

NO. 67657-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TREVOR MICHAEL ZOPPI
aka JAMES CARVER,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE STEVEN GONZALEZ

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA L. WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. Whether the trial court properly exercised its discretion in concluding that circumstances relating to Carver's competency had not changed since he was found competent, so another evaluation of his competency to stand trial was not warranted.

2. Whether the trial court properly concluded that Carver knowingly, voluntarily and intelligent made the decision to represent himself at trial, when he unequivocally asserted that right at two sequential hearings after being carefully advised of the consequences of that decision.

3. Whether Carver's assignment of error 3, challenging the trial court's initial finding of competency, which is not supported by argument or citation to authority, has been waived.

B. STATEMENT OF THE CASE

1. Procedural Facts

The defendant, Trevor Zoppi aka James Carver, was charged with five crimes: felony harassment of Laurel Zoppi, two counts of gross misdemeanor violation of a court order as to Laurel Zoppi, felony stalking of Jessica Smith, and malicious mischief in

the third degree for damage to the property of Jessica and Paul Smith. CP 18-21. The first three counts were designated domestic violence offenses. CP 18-19. Carver¹ asserted his right to represent himself at trial and was permitted to do so. CP 37; 1RP 29, 46, 57, 72, 80.²

Carver waived a trial by jury. CP 22; 1RP 141-42. Then Superior Court Judge Steven Gonzalez presided over a bench trial and found Carver guilty as charged. CP 22, 37-41; 2RP 145-48.

The court imposed a first-time-offender sentence on the two felony convictions and suspended sentences on the gross misdemeanor convictions. CP 23-33; 3RP 9-10.

2. Substantive facts

Because the substantive facts are uncontested, the State sets out the facts primarily as found by the trial court in the findings entered after this bench trial. CP 37-41.

Counts 1-3 charged that in July 2010, Carver threatened to kill his mother, Laurel Zoppi, and had contact with her on two

¹ The defendant was charged and sentenced under the name Trevor Zoppi but indicated his preference to be called James Carver. 1RP 63. All of the witnesses except his mother referred to him as Carver and the State will do so in this brief.

² The Report of Proceedings is in three volumes, referred to in this brief as follows: 1RP – volume including 11-2-10, 3-15-11, 5-4-11, 6-2-11, 6-17-11, and 7-11-11; 2RP – volume including 7-12-11 and 7-13-11; 3RP – 8-5-11.

occasions in violation of a court order. CP 18-19. The court order violated was a permanent protection order issued in King County District Court and personally served on Carver in April 2010, for the protection of Laurel Zoppi.³ CP 38.

Laurel Zoppi was afraid of her son, Carver, because of his mental health issues and anger problem. CP 38. During an incident in 2006, Carver assaulted Laurel Zoppi and damaged property. CP 38; 2RP 103-04. Carver was convicted of malicious mischief – domestic violence as a result of that incident and a no-contact order was entered. CP 38; 2RP 111.

On July 9, 2010, Laurel Zoppi received a handwritten letter from her son, Carver. CP 38. The next day she received two messages from Carver on her voice mail. CP 38; 2RP 72. On July 11, 2010, Carver called his mother and left a screamed message threatening, “I am going to rip your fucking head off.” CP 38; 2RP 72, 74. She was afraid he was going to kill her. 2RP 102.

Counts 4-5 charged that in April 2010, Carver stalked Jessica Smith and maliciously damaged property of Paul and Jessica Smith. Carver went to high school with Jessica Smith, who was known as Jessica Budke at that time, before her marriage to

³ Some dates in this paragraph of the fact section of the findings refer to 2011, but all of the dates listed as 2011 actually occurred in 2010.

Paul Smith. CP 38-39. In 2004 she began to receive email from Carver that referred to a relationship they never had. CP 39. She had Issaquah Police direct Carver to have no contact with her and the email temporarily stopped, then restarted. 2RP 38.

On September 25, 2007, Jessica Smith arrived home, went inside, and then saw Carver on her back porch, peering in, then knocking. CP 38; 2RP 39-40. Carver then went to the front door and rang the doorbell steadily until Paul Smith rushed home and told him to leave. CP 39; 2RP 40. Carver left a package of candy on the front porch. CP 39. Carver was convicted of gross misdemeanor stalking in Issaquah Municipal Court. CP 39.

On April 6, 2010, Paul Smith arrived home to find "Orion [the symbol of a heart] Lepus" spray painted in red paint across his entire garage door. CP 38. The Smiths called police, who also recovered a chocolate Easter bunny found in back of the house. CP 38-39. The damage cost over \$750 to repair. CP 40.

Carver was arrested that day and admitted that he had taken the bus to Issaquah, bought spray paint and went to Jessica Smith's house, where he spray-painted the message and left a chocolate bunny. 1RP 161-68. He said he was Orion and Jessica was Lepus, a rabbit. 1RP 163-64. Carver said the message was

“just a greeting in case she harbors feelings for me deep down.”

1RP 168. Jessica Smith was fearful for the safety of herself, her family, and her property. 1RP 39.

3. Proceedings Relating To Competency

King County Superior Court Judge Sharon Armstrong ordered an evaluation of Carver's competency to stand trial. CP 10-14. An evaluation by a psychologist from Western State Hospital (WSH) dated November 24, 2010, opined that Carver was competent to stand trial. WSH Evaluation at 11.⁴

On February 15, 2011, the determination of the competency issue was delayed so that a defense expert could interview and evaluate Carver. Supp. CP __ (Sub no. 36, Order of Continuance, 2/15/2011); 1RP 14, 17. On March 15, 2011, the defense expert's evaluation had been completed and defense counsel stipulated to Carver's competency to stand trial. 1RP 17. The trial court entered a finding that Carver understood the nature of the proceedings and was able to effectively assist counsel in the defense. CP 16. The court concluded that Carver was competent to stand trial. CP 16.

⁴ This evaluation from Western State Hospital was filed under seal and has been designated to this Court under seal. It will be cited as “WSH Evaluation” in this brief.

On June 2, 2011, Carver presented a motion to proceed pro se and stated that he wished to represent himself. 1RP 29-30. The judge conducted a lengthy colloquy, informing Carver of the charges and penalties, and informing him that he would be required to follow the rules as if he were a lawyer, that he would not be able to do legal research effectively, that he was not entitled to standby counsel, and that he would not be able to complain later about his inability to make proper objections. 1RP 30-36. Carver said that no promises or threats had been made to him to induce the request. 1RP 34. He said he would be prepared to proceed on the July 11th trial date. 1RP 34.

The court decided that before it ruled on the motion, it would have Carver re-evaluated by the defense-retained expert, Dr. Milner. 1RP 38. It ordered the defense to ask the expert to render an opinion as to whether due to mental illness, Carver would not be competent to conduct trial proceedings. 1RP 38. He directed defense counsel to specify that the issue related to Indiana v. Edwards, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008). 1RP 42. Defense counsel explained that the expert also is a lawyer and should understand the issue. 1RP 42.

On June 17, 2011, a new defense attorney, Hal Palmer, appeared and represented that Dr. Milner had met with Carver and concluded that he had the cognitive and executive functions to represent himself, and that Dr. Milner was working on a full report for the defense. 1RP 45, 71. Palmer expressed his own opinion that Carver was incompetent to stand trial or to represent himself because of delusions that one complaining witness was dead and another complaining witness was an actress. 1RP 45-47, 56.

At this hearing the court had another colloquy with Carver about the disadvantages and risks of pro se representation. 1RP 48-54. The court concluded that potential delusions did not interfere with Carver's ability to represent himself. 1RP 48, 55-56. The court accepted the waiver of counsel and ordered that Palmer act as standby counsel. 1RP 57.

On July 11, 2011, the case was assigned for trial to the court of Judge Steven Gonzalez. 1RP 63. The trial prosecutor asked the court to conduct a colloquy as to competency due to the prosecutor's concerns about the possibility that Carver's condition had deteriorated since the WSH evaluation was conducted. 1RP 68, 74. Asked if he had particular concerns, standby counsel

Palmer said he did not. 1RP 76. The judge examined Carver at length and did not find reason to doubt his competency. 1RP 71-81.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DECIDING NOT TO ORDER ANOTHER COMPETENCY EVALUATION.

Carver claims that both Judge Kessler and Judge Gonzalez abused their discretion in not ordering a second competency evaluation before trial. This argument should be rejected. The courts did not abuse their discretion in concluding that there was no significant change in circumstances relating to competency after the finding of competency on March 15, 2011.

An accused in a criminal case has a fundamental right not to be tried while incompetent. Drope v. Missouri, 420 U.S. 162, 171-72, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). 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(15); State v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992).

The existence of a mental disorder does not establish incompetency. State v. Smith, 74 Wn. App. 844, 850, 875 P.2d 1249 (1994), rev. denied, 125 Wash.2d 1017 (1995). That a defendant is suffering delusions does not prevent him from being competent to understand the proceedings and assist with his defense. State v. Benn, 120 Wn.2d 631, 661-62, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993); State v. Hahn, 106 Wn.2d 885, 887-88, 726 P.2d 25 (1986). Having the ability to assist with his defense does not mean that a defendant must be able to suggest or choose trial strategy. Benn, 120 Wn.2d 662; State v. Ortiz, 104 Wn.2d 479, 483, 706 P.2d 1069 (1985).

The version of RCW 10.77.060 in effect while this case was in the trial court provides that if a court finds there is "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).⁵ A stipulation

⁵ In pertinent part, former RCW 10.77.060(1)(a) provided:

Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency, the court on its own motion or on the motion of any party shall either appoint or request the secretary to designate at least two qualified experts or professional

to competency and counsel's representation of expert findings can erase doubt in the court's mind. State v. Heddrick, 166 Wn.2d 898, 908, 215 P.3d 201 (2009). A court's conclusion regarding the existence of reason to doubt a defendant's competency is reviewed for an abuse of discretion. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). An abuse of discretion occurs only when no reasonable judge would have reached the same conclusion. State v. Hager, 171 Wn.2d 151, 156, 248 P.3d 512 (2011).

Once a competency determination is made, the court is not required to revisit competency unless "new information presented has altered the status quo ante." State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992). The factors a trial judge may consider in deciding whether or not to order a competency evaluation include the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel." Fleming, 142 Wn.2d at 863, quoting

persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant.

The statute was amended by Laws of 2012, ch. 256, § 3. The changes are irrelevant to the arguments on this appeal.

State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302, cert. denied, 387 U.S. 948 (1967).

Carver argues that because both counsel urged the courts to order a new evaluation and Carver made statements suggesting delusions, the courts abused their discretion in not ordering a new evaluation because of the amount of time that had passed since the WSH Hospital evaluation. The State disagrees with Carver's characterization of the record. Carver has not established that new information presented altered the status quo ante, which would require the courts to revisit competency.

The State begins by addressing Carver's characterization of the facts at the three critical hearings, on June 2, June 17, and July 11, 2011.

The June 2, 2011, hearing before Judge Kessler.

Defense counsel's interjection that Carver characterizes as "noting competency concerns" does not refer to competency and is in the context of the self-representation motion; its content also indicates it refers to concerns about Carver proceeding pro se. 1RP 35-36. The State disputes the assertion that the trial prosecutor asked the court for a new competency evaluation. App. Br. at 11. The discussion cited follows the defense attorney's statement of

concern about Carver's ability to represent himself; the prosecutor reported that after the last hearing (that could have been no earlier than May 4th) prior defense counsel said that she did not think it was appropriate to have a new competency inquiry; the prosecutor said she had not heard anything to raise the issue again, but did not know if the court would want a further inquiry before ruling on the pro se motion; she said, "That is a continued concern to the State." 1RP 22, 36-37.

The June 17, 2011, hearing before Judge Kessler.

The State disputes Carver's suggestion that his alleged delusion that his mother was deceased was first revealed at this hearing. App. Br. at 12. Defense counsel at the hearing did not suggest that the delusion was new. 1RP 47. The judge, when referred to the delusion, said the record about it had been made "for months now," and that Carver "made his position clear as a bell from the beginning." 1RP 47. The April 3, 2011, letter from Carver to the judge and the prosecutor referred to Carver's assertion that his mother was deceased. Ex. 21; 2RP 133. Carver also referenced this claim in the hearing on May 4th. 1RP 25. Speaking to Judge Gonzalez, Carver asserted that since his arraignment he had been

telling the court, mainly Judge Kessler, that his mother was deceased. 1RP 77.

During this hearing defense counsel also refers to Carver's assertion that Jessica Smith is an actress. 1RP 56. The April 3rd letter to the court and prosecutor includes Carver's assertion that Jessica Smith was a "false person." Ex. 21.

During this hearing, while the prosecutor did alert the court to possible mental diagnoses that various evaluators had considered or found, the prosecutor appeared to be trying to make sure that there was no confusion after defense counsel said there was no Axis I diagnosis. 1RP 46, 53-55. The trial court was aware of the WSH diagnosis of a psychotic disorder. 1RP 55. In asking the court to inquire as to defense counsel's concerns, the prosecutor appeared to be trying to ensure that the court was aware of that opinion. 1RP 55. The court stated that it was aware of defense counsel's position that Carver's delusions established a competency issue – the court rejected the contention that it rendered Carver incompetent. 1RP 47, 55-57.

The July 11, 2011, hearing before Judge Gonzalez.

The State disagrees that the prosecutor stated in this hearing that Carver had clearly decompensated while awaiting trial. App. Br. at

15. The prosecutor specifically asked the court only to conduct a colloquy with the defendant to determine if an evaluation would be appropriate. 1RP 68, 74-75. The prosecutor expressed concern that Carver might have decompensated, but as she noted, the prosecutor had no contact with Carver outside the courtroom. 1RP 36, 75.

Moreover when asked what she believed had changed since Judge Kessler's last ruling on competency, the prosecutor could cite only one thing: she said she was not aware in June that Carver was claiming that Jessica Smith was an imposter. 1RP 69-70. She was mistaken in citing this as a change, however. The April 3rd letter to Judge Kessler includes Carver's assertion that Jessica Smith was a "false person." Ex. 21. On June 17th, defense counsel (and Carver) had referred to Carver's assertion that Jessica Smith was an actress, and Judge Kessler responded, "We've gone through this many, many times." 1RP 56.

There is no indication that, as Carver represents on appeal, the prosecutor and defense counsel Palmer were both urging a new evaluation. App. Br. at 16. The prosecutor specifically stated that she was requesting only a colloquy. 1RP 74-75. The prosecutor stated that Palmer had expressed concern in an earlier

hearing, but Palmer expressed no concern on this date. 1RP 68. Palmer said that he had worked with Carver for a month and a half, and that Carver's affect had been substantially stable. 1RP 75. When the Judge asked if Palmer had any particular concerns to be addressed in the colloquy, Palmer said, "I don't have any particular concerns." 1RP 76.

The delay between the competency evaluation conducted by the WSH psychologist and the trial date must be considered in light of the intervening two evaluations by a defense expert (Dr. Milner) who agreed that the defendant was first, competent to stand trial, and later, competent to represent himself. The first of these evaluations was conducted in late February or early March of 2011, as is noted in the continuance order of February 15, and referenced by defense counsel on March 15, 2011. 1RP 17. The second evaluation was conducted between June 2 and June 17th, approximately one month before trial. 1RP 38, 45; see also Carver's reference to that evaluation at 1RP 71.

State v. Sanders, 209 W. Va. 367, 549 S.E.2d 40 (2001), on which Carver relies, is factually distinguishable. There, despite an expert's warning about the possibility of degeneration if a long delay occurred before trial, five months passed between the competency

evaluation and trial. 549 S.E.2d at 46-47. Two months before trial, two experts evaluated Sanders and then issued a report raising serious doubts about defendant's competency. Id. at 47. The court held that, given the new report and defendant's bizarre behavior at trial, the trial court erred by failing to re-evaluate competency at the time of trial. Id. at 47. Here, in contrast, the last expert examination occurred just a month before trial and that examiner concluded at that time that Carver was competent to proceed and further, to represent himself. An expert opinion that a defendant is competent forms a tenable basis for a trial court conclusion that the defendant is competent. State v. Lawrence, 166 Wn. App. 378, 389, 271 P.3d 280 (2012).

Moreover, aside from the references to his alleged delusions, Carver was polite and rational throughout the trial proceedings. There is no indication that he was unaware of the nature of the proceedings and he made every effort to conform his behavior to the rules of court. E.g. participating intelligently in pretrial motions (1RP 82-113); making objections (1RP 165, 174, 175; 2RP 74-75); conducting cross examination relevant to the issues he was raising (1RP 182-84; 2RP 54-58, 109, 112-13);

noting his lack of objection to some exhibits (1RP 179; 2RP 28, 37, 71).

The ability to choose a defense strategy is not a requirement of competency. Notably, when informed that there was no record of his mother's death, and when he was actually confronted by his mother on the witness stand, Carver did not express surprise or assert that she was dead or an imposter. 2RP 9, 109. Instead, he presented the common equitable defense that his mother had had contact with Carver previously while a no contact order was in effect, and brought out the fact that she had given him a large sum of money when she saw him. 2RP 109-10, 113. When Carver later testified he did not address the charges relating to his mother, and Carver made no reference to those charges in his very brief closing argument. 2RP 127-33, 143-44.

It is not clear whether Carver referred to the alleged delusions because he believed them or because he believed it was to his advantage to be considered mentally unstable. There is no expert opinion in the record indicating that Carver believed the stories he told about the victims. His lack of reaction to the appearance of a mother who he claimed to believe had died five

years earlier suggests that the fact of her death was not a firmly held belief.

Whether or not Carver believed that Jessica Smith was Jessica Budke, he said in his April 3rd letter that he had been convicted of stalking Jessica Smith. Ex. 21. Carver in his testimony acknowledged that he had written the April 3rd letter, in which he said that he returned to Smith's address a second time and "taunted" her "by spray painting the home." Ex. 21. Carver also stated in that letter that when he told the court that Jessica Smith was a false person, the case was dismissed. Ex. 21. The prosecutor noted that Carver had had a stalking case in municipal court quickly dismissed on the basis that he was incompetent. 1RP 49-50. Carver may simply have been making the same effort here.

The possible delusions cited by Carver on appeal as representing new information were present when he was evaluated by a defense expert who concluded that he was competent to proceed and who later examined him again and concluded that he was competent to voluntarily and intelligently waive his right to counsel. Judge Kessler also was aware of these delusions when he made his finding that Carver was competent to stand trial. Thus, no new competency evaluation was required to address them.

The Utah case cited by Carver, State v. Lafferty, 20 P.3d 342 (Utah 2001), supports this conclusion. That case did note that the length of time since a competency evaluation is one relevant consideration in determining whether a new evaluation should be conducted. Id. at 360. However, the court found that bizarre behavior observed during that trial was simply the same type of behavior already considered by the court, so there was no need to revisit the competency issue. Id. at 361 (defendant displayed, *inter alia*, religious delusions, auditory hallucinations, irrational behavior, a grandiose belief in his own personal power, inability to prepare or present a defense, and denial of the evidence against him).

If this Court concludes that the trial court should have ordered a second competency evaluation at the time of trial, the remedy would be to remand for a determination of competency at the time of the plea. If Carver was competent, the convictions should be affirmed. See United States v. Renfroe, 825 F.2d 763, 767 (3rd Cir. 1987). "Such a determination may be conducted if a meaningful hearing on the issue of the competency of the defendant at the prior proceedings is still possible." Id.; see also United States v. Johns, 728 F.2d 953, 957-58 (7th Cir. 1984) (listing cases). In this case, because Carver had been evaluated by

experts three times over the seven months before trial, one of those experts evaluated Carver in June, just a month before trial, and because Carver acted as his own attorney and so had many conversations with the court on the record, a meaningful hearing on the issue is possible. Sanders, supra, ruled that a retrospective competency hearing was appropriate in that case, where a similar fund of information was available. 549 S.E.2d at 53-55.

2. THE TRIAL COURT DID NOT ERR IN GRANTING CARVER'S MOTION TO PROCEED PRO SE.

Carver contends that the trial court abused its discretion in granting Carver's motion to proceed pro se because he did not knowingly, intelligently, and voluntarily waive his right to counsel and because he was delusional. These arguments should be rejected. Judge Kessler conducted an extensive colloquy and obtained an expert evaluation before accepting the waiver of counsel, after repeated unequivocal requests by Carver. Carver's alleged delusions did not preclude a valid waiver. The trial court did not abuse its discretion in concluding that Carver voluntarily, knowingly, and intelligently waived his right to counsel.

The Sixth Amendment guarantees a criminal defendant the right to assistance of counsel, and the right to waive the assistance of counsel. U.S. Const. amend. VI; Faretta v. California, 422 U.S. 806, 819, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). A defendant who is competent to stand trial may waive the assistance of counsel if that waiver is knowing and intelligent. State v. Hahn, 106 Wn.2d 885, 893, 726 P.2d 25 (1986). Courts are directed to apply a presumption against the waiver of counsel, but the improper rejection of the right to self-representation requires reversal. State v. Madsen, 168 Wn.2d 496, 503-04, 229 P.3d 714 (2010).

A court is permitted to deny the right to self-representation only if the request is "equivocal, untimely, involuntary, or made without a general understanding of the consequences." Id. at 504-05. A court may not deny pro se status on the basis that the defendant is unfamiliar with legal rules. Id. at 509. A court may not deny pro se status because it would be detrimental to the defendant's ability to present a defense. Id. at 505.

Carver contends that his motion should have been denied because his request was equivocal, because he did not understand that he did not have the right to standby counsel, and because he was given inconsistent information about the maximum penalty that

he faced. The first two contentions are unsupported by the record. As to the third contention, it is true that the information given to Carver was not identical in the two colloquies by Judge Kessler, but the upward error in addition made in the first hearing does not render the waiver invalid where the penalty for each crime and the possibility of consecutive terms was accurately conveyed, properly conveying the seriousness of the possible penalties.

Carver made a motion to represent himself on June 2, 2011, stating that he wanted to cross-examine Jessica Smith (referred to as the young lady he heard on the audiotape). 1RP 29-30. When that hearing resumed on June 17, 2011, the judge asked Carver if he still wanted to represent himself, and Carver responded, "Yes, absolutely." 1RP 46. On the first day of trial, July 11, 2011, the trial judge asked Carver if he still wanted to represent himself, and Carver responded, "Yes. I do." 1RP 72. After another (the third) colloquy concerning the disadvantages of pro se status, the judge asked again if Carver still wished to represent himself; Carver again said he did. 1RP 80. There is nothing equivocal about any of these statements of Carver's desire to proceed pro se.

Carver asserts that the request was equivocal because it followed a request for a different lawyer, citing a hearing on May 4,

2011, before the three unequivocal requests just described. App. Br. at 32. On May 4, after defense counsel requested additional time to pursue an insanity defense, Carver said he wanted to dismiss his attorney. 1RP 24-25. Carver said he did not need a lawyer and concluded "I will not accept Kim [defense counsel at the time] or any other attorney, ever." 1RP 25. The court concluded that Carver had not established good cause to discharge counsel and denied that request. 1RP 26. If this was a request for a different lawyer, as Carver suggests, no such request was repeated in the hearings in which he unequivocally stated that he wished to represent himself. Moreover, a defendant's unequivocal request to proceed pro se is judged unequivocal even if it is combined with an alternative request for a new attorney. Madsen, 168 Wn.2d at 507.

The assertion that Carver did not understand that he had no right to standby counsel also is belied by the record. When Carver requested "an assisting counsel" at the hearing on his motion to proceed pro se, Judge Kessler immediately informed Carver that he was not entitled to that but that the court has discretion to appoint standby counsel. 1RP 30. The judge repeated that he could decide that Carver was on his own, and Carver said that he still wished to represent himself. 1RP 30. Later during the colloquy,

the judge again told Carver that he would be completely on his own and had no right to standby counsel; Carver said he understood. 1RP 32-33.

At the second hearing on Carver's motion, the judge again asked if Carver still wanted to represent himself and Carver responded, "Yes, absolutely." 1RP 46. After comments by both lawyers and the judge about Carver's possible mental illness diagnosis, Carver interrupted with the statement, "I just want to know if I can have a standby." 1RP 47. That request does not indicate confusion, but a desire for standby counsel and for the court to inform Carver whether the judge intended to appoint standby counsel in this case. Later in the colloquy, the court again asked Carver if he understood that he would be "completely on [his] own" and the judge "may or may not appoint standby." 1RP 51-52. Carver said, "I do understand that." 1RP 52. There is no indication in the record that Carver had any cognitive deficiency and no reason that the judge should disbelieve Carver's statement.

Carver is correct that during the two colloquies conducted at the bifurcated hearing on his motion, the judge described the total maximum penalty for the crimes charged differently. However, the only inaccuracy was in the court's addition of the maximum

penalties at the first hearing and the seriousness of the risks of trial was adequately conveyed.

At the first hearing, the judge accurately stated that the maximum penalty on the two Class C felonies charged, and a third Class C felony the State expected to add, was five years in prison and a \$10,000 fine. RCW 9A.20.021(1)(c); 1RP 31. He accurately stated that the maximum penalty for the two charged gross misdemeanors was one year in jail and a \$5000 fine. RCW 9A.20.021(2); 1RP 31. After explaining that the sentences could be run consecutively, the court inaccurately added the maximum terms to reach a potential total of 32 years instead of 17 years. 1RP 31. Before the court granted the motion at the second hearing, the court again correctly stated the maximum penalty for each charge and informed Carver that the sentences could be run consecutively. 1RP 51.

Thus, the waiver was with a correct understanding of the seriousness of the risks. If any confusion was caused by the court's incorrect math, it would have been to overstate the risks of a finding of guilt and would not detract from Carver's understanding that he faced serious consequences if convicted.

The discussion of the maximum penalties on the first day of trial was almost a month after the previous colloquy, but Carver recalled that the maximum penalty was five years. 1RP 76. The prosecutor agreed that the penalty was five years on each of the two felonies finally charged. 1RP 76. This discussion was weeks after Judge Kessler had accepted Carver's waiver of his right to counsel, so it is irrelevant to Carver's understanding at the time of that ruling, but in any case, the penalty stated for the felonies, the most serious charges, was correct.

Finally, that a defendant has delusions does not preclude self-representation. In State v. Hahn, supra, the court concluded that a paranoid schizophrenic defendant who was competent to stand trial but was psychotic and delusional had validly waived his right to counsel. 106 Wn. 2d at 886-87. The court held that "a defendant who is competent to stand trial may waive the assistance of counsel if the waiver is made knowingly and intelligently." Id. at 893, 895. The defendant need not have the ability to understand and choose among alternative defenses. Id. at 894. The defendant's lack of the skill and judgment needed to obtain a fair trial is not a basis for rejecting a request for self-representation. Id. at 890 n.2.

The supreme court recently declined to adopt a higher standard of competency for waiver of counsel in In re Pers. Restraint of Rhome, 172 Wn.2d 654, 665-66, 260 P.3d 874 (2011), while recognizing that such a possibility was left open by the United States Supreme Court in Indiana v. Edwards, supra. The court in Rhome held that under existing Washington law, a judge is not required to conduct an independent evaluation of the defendant's mental health status before accepting a waiver of counsel, observing that it is but one factor a trial court may consider in determining whether there is a knowing and intelligent waiver. Id. at 664-65. The court declined to consider whether a higher standard should be applied, because such a standard would not apply in that collateral attack. Id. at 666. However, the court went on to conclude that acceptance of Rhome's waiver of counsel was not an abuse of discretion, although the court did not specifically address mental health issues during the colloquy. Id. at 657, 668.

The Court of Appeals Division III directly addressed the issue that Rhome deferred; it concluded that a judge is not required to consider a mentally ill defendant's ability to represent himself at trial before accepting a waiver of counsel. State v. Lawrence, 166 Wn. App. 378, 392, 271 P.3d 280 (2012). The court noted the

difficulty in reviewing a trial court's decision that a defendant has the capacity to perform in the courtroom, unless the defendant is unable to communicate at all. Id. at 394-95.

In the case at bar, Judge Kessler did consider Carver's mental illness before accepting the waiver of counsel. Judge Kessler was well aware of the competency issue; he had reviewed the Western State Hospital report and concluded that Carver was competent to stand trial. CP 15-16; 1RP 17. The judge repeatedly stated that he was familiar with Carver's claim that his mother was deceased. 1RP 47, 56. The judge concluded that Carver's desire to present a defense based on that claim was no different than other pro se defendants who want to raise claims that attorneys understand will be unsuccessful. 1RP 56. The court in Lawrence observed that a defendant's desire to present his or her own theory of the case is a common reason proffered by those who want to represent themselves.⁶ 166 Wn. App. at 395-96.

Before he accepted the waiver in this case, on June 2nd Judge Kessler ordered that the defense expert (who already had evaluated Carver's competency) evaluate whether Carver's mental

⁶ The court in Lawrence upheld a waiver by a defendant who presented a defense that he could not have committed a shooting because he was robbing six other people on the other side of town; at sentencing he swore vengeance on the victims. 166 Wn. App. at 383-84.

illness was so severe that he could not conduct trial proceedings on his own. 1RP 38. On June 17th, at the beginning of the second hearing on the motion to proceed pro se, defense counsel stated that the defense expert had opined that Carver was able to represent himself, although counsel had grave concerns about that. 1RP 45.

It is not error when a trial judge allows a defendant who is mentally ill to make a knowing, voluntary, and intelligent waiver of counsel. Lawrence, 166 Wn. App. at 389. Having obtained an expert opinion on Carver's capacity and having conducted two thorough colloquies with Carver, the court did not abuse its discretion in granting the waiver.

3. CARVER'S ASSIGNMENT OF ERROR 3 IS UNSUPPORTED BY ANY ARGUMENT AND SHOULD BE REJECTED ON THAT BASIS.

Carver assigns error to the trial court's March 15, 2011, "finding of fact I" regarding Carver's competency to stand trial. That finding provides: "The defendant understands the nature of the proceedings against him/her and is able to effectively assist counsel in the defense of his/ her case." CP 16. Carver provides no authority, analysis, or argument in support of a claim that the

finding was error when it was entered, and the claim should be rejected on that basis.

RAP 10.3(a)(6) requires the appellant's brief contain argument supporting the issues presented for review, citations to legal authority, and references to relevant parts of the record. "Assignments of error unsupported by citation authority will not be considered on appeal unless well taken on their face." State v. Kroll, 87 Wn.2d 829, 838, 558 P.2d 173 (1976). There is no obvious error in the trial court's conclusion that Carver understood the nature of the proceedings and was able to effectively assist counsel on March 15, 2011; counsel representing Carver at that time stipulated to the finding, after having obtained an independent expert evaluation of the defendant's competency. 1RP 17.

Carver's argument on appeal relating to competency to stand trial is that the issue should have been reopened. He does not argue that the initial finding of competency was in error. This Court should conclude that Carver has waived this assignment of error and not consider it further. State v. Bello, 142 Wn. App. 930, 932 n.3, 176 P.3d 554, rev. denied, 164 Wn.2d 1015 (2008).

D. CONCLUSION.

For the foregoing reasons, the State respectfully asks this Court to affirm Carver's convictions and sentence.

DATED this 2nd day of July, 2012.

Respectfully Submitted,

DAN SATTERBERG
King County Prosecuting Attorney

by 
DONNA WISE, #13224
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office ID #91002

W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
(206) 296-9650

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 Oliver R. Davis, 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. TREVOR ZOPPI AKA JAMES CARVER, Cause No. 67657-1-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



Date