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SUPREME COURT NO. 100477-0

NO. 81346-3-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUSTYN BUSCH,

Petitioner.

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

The Honorable Richard T. Okrent, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Justyn Busch, appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished decision in State v. Busch, No. 80692-1-I, (filed November 15, 2021) (Appendix).

B. ISSUE PRESENTED FOR REVIEW

Did the trial court violate Busch's constitutional and statutory right to be competent during trial and sentencing by refusing to consider new information which evidenced significant, ongoing concerns about his competency and ability to assist in his defense, and should have mandated the ordering of a new competency evaluation? RAP 13.4(b)(1), (2), (3).

C. STATEMENT OF THE CASE

Busch suffers from unspecified schizophrenic spectrum disorder, other psychotic disorders, and cannabis use disorder. His mental health issues have led to five involuntary commitment and crisis service contacts, several outpatient

hospitalizations, and five prior competency evaluations. CP 140-45; 3RP¹ 14.

Consistent with this history, Busch's mental health and competency to stand trial were a reoccurring theme throughout this case. One month after Busch was charged with second degree unlawful possession of a firearm, a competency evaluation order was entered. CP 120-26, 135-36. This followed the State's own documented instances of Busch's unusual behavior at the Snohomish County Jail, including throwing urine and food at correctional officers. CP 203-16. The competency evaluation identified Busch's competency capacity deficits to include the following:

Unstable and agitated affect may increase his chances of behavioral outbursts in court and interfere with his ability to focus on reciprocal discussions with defense counsel[.]

Delusion beliefs will likely interfere with his ability to discuss the allegations against him, plea options, and other defense considerations[.]

¹ The index to the record citations is in the Amended Brief of Appellant (ABOA) at 3, n. 1.

Disorganized thought process will impair his abilities to discuss the allegations against him, plea options, and other defense considerations, and impair his ability to testify rationally[.]

Impaired judgment and insight are likely to prevent him from recognizing the role of mental illness in his behavior, and will likely lead to resistance of remediation attempts[.]

CP 148. Busch was determined not to be competent to stand trial and an order for competency restoration was entered. CP 115-19.

Three months later, there had been no improvements in Busch's mental illness symptoms and his competency had not been restored. The prosecution requested that Busch be forcibly medicated. CP 197-202. After a hearing, and over defense counsel's objection, the trial court entered an order authorizing forced medication. CP 103-07, 109-14.

A November 5, 2019 competency evaluation concluded that Busch presented no current symptoms of mental illness that significantly impaired his ability to understand the nature of the

proceedings or assist in his own defense. CP 184. The report explained that Busch had “demonstrated the ability to clearly communicate” and “engage in organized, reality-based, reciprocal conversations with no significant impairments observed.” CP 182-83. The report cautioned however, “It is important to note, due to the relatively recent abatement of his psychiatric symptoms, Mr. Busch’s current status may be tenuous in nature.” CP 184 (emphasis in original).

On December 6, six-weeks after the forced medication order was entered, Busch was found competent to stand trial. CP 101-02; 1RP 20-22, 62, 73. Trial began on January 13, 2020 and continued through January 15 with motions in limine and voire dire before Judge Paul Thompson. See 1RP 3-141.

Jury selection continued to January 16. That morning however, defense counsel notified the court that Busch was “agitated” and not “tracking well”. 1RP 150-51, 159. Defense counsel explained that Busch was unresponsive to requests from him and security officers. Judge Thompson agreed that

Busch seemed to be in a “different state than yesterday.” 1RP
151. When questioned by the court as to “what’s going on
today[,]” Busch provided a nonlinear answer:

Well, Your Honor, quite frankly, I'm in the same state to be actual factual. And to -- to have as accurate as a oath swear solemnly somebody could be there is nothing has changed in-between today, yesterday, previous days set forth. I know that as every single step is further gets further along in this trial process and apparently from, excuse me, that's rearrange. I can understand the heightened concern of the officers as in the back room there's scuffle marks on the waiting room cell, a whole bunch of other stuff that apparently I don't know could have been these same shoes. I don't know. These are scuff -- these aren't my shoes. I'm from Seattle, Washington, Your Honor.

There's several different concerns, several different things that I would want and hope to present in this case.

That to say that there's frustration is not accurate. But there is a ambitious desire to have the most fair, most appropriate case set forth. And in a lot of different cases the situation it may be seen or deemed as a help or surplus to push along the case that somebody may not be set forth. But to hold a case actual factually in the whole compository [sic] way, you know, controlled and organized to say the least, quite frankly, strategically approached how I best see so how I know would best see so fit. This is my whole different situation where why are there four

correction officers even needed for this case and trial to proceed where, quite frankly, in my case where this is court submission. Now, on record, I don't want to say, but, on record, you know, there's several different drag orders have been placed. On the drag orders, I've been assaulted by officer. None of them are here present, but it doesn't say nothing to say the least that this bureau, the staff is in cahoots for that. It's not funny, it's not a game that as you talk to your constituents and pacifically your constituents and your colleagues about the proceedings of this case. If you were to call down King County, if you were to call down in Texas, if you were to call down to anywhere where due your full judicial power and as -- in executive authority to be able to investigate this case, I've never ever, ever, ever, ever been treated ever had incarceration conditions so severe, so horrendous to humane rights as well as you know just a simple fair trial. You know.

1RP 151-53.

Defense counsel noted Busch's rambling answer was consistent with his behavior before being declared competent. As counsel explained, although Busch could answer questions related to individual roles within the judicial system, "90 percent of the conversation is what the Court is witnessing today." 1RP 156-57.

The prosecution voiced its own concerns about Busch's competency but represented that defense counsel had previously assured him and the court that Busch was competent to stand trial. 1RP 157. As defense counsel explained however, Busch's thoughts had been more coherent in the preceding days. 1RP 158.

Recognizing that "competency is fluid", Judge Thompson noted that while Busch exhibited "more heightened" behavior the day before, his behavior, demeanor, and answers had not dispelled the court's concerns that he had decompensated. 1RP 158-60. Judge Thompson noted that while the parties had been discussing the matter, "Mr. Busch seems to be – I would interpret it at least as speaking to himself, making some sort of comments. I am unclear at my vantage point if he is responding to internal stimuli or external stimuli. It appears to me to be internal." 1RP 160-61. Judge Thompson declared a mistrial and signed an order for another competency evaluation for Busch. 1RP 161-66; CP 80-87.

Another order for a competency evaluation was entered on January 24, 2020. CP 73-79. Busch underwent a third competency evaluation February 6, 2020. CP 186-96. The evaluation noted that Busch had refused all antipsychotic medication while in jail. CP 191. Busch denied experiencing auditory or visual hallucinations and the evaluation noted there was “no overt evidence of distraction by internal stimuli.” CP 192. The evaluation explained that Busch had a “logical, goal-directed, and linear thought process” and there was “no evidence of cognitive disorganization or tangential thought processes.” CP 192. The evaluation concluded that Busch presented no current symptoms of mental illness that significantly impaired his ability to understand the nature of the proceedings or assist in his own defense. CP 194-95.

Busch was again declared competent to stand trial on February 10, 2020. CP 71-72; 2RP 3-4. Busch’s attorney of record was not at the hearing but represented that it was an agreed order of competency. 2RP 3-5.

The parties next appeared before Judge Richard T. Okrent on March 2, 2020 for scheduled pretrial CrR 3.5 and CrR 3.6 hearings. Before taking pretrial testimony, the parties discussed the prosecution's motion to restrain Busch during the hearing. 1RP 3-4. The prosecution noted that since Busch's last competency evaluation he had thrown urine at jail staff, refused to appear in court, and threatened to kill one of the jail deputies. 3RP 5. The prosecution noted that just that morning, "multiple members" of the court's staff indicated "Busch was acting aggressively." 3RP 6.

Judge Okrent questioned whether Busch was currently taking any medication. 3RP 7-8. Busch refused to answer. 3RP 8. Busch, however, gave the following statement to the court:

The matters -- the matters, Your Honor, to be specific, to be exact, I've been in Snohomish County for the last ten months. This will be 300 days.

I've been all over the world for numerous amount of accomplishments, as well as unfortunate detainings, as I have some type of notoriety of being an African prince. So there is somewhat of a

infatuation of my presence in all different areas and aspects.

Unfortunately while being in this county, I have endured the most hinderous, the most obvious and oblique, consistent violation of my civil rights as well as trial rights, where it is not fair to say that I'm standing here a competent man to go to trial due to mental health issues.

In regards to this case proceeding in criminal matters and criminal court, I'm competent, yes, I am, with adequate mindset. But it is not fair to say in the least that this trial in proceeding in any type of way or fashion with medication, therapy, all of the other different things. I'm going to do it regardless when I get out of here. That's the only way I'll be able to rebound. Being tased is not helpful, you know, and pass-throughs. You know, being denied court transport as far as what happened Friday, you know, a CO named Henry with the oblique and obvious neglect from Sergeant Schwartz being present.

So as a person tries to call themself making a record, I'm definitely well familiar with the court proceedings and the process for me to go ahead and efficiently make on record the matter of my conditions and my mental status when being asked and being pertains. I'm not speaking incompetency here, to say the least, right, when you ask me about if I'm taking medication on that grounds.

So with that being said, there is definitely a lot of different things to presume regardless once I get out and huge rehabilitation processing step that I have to take. And it's very unfortunate because my father is an attorney in Texas. I went down there to go meet him. Came back. Trying to get my

life established and set up, and somehow I end up in this.

So I'm sitting in this whole process. This is not a courtroom or a federal courtroom, but I have several different cases, as well as a 42.90 U.S.C. 93. So many different things going on right now it's not realistic to say that a question can simply be answered yes or no about whether I'm taking medication.

3RP 8-10.

The parties recounted what had previously occurred in Judge Thompson's courtroom, including Busch's behavior, that led to the mistrial being declared. 3RP 10-14. As the prosecution acknowledged, the "spontaneous nature" of Busch's answers and behavior had been concerning and likely would have been "unsettling" to jurors and therefore prejudicial to his case. 3RP 12.

Defense counsel reiterated Busch's mental health history to Judge Okrent, including his numerous prior inpatient, outpatient, and involuntary treatment holds dating back to 2015. 3RP 14. Defense counsel maintained that although the February evaluation had concluded Busch was competent, "In my

humble opinion, he's not competent to stand trial." 3RP 15-16. Defense counsel noted that moments earlier, Busch had refused to discuss any medication with him, could not answer the court's question about any medication he was taking, and referred to himself as an African prince. 3RP 8, 15. Counsel noted that Busch could still answer questions related to individual roles within the judicial system but expressed concerns that Busch would not be able to assist in his defense. As counsel explained, should Busch choose to testify, "I have no confidence that I can ask him a question and get an answer that I would expect or that would be to the point." 3RP 15.

Judge Okrent responded that the issue before the court was not a competency evaluation, but whether to keep Busch restrained. As the court explained, "He's already been found competent to stand trial by a previous court based upon a evaluation of Western State. I'm not going to look at that at this point." 3RP 16.

The prosecution noted that defense counsel had previously signed the order finding Busch competent for trial and had not challenged Busch's competency in the weeks before the present hearing. 3RP 16-17. As defense counsel explained in response, however, "I have believed him to be incompetent from day one, and that maintains my position. Whether I sign an order agreed, approved to form, whatever, we cannot continue to go on the hamster wheel. If you're asking me if he's competent, absolute[ly] not, and that has been my position consistently." 3RP 17.

Judge Okrent again reiterated that the only issue being considered by the court was whether to restrain Busch. 3RP 17. Ultimately, Busch was not restrained during the pretrial hearings. 3RP 18-19.

The case continued that afternoon with the pretrial motions and jury selection. See 3RP 3-167. During voir dire, defense counsel question whether the prospective jurors had observed anything "constraining" or "uncomfortable". 3RP

125. Counsel questioned individual jurors as to whether it was problematic that “Mr. Busch has made some noises and outbursts a little bit here.” 3RP 125. The jurors denied that having any “negative associations with Mr. Busch’s personality[.]” 3RP 125.

Trial continued over the next several days. See 3RP 170-274. Busch did not testify. After the defense had rested, the prosecution noted that Busch was “lifting and waiving his hand at the jury while they were being instructed.” 3RP 242. The trial court explained, “I also looked at Mr. Busch and I didn’t see anything unusual given what I’ve seen previously.” 3RP 242.

Busch was convicted as charged. CP 40; 3RP 269-71. Based on Busch’s history of mental illness, defense counsel requested an exceptional downward sentence so that Busch could fully access mental health treatment. 3RP 277-79. Busch also addressed the court and denied being “mentally fit, stable mind for trial[.]” 3RP 282. Busch provided a lengthy nonlinear

statement to the court before sentencing was imposed. 3RP 281-87.

Citing Busch's mental health issues and prior atypical competency evaluations, the trial court agreed that an exceptional sentence downward was appropriate. 3RP 288. Busch was sentenced to 10 months in custody with credit for time served. 3RP 287-89; CP 22-36.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Busch's statements and behavior in court brought his competency into question and the trial court's refusal to consider the information and order a new competency evaluation violated his due process right to be competent while being tried, convicted, and sentenced.

Judge Okrent and Judge Thompson were eyewitnesses to similar behavior from Busch. Their responses to this information were vastly different, however. Whereas Busch's behavior rightly caused Judge Thompson to doubt his competency and declare a mistrial, Judge Okrent instead

categorically refused to even address Busch's competency. 3RP 16-17.

Whenever there is reason to doubt the competency of the accused however, the court *must* appoint an expert to evaluate his mental condition. State v. Sisouvanh, 175 Wn.2d 607, 620-21, 290 P.3d 942 (2012); State v. DeClue, 157 Wn. App. 787, 792, 239 P.3d 377 (2010) (recognizing a formal competency hearing is required under RCW 10.77.060 whenever a legitimate question of competency arises). Judge Okrent's failure to independently assess Busch's competency violated the court's mandatory obligation under RCW 10.77.060(1)(a) and denied Busch his right to due process and a fair trial.

A person accused of a crime has a fundamental right to be competent to stand trial. State v. Heddrick, 166 Wn.2d 898, 904, 215 P.3d 201 (2009). Washington law affords even greater protection than federal law by specifying "[n]o 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 statutory procedural requirements, set forth in chapter 10.77 RCW, are mandatory, not merely directory. Heddrick, 166 Wn.2d at 904, 906. ““The failure to observe procedures adequate to protect this right is a denial of due process.”” Id. at 904 (quoting State v. O’Neal, 23 Wn. App. 899, 901, 600 P.2d 570 (1979), rev. denied, 93 Wn.2d 1002 (1979)).

RCW 10.77.060(1)(a) provides:

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 a qualified expert or professional person, who shall be approved by the prosecuting attorney, to evaluate and report upon the mental condition of the defendant.

“[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).

A person is legally incompetent if he lacks the capacity to understand the nature of the proceedings against him, to consult with counsel, or to assist in his own defense. RCW 10.77.010(15); State v. Ortiz-Abrego, 187 Wn.2d 394, 403, 387 P.3d 638 (2017). Put another way, the accused must have “a rational as well as factual understanding of the proceedings against him.” Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). “[T]he task of the trial judge is not to measure overall mental capability but rather the specific mental capacity required to understand a trial.” Ortiz-Abrego, 187 Wn.2d at 410. In essence, the defendant must have the “ability to make necessary decisions at trial.” Id. (quoting State v. Jones, 99 Wn.2d 735, 746, 664 P.2d 1216 (1983)).

While there are no fixed signs of incompetency, factors to be considered include “the defendant’s appearance, demeanor, conduct, personal and family history, past behavior, medical and

psychiatric reports and the statements of counsel.” Ortiz-Abrego, 187 Wn.2d at 404 (quoting State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967)); see also O’Neal, 23 Wn. App. at 902. The trial court should afford “considerable weight” to a defense attorney’s opinion regarding his client’s competency. State v. McCarthy, 193 Wn.2d 792, 801, 446 P.3d 167 (2019) (citing State v. Lord, 117 Wn.2d 829, 901, 822 P.2d 177 (1991)).

A trial court’s decision to order a competency hearing is reviewed for abuse of discretion. McCarthy, 193 Wn.2d at 801-03; Ortiz-Abrego, 187 Wn.2d at 402. A court abuses its discretion when it is manifestly unreasonable or is based on untenable grounds. Sisouvanh, 175 Wn.2d at 623. However, the “failure to exercise discretion is itself an abuse of discretion subject to reversal.” State v. O’Dell, 183 Wn.2d 680, 697, 358 P.3d 359 (2015).

Busch’s own statements and behavior before Judge Okrent should have firmly established concerns about his competency. “Multiple members” of Judge Okrent’s own court

staff indicated “Busch was acting aggressively.” 3RP 6. Busch avoided answering whether he was currently taking medication and instead provided a rambling non-linear statement. 3RP 7-10. He made statements about being a “notorious” African prince. 3RP 8, 14-15. Busch made “noises and outbursts” during jury selection. 3RP 125. He made hand gestures toward the jury while they were being instructed. 3RP 242.

The Court of Appeals dismisses Busch’s “aggressive” behavior as nothing more than “hearsay from the prosecutor.” Op. at 9. The fact remains, however, that the behavior was significant enough to contribute to the prosecutor’s request that Busch be restrained during pretrial hearings. 1RP 3-6. Further context of Busch’s aggressive behavior can be gleaned from the prosecutor’s presentation of the *new* information that *since Busch’s last competency evaluation*, he had thrown urine at jail staff, refused to appear in court, and threatened to kill a jail deputy. 3RP 5.

The Court of Appeals next contends that Busch's non-linear answer to the trial court about whether he was taking medication "demonstrated that he was able to track what the court was asking" because he remarked that he was "competent" "with adequate mindset". Op. at 9. The Court suggests this demonstrates Busch was refusing to answer the question rather than an inability to do so. Op. at 10. Such reasoning is belied by the context of Busch's full "answer" to court's question. 3RP 8-10. The trial court's question called for a "yes" or "no" response. Instead, Busch's "answer" began with his assertion that, "I've been all over the world for numerous amount of accomplishments, as well as unfortunate detainings, as I have some type of notoriety of being an African prince." 3RP 8.

The Court of Appeals reasons that nothing in the record contradicts Busch's assertion that he was an African prince. Op. at 10. Citing this Court's opinion in McCarthy, the Court of Appeals also contends that even if a delusion, it was not enough

to constitute a “significant change” requiring the court to order a new competency evaluation. Op. at 10 (citing McCarthy, 193 Wn.2d at 806 (“[A]lthough delusions may have been apparent, there was no evidence presented to the trial court that would cast doubt on the defendant’s ability to recall facts, communicate with his attorney, or understand the ramifications and consequences of the crime.”))).

But whether Busch’s statements show an awareness of the nature of the proceedings is a different question than whether he could assist in his own defense by communicating with his attorney or coherently testifying. This is what distinguishes Busch’s case from McCarthy. There, an evaluator initially determined McCarthy to be incompetent. McCarthy, 193 Wn.2d at 796. After a significant competency restoration period, McCarthy was found competent to stand trial. Id. at 797.

Both before and after the determination of competency, McCarthy expressed delusional beliefs about conspiracies involving his former spouse and jailers harming him with toxic

fumes. Id. at 798. McCarthy testified at trial, accurately representing the facts as he believed them. Id. at 799.

This Court held that despite McCarthy's delusional beliefs, the evidence did not cast doubt on his ability to assist in his defense. McCarthy, 193 Wn.2d at 806-07. The Court noted that other than McCarthy's delusions, there was no other event that supported a conclusion he was incompetent to stand trial. Specifically, there was no basis to conclude that delusional beliefs affected McCarthy's ability to recall facts, retain composure, communicate with his attorney, or understand the consequences of the proceedings. Id. Therefore, the trial court's failure to sua sponte order another competency hearing was reasonable and not an abuse its discretion. Id. at 807.

Unlike McCarthy, here there was a basis to conclude that Busch's competency affected his ability to communicate with his attorney, assist in his defense, and recall facts. Busch was unable or unwilling to discuss with counsel whether he was taking medication. Counsel expressed concerns about Busch's

ability to testify, explaining, “I have no confidence that I can ask him a question and get an answer that I would expect or that would be to the point.” 3RP 15. Busch also had physical and audible outbursts in front of the jury, a fact that prosecution recognized would likely prejudice his defense. 1RP 160-61; 3RP 12.

Busch’s situation is more analogous to what occurred in State v. Fedoruk, 5 Wn. App. 2d 317, 319, 337, 426 P.3d 757 (2018), rev. denied, 192 Wn.2d 1012, 432 P.3d 792 (2019). There, the defendant was found competent after many months of concerning behavior. At trial however, Fedoruk began exhibiting “extreme behavior that was similar to behavior he displayed in past mental breakdowns.” Id. This included screaming in an unintelligible language, the need to be increasingly physically restrained due to his inability to remain composed, interrupting witnesses, collapsing on the floor, and other disruptive behaviors. Id.

Throughout trial, defense counsel informed the court of his concern about Fedoruk's "mood" and competency. Fedoruk, 5 Wn. App. 2d at 337-38. Defense counsel eventually moved for a mistrial based on Fedoruk's behavior in the courtroom. Id. at 332. The trial court denied the motion, finding that any need for a mistrial was due to Fedoruk's behavior. Id. After trial, however, a competency evaluation was ordered, and a psychologist found Fedoruk was in a psychotic state and not competent to proceed with sentencing. Id. at 334.

On appeal, the Court of Appeals vacated the conviction and held that the trial court abused its discretion when it failed to consider the new information that arose during trial that brought Fedoruk's competency into question. Fedoruk, 5 Wn. App. 2d at 338-39. The Court of Appeals opinion here fails to cite, much less address, Fedoruk.

The Court of Appeals concludes the trial court did not abuse its discretion by failing to order a new competency evaluation because "the record is absent of a significant change

in the defendant's mental condition." Op. at 11. But the trial court's failure here went beyond just failing to order a new competency evaluation. As in Fedoruk, the trial court failed to even consider the new information calling into doubt Busch's competency. Judge Okrent did *not* determine there was no *new* information that indicated a significant change in the Busch's mental condition; he categorically refused to even address Busch's competency. 3RP 16-17. This is itself an abuse of discretion warranting reversal. O'Dell, 183 Wn.2d at 697.

Judge Thompson properly recognized that Busch's "competency is fluid", something also predicted by the November 5, 2019, competency evaluation which concluded Busch's competency "may be tenuous in nature." CP 184 (emphasis in original). Busch's behavior before Judge Okrent demonstrated that he had once again mentally decompensated. But, instead of complying with the mandatory procedures of RCW 10.77.060 (1)(a), Judge Okrent declined to address Busch's competency for trial. Due process and chapter 10.77 RCW

demand more. Review is appropriate under RAP 13.4(b)(1), (2), and (3).

E. CONCLUSION

Busch respectfully asks this Court to grant review and reverse the Court of Appeals.

I certify that this document contains 4,520 words, excluding those portions exempt under RAP 18.17.

DATED this 15th day of December, 2021.

Respectfully submitted,
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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUSTYN MYLES BUSCH,

Appellant.

No. 81346-3-I

DIVISION ONE

UNPUBLISHED OPINION

COBURN, J. — Appellant Justyn Busch was charged with unlawful possession of a firearm in the second degree. Before his first trial, he was found not competent, but his competency was restored at Western State Hospital. At his first trial, the trial judge, based on his observations, declared a mistrial and ordered a new competency evaluation. After a finding of competency, a second trial was held, and no one requested a new competency evaluation. A jury found Busch guilty. He appeals arguing that the second trial judge should have ordered a new competency evaluation. We affirm, but we remand to strike the DNA collection fee from the judgment and sentence.

FACTS

In May 2019, Busch was charged with unlawful possession of a firearm in the second degree. About a month later, the court signed an order for a competency evaluation. The competency evaluator reported that Busch suffered

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from psychotic disorders that prevented him from understanding the nature of the legal proceedings or assisting his attorney.

Accordingly, the court determined that Busch was incompetent to stand trial, and it entered an order committing Busch for competency restoration. After restoration in November, the court found him competent to stand trial.

Trial began in January 2020. During jury selection, defense counsel alerted the court that Busch seemed agitated. Busch was “not really responding” to officers’ requests and not responding to defense counsel’s requests. The court observed that there were now four officers standing within a few feet of the defendant, which it felt indicated the officers had a heightened concern for whatever was going on. The court added that it was familiar with the officers and that they were experienced. The court asked Busch, “[W]hat’s going on today? You seem to be in a different state than yesterday.” Busch responded with a long incoherent statement. Defense counsel stated that when he met with Busch the prior week, Busch’s thoughts were more coherent than they were that morning.

The court noted that competency is fluid. The court explained that at that point in time it had concerns about Busch’s demeanor in court and that it felt the only solution was to sign a competency evaluation order and declare a mistrial.

The court reasoned:

[I]t does appear that there’s indication from jail staff that there has been a refusal to take medication. Also I’m seeing detailed in this document what I can only describe as assaultive, disruptive-type of behavior as well as threats to self. So based on all of this and the continued, again, I am not sure if it’s responding to internal or external stimuli, but it seems to me it’s internal. As

well as the lack of linear response to question, the overall demeanor at this time I think there is a manifest necessity to declare a mistrial. It's just entirely unclear to me whether or not this individual is actually competent, whether he can assist his attorney. His attorney has clearly indicated they're having issues which seems to be a lack of communication this morning. Mr. Busch's demeanor is very different than it was the entirety of yesterday.

In February, Busch was again found competent.

A second trial began in March. The State requested to have Busch restrained for a CrR 3.5, 3.6 suppression hearing, basing its request in part on Busch's behavior at the last trial that drew the trial judge's attention.

In arguing against restraints, defense counsel argued that his client had not acted out in any physical aggressive manner and went on to explain what had happened in the previous trial and the circumstances that led to a mistrial. Defense counsel stated, "Mr. Busch has never acted out in the courtroom. He has refused a lot of court appearances, but when he's present he has never acted out." At that point, Busch interjected, "I never refused a court appearance. The COs^[1] have refused to transport me to court and that is a contempt of the law. Whatever. I've never refused a court appearance."

The court noted that it had read somewhere that Busch may be on "some sort of medication" and defense counsel explained that previously a judge had granted a request for forced medications. The court inquired into whether Busch was medicated. Counsel responded that Busch was choosing not to answer this question. The court explained it did not have a problem with that, but that the information would help the court's decision. Busch then addressed the court:

¹ Presumably, Busch was referring to corrections officers.

The matters -- the matters, Your Honor, to be specific, to be exact, I've been in Snohomish County for the last ten months. This will be 300 days.

I've been all over the world for numerous amount of accomplishments, as well as unfortunate detainings, as I have some type of notoriety of being an African prince. So there is somewhat of a infatuation of my presence in all different areas and aspects.

Unfortunately while being in this county, I have endured the most hinderous, the most obvious and oblique, consistent violation of my civil rights as well as my trial rights, where it is not fair to say that I'm standing here a competent man to go to trial due to mental health issues.

In regards to this case proceeding in criminal matters and criminal court, I'm competent, yes, I am, with adequate mindset. But it is not fair to say in the least that this trial in proceeding in any type of way or fashion with medication, therapy, all of the other different things. I'm going to do it regardless when I get out of here. That's the only way I'll be able to rebound. Being tased is not helpful, you know, and pass-throughs. You know, being denied court transport as far as what happened Friday, you know, a CO named Henry with the oblique and obvious neglect from Sergeant Schwartz being present.

So as a person tries to call themself making a record, I'm definitely well familiar with the court proceedings and the process for me to go ahead and efficiently make on record the matter of my conditions and my mental status when being asked and being pertains. I'm not speaking incompetency here, to say the least, right, when you ask me about if I'm taking medication on that grounds.

So with that being said, there is definitely a lot of different things to presume regardless once I get out and huge rehabilitation processing step that I have to take. And it's very unfortunate because my father is an attorney in Texas. I went down there to go meet him. Came back. Trying to get my life established and set up, and somehow I end up in this.

So I'm sitting in this whole process. This is not a courtroom or a federal courtroom, but I have several different cases, as well as a 42.90 U.S.C. 93. So many different things going on right now it's not realistic to say that a question can simply be answered yes or no about whether I'm taking medication.

Defense counsel then explained the issues with the officers during the last trial. They had questioned why Busch was walking around counsel's table, which

is what he and counsel had done the day before to prepare for jury voir dire.

Busch became upset, stood against the wall, and would not sit down. Defense counsel then highlighted Busch's history of mental health evaluations and stated,

I have told [the prosecutor] I have told [the prior trial judge], and I will tell this court, Mr. Busch has been found competent by Western State Hospital. In my humble opinion he's not competent to stand trial. He cannot assist in his defense from one very important aspect. If he wishes to take the stand, which is his absolute right, I have no confidence that I can ask him a question and get an answer that I would expect or that would be to the point. The court asked a very simple question to me to ask Mr. Busch about medication. He refused to respond to me, but then on his own decided to respond to the court. In responding to that question he talked about being an African prince, his father being a lawyer in Texas. All of that could be true –

Busch interjected and said, "It is very true." Defense counsel then stated,

-- it is not in response to the question being asked. So that is my concern in terms of his ability to assist me in representing him.

If you ask him what a prosecutor does, what a judge does, what I do, what a plea bargain is, all of the things that Western State Hospital does in their evaluations, he answers those questions fine. He's a very smart man, but he does suffer from mental illness.

I don't have the answer for this court. You know, I don't have the answer for this court, but if the court is asking me what my opinion is of Mr. Busch's competency, I don't believe he's competent.

The court responded, "Well, we're not here on a competency evaluation. He's already been found competent to stand trial by a previous court based upon a[n] evaluation of Western State. I'm not going to look at that at this point. The issue is whether I keep him in restraints or not."

The prosecutor then said that the previous order finding Busch competent was in agreement of the parties, that defense counsel did not challenge

competency in the weeks leading up to this trial, and “[s]o unless there are new concerns, I would ask that the court proceed either way.” Defense counsel responded that he has told prosecutors that “Western State will find him competent. I have believed him to be incompetent from day one, and that maintains my position. Whether I sign an order agreed, approved to form, whatever, we cannot continue to go on the hamster wheel. If you’re asking me if he’s competent, absolute[ly] not, and that has been my position consistently.”

Busch interjected again to remind defense counsel, “He was asking you about the restraints.” The court agreed, “The issue here is whether or not I should restrain him or not.” The court denied the State’s request to restrain Busch.

After the State presented its evidence in the suppression hearing, the court asked Busch whether he wished to testify, and Busch stated, “I choose not to testify, Your Honor. I choose to plead my Fifth Amendment right, Your Honor.”

During jury selection, defense counsel in questioning a juror stated, “Mr. Busch has made some noises and outbursts a little bit here. Has that been a problem for you?” The juror said, “No. That’s his prerogative, I guess.” Another juror said, “I figure he’s probably nervous.”

After the State closed its case, defense counsel told the court that he explained to Busch that he had the absolute right to testify and could do so against his advice but that Busch did not wish to testify. When the court questioned Busch, he confirmed that statement was correct. Busch did not testify.

After the jury was excused for lunch after both parties rested, the prosecutor made a record that while the court was instructing the jury, “it appeared that Mr. Busch was lifting and waving his hands at the jury while they were being instructed.” The court was not alarmed stating, “I also looked at Mr. Busch and I didn’t see anything unusual given what I’ve seen previously. Any hand movements could be interpreted in any way.”

The jury found Busch guilty as charged.

At sentencing, the court found Busch indigent and imposed the \$100 DNA collections fee and the \$500 victim penalty assessment fee.

DISCUSSION

Competency

Busch contends that the trial court abused its discretion when it did not order another competency evaluation when there was a reason to doubt his competency. We disagree.

The due process clause of the Fourteenth Amendment to the United States Constitution guarantees an accused the fundamental right not to stand trial if he is legally incompetent. State v. Ortiz-Abrego, 187 Wn.2d 394, 402-03, 387 P.3d 638 (2017). Further, under RCW 10.77.050, “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.” “ ‘Incompetency’ means a person 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(16).

A trial court must order a competency evaluation whenever there is a reason to doubt competency. RCW 10.77.060(1)(a). This requirement continues even after a determination of competency. However, once there has been a determination that a defendant is competent to stand trial, a trial court need not revisit the issue of competency unless some objective incident or event occurs where the court is provided with new information that indicates a significant change in the defendant's mental condition. State v. Ortiz, 119 Wn.2d 294, 301, 831 P.2d 1060 (1992).

When making the determination of whether a competency evaluation is necessary, the factors the trial court considers include the defendant's behavior, demeanor, appearance, personal and family history, and psychiatric reports. State v. McCarthy, 193 Wn.2d 792, 801, 446 P.3d 167 (2019). Further, the court should afford "considerable weight" to a defense attorney's opinion regarding his or her client's competency. Id.

Whether a trial court should have sua sponte ordered a competency evaluation is reviewed for abuse of discretion. Id. at 803. "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). If the issue of competency is "fairly debatable," failure to order a subsequent evaluation does not violate RCW 10.77.060, and the trial court did not abuse its discretion. McCarthy, 193 Wn.2 at 803.

Busch asserts that the court should have ordered a competency evaluation before proceeding with a second trial. He argues that his "extensive

history of mental health issues, including numerous prior inpatient, outpatient, and involuntary treatment holds, should have caused [the court] great concern.” Further, he argues that his prior competency evaluations, a prior mistrial, and defense counsel’s belief that Busch was not competent also should have caused the court concern. Id. However, these were all incidents that happened *prior* to Busch having been evaluated again and found competent. The incidents were not new information that indicated a significant change in Busch’s mental condition since having been found competent.

Additionally, Busch contends the incidents that occurred on the day of the suppression hearing and during the second trial should have caused the court concern. We disagree.

First, Busch points to the prosecutor informing the court that court staff told the prosecutor that they observed Busch acting aggressively on the morning before the suppression hearing. However, the record contains nothing more about Busch’s behavior that morning other than hearsay from the prosecutor. Instead, the prosecutor highlighted what had happened at the first trial that led to a mistrial. Furthermore, defense counsel successfully argued to the court that Busch did nothing to warrant restraining him.

Busch next points to his long-winded answer when the court inquired if he was taking medications. Although Busch’s statement was long, he demonstrated that he was able to track what the court was asking him and stated, “In regards to this case proceeding in criminal matters and criminal court, I’m competent, yes, I am, with adequate mindset. . . . So many different things going on right now it’s

not realistic to say that a question can simply be answered yes or no about whether I'm taking medication." Busch, on appeal, mischaracterizes this statement as an indication that Busch "could not answer the court's question about any medication he was taking," as opposed to choosing not to answer.

Busch also points to his reference to being an African prince. Although Busch refers to himself as an African prince and purports that his father is a lawyer in Texas, there is nothing in the record to contradict that.² Regardless, if it was a delusion, delusions are not enough to constitute a "significant change" requiring the court to order a new competency evaluation after a previous competency evaluation found the defendant competent. McCarthy, 193 Wn.2d at 806 ("[A]lthough delusions may have been apparent, there was no evidence presented to the trial court that would cast doubt on the defendant's ability to recall facts, communicate with his attorney, or understand the ramifications and consequences of the crime.").

Busch's statement may have been long-winded, but it was not a non-linear incomprehensible statement. In fact, Busch is the one who correctly reminded defense counsel that he was veering off track discussing his competency when the question from the court was about restraints. After defense counsel's lengthy statement about Busch's history with mental health evaluations, Busch told his counsel, "He was asking you about the restraints." The court agreed. After the exchange, the court denied the State's request for restraints.

² Busch's counsel stated, "In responding to that question he talked about being an African prince, his father being a lawyer in Texas. All of that could be true —"

Busch next points to an observation defense counsel alluded to during voir dire when defense counsel asked a juror, “Mr. Busch has made some noises and outbursts a little bit here. Has that been a problem for you?” The juror responded, “No. That’s his prerogative, I guess. I don’t know how else to say that.” When defense counsel asked a second juror the same question, the juror answered, “I figure he’s probably nervous, so –” The record lacks any further description of Busch’s “little bit” of noises and outbursts. Tellingly, the jurors themselves did not find any concern with them.

Lastly, Busch points to the prosecutor’s observations that the defendant was “lifting and waving his hands at the jury while they were being instructed.” The court responded that it also looked at Busch and “didn’t see anything unusual given what [it had] seen previously. Any hand movements could be interpreted in any way.”

Moreover, the record indicates that Busch understood his rights and knew how to exercise them. He chose not to testify at both the suppression hearing and at trial at the advice of his counsel. He told the court, “I choose not to testify, Your Honor. I choose to plead my Fifth Amendment right, Your Honor.”

Contrary to what Busch contends, the record is absent of a significant change in the defendant’s mental condition. Accordingly, the court in the second trial did not abuse its discretion when it did not order a new competency evaluation.

Legal Financial Obligations

Busch contends that the trial court erred by imposing the \$100 DNA collection fee without first inquiring into whether Busch's mental health issues impacted his ability to pay the fee.

"RCW 9.94A.777(1) requires that a trial court determine whether a defendant who suffers from a mental health condition has the ability to pay any [legal financial obligations], mandatory or discretionary." State v. Tedder, 194 Wn. App. 753, 756, 378 P.2d 246 (2016). RCW 9.94A.777(1) provides:

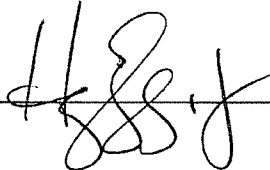
Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.


The State does not object to striking this fee.

CONCLUSION

The trial court did not abuse its discretion when it did not order a competency evaluation because nothing in the record suggested a significant change since Busch was last found competent. Thus, we affirm, but remand for the trial court to strike the imposition of the DNA collection fee from the judgment and sentence.

WE CONCUR:







NIELSEN KOCH P.L.L.C.

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