77.020(1).

The trial court appropriately employed the requirements set out in Hahn when it refused to consider the defendant's request to represent himself before making the preliminary determination regarding competency to stand trial. The defendant's position that the court erred in refusing to consider his request to represent himself before making a determination regarding competency relies on cases in which the defendant's competency was not at issue. In Vermillion the court presumed the defendant's competency to stand trial was not an issue stating "[i]f a person is competent to stand trial, that person is competent to represent himself." State v. Vermillion, 112 Wn. App. 844, 857, 51 P.3d 188 (2002), review denied, 148 Wn.2d 1022, 66 P.3d 638 (2003). Similarly other cases cited by the defendant do not directly address the question presented to the trial court here; namely, was the defendant competent to waive his right to counsel and competent to stand trial.

The defendant also argues the court was required to perform the mandatory analysis under RCW 10.77.020(1) and its failure to

do so denied the defendant his right to represent himself. That argument fails because the court cannot grant the request for self-representation without first making the analysis. That is precisely what the court did when it stated the threshold issue before it was whether the defendant was competent. The criteria outlined in RCW 10.77.020(1)(a)-(e) was characterized as “helpful guidance” on what constitutes an effective waiver of counsel. Hahn, 106 Wn.2d at 893. That statute does not direct how the court is to ascertain whether the defendant is competent. There is no requirement that the court need ask those questions directly from the defendant.

Here the court did address whether the defendant was competent to waive counsel when it conducted the hearing on whether the defendant was competent to stand trial. The court considered the reports and testimony from the two psychologists which addressed the defendant’s understanding of the nature of the charged, the range of punishment, possible defenses, and “other facts essential to a broad understanding of the whole matter.” The court also considered the defendant’s statement both in court and in writing, as well as his attorney’s declaration dated October 13, 2008. 1 CP 130-131.

The court did not err when it did not permit the defendant to represent himself at the competency hearing because the defendant's competency to stand trial was in question. Proceeding at a time when the defendant was not legally competent would violate his right to fair trial and due process. State v. Minnix, 63 Wn. App. 494, 497, 820 P.2d 956 (1991). When a defendant's competence is in doubt the court should appoint counsel until it is determined that the defendant is competent. "If the court has doubt relating to the ability of the defendant to make a knowing and intelligent waiver of counsel, that doubt should be resolved by appointing counsel to represent the defendant." State v. Chavez, 31 Wn. App. 784, 792-93, 644 P.2d 1202 (1982).

Since the court determined the defendant was not competent to stand trial at the November 12, 2008 hearing, it could not find the defendant could make a valid waiver of right to counsel. Once the defendant returned to court in February 2009 the defendant did not renew his request to represent himself. Rather the defendant expressed his interest in continuing with counsel. 2-10-09 RP 168; 2-18-09 RP 171-72; 2-26-09 RP 183. The court did not violate the defendant's right to represent himself when it refused to grant that request either at a time when the defendant's

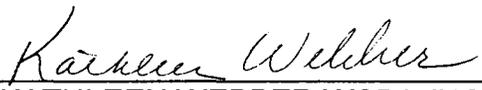
competency to waive the right to counsel was in doubt or thereafter when the court determined the defendant was not competent to stand trial.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to find the trial court did not err when it determined the defendant was not competent to stand trial, and ordered the defendant to take medications to restore his competency. The State asks the Court to affirm the defendant's conviction.

Respectfully submitted on July 13, 2010.

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