

64229-4

64229-4

NO. 64229-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JODY SANDS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Linda C. Krese, Judge

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BRIEF OF APPELLANT

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THE STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding appellant competent to stand trial. CP 167; 1RP 119-20.<sup>1</sup>

2. The trial court erred in entering Conclusion of Law “1” as to appellant’s competency. CP 166.

Issue Pertaining to Assignments of Error

To be competent to stand trial, the accused must be able to understand the nature of the charges against him and assist in his own defense. Following three competency evaluations, one 15-day and two 90-day commitments at Western State Hospital, experts for the state concluded appellant suffered from paranoid schizophrenia and was not competent to stand trial. Appellant was found competent following a fourth competency evaluation and an additional 180-day commitment. The trial court agreed appellant was mentally ill, likely delusional, and had other unresolved issues, but nevertheless found him competent because he understood the nature of the charges and was capable of assisting, albeit not rationally, in his defense. Where appellant was not capable of

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – April 30 and May 1, 2009; 2RP – June 9, 2009; 3RP – June 17, 2009; 4RP – June 23, 24, 25, 29, 2009 and July 2, 2009; 5RP – August 26, 2009; 6RP – August 28, 2009.

rationaly assisting in his defense, did the trial court err in finding him competent to stand trial?

B. STATEMENT OF THE CASE

1. Procedural History

On January 4, 2008, the Snohomish County prosecutor charged appellant Jody Sands with second degree murder with a deadly weapon for an incident that occurred December 19, 2007. CP 220-21.

On January 7, 2008, an order for a 15-day competency evaluation was entered, staying the proceedings. Supp. CP \_\_\_\_ (sub no. 6, Order of Commitment for 15 days to Western State Hospital and Staying of Proceedings, at 1). On February 7, 2008, an order was entered finding Sands not competent and ordering a 90-day commitment for competency restoration. CP 198-213; 214-15. On May 28, 2008, the Court found Sands was still incompetent and a second 90-day competency order was entered. CP 196-97; Supp. CP \_\_\_\_ (sub no. 22, Department of Social and Health Services Forensic Psychological Report, dated 5/26/09, at 1). On July 3, 2008, an order authorizing forced medication was entered. Supp. CP \_\_\_\_ (sub no. 26, Order on Motion for Forced Medication, dated 7/3/08, at 1). On August 28, 2008, the Court found Sands was still incompetent and ordered a 180-day commitment, pending competency restoration. CP 183-84, 185-87, 188-95.

On February 25, 2009, Western State filed a report claiming Sands was competent. CP 175-82; 1RP 17. The Honorable Linda Krese conducted a competency hearing on April 30 and May 1, 2009. 1RP. Sands was found competent to stand trial. CP 167; 1RP 119-20. Written findings of fact and conclusions of law were entered May 13, 2009. CP 160-66.

On June 9, 2009, Judge Krese conducted a pre-trial hearing on the State's motion to admit Sands' custodial statements. See 2RP. The court found Sands' statements made after his request for an attorney inadmissible and entered written findings of fact and conclusions of law on June 17, 2009. CP 137-141; 2RP 87-92; 3RP 3. The bench trial began on June 23, 2009 following Sands waiver of a jury trial. CP 136; See 4RP.

The court found Sands guilty. CP 20-34; 4RP 260. Sands was sentenced to 96 months in prison and 60 months of community custody. CP 20-34; 6RP 11, 14. Sands timely appeals. CP 3-19.

## 2. Sands' Competency

Laurie Theimann, a clinical psychologist at Western State Hospital, and Lee Gustafson, a forensic psychologist, testified at the competency hearing on April 30 and May 1, 2009. Theimann testified for the State and Gustafson for the defense. At the hearing, defense counsel argued that although Sands understood the nature of the proceedings

against him, his delusional beliefs prevented him from rationally assisting in his own defense. 1RP 96-100.

Gustafson reviewed Sands' records and forensic reports and concluded Sands suffered from paranoid schizophrenia. 1RP 45-46. Sands would not agree to an interview with Gustafson. 1RP46, 61-62. Theimann confirmed Sands suffered from a "chronic mental illness" of paranoid schizophrenia accompanied by delusions and hallucinations. 1RP 18-19.

Forensic Psychological Reports submitted by Theimann on February 5, 2008, May 26, 2008, and August 22, 2008, detail Sands' extensive involuntary hospitalization and treatment for mental illness over a 10-year period. See CP 198-213; Supp. CP \_\_\_\_ (sub no. 22, Department of Social and Health Services Forensic Psychological Report, dated 5/26/09, at 1); CP 188-95.

Theimann addressed Sands' competency to stand trial in her February 2008 report by concluding:

He [Sands] would be unable to reasonably participate in court hearings or testify at trial, should such be required of him. Mr. Sands' impaired concentration, disorganized thinking, and paranoia would hinder his ability to participate in rational dialogue with defense counsel regarding the details of the instant offense or in strategizing for his defense.

CP 211.

The May 2008 report found Sands still incompetent to stand trial: “His ability to rationally consider his legal options appeared compromised, as did his appreciation of his legal peril.” “[H]is belief that he could not be convicted of murder appeared to reflect illogical and irrational thinking associated with his thought disorder.” Supp. CP \_\_\_\_ (sub no. 22, Department of Social and Health Services Forensic Psychological Report, dated 5/26/09, at 9-10).

Thiemann’s August 2008 report also concluded Sands was incompetent to stand trial. “In his [Sands] current state I do not believe that he is capable of rationally considering his legal options or working effectively with his attorney, as he has little desire to defend himself based on irrational and delusional beliefs.” CP 193.

The last time Theimann interviewed Sands or reviewed his notes was when she submitted her final report on February 25, 2009. At the competency hearing, Theimann admitted she did not know Sands’ current mental status and acknowledged it may have changed since February. Nevertheless, Theimann relied on her February report to conclude Sands possessed the capacity to understand the nature of the charges against him and to assist in his defense. 1RP 17-19, 86-87. Thiemann conducted no psychological tests with Sands. 1RP 8-9.

Sands' testified he did not have any mental illness and did not suffer from paranoid schizophrenia. Sands said the medication he had been taking had no effect on him because he was already a stable person. 1RP 58-60. The medication did not affect voices Sands sometimes heard coming "out of the thin air" and he continued to have problems with people trespassing on his thoughts. 1RP 69, 71-72.

Sands said he was ninety-nine percent certain he would not be convicted of the alleged incident, but acknowledged if convicted he could spend 14 years in prison "on paper." When asked what Sands meant by "on paper" Sands explained:

A: Well, people like to go about their lives and then feel that the world is going to continue to turn, and life is going to continue to go on as it's been going, but actually, a lot of people should realize there's a large – this is primarily a Christian county, and the Christians themselves know that, as they term it, God's kingdom is supposed to be established on this planet. The thing about it is, that's going to have to happen eventually. I think it's going to happen at the end of 2012, personally, that's what I think.

Q: Let me ask you something. If you were going to be convicted and sentenced on his case, just as a hypothetical, in January of 2013, will you be in prison?

A: No.

Q: Why not?

A: Because I will have removed myself from the premises.

Q: How will you do that?

A: Very easily, but I'm not going to get into that now.

Q: Are you going to be released because your time is served?

A: No, it's not going to be – I'll just have the ability to take myself out of there.

Q: Without going into any details, is that going to be sort of on a metaphysical level?

A: Yes, and physically.

Q: Will your physical body still be in prison?

A: No.

1RP 64-66.

Sands said his attorney needed to adhere to his direction and give Sands "trust, obedience, attention, focus." Sands said, "I mean, mainly I know how to win this." 1RP 73-74. Sands said he did not cause the injuries to his grandfather, Albert Beasley, and believed the police framed him like "O.J. Simpson was framed." 1RP 67-68.

Thiemann said Sands continued to have some delusional and paranoid belief. Sands' believed he would spend a maximum three years in prison. 1RP 23-24, 27, 40. Thiemann recognized she could not always distinguish between an unusual and delusional belief. 1RP 37. Thiemann could not say whether Sands' belief that the police framed him was a delusion. Thiemann agreed that if Sands' belief was delusional it could be

a barrier to his competency. 1RP 89. Theimann admitted she did not have enough information to determine whether Sands' ability to consider a not guilty by reason of insanity defense was impaired by his mental illness. 1RP 87-88.

Gustafson said Sands' belief he would not be convicted was "a residual effect of his mental illness on his judgment." 1RP 80. Gustafson said Sands' condition had improved because of medication, but said a longer period of time on psychotropic medication would "result in some further improvement in his ability to consider such things as mental defenses, which up to this point he's been unwilling to consider." 1RP 49, 80-81. Gustafson concluded:

To this point, I've seen no evidence that [Sands] accepts that he has a mental illness, even though there's 10 years of history of severe impairment and involuntarily treatment, psychiatric treatment for mental illness. So he has no recognition how much that impairs him, and so to this point, he's been unable to consider the possibility of a mental defense or to assist his attorney in exploring that option.

1RP 82.

Following the conclusion of testimony, the court said it was "too bad" there was no additional testimony, noting, "maybe it would be nice. From my point of view, maybe it would be nice if we had." 1RP 93. Concluding Sands suffered from a long-term

mental illness and “other issues that have not yet been able to be completely resolved,” the court nonetheless ruled Sands competent to stand trial. 1RP 107, 111-12, 120; CP 160-66.

Because Sands appeared to understand the nature of the charge and proceedings, the court reasoned the only issue regarding competency was whether Sands could assist in his defense. 1RP 113. After examining several Washington cases, the court concluded competence does not include rationality. Judge Krese recognized the difficulty her ruling created, and questioned whether Sands could rationally assist in his defense:

I think, that quite frankly, it's one thing to say those things an appellate decision, and quite different for all of use to be trying to figure out how to one goes forward under those circumstances. It is certainly possible that some of us question whether this is good policy, but I do think that as at trial court judge, I have to follow the law as it's been set forth for me, and the cases seems fairly consistent in this regard. I think it creates a very difficult situation, because I think it is clear, as the defense asserts that at least as expressed by Mr. Sands, he does not understand the facts as other people would see them and does not see – does not seem to be willing to pursue a not guilty by reason of insanity plea as a result of his mental illness regardless of whether or not that would be an efficacious defense for him.

1RP 113-14, 116-17.

The court acknowledged Sands' mental illness would compromise his defense, noting, “it certainly is clear to me that his [Sands] mental

illness is going to make his attorney's task very difficult in defending him." 1RP 119. Following the competency hearing, Sands entered a plea of not guilty and subsequently waived his right to a jury trial. 1RP 123-24; 4RP 4-7.

### 3. Trial Testimony

Sands lived with his mother and Beasley at 2425 State Street in Everett, Washington. 4RP 214. Sands lived in a guesthouse attached to the main residence by a garage. 4RP 214-15. At approximately 2:00 a.m. on December 19, 2007, Sands said he came into the main residence to get something to eat and saw Beasley lying on the brick base of the living room fireplace. 4RP 218, 228. Realizing Beasley was unresponsive, Sands called 911. 4RP 218, 229-30.

Sands said he was curious about spending time in jail and decided to make up a story about hitting Beasley with an axe during the 911 call. 4RP 219-20, 230. Sands said he got an axe from his closet and propped it up against a wall. Sands went outside to wait for the police and ambulance. 4RP 223-24. Sands believed he would spend a week in jail and be released when Beasley recovered and was able to explain what really happened. 4RP 221-22, 225. Sands said he did nothing to hurt Beasley. 4RP 225, 231.

At 2:48 a.m., Officer Renea Wardlaw received information about a possible assault with a weapon. 4RP 48. Wardlaw saw Sands in the front yard of the house and asked him what happened. Sands said he hit his grandfather with an axe. 4RP 51. Wardlaw turned Sands over to officer Greg Sutherland and went inside the house to find Beasley. Wardlaw found Beasley lying on the floor. 4RP 52. Wardlaw said Beasley had an abrasion on the back of his head. 4RP 54. Wardlaw saw an axe leaning up against a wall and moved it when Emergency Medical Technicians (EMTs) arrived. 4RP 55, 62. Sutherland turned Sands over to Officer to Maiya Atkins and took EMTs inside the house. 4RP 14, 25, 101. Sutherland saw a broken television in the house with glass lying around it. 4RP 22-23.

EMT Timothy Kelly saw wounds on Beasley's shoulder and back of head. 4RP 116-17, 128. Kelly touched the axe to look at it but did not see any blood on it. 4RP 118-19, 121, 130, 147. Kelly admitted he examined the axe because there was not much blood and Beasley's injuries did not appear consistent with an axe strike. 4RP 118, 129. Kelly put the axe in a different place than he found it. 4RP 130. Kelly rode with Beasley in the back of the ambulance to the hospital. Beasley's condition worsened during the ride to the hospital. 4RP 122-23. Beasley was transported to Harborview Medical Center and died on December 28,

2007 from complications related to blunt force trauma to his head. 4RP 142-42, 165, 168, 184-86.

After Atkins placed Sands in the back of a police car she read Sands his Miranda rights.<sup>2</sup> Atkins said Sands told her he hit Beasley in the head with the blunt side of the axe a few times. 4RP 104-05. Sands made several comments to Atkins that did not make sense to her. Sands continued to make comments unrelated to the case during the drive to the police station. Sands never told Atkins why the incident happened. 4RP 105-06.

Detectives Richard Callaghan and Gary Fortin interviewed Sands at the police station. 4RP 137, 154. Callaghan said he read Sands his Miranda rights and Sands signed an acknowledgment of rights form and agreed to speak with police. RP 138-39, 154-55. Callaghan took a DNA sample from Sands. 4RP 133. Sands' DNA had a statistical match of 1 in 21 quadrillion with DNA found on the axe handle. 4RP 201-02.

Sands initially told the detectives the incident was too complicated to explain. Callaghan said Sands eventually said he hit Beasley in the back of the head with an axe a couple of times. 4RP 141, 157. Sands told Callaghan he hit Beasley because he wanted to. 4RP 142, 158. Sands told

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<sup>2</sup> Miranda v. Arizona, 384 U.S. 436, 469-73, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

detectives he was not related to Beasley. 4RP 140, 156. Fortin admitted Sands made comments during the interview that did not make sense. 4RP 160.

#### 4. Sentencing

At sentencing, the court continued to express concerns about Sands' mental illness, noting that although the court had found Sands met the minimal definition of competency, his ability to consider a mental defense at trial was "clouded by his mental health issues." 5RP 28-29; 6RP 8-9. Sands expressed regret that he had not entered a plea of not guilty by reason of insanity, stating, "I wasn't as competent as I saw myself being when that issue was being broached because I wasn't being honest with myself." 5RP 23-24. Sands reemphasized the world would end in 2012 and he would only serve 3 years in prison regardless of any sentence. 5RP 10, 24-25; 6RP 17.

Recognizing Sands' mental illness played "a major part" in the incident, the court imposed an exceptional downward sentence of 96 months in prison and 60 months of community custody. 5RP 10; 6RP 10-12; CP 20-34. The State conceded aggravating factors existed in the case and stipulated to the exceptional downward sentence, "affirmatively waiving it for any appellate purpose to make it clear." 6RP 15-16.

#### C. ARGUMENT

SANDS WAS NOT CAPABLE OF RATIONALLY ASSISTING  
IN HIS DEFENSE AND THEREFORE WAS NOT  
COMPETENT TO STAND TRIAL

The court questioned whether Sands could rationally assist in his defense after concluding Sands' mental illness affected his judgment and compromised his defense. But the court found Sands competent anyway based on the belief rationality was not required. 1RP 111-19. This ruling was erroneous. Washington courts have a history of requiring that accused persons be capable of rationally assisting in their defense. Because Sands was not rational, he was not competent and should not have been tried for second-degree murder.

1. Rationality is a Basic Requirement of Competency

“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. The conviction of an accused while he is legally incompetent violates his constitutional right to a fair trial under. Drope v. Missouri, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); State v. Marshall, 144 Wn.2d 266, 279, 27 P.3d 192 (2001); In re Personal Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001).

“Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.” Marshall, 144 Wn.2d at 277 (citing Godinez v. Moran, 509 U.S. 389, 402, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993)). “A person is not competent at the time of trial, sentencing, or punishment if he is incapable of properly appreciating his peril and of *rationaly assisting in his own defense*.” Marshall, 144 Wn.2d at 281 (citing State v. Harris, 114 Wn.2d 419, 427-28, 789 P.2d 60 (1990)); RCW 10.77.010(15) (emphasis added). “[C]ompetence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense.” Odle v. Woodford, 238 F. 3d 1084, 1089 (9th Cir. 2001), cert. denied, 534 U.S. 888, 122 S. Ct. 201, 151 L. Ed. 2d 142 (2001).

Though Washington’s competency statute does not explicitly state the ability to assist must be rational, Washington courts have long held, and continue to hold, that rationality is a basic requirement of competency. In State v. Tate, 1 Wn. App. 1, 458 P.2d 904 (1969), the court held the trial court abused its discretion in failing to determine whether a defendant who had been adjudicated as a psychopathic delinquent and committed to

a mental institution was competent. Although the case predated the competency statute, the court stated:

The common law rule of competency to stand trial was established in this jurisdiction in State ex. rel. Mackintosh v. Superior Court, 45 Wash. 248, 88 P. 207 (1907), and reaffirmed in State v. Schafer, 156 Wash. 240, 286 P.833 (1930); State v. Henke, 196 Wash. 185, 82 P.2d 544 (1938); State v. Davis, 6 Wn.2d 696, 108 P. 2d 641 (1940); and State v. Durham, 39 Wn.2d 781, 238 P.2d 1201 (1951). Under these decisions an accused may not be placed on trial if he is incapable of properly appreciating his peril and of *rationaly assisting in his own defense*.

Tate, at 3-4 (emphasis added).

The Tate court recognized this rule was consistent with recent decisions of the United States Supreme Court. It cited Dusky v. United States, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960), for the relevant “test”: whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. Tate, 1 Wn. App. 1 at 4.

Prior to enactment of the competence statute, Washington courts continued to apply this test. See, e.g., State v. Gwaltney, 77 Wn.2d 906, 468 P.2d 433 (1970) (“In this state, and in many others, a person accused of a crime is held to be legally competent to stand trial if he is capable of properly understanding the nature of the proceedings against him and if he

is capable of rationally assisting his legal counsel in the defense of his cause.”); State v. Mahaffey, 3 Wn. App. 988, 478 P.2d 787 (1970), rev. denied, 78 Wash.2d 997 (1971). (“A defendant's competency to stand trial is to be pragmatically tested by evaluating his capacity to understand his peril and to rationally assist his counsel in his defense.”); State v. Nabors, 8 Wn. App. 199, 505 P.2d 162 (1973) (quoting Gwaltney).

RCW 10.77.010 was adopted in 1973. In State v. Israel, 19 Wn. App. 773, 577 P.2d 631 (1978), this Court stated the statute “codified the common law language set forth in State v. Gwaltney,” which required a defendant to be capable of rationally assisting his legal counsel in the defense of his cause. Indeed, Washington courts continued to read into the statute a requirement that a defendant be able to assist rationally in order to be found competent. See State v. Swanson, 28 Wn. App. 759, 760, 626 P.2d 527 (1981) (“The standard for competency to stand trial is if the accused is ‘capable of properly understanding the nature of the proceedings against him and if he is capable of rationally assisting his legal counsel in the defense of his cause’”); State v. Wicklund, 96 Wn.2d 798, 638 P.2d 1241 (1982) (test is whether defendant is capable of rationally assisting his legal counsel); State v. Hicks, 41 Wn. App. 303, 704 P.2d 1206 (1985) (citing RCW 10.77.010 and Wicklund, supra, for the proposition that accused must be capable of rationally assisting);

Harris, 114 Wn.2d at 427-28 (although ability to assist is a “minimal requirement,” what is required is that a defendant be able to “communicate rationally with counsel”); Marshall, 144 Wn.2d at 281 (holding a person is not competent at the time of trial, sentencing, or punishment if he is incapable of properly appreciating his peril and of rationally assisting in his own defense).

Case law demonstrates competence embodies, at a minimum, rationality. Because Sands was not rational, he was not competent and should not have been tried for second-degree murder. Marshall, 144 Wn.2d at 281; Woodford, 238 F. 3d at 1089.

## 2. The Trial Court Erred in Finding Sands Competent

“[T]he consequences of an erroneous determination of competence are dire. Because he [the accused] lacks the ability to communicate effectively with counsel, he [the accused] may be unable to exercise other ‘rights deemed essential to a fair trial.’” Cooper v. Oklahoma, 517 U.S. 348, 364, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996). A trial court’s competency determination is reviewed for abuse of discretion. Marshall, 144 Wn.2d at 280. A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971), overruled on other grounds, 99 Wash.2d 251, 661 P.2d

964 (1983). Because the competency determination is a mixed question of law and fact, the reviewing court must “independently apply the law to the facts.” Marshall, 144 Wn.2d at 281. Here, the trial court failed to apply the correct legal standard to the facts.

The trial court acknowledged case law supported the position that an accused’s ability to assist must be rational, and noted “that language about rationally assisting is important to the proposition that the defense is taking here.” 1RP 112. Despite concerns about whether Sands could rationally assist in his defense, the trial court concluded competence does not require rationality, based on a review of cases in which only the “ability to assist” was required. 1RP 112-16. Judge Krese questioned the wisdom of State v. Hahn, 41 Wn. App. 876, 707 P.2d 699 (1985), rev’d in part, 106 Wn.2d 885, 726 P.2d 25 (1986), and State v. Jones, 99 Wn.2d 735, 664 P.2d 1216 (1983), upon which she relied, but nonetheless indicated she was bound to follow it: “It is certainly possible that some of us question whether this is good policy, but I do think that as at trial court judge, I have to follow the law as it’s been set forth for me, and the cases seems fairly consistent in this regard.” 1RP 115-17. The court concluded, “so given, as I said, what appears to be a fairly low bar in how we determine whether someone is competent to stand trial, I think I have to

find Mr. Sands competent to stand trial, recognizing how difficult that will be.” 1RP 119-20.

The cases upon which the trial court relied simply cited the language of RCW 10.77.010(15). Hahn and Jones did not reject the “rationality” aspect of competency embodied in the common law. Indeed, neither of the cases posed the question presented here: Where the defense attorney, experts, and the trial court unanimously agreed the accused is mentally ill, likely delusional, and unable to rationally consider matters such as mental defenses, could a finding of competence follow?

Jones and Hahn are distinguishable. Jones was diagnosed as a paranoid schizophrenic who was determined to be insane at the time of the alleged assault. Several psychiatrists, including one for the defense, concluded Jones was competent to stand trial. Finding Jones competent, the trial court granted the State’s motion to enter a plea of not guilty by reason of insanity over Jones’ objection. The court denied Jones’ motion to bifurcate the trial into a “guilt” phase and an insanity phase. Jones, 99 Wn.2d at 738-39. The Supreme Court reversed the trial court’s entry of Jones’ insanity plea, concluding an accused is entitled to determine his own plea. Jones, 99 Wn.2d at 742-43.

Similarly, Hahn was diagnosed as a paranoid schizophrenic with delusional beliefs that he was a secret agent. Hahn believed the charged

murder was justified because he was protecting secret information. To assert his defense, Hahn sought to proceed pro se. Hahn's attorney agreed Hahn was competent to stand trial, stating at the competency hearing that Hahn was "capable of assisting in the defense." Hahn, 41 Wn. App. at 877-80.

Distinguishing between competency to stand trial and competency to waive counsel, the Court of Appeals held Hahn was competent to do the former but not the later. The Court of Appeals reversed Hahn's conviction. Hahn, 41 Wn. App. at 883-85. The Supreme Court held Hahn was competent to do both, noting competency does not require an ability to choose among alternative defenses. Hahn, 106 Wn.2d at 894.

Unlike Jones and Hahn, Sands' attorney and the experts agreed, and the trial court found, Sands was mentally ill to the point of delusion and irrationality. As the court concluded, "I think it is clear, as the defense asserts that a least as expressed by Mr. Sands, he does not understand the facts as other people would see them and does not see – does not seem to be willing to pursue a not guilty by reason of insanity plea as a result of his mental illness regardless of whether or not that would be an efficacious defense for him." 1RP 117-18.

Moreover, the trial court did not question Sands' irrationality solely on his inability to choose wisely among potential defenses. It also

considered his total inability to cooperate with defense counsel or distinguish fantasy from reality. Indeed, as the trial court acknowledged, “Mr. Sands is also influenced by his belief that the consequences of being found guilty would be limited to three-and-a-half years from now, due to the end of the world in 2010,” and “it certainly is clear to me that his [Sands] mental illness is going to make his attorney’s task very difficult in defending him.” 1RP 118-19.

Having questioned Sands’ ability to assist rationally in his defense, the only possible conclusion was that Sands was not competent to stand trial. The court’s finding that Sands was nevertheless competent simply does not follow. The finding rejects the notion that the accused must be capable of rationally assisting in his defense, which courts continue to hold is the standard for competence. Marshall, 144 Wn.2d at 280-81.

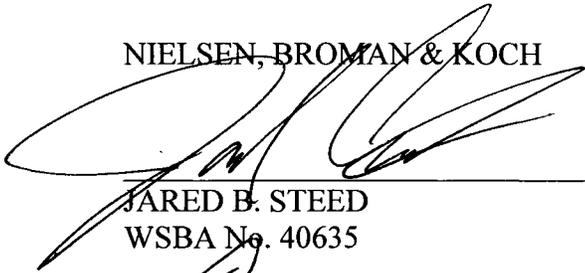
D. CONCLUSION

For the reasons set forth above, Sands' conviction should be reversed.

DATED this 21<sup>st</sup> day of June, 2010.

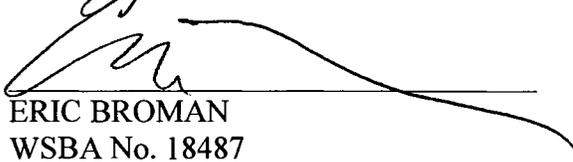
Respectfully submitted,

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64229-4-1
	)	
JODY SANDS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21<sup>ST</sup> DAY OF JUNE 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SETH FINE  
SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201
  
- [X] JODY SANDS  
DOC NO. 334236  
STAFFORD CREEK CORRECTIONS CENTER  
191 CONSTANTINE WAY  
ABERDEEN, WA 98520

**SIGNED** IN SEATTLE WASHINGTON, THIS 21<sup>ST</sup> DAY OF JUNE 2010.

x *Patrick Mayovsky*

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STATE OF WASHINGTON  
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