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Sep 16, 2015  
Court of Appeals  
Division I  
State of Washington

92334-5

No.  
Court of Appeals No. 67894-9-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER ORTIZ-ABREGO,

Petitioner.

**FILED**  
OCT 07 2015

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON CPB

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

The Honorable Susan Craighead

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Petitioner Alexander Ortiz-Abrego asks this Court to accept review of the opinion of the Court of Appeals in *State v. Ortiz-Abrego*, 67894-9-I.

B. OPINION BELOW

The Honorable Susan Craighead conducted a multi-day hearing on the question of Mr. Ortiz-Abrego's competency. The court considered reports and testimony of four separate experts, the testimony of Mr. Ortiz-Abrego's former attorney, and the judge's own observations. Judge Craighead found the opinion of one of these experts, Dr. Tedd Judd, "the foremost expert in Washington on Spanish-speaking nueropsychological testing and evaluation" particularly compelling and consistent with others' descriptions of Mr. Ortiz-Abrego's demonstrated incapacity. Applying the familiar requirements of *Dusky v. United States*,<sup>1</sup> the court thus found Mr. Ortiz-Abrego incompetent. The Court of Appeals concluded this decision was an abuse of the trial court's discretion.

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<sup>1</sup> 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)

C. ISSUE PRESENTED

The Due Process Clause of the Fourteenth Amendment prohibits criminal proceedings against an incompetent defendant. A person is competent to stand trial only when he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and to assist in his defense with a rational as well as factual understanding of the proceedings against him. Following a lengthy competency hearing, and after considering all the evidence submitted, Judge Craighead concluded Mr. Ortiz-Abrego lacked the capacity to understand the proceedings and to rationally assist his attorney. Is that conclusion manifestly unreasonable such as to constitute an abuse of the court's discretion?

D. STATEMENT OF THE CASE

In October 2008, the State charged Mr. Ortiz-Abrego with two counts of rape of child based upon alleged acts occurring in 2002. CP 1-2.

Prior to trial Mr. Ortiz-Abrego met numerous times with his attorney, Anna Samuel. CP 328-29. Despite spending several hours talking with him regarding the trial process and the perils he faced, Ms.

Samuel did not believe Mr. Ortiz-Abrego understood the information she was relaying. CP. 329-30, 332.

Mr. Ortiz-Abrego appeared in court on the first day of trial with his five-year-old son, because his wife was giving birth to another child. CP 330. When court staff attempted to make alternative arrangements for the care of his son, Mr. Ortiz-Abrego was unable to provide information as to where his son went to school. *Id.*

Before and during trial, defense counsel, the court and the prosecutor had concerns about Mr. Ortiz-Abrego's competency. CP 331. The trial court conducted a colloquy, and while the court remained concerned, the judge concluded Mr. Ortiz-Abrego was competent. CP 331-32.

Although he was facing an indeterminate sentence with a minimum of 20 years, Mr. Ortiz-Abrego declined a plea offer that would have led to a 15 month sentence. CP 332-33.

Because of lingering doubts, in the midst of trial, Ms. Samuel retained Dr. Judd to evaluate Mr. Ortiz-Abrego. CP 333.

Dr. Judd concluded Mr. Ortiz-Abrego was intellectually disabled with an IQ of 71 and that he had a cognitive learning disorder particularly affecting his auditory comprehension. CP 334. Dr. Judd

opined that Mr. Ortiz-Abrego exhibited particularly concrete thinking and would thus have difficulty with hypothetical or conditional reasoning. CP 335. This difficulty was evident in Mr. Ortiz-Abrego's interaction with counsel and in subsequent evaluations. *Id.* Dr. Judd recommended a series of accommodations which he believed would enable Mr. Ortiz-Abrego to understand the proceedings. CP 336. Those accommodations were not made during the trial. *Id.*

Even as the end of trial approached, Mr. Ortiz-Abrego did not seem to appreciate the possibility that if he was convicted he would be sent to prison. CP 337. Not until corrections officers attempted to take him into custody following the jury's guilty verdict did Mr. Ortiz-Abrego appear to come to that realization, and then he began crying for his children as they led him from the courtroom. *Id.*

In response to defense counsel's motion for new trial, the trial court ordered a competency evaluation. CP 61-65.

Following an evaluation, staff at Western State Hospital opined that Mr. Ortiz-Abrego was incompetent. CP 339-40. In November 2010, the trial court entered an order finding Mr. Ortiz-Abrego incompetent. CP 93-95.

Beginning in June 2011, the court conducted a lengthy hearing. Ms. Samuel testified to her efforts helping Mr. Ortiz-Abrego gain even a basic understanding of the proceedings. Ms. Samuel testified that despite those efforts, Mr. Ortiz-Abrego did not seem able to understand the proceedings or the potential outcomes. CP 328-29, 332, 336-37.

The State presented the testimony of two psychologists, Dr. George Nelson and Dr. Ray Hendrickson, and one psychiatrist, Dr. Roman Gleyzer, from Western State. Each of the three opined that Mr. Ortiz-Abrego was then presently competent. CP 342. The State's experts also opined that Mr. Ortiz-Abrego was exaggerating his condition in later evaluations. CP 339-40

Judge Craighead also heard testimony from Dr. Judd, whom she found "the most credible" of the experts who testified. CP 345. The court found Dr. Judd's testimony explained why Mr. Ortiz-Abrego was unable to understand the proceedings despite his attorney's efforts. CP 336. Dr. Judd explained that without certain accommodations Mr. Ortiz-Abrego would not be able to understand the proceedings or assist his attorney. CP 335.

Judge Craighead found that while there was evidence Mr. Ortiz-Abrego was malingering at later stages of the lengthy process that did



not “undermine the results of Dr. Judd’s evaluation or the observations of Ms. Samuel and the Court.” CP 364. The court concluded Mr. Ortiz-Abrego was unable to understand the proceedings and unable to assist his attorney during trial. CP 346-47.

The State appealed the trial court’s order. Finding Judge Craighead’s decision was an abuse of discretion, the Court of Appeals reversed. Opinion at 9.

E. ARGUMENT

The opinion of the Court of Appeals fails to afford the trial court’s competency determination the deference this Court’s opinions require. The opinion reinstates a conviction despite ample evidence establishing Mr. Ortiz-Abrego’s incompetency. In doing so, the opinion of the Court of Appeals is contrary to decisions of this Court and the United States Supreme Court and presents a significant constitutional question. For each of these reasons, review is proper under RAP 13.4.

**The trial court properly exercised its discretion to conclude Mr. Ortiz-Abrego was not competent at the time of trial and was not competent to be sentenced following trial.**

It is unquestionably a fundamental right not to be tried while incompetent. *Cooper v. Oklahoma*, 517 U.S. 348, 354, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996); *Drope v. Missouri*, 420 U.S. 162, 171-72, 95

S. Ct. 896, 43 L. Ed. 2d 103 (1975) (accused person's competency to stand trial is "fundamental to an adversary system of justice"); U.S. Const. amend. XIV. A person is competent to stand trial only when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (internal quotations omitted).

A trial court's determination of competency is reviewed for an abuse of discretion. *State v. Ortiz*, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). A court abuses its discretion only when

the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.

*State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal citations omitted). Judge Craighead's decision is based upon the correct legal standard and is fully supported by the record and by controlling caselaw.

This Court has described the circumstances which warrant the abuse of discretion standard to include those where:

1) the trial court is generally in a better position than the appellate court to make a given determination, (2) a determination is fact intensive and involves numerous factors to be weighed on a case-by-case basis; (3) the trial court has more experience making a given type of determination and a greater understanding of the issues involved; (4) the determination is one for which no rule of general applicability could be effectively constructed; and/or (5) there is a strong interest in finality and avoiding appeals,

*State v. Sisouvanh*, 175 Wn.2d 607, 621, 290 P.3d 942 (2012) (Internal citations and quotations omitted). But beyond simply identifying the circumstances in which an appellate court should apply a deferential standard of review, this list is useful in informing the nature of that review in cases such as this as well.

Judge Craighead presided over the lengthy trial in this case. She was able to observe Mr. Ortiz-Abrego's demeanor and responses. With that experience she was uniquely positioned to assess the experts' opinions in light of her observations and reach conclusions as to whether those opinions squared with the person she saw during trial. So too, Judge Craighead was able to hear Ms. Samuel's testimony and description of her interaction with Mr. Ortiz-Abrego and compare that to her own observations during trial to reach a conclusion. No matter what the State's experts said, unlike Judge Craighead they lacked the

luxury of having sat through Mr. Ortiz-Abrego's trial and thus lacked the ability to rely upon that experience and those observations.

Judge Craighead expressed the view that "the goal here is going to be that each [party] gives me the information you think I need to hear, and then I will make a decision." 4/22/11 RP 20. Consistent with that goal, Judge Craighead conducted a multi-day competency hearing. Judge Craighead was then able to view the hostility exhibited by Dr. Hendrickson towards defense counsel during a video-taped evaluation of Mr. Ortiz-Abrego. CP 343 (Finding of Fact 51.) The court also heard Dr. Hendrickson's efforts to minimize his actions, and from that conclude his account was less credible. *Id.* The court was able to observe the anger exhibited by Dr. Nelson on the witness stand with regard to his change of opinion of Mr. Ortiz-Abrego's competency. CP 339-40 (Finding of Fact 42).

Judge Craighead heard the State's experts describe Dr. Judd as the most-qualified individual to conduct an evaluation in a case such as this as he was the lone Spanish-speaking neuropsychologist in the region and Judge Craighead made a finding in that respect. CP 334, 342 (Findings of Fact 24 and 49). Dr. Judd's report contained suggested accommodations to ensure effective interaction with Mr. Ortiz-Abrego

and to ensure he could absorb information being provided to him. CP 342 (Findings of Fact 48 and 49). But those accommodations were not made during restorative classes or in subsequent evaluations. *Id.*

Competency determinations are fact specific inquiries.

The appointed expert[s]' competency evaluation[s] and report [are] only one consideration among many in a trial court's determination of the defendant's competency to stand trial. The expert's examination and report may be of relatively little importance to the trial court in making its competency determination in a given case, regardless of whether the examination and report are accepted as adequate . . . .

*Sisouvanh*, 175 Wn.2d at 622 (Internal citations omitted) (citing *inter alia State v. Dodd*, 70 Wn. 2d 513, 514, 424 P.2d 302 (1967)). In affirming a competency determination, *Dodd* noted the

trial court heard the defendant and his attorney, listened to a recital of his personal history, and considered a medical report signed by the Superintendent of Eastern State Hospital and two other doctors. These proceedings, combined with defendant's appearance and his comments and answers to extensive inquiries by the judge, all supplied the judge with a basis upon which to exercise a judicial discretion that the defendant was mentally competent to stand trial or to enter a plea of guilty

70 Wn. 2d at 520.

Competency determinations are not made in the abstract nor based simply upon benchmarks from other cases. And that is precisely why the abuse of discretion standard applies. Tasked with determining

the standard of review of a challenge to the adequacy of a competency evaluation this Court recognized

no rule of general applicability can be effectively constructed to govern the adequacy of competency evaluations in every case. As we have noted in the past, the mental health field is a discipline fraught with subtleties and nuances, and there is “wide latitude for differing opinions.

*Sisouvanh*, 175 Wn.2d at 622. Thus, simply comparing Mr. Ortiz-Abrego’s case to others is of limited value.

Judge Craighead plainly put much weight on the opinion of Dr. Judd. She found he was “by far the most qualified expert.” CP 334 (Finding of Fact 24). The court considered the difficulties Dr. Judd believed Mr. Ortiz-Abrego would have and saw concrete examples of those in observations of the trial. CP 329 (Finding of Fact 9); CP 335 (Finding of Fact 28). Judge Craighead considered a wealth of information provided by both parties. CP 346 (Finding of Fact 55). And from this information, Judge Craighead concluded Mr. Ortiz-Abrego was incompetent.

It is not enough that the Court of Appeals believes the evidence would permit alternative conclusions. Instead, so long as Judge Craighead’s conclusion is not manifestly unreasonable it must be

affirmed. Judge Craighead's ruling is well within the range of acceptable choices and therefore is not manifestly unreasonable.

Nonetheless, the Court of Appeals concludes Judge Craighead employed the incorrect standard in reaching her decision. Opinion at 8. The opinion asserts the trial court employed a requirement of an "actual or a proper understanding of the trial process" as opposed to simply the capacity to do so. *Id.* (Internal quotations omitted.) However, an examination of the legal standard of competency and the trial court's findings reveals Judge Craighead added nothing to that standard and instead employed the standard required by *Dusky* and Due Process.

*Dusky* requires a court find a person incompetent if he lacks either (1) sufficient ability to consult with his attorney "with a reasonable degree of rational understanding," or (2) a rational as well as factual understanding of the proceedings against him" 362 U.S. at 402. The court has made clear that this standards equates to a requirement that the person have "the capacity for 'reasoned choice' among the alternatives available to him." *Godinez v. Moran*, 509 U.S. 389, 397, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993). *Dusky* requires that a person have the ability to "perceive [] accurately, interpret[], and/or, respond [] appropriately to the world around him." *Lafferty v.*

*Cook*, 949 F.2d 1546, 1551 (10<sup>th</sup> Cir. 1991). At bottom, what is demanded is that a defendant has “sufficient competence to take part in a criminal proceeding and to make the necessary decisions throughout its course.” *Godinez*, 509 U.S. at 403 (Kennedy, J., concurring).

Nothing in Judge Craighead’s ruling deviates from or expands upon that standard. Judge Craighead found:

While Dr. Judd was careful in his report and his testimony to leave the determination of the defendant’s competency to the Court, he raised very serious doubts about the defendant’s competency. “Mr. Ortiz-Abrego’s borderline intelligence, concrete thinking, and auditory comprehension ability will have a substantial impact on his ability to participate in a trial. Most notably, he will have great difficulty in tracking, understanding, and remembering the proceedings. He will do worst with rapid speech, abstract concepts, and unfamiliar material. He will do somewhat better with slower proceedings, repetition, concrete material, and familiar events. He will have a great deal of difficulty responding to questions and will need repetition and simple questioning.” Exhibit 4. Dr. Judd also testified that if the Court were able to implement certain accommodations, it was possible that the defendant could track court proceedings, including sentencing. In the absence of these accommodations, the defendant would not have the capacity to understand the nature of the proceedings.

CP 335 (Finding of Fact 29.) As the quotations suggest, the bulk of this finding was taken verbatim from Dr. Judd’s report, but was also echoed in his testimony. 6/8/10 RP 124-35. Thus, there is simply no plausible way for the State to contend it is not factually supported.



A finding that a person will have “great difficulty in tracking, understanding, and remembering the proceedings” is in all respects equal to a finding that the person will be unable to respond to the world around him. Judge Craighead’s findings focus entirely upon Mr. Ortiz-Abrego’s ability or capacity to understand and assist and do not conflate capacity with an actual understanding. Moreover, the necessary understanding is of “the proceedings.” *Dusky*, 362 U.S. at 402. Thus, it is not clear what error Judge Craighead committed when she found he lacked the ability to understand “the trial process.”

Because the competency determination in this case involved looking backward to a trial which had occurred, Judge Craighead examined the conduct of the trial to see how Dr. Judd’s opinion squared with what she saw and what Ms. Samuel described. Cases like *Dodd* instruct that a court should examine the historical facts of the case in reaching a conclusion regarding the defendant’s competency. Judge Craighead was able to evaluate what she had observed and consider the deficits identified by Dr. Judd and his recommended accommodations which were not implemented at trial. But that is not the same as saying Mr. Ortiz-Abrego did not understand. Judge Craighead was certainly not required to ignore her own observations of the trial.

At most Judge Craighead applied the standard of *Dusky* and did so with the added context of her own observations. Her conclusions speak in terms of Mr. Ortiz-Abrego's ability or inability to understand the proceedings. CP 346-47. Conclusion of Law 2 concludes "I find he lacked the capacity to assist his attorney in the absence of the accommodations outlined by Dr. Judd, as set forth in Exhibit 4." CP 347. Thus, Judge Craighead concluded Mr. Ortiz-Abrego lacked the ability or capacity to understand.

The opinion faults Judge Craighead for relying on the absence of accommodations in her conclusion, as creating a "hybrid standard blending Washington competency law with the 'reasonable accommodations' requirements of the [Americans with Disabilities Act]." Opinion at 9. First, the trial court's detailed findings do no such thing. As detailed above, the court was in the unique position of having observed Mr. Ortiz-Abrego throughout trial and thus the ability to compare her own observations with those of the experts. In that circumstance a court's conclusion a person is unable to understand the proceedings due to the lack of accommodations is no different than concluding an unmedicated person lacked capacity where experts

opined medication was necessary to provide him the necessary capacity to understand trial.

*Dusky* requires a determination that a person have sufficient ability to consult with his attorney “with a reasonable degree of rational understanding” 362 U.S. at 402. Judge Craighead heard Dr. Judd’s description of the limitations Mr. Ortiz-Abrego would and will have in his relationship with counsel. Judge Craighead specifically noted that Mr. Ortiz-Abrego’s lack of understanding was not the basis for her finding of incompetency but rather “what is relevant is the extent to which these observations are consistent with Dr. Judd’s evaluation and the evaluations of the WSH experts.” CP 329 (Finding of Fact 9). Indeed, at one point, the deputy prosecutor too had concerns for Mr. Ortiz-Abrego’s competency. CP 332 (Finding of Fact 18). Judge Craighead found “Dr. Judd’s report explained for Ms. Samuel why her lessons about the court process had not worked.” CP 336 (Finding of Fact 30). The court found that Dr. Judd’s opinion that Mr. Ortiz-Abrego’s concrete thinking would stand in the way of his ability to assist “was exactly the problem his attorney identified.” CP 335 (Finding of Fact 28). The State never assigned error to this finding.

Judge Craighead properly considered that information with the added context of her own observations of the trial and subsequent proceedings. The court had ample evidence to conclude Mr. Ortiz-Abrego's inability to understand or assist his attorney was due to the condition described by Dr. Judd. Her conclusion that Mr. Ortiz-Abrego lacked the capacity to assist his attorney is a proper application of the *Dusky* standard is supported by the record and is not an abuse of discretion.

The Court of Appeals, not the trial court, has employed the incorrect standard to this matter.

“The function of the appellate court is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact. Instead, they must defer to the factual findings made by the trier-of-fact.”

*Bale v. Allison*, 173 Wn. App. 435, 458, 294 P.3d 789 (2013). The opinion is the result of the Court of Appeals substituting its opinion for that of the trial court. In doing so, the court failed to afford the trial court's competency determination the deference that *Sisouvanh* requires. In that way, the opinion of the Court of Appeals conflicts with this Court's opinion. Further, the opinion reinstates a conviction where sufficient evidence supports the trial court's conclusion that Mr. Ortiz-

Abrego was incompetent. Such an outcome is contrary to *Dusky* and presents a significant constitutional question. This Court should accept review under RAP 13.4.

F. CONCLUSION

Judge Craighead did not abuse her discretion when she found Mr. Ortiz-Abrego incompetent. This Court should accept review and reinstate the trial court's order.

Respectfully submitted this 16<sup>th</sup> day of September, 2015.

*s/ Gregory C. Link*  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
	)	No. 67894-9-1
Appellant,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
ALEXANDER ORTIZ-ABREGO,	)	
	)	FILED: August 17, 2015
Respondent.	)	
_____	)	

LEACH, J. — The State appeals a trial court's decision to grant Alexander Ortiz-Abrego a new trial after finding him incompetent to stand trial or to be sentenced. Because the trial court applied the wrong legal standard for competency, we reverse and remand for further proceedings consistent with this opinion.

FACTS

In October 2008, the State charged Ortiz-Abrego with two counts of rape of a child. On May 10, 2010, the first day of trial, counsel and the trial court expressed some concern about Ortiz-Abrego's competency. After a brief colloquy with Ortiz-Abrego, the trial court found him competent. After Ortiz-Abrego rejected a plea offer, the State amended the information to add a third count of rape of a child.

The court recessed on May 17, 2010, to allow neuropsychologist Dr. Tedd Judd to evaluate Ortiz-Abrego. Judd, a certified Hispanic mental health specialist and cross-cultural specialist, interviewed Ortiz-Abrego in Spanish. In his report, Judd described Ortiz-Abrego as having "a borderline mentally retarded intellectual level with concrete thinking," with an IQ [intelligence quotient] around 70.<sup>1</sup> Judd identified a specific learning disability in auditory comprehension, with weaknesses "in math and in quantitative thinking generally. The cause of this disability is unknown, but it is probably lifelong." Judd performed a specific test for memory malingering, which showed "good test effort when he fully understood the task."<sup>2</sup>

Judd clarified, "A specific evaluation of competence to stand trial was not requested and a full evaluation of this capacity was not completed." However, Judd emphasized that Ortiz-Abrego's "borderline intelligence, concrete thinking, and auditory comprehension disability will have a substantial impact on his ability to participate in a trial. Most notably, he will have great difficulty in tracking, understanding, and remembering the proceedings." Judd suggested a number of ways to compensate for Ortiz-Abrego's limitations:

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<sup>1</sup> Dr. Tedd Judd estimated Ortiz-Abrego's intellectual level at 70, "in the borderline range and consistent with this achieved IQ."

<sup>2</sup> "Malingering" is "false or grossly exaggerated symptoms intentionally produced for some external purpose." State v. Sisouvanh, 175 Wn.2d 607, 613, 290 P.3d 942 (2012).

Adjudicative Accommodations:

Mr. Ortiz-Abrego's cognitive impairments can be accommodated in the courtroom by frequent breaks to explain things. This explanation may be most efficiently carried out by a Spanish-speaking assistant who has some understanding of court proceedings, his case, and cognitive limitations. Simple written summaries in Spanish can help with his memory limitations, but direct translations of legal documents will be of limited use because of the limitations in his reading comprehension. Such summaries can be particularly helpful with decision-making, by summarizing the alternatives along with the advantages, disadvantages, and chances of success. To assure his comprehension, he should be asked to explain back what he has been told. If he is unable to explain, then he should be asked short answer, multiple choice or yes/no questions about the content, for example, "If you accept this plea bargain, how long will you go to prison for?" Simply asking him if he has understood something is almost certain to be an inaccurate and ineffective assurance of comprehension.

When he is testifying, questions should be brief, simple, and concrete. Interruptions to his narrative should be minimized. If mathematical precision is required, the numbers should be written down for him and the discrepancies explained, and he should be permitted to revise his responses to try to clarify the situation.

If challenging the testimony of others is an expected function, then there should be a break after the testimony that he could potentially challenge that would allow an assistant to explain the testimony to him and elicit potential challenges.

Defense counsel made no motions based on Judd's report, nor did the parties or the court raise the competency issue again during trial.

On May 27, 2010, a jury found Ortiz-Abrego guilty on counts I and III. On June 3, 2010, defense counsel filed a motion to arrest judgment or for a new trial, based on the competency issue, stating in a declaration, "[C]ounsel is concerned that Mr. Ortiz Abrego lacked the capacity to understand the process with which



he was involved for three weeks," given his cognitive limitations.<sup>3</sup> In June 2011, following inconclusive competency reports from Western State Hospital, the court held a contested competency hearing, ultimately finding that Ortiz-Abrego was "not competent to stand the trial we gave him" or to be sentenced.

On October 3, 2011, the trial court entered extensive findings of fact and conclusions of law. The court found by a preponderance of the evidence that at the time of trial, Ortiz-Abrego understood the charges against him. The court expressed doubt about Ortiz-Abrego's ability to appreciate his peril but declined to make a finding that he lacked such ability "because it is possible that a more skilled attorney utilizing the type of accommodations suggested by Dr. Judd could have helped the defendant understand this." The court found Ortiz-Abrego incompetent to be sentenced:

2. However, because none of the accommodations Dr. Judd suggested were made, I find by a preponderance of the evidence that the defendant was unable to understand the trial process, the testimony of witnesses, and argument as a result of the combination of his borderline intellectual functioning and his auditory processing disability. Therefore, I find that he lacked the capacity to assist his attorney in the absence of the accommodations outlined by Dr. Judd, as set forth in Exhibit 4.

3. I find by a preponderance of the evidence that the defendant was not competent to stand the trial we gave him, because he was not capable of properly understanding the nature

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<sup>3</sup> Counsel stated in her declaration that she had attempted to explain sentencing options "at least more than 15 times."

of the trial proceeding or rationally assisting his legal counsel in the defense of his cause.

4. I find that the defendant is not competent to be sentenced because even if the Court were to adopt the accommodations recommended by Dr. Judd, he did not understand the proceeding that [led] to his conviction.

The trial court granted defense's motion for a new trial. The State appeals.

#### STANDARD OF REVIEW

We review trial court competency decisions for abuse of discretion.<sup>4</sup> A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons.<sup>5</sup> An abuse of discretion standard also applies to a trial court's decision granting a motion for a new trial.<sup>6</sup>

A trial court's wide discretion allows it to operate within "a range of acceptable choices."<sup>7</sup> The reviewing court retains authority to "clarify and refine the outer bounds of the trial court's available range of choices and, in particular, to identify appropriate legal standards."<sup>8</sup> We review de novo whether the trial

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<sup>4</sup> Sisouvanh, 175 Wn.2d at 620, 622 n.3; State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985); State v. Lawrence, 108 Wn. App. 226, 232, 31 P.3d 1198 (2001), abrogated on other grounds by State v. Delgado, 148 Wn.2d 723, 63 P.3d 792 (2003).

<sup>5</sup> State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

<sup>6</sup> See Palmer v. Jensen, 132 Wn.2d 193, 197-98, 937 P.2d 597 (1997).

<sup>7</sup> Sisouvanh, 175 Wn.2d at 623 (internal quotation marks omitted) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

<sup>8</sup> Sisouvanh, 175 Wn.2d at 623.

court applied the correct legal standard.<sup>9</sup> When a court applies an erroneous legal standard, it abuses its discretion as a matter of law.<sup>10</sup>

#### ANALYSIS

"It is fundamental that no incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues."<sup>11</sup> Courts presume a person's competency, and Washington's competency statutes, found in chapter 10.77 RCW, place the burden on the party challenging competency to prove by a preponderance of the evidence any alleged incompetency.<sup>12</sup>

In Dusky v. United States,<sup>13</sup> the United States Supreme Court stated the test for competency as "whether [the defendant] 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

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<sup>9</sup> McCleary v. State, 173 Wn.2d 477, 514, 269 P.3d 227 (2012) (citing Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003)).

<sup>10</sup> Sisouvanh, 175 Wn.2d at 623 (trial court makes decision "for untenable reasons" and thus abuses discretion when it applies wrong legal standard) (internal quotation marks omitted) (quoting Rohrich, 149 Wn.2d at 654).

<sup>11</sup> State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982); U.S. CONST. amend. XIV, § 1; RCW 10.77.050.

<sup>12</sup> State v. Coley, 180 Wn.2d 543, 556-57, 326 P.3d 702 (2014); see also State v. Harris, 114 Wn.2d 419, 435-36, 789 P.2d 60 (1990). In Coley, our Supreme Court clarified that the presumption of competence and burden remain on the party challenging competency even following a previous determination of incompetency. Coley, 180 Wn.2d at 555, 557-58.

<sup>13</sup> 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

against him.” In Godinez v. Moran,<sup>14</sup> the Court reiterated, “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.” This standard applies “from the time of arraignment through the return of a verdict” and through sentencing.<sup>15</sup>

Washington law states “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.”<sup>16</sup> Courts have related the first part of the inquiry to a defendant’s appreciation of his peril and basic understanding of trial, the charges, and the roles of those involved in the proceedings.<sup>17</sup> For the second part of the inquiry, which our Supreme Court has called a “minimal requirement,”<sup>18</sup> courts have focused on a defendant’s ability to recall past facts which would be useful to the defense and relate those facts to his or her attorney.<sup>19</sup> However, a defendant need not be able to suggest any particular trial strategy or even to choose among alternative

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<sup>14</sup> 509 U.S. 389, 402, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993).

<sup>15</sup> Moran, 509 U.S. at 403 (Kennedy, J., concurring); Wicklund, 96 Wn.2d at 800.

<sup>16</sup> RCW 10.77.010(15); Ortiz, 104 Wn.2d at 482; Wicklund, 96 Wn.2d at 800; Lawrence, 108 Wn. App. at 232.

<sup>17</sup> Harris, 114 Wn.2d at 427-28; Ortiz, 104 Wn.2d at 482-83; Lawrence, 108 Wn. App. at 232.

<sup>18</sup> Harris, 114 Wn.2d at 429.

<sup>19</sup> Harris, 114 Wn.2d at 428; Lawrence, 108 Wn. App. at 232-33; Ortiz, 104 Wn.2d at 483.

defenses.<sup>20</sup> Nor does an inability to recall past events establish incompetency.<sup>21</sup> And establishing low intellectual functioning, without more, does not show incompetence.<sup>22</sup> A trial court may consider many factors in making its competency determination, "including the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel."<sup>23</sup>

The State contends that the trial court used the wrong test to determine competency and asks us to reverse the trial court and remand with instructions to apply the correct standard. We agree and reverse and remand accordingly.

In its findings of fact, the trial court noted that Dr. Tedd Judd's approach emphasizing educational accommodations "differs conceptually" from the approach to competency evaluation taken by Western State Hospital doctors. Washington law requires that a defendant have the capacity to understand the nature of the proceedings against him and have a basic understanding of trial. Unlike the standard the trial court used, it does not require proof that a defendant has an actual or a "proper" understanding of "the trial process, the testimony of witnesses, and argument." And while the trial court has discretion to

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<sup>20</sup> Harris, 114 Wn.2d at 428; Ortiz, 104 Wn.2d at 483.

<sup>21</sup> Harris, 114 Wn.2d at 428.

<sup>22</sup> Ortiz, 104 Wn.2d at 482-84; Lawrence, 108 Wn. App. at 232; State v. Minnix, 63 Wn. App. 494, 498-99, 820 P.2d 956 (1991).

<sup>23</sup> State v. Dodd, 70 Wn.2d 513, 514, 424 P.2d 302 (1967).

accommodate a defendant with cognitive difficulties, the court's finding of incompetence due to a lack of accommodations conflicts with the standard stated in the statute and case law. In relying on Dr. Judd's approach to find Ortiz-Abrego incompetent because of a lack of accommodations, the court strayed from well-established Washington law, adopting a hybrid standard blending Washington competency law with the "reasonable accommodations" requirements of the ADA (Americans with Disabilities Act).<sup>24</sup>

The court's colloquies with counsel during hearings about the court's findings support our conclusion. The court discussed the possibility "that we could design a way of conducting a trial for which [Ortiz-Abrego] would be competent." The court admitted to struggling with "this whole concept of reasonable accommodations" and considered whether "we may not be in a situation of changing the defendant; we may be in a situation of changing us" by using Dr. Judd's recommended accommodations.

Although the trial court thoughtfully considered many factors and weighed the evidence of a voluminous record covering three years of complicated proceedings, the court used a test that differs from Washington's two-part test for determining competency. Thus, the court abused its discretion.

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<sup>24</sup> Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A).

CONCLUSION

We reverse the trial court's 2011 competency decision and order for a new trial. We remand for further proceedings consistent with this opinion.

Leach, J.

WE CONCUR:

Cappulwick, J.

Becker, J.

STATE OF WASHINGTON  
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## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 67894-9-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: September 16, 2015